



University of Kentucky  
UKnowledge

---

Law Faculty Scholarly Articles

Law Faculty Publications

---

1992

## Money Laundering and Lawyers

Eugene R. Gaetke

*University of Kentucky College of Law*, [ggaetke@uky.edu](mailto:ggaetke@uky.edu)

Sarah N. Welling

*University of Kentucky College of Law*, [swelling@uky.edu](mailto:swelling@uky.edu)

Follow this and additional works at: [https://uknowledge.uky.edu/law\\_facpub](https://uknowledge.uky.edu/law_facpub)



Part of the [Criminal Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

---

### Recommended Citation

Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 *Syracuse L. Rev.* 1165 (1992).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

---

## Money Laundering and Lawyers

### Notes/Citation Information

Syracuse Law Review, Vol. 43, No. 4 (1992), pp. 1165-1245

# MONEY LAUNDERING AND LAWYERS

Eugene R. Gaetke†  
Sarah N. Welling‡

## INTRODUCTION

The federal government has recently enacted money laundering laws to track and discourage the use of money generated by crime. Because some of that money is used to pay legal fees, the laws have a direct impact on lawyers. The laws increase the risk of prosecution for lawyers, inhibit some methods of fee payment, and make some cases less attractive financially. Generally, the laws make law practice more complicated and risky.

The laws have been criticized for their impact on criminal defense lawyers. Critics have raised three broad objections. The first objection is constitutional. Critics have also objected to the laws on ethical grounds, claiming that they force lawyers to act unethically. The third objection is based on the practical impact of the laws. Critics claim the laws “chill” the relationship between lawyers and clients, drive some lawyers out of criminal work, and give prosecutors too much power to disqualify defense lawyers.

The constitutional questions have so far been resolved in favor of the government, but objections to the money laundering laws on the other two grounds need to be examined. Although the laws are constitutional as applied to criminal defense lawyers, the question re-

---

† Wendell Cherry Professor of Law, University of Kentucky College of Law; B.A., J.D., University of Minnesota. The authors would like to thank a number of people who were kind enough to review and comment upon earlier drafts of this article. They include Whitney Adams, Sara Beale, Kathleen F. Brickey, Pam Bucy, Gordon Greenberg, Nancy King, Kirk Munroe, Buddy Parker, David O. Stewart and Charles W. Wolfram. All of these people are busy but gave their time generously. The authors would also like to thank the student research assistants at the University of Kentucky College of Law who provided valuable legal research and editorial assistance during the lengthy period of gestation of this article. They include Kathryn A. Baird, Pamela Duncan, Janet M. Graham, Lisa Harbold, and Leland R. Howard. The errors that remain, of course, are those of the authors.

‡ Professor of Law, University of Kentucky College of Law; B.A., University of Wisconsin; J.D., University of Kentucky.

mains whether that application is wise. Based on the laws' ethical and practical impact, many claim that it is not.

Nowhere in the literature have the laundering laws been analyzed in terms of their collective impact on criminal defense lawyers.<sup>1</sup>

---

1. The criminally derived property statute, 18 U.S.C. § 1957 (1988), has received little attention in law reviews. A comprehensive analysis appears in D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291 (1993). A shorter discussion is found in G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149 (1989). Lawyers' liability under § 1957 has generated some analysis, mostly in the form of student notes arguing that liability would violate the Sixth Amendment. See, e.g., Lynne D. Boylston, Note, *Attorneys' Fees and the Money Laundering Control Act of 1986: Further Erosion of Criminal Defense Advocacy*, 21 GA. L. REV. 929 (1987); Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 LAW & CONTEMP. PROBS. 369 (Winter 1988); Paul G. Wolfeich, Note, *Making Criminal Defense a Crime Under 18 U.S.C. Section 1957*, 41 VAND. L. REV. 843 (1988). Cf. Kathleen F. Brickey, *Tainted Assets and the Right to Counsel — The Money Laundering Conundrum*, 66 WASH. U. L.Q. 47, 61 (1988) [hereinafter Brickey, *Tainted Assets*] (attorney liability would not violate the Sixth Amendment). Since Congress added the Sixth Amendment exemption for lawyers in 1988, only one author has written on lawyers' liability. See Alan J. Jacobs, Note, *Indirect Deprivation of the Effective Assistance of Counsel: The Prospective Prosecution of Criminal Defense Attorneys for 'Money Laundering'*, 34 N.Y.L. SCH. L. REV. 303 (1989).

The cash reporting requirement, I.R.C. § 6050I (1988), has received less attention in law reviews. A recent discussion is found in Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992); Patricia T. Morgan, *Money Laundering, the Internal Revenue Service and Enforcement Priorities*, 43 FLA. L. REV. 939 (1991). It is mentioned very briefly in Brickey, *Tainted Assets*, *supra*, at 48, and Robert C. Bonner, *A Balanced Perspective on Attorney Subpoenas*, 36 EMORY L.J. 803, 807-08 (1987) (Symposium on Government Intrusion into the Attorney-Client Relationship). The requirement is treated in more detail in David F. DuMouchel & Cynthia J.H. Oberg, *Defense Attorney Fees: A New Tool for the Prosecution*, 1986 DET. C.L. REV. 57.

Forfeiture of assets generally has also received some attention in law reviews. See, e.g., Brent Fisse, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation*, 13 CRIM. L.J. 368 (1989); Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254; Lalit K. Loomba, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471 (1989); David McClean, *Seizing the Proceeds of Crime: The State of the Art*, 38 INT'L & COMP. L.Q. 334 (1989); Nick H. Varsam, *Assets Held Hostage: Pretrial Restraint of Third-Party Property Under Criminal RICO*, 67 WASH. U. L.Q. 1187 (1989); Sean D. Smith, Note, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303 (1988); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990) (civil forfeiture).

Forfeiture of attorneys' fees has prompted a tidal wave of ink. Lists of the articles are easy to find. See, e.g., Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NOTRE DAME L. REV. 535, 537 n.23 (1988). Thoughtful analyses include Kathleen F. Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493

This article does that analysis. It begins by examining how the federal money laundering laws apply to criminal defense lawyers when they receive fees for their work. The article then explores whether and how the laws cause criminal defense lawyers to act unethically. The article next analyzes the practical impact of the laws on these lawyers. This article concludes that while the ethical criticisms of the laws are largely unfounded, there is legitimate, though as yet undocumented, concern about their practical impact on our criminal justice system.

---

(1986) [hereinafter Brickey, *Forfeiture*], and Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1. See generally Symposium, *Government Intrusion into the Attorney-Client Relationship*, 36 EMORY L.J. 755 (1987).

Most of this writing on fee forfeiture is now out of date because it focuses on issues resolved by two Supreme Court cases, *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), discussed *infra* in notes 58-60 and accompanying text. Aside from some case notes, see, e.g., Avalyn Y. Castillo, Note, *Forfeiture of Attorneys Fees: The Rights Remaining to the Accused and his Attorney after Caplin & Drysdale and U.S. v. Monsanto*, 17 AM. J. CRIM. L. 123 (1990); Steve Dettelbach, Note, *Forfeiting the Right to Counsel*, 25 HARV. C.R.-C.L. L. REV. 201 (1990); Melinda Hardy, Note, *Sixth Amendment — Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees*, 80 J. CRIM. L. & CRIMINOLOGY 1154 (1990), no law review has considered fee forfeiture in the wake of the Supreme Court cases. See, Alfredo Garcia, *The Right to Counsel Under Siege*, 29 AM. CRIM. L. REV. 35 (1992); Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992). Only two articles have appeared in legal magazines and newspapers. See, e.g., Barry Tarlow, *Fee Forfeiture: Apocalypse Now or Business as Usual?*, TRIAL Apr. 1990, at 44; Whitney Adams, *Fees, Forfeiture and the Attorney-Client Relationship*, Crim. Practice Manual (BNA) No. 57, at 151:301 (Dec. 12, 1990). On the international possibilities, see Richard J. Wilson, *Human Rights and Money Laundering: The Prospect of International Seizure of Defense Attorney Fees*, 3 CRIM. L. F. 85 (1991).

Nowhere have the laundering laws been analyzed collectively in terms of their impact on lawyers. Some authors have provided a partial analysis. See DuMouchel & Oberg, *supra* (discussing the cash reporting requirement and fee forfeiture); Boylston, *supra* (discussing the criminally derived property statute and fee forfeiture); Jacobs, *supra* (same). Professor Brickey brings the laundering laws together, see Brickey, *Tainted Assets*, *supra*, at 47-49, but this article preceded the significant changes of 1988 (the Sixth Amendment exception added to § 1957 and the Supreme Court's decisions on fee forfeiture). Finally, the practice-oriented literature includes two pieces which discuss the three money laundering laws as applied to lawyers. See Adams, *supra*; RICO CASES COMMITTEE, AMERICAN BAR ASS'N, PROTECTING YOURSELF AND YOUR FEE: A DEFENSE LAWYER'S PRACTICE GUIDE IN A NEW AGE OF FEDERAL LAW, (1991) (hereinafter ABA RICO PRACTICE GUIDE). Both of these are intended primarily for defense lawyers, to help them avoid trouble with the money laundering laws. Both are very good.

## I. THE MONEY LAUNDERING LAWS AND THEIR APPLICATION TO LAWYERS

Three money laundering laws apply to lawyers in their work.<sup>2</sup> They are 18 U.S.C. § 1957, I.R.C. § 6050I, and the criminal forfeiture laws.<sup>3</sup>

### A. Section 1957—Criminally Derived Property

Section 1957 basically makes it criminal to engage knowingly in a financial transaction with money generated by certain crimes.<sup>4</sup> The point of the crime is to exclude dirty money from the financial system. The statute was adopted in 1986 as part of a package to make money laundering a substantive crime.<sup>5</sup> The sanctions are vigorous, including imprisonment up to 10 years,<sup>6</sup> fines up to twice the amount involved or \$250,000,<sup>7</sup> and forfeiture of all property involved in the offense or traceable to property involved in the offense.<sup>8</sup>

Section 1957 provides: "Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished . . . ."<sup>9</sup> The conduct element requires the defendant to engage or attempt to engage in a

2. A fourth money laundering law, 18 U.S.C. § 1956, is sometimes implicated when criminal defense lawyers are paid their fees. For example, § 1956 is implicated when an attorney is hired by one who has committed specified unlawful activity who pays the attorney to represent a third person who might be a subordinate of the payor. In this fact scenario, the subordinate/client's legal expenses are being assumed by the criminal organization and the payment of the legal fee might be viewed as a financial transaction promoting the specified unlawful activity. To the extent that the lawyer "knowingly" accepts this fee with the stated purpose of promoting the unlawful activity of the organization by ensuring that the subordinate refuses to cooperate with the government, she may violate § 1956. We have decided not to include § 1956 in this article because it is implicated less frequently than the three laws we focus on.

3. The criminal forfeiture laws are cited *infra* in note 48. These laws can be grouped together and characterized as money laundering laws because they are all part of the government's effort in the last decade to track and disable money generated by crime.

4. See 18 U.S.C. § 1957 (Supp. 1993) ("Engaging in monetary transactions in property derived from specified unlawful activity.").

5. Section 1957 was adopted along with 18 U.S.C. § 1956 (1988) ("Laundering of monetary instruments") as part of the Money Laundering Control Act of 1986, § 1351, 18 U.S.C. §§ 1956-1957 (Supp. 1993).

6. 18 U.S.C. § 1957(b)(1) (1993).

7. *Id.* at § 1957(b). The fine referred to in (b)(1) is listed in 18 U.S.C. § 3571 (1988) as \$250,000.

8. See *id.* § 982 (criminal forfeiture); *id.* § 981 (civil forfeiture).

9. *Id.* § 1957(a).

monetary transaction, although "engage" is not defined in the statute.<sup>10</sup> "Monetary transaction" is defined broadly to include most transactions at financial institutions.<sup>11</sup> The property involved in the transaction must have a value over \$10,000,<sup>12</sup> and it must be derived from "specified unlawful activity," which includes a long list of crimes.<sup>13</sup> Finally, there are jurisdictional elements. The monetary transaction must affect interstate commerce,<sup>14</sup> and the offense must occur in the United States or the defendant must be a United States person.<sup>15</sup>

The mental element requires the defendant to engage in the transaction knowing the property is worth over \$10,000 and is criminally derived. "Criminally derived property" is defined as property derived from any criminal offense.<sup>16</sup> This mens rea gives the crime a two-tiered character because the property involved must actually be derived from certain listed crimes, but the defendant need only know that the property was derived from crime generally.<sup>17</sup>

---

10. *Cf. id.* § 1956(a)(1) & (3). These sub-sections of section 1956 prohibit "conducting" certain financial transactions. The term "conducts" is defined at section 1956(c)(2). Section 1957 prohibits "engaging" in transactions, and "engaging" is not defined. The relationship between conducting and engaging is uncertain, and the legislative history does not help.

11. 18 U.S.C. § 1957(f)(1) (Supp. 1993) ("the term 'monetary transaction' means the deposit, withdrawal, transfer, or exchange . . . of funds or a monetary instrument . . . by, through, or to a financial institution . . . including any . . . financial transaction under section 1956(c)(4)(B) . . ."). "Monetary instruments" include cash, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form and negotiable instruments in bearer form. *Id.* § 1956(c)(5). "Financial institutions" include banks, securities broker/dealers, currency exchanges, travelers' check and money order companies, and the U.S. Postal Service, among others. See 18 U.S.C. § 1956(c)(6) (Supp. 1993).

12. See 18 U.S.C. § 1957(a) (1988).

13. Section 1957(f)(3) refers to specified unlawful activity as it is defined in § 1956(c)(7). That section lists all federal offenses which are RICO predicates (except Bank Secrecy Act reporting requirements), all federal drug felonies, all foreign drug felonies, and a list of miscellaneous bribery, white collar, fraud, environmental, export control, and espionage crimes.

14. 18 U.S.C. § 1957(f)(1) (1988).

15. See *id.* § 1957(d). "U.S. person" is defined in 18 U.S.C. § 3077(2) (1988) basically to include United States nationals, resident aliens, and all persons and business entities within the United States.

16. See *id.* § 1957(f)(2).

17. And the defendant need not think the property was generated by a felony; it is sufficient if the defendant thinks it was generated by a misdemeanor. See *id.* § 1957(f)(2) ("a criminal offense"); U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL 9-105.400 (1988) [hereinafter DOJ MANUAL].

Several features of this crime are novel. One is the two-tiered character just described. Another is that receiving criminally-derived property is not prohibited, but using it in financial transactions is.<sup>18</sup> Also, the statute relies on an explicit numerical minimum of \$10,000 to limit its application to significant transactions.<sup>19</sup> Finally, the most novel feature is the law's imposition of heavy criminal penalties on persons who knowingly provide goods and services in exchange for "dirty money" but have no intent to promote the underlying criminal activity.<sup>20</sup>

Section 1957 could apply to lawyers depositing fees they knew their clients had generated by crime. Congress was aware of this application and originally intended to allow it.<sup>21</sup> Two years later, however, Congress amended the statute to exclude some lawyers' fees.<sup>22</sup> The amendment states that the definition of monetary transaction "does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the

---

18. Satisfaction of the financial transaction element is predictable, however. Section 1957 only applies to amounts over \$10,000. With such large sums, a normal receiver is unlikely to do anything but deposit it in a "financial institution" as defined in the statute. See *supra* note 11.

19. The reporting requirements use a numerical threshold of \$10,000. See, e.g., 31 U.S.C. §§ 5313 & 5316 (1984); I.R.C. § 6050I. The purpose for these reporting statutes is to filter out reports of small cash transactions, which are not suspicious. The numerical threshold in the substantive crime defined in section 1957 is unusual in that the \$10,000 line defines not merely how serious a crime the conduct is, but whether it is criminal at all.

20. Before the adoption of section 1957, persons who knowingly provided goods or services to criminals and were paid with criminally derived money were liable, if at all, only as accomplices or conspirators on the underlying crime. The one exception to this arose in cases where the money was criminally derived because it was stolen. In that situation, providers who were paid with the stolen money could be charged with receipt of stolen property. The question of whether to hold providers liable as accomplices when they acted with knowledge but no intent to further the underlying crime has troubled the courts. See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940); *Strafer*, *supra* note 1, at 151-53. Sometimes courts found ways to let the defendant off. See, e.g., *People v. Lauria*, 59 Cal. Rptr. 628 (Cal. Ct. App. 1967). Section 1957 takes a different approach and defines the knowing deposit of dirty money itself as a substantive crime rather than a basis on which to hold the defendant liable as an accomplice. Congress surely has the power to take this approach, but it is a dramatic expansion of substantive criminal liability.

21. See *Wolfteich*, *supra* note 1, at 849. *But cf.* *Weinstein*, *supra* note 1, at 376 (legislative history "ambiguous" as to congressional intent); *Jacobs*, *supra* note 1, at 344 (Congress had "no clear intent" on attorney liability). The *Wolfteich* analysis is the more persuasive.

22. See *Money Laundering Prosecution Improvements Act of 1988*, Pub. L. No. 100-690, §§ 6181-6187, 102 Stat. 4354 (codified at 18 U.S.C. § 1957).



Constitution . . . .”<sup>23</sup>

This is a curious amendment. Apparently it responds to concerns about the constitutionality of prosecuting criminal defense lawyers.<sup>24</sup> Yet to announce that the statute is limited by the Constitution is not news. If the statute intrudes on the Sixth Amendment, courts would be bound to dismiss prosecutions anyway. Congress’s purpose in adopting this amendment must have been not so much to make a substantive change in the law but rather to make a political statement, to signal its concern about the constitutional implications of prosecuting criminal defense lawyers.<sup>25</sup>

The reach of this statutory exception for lawyers should not be overstated. Because it is keyed to the Sixth Amendment, which generally does not attach until indictment,<sup>26</sup> the exception does not apply until then. A criminal defense lawyer who deposits tainted fees from an unindicted client may not be protected by the exception.<sup>27</sup> Thus even with the amendment, section 1957 could apply to defense lawyers who deposit their fees.

Any constitutional objections to section 1957 based on the client’s right to counsel presumably have been obviated by this exception. Congress added to the statute. More importantly, one year after the statutory exception was adopted, the Supreme Court decided the two forfeiture cases which limit defendants’ Sixth Amendment rights.

