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Making Criminal Defense a Crime Under 18 U.S.C. Section 1957

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Making Criminal Defense a Crime Under 18 U.S.C. Section 1957

I. INTRODUCTION

In 1984 the President's Commission on Organized Crime[1] concluded that money laundering[2] was the lifeblood of organized crime.[3] The Commission found that drug traffickers and racketeers exploited weaknesses in the Bank Secrecy Act[4] to launder much of their income,

1. President Ronald Reagan established the Commission by Executive Order 12435 on July 28, 1983. The Executive Order empowered the Commission to analyze the nature and extent of organized crime, to discover the sources of its income and the ways in which the income is spent, to evaluate the effectiveness of current laws and procedures, and to recommend administrative and legislative improvements. *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 2, THE CASH CONNECTION: ORGANIZED CRIME FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (Oct. 1984) [hereinafter INTERIM REPORT].

2. Money laundering is "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." INTERIM REPORT, *supra* note 1, at 7.

3. Letter from Irving R. Kaufman, Chairman of the President's Commission on Organized Crime, to President Ronald Reagan (Oct. 1984), *reprinted in* INTERIM REPORT, *supra* note 1, at iii.

4. The Bank Secrecy Act is the principal means by which government controls money laundering. *See* Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 31 U.S.C. §§ 5311-5323 (Supp. IV 1986)).

estimated by one source to be 150 billion dollars annually.[5] In response, the Commission recommended legislation to strengthen currency reporting laws, to extend the investigative powers of federal agencies, and to create a new money laundering offense.[6] This new legislation would hold criminally liable persons who conduct a monetary transaction with knowledge or reason to know that the funds involved were derived from unlawful activity.[7] The Commission intended the offense to reach those who perform "ministerial duties"[8] necessary for money laundering, but the broad language of the proposed legislation threatened anyone who received and banked money derived from illegal activities.

The broad reach of the Commission's offense had ample precedent in laws proscribing the receipt of stolen property. The crime of receiving stolen property typically imposes liability on anyone who knowingly receives property belonging to another with an intent to conceal it from the true owner; the crime does not require complicity in the underlying theft.[9] Despite this precedent, the National Association of Criminal Defense Lawyers (NACDL) vociferously opposed the new legislation, arguing that the money laundering offense would expose innocent people to

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5. In introducing money laundering legislation, Senator Strom Thurmond adopted an estimate by the *Wall Street Journal* that illegal drugs, gambling, and vice generate $150 billion annually. *See* 132 CONG. REC. S9626 (daily ed. July 24, 1986). Representative William Hughes estimates the income of drug trafficking alone to be $130 billion annually. *See Forfeiture Portions of the Comprehensive Crime Bill and the Antidrug Abuse Act of 1986: Hearings Before the House Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 1 (1987) [hereinafter *Forfeiture Hearings 1987*]. That figure, however, is considerably higher than the $50 to $75 billion estimated by the President's Commission on Organized Crime. *See* INTERIM REPORT, *supra* note 1, at 13.

6. INTERIM REPORT, *supra* note 1, at 58-82.

7. *Id.* at 67.

8. *Money Laundering Legislation: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 106 (1986) [hereinafter *Money Laundering Hearings*] (remarks of James D. Harmon, Jr., Executive Director and Chief Counsel, President's Commission on Organized Crime) (stating that "those responsible for more ministerial duties (such as the picking up or delivery of the funds being laundered) may not know all the details of their clients' activities, but are highly likely to be exposed to information that gives them actual knowledge (or reason to know) the true nature or source of the funds they are laundering").

9. 76 C.J.S. *Receiving Stolen Goods* § 1 (1952). The new money laundering offense is a variant of the crime of receiving stolen property. Under the Comprehensive Forfeiture Act, Pub. L. No. 98-473, §§ 301-323, 98 Stat. 2040 (1984) (amending 18 U.S.C. § 1963 and adding 21 U.S.C. § 853), the government claims title to illegally derived property at the time of the offense. Anyone receiving illegally derived property, therefore, receives property belonging to the government. The Seventh Circuit used this analysis in Roma v. United States, 53 F.2d 1007 (7th Cir. 1931), to uphold the conviction of a defendant under a receiving stolen property statute. In *Roma* the government attached 99 sacks of whiskey pursuant to the National Prohibition Act. The defendant received the stolen whiskey prior to the entry of the order for forfeiture. Relying on United States v. Stowell, 133 U.S. 1 (1889), the court found that the government possessed title to the whiskey before entry of the forfeiture order and, therefore, the defendant had received stolen public property. *Roma*, 53 F.2d at 1009.

criminal liability.[10] The NACDL was particularly concerned about the potential liability of attorneys who receive tainted funds from clients. The NACDL argued that the *in terrorem* effect of the statute on lawyers would deprive defendants of their right to counsel of choice, cripple the adversary system, and radically change the criminal bar.[11] These arguments did not persuade the United States Congress. A version of the Commission's proposed offense passed the House and Senate in October 1986 and was enacted as section 1957[12] of the Money Laundering Control Act of 1986.[13]

This Note considers whether attorneys should be prosecuted under section 1957 for knowingly receiving tainted, bona fide attorneys' fees. It concludes that prosecution would serve the public interest in certain cases. Part II discusses the statute, its legislative history, and congressional intent. Part III considers the constitutionality of the statute as applied to bona fide attorneys' fees. Part IV considers the policy implications of including bona fide fees within the ambit of section 1957. Part V discusses the proposed policy of the Justice Department for section 1957 and revisions to that policy offered by the American Bar Association (ABA) and the NACDL. Finally, Part VI recommends to Congress an amendment to section 1957 that would accommodate the interests of both criminal defendants and the government.

II. THE SCOPE OF SECTION 1957

A. *Section 1957*

The Money Laundering Control Act contains two new offenses. Section 1956, entitled "Laundering of monetary instruments," prohibits anyone from engaging in financial transactions involving the proceeds of specified unlawful activity, with intent to promote that activity, and with knowledge that the transaction is designed to conceal the nature, source, or ownership of the proceeds.[14] Section 1957, entitled "Engaging in monetary transactions in property derived from specified unlawful activity," does not require an intent to promote money laundering.[15]

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10. The NACDL registered its opposition when the new offense was introduced in both the House and the Senate. *See* H.R. REP. No. 855, 99th Cong., 2d Sess. 9 (1986); *Money Laundering Hearings*, *supra* note 8, at 123-25, 130-44. The House included the new offense with modifications in its version of the Money Laundering Control Act of 1986. *See* H.R. REP. No. 855, *supra*, at 1-2. The Senate did not include the offense at all. *See* S. REP. No. 433, 99th Cong., 2d Sess. 8-9 (1986).

11. *Money Laundering Hearings*, *supra* note 8, at 134-37.

12. 18 U.S.C. § 1957 (Supp. IV 1986).

13. Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 100 Stat. 3207-3218.

14. 18 U.S.C. § 1956 (Supp. IV 1986).

15. Section 1957(a) provides in part:

Whoever . . . knowingly engages or attempts to engage in a monetary transaction in crimi-

The statute imposes criminal penalties[16] on anyone who knowingly engages in a monetary transaction[17] in criminally derived property,[18] when the property is worth more than 10,000 dollars and is derived from specified unlawful activity.[19]

Congress intended the knowledge requirement of section 1957 to have a "narrow and unusually limited meaning."[20] Although knowledge

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nally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity . . . shall he punished as provided in subsection (b).

18 U.S.C. § 1957(a) (Supp. IV 1986).

16. Section 1957(b) states:

(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

18 U.S.C. § 1957(b)(1), (2) (Supp. IV 1986).

17. According to § 1957(f)(1):

[T]he term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined for the purposes of subchapter II of chapter 53 of title 31) by, througb, or to a financial institution (as defined in section 5312 of title 31) . . . ."

18 U.S.C. § 1957(f)(1) (Supp. IV 1986).

The NACDL buttresses its argument that § 1957 exposes innocent people to liability by focusing on the word "withdrawal." The NACDL posits a person who innocently receives and banks tainted funds and subsequently learns that the funds were illegally derived. In the view of the NACDL, the statute will prevent the depositor from making any withdrawal over $10,000 from the account because he now has knowledge of the source of the tainted money. *Forfeiture Hearings 1987*, *supra* note 5, at 219-22; Wallace, Money Laundering: The Case for Repeal of the 'Receiving and Depositing' Offense, at 10 (NACDL Jan. 17, 1987) (copy on file with the *Vanderbilt Law Review*). While facially appealing, this argument is probably a chimera. First, tbe argument is unclear about how one could possess actual knowledge that the withdrawn money is tainted, as long as the account contained both legitimate and illegally derived money—unless, of course, the withdrawal exceeded the amount of legitimate money in the account. Second, one who withdraws money to give to the government or to hold in escrow for the true owner probably would not be liable. Consider the crime of receiving stelen property. Courts infer a criminal intent from statutes proscribing the receipt of stolen property. To possess criminal intent the receiver must intend to benefit himself, to aid the thief, or to deprive the true owner of the property. 76 C.J.S. *Receiving Stolen Goods* § 9 (1952). Because § 1957 is a variant of the crime of receiving stolen property, *see supra* note 9, a court likely would require the same criminal intent.

18. Section 1957(c) provides:

In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

[T]he term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense. . . .

18 U.S.C. § 1957(f)(2) (Supp. IV 1986).

19. "[T]he term 'specified unlawful activity' has the meaning given that term in section 1956 of this title." 18 U.S.C. § 1957(f)(3) (Supp. IV 1986). Section 1956 defines the term to include racketeering as defined in 18 U.S.C. § 1961(a), criminal activity involving controlled substances, and any of the particular activities listed in § 1956, ranging from offenses involving concealment of assets and false oaths to criminal violations of the Trading with the Enemy Act.

20. 132 CONG. REC. E3821, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. Bill McCollum and William Hughes).

of circumstantial evidence might satisfy the scienter requirement,[21] mere suspicion that the money is illegally derived or that the person involved is a criminal does not suffice.[22] A defendant must have actual knowledge of, or be willfully blind to, the illegal derivation of the money.[23]

B. Legislative History and Intent

Section 1957 contained an exemption for bona fide attorneys' fees[24] until ten days before the President signed the Money Laundering Control Act[25] into law. Representative Bill McCollum first proposed the exemption during the markup of House Bill 5077,[26] an early version of the statute considered by the House Subcommittee on Crime. Representative McCollum, and other members of the Subcommittee, argued that exposing defense attorneys to prosecution for accepting bona fide, tainted legal fees would chill the attorney-client relationship, interfere with the attorney-client privilege, and deprive defendants of their right to representation.[27] Representatives opposed to the exemption argued

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21. Representative Bill McCollum has argued that a grocer who accepts money from a customer, knowing him to he a reputed drug dealer without a legitimate source of income, has knowledge within the meaning of § 1957. 132 CONG. REC. E3821 (daily ed. Nov. 6, 1986) (citing *Markup by the Subcomm. on Crime of H.R. 5077, Money Laundering Control Act of 1986*, July 16, 1986, transcript at 11-14 [hereinafter *Markup of H.R. 5077*]).

