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## Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?

The country's defense bar has widely criticized the Comprehensive Forfeiture Act of 1984 (CFA)<sup>1</sup> since its enactment.<sup>2</sup> Congress enacted CFA, part of the Comprehensive Crime Control Act of 1984,<sup>3</sup> as an amendment to the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>4</sup> and the Continuing Criminal Enterprise Statute (CCE).<sup>5</sup> Prior to 1984, RICO and CCE contained provisions that called for the criminal forfeiture of a convicted defendant's assets which could be identified as "fruits of the crime."<sup>6</sup> With the enactment of CFA, however, Congress made it clear that a prosecutor could obtain forfeiture of such assets from a third party to whom the defendant had transferred the assets.<sup>7</sup> The question has arisen as to whether prosecutors can use CFA to obtain forfeiture of attorneys' fees paid by a convicted defendant.<sup>8</sup> The Justice Department has insisted that the third party forfeiture provision in CFA applies to a defendant's attorneys' fees.<sup>9</sup> On the other hand, some defense attorneys have argued that Congress did not intend CFA to apply to attorneys' fees,<sup>10</sup> and that the forfeiture of attorneys' fees under the provisions of CFA would violate the defendant's sixth amendment right to counsel.<sup>11</sup> The courts are divided as to whether CFA can be applied to obtain forfeiture of attorneys' fees.<sup>12</sup>

1 Pub. L. No. 98-473, Title II, §§ 301-322, 98 Stat. 1837, 2040-2057 (codified in scattered sections of 18, 19, 21, 26, and 28 U.S.C.). This note concerns only the criminal forfeiture provisions of CFA codified at 18 U.S.C. § 1963, and 21 U.S.C. §§ 853 (Supp. III 1985). All references to CFA in this note will refer only to these criminal forfeiture provisions.

2 See, e.g., *The Forfeiture of Attorney Fees in Criminal Cases: A Call for Immediate Remedial Action*, 41 REC. A.B. CTRY N.Y. 469 (1986) [hereinafter N.Y. Bar Rep.].

3 Pub. L. No. 98-473, Title II, 98 Stat. 1837, 1976-2194 (1984).

4 18 U.S.C. §§ 1961-1968 (1982).

5 21 U.S.C. § 848 (1982).

6 18 U.S.C. § 1963, 21 U.S.C. § 848 (Supp. III 1985).

7 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (Supp. III 1985). See also *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) (pre-CFA case allowing forfeiture of assets transferred to third parties); *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979) (same).

8 *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *In re Grand Jury Subpoena Duces Tecum*, 605 F. Supp. 839 (S.D.N.Y.) [hereinafter *Simels*], *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

9 *Justice Department Guidelines on Forfeiture of Attorneys' Fees*, reprinted in 38 Crim. L. Rep. (BNA) 3001 (Oct. 2, 1985) [hereinafter *D.O.J. Guidelines*].

10 See, e.g., *Krieger & Van Dusen, The Lawyer, the Client, and the New Law*, 22 AM. CRIM. L. REV. 737 (1984); N.Y. Bar Rep., *supra* note 2.

11 *Id.*

12 Compare *Harvey*, 814 F.2d 905 (holding that application of CFA's third party forfeiture provisions to private attorneys' fees violates a defendant's right to counsel of choice); *Ianniello*, 644 F. Supp. 452 (holding that the third party forfeiture provisions of CFA do not apply to attorneys' fees); *Badalamenti*, 614 F. Supp. 194 (same); and *Rogers*, 602 F. Supp. 1332 (same) with *Simels*, 605 F. Supp. 839, *supra* note 8 (holding that the third party forfeiture provisions of CFA apply to attorneys' fees).

This note addresses some of the issues surrounding the forfeiture of attorneys' fees under the present provisions of CFA. Part I recounts the development of CFA. Part II summarizes the opinions of the federal courts and the Justice Department on the proper interpretation of CFA's third party forfeiture provisions. Part III examines the sixth amendment implications of the forfeiture of attorneys' fees under CFA, and concludes that CFA's third party forfeiture provisions would violate a defendant's right to counsel if applied to bona fide attorneys' fees. Part IV notes that while bona fide attorneys' fees should not be subject to forfeiture under CFA, sham attorneys' fees should be. Part V also proposes an amendment to CFA which would provide for post-conviction attorneys' fee hearings to determine if the transfer of attorneys' fees was a sham, and thus subject to forfeiture. Finally, Part V concludes that this amendment constitutes a workable change to CFA, protecting the defendant's constitutional rights while preserving the spirit of CFA.

### I. The Comprehensive Forfeiture Act of 1984

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act<sup>13</sup> and the Continuing Criminal Enterprise Statute.<sup>14</sup> Congress designed these statutes to attack the foundation of sophisticated racketeering and drug trafficking operations.<sup>15</sup> Noting that profit was the motivation for these crimes, Congress believed that the only way to combat racketeering and drug trafficking successfully was to erode the economic power bases that supported these operations.<sup>16</sup> The traditional criminal sanctions of fine and imprisonment were inadequate to accomplish this goal so Congress reintroduced the sanction of criminal forfeiture to the American criminal justice system.<sup>17</sup>

Despite the severity of the sanction, the criminal forfeiture provisions of RICO and CCE were not very effective.<sup>18</sup> The General Accounting Office issued a report finding that the major reasons for the failure of the forfeiture provisions were: (1) that federal law enforcement agencies did not pursue forfeiture often, and (2) that the forfeiture provisions were poorly drafted, containing numerous limitations and ambiguities which impeded the use of forfeiture.<sup>19</sup>

13 18 U.S.C. §§ 1961-1968 (1982).

14 21 U.S.C. § 848 (1982).

15 S. REP. NO. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3374.

16 *Id.*

17 *Id.* Criminal forfeiture is an in personam proceeding. To avail itself of criminal forfeiture, the government brings one action which combines the forfeiture proceeding with the prosecution of the offense giving rise to the forfeiture. *Id.* at 197. This action encompasses all forfeitable assets. Under civil forfeiture, the government must bring an in rem proceeding in the district where the property is located. *Id.* at 193. Because criminal forfeiture allows the government to obtain the forfeiture of all assets in one action, it is a more efficient method of obtaining forfeitable assets. *Id.*

18 COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 9-15 (1981) (government's record in taking the profit out of organized crime was far below Congress' expectations). See generally ABA CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION 90 n.95 (1985) (statistics on RICO and CCE forfeitures from 1970-80).