---

23. 18 U.S.C. § 1957(f)(1) (1988).

24. Some writers had concluded that prosecuting attorneys under § 1957 would be unconstitutional. *See, e.g.,* Weinstein, *supra* note 1, at 386. *But see* Brickey, *Tainted Assets*, *supra* note 1, at 61 (attorney liability would not violate the Sixth Amendment); Wolfeich, *supra* note 1, at 861; Jacobs, *supra* note 1, at 310.

25. One writer suggests the amendment reflects Congress’ intent that the limits in the Department of Justice draft guidelines be read as part of the statute. *See* Jacobs, *supra* note 1, at 347. This is an interesting idea. However, the guidelines finally adopted differed from the draft guidelines Congress had before it when it passed the 1988 amendment. *Compare* the draft guidelines, *reprinted in* Wolfeich, *supra* note 1, at 870 with the final guidelines, DOJ MANUAL, *supra* note 17, at 9-105.000 to .800, discussed *infra* in notes 30-37 and accompanying text. Therefore, the idea that Congress relied on the draft guidelines is helpful in defining Congress’s intent, but it does not mean that Congress’s intent is consistent with the Department of Justice guidelines in effect today.

26. *United States v. Gouveia*, 467 U.S. 180, 191 (1984).

27. *See generally* Brickey, *Tainted Assets*, *supra* note 1, at 61 (“A generalized concern that a suspect would be better off if he were represented by counsel while under investigation simply does not implicate sixth amendment rights.”).

Moreover, because the § 1957 amendment is keyed to the Sixth Amendment, some writers believe that the forfeiture cases, *Monsanto* and *Caplin & Drysdale*, render the exception meaningless.

Because the section 1957 exception is keyed to the Sixth Amendment, many writers believe that the forfeiture cases render the exception meaningless.<sup>28</sup> No other constitutional challenges to section 1957 have been successful.<sup>29</sup>

The Department of Justice has adopted internal guidelines which also limit the use of section 1957 against lawyers.<sup>30</sup> As a threshold, these guidelines require that the property transferred to the lawyer be a bona fide fee, not a sham designed to hide the property.<sup>31</sup> If this condition is met, the Department of Justice will only prosecute lawyers who have actual knowledge that the fee was generated by crime, even if the lack of actual knowledge is due to the lawyer's willful blindness.<sup>32</sup> The lawyer's actual knowledge cannot come from confidential lawyer-client communications or the lawyer's own efforts in the course of representing the client.<sup>33</sup> Practically, the lawyer's knowledge will need to have existed before the representation began.<sup>34</sup> The relevant time for determining the lawyer's knowledge is the time of the financial transaction, not the time the fee is received.<sup>35</sup> Finally, the Justice Department says it will not inform a lawyer that the fee may be criminally derived solely for the purpose of giving that lawyer the forbidden actual knowledge.<sup>36</sup> These guidelines restrict the factors on which the Department of Justice will rely in deciding to prosecute lawyers, but their impact is uncertain. The guidelines are not binding on the Department,<sup>37</sup> and they only apply to the decision to

---

28. See, e.g., ABA RICO PRACTICE GUIDE, *supra* note 1, at 3. On the other hand, it can be argued that Congress intended to alter the 1957 statute in accord with the Sixth Amendment as it existed at the time, and subsequent changes in the scope of the Sixth Amendment are irrelevant to its legislative intent.

29. No reported cases have sustained constitutional challenges to section 1957. See generally Randall, *supra* note 1, at 1341-65.

30. DOJ MANUAL, *supra* note 17, at 9-105.600.

31. *Id.* at 9-105.610.

32. *Id.* at 9-105.620. Other defendants would be liable under a willful blindness theory. *Id.* at 9-105.500. "Willful blindness" is a doctrine which allows the government to prove the defendant's guilty knowledge by showing conscious avoidance of knowledge, or "ostrich-like" behavior. See generally *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (*en banc*), *cert. denied*, 426 U.S. 951 (1976); Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEXAS L. REV. 1351 (1992); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).

33. DOJ MANUAL, *supra* note 17, at 9-105.600.

34. See *id.* at 9-105.630.

35. *Id.* at 9-105.400.

36. *Id.* at 9-105.700.

37. *Id.* at 9-105.700 ("This policy statement is not intended to create or confer any

prosecute, not to the prosecution itself.<sup>38</sup>

These two restrictions on section 1957's application to lawyers, the statutory Sixth Amendment exception and the Department of Justice's internal guidelines, are doubtful in their reach and effect. The statutory Sixth Amendment exception to the extent it has any meaning in the wake of the forfeiture cases, probably applies only to lawyers whose clients have been indicted. The Department of Justice guidelines are not enforceable. Section 1957 may still be applied to criminal defense lawyers who are paid with criminally-derived funds.

### B. Section 6050I — Reports of Cash Transactions

Section 6050I requires persons to report to the Internal Revenue Service cash payments they receive in their trade or business if the payments are over \$10,000.<sup>39</sup> Sanctions for failure to report section 6050I transactions are robust. Criminal penalties include imprisonment up to five years and fines;<sup>40</sup> civil penalties are also available.<sup>41</sup>

The section 6050I reporting obligation clearly extends to lawyers

---

rights, privileges, or benefits on prospective or actual witnesses or defendants. Nor is it intended to have the force of law or of a United States Department of Justice directive.") (citing *United States v. Caceres*, 440 U.S. 741 (1979)).

38. Adams, *supra* note 1, at 151:305 (guidelines govern only decision to prosecute, not trial strategy).

39. I.R.C. § 6050I(a) (1988) ("Any person — (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than \$10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b) . . ."). This statute was adopted to close a loophole in the currency reporting laws. The other federal reporting laws, adopted in 1970, require reports of all cash transactions over \$10,000 at financial institutions. 31 U.S.C. § 5313(a) (1988), and reports of cash and bearer financial instruments over \$10,000 that are imported to or exported from the U.S. *Id.* § 5316. Section 6050I was adopted in 1984 to reach large cash payments for goods and services. For example, section 6050I requires a report if cars, jewelry, or gold are purchased with cash. *See* Treas. Reg. § 1.6050I-1(c)(1) (1992). *See also id.* § 1.6050I-1(c)(1)(vii) (examples 1-3). Together, the three reporting requirements mean that the government is informed of basically all large cash transactions.

40. Fines can be \$250,000. *See* 18 U.S.C. § 3571. This is the sanction for failure to report or to supply information. Sanctions for filing a false § 6050I return are imprisonment up to 3 years and fines of \$100,000 for individuals, \$500,000 for corporations. *Id.*; 18 U.S.C. § 3571 (1988). And, of course, these maximum sanctions are affected by the sentencing guidelines.

It is unclear whether the sanctions of I.R.C. § 7201 (tax evasion) apply to § 6050I filings because those filings do not involve any tax liability.

41. Civil sanctions are a \$50 penalty for each failure to file. I.R.C. § 6721(a). For intentional failure to file the report required by § 6050I, the penalty is the greater of 10% of the aggregate amount of the items which were required to be reported or 10% of the taxable income derived on the transaction. *Id.* § 6721(b).

who receive cash fees over \$10,000. In fact, the section 6050I regulations use a lawyer as an example.<sup>42</sup> Information required on the reporting form includes the name, address and taxpayer identification number of the payor and the lawyer, the name, address and taxpayer identification number of the client if the fee is paid by a third party, the amount of cash, the amount paid in denominations of \$100 bills or larger, and the date and nature of the transaction.<sup>43</sup>

Lawyers have argued that compelling the disclosure of clients' identities, the fact that clients paid cash, and the amount of cash is unconstitutional under the Fifth and Sixth Amendments.<sup>44</sup> These

---

42. See 26 C.F.R. § 1.6050I-1(c)(7)(iii) (example 2) (1992) ("An attorney agrees to represent a client in a criminal case with the attorney's fee to be determined on an hourly basis. In the first month in which the attorney represents the client, the bill for the attorney's services comes to \$8000 which the client pays in cash. In the second month in which the attorney represents the client, the bill for the attorney's services comes to \$4000, which the client again pays in cash. The aggregate amount of cash paid (\$12,000) relates to a single transaction . . . , the sale of legal services relating to the criminal case, and the receipt of cash must be reported under this section.").

43. Reporting under § 6050I is accomplished by filing IRS Form 8300. A copy of Form 8300 is included as an appendix.

44. *United States v. Goldberger & Dubin*, P.C., 935 F.2d 501 (2d Cir. 1991).

This case has an interesting history. Lawyers objecting to the forms had filed them but omitted all information that identified the client. See Alexander Stille, *Both Sides Claim Disclosure Win*, NAT'L L.J., Mar. 26, 1990 at 32; Richard L. Fricker, *Doing Time: Fight Over Fee Disclosure Lands Five Lawyers in Tulsa Jail*, A.B.A. J., Feb. 1990, at 24. The IRS's initial policy until 1989 was not to pursue lawyers who filed incomplete forms. See Linda P. Campbell & William Grady, *Drug War Targets Defense Lawyers*, CHI. TRIB., May 20, 1990, § 1, at 25; David F. Axelrod & Steven M. Harris, *The Perils of Getting Paid in Cash*, CRIM. JUST., Winter, 1989, at 6, 42. In 1989, the IRS changed its policy. See Laurie P. Cohen & Richard B. Schmitt, *Legal Beat: IRS Presses Lawyers on Clients Using Cash*, WALL ST. J., Nov. 2, 1989, at B9; Stille, *supra*; Campbell & Grady, *supra*. As part of an IRS effort dubbed "Attorneys Project," some 950 computer-generated letters were directed to lawyers nationwide regarding 2,400 Form 8300's that failed to identify the payor of the cash. *U.S. Moves Against Lawyers in Cash Transaction Cases*, Laws. Man. on Prof. Conduct (ABA/BNA) 6 Current Reports No. 4, at 83 (Mar. 28, 1990) [hereinafter *ABA/BNA Lawyer's Manual*]; Stille, *supra*. Subsequently, subpoenas were issued to approximately 90 of these lawyers to obtain testimony regarding the information not reported in the Form 8300s. *ABA/BNA Lawyer's Manual, supra*, 6 Current Reports No. 4, at 84 (Mar. 28, 1990).

Ultimately, the IRS filed summons enforcement actions against two law firms. See *United States v. Fischetti*, No. M-18-304 (S.D.N.Y. Nov. 16, 1989)(VLB) (Order to Show Cause). This case involved the failure of a law firm to submit a complete 8300 form. During the lawsuit, the National Association of Criminal Defense Lawyers (NACDL) and other interested parties submitted an amicus brief which argued that § 6050I created constitutional dilemmas for lawyers. *Amici* alleged that complying with § 6050I would violate a client's Sixth Amendment rights in three ways. First, it was alleged that the report would interfere with the client's ability to retain counsel by discouraging a cash-paying client from retaining a lawyer out of fear that the government would then investi-

constitutional challenges have been rejected,<sup>45</sup> however, so the reporting requirements of section 6050I are important to lawyers.<sup>46</sup>

### C. Criminal Forfeiture of Fees

Forfeiture laws pose a different kind of risk for lawyers, a risk more like civil than criminal liability. The risk is that the lawyer will have to give up money earned as a fee.

The criminal forfeiture laws provide that with certain crimes, the defendant may have to forfeit property involved in the crime.<sup>47</sup> This

---

gate. Furthermore, § 6050I was said to discourage the free and open communication that is necessary between a lawyer and client. The client will not be willing to communicate fully with the lawyer when the client knows that the government will receive detailed information about the client from the 8300 form. Finally, the Sixth Amendment was claimed to be implicated because § 6050I destroys the lawyer-client relationship through the disqualification of the choice of counsel. Prosecutors who learned that opposing lawyers had submitted 8300 forms would designate these lawyers as government witnesses, subpoena them to testify, and then attempt to disqualify them from any further representation of their clients.

The *amici* also contended that § 6050I violated the Fifth Amendment. First, they claimed that the Fifth Amendment guarantee of due process includes a client's right to effective representation of counsel and that § 6050I interferes with effective assistance by damaging the lawyer-client relationship as described above. Second, the *amici* alleged that compelling the lawyer to supply information about the client may implicate the Fifth Amendment privilege against self-incrimination. The *amici* gave the examples of client identity and fee amounts as examples of information on Form 8300 which is potentially incriminating. The *amici* further argued that disclosure of a client's identity may be relevant to criminal forfeiture and other federal offenses. For example, evidence of fee payments may alert prosecutors to argue that these payments are proceeds of illegal activity. The final Fifth Amendment argument was that if the client cannot be compelled to produce the information, the lawyer cannot be compelled to produce the information either. Otherwise, the government could make an "end run" around the Fifth Amendment by making the lawyer disclose information that could not be compelled from the client. *Id.* at 25-47.

The trial judge ordered the lawyers to complete the reporting form. *United States v. Fischetti*, No. M-18-304 (S.D.N.Y. Mar. 13, 1990).

45. See *Goldberger & Dubin, P.C.*, 935 F.2d at 501.

46. The Department of Justice does not plan to give lawyers special treatment under section 6050I. See Letter from James A. Bruton, Deputy Assistant Attorney General, Tax Division, to Michael S. Ross, Chair, ABA Grand Jury Committee (Sept. 7, 1990) (on file with the authors).

47. See 18 U.S.C. §§ 982 & 1963 (1988); 21 U.S.C. § 853 (1988). These forfeiture statutes differ some in their definitions of what property is subject to forfeiture. Basically, § 982(a)(1) allows forfeiture of any property, real or personal, involved in the offense and any property traceable to such property; § 1963(a) allows forfeiture of any interest acquired or maintained in violation of RICO, any interest in the enterprise, and all proceeds of RICO violations; and § 853(a) allows forfeiture of all proceeds of violations, direct and indirect, all property used or intended to be used to facilitate violations, and any interest in a continuing criminal enterprise. Aside from these and some other insignificant differ-

forfeiture is in addition to the regular sanctions of fines and imprisonment.<sup>48</sup> Crimes which allow forfeiture are RICO,<sup>49</sup> drug felonies,<sup>50</sup> money laundering,<sup>51</sup> and various bank fraud and corruption crimes.<sup>52</sup>

The forfeiture laws include provisions designed to stop defendants from dissipating or hiding the tainted assets.<sup>53</sup> A "relation back" clause states that the forfeited assets belong to the government as of the date the crime was committed.<sup>54</sup> Assets in the defendant's hands may be restrained before conviction.<sup>55</sup> A "substitute assets" clause allows the government to confiscate the defendant's clean assets if the defendant hid, commingled or diminished the dirty ones.<sup>56</sup> Finally, assets the defendant has transferred to third parties may be seized from the third parties.<sup>57</sup>

Among the third parties who may suffer forfeiture are the defendant's lawyers. The Supreme Court has ruled that these criminal forfeiture laws apply to lawyers' fees and that forfeiture of fees is constitutional.<sup>58</sup> To the extent a defendant pays a lawyer with forfeitable

ences, the three forfeiture statutes are similar. Hereafter we will rely primarily on the drug forfeiture statute, 21 U.S.C. § 853.

The history and operation of the criminal forfeiture laws are thoroughly discussed in Brickey, *Forfeiture*, *supra* note 1, and William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613 (1984).

48. Congress hopes that forfeiture will allow the government to strip criminal organizations of their economic power. *See, e.g.*, S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983); H.R. REP. NO. 845, 98th Cong., pt. 1, at 6 (1984). *See also* 116 Cong. Rec. 607 (1970) (remarks of Sen. Byrd); 116 CONG. REC. 35193 (1970) (remarks of Rep. Poff); S. REP. NO. 520, 97th Cong., 2d Sess. 2 (1982).

49. 18 U.S.C. § 1963 (1988).

50. 21 U.S.C. § 853 (1988).

51. 18 U.S.C. § 982 (forfeiture based on violations of 31 U.S.C. §§ 5313, 5324 and 18 U.S.C. §§ 1956 & 1957). *See also* 31 U.S.C. §§ 5315 & 5316 (1988).

52. *See* 18 U.S.C. § 982 (1988) (forfeiture based on violations of 18 U.S.C. §§ 215, 656-657, 1005-1007, 1014, 1341, 1343, or 1344 affecting a financial institution). These crimes were added to the forfeiture statute in 1989 as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, §§ 961 & 963, 103 Stat. 183, 499-501, 504-05 (1989) (codified at scattered sections of 18 U.S.C.).

53. *See, e.g.*, S. REP. NO. 225, *supra* note 48, at 200-01 (1984 amendments' purpose is to close a loophole whereby forfeiture could be avoided by sham transactions).

54. *See* 21 U.S.C. § 853(c) (1988); 18 U.S.C. § 1963(c) (1988).

55. *See* 21 U.S.C. § 853(e); 18 U.S.C. § 1963(d) (1988).

56. *See* 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m) (1988).

57. *See* 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c) (1988).

58. *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). These cases are intelligently discussed in Jacobs, *supra* note 1. *See also* Notes cited *supra* note 1.

assets, the government can seize the fees from the lawyer. Once the government proves that property used to pay the lawyer is forfeitable and was transferred to the lawyer after the date of the crime, the only defense the lawyer has is the bona fide purchaser defense.<sup>59</sup> The lawyers must prove in a post-trial hearing that at the time they received the fee, they were "reasonably without cause to believe" the property was subject to forfeiture.<sup>60</sup> Lawyers defending RICO, drug felony, money laundering, and financial institution fraud cases risk losing their fees if they cannot meet this standard.

The Department of Justice has adopted internal guidelines which limit situations where it will seek forfeiture of lawyers' fees.<sup>61</sup> Assuming the payment to the lawyer is not a sham transfer (that is, the fee is a bona fide payment for services rendered on a criminal case) the government will only pursue forfeiture when it has reason to believe the lawyer has actual knowledge that the asset is forfeitable.<sup>62</sup> Thus, under the guidelines, a lawyer who avoids actual knowledge even by willful blindness will not be liable for forfeiture.<sup>63</sup> Further, the lawyer must have the actual knowledge at the time the fee is earned,<sup>64</sup> so if

---

59. 21 U.S.C. § 853(c) & (n)(6) (1988). This conclusion is consistent with *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements known as 92 Buena Vista Avenue, Rumson, N.J.*, 52 Crim. L. Rep. 2231 (1993). *Buena Vista* holds, *inter alia*, that transferees can assert the innocent owner defense to protect interests in property acquired *after* the illegal transaction giving rise to forfeiture. This conclusion is consistent with the pattern we analyze for lawyers: in trying to qualify as bona fide purchasers, the lawyer will have acquired her interest in the property after the date of the act giving rise to forfeiture.

