1987

Forfeiture of Legal Fees: Who Stands to Lose?

G. Robert Blakey
Notre Dame Law School

FORFEITURE OF LEGAL FEES: WHO STANDS TO LOSE?

by
G. Robert Blakey*

> Free competition prevails at the bar as well as elsewhere, and different men command different rates of compensation, and some of them much in excess of any official salaries. Thus far the experience of the commonwealth has been that this freedom has not operated to keep citizens from the courts, or to shut the poor off from justice. - *Oliver Wendell Holmes*[1]

In a sense, this panel and the people in this room are among the most qualified people in the United States to discuss the question of the forfeiture of legal fees. We have with us today distinguished academics who have written and studied the issue. We have today with us able practitioners who have had to live with this issue in the context of the day to day trial of cases. We are drawn from all areas of the country. We are certainly not provincial. But we should be frank. We are also the most disqualified people in the United States to discuss this issue, and the principle of our disqualification is as old as Dr. Bonham's case:[2] no man can be a judge in his own case.

Let us strip away the rhetoric. Let us not discuss this as a constitutional question under the sixth amendment. Let us not discuss this as a subtle question of statutory analysis. Let us not discuss this as the sort of question in which law professors draw nice distinctions between close cases. Let us instead focus on the real issue: How shall legal fees be determined in our society?

---

*William J. and Dorothy O'Neil Professor of Law, Notre Dame Law School. These remarks were prepared for a panel discussion at the 1987 Annual Meeting of the Associations of American Law Schools, held on January 3-6, 1987 in Los Angeles, California. They have been edited, but do not contain the qualifications or sources that would be appropriate for a more formal paper. Professor Blakey served as Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), was processed.

[1] Hyde v. Moxie Nerve-Food Co., 160 Mass. 559, 36 N.E. 585, 586 (1894).

[2] 77 Eng. Rep. 638 (K.B. 1610).

We have three alternatives. Legal fees can be determined by the free market, and that is, bluntly, by the highest bidder. He who has the most money can buy the best lawyer. Or legal fees can be determined by political decision, which means they will be set by the political determinations that fix the salaries of the various public defenders. And if not by the free market or the public defender system, then legal fees will be determined by a third system, by the judiciary on a case by case basis of appointing counsel, or perhaps by some review process of the free market. The question is whether legal fees shall be set by the judiciary on a Criminal Justice Act (CJA) fee schedule, or case by case on some broader basis.[3]

Let us make explicit what few of us are saying: If fees are to be set by the judiciary under CJA under a complex case analysis or otherwise, those fees will probably be smaller. The average partner at a major law firm, age 50, makes about $165,000 per year. That means fifty percent of partners make more than that, and fifty percent make less. But the average federal judge makes just about half of that. So when it comes time for a judge to set those fees, even in complex litigation, he or she will be setting them, case by case, not in comparison with partner's salaries, but in comparison with a *judge's* salary. Compared to the free market, that will be a very different fee schedule.

Let us be upfront, too, about the kinds of cases we are discussing. We are not talking about the majority of cases that come up in the federal or state courts. The vast majority of criminal defendants are poor and are already being handled under CJA or some comparable system of public defenders. We are not talking about white collar offenders, tax evaders, or antitrust violators. Those offenders will typically have sources of funds that arguably are not tainted. They can pay and will pay the free market price.

What we are talking about is the professional offender. We are not talking about the bank robber, because no one in this room will argue that a lawyer ought to take his or her fees out of the proceeds of a bank robbery.[4] We are not talking about the professional

---

[3] *See generally* 18 U.S.C. § 3006A (d)(1982, Supp. II 1984 & Supp. III 1985).

[4] *See, e.g.*, Bennett v. State, 211 So. 2d 520 (Miss. 1968) (lawyer convicted of receipt of

scam artist, because I do not think anybody in this room will argue that a lawyer ought to take his or her fees out of the fruits of a fraud. That is, as against an identifiable victim of a bank robbery or of a land fraud scam, the conflict between the lawyer and the victim is going to be won by the victim.