19 COMPTROLLER GENERAL, *supra* note 18, *noted in* S. REP. NO. 225, *supra* note 15, at 191.

In response to the shortcomings of the forfeiture provisions in RICO and CCE, Congress enacted the Comprehensive Forfeiture Act of 1984.<sup>20</sup> Congress designed CFA both to clarify and to expand the forfeiture provisions of RICO and CCE.<sup>21</sup> In developing CFA, Congress identified as one of the major shortcomings of the existing criminal forfeiture provisions the failure of the provisions to cover assets that the defendant transferred or concealed prior to conviction.<sup>22</sup> To deal with this problem, Congress included in CFA a provision which stated that the title to property subject to criminal forfeiture under RICO and CCE vests in the United States upon commission of the offense which triggers the forfeiture action.<sup>23</sup> Under this "relation back" or "taint" theory, the government can obtain forfeiture of assets from third party transferees if those assets would have been subject to forfeiture if held by the defendant.<sup>24</sup>

However, Congress did not want this provision to justify the forfeiture of assets acquired by innocent bona fide purchasers.<sup>25</sup> CFA provides for a post-conviction ancillary hearing at which a third party who is holding property subject to forfeiture may apply for relief.<sup>26</sup> Under the

20 18 U.S.C. § 1963, 21 U.S.C. § 853 (Supp. III 1985).

21 S. REP. NO. 225, *supra* note 15, at 192.

22 *Id.* at 195. Although the criminal forfeiture provisions did authorize the court to issue an order restraining the postindictment transfer of assets, neither RICO nor CCE provided any standards for the issuance of a restraining order. *Id.*

23 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (Supp. III 1985). The identical language in these two statutes states:

(c) All right, title, and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection [(m) under RICO, (n) under CCE] that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

24 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (Supp. III 1985); *supra* note 23.

25 S. REP. NO. 225, *supra* note 15, at 201.

26 18 U.S.C. § 1963(m), 21 U.S.C. § 853(n) (Supp. III 1985). These identical provisions state, in pertinent part:

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice . . . whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

....  
(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing.

....  
(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;  
the court shall amend the order of forfeiture in accordance with its determination.

ancillary hearing provisions, a third party can prevail in asserting a legal interest superior to that of the United States in one of two ways. The third party can show that he had a legal interest in the property, superior to that of the defendant, at the time the crime was committed.<sup>27</sup> In the alternative, the third party must prove that he was a bona fide purchaser for value who had no reason to believe that the property was subject to forfeiture.<sup>28</sup>

With these new provisions, Congress hoped to clarify RICO and CCE and thereby reduce the questions surrounding their enforcement. Instead, the enactment of CFA has generated new questions, some of which challenge the constitutionality of the Act itself.

## II. Interpreting CFA: Are Attorneys' Fees Subject to Forfeiture?

Under a literal reading of CFA, the third party forfeiture provisions apply to attorneys' fees paid by the defendant to his defense counsel in a RICO or CCE trial.<sup>29</sup> Indeed, the Justice Department has issued guidelines on the forfeiture of attorneys' fees under CFA.<sup>30</sup> Many defense attorneys, however, claim that CFA, as applied to attorneys' fees, violates a defendant's constitutional rights.<sup>31</sup> The courts are split on the issue of whether or not CFA applies to attorneys' fees.<sup>32</sup>

### A. Judicial Interpretations

The trend in the courts has been to hold that CFA does not, and was not intended to, apply to bona fide attorneys' fees.<sup>33</sup> The earliest case concerning the application of CFA's third party forfeiture provisions to attorneys' fees is *United States v. Rogers*.<sup>34</sup> In *Rogers*, the government filed a petition for a restraining order to prevent some RICO defendants from transferring certain assets.<sup>35</sup> Counsel for the defendants, making conditional appearances, filed motions to exclude attorneys' fees from forfeiture.<sup>36</sup> The court held that funds paid to an attorney for legitimately rendered services were not subject to forfeiture under CFA.<sup>37</sup>

The *Rogers* court first considered the actual language of the statute.<sup>38</sup> The court found that the language indicated that Congress intended to

If the third party's claim under these provisions fails, he may petition the Attorney General for mitigation or remission of the forfeiture order. See 18 U.S.C. § 1963(h)(1), 21 U.S.C. § 853(i)(1) (Supp. III 1985). However, the Attorney General's decision is not subject to judicial review. See *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir.), cert. denied, 449 U.S. 833 (1980).

27 18 U.S.C. § 1963(m)(6)(A), 21 U.S.C. § 853(n)(6)(A) (Supp. III 1985); *supra* note 26.

28 18 U.S.C. § 1963(m)(6)(B), 21 U.S.C. § 853(n)(6)(B) (Supp. III 1985); *supra* note 26.

29 See, e.g., *D.O.J. Guidelines*, *supra* note 9, at 3001 (stating that attorneys' fees are subject to third party forfeiture under CFA). But see, e.g., *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985) (holding that CFA's third party forfeiture provisions do not apply to attorneys' fees).

30 *D.O.J. Guidelines*, *supra* note 9.

31 See, e.g., *Krieger & Van Dusen*, *supra* note 10; N.Y. Bar Rep., *supra* note 2.

32 See cases cited *supra* note 12.

33 See *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); and *Rogers*, 602 F. Supp. 1332. See also *supra* notes 8 & 12.

34 602 F. Supp. 1332. See *supra* notes 8 & 12.

35 602 F. Supp. at 1334.

36 *Id.*

37 *Id.* at 1349.

38 *Id.* at 1346.

treat assets in the hands of third parties differently from assets in the hands of the defendant.<sup>39</sup> The statute did not, however, state specifically whether attorneys' fees were forfeitable.<sup>40</sup>

In the absence of clear statutory language, the court turned to CFA's legislative history.<sup>41</sup> According to the legislative history, the purpose of the third party forfeiture provisions was to "permit the voiding of certain pre-conviction transfers and so close a potential loophole in current laws whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions."<sup>42</sup> The *Rogers* court interpreted that statement to mean that the government could only obtain forfeiture of third party assets that were transferred as part of a sham.<sup>43</sup> According to the court, an attorney who receives funds for rendering legitimate services is not engaged in a sham.<sup>44</sup>

The court also noted that application of CFA to obtain forfeiture of attorneys' fees might interfere with the defendant's sixth amendment right to counsel.<sup>45</sup> To avoid declaring the third party forfeiture provisions of CFA unconstitutional and to carry out its interpretation of CFA's legislative intent, the *Rogers* court held that assets transferred to an attorney for rendering legitimate services were not subject to forfeiture under CFA.<sup>46</sup>

The second court to address this issue specifically rejected the holding in *Rogers*. In *In re Grand Jury Subpoena Duces Tecum* (hereinafter *Simels*),<sup>47</sup> a defendant being prosecuted under CCE moved for a motion to quash a trial subpoena served on his defense counsel.<sup>48</sup> While the holding in *Simels* concerned only the constitutionality of issuing a subpoena to the defendant's counsel,<sup>49</sup> the court discussed the forfeiture of

39 *Id.* at 1347.