60. *Id.*

61. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL 9-111.000 to 9-111.700, reprinted in ABA RICO PRACTICE GUIDE, *supra* note 1, at B-1 [hereinafter DOJ FORFEITURE GUIDELINES] ("Policy with Regard to Forfeitures of Assets Which Have Been Transferred to Attorneys as Fees for Legal Services."). These guidelines were omitted from the Manual in 1989, but the impact of this is unclear. The Department still adheres to the guidelines. See ABA RICO PRACTICE GUIDE, *supra* note 1, at B-1 n.\*.

62. DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.430.

63. The Department of Justice guidelines do not explicitly reject willful blindness, but its rejection is indicated by two factors. First, the knowledge that a criminal defense attorney must have is always described in the guidelines as "actual" knowledge. The only meaning this term can have is to eliminate imputed knowledge or willful blindness. Second, the mental state required for attorneys doing civil work — "reasonable cause to know" the asset was forfeitable — expresses a willful blindness-type standard and provides a contrast with the "actual knowledge" standard prescribed for attorneys doing criminal work. See DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.420 to .430.

64. See *id.* at 9-111.501. This guideline states that:

a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to

the fee is earned and the lawyer finds out later the money was tainted and forfeitable, the government will not seek forfeiture. Finally, the knowledge that an asset is subject to forfeiture must relate to a specific asset,<sup>65</sup> and the Department's evidence of the lawyer's knowledge must come from sources other than compelled disclosure of confidential communications from the client.<sup>66</sup>

Like the Department of Justice guidelines on section 1957, these forfeiture guidelines are solely for the Department's internal use. They are not enforceable in any way,<sup>67</sup> and they govern only the Department's decision to pursue forfeiture, not how the Department will proceed once the decision is made.<sup>68</sup> The government's self-imposed limits are some protection for lawyers, but forfeiture is still a threat to fees. And, of course, the threat is greater if the Department of Justice disregards the voluntary limits.

These three laundering laws affect lawyers in several ways. If lawyers deposit fees over \$10,000 and the property is derived from certain crimes, they may be criminally liable under section 1957 if they knew what their client was doing. If lawyers are paid over \$10,000 in cash, they must report the transaction to the government under section 6050I. Intentional failure to report is a crime. And if lawyers take tainted fees from defendants who get convicted of certain crimes, the lawyers may forfeit their fees to the government.

The Justice Department's guidelines on the use of the laws against lawyers<sup>69</sup> reduce the risks for lawyers. Given the voluntary

---

an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset.

*Id.* For a non-refundable retainer, the fee is earned on transfer. But if the client is billed hourly, the time of transfer is not necessarily the same as the time at which the fee is earned. *See infra* text accompanying notes 114, 145-49.

65. DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.430.

66. *Id.* This exclusion of confidential communications is narrower than the DOJ Guidelines applicable to section 1957. Those guidelines exclude confidential communications and the lawyer's investigative efforts. *See supra* note 32 and accompanying text.

67. DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.400 ("These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice."). *See also* United States v. Caceres, 440 U.S. 741 (1979); *supra* note 36.

68. *See supra* note 38.

69. These guidelines are discussed *supra* in text accompanying notes 30-38 & 61-68.



nature of those guidelines,<sup>70</sup> however, the potential impact of the laws on lawyers remains a threat. The reality of the defense lawyers' world includes the possibility that the Department might disregard its own policies. For these lawyers, the possibility of the laws' full application to their practice is a justifiable concern. In this article, therefore, the impact of the laws will be analyzed under the assumption that the Department will not adhere to its guidelines in order to consider the full potential effect of the laws on defense lawyers.<sup>71</sup>

Constitutionally, these laws can be applied to lawyers. The remaining question is whether they should be applied to lawyers.<sup>72</sup> One possible danger is that the laws cause lawyers to act unethically. Whether they do is the question to which we now turn.

## II. THE LAWS' ETHICAL IMPACT

Commentators have criticized the money laundering laws' effect on lawyers, claiming that the laws raise ethical problems for defense lawyers.<sup>73</sup> Ethics questions are raised in six areas: competent repre-

---

70. The guidelines are viewed by the Department and by the courts as non-binding. *See supra* notes 38 & 67. Moreover, they apply only to decision to prosecute, as described *supra* in notes 38, 68.

71. We recognize that if the Department adheres to its guidelines, much of the potential for harm to lawyers and their ethics will be reduced. *See Brickey, Forfeiture, supra* note 1, at 536-38 (discussing Justice Department guidelines for forfeiture cases).

72. The joint dissent in *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), noted that although the Court's decision may have resolved the constitutional issue, the debate about the wisdom of the application of the forfeiture law to lawyers should continue. *Caplin & Drysdale*, 491 U.S. at 656 (Blackmun, J., dissenting) ("This Court has the power to declare the Act constitutional, but it cannot thereby make it wise.").

73. *See, e.g., DuMouchel & Oberg, supra* note 1, at 60; Albert J. Krieger & Susan W. Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737, 741 (1985); Ephraim Margolin & Bradford Battson, *Fee Forfeiture in Federal Criminal Cases*, TRIAL, Sept. 1987, at 27-28; Geoffrey A. Haddad, Note, *Caplin & Drysdale, Chartered v. United States: Constitutionalizing Attorney Fee Forfeitures with Ethical Dilemmas for the Criminal Defense Bar*, 19 CAP. U. L. REV. 825, 826 (1990) (forfeiture laws present "insoluble ethical dilemmas" and a "minefield of ethical traps" for criminal defense lawyers); Richard W. Mass, Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663, 671-74 (1987); Elizabeth A. Raies, Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 W. VA. L. REV. 825, 844-45 (1986); Elizabeth E. Stanulis, Comment, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. RICH. L. REV. 589, 601 (1987); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("ethical problems of great magnitude").

sentation, unreasonable fees, conflicts of interest and plea negotiations, contingent fees, confidentiality, and the lawyer as witness.

### A. *Competent Representation*

One ethical concern about the impact of the money laundering laws is that the laws impede lawyers' duty to represent clients competently.<sup>74</sup> Specifically, section 1957 is said to cause lawyers to avoid the discovery of facts which would result in knowledge that the fee is criminally derived, because that knowledge could lead to the lawyers' own criminal liability under that provision.<sup>75</sup> Similarly, some argue that the criminal forfeiture laws cause lawyers to avoid facts that would undermine a possible fee forfeiture defense for them.<sup>76</sup> Thus, it is maintained, the laws reward ignorance and, as a result, encourage lawyers to provide inadequate investigation.

More specifically, that argument is based on the mens rea requirement in section 1957 and the availability of a bona fide purchaser defense to fee forfeiture. To violate section 1957 a lawyer must "knowingly" engage in a monetary transaction in property that is criminally derived.<sup>77</sup> Arguably, a lawyer who avoids acquiring information which would lead to that knowledge can avoid criminal liabil-

74. Margolin & Battson, *supra* note 73, at 27-28; Haddad, *supra* note 73, at 839; Stanulis, *supra* note 73, at 601-02.

75. Brickey, *Tainted Assets*, *supra* note 1, at 49 (recounting argument); Wolfeich, *supra* note 1, at 847-48 (recounting NACDL argument that § 1957 would cripple the adversary system); Boylston, *supra* note 1, at 959.

76. *Caplin & Drysdale*, 491 U.S. at 649-50 (Blackmun, J., dissenting); Margolin & Battson, *supra* note 73, at 27-28; Wolfeich, *supra* note 1, at 863; Boylston, *supra* note 1, at 954-55; Haddad, *supra* note 73, at 838-39; Mass, *supra* note 73, at 672-73; Stanulis, *supra* note 73, at 601-02.

The amicus brief of the ABA in *Caplin & Drysdale* emphasized the law's incentive for ignorance:

If counsel fees are indeed forfeited at trial, the sole statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears the burden of proving his ignorance of the facts which support the forfeiture verdict . . . . Whereas, before and during trial, counsel must investigate and master all relevant evidence to defend his client, after trial, counsel must prove his ignorance of both the facts leading to fee forfeiture and the government's forfeiture contentions . . . .

Brief Amicus Curiae of the American Bar Association at 17-18, *Caplin & Drysdale*, Chartered v. United States, 491 U.S. 617 (1989) (No. 87-1729).

Even the Justice Department's guidelines recognize the impact that fee forfeiture can have on preventing the free flow of information between the lawyer and client. DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.230.

77. 18 U.S.C. § 1957 (1988), discussed *supra* in text accompanying notes 4-38.

ity. Similarly under the forfeiture law, those who can establish that they were bona fide purchasers and were reasonably without cause to believe that the property transferred to them was subject to forfeiture can avoid that result.<sup>78</sup> Lawyers trying to protect their fees might be inclined to avoid the information that would give them reasonable cause to believe their fee was involved in a forfeiture crime.

The law of legal ethics, of course, requires lawyers to provide their clients with competent representation.<sup>79</sup> Such representation includes adequate investigation and thorough preparation,<sup>80</sup> including inquiry into all relevant facts known to the client.<sup>81</sup> Section 1957 and the forfeiture law appear to provide some legal advantage for the ignorant and, therefore, to dissuade lawyers from seeking certain knowledge about their clients. The laws thus arguably generate a conflict between the clients' interest in having fully informed lawyers and the lawyers' interest in avoiding their own criminal liability and in keeping their fees. It is feared that some lawyers may yield to these disincentives and their own personal interests, fail to become adequately informed about all matters bearing on the criminal represen-

---

78. 21 U.S.C. § 853(c) (1988), discussed *supra* in text accompanying notes 46-68.

79. Rule 1.1 of the Lawyers are obligated to provide "competent representation" to a client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) [hereinafter MODEL RULES]. The Model Rules are the ABA's most recent statement of the ethical obligations of lawyers and have been adopted with varying modifications by 34 states and the District of Columbia. State Ethics Rules, *ABA/BNA Lawyer's Manual*, *supra* note 44, at 01:3-4 (July 15, 1992).

Under the ABA's 1969 Model Code of Professional Responsibility, a lawyer was prohibited from representing a client in a legal matter unless competent to handle it, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101(A)(1) (1969) [hereinafter MODEL CODE], and from handling a legal matter without adequate preparation. *Id.* DR 6-101(A)(2).

80. MODEL RULES Rule 1.1 and cmt. 5; MODEL CODE EC 6-4.

81. Neither the Model Rules nor the Model Code provides unequivocal expression of this aspect of competent representation, although thorough investigation is logically a necessary component of it. Other standards of the American Bar Association, however, state the obligation directly. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standards 4-3.2(a) (1979) ("As soon as practicable the lawyer should seek to determine all relevant facts known to the accused."). *See also id.* Standard 4-4.1 ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."). Furthermore, the Standards clearly declare that lawyers should not be dissuaded from this duty by their own interests. *Id.* Standard 4-1.6 ("considerations of personal and professional advantage should not influence the lawyer's advice or performance.").

tation, and thereby provide less than competent representation to their clients. In particular, lawyers might avoid investigating their clients' fee payments, but the laws could inhibit lawyers' broader investigations, too.

### 1. *Questions About the Fee*

The information most relevant to the lawyer's liability under section 1957 and fee forfeiture is information concerning the legitimacy of the source of the fee. Lawyers wary of those provisions could react by avoiding inquiries about the source of the fee. Whether that avoidance would diminish the competent representation of the client, however, is not clear. A lack of information on the legitimacy of the source of the fee would only reduce the competence of the lawyer's representation if it affects the substantive defense of the client. This is not inevitably so, but to examine the laws' potential for reducing lawyers' competence, we can assume that it does.<sup>82</sup>

The lawyer's questions about the legitimacy of the source of the fee may be direct or indirect. Although the direct question is awkward, many lawyers are asking it. As for indirect questions, far from discouraging such questions, the laws actually encourage them.

#### a. *The Direct Question About the Fee*

Some argue that the laws will dissuade lawyers from asking their clients directly about the legitimacy of the source of their fee.<sup>83</sup> On the contrary, anecdotal evidence shows that many lawyers are asking this question.<sup>84</sup> For lawyers who choose not to ask this direct question, it is not an effort to avoid bad news. Rather, the reason is that the question is awkward and rude.<sup>85</sup> It is especially sensitive because

---

82. See, notes 49-52 *supra*, and accompanying text. Forfeiture is now widely available. Furthermore, we assume that the source of the fee is only an issue in cases where the lawyer is consulted about crimes which allow forfeiture or other suspicious factors arise.

See, factors listed in ABA RICO Practice Guide, *supra*, note 1 at 33 (size of payment whether it is in cash, whether it is paid from an off-shore account, and whether client has apparently legitimate source of income).

83. See RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS 178 (Supp. 1990).

84. See correspondence on file with *Syracuse Law Review* (letter from Kirk Monroe and notes of telephone conversation with Gordon Greenberg).

85. It has been noted more broadly that lawyers tend to be generally reluctant to discuss legal fees with clients. See, e.g., Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 953 (only 27 of 45

it will be asked when the fee is first tendered, at a time when the lawyer's relationship with the client is new and the lawyer is trying to encourage trust and confidence.

Aside from it being rude, lawyers may eschew the direct question because even when it is asked, more investigation is still required. Lawyers who ask the explicit question about whether the fees were criminally derived will have to explain to the client why they are asking such a question.<sup>86</sup> The explanation will likely signal the client that the right answer in terms of the client's interests is that it is clean. Thus the client's response to the direct question may not be reliable. In weighing the factors on whether there is reasonable cause to believe the fee is dirty, the client's mere assertion that it is clean may not alone be sufficient. Under the forfeiture laws, the lawyer carries the burden of proving by a preponderance that he was "reasonably without cause to believe" the fee was subject to forfeiture.<sup>87</sup> It would be risky for a lawyer to assume she could carry this burden merely by proving that she asked the client if the fee was clean and the client said it was. Thus, even if the lawyer does ask the direct question, she will still need to investigate further to meet the statutory standard.

---

lawyers interviewed regularly discussed and obtained agreements regarding fees at initiation of representation); Alan D. Hutchinson, *Getting Paid*, 34 RES GESTAE 24, 24 (1990) ("Even experienced lawyers would prefer to skirt the issue [of fee discussions]."); Robert W. McMenamin, *10 Ways to Avoid Fee Trouble*, in 2 LAW OFFICE ECONOMICS & MANAGEMENT MANUAL § 24:04 (Paul S. Hoffman ed., 1986) ("Many complaints against lawyers involve a lack of communication, much of it concerning fees."); JAMES W. McRAE, LEGAL FEES & REPRESENTATION AGREEMENTS 1 (1983) ("The single area of the practice with which most lawyers have the most difficulty is fees and billing."); KLINE D. STRONG & ARBEN O. CLARK, LAW OFFICE MANAGEMENT 175 (1974) ("Preparing bills to submit to clients for payment of legal services is probably the most onerous task which must be performed in the practice of law. Distasteful as the task is, it is nevertheless necessary."); DEBORAH HELLER & JAMES M. HUNT, PRACTICING LAW AND MANAGING PEOPLE: HOW TO BE SUCCESSFUL 137 (1988) ("Setting and discussing fees, billing clients, and collecting fees are areas many attorneys would prefer that someone else manage.").

The awkwardness and reluctance that many lawyers feel about any discussion with clients regarding fees may reflect the historical characterization of the practice of law as a learned profession rather than a common business or trade. See HENRY S. DRINKER, LEGAL ETHICS 169-70 n.5 (1953) (relating the tradition of the British bar, by which the client paid his fee by inserting it in a purse hanging at the back of the lawyer's garb, still reflected by the symbolic purse at the back of the modern barrister's gown).

86. The explanation from the lawyer would be that the lawyer is asking because if the fee is dirty and the lawyer knows this at a certain time, the lawyer may lose the fee or face criminal liability. The explanation will reveal, explicitly or implicitly, that the lawyer is inquiring to be sure the fee is clean to protect himself or herself.

87. See 21 U.S.C. § 853(c) (1988).

The lawyer who does nothing to pursue the reasonableness of the client's answer is taking a risk that she will not be able to establish bona fide purchaser status. Likewise, for section 1957, reliance on the client's mere assertion without further investigation would be unwise, although probably not as dangerous as in the forfeiture context.<sup>88</sup>

A direct question on the legitimacy of the fee is often asked. When not asked, it is not because the answer may be dangerous under the laundering laws but because the question is painful and the client's assertion of cleanliness will be helpful but not conclusive in avoiding the impact of the laws.<sup>89</sup>

*b. Indirect Questions About the Fee*

Direct questions on the legitimacy of the source of the fee are one approach for defense lawyers. Questions about the client's age, schooling, work history and family background will also give the lawyer an indication whether the client could have accumulated sufficient clean assets to pay the fee.<sup>90</sup>

Anecdotal evidence suggests lawyers are asking these indirect questions.<sup>91</sup> If they are not, they should be. Such questions are one way for lawyers to protect themselves from getting involved in a case which results in forfeiture of fees or their own indictment.

Lawyers facing potential criminal liability under section 1957 or

---

88. It is easier for the government to impose the forfeiture sanction than section 1957 liability because the mens rea and burdens of proof differ. The mens rea of forfeiture is lower than that of section 1957 ("reasonably without cause to believe" for forfeiture as opposed to "knowingly" for section 1957) and the burden of proof for forfeiture is on the lawyer (by a preponderance) rather than on the government (beyond a reasonable doubt).

89. In an ABA monograph, the RICO Cases Committee recommends that lawyers ask the direct question on the source of the fee. See ABA RICO PRACTICE GUIDE, *supra* note 1, at 33. The Committee recommendation that lawyers ask the question will surely increase the likelihood that lawyers will ask it, even though it remains awkward and other investigation is required.

90. For example, a client who is 32 years old, with little education and no developed business or career who can pay a large fee (with or without the assertion that it is clean) is riskier than a middle aged person with a business or career.