22. 132 CONG. REC. S16921 (daily ed. Oct. 17, 1986) (statements of Sens. Thurmond and DeConcini).

23. Although the willful blindness standard is not mentioned in the legislative history of § 1957, it explains a finding of knowledge in a hypothetical posed by Representative McCollum, *supra* note 21. In addition, the legislative history to § 1956 of the Money Laundering Control Act indicates that Congress intended "knowing" in that section to include willful blindness. *See* S. REP. No. 433, *supra* note 10, at 9-10. Willful blindness is "a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment." United States v. Jewell, 532 F.2d 697, 704 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

24. The exemption was inserted at the end of paragraph (a) and read: "This paragraph does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom." H.R. REP. No. 855, *supra* note 10, at 1.

25. The President signed the Money Laundering Control Act on October 27, 1987 as part of Pub. L. No. 99-570.

26. H.R. 5077, 99th Cong., 2d Sess. (1986).

27. Representative Bill McCollum argued: "I am concerned, as you are, I have been for some time, about the impact our statute might have on chilling the relationships between a defense attorney in a criminal proceeding and his client." *Markup of H.R. 5077*, *supra* note 21, at 5, *quoted in Report to the House of Delegates No. 110A*, A.B.A. SEC. CRIM. JUST. 8 (1986) [hereinafter ABA REPORT].

Representative William Hughes, chairman of the Subcommittee on Crime, also argued in favor of the exemption:

> We certainly don't want the statute to be so broad we either chill the relationship between defense attorneys and their clients or that, in fact, we expose defense attorneys in receiving fees to possible criminal prosecution where they have not participated in any way in a criminal offense either in the underlying participation in the criminally derived property or the

that prosecution of attorneys in some cases might be necessary to fight a "growing persistent crime."[28] After long debate, the Subcommittee adopted the exemption because of concern for the statute's impact on the right to effective assistance of counsel. The Subcommittee believed that, without the exemption, attorneys would fail to investigate fully their clients' cases in order to avoid learning the source of their fees.[29]

The attorneys' fee exemption remained in the Money Laundering Control Act when it was introduced in the House as part of as the Omnibus Drug Enforcement, Education, and Control Act of 1986.[30] The Omnibus bill passed the House twice before being amended and renamed the Anti-Drug Abuse Act of 1986.[31] The attorneys' fee exemp-

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attempt to conceal or launder those funds.

Markup of H.R. 5077, supra note 21, at 5, *quoted in* ABA REPORT, *supra*, at 8. Representative Daniel E. Lungren also recognized a chilling effect on the attorney client relationship:

> Unfortunately, we find ourselves with attorneys being in a very different situation, and I think there is a chilling effect here. * * * . . . I think the Defense Bar has made a good argument; in fact, the chilling effect would be that the attorney would not want to know the facts that are within the mind of the person he or she is representing, because if he or she knows that, they might find out they can't accept any of the financial benefits here.

Markup of H.R. 5077, supra noto 21, at 5, *quoted in* ABA REPORT, *supra*, at 9. Representative Bruce Morrison also favored the exemption: "I don't have the problem in creating an exception for the attorney, I think the attorney-client privilege and the right to representation under the Sixth Amendment is important enough. . . ." *Markup of H.R. 5077, supra* note 21, at 19, *quoted in* ABA REPORT, *supra*, at 9-10.

28. For example, Representative Romano Mazzoli argued:

> I think that we are here to try to fight a growing persistent crime, we are trying to fight this conspiracy of violence, and conspiracy of action in which unfortunately some lawyers have been involved, and if there is a need for section 1, I think it should be applicable across the board.

Markup of H.R. 5077, supra note 21, at 15, *quoted in* Supplemental Brief for the United States at 5-6, United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc) [hereinafter Supplemental Brief].

Representative Clay Shaw also argued against the attorneys' fee exemption:

> Now this is not an indictment of the Criminal Bar, but it is an indictment of an ongoing relationship between drug dealers and a single lawyer that seems to go on and on and on. And to make the monies that are paid as bona fide fees for this particular lawyer as an exemption when he probably, more than anyone else, should bear responsibility for knowingly taking these funds I think would be a very bad mistake, and I would hope this committee would not accept that.

Markup of H.R. 5077, supra note 21, at 22, *quoted in* Supplemental Brief, *supra*, at 6.

29. 132 CONG. REC. E3822, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes); H.R. REP. No. 855, *supra* note 10, at 14.

30. *See* H.R. 5077, *supra* note 26. After incorporating the amendment into H.R. 5077, the Subcommittee on Crime reported the bill as a clean bill and reintroduced it as H.R. 5217. The House Judiciary Committee approved H.R. 5217 on July 29, 1986, and referred it to the Banking Committee. The Banking Committee discharged the bill on September 26, 1986. *See* 1985-1986 Cong. Index (CCH) 35,095. Language identical to H.R. 5217 was introduced on September 8, 1986 as part of H.R. 5484, entitled the "Omnibus Drug Enforcement, Education, and Control Act of 1986."

31. The House passed the Omnibus bill on September 11 and October 8, 1986. *See* 1985-1986

tion, however, was one of more than 1200 sections in the Omnibus bill and received no consideration during the floor debates.[32]

Congress dropped the attorneys' fee exemption[33] from the Omnibus bill during a late-night conference to resolve differences between House and Senate versions of the bill.[34] Representatives Bill McCollum and William Hughes, attendees at the conference, note in the *Congressional Record* that the conferees favored the policy behind the exemption.[35] The conferees, however, were reluctant to favor the attorney-client relationship when other situations also might warrant special treatment.[36] As the hour grew late, the difficulty of redrafting section 1957 and the unlikelihood that attorneys would be prosecuted convinced the conferees to leave the issue of statutory exemptions to a later Congress.[37] The Congressmen's remarks show that the conferees understood statutory exemptions to lie within Congress' province; the conferees did not intend exemptions to be inferred by the courts. Thus, the plain language of the statute and the legislative history indicate that section 1957 encompasses bona fide attorneys' fees.[38]

Cong. Index (CCH) 35,101-02.

32. For a list of the debates on the Omnibus Drug Enforcement, Education and Control Act of 1986, see CONGRESSIONAL INFORMATION SERVICES, CIS ANNUAL 1986 LEGISLATIVE HISTORIES OF U.S. PUBLIC LAWS 578-79, Items 4.4-4.19 (1987) (relating to Pub. L. No. 99-570 debate). The first mention of the attorneys' fee exemption does not occur in the *Congressional Record* until almost three weeks after Congress passed the Money Laundering Control Act. *See* 132 CONG. REC. E3821, E3827 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes).

33. A congressional source familiar with the conference has indicated that the exemption was dropped at the insistence of Senator Joseph Biden. The comments of Representatives McCollum and Hugbes in *Forfeiture Hearings 1987*, *supra* note 5, at 232-33 confirm this information.

34. *See generally* 132 CONG. REC. E3821-22, E3827-28 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes); *Forfeiture Hearings 1987*, *supra* note 5, at 196-97, 232-33. The conference occurred in the Speaker's dining room and was described by two attendees as "bizarre." *Id.* at 233. Major participants at the conference included House Majority Leader Jim Wright; Minority Leader Robert Michel; Chairman Rangel of the Senate Select Committee on Narcotics Abuse and Control; Congressmen Rodino, Hughes, McCollum, Lungren, and Shaw of the House Judiciary Committee; and Senators Biden, Hawkins, Hatch, Chiles, DeConcini, Moynihan, and D'Amato. The conference also included members of the following House committees: Foreign Affairs, Armed Services, Ways and Means, Merchant Marines and Fisheries, Banking, Public Works, Education and Labor, Energy and Commerce, Post Office and Civil Service, Interior, Government Operations, and Rules. Letter from House Majority Leader Jim Wright to Author (Jan. 11, 1988).

35. 132 CONG. REC. E3822, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes). Whether the Congressmen spoke for all the conferees on this point is unclear, because at least one of the conferees objected to the exemption during the markup of H.R. 5077. *See supra* note 28.

36. *Id.*

37. *Id.*

38. The clear language of a statute controls in the absence of "clearly expressed legislative intent to the contrary." United States v. Turkette, 452 U.S. 576, 580 (1981) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); *see also* N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.04 (C. Sands 4th ed. 1984). The courts' handling of attorneys' fee forfeitures under the Comprehensive Forfeiture Act, 21 U.S.C. § 853(c) (Supp. IV 1986)

III. THE CONSTITUTIONAL IMPLICATIONS OF SECTION 1957

Since the passage of section 1957, both the ABA and NACDL have called on Congress to amend the statute.[39] These groups argue that section 1957 threatens an attorney with prosecution for the legitimate representation of a defendant.[40] The ABA and NACDL also contend that

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and 18 U.S.C. § 1963(c) (Supp. IV 1986) illustrates how courts might interpret § 1957. Section 853 (c) states:

> All right, title, and interest in property described in subsection (a) of this section 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 (n) of this section 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.