40 *Id.*

41 *Id.*

42 S. REP. NO. 225, *supra* note 15, at 200-01.

43 602 F. Supp. at 1347. The *Rogers* court also based this interpretation of the third party forfeiture provisions of CFA on a footnote to the legislative history of CFA. The footnote stated that "[t]he provision should be construed to deny relief [only] to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." S. REP. NO. 225, *supra* note 15, at 209 n.47, cited in *Rogers*, 602 F. Supp. at 1347 (the parenthetical "only" was added by the *Rogers* court). *But cf.* *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.").

44 602 F. Supp. at 1347. The defendant makes a sham transfer when he transfers assets to avoid their forfeiture.

45 *Id.* See also *infra* notes 78-140 and accompanying text.

The court cited an earlier draft of provisions dealing with in personam forfeiture. The draft stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984), *quoted in Rogers*, 602 F. Supp. at 1347.

46 602 F. Supp. at 1349.

47 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). See *supra* notes 8 & 12.

48 The subpoena called for the attorney to produce documentary evidence relating to his fee arrangement and payments received from the defendant. 605 F. Supp. at 844.

49 While the constitutionality of issuing a subpoena to the defendant's attorney in a RICO or CCE case is an interesting topic, it is beyond the scope of this note. For sources addressing that topic, see generally *Badalamenti*, 614 F. Supp. at 198; *Simels*, 605 F. Supp. 839, *supra* note 8; N.Y. Bar Rep., *supra* note 2, at 495-502. See also *D.O.J. Guidelines*, *supra* note 9, at 3007.

attorneys' fees as well.<sup>50</sup> The *Simels* court stated that the *Rogers* decision, limiting the forfeiture of attorneys' fees to sham transactions, was contrary to the legislative history of CFA.<sup>51</sup> According to the court, an attorney who has seen his client's indictment has notice that the client's assets are subject to forfeiture and therefore the attorney may be subject to third party forfeiture under CFA.<sup>52</sup> The court also found that Congress clearly intended the courts to resolve the conflict between the CFA forfeiture provisions and the sixth amendment.<sup>53</sup> The *Simels* court concluded that to allow the defendant to use forfeitable assets "to obtain the services of the Rolls-Royce of attorneys . . . would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power."<sup>54</sup>

In a very similar case, a court agreed with the reasoning of the *Rogers* court and rejected the *Simels* court's position on whether the government could obtain forfeiture of a defendant's attorneys' fees. In *United States v. Badalamenti*,<sup>55</sup> the attorney for a defendant being prosecuted under RICO and CCE moved to quash a subpoena served on him. The subpoena required the attorney to testify about his fee arrangement with his client.<sup>56</sup> The *Badalamenti* court held that the government could not rely on possible attorneys' fee forfeiture as the basis of the subpoena because the third party forfeiture provisions of CFA do not apply to bona fide attorneys' fees.<sup>57</sup> Rather than relying on the legislative history of CFA, the court determined that the application of CFA to forfeit attorneys' fees would violate the defendant's sixth amendment right to counsel.<sup>58</sup> Because Congress could not have intended the act to be unconstitutional, the court reasoned that CFA did not apply to bona fide attorneys' fees.<sup>59</sup>

The most recent case addressing the issue of attorneys' fee forfeiture under CFA is *United States v. Harvey*.<sup>60</sup> In *Harvey*, three district court cases were consolidated for appeal on issues respecting CFA's forfeiture provisions.<sup>61</sup> In two of the cases, the district courts followed the *Rogers* decision and held that Congress did not intend the third party forfeiture

50 605 F. Supp. at 849 n.14, *supra* note 8 (one of the government's interests in obtaining the fee information was to seek the forfeiture of attorneys' fees).

51 *Id.*

52 *Id.* Cf. 18 U.S.C. § 1963(m), 21 U.S.C. § 853(n) (Supp. III 1985); *supra* note 26.

53 The court criticized the *Rogers* court's reliance on H.R. REP. NO. 845, *supra* note 45. The *Simels* court quoted the next sentence of the report: "The Committee, therefore, does not resolve the conflict in the District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." H.R. REP. NO. 845, *supra* note 45, at 19 n.1; 605 F. Supp. at 850 n.14, *supra* note 8.

54 *Simels*, 605 F. Supp. at 850 n.14, *supra* note 8.

55 614 F. Supp. 194 (S.D.N.Y. 1985). See *supra* notes 8 & 12.

56 614 F. Supp. at 195. Cf. *supra* note 49 (citing to sources which discuss the constitutionality of such a subpoena).

57 614 F. Supp. at 198.

58 *Id.* See also *infra* notes 78-140 and accompanying text.

59 614 F. Supp. at 198.

60 814 F.2d 905 (4th Cir. 1987). See *supra* notes 8 & 12.

61 The cases heard on appeal were *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986); and *United States v. Harvey*, No. CR-85-224-A (E.D. Va. Nov. 8, 1985).

provisions of CFA to encompass bona fide attorneys' fees.<sup>62</sup> The *Harvey* court specifically rejected this interpretation of CFA.<sup>63</sup>

The court noted that when a court is interpreting a statute, it may look to the legislative history for guidance only if the statute is unclear or subject to different interpretations.<sup>64</sup> Similarly, the *Harvey* court found that a court may only choose an interpretation consistent with constitutionality over an interpretation of unconstitutionality if the statute is sufficiently ambiguous to permit a choice between the two.<sup>65</sup> The court found that the statutory language of CFA's third party forfeiture provisions was unambiguous and clearly encompassed even bona fide attorneys' fees.<sup>66</sup> The court went on to find that, under certain circumstances, application of the CFA forfeiture provisions to attorneys' fees would violate a defendant's sixth amendment right to counsel.<sup>67</sup>

### B. *The Justice Department Interpretation*

In 1985, the Department of Justice issued guidelines on the forfeiture of attorneys' fees.<sup>68</sup> The Justice Department insisted that attorneys' fees were subject to forfeiture under CFA unless the attorney could prove that he was a bona fide purchaser and was reasonably without cause to know the assets were subject to forfeiture.<sup>69</sup> The Justice Department stated that the intrusion of the third party forfeiture provisions on a defendant's right to counsel did not amount to an unconstitutional inter-

62 *Bassett*, 632 F. Supp. at 1317; *Reckmeyer*, 631 F. Supp. at 1195.