91. See *ABA Meeting Features Programs on Fee Forfeiture, Government Investigative Tactics*, 49 Crim. L. Rep. (BNA) 1499-1501 (1991) [hereinafter *ABA Meeting*] (panel discussion at 1991 ABA Annual meeting). As an alternative to quizzing clients, many defense attorneys are now relying on prosecutors' representations that they will not pursue the fees. See, correspondence and notes of telephone interviews on file with *Syracuse Law Review*. This new approach is more evidence of the "informal professional culture" between these specialized bars mentioned *infra* in n. 131.

fee forfeiture should be more, rather than less, likely to inquire about the facts surrounding their fee payments. Far from discouraging such questions, the laundering laws actually operate to the contrary by providing incentives for lawyers to inquire about the source of the fee. The laundering laws encourage the questions because the laws make the lawyer's self-interest depend on the answer. It is therefore unlikely that the federal laws actually cause lawyers to refrain from asking, directly or indirectly, any questions about the fee that they asked previously before the laws were enacted.

## 2. *Investigation Generally*

Beyond the argument that the laws discourage lawyers from asking the client questions about the source of fees, some commentators have alleged that the federal laws more broadly discourage lawyers from investigating any facts suggesting their clients' guilt<sup>92</sup> in order to avoid knowledge which would preclude a later good faith defense to fee forfeiture<sup>93</sup> or which would raise a section 1957 problem for the lawyer.<sup>94</sup> The laws are thus said to promote studied ignorance rather than thorough inquiry. If this is true, the laws could be said to deter the sort of careful investigation necessary for ethical, competent representation of a client. But there are several reasons that forfeiture and section 1957 do not encourage knowledgeable, conscientious lawyers to rely on deliberate ignorance.

### a. *Manipulation of the Mens Rea*

The argument that the laundering laws encourage ignorance is premised on the assumption that lawyers will try to avoid the impact of the laws by manipulating their mens rea. But manipulation of the

---

92. The laws are not likely to affect lawyer's direct questions to clients about their guilt or innocence. Such information is rarely of interest to lawyers. This is because the client's view is generally based on a misconception of those terms. A client's guilt is a product of many factors, such as the client having engaged in the proscribed conduct, the client having possessed the required state of mind, the absence of affirmative defenses, and the ability of the prosecution to prove the elements of the crime beyond a reasonable doubt. The client's opinion regarding his own guilt is simply irrelevant to the defense lawyer. Section 1957 and the forfeiture law likely have no effect on this area of inquiry.

93. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 649-50 (1989) (Blackmun, J., dissenting). For citations noting this effect of the criminal forfeiture laws, see *supra* note 76.

94. For citations to authorities noting this effect of section 1957, see *supra* note 75.

mens rea by avoiding actual knowledge would not be enough to avoid the sanctions of forfeiture and section 1957.

As to forfeiture, if the client is convicted on the forfeiture count and the government pursues the fees, the only defense the lawyer has is the bona fide purchaser defense.<sup>95</sup> To meet this, the lawyer must prove by a preponderance of the evidence that the lawyer was a bona fide purchaser and was "at the time of purchase reasonably without cause to believe the asset was subject to forfeiture . . . ."<sup>96</sup> The mens rea standard, "reasonably without cause to believe," sounds like a negligence standard. It relies on *cause* to believe rather than actual belief, and the lack of cause to believe must be *reasonable*, again suggesting the standards of negligence. Even if this language is construed to state more than a negligence mens rea standard, it is clear that it states less than a knowledge mens rea standard.<sup>97</sup>

It will often be difficult for lawyers to meet this mens rea standard.<sup>98</sup> If the assets are specifically described in the indictment and

95. See 21 U.S.C. § 853(c) (1988) ("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) . . . 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 . . . ."). This assumes the transfer of the fee to the lawyer is after the date of the crime. *Buena Vista*, *supra* note 59. See also *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) ("Congress defined . . . two rather limited categories of third parties who are entitled to petition the courts for a hearing to adjudicate the validity of their interests in the forfeited property . . . . Those who fall outside [the] exceptions, regardless of how sympathetic they are, must petition the Attorney General for relief.").

96. 21 U.S.C. § 853(c) & (n)(6)(B) (1988).

97. The statute may articulate a recklessness standard. Recklessness is defined as acting to "consciously disregard a substantial and unjustifiable risk . . . . The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962). The distinction between recklessness and negligence is that "[r]ecklessness involves conscious risk creation; negligence involves the failure to perceive a risk of which one ought to have been aware." PHILLIP E. JOHNSON, CRIMINAL LAW 67 (4th ed. 1990).

As noted above, we are assuming the Department of Justice Guidelines on actual knowledge are not used.

98. Cases indicate how difficult it would be for criminal lawyers to prove they were reasonably without cause to believe the fee was forfeitable. See, e.g., *United States v. Long*, 654 F.2d 911, 917 (3d Cir. 1981) (under circumstances of the case, two lawyers experienced in criminal law could not qualify as being reasonably without cause to believe the fee was forfeitable). For example, the client's indictment on charges authorizing forfeiture puts the lawyer on notice that the fee is forfeitable, even where the indictment does



the lawyer receives the described property as a fee, the lawyer will clearly have cause to believe the fee is subject to forfeiture.<sup>99</sup> Where the indictment does not specifically describe assets or the client has not yet been indicted, however, the lawyer may be able to prove that he was reasonably without cause to believe that the fee payment was subject to forfeiture.<sup>100</sup> But it would be naive for the lawyer to assume she could meet this standard by deliberately avoiding investigation. If no suspicious circumstances are present,<sup>101</sup> the lawyer is truly

---

not identify the property specifically but merely tracks the statutory language. *See* *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983). The Supreme Court and the Department of Justice agree that lawyers will generally not qualify as being "reasonably without cause to believe" that property is subject to forfeiture. *See* *United States v. Monsanto*, 491 U.S. 600, 604 n.3 ("highly doubtful" that one who defends a client in a criminal case that results in forfeiture could prove that he was without cause to believe the property was forfeitable); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 632 n.10 (1989); DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.230 ("the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to [fall within the exception] . . ."); *Brickey, Forfeitures, supra* note 1, at 503 ("[T]he nature of a criminal defense lawyer's representation may preclude him from using the BFP provisions to shelter his fees from forfeiture."); *DuMouchel & Oberg, supra* note 1, at 68-70; *Margolin & Battson, supra* note 73, at 27 ("Defense practitioners are particularly vulnerable to the forfeiture statute because of the difficulty in proving that, at the time they earned the fees, they were 'reasonably without cause to believe that the property was subject to forfeiture.'"); *Thomas D. Morgan, An Introduction to the Debate Over Fee Forfeitures*, 36 EMORY L.J. 755, 758-59 (1987) ("In practical effect, no lawyer could take a fee from a defendant charged with a crime under RICO or CCE without such notice. Indeed, notice would be given by the charge itself.").

99. *See Caplin & Drysdale*, 491 U.S. at 632 n.10 ("[T]he only way a lawyer could be a beneficiary of . . . [the bona fide purchaser exception] . . . would be to fail to read the indictment of his client."). In *Caplin & Drysdale*, the petitioner conceded that a criminal defense lawyer would be unable to qualify as a bona fide purchaser if the indictment specified the forfeitable assets. *Id.* *See also* DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.511 (if property is specifically described, lawyer has actual knowledge); FED. R. CRIM. P. 7(c)(2); *William W. Taylor III, Forfeiture under 18 U.S.C. § 1963: RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 393 (1980); *Note, supra* note 73, at 838.

In some cases further notice to the lawyer is provided by a restraining order, issued *ex parte* by the district court at the time of the indictment, prohibiting the defendant from transferring any of the enumerated assets. Such orders are authorized by 21 U.S.C. § 853(e)(1) (1988). Under certain extreme circumstances, a restraining order may be issued even prior to indictment. *See id.*

100. *But see Raimondo*, 721 F.2d 476 (the client's indictment on charges authorizing forfeiture puts the lawyer on notice that the fee is forfeitable, even where the indictment does not identify the property specifically but merely tracks the statutory language).

101. MODEL PENAL CODE § 2.02(5) & (7) (Proposed Official Draft 1962). Indeed, willful blindness would also establish a mens rea of knowledge. *See id.* § 2.02(7); *Jewell*, 532 F.2d at 697.

ignorant, and this kind of ignorance is surely protected. In contrast, ignorance which is deliberate or willful because suspicious circumstances arose and the lawyer looked the other way is not protected. When a lawyer becomes suspicious and then deliberately avoids questions that would enlighten, that conduct is willful blindness.<sup>102</sup> Under traditional mens rea principles, willful blindness is more than enough to establish recklessness or negligence.<sup>103</sup>

Lawyers differ in the amount of risk they are willing to tolerate in regard to fees, but if any suspicious factors arise, it is unlikely that many would see intentional ignorance as a refuge from forfeiture. Because the mens rea standard is not safely avoided by deliberate lack of knowledge, forfeiture law does not encourage intentional ignorance.<sup>104</sup>

Under section 1957, the mens rea the government must prove is that the lawyer had knowledge the fee was criminally derived.<sup>105</sup> As with forfeiture, the lawyer could not avoid this mens rea merely by deliberately blinding himself to information. Such avoidance of information is classic willful blindness,<sup>106</sup> which will establish the mens rea of knowledge.<sup>107</sup> The lawyer relying on deliberately preserved igno-

---

102. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976) ("To the requirement of actual knowledge there is one strictly limited exception . . . [T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.") (quoting GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART*, § 57 (2d ed. 1961)).

103. *See, e.g.*, ABA RICO PRACTICE GUIDE, *supra* note 1, at 33 (listing factors such as the size of the payment, whether it is in cash, whether it is paid from an off-shore account, and whether the client has apparently legitimate sources of income).

104. Of course, it may be that lawyers misinterpret the mens rea standards and think they can avoid sanctions through deliberate blindness. If the law's harmful impact is a result of lawyers' misunderstanding, this is not evidence — it is a bad law.

The Justice Department's guidelines pertaining to forfeiture add an additional reason why lawyers generally need not reduce their investigation in order to protect their status as bona fide purchasers. Those guidelines provide that the department will pursue forfeiture only when "there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer." DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.430. Furthermore, that knowledge must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. *Id.* Additionally, the lawyer must have actual knowledge that the particular asset received as a fee was subject to forfeiture. *Id.* at 9-111.510.

105. 18 U.S.C. § 1957(a) (1988). *See supra* notes 16-17 and accompanying text.

106. *See Jewell*, 532 F.2d at 697.

107. MODEL PENAL CODE § 2.02(7). *See Jewell*, 532 F.2d at 697.

rance would not be in as much danger under the "knowingly" standard of section 1957 as she would be under the "reasonably-without-cause-to-believe" standard of forfeiture,<sup>108</sup> but it is still not a safe situation. Thus like forfeiture, section 1957 does not discourage investigation because as lawyers must know, willful blindness may itself be construed as knowledge and the mens rea requirement would be met.

*b. Manipulation of Other Elements*

Even if it were possible to manipulate the mens rea to avoid the sanctions of forfeiture and section 1957, it will often be unnecessary because other elements can be manipulated more readily. In the case of forfeiture, lawyers' cause to believe the fee was criminally derived is only relevant at "the time of purchase" of the lawyers' services.<sup>109</sup> If lawyers are paid a fee and only later develop cause to believe it was dirty, they are not subject to forfeiture. Thus the lawyer can reduce the risk of forfeiture by moving up "the time of purchase."<sup>110</sup>

Anecdotal evidence shows lawyers are doing this. Some lawyers have opted for non-refundable "global" or lump sum fees payable early in the representation.<sup>111</sup> Such fee agreements define the time of purchase of the lawyer's services as the initial payment,<sup>112</sup> rendering subsequent suspicions irrelevant. The entire fee is thereby protected.

There are several problems with this approach. The first is the

---

108. See *supra* notes 93-100.

109. 21 U.S.C. § 853(c) (1988).

110. Criminal defense lawyers typically utilize advance payments of fees. See MARTIN MAYER, *THE LAWYERS* 161 (1966) ("criminal practice is the one branch of the law where lawyers collect their fees in advance."); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT* 84 (1985); UNDERWOOD & FORTUNE, *supra* note 83, at 175 n.2 (Supp. 1991); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 514-15 (1991); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 734 (1977).

111. See *ABA Meeting*, *supra* note 91, at 1499 (comments of Charles Blau). In one extreme case, a Florida lawyer had clients pay him \$10,000 per person, as a form of pre-paid legal fee, before they engaged in drug-smuggling operations. If any of the persons involved were arrested during the operation, the lawyer would represent them without additional charge. The lawyer was convicted of conspiracy to import marijuana and to defraud the Internal Revenue Service. Martha Brannigan, *Lawyer is Convicted In Case Involving "Prepaid" Program*, WALL ST. J., July 20, 1989, at 5.

112. For further discussion of nonrefundable retainers, see *infra* text accompanying notes 141-42.

awkwardness of demanding a presumably large,<sup>113</sup> non-refundable<sup>114</sup> fee from the client early in the representation, before the client and lawyer have an established relationship. Such a demand may scare away clients or at least impair their trust. If the client is not driven off, it is often hard for the client to come up with the funds for such a fee all at once. Finally, the use of large, non-refundable lump sum fees may turn out to be unreasonable and therefore unethical.<sup>115</sup> To the extent a lawyer can define the "time of purchase" as early in the representation, though, it relieves any pressure to manipulate the mens rea by maintaining ignorance.

Similar arguments have been made that section 1957 will discourage adequate investigation.<sup>116</sup> This argument assumes that once lawyers suspect that the fee is criminally derived, they will continue with the case and try to avoid liability by preserving their technical ignorance. But the elements of section 1957, analyzed carefully, indicate that there are other ways lawyers can avoid liability without deliberately minimizing their knowledge of the case by limiting their investigation.

As described above, the conduct element of section 1957 is engaging in a monetary transaction in property worth over \$10,000 which is derived from specified unlawful activity.<sup>117</sup> Additionally, the lawyer must engage in this conduct with the prescribed mens rea, that is, knowing that the property is criminally derived.<sup>118</sup> Few lawyers will satisfy these elements.

First, if the client has already been indicted, the lawyer may sail into a statutory safe harbor based on the Sixth Amendment.<sup>119</sup> The definition of "monetary transaction" excludes all transactions necessary to preserve the right to representation as guaranteed by the Sixth Amendment.<sup>120</sup> Thus, an attorney depositing fees from a client after

---

113. The fee would need to be sufficiently large to cover the possibility of having to do a lot of work.

114. The fee would have to be non-refundable to make it clear that title passes at the time of transfer rather than as the work is done.

115. For further discussion of ethical treatment of nonrefundable retainers, see *infra* text accompanying notes 148-51.

116. See *supra* note 76-77.

117. See *supra* text accompanying notes 9-13.

118. See *supra* text accompanying notes 16-17.

119. See *supra* text accompanying notes 21-28.

120. 18 U.S.C. § 1957(f)(1) (1988), discussed *supra* in notes 21-28 and accompanying text.

indictment is not liable because the monetary transaction element is missing.

Even without this harbor, the timing of the monetary transaction is important. To face liability, the lawyer must have the mens rea at the time of the conduct.<sup>121</sup> For section 1957, that means the lawyer must know that the fee is criminally derived when it is deposited in the firm account or otherwise negotiated.<sup>122</sup> For criminal defense lawyers who often demand full payment before beginning work,<sup>123</sup> the likelihood is slight that they will investigate enough to learn that the fee is criminally derived before engaging in a monetary transaction with that fee.<sup>124</sup>

The timing element can also operate to protect a lawyer who does know that the fee is criminally derived. If the lawyer learns that the fee is criminally derived before engaging in a monetary transaction with it, the lawyer can hold the fee, delaying the monetary transaction until the client is indicted and the possible safe harbor opens.<sup>125</sup> Of course, if the client is never indicted, the lawyer never gets into that harbor. Yet if the client is never indicted, the likelihood that the lawyer will be prosecuted under section 1957 based on fees from that client is also reduced. Because it will be difficult for the government to prove that the fee was derived from specified unlawful activity by the client.

The section 1957 net, therefore, catches only those lawyers who are working for clients not under indictment and who receive fees over \$10,000 which the lawyers know are criminally derived at the

---

121. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 268 (2d ed. 1986) (“[I]t is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur . . . . The easiest cases are those in which the bad state of mind follows the physical conduct, for here it is obvious that the subsequent mental state is in no sense legally related to the prior acts . . . of the defendant.” (footnotes omitted)).

122. See DOJ MANUAL, *supra* note 17, at 9-105.400 (“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.”).

This assumes deposit in a firm account qualifies as a monetary transaction. Such a deposit would meet the definition in section 1957(f)(1), quoted *supra* note 11. The fact that final title to the fee may not pass until the lawyer withdraws against the account is irrelevant in defining whether a monetary transaction has occurred.

123. See *supra* note 111 and accompanying text.

124. It is possible that the client will describe the fee as criminally derived as it is handed to the lawyer, but this seems unlikely.

125. Of course, a lawyer who holds the fee for a time would have to take it in a guaranteed form so there was no risk it would be dishonored later.

time they deposit them. Because of the nature of criminal practice (some clients only consult a lawyer after indictment, and lawyers often receive full payment before beginning work), this congruence of conditions is rare. Because the threat of criminal liability under section 1957 is slight, the need for lawyers to limit the extent of their knowledge to avoid that liability is commensurately slight.

To the extent the conditions do coalesce, of course, the lawyer is vulnerable. Many believe that the rare lawyers who satisfy these conditions, *i.e.*, those who knowingly take dirty money, already practice in such questionable ways<sup>126</sup> that their protests that section 1957 causes them to act unethically by deterring zealous investigation are empty.

Although it is possible for a criminal defense lawyer to fall within the elements of section 1957, it will occur infrequently because of the narrowness of the crime and the usual realities of criminal practice. Furthermore, if the lawyer concludes that criminal liability is a risk, some elements can be manipulated to avoid liability, like the date of the monetary transaction. With these options available, it is unlikely that lawyers would choose to avoid liability by limiting their knowledge to negate the mens rea element. Defeating the conduct elements is easier and is also more effective than defeating the mens rea element because fact-finders can infer what the defendant knew,<sup>127</sup> but dates are intractable. In short, lawyers would be foolish to try to avoid liability by limiting their knowledge.