Who *are* we talking about? Pimps, gamblers, and, let us be blunt, principally drug dealers. So the issue, rephrased, becomes, how shall legal fees be set in drug cases?

Now let us turn to the background.

In 1970, Congress drafted two statutes that created these issues. One of them is the Racketeer Influence and Corrupt Organizations (RICO) statute;[5] the other is the Continuing Criminal Enterprise (CCE) statute.[6] They are two halves of the same idea. They were both drafted at the same time and by the same principal Senators, members of Congress, and staff. It wasn't clear to those of us involved in drafting them which statute, if either, would become law. It is possible to say that the CCE statute is a RICO drug statute. It is also possible to say that RICO is CCE for everybody else. The statutes are parallel in their language, in their philosophy, and in their impact.

What is, or what was, their philosophy? Well, the old law, the law of the nineteenth century, was the law of common law felonies — murder, rape, and robbery. Essentially, it focused on a single incident, involving a single perpetrator and a single victim. We prosecuted such offenders one by one and, typically, tried to lock them up for some period of imprisonment.

In 1970 Congress decided that that kind of crime and that kind of a criminal justice system was inadequate to deal with modern forms of organizational crime. I did not say "organized crime," in the sense of the Mafia. I said organizational crime — that is, orga-

---

stolen property from client and disbarred), *cert. denied*, 393 U.S. 320 (1969); Errico v. County of Westchester, 39 Misc. 2d 1090, 242 N.Y.S.2d 524 (1963) (attorney not entitled to take fee from stolen property).

[5] 18 U.S.C., §§ 1961-68 (1982, Supp. II 1984 & Supp. III 1985).

[6] 21 U.S.C. §§848, 853 (1982, Supp. II 1984 & Supp. III 1985); 18 U.S.C.A. § 1956(c)(7)(C)(West Supp. 1987).

nizations engaging in crime as perpetrators, as victims, or as instruments of the activity, whether they commit white collar crime, fraud, or organized crime involving drugs. The nineteenth century criminal justice system simply did not adequately respond to such modern organizational crime. Consequently, any new law had to do at least three things.

First, it had to focus not simply on individuals, but also on organizations. Second, it had to authorize or make possible more extended terms of imprisonment. The old philosophy of rehabilitation or of deterence simply was not adequate to deal with organizational crime. Therefore, any new law had to adopt some system of incapacitation.

Finally, it was not enough to send the leader to jail, because he or she could be replaced. The law had to strike at the heart of the motivation of the offender and the crime itself. It had to strike at property. It was not enough to take away criminals' liberty. To make any impact on this kind of crime, the law had to deprive the organization of one source of its power — money. I am talking about taking, not only liberty, but also property.

I am not a Marxist.[7] I do not usually make a wholly economic analysis of the law. But the judgment was made in 1970 that these kinds of crimes were not principally motivated by poverty, by passion, by mental disease, or by discrimination, but by desire for money or profit; they were, in some sense, the product of rational calculation. They fit Bentham's model.[8] Any crime model that simply made an effort to deal with them in the old way, depriving them only of liberty, but not of power and profit as well, simply would be ineffective.

Dealing with liberty, power, *and* profit is exactly what RICO and CCE do. Both focus on enterprises — groups of people engaging not in single offenses, but in patterns or series of offenses. Given those two elements, "patterns" and "enterprises," RICO and CCE adopt a philosophy of long term imprisonment and stiff economic sanction (the seizure of the assets gained from or used in the

---

[7] *See* Murphy, *Marxism and Retribution*, 2 PHILOSOPHY & PUB. AFF. 217 (1973).

[8] J. BENTHAM, WORKS 396, 402 (J. Bowring ed. 1843).

course of the offence).