In the third case, *Harvey*, No. CR-85-224-A (E.D. Va. Nov. 8, 1985), pretrial restraining orders on the defendant's assets had rendered him effectively indigent. The court appointed counsel for his defense, and he was subsequently convicted. The defendant appealed on the grounds that the restraining orders violated his sixth amendment right to counsel and his fifth amendment due process rights. 814 F.2d at 912-13. See also *infra* note 85 (the courts have not resolved the issue of whether the government may restrain a defendant's assets if that would prevent a defendant from retaining private counsel).

63 814 F.2d at 918.

64 "When no ambiguity is apparent on the face of a statute, an examination of legislative history is inappropriate. The proper function of legislative history is to solve, and not create, an ambiguity." *United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979), quoted in *Harvey*, 814 F.2d at 916.

65 814 F.2d at 917. See also 2A SUTHERLAND, STATUTORY CONSTRUCTION § 45.11 (4th ed. 1984) (courts are not free to interpret in violation of congressional intent even if that is the only way that constitutionality may be preserved).

66 814 F.2d at 918 ("Property marked for or paid as attorney fees is necessarily included within that defined as subject to forfeiture by §§ 1963(a) and (b) for the simple reason that those provisions define forfeitable property without regard to its intended or actual use."). See also Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 538-39 (1986) (noting the district courts' findings of ambiguity in the clear language of CFA).

The *Harvey* court also found that even the legislative history of CFA indicated that all attorneys' fees would be subject to forfeiture. See S. REP. NO. 225, *supra* note 15, at 196 ("Changes [in the criminal forfeiture statutes] are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture."). The *Harvey* court found this passage to reflect a clear congressional intent not to limit third party forfeiture to sham transfers.

67 814 F.2d at 926. The circumstances the court described were when application of the CFA forfeiture provisions deprive an accused of the ability to employ and pay legitimate attorneys' fees to private counsel. See also *infra* notes 90-107 and accompanying text (discussion of the impact of CFA third party forfeiture provisions on a defendant's sixth amendment right to counsel of choice).

68 D.O.J. Guidelines, *supra* note 9.

69 *Id.* at 3001.



ference.<sup>70</sup> It also noted that CFA did not contain any language exempting attorneys' fees from its coverage.<sup>71</sup> In fact, the legislative history of CFA cited with approval a pre-CFA case holding that some of a defendant's property was forfeitable even though it was transferred to his attorney prior to conviction.<sup>72</sup> The Justice Department believed that the exemption of attorneys' fees would "undermine substantially the purpose of the third party forfeiture provisions."<sup>73</sup>

As both the Justice Department and the *Harvey* court found, a literal reading of CFA indicates that the third party forfeiture provisions do encompass bona fide attorneys' fees.<sup>74</sup> However, the Justice Department and most of the courts that have interpreted CFA's forfeiture provisions as applied to attorneys' fees have noted that the provisions have some impact on a defendant's sixth amendment right to counsel.<sup>75</sup> It was CFA's intrusion on a defendant's right to counsel which caused some district courts to search through CFA's legislative history to support an interpretation of CFA that excluded bona fide attorneys' fees from forfeiture.<sup>76</sup> This intrusion on a defendant's sixth amendment rights also led the *Harvey* court to declare CFA's forfeiture provisions unconstitutional as applied to bona fide attorneys' fees.<sup>77</sup>

### III. Sixth Amendment Implications of CFA

Most of the courts which have addressed the issue have held that forfeiture of bona fide attorneys' fees under the present provisions of the CFA would violate a defendant's sixth amendment<sup>78</sup> right to counsel.<sup>79</sup> The potential violation is three-fold in nature; the forfeiture of bona fide attorneys' fees under CFA would: (1) violate a defendant's right to have counsel; (2) violate a defendant's right to choice of counsel; and (3) violate a defendant's right to effective counsel.

<sup>70</sup> *Id.* But see *infra* notes 78-140 and accompanying text.

<sup>71</sup> *D.O.J. Guidelines*, *supra* note 9, at 3003.

<sup>72</sup> S. REP. NO. 225, *supra* note 15, at 200 n.28 (citing *United States v. Long*, 654 F.2d 911 (3d Cir. 1981)).

However, the facts in this case suggest that the transfer was part of a sham. In *Long*, the defendant in a CCE case transferred an airplane to his attorney in payment of past debts and as a retainer for future services. The purchase price of the airplane was \$140,000. Thirty thousand dollars of that amount was for past services; \$79,000 was for future services. The lawyer gave the balance, \$31,000, in cash to an unknown messenger. A man known only as "Tony" in the Bahamas transferred title to the plane to the attorney's partner. The firm tried to sell the plane through trade magazines, but the issuance of a restraining order stopped the sale.

<sup>73</sup> *D.O.J. Guidelines*, *supra* note 9, at 3003.

<sup>74</sup> *Id.*; and *Harvey*, 814 F.2d at 914.

<sup>75</sup> *D.O.J. Guidelines*, *supra* note 9, at 3002; *Harvey*, 814 F.2d at 926; *Ianniello*, 644 F. Supp. at 456; *Badalamenti*, 614 F. Supp. at 196; and *Rogers*, 602 F. Supp. at 1349.

<sup>76</sup> *Ianniello*, 644 F. Supp. at 445; *Rogers*, 602 F. Supp. at 1347.

<sup>77</sup> 814 F.2d at 926.

<sup>78</sup> The sixth amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

<sup>79</sup> *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985). *Contra Simels*, 605 F. Supp. 839, *supra* note 8.

### A. *The Right to Have Counsel*

Some courts have found that if the CFA third party forfeiture provisions applied to attorneys' fees, CFA would violate a defendant's sixth amendment right to have counsel.<sup>80</sup> The courts reasoned that the threat of forfeiture would make it difficult, if not impossible, for a defendant to secure the services of an attorney.<sup>81</sup> The courts doubted that an attorney would be willing to invest the time and resources required to defend a RICO or CCE defendant without a better guarantee of payment.<sup>82</sup>

The Justice Department rejected the arguments advanced by the district courts.<sup>83</sup> It stated that a defendant who was effectively rendered indigent because of the potential forfeiture could still obtain appointed counsel.<sup>84</sup> Potential forfeiture of attorneys' fees could effectively render a defendant indigent if the government issued restraining orders to cover substantially all of a defendant's assets. The defendant would also be effectively indigent if the threat of forfeiture dissuaded private attorneys from accepting a defendant's unrestrained assets.