### *c. Other Pressures Encouraging Investigation*

For those criminal defense lawyers who are disposed to try to qualify under the bona fide purchaser exception or avoid section 1957 by limiting their knowledge, other pressures operate to restrain

---

126. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE IMPACT: ORGANIZED CRIME TODAY 221, 250 (1986) [hereinafter PRESIDENT'S REPORT]. See generally Wolfteich, *supra* note 1, at 864. These lawyers engage in a range of unsavory conduct, including subornation of perjury, obstruction of justice, and other practices which facilitate crime. See PRESIDENT'S REPORT, *supra*, at 257-58. See generally Wolfteich, *supra* note 1, at 864. They are the targets Congress aimed at with section 1957. *Id.* ("During consideration of House Bill 5077 [an early version of section 1957], the Subcommittee on Crime expressed the most concern about lawyers involved in a 'growing persistent crime,' often involving longstanding relationships with drug dealers." (footnotes omitted)).

127. These inferences are easy to draw under the willful blindness doctrine which basically lets the fact-finder resolve whether the defendant should have investigated further.

them.<sup>128</sup> As noted above, the law of legal ethics forbids inadequate investigation.<sup>129</sup> In opting for ignorance, criminal defense lawyers would have to be willing to risk ethical complaints and disciplinary proceedings for failing to represent a client competently. Lawyers' fear of civil liability also dissuades them from acting contrary to their clients' interests in this way.<sup>130</sup>

Moreover, the restraints operating to prevent lawyers from inadequate investigation go beyond the legal restrictions. Lawyers' sense of loyalty and dedication to the clients who seek their assistance typically transcends the letter of the law of legal ethics and legal malpractice. These feelings of professional and personal obligation cause lawyers to work to see their clients' interests furthered rather than sacrificed. Lawyers' professional pride prevents them from abandoning their duty to investigate their clients' matters thoroughly. Indeed, criminal defense lawyers, who often deal with the same prosecutors, would be particularly unwilling to embarrass themselves and develop a reputation for doing bad work.<sup>131</sup>

Lawyers' personal pride also operates to restrain lawyers from abandoning their clients' interests for their own gain. Lawyers generally fear the consequences of their own ignorance, whether intentional or inadvertent. They do not want to go to trial with only selected knowledge and risk public revelation of their ignorance. Finally, law-

---

128. Indeed, lawyers might be expected to investigate more thoroughly under certain circumstances, such as when there is reason to believe that a fee payment is being made from stolen property or that a client is using the lawyer's services in the furtherance of a crime. Wolfteich, *supra* note 1, at 868. Courts sometimes expect more of a lawyer when facts suggest that a client is involving her in criminal conduct. *See, e.g., United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964) (lawyer convicted of securities crimes and mail fraud despite lack of actual knowledge of client's criminal activities).

129. *See supra* text accompanying notes 73-75.

130. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 206-07 (1986) (the increased threat of malpractice liability causes lawyers to conform to the profession's standards for the protection of client interests). *See* John M. Burkoff, *Legal Negligence: The Threat and the Reality in Criminal Cases*, *TRIAL*, Sept. 1987, at 33. According to Professor Burkoff, among the most frequent claims in malpractice actions brought against criminal defense lawyers are inadequate preparation or investigation, bad advice regarding the entry of guilty pleas, and conflicts of interest. *Id.* at 37. These are the same sorts of misconduct that the forfeiture laws are said to encourage. Even though malpractice actions against criminal defense lawyers are rarely successful, *id.*, most of these lawyers presumably would want to avoid such conduct out of concern about the mere filing of such suits against them.

131. Some lawyers have recognized the "informal professional culture" existing among prosecutors and criminal defense lawyers, suggesting that it is a check upon prosecutorial power. *Constitutional Law Conference*, 58 U.S.L.W. 2200, 2207 (1989).

yers hate to lose. Their desire to win encourages thorough investigation, and if the lawyer wins, of course, there is no fee forfeiture and the risk of section 1957 liability is reduced.<sup>132</sup>

The forfeiture law and section 1957, therefore, provide no incentive for defense lawyers to avoid questioning clients or otherwise investigating the facts of the case. Because of the laws, many lawyers are asking clients directly if the fee is criminally derived. To the extent this question goes unasked it is not out of fear of the answer, but rather because the question is awkward and the answer standing alone is insufficient to protect the lawyer. Indirect questions on possible legitimate sources of income are also helpful and are in fact being asked. Forfeiture and section 1957 laws do not deter these questions, but actually provide incentives for lawyers to ask them. Additionally, investigation is not deterred because deliberately avoiding knowledge would amount to willful blindness, and a mens rea of willful blindness is sufficient for liability under both forfeiture and section 1957. Anyway, manipulating the mens rea by maintaining technical ignorance is unnecessary because other elements of forfeiture and section 1957 are more readily avoided. Finally, for lawyers tempted to try to avoid the laws by maintaining ignorance, there are other sources of countervailing pressure, including the law of legal ethics and malpractice and professional and personal pride. In the face of this array of incentives, the money laundering laws should not cause reduced investigation.

### B. *Unreasonable Fees*

As noted above, the money laundering laws provide incentives for defense lawyers to change their fee arrangements with clients.<sup>133</sup> While these changes make legal and economic sense, they raise questions about the ethics of the fees.<sup>134</sup>

The money laundering laws have three likely effects on fees. First, they pressure lawyers to charge higher fees to compensate for the additional risk and complication presented by the money laundering laws. The risk stems from the possibility of fee forfeiture and the

---

132. The risk of section 1957 liability is reduced because the government will have a harder time proving that the fee was in fact derived from specified unlawful activity if the client is acquitted. One commentator has noted this tendency of litigators as a check on conflicts of interest. Lushing, *supra* note 110, at 524.

133. See *supra* text accompanying notes 109-15.

134. This ethical problem apparently has not been recognized by any of the critics of the money laundering laws.



specter of the lawyer's own criminal liability under section 1957. The complication arises out of the lawyer's attention to new concerns about the source of fee payment, the legality of the fee, the possibility of the lawyer's own testimony, the likelihood of additional proceedings to obtain the fee, and the need for reporting to the government under section 6050I. For defense lawyers the laws have made fees more speculative, their own prosecution more likely, and work more difficult. The cases are thus economically less attractive. One predictable response is to charge higher fees.

Second, the money laundering laws pressure defense lawyers to get full payment at the very outset of the representation.<sup>135</sup> This pressure results both from forfeiture and section 1957. As noted above, lawyers may avoid forfeiture by proving that they were reasonably without cause to believe at the time of the purchase of the legal services that the fee was subject to forfeiture. By moving the time of purchase of the legal services to the earliest point in the representation, lawyers can obtain title to the assets before any reason to question the legitimacy of the fee arises.<sup>136</sup> Thus, lawyers maximize protection of their fees from forfeiture by demanding fee payment at the beginning of the representation. Similarly, early payment and deposit of fees may be used by lawyers to avoid criminal liability under section 1957. Such an approach would permit lawyers to engage in the monetary transaction with the fee prior to obtaining knowledge that the assets used to pay the fee were derived from specified unlawful activity.<sup>137</sup> In these ways the laws provide incentives to defense lawyers to demand fee payment at the earliest point in their relationships with clients.

The third effect of the money laundering laws on fees is the increased pressure they generate on defense lawyers to use nonrefundable retainers.<sup>138</sup> Both forfeiture and section 1957 encourage early fee payment to protect lawyers, but early payment alone will not suffice.

---

135. This pressure is described *supra* in text accompanying notes 110-12.

136. *See supra* text accompanying note 110.

137. *Id.* This conclusion assumes that such large up-front payments would be seen as bona fide fees under the statute rather than sham transactions.

138. This tendency is described *supra* in text accompanying notes 110-15. The distinction between a nonrefundable retainer and a fee advance is discussed in WOLFRAM, *supra* note 130, at 505-06; *ABA/BNA Lawyer's Manual*, *supra* note 44 at 41:602 (July 18, 1990). *See ABA Meeting*, *supra* note 91, at 1499 ("Some [lawyers] require the client to agree that the fee is earned at the time it is paid, no matter what happens later.") (quoting Charles Blau).

If a defense lawyer accepts early payment of a fee merely as an advance against which withdrawals will be made as work proceeds, title to the fee has not passed to the lawyer until that work is performed.<sup>139</sup> In the forfeiture context, the lawyer's increasing knowledge as work progresses reduces the chance of successfully claiming bona fide purchaser status for the entire fee. Similarly, such fee advances leave open the possibility that the withdrawals from the lawyer's trust account and subsequent deposits in the operating account of the lawyer would be monetary transactions made with the requisite knowledge for liability under section 1957. To avoid such results, lawyers will be inclined not only to demand early payment but also to characterize that payment as nonrefundable, regardless of later developments.

The law of legal ethics demands that fees be reasonable.<sup>140</sup> The increased risk and complication presented by cases involving the money laundering laws would undoubtedly justify a larger fee than if such laws were not implicated.<sup>141</sup> Thus, the mere fact that the laws cause defense lawyers to charge higher fees is not an ethical problem, assuming that the fees remain within the bounds of reason. Similarly, the fact that defense lawyers would move the payment of the fee to an early point in the representation does not suggest any ethical problem.<sup>142</sup> The financial aspect of the lawyer-client relationship is appropriately resolved early in a representation,<sup>143</sup> and there is no ethical reason why it could not be done immediately upon a client's consulta-

---

139. Such advance payments would remain the client's funds until services were provided and the lawyer asserted the right to withdraw the funds as hers. WOLFRAM, *supra* note 130, at 506. This is accomplished through use of a trust account. For the ethical controls on the use of such an account, see MODEL RULES Rule 1.15; MODEL CODE DR 9-102.

140. MODEL RULES, Rule 1.5(a). The Model Code provides that legal fees shall not be "clearly excessive." MODEL CODE DR 2-106(A). The Code provision goes on, however, to define a fee to be clearly excessive "when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." *Id.* DR 2-106(B). Thus, even the Model Code's ethical limit on fees turns on a reasonableness test.

141. One of the factors used for the determination of the propriety of a fee under the Model Rules and the Code is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." MODEL RULES Rule 1.5(a)(1); MODEL CODE DR 2-106(B)(1).

142. The ethical rules contain no provisions on when payment may be appropriately demanded.

143. Both the Model Rules and the Code encourage lawyers to conclude the matter of fees as early as possible in the relationship. *See* MODEL RULES Rule 1.5(b) & cmt. 1; MODEL CODE EC 2-19.

tion with a lawyer.<sup>144</sup>

The use of nonrefundable retainers, however, can raise ethical concerns. Most states recognize that lawyers are free to make such fee arrangements, assuming they are clearly understood by the clients.<sup>145</sup> When events subsequent to the fee payment render the fee paid excessive,<sup>146</sup> however, some states have recognized that a portion of the fee must nevertheless be refunded to the client despite its characterization as nonrefundable.<sup>147</sup> A lawyer approached by a client fearing indictment for certain crimes might be inclined to demand the payment of a large nonrefundable retainer at the outset of the representation in an effort to avoid fee forfeiture and possible criminal liability under section 1957. Should the client not be indicted, however, the lawyer may be ethically compelled to return to the client the excess beyond what would be a reasonable fee for services actually provided.<sup>148</sup>

Although the money laundering laws provide defense lawyers with incentives to adjust their fee practices, they present no novel or particularly difficult ethical problem relative to fees. As in all representations, defense lawyers merely need to be alert to the reasonableness of their fees, not only at the inception of the representation, but also as the representation continues and is concluded.

### C. *Conflicts of Interest and Plea Negotiations*

Another question is whether the forfeiture law creates a conflict

---

144. Practically it might be difficult for lawyers to demand immediate payment of a fee, given the personal dynamics of an initial consultation with a potential client. This practical effect is discussed further in part III.

145. See WOLFRAM, *supra* note 130 at 178-79. For a brief summary of the case law and ethical opinions to this effect, see *ABA/BNA Lawyer's Manual*, *supra* note 44 at 41:602-03.

146. For example, when a plea negotiation obviates the need for trial, an assumption of which was included in the fee determination at the outset of the representation. See *ABA Meeting*, *supra* note 91 at 1499 (when lawyer requires client to agree that fee is earned at time it is paid, no matter what happens later, it may be overreaching from ethical standpoint) (quoting Charles Blau).

147. See, e.g., *Jennings v. Backmeyer*, 569 N.E.2d 689 (Ind. Ct. App. 1991) (lawyer must return unearned portion of fee when client dies prior to completion of work); *Jacobson v. Sassower*, 122 Misc. 2d 863 (Sup. Ct. 1983), *aff'd*, 107 A.D.2d 603 (1st Dep't 1985) *aff'd*, 66 N.Y.2d 991 (1985) (lawyer must return unearned portion of so-called nonrefundable retainer when client discharges lawyer).

148. Professor Wolfram has opined, although in another context (when lawyers are discharged by their clients), that "no retainer should be nonrefundable to the extent that it exceeds a reasonable fee." WOLFRAM, *supra* note 130 at 547.

of interest for lawyers in plea negotiations.<sup>149</sup> The possibility of fee forfeiture, it is said, pressures defense lawyers to protect their own interests in the fee during plea negotiations.<sup>150</sup> That pressure may cause lawyers to urge their clients to plead guilty to offenses not involving forfeiture<sup>151</sup> or to plead guilty to more serious offenses if the prosecutors waive forfeiture,<sup>152</sup> even though the bargain may not serve the best interests of the client.<sup>153</sup> The forfeiture law thus promotes "fee bargaining" for lawyers rather than plea bargaining for clients.<sup>154</sup>

It is likely that the forfeiture law has this effect. From the lawyer's perspective, fee forfeiture is a particularly harsh personal consequence of a client's conviction. The prospect of forfeiture undoubtedly shades a lawyer's view of a proffered plea bargain. It is

149. *Caplin & Drysdale*, 491 U.S. at 650 (Blackmun, J., dissenting); Brickey, *Forfeiture*, *supra* note 1, at 534; DuMouchel & Oberg, *supra* note 1, at 80; Krieger & Van Dusen, *supra* note 73, at 741 ("a conflict of classic and monumental proportions" leaving lawyers in "an untenable position"); Danton A. Berube, Note, *Drug Proceeds Forfeiture and the Right to Counsel of Choice*, 43 VAND. L. REV. 1377, 1395 (1990); Wolfteich, *supra* note 1, at 853-54; Haddad, *supra* note 73, at 840-42; Mass, *supra* note 73, at 673; Note, *supra* note 73, at 844-45; ABA RICO PRACTICE GUIDE, *supra* note 1, at 14.

150. *Caplin & Drysdale*, 491 U.S. at 650 (Blackmun, J., dissenting); DuMouchel & Oberg, *supra* note 1, at 80; Margolin & Battson, *supra* note 73, at 28; Mass, *supra* note 73, at 673; Note, *supra* note 73, at 844-45. One defense lawyer has stated, "Lawyers who agree to plead their clients guilty, who don't antagonize prosecutors, are more likely to retain their fees . . . Hey, whose interest is the lawyer going to look out for in such a circumstance?" Neil A. Lewis, *Drug Lawyers' Quandary: Lure of Money vs. Ethics*, N.Y. TIMES Feb. 9, 1990, at A1, B11.

151. Brickey, *Forfeiture*, *supra* note 1, at 534; Krieger & Van Dusen, *supra* note 73, at 741; Haddad, *supra* note 73, at 841. See also William J. Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, CRIM. JUST., Spring 1986, at 2, 7 (three defense lawyers reported such a government offer).

152. Krieger & Van Dusen, *supra* note 73, at 741; Mass, *supra* note 73, at 673.

153. Alternatively, the prospect of forfeiture might cause a defense lawyer to urge a client to go to trial, in hopes of avoiding forfeiture through an acquittal, when the client's best interests would suggest a guilty plea even though it would also result in fee forfeiture. DuMouchel & Oberg, *supra* note 1, at 80; Haddad, *supra* note 73, at 840. That plea agreements involve bargaining in regard to the forfeiture of assets as well as the entry of guilty pleas is shown by *Caplin & Drysdale*, 491 U.S. at 617. There the defendant entered a plea agreement which included his entry of a guilty plea to a Continuing Criminal Enterprise charge as well as his agreement to forfeit all the assets specified in the indictment. *Id.* at 621.

154. It is difficult to trace the origin of the play on words, "fee bargain." Professor Yale Kamisar used the term in a summary of the Supreme Court's term and *Monsanto* and *Caplin & Drysdale* decisions. See *Constitutional Law Conference*, *supra* note 136, at 2207.

undeniable that forfeiture law thus creates a conflict between the defense lawyer's own interests and those of the client.

The conflict, however, is a common one for lawyers. Every legal fee creates a conflict of interest between the lawyer and the client.<sup>155</sup> Lawyers representing clients under contingent fee agreements in civil cases are pressured to settle their cases quickly, even if short of their value, to maximize the hourly return on their time.<sup>156</sup> Hourly billing promotes delay and time-sheet padding<sup>157</sup> and in criminal and civil cases tempts defense lawyers to reject settlement and go to trial. Lump sum fee payments, frequently used by criminal defense lawyers, pressure lawyers to accept negotiated outcomes without thorough investigation and without trial.<sup>158</sup> Every day lawyers confront the inherent conflict that arises because clients want to minimize the amount they pay for legal fees while lawyers want to maximize it. The resolution of that conflict is provided clearly in the law of legal ethics. The lawyer must subordinate self-interest to the interests of the client.<sup>159</sup>

---

155. That is, the lawyer's interest is to maximize the fee while that of the client is to minimize it. *See generally* Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 *LAW & SOC'Y REV.* 567 (1980-81).

156. A quick settlement for a certain amount may appear to the lawyer to be preferable to the uncertainty of a jury verdict after lengthy and costly preparation. The earlier the settlement offer is made, the more attractive it may be in terms of the costs already invested in the representation. *Cf.* Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 *LAW & SOC'Y REV.* 251 (1985).

157. *See generally* Johnson, *supra* note 155. The practice of padding time sheets has been less charitably described in Lisa G. Lerman, *When Lawyers Are Liars*, *NAT'L L.J.*, Apr. 30, 1990, at 13.

158. In this sense the lump sum payment frequently employed by defense lawyers can operate to create pressures similar to those engendered by contingent fees in civil cases. For discussion of the use of contingent fees in criminal cases, *see infra* text accompanying notes 170-82.