21 U.S.C. § 853(c) (Supp. IV 1986). Section 1963(c) contains substantially the same language. Although § 853(c) contains no attorneys' fee exemption and its legislative history is ambiguous, most early decisions hold that the Comprehensive Forfeiture Act does not reach bona fide attorneys' fees. These courts reasoned that Congress could not have intended the forfeiture of attorneys' fees because forfeiture would violate the defendant's sixth amendment right to counsel. In effect, these courts inferred a specific intent to exempt attorneys' fees from Congress' general intent to avoid violations of the sixth amendment right to counsel. *See* Unitod States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986), *aff'd on other grounds sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (rejecting the district court's interpretation of legislative history); United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd on other grounds sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (rejecting the district court's interpretation of legislative history), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc) (decided on constitutional grounds); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

Recent circuit court decisions, however, reject this approach and uphold the constitutionality of attorneys' fee forfeiture. *See* United States v. Nichols, 1988 U.S. App. LEXIS 3043 (10th Cir. 1988) (overruling *Rogers sub silentio*); United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc) (overruling *Reckmeyer* explicitly and *Bassett sub silentio*); United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (rehearing granted en banc) (overruling *Ianniello* and *Badalamenti sub silentio*) (rehearing granted en banc); *see also* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 499-503 (1986). The Fifth Circuit interprets the Comprehensive Forfeiture Act to extend only to sham transfers of attorneys' fees, allowing an attorney who has received a bona fide fee to avoid forfeiture. *See* United States v. Thier, 801 F.2d 1463 (5th Cir. 1986). The persuasiveness of *Thier* on other circuits, and on the Fifth Circuit itself, is suspect. *Thier* relied heavily on *Bassett, Ianniello, Reckmeyer, Badalamenti,* and *Rogers*, each of which has been rejectod by the appellate court in its circuit. Also, while *Thier* still binds the Fifth Circuit, the concurrence to a recent Fifth Circuit decision indicates a preference for the reasoning of *Caplin & Drysdale*. *See* United States v. Jones, 837 F.2d 1332 (5th Cir. 1988) (Davis, J., concurring).

39. *See Forfeiture Hearings 1987, supra* note 5, at 217-22 (statement of Bruce M. Lyons, President, NACDL); ABA REPORT, *supra* note 27. The ABA and the NACDL also have lobbied the Justice Department to support a statutory exemption for bona fide attorneys' fees. *See* Letter from Albert J. Krieger, Chairperson of the Dialogue with the Justice Department Committee (NACDL), and David Rudolph (ABA) to William Weld, Assistant Attorney General, U.S. Department of Justice (Nov. 7, 1987) [hereinafter Letter] (copy on file with the *Vanderbilt Law Review*).

40. Letter, *supra* note 39.

the threat of prosecution potentially impairs a defendant's sixth amendment right to effective assistance of counsel and to counsel of choice, strains the relationship between attorney and client, and discourages private attorneys from defending suspected drug dealers.[41] These arguments also have been raised against statutes that threaten the forfeiture of attorneys' fees.[42] Like section 1957, attorneys' fee forfeiture statutes may penalize an attorney for accepting illegally derived money in payment of a bona fide fee. Because section 1957 and the attorneys' fee forfeiture statutes potentially impair a defendant's rights in the same manner, this Note will explore the constitutionality of section 1957 by reference to cases involving the forfeiture of attorneys' fees.

A. Constitutionality of Attorneys' Fee Forfeiture

The forfeiture of a defendant's assets is authorized by the Comprehensive Forfeiture Act of 1984 (CFA).[43] Under this Act, the government claims title to property obtained in violation of the Racketeering Influenced and Corrupt Organizations Act (RICO)[44] and the Continuing Criminal Enterprise Act.[45] Title vests at the time of the offense, not at the time of conviction.[46] The government may prevent the dissolution of property by obtaining a pretrial restraining order[47] and by seeking the forfeiture of property transferred to a third party.[48] Third party transferees may defeat forfeiture if they can show that they were bona fide purchasers for value who took without notice of the government's claim.[49] This asset forfeiture provision has constitutional ramifications when assets subject to forfeiture have been transferred to an attorney in payment of a bona fide fee.

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41. ABA REPORT, *supra* note 27, at 3, 7.

42. *See infra* notes 43-123 and accompanying text.

43. Pub. L. No. 98-473, §§ 301-323, 98 Stat. 2040 (amending 18 U.S.C. § 1963 and adding 21 U.S.C. § 853).

44. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

45. 21 U.S.C. § 848 (1982 & Supp. IV 1986).

46. *See supra* note 38 (quoting 21 U.S.C. § 853(c)). The ABA argues that the government cannot acquire title until after conviction because criminal forfeiture is punishment, and the government may not punish a defendant until after conviction. *See Forfeiture Hearings 1987*, *supra* note 5, at 86, 97-99. This argument has not prevailed in the courts. *See, e.g.*, United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc); United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (rehearing granted en banc); United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

47. 18 U.S.C. § 1963(d) (Supp. IV 1987); 21 U.S.C. § 853(c) (Supp. IV 1987).

48. 18 U.S.C. § 1963(d) (Supp. IV 1987); 21 U.S.C. § 853(c) (Supp. IV 1987); *see supra* note 38 and accompanying text.

49. 18 U.S.C. § 1963(d) (Supp. IV 1987); 21 U.S.C. § 853(c) (Supp. IV 1987).

1. *United States v. Harvey*

United States v. Harvey[50] was one of the first cases to reach the constitutional merits of attorneys' fee forfeiture.[51] In *Harvey* the United States Court of Appeals for the Fourth Circuit consolidated appeals from three district courts: *United States v. Harvey*,[52] *United States v. Reckmeyer*,[53] and *United States v. Bassett*.[54] Each of these cases raises the issue of whether the Comprehensive Forfeiture Act is constitutional. In the first district court case a pretrial restraining order rendered the defendant indigent, and the court appointed counsel. The defendant was convicted and appealed.[55] In *Reckmeyer* and *Bassett* the court issued the restraining order, but exempted attorneys' fees from forfeiture. The government appealed the orders in both cases.[56]

After finding that the Comprehensive Forfeiture Act encompassed attorneys' fees,[57] the Fourth Circuit turned to the constitutionality of the Act. The court identified the following constitutional rights possibly violated by the CFA: (1) the sixth amendment right to some counsel; (2) the sixth amendment right to the effective assistance of counsel and the fifth amendment right to a fair trial; and, (3) the sixth amendment right to counsel of choice.[58] These claims are considered in turn.

The sixth amendment guarantees a right to the effective assistance of counsel in a criminal prosecution,[59] which necessarily includes the right to representation by some counsel.[60] Opponents of attorneys' fee forfeiture argue that the mere threat of a restraining order on a defendant's assets effectively denies him counsel by deterring private counsel from accepting a case, without rendering the defendant indigent and eligible for court-appointed representation.[61] Under the Criminal Jus-

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50. 814 F.2d 905 (4th Cir. 1987).

51. Several district courts previously had considered the constitutionality of fee forfeiture, but avoided a holding based on constitutional grounds by finding that the forfeiture provisions did not encompass attorneys' fees. *See, e.g.*, United States v. Bassett, 632 F. Supp. 138 (D. Md. 1986); United States v. Reckmeyer, 631 F. Supp. 1191, (E.D. Va. 1986); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

52. The district court did not publish a decision in this case.

53. 631 F. Supp. 1191 (E.D. Va. 1986).

54. 632 F. Supp. 1308 (D. Md. 1986).

55. *Harvey*, 814 F.2d at 912-13.

56. *Id.* at 911-12.

57. *Id.* at 913-18.

58. *Id.* at 921-22.

59. U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense").

60. Scott v. Illinois, 440 U.S. 367, 373 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

61. *Attorneys' Fee Forfeiture: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 228-29 (1986) (statement of Edward F. Marek, on behalf of the Federal Public Defenders and the Federal Community Defenders) [hereinafter *Forfeiture Hearings 1986*]; Brief

tice Act,[62] only defendants who can show that they are financially unable to retain counsel are eligible for appointed representation.[63] A defendant could not argue that his assets might be forfeitable, and thus unavailable for attorneys' fees, without incriminating himself by divulging the source or utilization of the assets. If the defendant declines to incriminate himself, opponents argue, he will stand trial without counsel.[64] Two district courts have accepted this argument in dicta.[65]

The *Harvey* court rejected this argument without extensive discussion.[66] The court reasoned that while a defendant might be denied counsel in an individual case, such a possibility could not lead to a finding that the Act is facially unconstitutional. One commentator has argued that this possibility could never exist. In her view, the threat of a restraining order would not prevent a defendant from showing that he was financially unable to retain counsel, and in fact never has forced a defendant to trial without counsel.[67]

The Fourth Circuit also recognized the possibility that forfeiture of attorneys' fees might impair the sixth amendment right to the effective assistance of counsel and the fifth amendment right to a fair trial. Private or appointed counsel must be effective to ensure that a prosecutor proves his case before an impartial tribunal,[68] and generally to ensure a fair trial.[69] Amici curiae in *Harvey* argued that fee forfeiture violated these guarantees by engendering conflicts of interest between a privately retained attorney and his client.[70] Defense counsel's interests will conflict with his client's if the prosecution offers a plea bargain requir-

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Amicus Curiae for the N.Y. Criminal Bar Ass'n at 18, United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (Nos. 86-5069, 5025, 5050), *rev'd sub nom. on rehearing*, United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc).

62. 18 U.S.C. § 3006A (1982 & Supp. IV 1986).

63. *Id.* at § 3006A(a).

64. *Forfeiture Hearings 1986*, *supra* note 61, at 229-30 (statement of Edward Marek).

65. *See* United States v. Ianniello, 644 F. Supp. 452, 456-57 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). *Ianniello* and *Badalamenti* effectively have been overruled by United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (holding that the Comprehensive Forfeiture Act did not violate the sixth amendment) (rehearing granted en banc).

66. *Harvey*, 814 F.2d at 922.

67. Brickey, *Attorneys' Fee Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" from "Is"*, 36 EMORY L.J. 761, 768-69 (1987).

68. Strickland v. Washington, 466 U.S. 668, 685 (1984).

69. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

70. Brief Amicus Curiae of the Am. Bar Ass'n at 18-19, *Harvey*, 814 F.2d 905; Brief Amicus Curiae of the N.Y. Criminal Bar Ass'n, *supra* note 61, at 9-12. The Supreme Court has noted that conflicts of interest pose risks to the effective assistance of counsel. *See* Wood v. Georgia, 450 U.S. 261, 271 (1981) (stating "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest" (citation omitted)); *see also* United States v. Bassett, 632 F. Supp. 1308, 1326 n.5 (D. Md. 1986); United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D. Va. 1986); United States v. Ianniello, 649 F. Supp 452, 457 (S.D.N.Y. 1985).

ing the forfeiture of attorneys' fees. A conflict of interest also arises when defense counsel is subpoenaed to testify about the source and amount of fees or when counsel testifies in a post-trial hearing to show that he was a bona fide purchaser. While such testimony is not covered by the attorney-client privilege,[71] it chills the confidential relationship between attorney and client. Finally, when an attorney accepts a case in which his fees depend on the outcome, he violates an ethical rule against accepting a contingent fee in a criminal case.[72]

Although court-appointed attorneys may avoid these conflicts because they are not paid with forfeitable money, amici curiae in *Harvey* maintained that the appointment of counsel also threatens the right to effective assistance of counsel.[73] Appointed counsel is not available until the initiation of formal adversary proceedings,[74] which gives the prosecution a substantial advantage in gathering information prior to indictment.[75] Moreover, the quality of appointed representation also is impaired by the low compensation paid to private counsel under the Criminal Justice Act.[76] Compensation mandated by the Criminal Justice Act routinely falls below private rates[77] and has not kept pace with the rising cost of living.[78] Inadequate funding also handicaps the assistance offered by federal public defenders. The complexity of RICO and Continuing Criminal Enterprise Act cases demands more attorneys and

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71. Client identity and fee information are not protected by the attorney-client privilege. *See, e.g., In re* Shargel, 742 F.2d 61 (2d Cir. 1984); *In re* Ousterhoudt, 722 F.2d 591 (9th Cir. 1983); *In re* Slaughter, 694 F.2d 1258 (11th Cir. 1982); *In re* Grand Jury Investigation, 631 F.2d 17 (3d Cir. 1980); United States v. Strahl, 590 F. 2d 10 (1st Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); United States v. Haddad, 527 F.2d 537 (6th Cir. 1975), *cert. denied*, 425 U.S. 974 (1976); *In re* Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975).

72. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1984) (stating that a "lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981).

73. *See* Brief Amicus Curiae of the Am. Bar Ass'n, *supra* note 70, at 19-22.

74. *See* Moran v. Burbine, 475 U.S. 412 (1986); United States v. Gouveia, 467 U.S. 180 (1984).

75. *Forfeiture Hearings 1986, supra* note 61, at 231-33 (statement of Edward Marek).

76. Counsel for appellant Harvey argued that low Criminal Justice Act (CJA) rates prevented him from hiring "back-up staff, paralegals and the like" although, for obvious reasons, he did not argue his counsel was ineffective. Brief for Appellants at 27 n.18, *Harvey*, 814 F.2d 905. Counsel did argue, however, that low CJA rates left "the defense plan in shambles, with no real hope of mounting any semblance of an adversarial position to the juggernaut of prosecution." Brief for Appellants, *supra*, at 10.

77. The CJA currently authorizes a maximum compensation of $3500 for each attorney in cases in which one or more felonies are charged and up to $2500 for representation in an appellate court. 18 U.S.C. § 3006A(d)(3) (1982 & Supp. IV 1986). An empirical study by the Association of the Bar of the City of New York found that private attorneys' fees in Racketeering Influenced and Corrupt Organizations Act (RICO) and Continuing Criminal Enterprises Act cases routinely exceeded CJA rates. *See* United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (mentioning study) (rehearing granted en banc).

78. *Forfeiture Hearings 1986, supra* note 61, at 235 (statement of Edward Marek).

more time than federal defender offices can provide while adequately handling other cases.[79]

The *Harvey* court also disposed of these arguments without much discussion.[80] The court noted that conflicts of interest and inadequate resources for appointed counsel will not occur in all cases. Counsel can avoid a conflict of interest by taking a case pro bono or at Criminal Justice Act rates. The defendant also may find assets not subject to forfeiture and retain private counsel. Thus, the Comprehensive Forfeiture Act does not violate the right to effective assistance of counsel on its face. Any constitutional challenge alleging ineffective representation must be made after conviction.[81]

The *Harvey* court, however, did hold that the CFA violates the right to counsel of choice.[82] Under the sixth amendment, a defendant has the qualified right to retain counsel of choice[83] from his own private resources.[84] This right is qualified, however, by a public interest in the fair, orderly, and efficient administration of justice.[85] Courts have refused to honor a defendant's choice of counsel because of counsel's misconduct or failure to be admitted to the local bar,[86] conflict with a court

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79. *Id.* at 236-37.

80. *Harvey*, 814 F.2d at 922.

81. *Id.; cf.* United States v. Morrison, 449 U.S. 361, 365-67 (1981); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71 (1961) (citation omitted) (finding that "potential impairment of constitutional rights under a statute does not itself create a justiciable controversy in which the nature and extent of those rights may be litigated"). For a complete discussion of deferring sixth amendment claims, see Brickey, *supra* note 38, at 529-38.

82. *Harvey*, 814 F.2d at 923-27.

83. Powell v. Alahama, 287 U.S. 45, 53 (1932) (stating that "a defendant should be afforded a fair opportunity to secure counsel of his own choice"). Although *Powell* established only the right to counsel of choice in capital cases, generally it is cited for the proposition that the right to counsel of choice is guaranteed by the sixth amendment. *See, e.g., Harvey*, 814 F.2d at 923; United States v. Cicale, 691 F.2d 95, 106 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Linton v. Perini, 656 F.2d 207, 208 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974). *See generally* Brickey, *supra* note 38, at 506-22.

The qualified right to counsel of choice is rooted in the importance of the "basic trust between counsel and client, which is the cornerstone of the adversary system," *Linton*, 656 F.2d at 209, and defendant's "right to decide, within limits, the type of defense he wishes to mount," United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (citing Faretta v. California, 422 U.S. 806 (1975), and Brooks v. Tennessee, 406 U.S. 605 (1972)). The right, however, does not guarantee a " 'meaningful' relationship between an accused and his counsel." Morris v. Slappy, 461 U.S. 1, 14 (1983) (footnote omitted).

84. *See Burton*, 584 F.2d at 488-89; *Inman*, 483 F.2d at 739-40.

85. United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc); Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); *Burton*, 584 F.2d at 489; Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978).

86. *See, e.g.*, Leis v. Flynt, 439 U.S. 438, 442 (1979); *Dinitz*, 538 F.2d at 1219-22; Ross v. Reda, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1985).

imposed schedule,[87] or a conflict of interest.[88] In addition, defendants may not receive counsel of choice if an attorney is unwilling to take the case or because the defendant is unable to pay the attorney's fee.

The government argued in its brief that the Act did not violate the qualified right to counsel of choice for two reasons.[89] First, the accused is responsible for his inability to retain counsel of choice because the defendant's own conduct provided the government with probable cause to restrain the defendant's assets. In this way, the restraining order is analogous to the pendency of tax assessments or liens issued at government request, which do not violate the sixth amendment.[90] Second, the government contended that a legitimate public interest in forfeiture outweighs the defendant's qualified right to counsel of choice.[91] Congress intended by the CFA to strip drug traffickers of the assets used to continue their criminal enterprises, to deter future criminal conduct, and to ensure that the public received the proceeds of illegal conduct.[92] An exemption for bona fide attorneys' fees would make fraudulent transfers more difficult to detect[93] and deprive the public of assets to which it is entitled by statute. The exemption also would appear to give special treatment to drug traffickers and racketeers because no statutory exemption prohibits the state from restraining stolen property held

87. *See, e.g.*, Morris v. Slappy, 461 U.S. 1 (1983); *Cicale*, 691 F.2d at 106-07; *Inman*, 483 F.2d at 740.

88. *See, e.g.*, United States v. James, 708 F.2d 40, 44-45 (2d Cir. 1983); United States v. Vargar-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978).

89. Brief for the United States at 34-44, *Harvey*, 814 F.2d 905.

90. The government relied on United States v. Brodson, 241 F.2d 107 (7th Cir.) (en banc), *cert. denied*, 354 U.S. 911 (1957), for this proposition. In *Brodson* the government made a jeopardy tax assessment and filed tax liens against the defendant prior to indictment for tax evasion. The defendant moved to dismiss the indictment on the grounds that the jeopardy assessment and tax liens prevented him from retaining an accountant to aid in his defense. The defendant claimed that, without an accountant, he would be denied a fair trial and effective assistance of counsel. The district court dismissed the indictment. *Id.* at 108.

The United States Court of Appeals for the Seventh Circuit reversed, finding that a determination of harm to the defendant in advance of conviction was purely speculative because he had not shown that an accountant was necessary for his defense, that one could not be retained using other funds, or that he would be convicted. *Id.* at 110. Because the effect of the jeopardy assessments and tax liens was uncertain, the court reinstated the indictment. *Id.* at 111. The reason for the defendant's injury—the government action—did not affect the court's constitutional analysis. *Id.*

91. *See Powell*, 287 U.S. at 69 (finding due process denied only if a court "were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him"); United States v. Flanagan, 679 F.2d 1072, 1075 (3d Cir. 1982) (stating that the protection of fifth and sixth amendments "goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of [defendant's] choice"), *rev'd on other grounds*, 465 U.S. 259 (1984).

92. S. REP. No. 225, 98th Cong., 1st Sess. 191, 191-93, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3374, 3374-76.

93. Brief for the United States, *supra* note 89, at 36.

by a thief.[94]

The government offered other arguments during Senate hearings[95] on the forfeiture of attorneys' fees. Forfeiture prevents criminals from enjoying the fruits of their illegal activity, including the services of an expensive private attorney.[96] Forfeiture also helps the government secure witnesses against drug and racketeering leaders.[97] The government argued that leaders of criminal enterprises frequently provide "workers" with legal representation to discourage them from accepting a plea that would require testimony against the organization.[98] Thus, forfeiture of attorneys' fees would discourage this conduct while facilitating prosecution of racketeers and drug traffickers.

The *Harvey* court found that a defendant's interest in counsel of choice and effective representation outweighs any interest in forfeiture.[99] The court reasoned that since sixth amendment guarantees protect the guilty as well as the innocent, the framers of the amendment must have assumed that illegally derived money would be used to pay counsel. The court termed this reasoning "a traditional working assumption within the legal profession."[100] The framers also must have intended for counsel to be sufficiently informed to provide an effective defense, an intent that the court found was emasculated by the Comprehensive Forfeiture Act.[101]

According to the three judge panel, deprivations of counsel under the CFA are fundamentally different from other deprivations cited by the government. Although a conflict of interest or the unwillingness of counsel to accept a case may deprive a defendant of particular counsel, the defendant still may choose another attorney. A restraining order

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94. The government may restrain stolen property in order to hold it for the true owner. *Id.* at 38.

95. *Forfeiture Hearings 1986, supra* note 61, at 36 (Letter from the Office of the Asst. Att'y Gen. to Sen. Strom Thurmond (July 7, 1986)).

96. *Id.; see also In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 605 F. Supp. 839, 850 n.14 (S.D.N.Y.) (noting that "[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from those same tainted funds"), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

97. *Forfeiture Hearings 1986, supra* note 61 at 36.