Some courts have held that appointed counsel would be available only if the government obtained a restraining order preventing the transfer of substantially all of the defendant's assets.<sup>85</sup> Thus, defendants whose assets are not restrained would not qualify for court-appointed counsel.<sup>86</sup> The government has also suggested that a defendant could use nonforfeitable assets to pay his attorney.<sup>87</sup> This solution would not

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80 See *Ianniello*, 644 F. Supp. at 456-57; and *Badalamenti*, 614 F. Supp. at 197-98. See generally *Powell v. Alabama*, 287 U.S. 45 (1932) (a person accused of a crime has the right to be assisted by counsel in his defense). The right to counsel "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the bases of all our civil and political institutions.'" *Id.* at 67 (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)). See also *United States v. Mohabir*, 624 F.2d 1140, 1149 (2d Cir. 1980) ("[T]he right to obtain the assistance of counsel at all crucial stages is essential if both the symbol and reality of fair trial are to be preserved.").

81 *Ianniello*, 644 F. Supp. at 456; and *Badalamenti*, 614 F. Supp. at 196.

82 Cf. *Ianniello*, 644 F. Supp. at 454; and *Rogers*, 602 F. Supp. at 1332, 1334. The defense attorneys in these cases made appearances conditioned on the courts holding that their fees would not be subject to forfeiture.

As the court in *Badalamenti* commented, "[b]y the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute . . . we insure that no lawyer will accept the business." 614 F. Supp. at 196. See also Chambers, *Criminal Lawyers in Study Say New Laws Inhibited Case Choices*, N.Y. Times, Nov. 21, 1985, at A20, col. 1 (a survey of criminal defense lawyers indicated that some lawyers would refuse to accept RICO and CCE cases because of the changes in federal law).

83 *D.O.J. Guidelines*, *supra* note 9, at 3002.

84 *Id.*

85 *Badalamenti*, 614 F. Supp. at 197. However, the courts have not resolved the issue of whether the government can restrain all of a defendant's assets when that would prevent the defendant from retaining counsel. Compare *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986) (holding that the defendant's interests in obtaining counsel of choice and the possible adverse effects of a court's pretrial refusal to exempt defense counsel fees from forfeiture do not mandate that a trial court exempt from restraining orders sufficient assets to cover a defendant's attorneys' fees) with *Harvey*, 814 F.2d 905 (holding that restraining orders that prevent a defendant from hiring and paying private counsel violate a defendant's sixth amendment right to counsel of choice) and *Ianniello*, 644 F. Supp. 452 (modifying a restraining order to enable the defendant to pay his attorneys' fees based on a holding that legal fees to pay counsel of choice are a necessity in life).

86 *Badalamenti*, 614 F. Supp. at 197. In any event, having a court appoint counsel does not necessarily remove all sixth amendment problems. See *infra* notes 110-19 and accompanying text.

87 *Badalamenti*, 614 F. Supp. at 198; *D.O.J. Guidelines*, *supra* note 9, at 3002.

protect a defendant whose assets were all subject to forfeiture.<sup>88</sup> Moreover, this solution may not be very effective in the light of recent decisions holding that the government need not "trace" money subject to forfeiture in order to obtain forfeiture of it.<sup>89</sup> Therefore, under some circumstances the third party forfeiture provisions of CFA would deprive a defendant of his right to have counsel if the provisions were applied to attorneys' fees.

### B. *The Right to Choice of Counsel*

The right to choice of counsel is related, but is not identical, to the right to have counsel. Courts have held that the sixth amendment guarantees the right to counsel of choice,<sup>90</sup> but the right is not absolute.<sup>91</sup> A defendant's right to choice of counsel is limited by his financial resources.<sup>92</sup>

The Justice Department noted that forfeiture of attorneys' fees impacts on a defendant's right to choose counsel, but stated that the impact did not amount to an unconstitutional interference.<sup>93</sup> Because any forfeitable assets which the defendant holds are the property of the United States,<sup>94</sup> the Justice Department reasoned that a defendant is not being deprived of his right to choice of counsel if he cannot use forfeitable funds to pay attorneys' fees.<sup>95</sup>

The United States does not have title to the assets of a defendant who is found not guilty, because those assets are not forfeitable. Yet, CFA's forfeiture provisions may prevent such a defendant from using his own funds to pay attorneys' fees.<sup>96</sup> Thus, the forfeiture provisions may

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88 *Cf. Badalamenti*, 614 F. Supp. at 198 ("The right to counsel belongs to guilty defendants as well as innocent ones.").

89 "It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known." *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 106 S. Ct. 72 (1985) (emphasis in original). *Accord* *United States v. Ginsburg*, 773 F.2d 798, 802-03 (7th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1186 (1986); *United States v. Navarro-Ordas*, 770 F.2d 959, 970 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1200 (1986).

90 *E.g., Powell*, 287 U.S. at 53 ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *United States v. Curcio*, 694 F.2d 14, 22-23 (2d Cir. 1982).

91 *See* *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). *See also* *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

92 *E.g., Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) ("While it is clear that an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so, it is also clear that the right to retain counsel of one's choice is not absolute.").

93 *D.O.J. Guidelines*, *supra* note 9, at 3002.

94 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (Supp. III 1985); *supra* note 23.

95 *D.O.J. Guidelines*, *supra* note 9, at 3002.

96 Restraining orders covering substantially all of the defendant's assets could prevent the defendant from securing private counsel. *Cf. supra* note 85 (the courts are split on whether the government may restrain a defendant's assets if that would prevent him from securing private counsel). Additionally, the threat of fee forfeiture may cause attorneys to refuse to represent a defendant. *See* *Chambers*, *supra* note 82 (some lawyers would refuse to accept RICO and CCE cases because of the changes in federal law).

deprive a defendant who is found not guilty of his right to choice of counsel.<sup>97</sup>

The Fourth Circuit in *United States v. Harvey*<sup>98</sup> defined the right to counsel of choice as "the right to be free of arbitrary governmental interference in choosing, paying, and retaining the services of privately retained counsel."<sup>99</sup> The *Harvey* court found that the right to counsel of choice was the primary component of the right to counsel, and that the right to appointed counsel was only a back-up right that an indigent defendant could use.<sup>100</sup> The court stated that the government could not directly or indirectly deny persons accused of certain crimes, or all crimes, the right to counsel of choice merely because the accused could use the back-up right to appointed counsel.<sup>101</sup>

The court proceeded to find that the right to counsel of choice encompassed a defendant's right to use his property legitimately to obtain private counsel, even though the government should later prove that the property was tainted by criminal conduct.<sup>102</sup> According to the court, the right of a RICO or CCE defendant to counsel of choice overrides the government's interests in deterrence, in preserving property for forfeiture, and in separating a convicted defendant from his economic base.<sup>103</sup> Thus, the Fourth Circuit held that to the extent that CFA's forfeiture provisions deprived a defendant of the ability to employ and pay private counsel, CFA was unconstitutional for violating the defendant's sixth amendment right to counsel of choice.<sup>104</sup>

It is clear that the forfeiture of attorneys' fees would impact on a RICO or CCE defendant's right to choice of counsel.<sup>105</sup> While the Justice Department claims that the impact does not reach unconstitutional proportions,<sup>106</sup> it appears that the potential forfeiture of attorneys' fees would unreasonably interfere with the defendant's right to counsel, especially in cases where the defendant is subsequently found not guilty.<sup>107</sup> Whether a defendant is able to retain counsel of his choice or has appointed counsel to represent him, the forfeiture of attorneys' fees under CFA may still interfere with his right to effective counsel.