159. Under Model Rule 1.1, a lawyer must represent a client competently. Furthermore, under Model Rule 1.7(b), if a lawyer's own interests will adversely affect the representation, the lawyer's representation of the client is prohibited. Thus, a lawyer who is unable to subordinate self-interest in a fee to the interests of the client must withdraw because of the inevitable violation of these two rules. MODEL RULES Rule 1.16(a)(1). The same result is dictated by the prior Model Code. DR 7-101(A)(3) prohibited a lawyer from prejudicing the client during a representation, and DR 5-101(A) prohibited a lawyer from continuing a representation when the lawyer's professional judgment would be affected by the lawyer's financial interests, unless the client consented after consultation. Under DR 2-110(B)(2), the lawyer was required to withdraw if the representation would result in the violation of a Disciplinary Rule.

In a different context, the Supreme Court denied that the anti-client pressures created by the lawyer's self-interest in fees presented an "ethical dilemma" for the lawyer.

While the forfeiture law creates an additional source of such conflicts for criminal defense lawyers, they are not different in kind than other fee conflicts. The same anti-client pressures created by legal fees are inevitable in private practice. Nor are the economic pressures created by the forfeiture law more intense than other fee conflicts.<sup>160</sup> The forfeiture law does not create any ethical problems for lawyers engaged in plea negotiations that are novel in their nature or extent.

What restrains lawyers presented with these conflicts in their fee arrangements from acting out of sheer avarice and yielding to their own self interest in maximizing their fees? One restraint is the law of

---

In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Court faced the issue of civil rights plaintiffs who had accepted a settlement offer in an amount greater than they expected to receive at trial but conditioned on their waiver of their statutory right to receive attorneys' fees. The Supreme Court held that the statute did not prohibit such waivers as parts of settlements. *Jeff D.*, 475 U.S. at 729. In doing so, the Court also rejected counsel's argument that such waivers presented an ethical dilemma for the lawyers. The Court saw the lawyer's only ethical obligation as being the duty to represent the clients competently and zealously, despite any self-interest in obtaining fee payment. *Id.* at 728.

Similarly in the forfeiture context, a lawyer's ethical obligation is to provide competent and zealous representation for the criminal defendant despite the threat of fee forfeiture. We do not deny that the threat of forfeiture creates real anti-client pressures. The point is that the pressures are not unlike those felt in any private representation of a client regardless of the fee arrangement utilized. The professional obligation of lawyers is clear; the self-interest in fees must be subordinated to the best interests of the client.

The possibility of fee forfeiture and the professional obligation to disregard the desire to be paid, of course, may cause lawyers to be disinclined to accept cases with a possibility of forfeiture. This practical effect is discussed in part III of this article. Our point here is that the ethical issue presented is common and clearly resolved. The client's interests come first.

160. A defense lawyer might face the loss of an entire fee through forfeiture but only when there are no non-forfeitable assets owned by the client. See *Caplin & Drysdale, Chartered, v. United States*, 491 U.S. 617, 625 (1989). Even in this worst case situation, a lawyer who is denied a fee as a result of forfeiture would likely be entitled to retroactive payment under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1988). See Joseph diGenova & Constance L. Belfiore, *An Overview of the Comprehensive Crime Control Act of 1984 — The Prosecutor's Perspective*, 22 AM. CRIM. L. REV. 707, 717 (1985). This theory was used to compensate defense lawyer F. Lee Bailey, who paid the government \$145,000 he had received in fees for representing a convicted drug dealer. See *Prominent Lawyer Says He'll Return Fee*, CHI. TRIB., Oct. 10, 1990, at 3. Similar settlements have been reached in other forfeiture cases using CJA rates to determine the amount defense lawyers are entitled to keep. Rosiland Rossi, *U.S. Takes Half of \$40,000 Drug King Paid to Lawyers*, CHI. SUN-TIMES, Dec. 5, 1990, at 16. Although that payment will likely be less than the client would have paid, it would surely ameliorate the loss suffered by the lawyer. Under the CJA, lawyers are compensated at a rate not to exceed \$60 per hour for time in court and a rate not to exceed \$40 per hour for time out of court. The maximum amount a lawyer can be paid for representing a client charged with a felony is \$3500; the maximum amount for a misdemeanor is \$1000. 18 U.S.C. § 3006A(d)(1)-(3) (1988).

legal ethics.<sup>161</sup> Lawyers are reluctant to risk ethical complaints and discipline by trading their clients' interests for more money. The law applicable to fiduciaries, which imposes a duty of good faith and fair dealing upon lawyers, is a further legal impediment to self-dealing.<sup>162</sup> Lawyers' fear of malpractice claims also dissuades them from subordinating their clients' interests to their own urge for larger fees.<sup>163</sup>

In addition, as noted above,<sup>164</sup> lawyers' conduct is governed by more than the dictates of the law. Their sense of personal and professional loyalty and dedication to their clients operates as a further check on lawyers' human tendency toward greed in profiting at their clients' expense. Also, lawyers' professional and personal pride deters them from freely shortchanging their clients for a larger fee.

Lawyers choosing to maximize their own interests at the expense of their clients by agreeing to an unfavorable plea bargain are violating ethical rules, risking civil liability, betraying those who trust them, and undermining their own professional reputation. There may be some criminal defense lawyers who would endure these risks in order to secure payment of their fee in a given case. Surely most would not.<sup>165</sup> The forfeiture law imposes pressure upon defense lawyers, but it is likely that most will resist that pressure and represent their clients competently.<sup>166</sup> Those lawyers undoubtedly would prefer that the

---

161. Lawyers are expected to provide competent and diligent representation so as not to prejudice their clients' rights. MODEL RULES Rules 1.1 & 1.3. See MODEL CODE DR 7-101(A). Furthermore, lawyers are prohibited from allowing their personal interests, including those involving their fees, to interfere with the provision of this representation. MODEL RULES Rule 1.7(b); MODEL CODE DR 5-101(A). The ABA STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE are equally clear. Defense Function Standard 4-1.6 declares the client's interests to be paramount in all aspects of the lawyer's representation, including plea negotiations. Standard 4-3.5(a) requires the defense lawyer to disclose to the client all conflicts of interest. Standard 4-5.1(a) requires the lawyer to advise the accused with complete candor, and Standard 4-5.2(a) leaves the decision whether to accept a plea bargain up to the client.

162. The lawyer's fiduciary duty is discussed generally in WOLFRAM, *supra* note 130 at 145-48.

163. Lawyer malpractice actions can extend to intentional wrongs by lawyers against the interests of their clients. *Id.* at 227. For discussion of malpractice actions against criminal defense lawyers, see *supra* text accompanying note 130.

164. See *supra* text accompanying notes 131-32.

165. Some commentators evidence a less favorable view of lawyers' ethics, apparently assuming the worst of those in the profession. See Krieger & Van Dusen, *supra* note 73, at 740 (the potential of forfeiture "creates a threat to the lawyer because the lawyer will seek to protect the fee."). See also, Lewis, *supra* note 150.

166. The fee pressures may, however, cause lawyers to avoid criminal cases involving forfeiture. This practical effect of the law is discussed in part III of this article.

forfeiture law did not exist, but the law does not put lawyers in any new or more intense conflict with their clients over fees.

#### D. Fee Forfeiture and Contingent Fees

The argument has also been made that the forfeiture law creates a contingent fee when applied to defense lawyers' fees.<sup>167</sup> Assuming the forfeiture elements are met, the only way for the defense lawyer to keep the fee is to avoid the substantive conviction.<sup>168</sup> Practically, in that situation the fee is contingent upon the defendant's success in the criminal case.<sup>169</sup>

Contingent fees in criminal cases are proscribed by every codification of legal ethics in this country.<sup>170</sup> The reasons for this proscription, however, are not clear.<sup>171</sup> In its *Model Code of Professional Responsibility*, the American Bar Association justified the restriction

---

167. ABA RICO PRACTICE GUIDE, *supra* note 1, at 13-14; DuMouchel & Oberg, *supra* note 1, at 80; William J. Genego, *The Legal and Practical Implications of Forfeiture of Attorneys' Fees*, 36 EMORY L.J. 837, 841 (1987); Margolin & Battson, *supra* note 73, at 27, 30 n.8; Berube, *supra* note 149, at 1394; Wolfteich, *supra* note 1, at 854; Boylston, *supra* note 1, at 954-55; Haddad, *supra* note 73, at 836-38; Mass, *supra* note 73, at 673; Note, *supra* note 73, at 844; Stanulis, *supra* note 73, at 601-02.

The argument was embraced by the *Caplin & Drysdale* dissent, 491 U.S. at 649, but rejected cursorily by the majority, *id.* at 632 n.10. The majority doubted whether the fact that collection of the fee turned on acquittal rendered the fee inappropriate because "this often may be the case in criminal defense work." *Id.* Presumably the Court had in mind that criminal defense lawyers would regularly have difficulty collecting fees from convicted clients, a situation similar to that presented by forfeiture. The contention, however, overlooks the reality of criminal practice in which payment of fees in advance is the standard agreement. For further discussion of this aspect of private criminal practice, see *supra* note 110.

The amicus brief of the American Bar Association stressed that the contingent fee aspect of forfeiture raised "serious ethical concerns." Brief Amicus Curiae of the American Bar Association at 17-22, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)(No. 87-1729).

168. The lawyer can avoid forfeiture by defeating either the substantive count or the forfeiture count.

169. To be accurate, the client's ability to pay the fee may be contingent on success rather than an obligation to pay it. ABA RICO PRACTICE GUIDE, *supra* note 1, at 13-14.

170. See WOLFRAM, *supra* note 130, at 536. Both the Model Rules and its predecessor, the Model Code, prohibit contingent fees in criminal cases. MODEL RULES Rule 1.5(d)(2); MODEL CODE DR 2-106(C).

171. WOLFRAM, *supra* note 130, at 536 ("The criminal defense prohibition seems to be largely an historical accident."). Professor Wolfram discusses the history and critiques the rationale of the prohibition on contingent fees in criminal cases. *Id.* at 535-38. Professor Lushing provides an excellent discussion of the rationales for the prohibition. See Lushing, *supra* note 110, at 513-36.



by noting that criminal cases, unlike some civil cases, do not generate a *res* out of which a contingent fee could be paid.<sup>172</sup> Not all civil cases in which contingent fees are used generate such a *res*,<sup>173</sup> though, and it is unclear in any event why a *res* should make a difference.<sup>174</sup> Some have justified the restriction because of fears that criminal defense lawyers might be driven by contingent fees to bribe jurors or suborn perjury.<sup>175</sup> Similar concerns suggest that a prohibition should extend to civil cases, but it does not. It has also been observed that criminal defense lawyers might be deterred from negotiating for guilty pleas to lesser offenses if their fee is contingent upon acquittal.<sup>176</sup> Again, the same fee pressures operate in civil cases where contingent fees are routinely used despite their potential for affecting settlement decisions by the lawyer.<sup>177</sup> The argument has also been made that contingent fees in civil cases are necessary to provide representation to the indigent while in criminal cases the Sixth Amendment mandates appointed

---

172. MODEL CODE EC 2-20. It might be noted, however, that it is not unusual for a criminal case to be focused on a particular sum of money or other asset. For example, if a defendant is charged with bank robbery, the money in the possession of the defendant upon arrest is surely a primary subject of the prosecution. If this defendant is acquitted, the lawyer could be paid from that money. If the defendant has no other assets, the lawyer's fee would likely not be paid. The situation is identical to the indigent plaintiff in a civil case, and there is as much a *res* against which a fee could be charged in this criminal case as in the civil litigation.

173. For example, when a contingent fee is used for the representation of a defendant in a civil matter. WOLFRAM, *supra* note 130, at 532-33 & 536.

174. The fundamental characteristic of the contingent fee is that the lawyer assumes the risk that he will receive a reduced or no fee because of an unfavorable result. There is no logical reason why a lawyer and client should not be able to agree on a contingent fixed fee, say \$10,000, in the event that the client prevails in certain litigation or obtains a specified result in negotiations even though no money or other property passes to the client as a result. In this situation, the fee is contingent, but there is no *res*.

175. WOLFRAM, *supra* note 130, at 535-36; See Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 775 (1989) (contingent fees in criminal cases, "by making the defense attorney an interested party in the case, provide the potential for corrupting justice.").

176. WOLFRAM, *supra* note 130, at 538. This pressure would only be felt when the fee was contingent upon acquittal. A fee in a criminal case could as easily be contingent upon a reduction in the charge or reflect the degree of reduction obtained on a sliding scale. *Id.* In such cases, the contingency would not pressure a lawyer to go to trial in hope of acquittal, although the fee might still create conflicts between the interests of the client and the interests of the lawyer regarding the most favorable disposition. For further discussion of this effect of fees on plea negotiations, see *supra* text accompanying notes 149-66.

177. For further discussion of the effect of fees on negotiations in civil cases, see *supra* text accompanying notes 155-59.

counsel for poor defendants, thus obviating the need for contingent fees.<sup>178</sup> That argument has some merit but does not explain the broad approval of contingent fees in civil cases regardless of the plaintiff's wealth.<sup>179</sup> Others have noted more practically, and perhaps more candidly, that the prohibition of contingent fees serves as a restriction on fee competition and thus protects the established criminal defense bar's standard practice of requiring clients to pay their fees up front.<sup>180</sup>

Regardless of the justification for the ethical rule against contingent fees in criminal cases generally, the contingent aspect of the lawyer's fee in forfeiture cases presents fewer concerns. For one thing, when the client has some legitimate assets the fee can be paid from them and forfeiture creates no contingency.<sup>181</sup> The mere possibility of forfeiture of certain assets, therefore, does not necessarily render the fee contingent, if the client can pay with other assets.<sup>182</sup>

Second, those worried about the absence of a *res* in criminal cases may take some comfort from the fact that there is a *res* at issue in forfeiture counts. The assets listed in the forfeiture count are the subject of the forfeiture proceedings in the case. Any claim to these assets made by the lawyer is the subject of a separate hearing after conviction.<sup>183</sup> Whatever may be the function of a *res* to the legitimacy

---

178. ABA RICO PRACTICE GUIDE, *supra* note 1, at 14.

179. The ethical rules do not limit the use of contingent fees in civil cases to impecunious plaintiffs. MODEL RULES Rules 1.5(c) & 1.8(j)(2); MODEL CODE DR 5-103(A)(2). The comments to MODEL RULES Rule 1.5 urge lawyers to use contingent fees only when "consistent with the client's best interest." MODEL RULES Rule 1.5 cmt 3. There are times, of course, when a contingent fee would not be advantageous for a client who could afford an hourly fee. More directly, the Ethical Considerations of the Code encourage lawyers not to use contingent fees for clients able to afford hourly fees, unless the client so requests after being advised about the various fee possibilities. MODEL CODE EC 2-20.

180. See HAZARD & HODES, *supra* note 110, at 84; Morgan, *supra* note 110, at 734.

181. When the client has sufficient non-forfeitable assets to pay the fee, forfeiture determines only the assets from which the fee is paid, not whether the fee is paid. Thus, there is no contingency in these situations. Furthermore, as the Supreme Court noted in *Caplin & Drysdale*, even a convicted client might obtain clean assets after conviction and pay the criminal defense lawyer with those assets. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625 (1989). Practically, of course, this does not seem likely to be a common occurrence.

182. Furthermore, it is possible that the defense lawyer who loses her fee to forfeiture after her client's conviction can apply and qualify for retroactive appointment and payment under the CJA. See *supra* note 160. The availability of such payment reduces the "contingent" aspect of the fee subject to forfeiture.

183. See 21 U.S.C. § 853(n)(6) (1988).

of a contingent fee, therefore, is satisfied in the circumstances of criminal forfeiture.<sup>184</sup>

Third, to the extent that the purpose of the contingency fee prohibition in criminal cases is to discourage corruption of the criminal justice system by lawyers greedy for their fees, the forfeiture law constitutes a congressional statement that the societal goals of that law are more important than congressional fears of such misconduct.<sup>185</sup> The congressional objective of separating the criminal from the economic value of the crime prevailed in Congress over any concerns about perjury or bribery, conduct which is already prohibited by other criminal laws.<sup>186</sup>

Fourth, while the contingency of the fee in forfeiture cases does present some anti-client pressures in plea negotiations, these are just like other fee pressures felt in similar situations by lawyers. As noted above in regard to plea negotiations generally, lawyers facing forfeiture might be inclined to sell their clients short to secure payment of their fees.<sup>187</sup> To do so, however, they will need to disregard their legal duties to their clients<sup>188</sup> and discard their professional and personal pride.<sup>189</sup> The contingency aspect of the fee makes such misconduct no more likely than the general conflict of interest that exists between lawyers and clients because of fees.

Finally, for established criminal defense lawyers concerned about protecting themselves from the competition of other lawyers using contingent fees in criminal cases, the contingent aspect of fees in forfeiture cases presents little cause for alarm. That contingency is

---

184. The application of the forfeiture law to defense lawyers' fees puts their fees in issue in the litigation. To that extent there is a *res* in such criminal cases even though in many criminal cases generally, where there is no money or other property as the focus of the case, there is none. For discussion of a non-forfeiture criminal case in which the defendant's claim to part of the assets is at issue, *see supra* note 172.

185. The Comprehensive Forfeiture Act of 1984 has been viewed as a deliberate congressional balancing of law enforcement needs and constitutional concerns. Terry Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 747 (1985). In the legislative history there is no express weighing of congressional concern about subornation of perjury, bribery, or obstruction of justice with the seriousness of the offenses regulated by the act. Nevertheless, the enactment of the forfeiture law implicitly indicates a greater concern about the offender's use of criminally derived funds than about the likelihood of defense lawyers' abuse of the judicial system in response to the contingency aspect of forfeitable fees.

186. *See* 18 U.S.C. §§ 201 & 1622 (1988).

187. *See supra* text accompanying notes 149-54.

188. *See supra* text accompanying notes 161-63.

189. *See supra* text accompanying notes 131-32, 164.

imposed by law, not by the choice of the defense lawyers facing forfeiture, and its use is in the hands of the prosecutors. Federal prosecutors' use of criminal forfeiture to reach fees of defense lawyers in a limited range of cases is little competitive threat to the common practice of up-front fee payments. Even if the promulgation of an ethical rule to protect a segment of lawyers from fee competition is viewed as legitimate, therefore, there is little reason to be concerned about the contingency aspect of criminal forfeiture cases disrupting the general sanctity of up-front fee payment.