98. This practice was detailed in Staff of the President's Commission on Organized Crime, Materials on Ethical Issues for Lawyers Involved With Organized Crime Cases (1985) (unpublished) (copy on file with the *Vanderbilt Law Review*). The paper summarizes five case studies of "mob-connected" lawyers published in PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE IMPACT: ORGANIZED CRIME TODAY 221-49 (1986) [hereinafter THE IMPACT].

99. 814 F.2d at 924.

100. *Id.* at 925.

101. *Id.*

cuts off all choice.[102] Court imposed schedules may deprive a defendant of chosen counsel, but only when he is at fault for delaying the selection of counsel for some period of time. A restraining order deprives a defendant of chosen counsel irrespective of his efforts to retain private counsel.[103] The government may deprive a thief of chosen counsel by restraining stolen property in his possession in order to preserve that property for the true owner. The CFA reaches property that belongs to the accused.[104] The court also distinguished jeopardy tax assessments on the ground that these assessments reach property to which the government has a claim before criminal conduct is charged.[105] Finally, the court dismissed the argument that a defendant is to blame for his indigency as "border[ing] on sophistry" because the sixth amendment guarantees the assistance of counsel to the guilty as well as the innocent.[106] The *Harvey* court thus found the Comprehensive Forfeiture Act unconstitutional to the extent that it authorizes restraining orders and forfeitures that deny a defendant the ability to pay bona fide attorneys' fees.

2. *United States v. Caplin & Drysdale, Chartered*

The government petitioned for a rehearing of *Harvey* before the entire Fourth Circuit, styling the case as *United States v. Caplin & Drysdale, Chartered.*[107] The court granted a rehearing of the case and reversed. The decision considered each of the constitutional arguments discussed by the three judge panel: the right to some counsel, the right to effective assistance of counsel and a fair trial, and the right to counsel of choice. The court dismissed the argument that a defendant might be deprived entirely of counsel as unrealistic.[108] Although the Criminal Justice Act requires that a defendant be financially unable before being appointed counsel, no defendant can be forced to trial without counsel. The court, however, declined to speculate how counsel would be provided. The court also considered whether conflicts of interest,

102. *Id.* at 926.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. 837 F.2d 637 (4th Cir. 1988) (en banc). The government did not seek rehearing of the decision regarding defendants Harvey and Bassett. The Fourth Circuit found that defendant Harvey was not denied his chosen counsel. The court did find that defendant Bassett was denied chosen counsel but the government decided not to appeal because the case had been in the pretrial stage for a lengthy period of time. Petition of the United States for Rehearing with Suggestion for Rehearing en banc at 1 n.1 United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc).
108. *Id.* at 643.

prosecutorial misconduct, or inadequately prepared appointed counsel always would result from the forfeiture act. Like the three judge panel, the court found such results speculative and best handled on a case by case basis.[109]

The Fourth Circuit, however, differed with the panel's resolution of the counsel of choice issue. The *Harvey* court found that the presumption of innocence and a defendant's interest in the attorney-client relationship outweigh the government's interest in forfeiture. The court in *Caplin & Drysdale* declined to balance these interests at all.[110] The right to chosen counsel belongs only to those with legitimate assets.[111] Defendants without assets or with insufficient assets must accept appointed counsel or the private counsel they can afford. Consequently, a creditor's lien or jeopardy tax assessments levied by the government may prevent a defendant from retaining counsel of choice without violating the sixth amendment.[112]

The Fourth Circuit rejected the *Harvey* court's distinction between restraining suspected stolen property and restraining suspected racketeering proceeds. The *Harvey* court maintained that in the case of stolen property, the property is manifestly that of someone other than the accused. In the case of suspected racketeering proceeds, on the other hand, the accused has the superior claim to the funds. The court in *Caplin & Drysdale* disputed both contentions.[113] The court noted that stolen property need not bear the markings of its true owner and emphasized that the government has superior title to racketeering proceeds under the relation-back provisions of the Comprehensive Forfeiture Act.[114] Because the government has apparent title to property restrained under the CFA, the restraining order does not abridge the qualified right to counsel of choice.

Finally, the Fourth Circuit rejected the *Harvey* court's reliance on the presumption of innocence before conviction. The *Caplin & Drysdale* court argued that although the presumption of innocence is critical in assigning the burden of proof, it is not a grant of immunity from pretrial inconvenience.[115] Like pretrial detention to prevent the escape

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109. *Id.* at 646-47; *see also* United States v. Nichols, 1988 U.S. App. LEXIS 3043, at 69-76 (10th Cir. 1988) (LEXIS, Genfed library, U.S. App. file).

110. *Caplin & Drysdale*, 837 F.2d at 644.

111. *Id.*; *see also Nichols*, 1988 U.S. App. LEXIS 3043, at 64-69.

112. *Caplin & Drysdale*, 837 F.2d at 645-46. The court cited in support United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); United States v. Brodson, 241 F.2d 107 (7th Cir.) (see discussion *supra* note 90), *cert. denied*, 354 U.S. 911 (1957); and United States v. Stevedoring Corp., 138 F. Supp. 555 (S.D.N.Y. 1956).

113. *Id.* at 645-46.

114. *Id.*; *see supra* note 46 and accompanying text.

115. *Caplin & Drysdale*, 837 F.2d at 643; *see also Nichols*, 1988 U.S. App. LEXIS 3043, at 47

of a defendant, a restraining order on forfeitable assets prevents dissolution of those assets prior to conviction.

3. Second and Tenth Circuit Decisions

The Second and Tenth Circuits similarly reject the *Harvey* analysis and uphold the constitutionality of attorneys' fee forfeiture. The Second Circuit in *United States v. Monsanto*[116] and the Tenth Circuit in *United States v. Nichols*[117] rooted their analyses in the premise that a defendant has a right to retain chosen counsel only from his own resources. Because the government has title to illegally derived property under the Comprehensive Forfeiture Act,[118] the courts considered whether the government may constitutionally restrain assets intended for attorneys' fees prior to adjudication of the government's claim. The *Monsanto* and *Nichols* courts answered affirmatively. In passing the CFA, Congress determined that pretrial restraint of assets was necessary to deprive drug traffickers and racketeers of the benefits of organized crime.[119] One of those benefits, according to the *Monsanto* and *Nichols* courts, is the services of a private attorney.[120] So long as the government puts forward sufficient proof of its claim, an order restraining assets earmarked for attorneys' fees suffers no constitutional defect.[121]

B. Impact of Attorneys' Fee Forfeiture Cases on Section 1957 Analysis

Constitutional analysis of section 1957 likely would track the courts' analyses of the Comprehensive Forfeiture Act. Both statutes

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(citing Bell v. Wolfish, 441 U.S. 520, 532-33 (1979)).

116. 836 F.2d 74 (2d. Cir. 1987) (rehearing granted en banc).

117. 1988 U.S. App. LEXIS 3043 (10th Cir. 1988) (LEXIS, Genfed library, U.S. App. file).

118. *See supra* notes 43-49 and accompanying text.

119. *See supra* note 92 and accompanying text. The *Nichols* court compared the government's regulatory interest in pretrial restraint of assets to the government's interest in pretrial restraint of a defendant and the requirement that a defendant post bail. 1988 U.S. App. LEXIS 3043, at 48-50. The court also compared the pretrial restraint of assets to restraints imposable by any third party creditor. *Id.* at 40-42. The *Nichols* and *Monsanto* courts considered the government's interest sufficient to justify pretrial restraint of assets. For a court to argue that the public interest behind the CFA did not justify pretrial restraint of assets would amount "to an impermissible substitution of judicial policy for Congressional policy." *Monsanto*, 836 F.2d at 80-81.

120. *Nichols*, 1988 U.S. App. LEXIS 3043, at 62; *Monsanto*, 836 F.2d at 81 (noting the anomaly of contending that privately retained counsel is necessary for an effective defense while arguing that the same counsel, retained from tainted funds, confers no benefit on tbe defendant).

121. The *Nichols* court held that a grand jury indictment was sufficient proof for a pretrial restraining order. 1988 LEXIS U.S. App. 3043, at 62-63. The *Monsanto* court ruled that a pretrial adversary hearing is required before the government may restrain assets intended for attorneys' fees.

may penalize attorneys for accepting bona fide, tainted fees. Attorneys seek exemption from both statutes by arguing for the constitutional rights of defendants and the need for a vigorous adversary system. Both statutes implicate the same constitutional rights. However, although the criminal penalties in section 1957 are more severe than the civil penalties of the CFA, the argument for the facial invalidity of section 1957 is weaker. Section 1957 requires the prosecution to show that an attorney has knowledge of the illegal source of his fee to defeat the presumption of bona fide purchaser status.[122] Knowledge is a considerably higher standard than the "mere notice of forfeitability" required under the CFA.[123] Because the prosecution's burden of proof is higher under section 1957, fewer attorneys will be threatened with prosecution, and actual harm to a defendant's rights will occur in even fewer cases.

After *Caplin & Drysdale*, *Nichols*, and *Monsanto*, every circuit court reaching the constitutional merits has upheld the facial constitutionality of the Comprehensive Forfeiture Act of 1984. To the extent that these cases foreshadow future decisions, the prosecution of attorneys under section 1957 will pose no constitutional difficulties per se.

IV. Policy Considerations

The potential impact of section 1957 on the adversary system and on the quality of representation makes its application to attorneys a legitimate subject of debate. Both the ABA and the NACDL have called for revision of section 1957,[124] and members of Congress have indicated their willingness to consider amending the statute.[125] Empirical and anecdotal evidence indicates that prosecutorial practices involving attorneys' fee forfeiture have changed the way some defense attorneys accept cases and handle clients. These practices include subpoenaing attorneys to testify about their fees, summonsing by the Internal Revenue Service, using confidential informants at defense meetings, attempting to gain forfeiture of attorneys' fees, and trying to disqualify an attorney who is representing a particular client.[126]

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122. *See supra* notes 20-23 and accompanying text.

123. *See supra* note 49 and accompanying text.

124. *See supra* note 39.

125. *See, e.g., Forfeiture Hearings 1987, supra* note 5, at 232 (statement of Rep. McCollum).