Now, let us discuss candidly why those kinds of organizations exist in our society. They service a demand. There is a demand in our society for illicit sex, if any sex is illicit anymore. There is a demand in our society for illicit chance. There is a demand in our society for drugs. We call them recreational drugs and are basically schizophrenic about them. On the one hand, we use them. On the other hand, we know that we should not. Drug laws reflect that schizophrenia. Look at the drug traffic, and ask yourself why people sell drugs. People are in it to make money. The threat, then, of RICO and CCE is long term imprisonment and the seizure of assets.

Just as these criminal organizations service a demand, they also create a demand in our society. These organizations need services; they need bankers to launder their money, real estate brokers to invest in physical assets, and stock brokers to invest in intangible assets.

And they need lawyers to keep the law off their backs. They need house counsel to make possible their day-to-day operations; they need corrupt lawyers to make possible their operations. I am not suggesting that all bankers, stock brokers, real estate agents, or lawyers that deal with such organizations are corrupt, but I am telling you that *some* are.[9] And any assumption that they are not, that all of the lawyers involved with these organizations are in some sense just nineteenth century single practitioners, handling their cases one by one, is bizarre. It is not part of the real world.

In order to authorize the seizure of assets associated with illegal enterprises that engage in servicing various illicit demands of our society, questions of a legal nature must be answered. They are: How will we go about doing it?; Shall we take essentially a criminal tack? Shall we take essentially a civil tack? There are, fortunately, due process limitations in our Constitution on how we go about seizing other people's property. There are also serious questions

---

[9] *See Staff Reporter on Mob Lawyers: President's Commission on Organized Crime*, 37 CRIM. L. RPTR. 201820 (1985) (renegade attorneys who work for the "mob" constitute significant threat to the integrity of the bar disproportionate to their numbers).

about *when* we should seize the property. What do we do about that period of time between the day the process begins and the day the process ends? We are, presumably, attempting to seize assets from bad people. I am not talking about the presumption of innocence appropriate to trial, but the real world perspective of law enforcement: We do not bring cases against people who are in fact innocent. We do bring cases against people who are presumed to be innocent. But the government has every reason to believe that in fact they are guilty. Since eighty-five to ninety percent of the people plead guilty, the government is correct eighty-five to ninety percent of the time. My point is that most people in the system are, in fact, guilty. And if we wait until the conclusion of the litigation, will there be any assets there to seize?

What we have to do, on the criminal side, is precisely what we do on the civil side. There is a whole set of civil law remedies — attachment, equitable attachment, freeze orders, injunctions — with which we have extensive experience. In 1970, a decision was made to adapt or adopt those processes for the seizure of property to the criminal process in the same way we have always used them to seize live bodies. We begin a criminal case by seizing a defendant, and then bailing him. Why? Because if we only tagged him and expected him to wait until the criminal process was all over, it is highly likely that he would not be there. Do we honestly believe that that same defendant will leave his assets around for us to seize at the end of a trial?

If every defendant were adjudicated guilty, we would have little problem. But a serious problem arises in determining what kind of process — criminal or civil — shall we give to people in the seizure of assets. How shall we seize assets — at least preliminarily — between the time we begin the investigation and the time we end the adjudication?[10] That is the issue we face today.

---

[10] *See* United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (since Rule 65 hearing requirement applicable to CCE, not violation of due process; indictment may not be challenged; grand jury finding not irrebuttable; exception in living expenses and legal fees question of discretion; necessary knowledge of counsel does not defeat right to fees); United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (*ex parte* TRO under § 853 violated due process; Rule 65 read into provision; hearing required to restrain property of defendant and third party); United States v. Lewis, 759 F.2d 1316, 1324-27 (8th Cir. 1985) (*ex parte*

The 1970 statutes were drafted based upon several assumptions. One assumption was that this was to be a new beginning, an effort to deal with these problems in a new way. The statutes were drafted like a lot of efforts of that kind: when we began, we blocked it out in general. We did not come to the problem with a fully formed or detailed understanding of what the real problem was, because it was a *new* problem. This was not codification; it was innovation.