None of the reasons given for prohibiting contingent fees in criminal cases applies to the lawyer's fee in a forfeiture case. The alarm expressed about this effect of the federal forfeiture law, therefore, lacks substance. While the contingent aspect of such a fee suggests the presence of an ethical concern, closer analysis dispels it.<sup>190</sup>

### *E. Confidentiality*

Commentators have also asserted that the money laundering laws impose on lawyers' ethical duty to preserve client confidentiality.<sup>191</sup> This argument is usually directed at the section 6050I reporting requirement,<sup>192</sup> but similar comments have also been made about fee forfeiture.<sup>193</sup>

#### *1. Section 6050I*

As described above,<sup>194</sup> section 6050I requires lawyers to report cash payments over \$10,000 to the Internal Revenue Service, along with the name and address of the payor and, if made by a benefactor, the name of the beneficiary of the payment.<sup>195</sup> The law thus compels

---

190. To have standard, and otherwise appropriate, fee arrangements between lawyers and their clients rendered unethical because of a prosecutor's decision to seek forfeiture of the fee in a specific case would be a ludicrous application of the current rules on contingent fees in criminal cases. Surely if the present ethical rules were held to warrant discipline for such a lawyer, the rules would need to be changed.

191. Bennett L. Gershman, *Legal Ethics: IRS Form 8300*, CRIM. JUST., Spring 1990, at 22, 23; Boylston, *supra* note 1, at 955-56; Haddad, *supra* note 73, at 842-43; Note, *supra* note 73, at 841-44; Stanulis, *supra* note 73, at 603-05.

192. See, e.g., Gershman, *supra* note 191, at 23.

193. See, e.g., Brickey, *Forfeiture*, *supra* note 1, at 535.

194. See *supra* text accompanying notes 39-46.

195. See *infra* app. 1 (Form 8300). For further discussion, see *supra* note 43 and accompanying text.

lawyers to reveal to the government the names of certain clients and information about the payment of their legal fees.

Lawyers are justifiably concerned about disclosing any client information to the government.<sup>196</sup> For one thing, lawyers must be cautious about preserving the client's attorney-client privilege under evidence law.<sup>197</sup> Under certain circumstances that privilege covers information required by section 6050I.<sup>198</sup> Additionally, lawyers have a

---

196. Although the reporting requirement of § 6050I is part of the Internal Revenue Code, the government wants the information for more than revenue collection purposes. Section 6050I closes a loophole in the reporting laws. In enacting the other reporting laws, Congress identified the purposes of the reporting laws as "to require certain reports or records where they have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." 31 U.S.C. § 5311 (1988). These purposes are served as well by § 6050I. The information sought by Form 8300 is relevant to criminal investigations. The names of clients and other payors, large amounts of legal fees paid in cash, and particularly the portion of a fee paid in \$100 bills all provide promising leads to investigators of drug and organized crimes. Furthermore, such disclosures will flag for law enforcement those cash payments which might reasonably be viewed as involving the proceeds of crime for purposes of section 1957 investigations. Additionally, certain information on Form 8300 is useful to Immigration and Naturalization Service investigations of illegal aliens.

197. For general discussions of the evidentiary privilege, see JOHN W. STRONG, MCCORMICK ON EVIDENCE §§ 87-88 (4th ed. 1992) [hereinafter MCCORMICK]; WOLFRAM, *supra* note 130, at 242-43.

It is typically said that the identity of the client and the fact of consultation are not privileged. MCCORMICK, *supra*, § 90; WOLFRAM, *supra* note 130, at 259-60. The same is true for details of the fee or other aspects of the employment agreement. *Id.*

The general rule, however, has been the subject of much dispute, especially where the disclosure of client identity or fee information would be particularly harmful to the client. MCCORMICK, *supra*, § 90. The resulting case law is inconsistent and confusing. Steven Goode, *Identity, Fees, and The Attorney-Client Privilege*, 59 GEO. WASH. L. REV. 307, 311, 320-35 (1991). Professor Goode's recent article applying the privilege to the disclosures required by section 6050I is enlightening. *See id.* at 346-56.

198. There are usually said to be three exceptions to the general rule that client identity and fee arrangements are not privileged: the "legal advice" exception, the "last link" exception, and the "communication rationale" exception. Note, *Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1519-21 (1985). The legal advice exception covers situations in which disclosing the identity of the client or the fee arrangement would be equivalent to revealing an otherwise privileged communication. Max Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1798 (1988). This disclosure would in essence implicate the client in the matter for which the client sought legal advice in the first place. "In order for [this] exception to apply, the person seeking the legal advice must be the client of the [involved lawyer]." *United States v. Anderson*, 906 F.2d 1485, 1488 (10th Cir. 1990).

The second exception is the "last link" exception under which the information is privileged if it provides the "last link" in a chain of incriminating evidence which could eventually lead to the indictment of a client. This exception has not received the judicial approval accorded the other two exceptions. *See In re Grand Jury Proceedings*, 680 F.2d

broader duty to protect client confidentiality under ethics law.<sup>199</sup>

The disclosures required by section 6050I fall within the ambit of Model Rule 1.6(a), which protects "information relating to the representation of a client."<sup>200</sup> Under that rule, such information is to be kept confidential unless the client consents to disclosure or revelation is impliedly authorized in order to carry out the representation.<sup>201</sup> Further exceptions permit disclosure when necessary to prevent a client's violent crimes<sup>202</sup> or when raised in support of the lawyer's own

---

1026 (5th Cir. 1982); *In re Grand Jury Proceedings*, 899 F.2d 1039 (11th Cir. 1990); *In re Grand Jury Proceedings*, 896 F.2d 1267 (11th Cir. 1990) (per curiam); Note, *Attorney-Client Privilege*, *supra*, at 1520. See generally Tabackman and Elizabeth D. Smith, "Last Link" Doctrine, 2 MONEY LAUNDERING LAW REPORT No. 11, June 1992 at 1.

The third exception is the "communication rationale" exception. It protects the information if disclosure would reveal otherwise privileged confidential communications. *In re Grand Jury Proceedings*, 898 F.2d 565, 568 (7th Cir. 1990). The courts generally define "communications" narrowly to include only deliberate communications, and this exception is applied most often to situations where the court already has substantial information, and disclosure of an anonymous client's identity would connect him with a separately privileged communication. Note, *Attorney-Client Privilege*, *supra*, at 1521.

A recent decision by the Second Circuit upheld the reporting requirements of section 6050I against claims of violation of attorney-client privilege. In *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-05 (2d Cir. 1991), the court held that the information sought by Form 8300 was not privileged. This was the first federal appellate decision to rule on the application of the privilege to the reporting requirement.

For further discussion of the section 6050I reporting requirement and the lawyer-client privilege, see Daniel J. Capra, *Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, 4 GEO. J. LEGAL ETHICS 235 (1990). The focus of this article, however, is the ethical duty of confidentiality rather than the reach of the attorney-client privilege under the law of evidence. The former is considerably broader than the latter. See WOLFRAM, *supra* note 130, at 296.

199. MODEL RULES Rule 1.6; MODEL CODE DR 4-101. We have used the term "confidentiality" to describe the broad ethical duty pertaining to information about the client and the representation. This is the approach of the leading treatise on legal ethics. See WOLFRAM, *supra* note 130, at 296.

200. MODEL RULES Rule 1.6(a). The ABA's prior Model Code protected client "confidences" (information covered by the attorney-client privilege) and "secrets" (information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."). MODEL CODE DR 4-101(A). Even if not privileged, see *supra* note 198, the information sought by section 6050I would typically fall within the Code's definition of "secret" since it would be at least embarrassing, if not detrimental, to the client to reveal it.

201. MODEL RULES Rule 1.6(a).

202. *Id.* Rule 1.6(b)(1). The Model Code contains a similar but broader exception permitting lawyers to reveal a client's intention to commit any crime, not just those which are violent, and the information necessary to prevent it. MODEL CODE DR 4-101(C)(3).

claims or defenses in actions arising out of the representation.<sup>203</sup> These exceptions do not cover the section 6050I information. Assuming that the client has not consented,<sup>204</sup> therefore, the duty to report under section 6050I conflicts with the lawyer's duty of confidentiality under Model Rule 1.6.

The ABA's comments to Model Rule 1.6,<sup>205</sup> however, note two further exceptions to the duty of confidentiality.<sup>206</sup> For one, they recognize an exception when lawyers are compelled by other law to disclose confidential information.<sup>207</sup> Thus, under the ABA's Model Rules as explicated by the comments, a lawyer's disclosure of confidential information under a law like section 6050I is viewed as appropriate rather than unethical.<sup>208</sup>

---

203. MODEL RULES Rule 1.6(b)(2). Similarly, the Model Code permits revelations necessary for the lawyer to collect a fee or to defend against accusations of wrongful conduct. MODEL CODE DR 4-101(C)(4).

204. Client consent, if informed, justifies revelation under both the Model Rules and the prior Model Code. MODEL RULES Rule 1.6(a); MODEL CODE DR 4-101(C)(1).

205. The drafters of the Model Rules envisioned the comments as not adding to the obligations imposed by the rules but providing "guidance for practicing in compliance with the Rules." MODEL RULES Scope cmt. 1.

206. Some states have made these exceptions part of the express rule on confidentiality. *See, e.g.*, KY. SUP. CT. RULES § 3.130(1.6)(b)(3); MICH. RULES PROF. CONDUCT Rule 1.6(c)(2).1.6(2).

207. This comment merely recognizes that the courts would, in some instances, find the duty of confidentiality imposed by the rules to be subordinate to other law external to the rules. Resolution of the issue of whether that other law supersedes the general protection of client confidentiality is expressly avoided by the drafters of the comment, although they propose a presumption against such supersession. MODEL RULES Rule 1.6 cmt 20.

Surely there is no doubt about the superiority of federal law over state law. Section 6050I is a federal law, and federal law prevails over conflicting state law under the Supremacy Clause of the Constitution. U.S. CONST. art. VI, cl. 2. The Supreme Court has recognized the supremacy of federal statutory law over state law of legal ethics in a related context. In response to arguments that federal fee forfeiture laws conflicted with state ethics rules prohibiting contingent fees in criminal cases, the Court stated that "[t]he fact that a federal statutory scheme authorizing contingency fees — again, if that is what Congress has created in § 853 (a premise we doubt) — is at odds with model disciplinary rules or state disciplinary codes hardly renders the federal statute invalid." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 n.10. A federal district court reached the same conclusion in holding that a state's ethics rule restricting the power of prosecutors to obtain subpoenas against lawyers was inapplicable to federal prosecutors. *Baylson v. Disciplinary Bd.*, 764 F. Supp. 328 (E.D. Pa. 1991).

208. UNDERWOOD & FORTUNE, *supra* note 83, at 87 (Supp. 1988). The same result is even clearer in those states that have made the "compelled by other law" exception a part of the confidentiality rule itself. *See supra* note 206.

This result is a specific application of the general rule in legal ethics that other law "trumps" the ethical obligation of loyalty to the client. GEOFFREY C. HAZARD & SUSAN KONIAK, *THE LAW AND ETHICS OF LAWYERING* 47 (1990).

As another exception, the ABA's comments to Model Rule 1.6 state that lawyers are free to disclose information relating to the representation of a client when directed by court order to do so.<sup>209</sup> Since the method of enforcing the section 6050I reporting obligation is to subpoena lawyers who have failed to disclose the specified information,<sup>210</sup> a court order in a summons enforcement proceeding ends the ethical problem abruptly. At that point, the lawyer is free under the law of ethics to reveal the information.<sup>211</sup>

A lawyer's ethical duty when faced with a reporting obligation under section 6050I is thus primarily one of procedure. The lawyer should assert the confidentiality of the information about the client and fee payment in the required report. If the government insists upon receiving the information, however, the ethical duty of confidentiality ends. A number of state bar associations have so concluded in ethics opinions on section 6050I.<sup>212</sup>

The "dilemma" generated by section 6050I is not an ethical one

---

209. MODEL RULES Rule 1.6 cmt 19.

210. The Internal Revenue Service summons authority is found at I.R.C. § 7602 (1988).

211. The same can be said to be true under the law of evidence and the attorney client privilege. After invoking the privilege, the lawyer's duty to provide the information is determined by the court. If the court orders the information revealed, the lawyer is free to do so. WOLFRAM, *supra* note 130, at 254.

212. See, e.g., Op. RI-54, reported at [Ethics Ops. 1986-1990] *ABA/BNA Lawyer's Manual*, *supra* note 44 at 901:4772 (Aug. 1, 1990) (Mich. informal op.); Op. 86-2, reported at [Ethics Ops. 1986-1990]; *ABA/BNA Lawyer's Manual*, *supra* note 44 at 901:3201 (May 11, 1988) (Ill. informal op.); Op. E-90-3, reported at [Ethics Ops. 1986-1990]; *ABA/BNA Lawyer's Manual*, *supra* note 44 at 901:9111 (Apr. 2, 1990) (Wis. informal op.); Op. 41 (Revised), reported at [Ethics Ops. 1980-1985]; *ABA/BNA Lawyer's Manual*, *supra* note 44 at 801:2703 (Nov. 15, 1985) (Ga. informal op.); Op. 214, reported at [Ethics Ops. 1980-1985]; *ABA/BNA Lawyer's Manual*, *supra* note 44 at 801:2307 (Mar. 22, 1983) (D.C. informal op.). Several of these ethics opinions are summarized in Podgor, *supra* note 1, and Cornelia Honchar Tuite, *Wrestling With 8300 Forms*, A.B.A. J., Oct. 1990, at 114, 114-15.

Even an ethics opinion issued by the National Association of Criminal Defense Lawyers (NACDL), an organization critical of the application of the money laundering laws to lawyers, agrees with this conclusion. An opinion issued by NACDL concludes that disclosure of the Form 8300 information "should not be made unless and until a court, preferably an appellate court, considers the validity of the summons and any judicial enforcement orders in this area and that court's ruling requires such disclosure." Ethics Advisory Committee of NACDL, Formal Op. 89-1, at 14 (copy on file with the authors). The opinion thus recognizes that the lawyer's ethical duty to maintain the confidentiality of the information ends with the court's order of disclosure. This opinion is summarized at *ABA/BNA Lawyer's Manual*, *supra* note 44 at 6 Current Reports No. 10, at 183 (June 20, 1990).



at all since the law of ethics permits the disclosure. The report required by section 6050I and the actions dictated by the law of ethics undoubtedly make the representation of certain clients more complicated and more burdensome for the lawyer. Also the disclosures mandated by section 6050I may involve information that the lawyer and the client would prefer not be revealed to the government.<sup>213</sup> But additional burden and disadvantage to the client do not an ethical dilemma make.<sup>214</sup> The law does not require the lawyer to choose be-

---

213. As one commentator has noted, if the client has already been charged with a crime, the report mandated by § 6050I provides no new information to the government. If the client has not yet been charged, however, the report does reveal that the client is seeking advice from a criminal defense lawyer. This information might be helpful to the government and detrimental to the client. Krieger & Van Dusen, *supra* note 73, at 744 (“The notice to the government of the newly created relationship with the criminal lawyer alerts the government that a person, not yet targeted in its investigation, has real concerns; or that an investigation that was peripheral to a person’s interests should be re-evaluated under these new circumstances. . . . [T]he interest of the government likely will be piqued by the consultation with the criminal lawyer.”). Others have stated that § 6050I “is the only statute in the world that requires a lawyer to give information that can incriminate a client. It’s like a self-generating red flag.” Fred Strasser, *Lawyers Must Name Names*, NAT’L L.J., June 24, 1991, at 18 (comment of Michael L. Bender, Chair, ABA Criminal Justice Section).

214. Lawyers are sometimes compelled to reveal information that is harmful to their clients. At least one court and some bar ethics opinions have required lawyers to reveal that their clients have jumped bail. *United States v. Del Carpio-Cortina*, 733 F. Supp. 95 (S.D. Fla. 1990). There the court held that a lawyer with a firm factual basis for a belief that a client has jumped bail must notify the court. *Id.* Another example of mandatory disclosures contrary to the interests of the client is client perjury. MODEL RULES Rule 3.3(a)(4) & (b). *See also* *Nix v. Whiteside*, 475 U.S. 157 (1986). Similarly, lawyers have been typically viewed as having an obligation to reveal and to provide to the prosecution any fruits and instrumentalities of a crime left in their possession by clients. *See, e.g., In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), *aff’d*, 381 F.2d 713 (4th Cir. 1967). For discussion of the line of cases so concluding, *see* WOLFRAM, *supra* note 130, at 645-46. A number of state ethics opinions have found similarly. Arizona Bar Op. 85-4, reported at [Ethics Ops. 1980-1985] *ABA/BNA Lawyer’s Manual*, *supra* note 44, at 801:1324 (Mar. 14, 1985) (lawyer who obtains incriminating evidence from his client’s girlfriend must disclose the evidence to the prosecution even though evidence constitutes a “secret” under Code); Maryland State Bar Association Committee on Ethics, Op. 90-24 (Mar. 23, 1990), discussed at [6 Current Reports] *ABA/BNA Lawyer’s Manual*, *supra* note 44, at 130 (May 9, 1990) (lawyer possessing cash known to be stolen by client must return it to the proper authorities, although he need not do so with the client’s bag which held the cash).

Even the Model Rules contain obligations to reveal harmful information about a client, whether or not such disclosure would reveal confidential information. MODEL RULES Rule 3.3(a)(2), 3.3(b) (lawyer must disclose material fact if necessary to avoid assisting a criminal or fraudulent act by client, even if disclosure involves confidential information); *id.* Rule 3.3(a)(4), 3.3(b) & cmt 11. (lawyer who has offered evidence which is false must take remedial measures whether or not such action would disclose confidential information).

tween the unsavory alternatives of illegal or unethical conduct.<sup>215</sup> The law merely compels the lawyer to take actions to protect, so far as possible, the confidentiality of information about the client. While lawyers would understandably prefer not to have to comply with section 6050I, objections to it on ethical grounds are strained.