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97 The Justice Department stated that the threat of forfeiture of attorneys' fees does not interfere with the defendant's right to choice of counsel. "If counsel refuses to represent a prospective client because he believes that the client does not have the financial ability to pay . . . there is no interference with the right to counsel of choice." *Id.* at 3003 n.7. But, if the threat of forfeiture of attorneys' fees causes attorneys to refuse to represent a defendant, the forfeiture provisions might interfere with the defendant's right to have counsel. *See supra* notes 80-89 and accompanying text.

98 814 F.2d 905 (4th Cir. 1987).

99 *Id.* at 924.

100 *Id.* at 923. The court recognized that the right to counsel of choice might appear unfair and undemocratic, for some defendants could hire the most experienced attorneys while other defendants would have to settle for much less qualified attorneys. *Id.*

101 *Id.* at 924.

102 *Id.* at 924-25.

103 *Id.* at 925.

104 *Id.* at 926.

105 *See id.*; *D.O.J. Guidelines, supra* note 9, at 3002.

106 *D.O.J. Guidelines, supra* note 9, at 3002.

107 *See supra* notes 96-104 and accompanying text.

### C. *The Right to Effective Counsel*

Inherent in a criminal defendant's right to counsel is the right to effective counsel.<sup>108</sup> Some of the courts which have discussed the issue of forfeiture of attorneys' fees noted the impact of fee forfeiture on the defendant's right to effective counsel.<sup>109</sup> The effect of fee forfeiture differs depending on whether appointed or private counsel represents the defendant.

#### 1. Appointed Counsel

The Justice Department stated that the application of CFA's third party forfeiture provisions to attorneys' fees does not affect a defendant's right to have counsel.<sup>110</sup> A defendant who is effectively rendered indigent by such forfeiture is entitled to appointed counsel.<sup>111</sup> In contrast, the *Rogers* court found that the ability to have counsel appointed "pays no more than lip service to due process and the right to counsel."<sup>112</sup> The court believed that the defense of RICO and CCE cases requires a commitment of both time and money beyond the resources of the average public defender.<sup>113</sup> The *Rogers* court noted that adequate defense of a RICO or CCE case also requires representation during grand jury investigations.<sup>114</sup> Because a defendant receives right to counsel "only at or after the time that adversary judicial proceedings have been initiated against him,"<sup>115</sup> counsel appointed at that time (ninety or one hundred days before trial) is patently inadequate.<sup>116</sup>

The logic of this argument is disturbing. It presumes that truly indigent RICO and CCE defendants are not adequately represented by their appointed counsel.<sup>117</sup> This argument suggests that a two-class system of RICO and CCE defendants exists. Those defendants having property, whether subject to forfeiture or not, could get adequate counsel; those not having property would necessarily get inadequate counsel.<sup>118</sup> Providing a RICO or CCE defendant with appointed counsel does not automatically deny the defendant his right to effective counsel.<sup>119</sup>

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108 See *Strickland v. Washington*, 466 U.S. 668 (1984) (one of the latest U.S. Supreme Court cases defining the right to counsel).

109 *Ianniello*, 644 F. Supp. at 457; *Badalamenti*, 614 F. Supp. at 196; *Simels*, 605 F. Supp. at 850 n.14, *supra* note 8; *Rogers*, 602 F. Supp. at 1349.

110 *D.O.J. Guidelines*, *supra* note 9, at 3002.

111 *Id.*

112 602 F. Supp. at 1349.

113 *Id.*

114 *Id.* at 1349-50.

115 *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

116 *Rogers*, 602 F. Supp. at 1350.

117 See *Brickey*, *supra* note 66, at 493, 521.

118 This two-class system should not be confused with a system in which both a defendant who hires his own attorney and a defendant who has appointed counsel receive adequate representation.

119 See *Strickland v. Washington*, 466 U.S. 668, 690 (counsel is strongly presumed to have rendered adequate assistance). But see *Krieger & Van Dusen*, *supra* note 10 at 737, 739-40 (comparing the use of a public defender in a RICO or CCE case to an outpatient service performing an arterial bypass).

## 2. Private Counsel

Some courts have argued that a defendant in a RICO or CCE case is denied the right to effective counsel when the defendant hires a private attorney whose fees are subject to forfeiture.<sup>120</sup> The two bases for this argument are: (1) the potential violation of the attorney-client privilege,<sup>121</sup> and (2) the possible conflicts of interest.<sup>122</sup>

The potential violation of the attorney-client privilege arises in the context of a post-conviction ancillary hearing. If the private attorney whose fees are subject to forfeiture wishes to challenge the forfeiture, he must raise the issue in a post-conviction ancillary hearing.<sup>123</sup> In order to prove that he was without reasonable cause to believe that the property transferred to him was subject to forfeiture, the attorney would have to disclose any information he might know about the scope and sources of the defendant's assets.<sup>124</sup> Although a third party ancillary hearing occurs only after a conviction, the attorney's disclosure could affect the defendant's appeal.<sup>125</sup> Also, the purpose of the attorney-client privilege is to encourage free and open communication between the attorney and his client.<sup>126</sup> The threat of the attorney disclosing privileged information would chill the free flow of information between the RICO or CCE defendant and his attorney.<sup>127</sup> Thus, it would impinge on the defendant's right to effective counsel.<sup>128</sup>

The forfeiture of private attorneys' fees under the present provisions of CFA also raises conflicts of interest problems. The attorney's interest in preserving his fees would conflict with the defendant's interest in preserving his assets and his freedom.<sup>129</sup> This conflict could manifest itself in several forms. The attorney's obligation to be well informed about his client's case would conflict with the attorney's interest in not learning facts that would endanger his fee.<sup>130</sup> If a defendant was offered a plea bargain which excluded the forfeiture of attorneys' fees, the attorney might be tempted to accept the bargain even if it was not in the best interests of the defendant.<sup>131</sup> On the other hand, if the plea bargain was in the best interests of the defendant but did not exclude forfeiture of

120 *Ianniello*, 644 F. Supp. at 457; *Badalamenti*, 614 F. Supp. at 196; *Simels*, 605 F. Supp. at 850 n.14, *supra* note 8; *Rogers*, 602 F. Supp. at 1349. See also *D.O.J. Guidelines*, *supra* note 9, at 3003.