A few other assumptions were made as well. One was that the Department of Justice was committed to this kind of program. We believed that it would be implemented with discretion, but vigorously. Another assumption was that the federal judiciary would accept the legislation with sympathy and implement it with care and discretion. A further assumption was that the practicing bar — on the criminal and civil side of RICO — would come to it with a certain amount of intelligence and sympathy for the problem. To assure that the law was nudged in the right direction, RICO was not only broadly written, but also was denominated a remedial, not a criminal, statute. Its liberal interpretation was also enjoined.[11]

It turns out that in practice, all of those assumptions were wrong. The Department of Justice ignored RICO for the better part of a decade. It has only recently become the tool it was designed to be, as, for example, in the Mafia prosecutions. Everybody knows in New York that the heads of the five families just went down. What many of you do not know is that nine of the eleven defendants in the original indictment were personally

---

TRO under § 848(d) violated due process; Rule 65 read into provision; must find irreparable injury; solvent defendant may not be denied choice of counsel, *citing* United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)). *But see* Gerstein v. Pugh, 420 U.S. 103, 122-25 n.27 (1975) ("[t]he relatively simple civil procedures . . . are inapposite and irrelevant in the wholly different context of the criminal justice system"); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-80 (1974) (Fuentes v. Shevin, 407 U.S. 67, 93-94 n.30 (1972) inapplicable to forfeitures). *See also* Pierce v. United States, 255 U.S. 398, 401-02 (1921) (Brandeis, J.) ("The corporation cannot disable itself from responding [to a prospective fine] by distributing its property among its stockholders and leaving remediless those having valid claims."); An Act against Fraudulent Deeds, alienations, etc., 1570, 13 Eliz., ch. 5 (fraudulent conveyances avoidable).

[11] 84 Stat. 947 (1970).

named in the 1969 Senate committee report on RICO.[12] The Department of Justice did not get around to using RICO against the named targets for fifteen years. The statute simply has not received an imaginative or a vigorous implementation by the Department of Justice.

Let me confess, with candor, that these assumptions were naive. It turns out that Department of Justice lawyers, like all of us, tend to do today what was left unfinished yesterday. New ideas and approaches coming from the outside are seldom well received. It has taken the Justice Department lawyers a great deal of time to study RICO and understand it. The thing to say in their behalf is that now they do understand it, and they are using it creatively.

In drafting RICO and CCE, we also assumed that if we blocked out the general direction in which these procedural provisions should move, the judiciary would work it out. For example, we did not put on the face of the statute a provision dealing with notice in the indictment for interests to be forfeited, or for special verdicts, which obviously are necessary. We assumed that that should be done by rulemaking process. Indeed, after the statute was passed, Senator McClellan asked the staff to talk to the Rule Committee about adding provisions of that sort to the federal rules. We assumed, in short, that the language in the statute that dealt with these things generally would be implemented with sympathy by the judiciary. We were wrong. The federal judiciary came to the statutes as a country parson reading the first chapter of Genesis—with a dry and hostile literalism.[13]

Understand what has happened since. Congress supports the approach established in RICO and CCE, which have endured over the better part of almost twenty years. Senator McClellan is dead

---

[12] *See* TIME, Dec. 1, 1986, at 32 (conviction of eight men in Commission prosecution, among whom were the leaders of three of New York City five crime families); *compare* S. REP. No. 617, 91st Cong. 1st Sess. 36-43 (1969) (five of nine individuals indicted in 1985 identified) *with* N.Y. Times, Feb. 27, 1985, at 1, col. 2 (nine mob leaders indicted, four of whom on Commission and heading New York City crime families).

[13] *See, e.g.*, United States v. Marubeni America Corp., 611 F.2d 763, 765-70 (9th Cir. 1980) (§ 1963(a)(1) forfeiture limited to interest in an enterprise); United States v. McManigal, 708 F.2d 276, 283-87 (7th Cir). (same holding), *vacated*, 464 U.S. 979, *aff'd as modified*, 723 F.2d 580 (7th Cir. 1983).

now, God rest his soul. If he alone had supported these statutes, they would long since have been buried with him. However, he has been succeeded in this area by no less than Senator Ted Kennedy. And if you want to look for somebody who is an opposite of John McClellan, an old Southern conservative, look at Ted Kennedy, a young Northern liberal.