126. *See* Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, CHAMPION, May 1986, *reprinted in Forfeiture Hearings 1986, supra* note 61, at 163 [hereinafter Genego, *Reports from the Field*]. An abbreviated version of this article is contained in Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, CRIM. JUST., Spring 1986, at 3 [hereinafter Genego, *Risky Business*]. Ironically, § 1957 may be a defense against prosecutorial practices that require an attorney to testify about the source of his fees. Because an attorney may be criminally liable for knowingly accepting racketeering proceeds, an attorney may refuse to answer questions about his fees under the fifth amendment. The fifth amendment, how-

A 1985 survey of members of the NACDL[127] found that the attorneys most frequently affected by the prosecutorial practices were private attorneys handling white collar or drug cases, attorneys who had practiced criminal defense the longest, and attorneys who earned the most money.[128] Forty-six percent of those responding to the survey indicated that they practiced criminal law differently as a result of these prosecutorial practices.[129] Approximately thirty percent of the respondents said that prosecutorial practices affected their evaluation of whether to take certain actions on behalf of their clients, including whether to interview witnesses for the prosecution and whether to defend against government efforts to forfeit assets.[130] Fourteen percent of the respondents indicated that they had decided not to take on specific criminal cases.[131]

Evidence independent of this survey confirms that at least some attorneys practice criminal law differently in order to avoid the consequences of the prosecutorial practices. This evidence shows that some attorneys will accept a case conditioned on exemption of their fees from forfeiture[132] or will seek to withdraw if appointed.[133] Some attorneys

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ever, does not protect business records containing fee information. *See* Andresen v. Maryland, 427 U.S. 463, 477 (1976) (holding that fifth amendment protection does not encompass business records).

127. *See* authorities cited *supra* note 126. Professor William Genego of the University of Southern California Law Center conducted a survey of all the members of the NACDL to gauge the effects of prosecutorial practices directed at criminal defense attorneys. The survey asked four sets of questions. The first set requested information about the respondents' age, income, and legal practice. The second set asked whether the respondents believed that the Department of Justice or individual United States Attorneys' offices had adopted a practice of investigating and prosecuting criminal defense attorneys in order to discourage the zealous representation of clients. The third set requested information about specific prosecutorial practices against attorneys: grand jury subpoenas, summonses from the Internal Revenue Service, the use of confidential informants at defense meetings, attempts to gain forfeiture of attorneys' fees, and efforts to disqualify an attorney from representing a particular client. The fourth set requested information about how those practices had affected respondents' practices. Genego, *Reports from the Field*, *supra* note 126, at 164.

The survey results may not indicate the experience of all criminal defense attorneys. Members of the NACDL may represent a group more likely to have been affected by the cited prosecutorial practices. *Id.* at 164 n.5. The likelihood that an attorney was affected is even higher if the attorney responded to the survey. *Id.* at 164 n.6. Despite the bias in the survey, Professor Genego believes the results are significant. *Id.*

128. Genego, *Reports from the Field*, *supra* note 126, at 168; *see also* Genego, *Risky Business*, *supra* note 126, at 4.

129. Genego, *Reports from the Field*, *supra* note 126, at 168; *see also* Genego, *Risky Business*, *supra* note 126, at 5.

130. Genego, *Reports from the Field*, *supra* note 126, at 168; *see also* Genego, *Risky Business*, *supra* note 126, at 7.

131. Genego, *Reports from the Field*, *supra* note 126, at 168; *see also* Genego, *Risky Business*, *supra* note 126, at 7.

132. *See, e.g.*, United States v. Harvey, 814 F.2d 905, 912 (4th Cir. 1987), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc); United States v. Bassett, 632 F. Supp. 1308, 1308-09 (D. Md. 1986); United States v. Ianniello, 644

will refuse to take a case if forfeiture of fees is threatened.[134] These prosecutorial practices also have affected the way some attorneys accept cases. Because the source of an attorney's fee may lead to forfeiture or the prosecution of the attorney under section 1957, at least one attorney gives potential clients a *Miranda*-type warning.[135]

In sum, prosecutorial practices have made some private criminal defense attorneys reluctant to accept cases in which fees would be paid from forfeitable assets. Appointed attorneys who are paid under the Criminal Justice Act may prepare less thoroughly than if they were paid at private rates. Finally, attorneys paid from private funds may avoid a full investigation of their clients' cases in order to maintain bona fide purchaser status.

To a certain extent, these results further the policy and aims of section 1957. The drafters of section 1957 intended the statute to render illegal money worthless and thus deprive racketeers and drug traffickers of the fruits of their illegal enterprises.[136] Illegally derived money that is paid to attorneys defeats that goal by depriving the government of assets to which it is entitled under the Comprehensive Forfeitures Act and by providing better representation to defendants than is constitutionally necessary.[137] The prosecution of attorneys may be particularly desirable to avoid the erosion of public confidence in the

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F. Supp. 452, 454 (S.D.N.Y. 1985).

133. *Harvey*, 814 F.2d at 912.

134. United States v. Monsanto, 836 F.2d 74, 76 (2d Cir. 1987) (rehearing granted en banc).

135. One lawyer reads the following warning to potential clients:

> What you tell me is going to be confidential, except all matters which deal with future criminality, except all matters which deal with fees to be paid me, and all matters which deal with the source of the funds with which you are going to pay me. In other words, as to those areas about which you tell me, I may end up being your prosecutor or at least a witness against you.

Forfeiture Hearings 1987, *supra* note 5, at 199 (statement of Bruce Lyons, President, NACDL).

136. Representative Clay Shaw articulated the purpose of § 1957 during the markup of House Bill 5077.

> I am sick and tired of watching people sit back and say, ["]I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.["] The only way we will get at this problem is to let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make the drug dealers' money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocketbook ***. [Y]ou have outstanding business people who are otherwise totally moral who are accepting these funds and profiting greatly from drug trafficking that is going on throughout this country, and this will put a stop to it.

Markup of H.R. 5077, *supra* note 21, at 22-23, *reprinted in* 132 CONG. REC. E3821, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes).

137. *See supra* notes 95-98 and accompanying text. While privately retained counsel is not necessarily more able than appointed counsel, the gravamen of the arguments against § 1957 is that a well-financed lawyer chosen by the defendant provides the best representation. *See supra* notes 68-79, 82-88, 99-106 and accompanying text. The Constitution, however, only requires that a defendant receive effective representation and a choice of lawyers he can afford.

legal system as citizens watch the profits of drug dealing enrich attorneys under the claim of constitutional privilege.[138]

The policies advanced by section 1957, however, will not be advanced by the prosecution of all attorneys. Groups that have studied the role of lawyers in organized crime have been careful to distinguish between legitimate representation of a client and representation that encourages crime. The report of the President's Commission on Organized Crime distinguished between three types of conduct by lawyers.[139] The first and largest category encompasses the zealous, ethical representation of witnesses and defendants in criminal cases.[140] The second category encompasses practices that divided an attorney's loyalty to an individual client, such as the representation of multiple defendants and certain third party fee arrangements.[141] The third category encompasses the least frequent but most harmful conduct, including subornation of perjury, obstruction of justice, and other actions calculated to abet an illegal enterprise.[142] Criminal lawyers in this third category, which the Commission calls "mob-connected"[143] and "lawyer-criminals,"[144] were the Commission's principal concern. During consideration of House Bill 5077, the Subcommittee on Crime expressed the most concern about lawyers involved in a "growing persistent crime,"[145] often involving longstanding relationships with drug dealers.[146] Criminal liability for attorneys under section 1957, therefore, is most justified when lawyer-criminals are the target. As the target widens to encompass less heinous conduct, criminal liability becomes less justifiable and defendants' interests more weighty.

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138. United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc). Courts have expressed a similar view in cases in which attorneys have accepted stolen property or ransom money in payment of bona fide attorneys' fees. *See, e.g.*, Laska v. United States, 82 F.2d 672, 676-77 (10th Cir.) (convicting an attorney in part for accepting ransom money in payment of fee), *cert. denied*, 298 U.S. 689 (1936); *In re* Chase, 119 A.D.2d 227, 228, 506 N.Y.S.2d 191, 192 (1986) (disbarring attorney for, *inter alia*, knowingly receiving stolen property in payment of fee); People v. Zelinger, 179 Colo. 379, 380-81, 504 P.2d 668, 668-69 (1972) (disciplining attorney for receiving stolen property in payment of fee and failing to investigate its source).

139. THE IMPACT, *supra* note 98, at 250-58.

140. *Id.* at 250-52.

141. *Id.* at 254-57. The Commission recommended revisions to the *Model Rules of Professional Conduct*, *supra* note 72, to curb this unethical conduct.

142. *Id.* at 257-58. The Commission recommended revisions to the *Model Rules of Professional Conduct*, *supra* note 72, and more vigorous enforcement of existing ethical canons to curb conduct in this third category. The Commission did not specifically recommend new legislation. *Id.* at 258-75.

143. *Id.* at 250.

144. *Id.* at 221.

145. *See supra* note 28 and accompanying text.

146. *Id.*

V. Policy Proposals

The proposed policy of the Justice Department for prosecuting attorneys under section 1957 attempts to accommodate the legitimate interests of defendants with those of the government.[147] The proposal is reprinted in the Appendix following this Note. Under these proposed guidelines, the Department will not prosecute attorneys for accepting a bona fide fee for representation in a criminal matter except when there is proof beyond a reasonable doubt that the attorney had actual knowledge of the fee's illegal origin. A bona fide fee is one paid without fraud or deceit for legitimate legal representation.[148] A fee is not bona fide if the fee transaction was designed to shield assets from forfeiture or to allow the client to maintain an interest in those assets.[149] Third party payments that hinder an attorney's loyalty to his client also may not be bona fide.[150] Under section 1957's actual knowledge standard, the Justice Department generally will not prosecute if the evidence indicates only willful blindness. The attorney must actually have known that the property was criminally derived.[151] Furthermore, the proposed guidelines prohibit the government from establishing knowledge through confidential communications in a current matter. Nor may the government rely on information gained by an attorney in furtherance of his obligation to represent his client, whether gained preliminary to, or during, representation.[152] Thus, as a practical matter, proof of knowledge must be shown to have existed before representation began.[153]

The Justice Department guidelines go far to accommodate defendants' interests. An attorney does not risk criminal sanctions for fully investigating his client's case because knowledge gained during representation will not satisfy the scienter requirement. Also, the high standard of actual knowledge allows an attorney to gauge whether he risks criminal liability prior to undertaking representation. Thus, the statute will reach only the most culpable attorneys—those with actual knowledge gained before the existing representation began. As long as the Justice Department follows these guidelines, a defendant runs no risk of losing his attorney once retained or of having the quality of representation compromised by the threat of criminal liability to that attorney.

The ABA and NACDL have offered revisions to the Justice De-

147. United States Dep't of Justice, U.S. Attorneys' Manual (draft Aug. 3, 1987) [hereinafter U.S. Attorneys' Manual] *reprinted in* Appendix, *infra* at 870-77.