121 See *infra* notes 123-28 and accompanying text.

122 See *infra* notes 129-35 and accompanying text.

123 18 U.S.C. § 1963(m), 21 U.S.C. § 853(n) (Supp. III 1985). See also *supra* note 26.

124 See *Ianniello*, 644 F. Supp. at 457; *Rogers*, 602 F. Supp. at 1349. Information relating to fees is not generally privileged. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974). However, it may be privileged if its disclosure would implicate the client in a crime. See *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973).

125 *Rogers*, 602 F. Supp. at 1349.

126 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

127 *Ianniello*, 644 F. Supp. at 457; *Rogers*, 602 F. Supp. at 1349. See also *D.O.J. Guidelines*, *supra* note 9, at 3003.

128 *Ianniello*, 644 F. Supp. at 457; *Rogers*, 602 F. Supp. at 1349.

129 *Simels*, 605 F. Supp. at 850 n.14, *supra* note 8.

130 *Badalamenti*, 614 F. Supp. at 196.

131 *Ianniello*, 644 F. Supp. at 457; *Badalamenti*, 614 F. Supp. at 196-97. See also *Brickey*, *supra* note 66, at 534; *Krieger & Van Dusen*, *supra* note 10, at 741; *N.Y. Bar Rep.*, *supra* note 2, at 483.

attorneys' fees, the attorney might refuse it in the hopes of getting an acquittal.<sup>132</sup>

The attorney's interests may also conflict with public policy concerns. Two courts and a few commentators have suggested that an attorney who agrees to represent a defendant in the face of possible forfeiture may be accused of accepting the case on a contingency basis.<sup>133</sup> If the defendant is acquitted, the attorney keeps his fee. If the defendant is convicted, the attorney's fee may be subject to forfeiture. Although the possibility of fee forfeiture upon a defendant's conviction does not create a true contingency fee arrangement,<sup>134</sup> the defendant's attorney would possess the same motivation to procure an acquittal as he would under a true contingency arrangement.<sup>135</sup> Consequently, even though fee forfeiture does not create a contingency fee arrangement per se, in effect it still produces a conflict between the attorneys' interests and public policy.

A defendant who has court appointed counsel in a RICO or CCE case is not necessarily deprived of his right to effective counsel. But, a defendant who hires private counsel could be deprived of this same right if the third party forfeiture provisions of CFA were applied to attorneys' fees. In addition to its impact on the right to effective counsel, the CFA would violate the defendant's constitutional rights to have counsel and to choose counsel if the third party forfeiture provisions encompass bona fide attorneys' fees.

In response to these problems, the Justice Department issued guidelines on the forfeiture of attorneys' fees.<sup>136</sup> Under these guidelines, the Justice Department will not use information from confidential communications between the client and his attorney to establish that the attorney had reasonable cause to know that assets which the defendant transferred to him were subject to forfeiture.<sup>137</sup> While adherence to the guidelines could eliminate CFA's interference with the attorney-client privilege and diffuse some of the conflicts of interest,<sup>138</sup> they are largely ineffective. The guidelines are solely for the purpose of guidance; they do not bind the government.<sup>139</sup> Additionally, the Justice Department be-

132 *Ianniello*, 644 F. Supp. at 1197. See also *Brickey*, *supra* note 66, at 534; N.Y. Bar Rep., *supra* note 2, at 482.

133 *Ianniello*, 644 F. Supp. at 457; *Badalamenti*, 614 F. Supp. at 196. See also *Reed*, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 778 (1984); N.Y. Bar Rep., *supra* note 2, at 482.

*Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983); RESTATEMENT OF CONTRACTS § 542 (1929) (contingent fees in criminal cases are illegal and unenforceable under contract law as against public policy).

134 If the government should obtain forfeiture of the attorney's fees, presumably the attorney would have an outstanding debt against the defendant.

135 The defendant may have insufficient nonforfeitable assets with which to pay the debt. Certainly an attorney would want to avoid the expense of collecting such a debt.

136 *D.O.J. Guidelines*, *supra* note 9.

137 *Id.* at 3005. *Cf.* *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986) ("[T]he defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services.").

138 See *Brickey*, *supra* note 66, at 537-38 (noting that adherence to these guidelines should reduce the conflicts of interest problems associated with the forfeiture of attorneys' fees).

139 *D.O.J. Guidelines*, *supra* note 9, at 3001.

believes that bona fide fees may be subject to forfeiture.<sup>140</sup> The guidelines do not correct CFA's effect on a RICO or CCE defendant's right to have and right to choose counsel. Thus, even adopting the Justice Department's guidelines, CFA's third party forfeiture provisions may violate a defendant's sixth amendment right to counsel if applied to bona fide attorneys' fees.

#### IV. Amending CFA

While CFA's third party forfeiture provisions should be declared unconstitutional as applied to bona fide legal fees, most courts have noted that such a ruling would not prevent the forfeiture of attorneys' fees transferred as part of a sham.<sup>141</sup> The CFA third party forfeiture provisions were designed to prevent the defendant from making a sham transfer to a third party.<sup>142</sup> For the most part they are effective, but not as applied to the defendant's attorney in a RICO or CCE trial, because they do not distinguish between bona fide and sham attorneys' fees. The forfeiture of bona fide attorneys' fees under CFA would violate a defendant's sixth amendment right to counsel.<sup>143</sup> The difficulty lies in designing an amendment to CFA that would provide for the forfeiture of sham attorneys' fees while protecting the defendant's right to counsel.

Some commentators have suggested a pretrial hearing to determine whether the assets with which the defendant proposes to pay an attorney are subject to forfeiture.<sup>144</sup> A pretrial hearing would provide early resolution of the attorneys' fee forfeiture issue. The defendant's attorney could then proceed to trial without any subsequent threat to his fee. This solution would eliminate any conflict of interest problems during the trial. At the pretrial hearing, the court could also determine whether the defendant is rendered effectively indigent because all of his assets are subject to forfeiture. Then the court might appoint counsel to represent the defendant, removing the right to counsel problems.<sup>145</sup>

However, the pretrial hearing solution creates other problems. At the hearing, the government would be required to disclose much of its case in order to show that the assets with which the defendant wishes to pay his attorney are subject to forfeiture. Considering the complexity of a RICO or CCE case, the added time and expense of a pretrial hearing of

140 *Id.* at 3003.