Thus, the recognition of the need to do something about modern kinds of organized crime and drug traffic led to the 1984 Act,[14] which said that half of what the federal judiciary had done in interpreting RICO and CCE was wrong. It overruled several opinions.[15] It made what began like a constitution, in its generality, look like a provision of the federal revenue code, detailing what property could be seized, and how it could be seized, and what process was due.

In passing the 1984 Act, Congress committed itself to making RICO and CCE work, if necessary, over the objections of the federal judiciary, over the objections of the practicing bar and of criminal defense lawyers. The thrust in our society is to do something about these problems, but not to do it mindlessly. Our society wants to find out what will, as a practical matter, be effective against organizational crime, consistent with our history and tradition. Make no mistake about it.

This brings me back to where I began. I do not believe that the forfeiture of legal fees has a lot to do with the sixth amendment. Nothing in the text of the sixth amendment directly addresses whether lawyers' fees should be set by the free market, by judges, or by salaries. Nor is there any material on fee forfeiture in the history of the constitutional convention or the arguments and debates about the ratification of the sixth amendment. I am not presenting an Ed Meece original intent analysis. But as a *matter* of

---

[14] Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984). *See generally* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1984).

[15] *See* cases cited *supra* note 13. *See also* United States v. McManigal, 708 F.2d 276, 287-90 (no relation back except sham); *cf.* United States v. Veon, 549 F. Supp. 274, 280 n.13 (E.D. Cal. 1982) (*lis pendens* notice struck under CCE since no interest in property until judgment), *reversed without op.*, 720 F.2d 685 (9th Cir. 1983).

original intent, fee forfeiture is not mentioned.

Similarly, any one of you could, of course, draft an argument that this either is or is not a sixth amendment question. Anyone here who believes that the general language of the amendment could not be so construed is not familiar with legal realism. I am saying, however, that this is not the kind of constitutional question that original intent or anything in current jurisprudence can resolve. It is not a statutory analysis question, either. As the discussion above shows, we cannot settle this by interpreting the statute itself. The real issue before us is not what the Constitution or the statute says, but what we as a community can do to resolve the problem.

I suggest to you that this is a question of identifying the interests involved and balancing them. We have polar positions. One position says that this ought to be solely a free market question to be resolved by the lawyer and the client. If the client has illicit assets, he or she should be able to pay them to a lawyer, rather than forfeit them to the government. As a private defense attorney, that is the view that I would like to see prevail. The largest single fee I ever earned was in a drug case. I would hate to think that I would have to sell my time at what it is truly worth, rather than what I can command when working on RICO and CCE cases. But should my personal view be adopted by society?

The position on the other side is that there will be *no* private defense bar in these cases; they will be all handled by CJA appointments or by public defenders. I find that equally unacceptable.

So the question remains: how can we work this out so that our society can realize, and actualize, what we need and what we want? I will leave its resolution to my compatriots.[16]

---

[16] *Compare* United States v. Thier, 801 F.2d 1463 (5th Cir. 1986)(necessary knowledge acquired by defense counsel not disqualifying as BFP) *with* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987)(RICO and CCE apply to forfeit legal fees, but are unconstitutional as applied). *See also* United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983)(*per curiam*) (CCE before 1984 amendment applicable to legal fee); United States v. Long, 654 F.2d 911, 917 (3d Cir. 1981) (same holding); Payden v. United States, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985) (RICO and CCE after 1984 amendment applicable to legal fee; *Rogers*

rejected), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); United States v. Rogers, 602 F. Supp. 1332, 1343-345, 1348 (D. Colo. 1985) (unconstitutional as applied to "legitimate transfer for value" of legal fee (except sham); motion granted to exclude; lenity applied; requires more than indictment for permanent restraining order (rule 65)); United States v. Badalamenti, 614 F. Supp. 194, 196-99 (S.D.N.Y. 1985) (unconstitutional as applied to legal fees).