148. *Id.* § 9-105.410, *reprinted in* Appendix, *infra* at 875.

149. *Id.*

150. *Id.*

151. *Id.* § 9-105.420, *reprinted in* Appendix, *infra* at 876-77.

152. *Id.*

153. *Id.*

partment guidelines.[154] These revisions would restrict prosecution to attorneys who knowingly and willfully contribute to the ongoing activities of a criminal enterprise.[155] In order to lessen any chilling effect on legitimate attorney-client relationships, the proposed revisions offer an even stricter scienter requirement. First, the actual knowledge standard would apply to fees earned in any legal representation, not merely to fees earned for representation in a criminal matter.[156] Second, an attorney would be under no obligation to investigate the source of his fee.[157] Third, an attorney would not risk prosecution if he had detailed knowledge of a client's conduct, but not actual knowledge of the criminal origin of the fees.[158] For example, an attorney who knew that his fee was derived from the sale of sexually explicit materials would not have knowledge that this fee came from the sale of obscenity, unless a jury had made that determination already by applying community standards.[159] Receipt of fees derived from other offenses requiring the subjective judgments of a jury, such as fraud or misleading conduct, similarly would not support prosecution.[160] Finally, evidence of an attorney's knowledge would have to be derived from a third party, not from the attorney himself.[161] In order to ensure that these guidelines are followed, the revisions would require that a target attorney be given a hearing prior to indictment before the Assistant Attorney General of the Criminal Division.[162]

The ABA and NACDL revisions do not fully allay the bar's concerns.[163] The Justice Department guidelines do not bind the Department and confer no rights on defendants.[164] Furthermore, they contemplate prosecution on a willful blindness theory in "extraordinary cases"[165] and allow the use of client communications when other evi-

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154. For the text of Guidelines on Section 1957, see Letter, *supra* note 39 (showing suggested amendments).

155. Letter, *supra* note 39, at 3.

156. *Id.* at 7.

157. *Id.*

158. *Id.* at 8.

159. *Id.*

160. *Id.* This revision appears to clarify rather than modify the scienter requirement of § 1957. Under § 1957, a defendant risks conviction only if he knows that the property he received was criminally derived. If that determination can be made only by a jury applying "community standards," an attorney cannot be charged with knowledge of the criminal derivation of the property.

161. *Id.*

162. *Id.* at 3.

163. *See supra* note 39.

164. U.S. ATTORNEYS' MANUAL, *supra* note 147, § 9-105.500, *reprinted in* Appendix, *infra* at 877.

165. *Id.* § 9-105.420, *reprinted in* Appendix, *infra* at 876.

dence establishes that the attorney had actual knowledge.[166] Therefore, the chilling effect of section 1957 remains to the extent that an attorney distrusts the good offices of the Justice Department.

VI. RECOMMENDATION

Neither the proposed Justice Department guidelines nor the ABA-NACDL proposals strike an appropriate balance between the aims of section 1957 and the aims of a zealous adversary system. The ABA-NACDL proposals would still permit racketeers to retain the benefits of high priced lawyers, would still deprive the government of money to which it is statutorily entitled, and would still pose risks to public confidence in the judicial system. The ABA-NACDL proposals also would overvalue the needs of civil defendants. A vigorous adversary system and well-prepared defense counsel are needed most in criminal matters in which a client's life or liberty is at stake.[167] That argument is far less weighty when a client seeks representation in a civil matter.

The ABA-NACDL proposals, however, highlight problems with the Justice Department guidelines and with section 1957. For example, an attorney considering whether to accept a client may be unsure whether to investigate the source of his fee and, if so, how far that investigation should go. He also may be unsure of the Justice Department's willingness to follow its prosecutive policies. In short, an attorney now faces a host of uncertainties that may deter him from taking a case or from fully investigating it.

Congress can reduce the uncertainty inherent in the Justice Department draft guidelines by amending the scienter requirement in section 1957.[168] The amendment should discount knowledge gained

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166. *Id.* § 9-105.430, *reprinted in* Appendix, *infra* at 877.

167. The United States Constitution requires the effective assistance of counsel only in criminal matters. U.S. CONST. amend. VI.

168. Congress and the Justice Department have resisted a statutory exemption for attorney conduct because it might open the door to exceptions for other interest groups. 132 CONG. REC. E3821, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes); Letter, *supra* note 39. Congress expressed concern over the potential liability of doctors who are paid with tainted money, and the NACDL has shown concern for priests who receive tainted donations and colleges that receive tainted tuition payments. *Forfeiture Hearings 1987*, *supra* note 5, at 220; Wallace, *supra* note 17, at 11. Each of these parties may, by virtue of their relationship with the racketeer, know the source of the racketeer's income. Several factors make a statutory exemption for these groups unnecessary. First, the statute itself limits prosecution to persons with knowledge who have received and deposited more than $10,000. Practical limitations make prosecution particularly difficult because the fifth amendment and privileges under Federal Rule of Evidence 501 may foreclose testimony from the defendant. Second, a prosecutor may exercise his discretion and not prosecute in sympathetic cases, or he may pursue the lesser penalty of forfeiture under the Comprehensive Forfeiture Act. *See supra* noto 38. Finally, the interests of defendants and of a vigorous adversary system enjoy constitutional protection, unlike the interests of other interest groups.

preliminary to or during representation of a then existing criminal matter. Amended in this fashion, section 1957 would expose to criminal liability only attorneys whose knowledge of a client's criminal activities was gained before representation. This effect would be desirable because it would prevent the formation of an unseemly alliance between an attorney and drug dealer, reducing the threat to public confidence in the judicial system and the recruitment of mob-connected lawyers. All other attorneys could undertake representation without risking a conflict of interest, without risking prosecution for fully investigating the client's case, and without fearing that the Justice Department might abrogate its guidelines.

This amendment still would leave uncertain how far an attorney should investigate a potential client. Attorneys, however, already are under a duty in certain contexts to investigate their clients prior to undertaking representation. For example, attorneys have an explicit ethical duty to investigate whether they are being paid with stolen property,[169] in addition to an implied duty to inquire whether the client is seeking advice in furtherance of a crime.[170] A lawyer also may investigate the client simply to determine whether the client can pay the attorney's fee. In any case, the duty would be no more onerous than for ordinary citizens. Justice Department guidelines and ad hoc solutions by courts would guard against prosecutorial excesses.

Underlying the opposition to section 1957 is the belief that no public consensus exists about the morality of knowingly receiving illegally derived money and the concern that the statute subjects innocent people to criminal liability.[171] Congress should reject this argument. A public consensus already exists about the immorality of receiving stolen property,[172] and a consensus is emerging about the immorality of using proceeds from criminal activities.[173] The proposed amendment to sec-

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169. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1982). The duty to investigate generally may be inferred from statutes proscribing the receipt of stolen property.

170. *In re* Wines, 370 S.W.2d 328 (Mo. 1963) (suspending a lawyer who acted on false information supplied by client without investigation); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470 (1981). "A lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetuating a fraud or otherwise committing crime." *Id.*

171. *See, e.g., Forfeiture Hearings 1987, supra* note 5, at 221 (statement by Bruce Lyons, President, NACDL) (citing refusal by Republican National Committee to return illegally derived money because the Committee had "done nothing wrong"); Letter, *supra* note 39 (stating that "honest and ethical" attorneys may be subject to liability for the "legitimate" representation of a client).

172. *See supra* notes 6 & 138 and accompanying text.

173. Arizona recently adopted a money laundering statute making it a crime to receive racketeering proceeds with knowledge or reason to know that they were the proceeds of an offense. ARIZ. REV. STAT. ANN. § 13-2317(A) (Supp. 1987). California also recently adopted a money laundering

tion 1957 would develop this consensus further by drawing a bright line between ethical representation of a client and representation that encourages crime at the expense of the public weal.

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statute that makes it a crime to conduct a transaction knowing the money is the proceeds of or is derived from criminal activity. The statute, however, makes special provision for attorneys who receive tainted money in payment of a fee earned from representation in a criminal proceeding. In that case, the statute requires evidence that the attorney possessed a criminal intent to disguise the source of the funds or the nature of the criminal activity. CAL. PENAL CODE § 186.10(a) (West Supp. 1988). Twelve states proscribe the knowing receipt of proceeds derived from racketeering activity that are then used to acquire an interest in an enterprise or in real property. *See* COLO. REV. STAT. § 18-17-104(1)(a) (1986); CONN. GEN. STAT. ANN. § 53-395(a) (West 1985); FLA. STAT. ANN. § 895.03 (1) (West Supp. 1987); IND. CODE ANN. § 35-45-6-2(a)(1) (Burns 1985); LA. REV. STAT. ANN. § 15:1353(a) (West Supp. 1987); MISS. CODE ANN. § 97-43-5 (1) (1987); NEV. REV. STAT. ANN. § 207.400(1) (Michie 1986); OR. REV. STAT. § 166.720(1) (1985); R.I. GEN. LAWS § 7-15-2(a) (1985); TENN. CODE ANN. § 39-1-1004(a) (Supp. 1987); WASH. REV. CODE ANN. § 9A.82.080(1) (1988); WIS. STAT. ANN. § 946.83 (1) (West Supp. 1987). Two states have similar statutes, but the legislative intent behind them would limit prosecution to cases in which there is an interrelated pattern of criminal activity. *See* GA. CODE ANN. §§ 16-14-2(b), 16-14-4(a) (1984); N.C. GEN. STAT. §§ 75D-2(c), 75D-4 (1986). Six states limit prosecution to persons who have participated in the underlying offense. *See* DEL. CODE ANN. tit. 11, § 1503(c) (1987); IDAHO CODE § 18-7804(a) (Supp. 1987); N.M. STAT. ANN. § 30-42-4(a) (1987); N.Y. PENAL LAW § 460.25(1) (McKinney Supp. 1988); 18 PA. CONS. STAT. ANN. § 911(b) (1983); UTAH CODE ANN. § 76-10-1603(1) (Supp. 1987).

U.S. Department of Justice

DRAFT

Washington, D.C. 20530

AUG 3 1987

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for the United States Attorneys

William F. Weld
Assistant Attorney General
Criminal Division

RE: Prosecutive Policy for Violations of the Money Laundering Control Act - 18 U.S.C. Section 1957

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-105.000

PURPOSE: This bluesheet supplements the prosecutive policy concerning the Money Laundering Control Act originally set forth in USAM 9-105.100.