141 *E.g.*, *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987); *United States v. Ianniello*, 644 F. Supp. 452, 458 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985); *United States v. Rogers*, 606 F. Supp. 1332, 1348 (D. Colo. 1985). A sham transfer is one which the defendant makes for the purpose of avoiding forfeiture.

142 S. REP. NO. 225, *supra* note 15, at 209 n.47.

143 *See supra* notes 78-140 (discussion of the impact of CFA's third party forfeiture provisions on a defendant's right to counsel).

144 *E.g.*, Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 *FORDHAM L. REV.* 1171, 1184 (1986); Note, *Criminal Forfeiture of Attorney's Fees Under RICO and CCE*, 2 *NOTRE DAME J.L., ETHICS & PUB. POL'Y* 541, 575 (1986); Comment, *Today's RICO and Your Disappearing Legal Fee*, 15 *CAP. U.L. REV.* 59, 89 (1985).

145 *But see Ianniello*, 644 F. Supp. at 457 (noting that a defendant with money available to pay an attorney could not swear under oath that he, the defendant, was financially unable to obtain counsel as required before the court will appoint counsel). *See also id.* at 458 ("Any restraint of defendants' assets which render defendants unable to pay their counsel affects their right to choice of counsel.").



this type could be substantial. Additionally, if the defendant is later acquitted, the hearing will have been unnecessary. While a pretrial hearing might protect the defendant's right to counsel and prevent a defendant from making a sham transfer of forfeitable assets to his attorney, the disadvantages of a pretrial hearing prevent it from being the ideal solution.

The Fourth Circuit in *United States v. Harvey*<sup>146</sup> and at least one commentator have suggested that the government should have to prove that the attorneys' fees were transferred as part of a sham before it can obtain their forfeiture.<sup>147</sup> However, this proposition puts a heavy burden on the government and is not in keeping with the spirit of the third party forfeiture provisions of CFA. Congress designed the provisions so that if a third party wants to protect the assets transferred to him, he has the burden of proving that he falls within one of the CFA exemptions.<sup>148</sup> Thus, when the forfeiture of attorneys' fees is in question, the attorney, and not the government, should have the burden of proving that the defendant's legal fees were not transferred as part of a sham.

A workable amendment to CFA should provide for a post-conviction attorneys' fee hearing. If the trial jury should find that the assets transferred to the defendant's attorney are subject to forfeiture, the government would have a presumption of forfeitability of the assets. At the post-trial hearing, the attorney would have to prove that the assets were not transferred as part of a sham. To meet this burden of proof, the attorney would have to show at the post-conviction hearing that the transferred assets constituted a reasonable fee for his services.

The judge presiding over the hearing should determine the reasonableness of the fee in view of the actual services performed by the attorney in connection with the case and in view of the services which the attorney might have anticipated rendering at the outset of the case. The judge should also consider the fees that the defendant's attorney is accustomed to receiving in similar cases.<sup>149</sup> The government would be entitled to challenge the defense attorney's evidence regarding his fee. If the judge should find that the fee is reasonable, the attorney will be allowed to retain the full fee. On the other hand, if the judge should find that the fee is excessive, the judge may require the attorney to forfeit that amount which exceeds the judge's estimate of a reasonable fee. In the event that the judge should find that the fee is so excessive as to indicate a sham transfer or that the mode of the transfer indicates a sham,<sup>150</sup> the judge should require the attorney to forfeit the entire fee.

146 814 F.2d 905. See *supra* notes 60-67 and accompanying text.

147 814 F.2d at 928; and Note, *The 1984 RICO Amendments: Will Defendants and Their Attorneys Be Short Changed?*, 18 PAC. L.J. 31, 56-57 (1986).

148 18 U.S.C. § 1963(m), 21 U.S.C. § 853(n) (Supp. III 1985); *supra* note 26.

149 The court should avoid imposing a standard "reasonable" hourly fee, such as the \$80 hourly fee suggested by the government in *Ianniello*, 644 F. Supp. at 458. See N.Y. Bar Rep., *supra* note 2, at 523-24 ("The problem with the fixed amount is that, over time, it becomes outmoded; the problem with the low amount is that it discourages counsel from doing the appropriate amount of work on a case.").

150 Cf. *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) (the government obtained forfeiture of an asset transferred to the defendant's attorney where the facts of the transfer indicated that it was done as part of a sham). See also *supra* note 72.

Because such a hearing would take place after conviction, the government would not have to disclose its case before the RICO or CCE trial in order to obtain forfeiture of the defendant's attorneys' fees. The fee hearing will only occur after the defendant has been convicted and the jury has found that the assets transferred to the defendant's attorney are subject to forfeiture. Thus, the costs associated with the hearing will be incurred only when necessary. The hearing should not be unduly burdensome to the court as CFA already provides for post-conviction hearings to determine the ultimate forfeitability of assets transferred to third parties.

The new post-conviction fee hearing provision would be effective in preventing sham transfers from the defendant to his attorney. And even if the attorney is allowed to retain his fee, the defendant will be stripped of his economic base.<sup>151</sup> The new amendment would also protect the defendant's sixth amendment right to counsel. In the absence of a sham transfer, reasonable attorneys' fees are protected from forfeiture. The attorney will not have to testify about any confidential information. Because his fees will not generally be subject to forfeiture, the attorney's interests will not be in conflict with either the interests of his client or the interests of public policy. Therefore, a defendant should have little difficulty locating a competent lawyer who will be willing and able to represent him effectively.

## V. Conclusion

If the third party forfeiture provisions of CFA apply to bona fide attorneys' fees, a defendant is deprived of his sixth amendment right to counsel. Therefore, the government cannot use the third party forfeiture provisions of CFA to obtain forfeiture of bona fide attorneys' fees. Assets that the defendant transfers to his attorney as part of a sham are subject to third party forfeiture, but CFA does not presently include provisions under which the government may obtain the forfeiture of sham fees. A new amendment to CFA which provides for a post-conviction fee hearing would allow the government to obtain forfeiture of sham attorneys' fees while protecting the defendant's right to counsel.

*Sharon R. O'Keefe*

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<sup>151</sup> Cf. S. REP. NO. 225, *supra* note 15, at 191 (stating that the purpose of the forfeiture mechanisms of RICO and CCE is to strip offenders of their economic power bases).