Detailed Table of Contents
for Chapter 105

9-105.000 - POLICY WITH REGARD TO PROSECUTIONS UNDER 18 U.S.C. § 1957

Section 1957 creates an offense entitled "engaging in monetary transactions in property derived from specified unlawful activity." The elements of this offense are: (1) an individual must "knowingly" engage or attempt to engage in a "monetary transaction" in "criminally derived property"; (2) "the value of the property must be greater than $10,000"; and (3) the criminally derived property must be derived from certain "specified unlawful activity."

9-105.100 - Division Approval

Approval by the Assistant Attorney General of the Criminal Division is required before indictment for all prosecutions under 18 USC §1957 if the potential defendant is an attorney and the criminally derived property is or purports to be attorneys' fees paid to the attorney for providing representation to a client in a criminal or civil matter. Such approval shall be given in accordance with the prosecution policies set forth in Sections 9-105.300 and 9-105.400.

9-105.200 - "Knowingly" as an Element of Proof in 18 U.S.C. § 1957 Prosecutions

Although subsection 1957 (a) requires proof that the property involved is in fact derived from "specified unlawful activity," subsection 1957 (c) specifically states that "the government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." Thus, Section 1957 requires proof only that the defendant knew the property came from some illegal activity, whether it be a felony or misdemeanor offense.

A defendant may be proven to have knowledge that property is criminally derived by proof that he either (1) knows that the property is criminally derived or (2) is willfully blind to this fact -- i.e., he has his suspicions definitely aroused and refuses to investigate for fear he will discover that the property is criminally derived. See, e.g., United States v. Jewell, 532 F. 2d 697 (9th Cir.)(en banc) cert. denied, 426 U.S. 951 (1976).

The relevant time for determining whether the requisite knowledge exists is the time at which the individual engages in a transaction within the ambit of Section 1957. Lack of knowledge at the time of the property's receipt is not critical if there is a gap between the receipt of the property and the monetary transaction. Thus, if property is received without knowledge of its criminal derivation, but the individual subsequently gains knowledge of its criminal origin before engaging in a monetary transaction, he can be held liable.

In evaluating whether a defendant actually knew or was willfully blind to the fact that the property was criminally derived, all of the circumstances surrounding the receipt or transfer of the property should be considered. In most cases it is expected that there will be evidence that the defendant was told of the source of the property either by the person who gave it to him or by some third party. However, such evidence is not always required. The following list, though not intended to be all-inclusive, is representative of the type of behavior which, alone or in combination, may support a decision to investigate or prosecute:

(1) Acceptance of a commission when general industry practice does not provide for commissions.

(2) Acceptance of a commission above market rates.

(3) Use of false names to purchase goods and/or services.

(4) Numerous and unjustified transfers of title to others or sham transfers of title.

(5) Failure to provide accurate identification or use of suspicious identification.

(6) Use of cash in large denominations.

(7) Knowledge that legitimate livelihood of purchaser is insufficient to allow purchaser to afford the goods and/or services to be purchased.

(8) Grossly inadequate or grossly inflated purchase/sale price.

(9) Seller's obligation to break or bend company rules to consummate the deal.

stp (10) Conducting business under odd circumstances, at irregular hours, or in unusual locations by industry standards.

9-105.300 - General Prosecution Standards

With respect to transactions between possessors of criminally derived property and sellers of goods and/or services, other than attorneys who receive such property as bona fide fees for representation in a criminal matter, a prosecution for violation of Section 1957 may be instituted if there is evidence to establish that the defendant had actual knowledge of the illegal origin of the property or that the defendant was

"willfully blind" to such fact. In sum, such persons should be accorded no special consideration and may be prosecuted to the full extent allowed under the statutes. Of course, there must be sufficient evidence to prove the actual knowledge or willful blindness beyond a reasonable doubt.

9-105.400 - Prosecution Standards - Bona Fide Fees Paid to Attorneys for Representation in a Criminal Matter

There is no statutory prohibition upon the application of Section 1957 to transactions involving bona fide fees paid to attorneys for representation in a criminal matter. However, the Department recognizes that attorneys in such situations, unlike all others who may deal with criminal defendants, may be required to investigate and pursue matters which will provide them with knowledge of the illicit source of the property they receive. Indeed, the failure to investigate such matters may be a breach of ethical standards or may result in a lack of effective assistance to the client.

Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law, the Department, as a matter of policy, will not prosecute attorneys under Section 1957 based upon the receipt of property constituting bona fide fees for the legitimate representation in a criminal matter, except if (1) there is proof beyond a reasonable doubt that the attorney had actual knowledge of the illegal origin of the specific property received and (2) such evidence does not consist of confidential communications made by the client preliminary to or during representation in a criminal matter or other information obtained by the attorney preliminary to or during the representation and in furtherance of the obligation to effectively represent the client.

What constitutes "representation in a criminal matter" depends on the facts and circumstances of the particular case. In deciding if representation in different proceedings constitutes representation in a single matter, consideration will be given to whether all of the proceedings relate to investigations of cases arising out of or based upon the same facts or transactions.

This prosecution standard only applies to fees received for legal representation in a criminal matter. Attorneys who receive criminally derived property in exchange for carrying out or engaging in other commercial transactions unrelated to the representation of a client in a criminal matter or for representing a client in a civil matter should be treated the same as any other person under the policy in § 9-105.300.

Proper application of this policy requires examination of three issues: (1) what constitutes bona fide fees; (2) what

constitutes actual knowledge; and (3) what evidence may be relied upon to meet the knowledge requirement of the policy.

9-105.410 - Bona Fide Fees

The first question which will have to be answered to determine if this prosecution standard applies, is whether the fee paid was a bona fide fee for representation in a criminal matter. This question will have to be answered on a case-by-case basis; however, the fundamental inquiry is whether the fee was paid in good faith without fraud or deceit for representation concerning the defendant's personal criminal liability. Thus, for example, if a defendant's legal fees are paid by another in an effort to protect that other person's identity or legal interests or any other interests of the overall criminal venture, such payments may not be bona fide.

However, fee payments by third parties, standing alone, do not create any presumption of lack of bona fides, so long as the attorney's loyalty and obligation remains to the client and the third-party payment does not create any conflicting obligation to the payor.

Similarly, if there is a reasonable basis to believe that the fee transaction was a fraudulent or sham transaction designed to shield the property from forfeiture, hide its existence from governmental investigative agencies, or was conducted for any purpose other than for legitimate legal representation, the fee would not be bona fide. Generally, a transaction is a sham or fraud if there is evidence that a scheme or plan existed to maintain the client's or any other person's or corporation's interest in the asset or the ability to use it beneficially. This may be established, for example, by proof that the value of the property transferred far exceeded the value of the services rendered and that there was an agreement by the attorney to transfer the asset or some portion of it back to the client, a third party or any other legal entity. There need not be proof that the attorney was a participant in the criminal activity giving rise to the property or that he otherwise violated the law. Quite obviously, however, proof that an attorney knowingly acted in a manner as to aid and abet or serve as an accessory after the fact to a money laundering transaction or otherwise to facilitate criminal conduct would lead to the conclusion that the property was not a bona fide fee.

9-105.420 - Actual Knowledge as Applied to Bona Fide Fees

As applied to bona fide fees received for representation in a criminal matter, the Department's policy precludes prosecution if there is evidence only of willful blindness. Thus, prosecution may not be commenced if it is only established that the attorney consciously avoided learning the true nature of the property.

The existence of actual knowledge will have to be determined on a case-by-case basis, taking into consideration all the facts and circumstances. However, prosecutors seeking to prosecute attorneys for violations of Section 1957 based on monetary transactions arising from the payment of bona fide fees for representation in a criminal matter must be very circumspect in seeking authority to proceed. Prosecutors must first possess proof beyond a reasonable doubt that the specific property involved in the monetary transaction was criminally derived. Second, there must be proof beyond a reasonable doubt that the attorney actually knew this to be true and, as discussed below, that this knowledge was derived from information known to the attorney from outside the relationship.

Because this actual knowledge requirement is a matter of policy and not a statutory mandate, proof beyond a reasonable doubt of "willful blindness" will suffice to sustain a conviction. In other words, while the government will not undertake a prosecution except if it believes that there is proof beyond a reasonable doubt of actual knowledge, the government is not precluded from relying on a "willful blindness" instruction at trial. However, it is expected that this will only occur in extraordinary cases, and that cases normally will be submitted to the trier of fact on an actual knowledge theory.

9-105.430 - Evidence of Actual Knowledge

Another aspect of the Department's policy is that the actual knowledge predicate must be based on evidence other than confidential communications made by the client preliminary to or during representation on the matter or other information obtained by the attorney preliminary to or during the representation and in furtherance of the obligation to effectively represent the client. This policy means that evidence that the attorney learned from the client during the course of the representation that the fee was paid from an illegitimate source may not be relied upon to establish actual knowledge. For example, a client's voluntary testimony at trial or a client's voluntary disclosure of communications with his or her attorney -- discussed in an attempt to "make a deal" by implicating the attorney in criminal misconduct -- may not be used to meet the

policy requirement of actual knowledge. 1/ However, if there is other evidence that establishes beyond a reasonable doubt that the attorney had actual knowledge, client communications may be used at trial to prove the requisite knowledge.

As a practical matter, this limitation means that in most cases there will be proof beyond a reasonable doubt of actual knowledge that pre-existed representation on the particular matter or that was gained independent of the attorney - client relationship on that matter. For example, if any attorney is functioning as "in house" counsel for a criminal enterprise and knows from personal observation or non-privileged communication with the criminal entrepreneurs that certain money is criminally derived, then the subsequent payment of legal fees to that attorney for legal representation on a particular criminal matter may be subject to prosecution.

This limitation upon the type of evidence that may be relied upon to meet the policy requirement of actual knowledge is imposed as a matter of policy. It is imposed to insure that attorneys representing criminal clients will have no incentive to avoid fully investigating the activities of the client relating to the criminal investigation or prosecution and thus will be able to provide adequate and effective representation.

9-105.500 - Prohibition on Giving Notice of the Criminal Derivation of Property

No Department attorney shall either orally or in writing inform an attorney who is legitimately representing a client in a criminal case that the property the attorney is receiving is or may be criminally derived solely for purposes of meeting the requirements of knowledge imposed by this prosecution policy or by the statute.

This Policy statement is not intended to create or confer any rights, privileges, or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of a United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

1/ This standard is separate from that set forth for forfeiture of a fee under § 9-111.000.