The present ethical rules' lenient treatment of disclosures when required by law or court order reflects the profession's assumption that such requirements will typically show appropriate concern for the lawyer-client relationship. In the case of section 6050I, that assumption is justified. It compels disclosure only of information traditionally viewed as outside the protection of the attorney-client privilege, facts which have legitimate revenue collection relevance. Furthermore, section 6050I seeks disclosure of all large cash transactions and is not specifically targeted at lawyers. It is possible, however, to imagine broader legislative efforts to intrude on the lawyer-client relationship through creative reporting requirements that reach beyond the identity of clients and information pertaining to the payment of fees. The ethical rules, which now condone any disclosure required by law or court order, would offer little comfort to the lawyer or client in such circumstances. Any legislative efforts along these lines, therefore, might necessitate a re-thinking of the current ethical rules permitting disclosure. The reporting requirement of section 6050I, though, does not warrant that concern.

## 2. *Forfeiture*

Confidentiality arguments relating to fee forfeiture require similar analysis. It is true that forfeiture calls into question facts regarding fee payments<sup>216</sup> and makes relevant the lawyer's testimony on those payments.<sup>217</sup> When such testimony is sought, therefore, the

---

215. Of course, the whole problem of reporting under section 6050I can be avoided by the lawyer's refusal to accept fee payment in cash or at least counseling the client as to the problems presented by a cash payment. *See United States v. Goldberger & Dubin*, P.C., 935 F.2d 501, 504 (2d Cir. 1991).

216. For discussion of the elements of forfeiture, see *supra* text accompanying notes 47-57.

217. The Justice Department, however, has voluntarily restricted its use of compelled disclosures to establish forfeiture. In its guidelines, the Department declares that "compelled disclosures of confidential communications made during the course of the representation" will not be used to establish reasonable grounds to believe that the lawyer knew assets were forfeitable at the time of the transfer or to show that the lawyer knew that the assets came from criminal misconduct. DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.430. *See id.* at 9-111.512 & 9-111.610.

lawyer must be concerned about the evidentiary attorney-client privilege and the ethical duty of confidentiality. As in the case of the section 6050I reporting requirement, however, the lawyer's primary concern is the procedural one of raising both privilege and confidentiality for the court's consideration. Upon being ordered by the court to answer, ethics law permits the lawyer to do so.<sup>218</sup>

In the case of forfeiture there is a further justification for the lawyer's disclosure of fee information. As noted above,<sup>219</sup> the Model Rule prohibition on the disclosure of client confidences makes an exception when the lawyer's conduct is called into question. Model Rule 1.6(b)(2) permits disclosures "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved."<sup>220</sup> Arguably the government's claim to assets held by the lawyer could be viewed as a "civil claim" under this provision. As to the lawyer, the court's order of forfeiture has the same effect as a civil judgment in that it requires the lawyer to disgorge money.<sup>221</sup>

Model Rule 1.6(b)(2) further permits disclosures needed "to respond to allegations in any proceeding concerning the lawyer's representation of the client."<sup>222</sup> Surely the forfeitability of a legal fee is within the reach of this clause.<sup>223</sup> Thus, testimony sought from a lawyer in the forfeiture context falls within both portions of Model Rule 1.6(b)(2)'s exception to the ethical protection of confidentiality. Disclosure of fee information in such situations presents no ethical difficulty.

Critics of the federal money laundering laws' impact on confidentiality overstate the case. While these laws may have negative practi-

---

218. For discussion of the ethics law pertaining to similarly compelled disclosures under § 6050I, see *supra* text accompanying notes 196-215.

219. See *supra* text accompanying note 203.

220. MODEL RULES Rule 1.6(b)(2). For discussion and critique of the lawyer self-defense exception to the duty of confidentiality, see WOLFRAM, *supra* note 130, at 307-10.

221. The lawyer's right to assets forfeited are determined in a post-conviction hearing at which third parties' status as bona fide purchasers is litigated using a preponderance of the evidence standard. 21 U.S.C. § 853(n)(6) (1988).

222. MODEL RULES Rule 1.6(b)(2).

223. The jury's determination of the forfeitability of the fee can be viewed as an allegation that the assets used belonged to the government at the time they were paid to the lawyer. See *supra* text accompanying notes 53-57. The post-conviction hearing, therefore, is the lawyer's opportunity to respond to this allegation by establishing the applicability of the bona fide purchaser exception to this transfer. 21 U.S.C. § 853(c) (1988).

cal effects on lawyers and their clients, they do not place lawyers in an ethical dilemma. The law of ethics structures how the lawyer should respond to inquiries about such matters, but ultimately it permits the disclosures that the federal laws compel.

### F. *The Lawyer as Witness*

Another issue is whether the money laundering laws raise problems under ethical rules on lawyers serving as witnesses.<sup>224</sup> In fact, some have asserted that prosecutors can use the money laundering laws and these ethical prohibitions to disqualify defense counsel simply by calling them as witnesses, allowing the government to choose its opponents.<sup>225</sup>

Two ethical issues arise when lawyers are called to testify in proceedings in which they are representing clients.<sup>226</sup> One involves the propriety of the lawyer serving as both an advocate and a witness in the same matter.<sup>227</sup> In certain instances those joint roles are prohibited.<sup>228</sup> Even if the merger of the role of advocate and witness is appropriate, however, the second ethical issue must be addressed. This

224. Commentators have noted ethical problems with lawyers serving as witnesses. See, e.g., Gershman, *supra* note 191, at 23; Krieger & Van Dusen, *supra* note 73, at 742 ("the prospect of the attorney being a witness or providing evidence against the client is a concept reprehensible in all respects and disastrous in all effects."); Reed, *supra* note 185, at 777; Tuite, *supra* note 212, at 114; Jack B. Zimmerman & Jim E. Lavine, *Attorney Subpoenas Imperil Choice of Counsel*, TRIAL, Apr. 1990, at 51, 51 ("The prosecutor has a much better chance of winning a case if he or she can unilaterally veto the adversary's choice of counsel. What lawyer wouldn't love to be able to pick his opponent?"); Hadad, *supra* note 73, at 843; Mass, *supra* note 73, at 674.

225. *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (using forfeiture, prosecutors "possess the ultimate tactical advantage of being able to exclude competent defense counsel as they choose. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries."); Gershman, *supra* note 191, at 23; Krieger & Van Dusen, *supra* note 73, at 742 ("There appears to be an unlimited discretion within the government to select the defendant's counsel."). See also *United States v. Gotti*, 771 F. Supp. 552 (E.D.N.Y. 1991); Arnold H. Lubasch, *Judge Disqualifies Gotti's Lawyer from Representing Him at Trial*, N.Y. TIMES, July 27, 1991, at § 1, 1.

226. This is recognized in Richard C. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 U.C. DAVIS L. REV. 651, 680 (1982), where the author notes a two-step approach to advocate-witness issues under the Model Rules.

This discussion focuses on the ethical implications when the government calls criminal defense lawyers as witnesses. This question also has constitutional implications, which are discussed *infra* in notes 343-46 and accompanying text.

227. See MODEL RULES Rule 3.7; MODEL CODE DR 5-101(B), DR 5-102.

228. There are exceptions to the general prohibition. See MODEL RULES Rule 3.7 (a)(1)-(3); MODEL CODE DR 5-101(B)(1)-(4).

issue focuses on the potential conflicts of interest that may arise from the content of the lawyer's testimony.<sup>229</sup> To continue representing a client, a defense lawyer called as a witness must surmount both ethical barriers.

### 1. *The Advocate-Witness Problem*

Generally, the law of ethics precludes a lawyer from serving as both a witness and an advocate at trial.<sup>230</sup> The purpose of the restriction is to prevent harm to the client,<sup>231</sup> to the client's opponent,<sup>232</sup> and to the judicial system<sup>233</sup> that would result from a merger and confusion of the two roles. There are exceptions to the prohibition. Lawyers can serve in both roles when the testimony relates to an uncontested matter<sup>234</sup> or to the nature and value of legal services rendered in a case.<sup>235</sup> Furthermore, the mixed roles are appropriate when disqualification of the lawyer would work a substantial hardship on the client.<sup>236</sup> Application of these provisions indicates that there is little ethical difficulty presented by the mere merger of the lawyer's roles as witness and advocate in the money laundering context.

#### a. *Section 6050I*

A lawyer who does not complete the reporting form on cash payments under section 6050I<sup>237</sup> might well be subpoenaed by the government in a summons enforcement action to testify regarding the facts surrounding the payment.<sup>238</sup> Such a scenario, however, presents no problem for the lawyer under the advocate-witness rule.

---

229. In the Model Rules this issue is handled under the general conflict of interest provisions, Rule 1.7 pertaining to current clients and Rule 1.9 pertaining to former clients. WOLFRAM, *supra* note 130, at 383-84.

230. The prohibition is discussed and its rationale critiqued in WOLFRAM, *supra* note 130, at 375-90.

231. The client might be harmed by an opponent's easy impeachment of the lawyer-witness on grounds of interest. *Id.* at 377.

232. The opponent might feel inhibited in cross-examining a fellow lawyer, or the testifying lawyer's testimony might be given too much credence. *Id.* at 377-78.

233. The lawyer might be tempted to commit perjury to win for the client or the public might view the testimony as likely to be false. *Id.* at 378.

234. MODEL RULES Rule 3.7(a)(1); MODEL CODE DR 5-101(B)(1) & (2).

235. MODEL RULES Rule 3.7(a)(2); MODEL CODE DR 5-101(B)(3).

236. MODEL RULES Rule 3.7(a)(3); MODEL CODE DR 5-101(B)(4).

237. The reporting obligation is discussed *supra* in text accompanying notes 39-46.

238. The reporting obligation of section 6050I is enforced through a summons enforcement proceeding. Prior to the institution of such proceedings, the Internal Revenue Service has attempted to obtain voluntary disclosure through correspondence directed to

For one thing, the lawyer is testifying in a proceeding distinct from the criminal action brought against the client and for which the fee was paid. In the summons enforcement action the lawyer, not the client, is the respondent, and it is the lawyer's failure to submit the appropriate form that is at issue.<sup>239</sup> The lawyer's testimony will focus on the client's identity and fee payment in the criminal action,<sup>240</sup> and the lawyer will be required to raise the client's evidentiary privilege and assert the broader ethical principle of confidentiality.<sup>241</sup> To that extent the two matters are related. The lawyer called to testify in the summons enforcement proceeding, however, faces no advocate-witness problem because there is simply no melding of the two roles there or in the client's criminal proceeding.<sup>242</sup>

Furthermore, even if the section 6050I enforcement action is viewed as practically intertwined with the client's prosecution,<sup>243</sup> the lawyer's role of witness in the summons enforcement action would not preclude service as an advocate in the client's criminal proceeding. Model Rule 3.7 generally precludes the lawyer's joint role as ad-

---

lawyers who have filed Form 8300's omitting information or asserting privilege. See 1 Money Laundering Alert 1 No. 3 (Dec. 1989).

239. While section 6050I's reporting requirement provides information about the client to the government, it is considered a compliance provision attempting to trace the flow of cash income to its recipient, here the lawyer. See JOINT COMM. ON TAXATION, 98TH CONG. 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 491 (Comm. Print 1986). That targeting lawyers is justifiable is shown by a recent General Accounting Office report that identified them as among the occupational groups that most frequently underreport taxable income. See General Accounting Office, *Tax Administration, Profiles of Major Components of the Tax Gap, Briefing Report to the Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives* 3, 29 (Apr. 1990).

240. That is, the government will be attempting to obtain only the information required by Form 8300, a copy of which is appended to this article. That information is described *supra* note 43 and accompanying text.

241. The lawyer's duty to raise the client's privilege and the ethical obligation of confidentiality is discussed *supra* in text accompanying notes 196-212.

242. The lawyer would be called as a witness under subpoena in the summons enforcement action regarding her failure to report under section 6050I. This would not merge the lawyer's role as witness with the lawyer's role as advocate in the criminal trial. It is the merger of the two roles "at trial" that is the concern of the advocate-witness prohibition. MODEL RULES Rule 3.7(a). See WOLFRAM, *supra* note 130, at 375.

243. Here we might assume the worst and hypothesize that the government has utilized § 6050I and the summons enforcement proceeding specifically to obtain an advantage in the prosecution of the lawyer's client in a separate criminal proceeding. Thus, the government could be seeking information pertaining to the payment of a cash fee hoping that it will be helpful in the prosecution.

vocate-witness at the client's "trial."<sup>244</sup> Under section 6050I, the lawyer's role as witness would be limited to the summons enforcement proceeding and would not be a part of the criminal trial at all.<sup>245</sup>

Section 6050I, therefore, might result in a lawyer being called to testify regarding the representation of a client. The lawyer's mere role as a witness in that context, however, would not ethically preclude serving as an advocate for the client in the criminal action.<sup>246</sup>

*b. Forfeiture*

Fee forfeiture also presents situations in which a lawyer might be a witness. Three contexts for such testimony are possible. Application of the advocate-witness rule, though, reveals that none raises an ethical dilemma for the lawyer.

First, when the government is investigating forfeiture, the lawyer might be subpoenaed to testify before a grand jury regarding the fees paid by a client or benefactor.<sup>247</sup> The advocate-witness rule does not apply to this situation since the lawyer is serving only as a witness before the grand jury and not in the dual role as advocate and witness at a trial.<sup>248</sup>

Second, a lawyer may choose to testify in a post-conviction hearing on third party claims to forfeited assets.<sup>249</sup> Once a client is convicted and an order of forfeiture has been entered, third parties seeking to avoid forfeiture of assets in their possession can file a claim.<sup>250</sup> A lawyer might use this procedure to try to qualify as a bona fide purchaser<sup>251</sup> to avoid forfeiture, although as noted above, it

---

244. MODEL RULES Rule 3.7(a). See WOLFRAM, *supra* note 130, at 388.

245. As we shall see, even the lawyer-advocate's testimony in the criminal trial itself does not necessarily run afoul of the advocate-witness rule. See *infra* text accompanying notes 265-81.

246. Commentators are not reading the ethical rules carefully, therefore, when they assert that section 6050I presents a device for the automatic disqualification of defense counsel. See, e.g., Tuite, *supra* note 212, at 114 (if lawyer is called to testify about payment in cash, lawyer may be forced to withdraw because "[c]ertainly, a lawyer cannot be both advocate and witness.").

247. The government lists in the indictment the assets for which forfeiture is sought. FED. R. CRIM. P. 7(c)(2). Thus, testimony regarding forfeiture is brought before the grand jury for their deliberation on the forfeiture count.

248. MODEL RULES Rule 3.7(a). See WOLFRAM, *supra* note 130, at 375 & 388.

249. The post-trial procedures for third party claims to forfeited assets are described in Reed, *supra* note 185, at 770-76. For further discussion of these procedures as applied to lawyers, see *supra* text accompanying notes 78 & 221.

250. 21 U.S.C. § 853(n)(2) (1988).

251. Other third parties, such as merchants or providers of nonlegal services, may

will be difficult for defense lawyers to qualify.<sup>252</sup> At this point, the client's "trial" has already been concluded, and the lawyer is only appearing on his own behalf rather than as the client's advocate.<sup>253</sup> At any rate, the lawyer's testimony in such a hearing would be related to the nature and value of legal services rendered in the case.<sup>254</sup> For such testimony there is an express exception to the advocate-witness rule.<sup>255</sup>

The third situation implicating the advocate-witness rule under forfeiture laws occurs if the lawyer is called as a witness at the client's trial to testify regarding the payment of the fee.<sup>256</sup> Again, it is likely that such testimony will fit within the "nature and value of legal services" exception to the advocate-witness rule.<sup>257</sup> Furthermore, the application of the advocate-witness prohibition to disqualify the lawyer in such situations in some instances will work a substantial hardship on the client.<sup>258</sup> This is most likely if the government announces its intent to call the defense lawyer as a witness late in the pre-trial pro-

---

also be claimants in these post-conviction proceedings in an attempt to avoid forfeiture of assets paid them by the convicted defendant.

252. See *supra* text accompanying notes 98-103.

253. If he possesses clean assets, the client's interests are also served by the third parties' success in the post-conviction process. If the third parties avoid forfeiture, the client need not pay the claimant out of those clean assets.

254. The focus of the post-conviction hearing would be on the value of the services rendered, as well as on the mens rea of the lawyer when the assets were paid. The statute requires the third party transferee to prove he or she was a "bona fide purchaser *and* was reasonably without cause to believe . . ." 21 U.S.C. § 853(n)(6)(B) (1988) (emphasis added). The bona fide purchaser language implicates the value of the services. Moreover, under the Justice Department's voluntary guidelines, the fee cannot be transferred to the lawyer as a sham transaction "designed to shield from forfeiture assets which otherwise are forfeitable." DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.410. In addition, forfeiture will only be pursued if the lawyer had "actual knowledge that the asset was subject to forfeiture at the time of the transfer." *Id.* at 9-111.430. Thus, the lawyer's knowledge at the time of the payment of the fee will also be the subject of the hearing.

255. MODEL RULES Rule 3.7(a)(2); MODEL CODE DR 5-101(B)(3). See WOLFRAM, *supra* note 130, at 386.

256. When an indictment contains a forfeiture count, the jury at the trial is called upon to render a verdict as to the forfeitability of the listed assets in the event of the defendant's conviction. FED. R. CRIM. P. 31(e). Thus, at the criminal trial itself the forfeitability of those assets is an issue regarding which testimony will be taken. The lawyer, as a transferee of some of those assets, may well have relevant knowledge pertaining to those assets and may be called to testify regarding it.

257. See *supra* text accompanying note 254.

258. The hardship, of course, would result from the economic cost associated with substitution of counsel and the disruption of the established relationship between the client and client's chosen counsel.



cess.<sup>259</sup> If it is a substantial hardship, the ethical rules do not prohibit the merger of the advocate and witness roles.<sup>260</sup> While the testimony of the defense lawyer on the forfeiture count at the client's trial may impermissibly join the roles of advocate and witness, therefore, the exceptions may in many instances permit it.

The likelihood of the advocate-witness rule presenting a difficult ethical issue for defense counsel is slight. In most situations of lawyers being called to provide testimony under the laundering laws, the rule does not apply because the two roles of advocate and witness are not being merged in a trial. In the few instances when the rule's broad prohibition might be applicable, the joint role is likely to be permitted under an exception. The advocate-witness rule under the law of ethics, therefore, is ill-suited for broad-scale prosecutorial interference with defendants' choice of counsel.<sup>261</sup>

## 2. *Conflicts of Interest*

A lawyer's testimony regarding representation of a client may also raise ethical questions involving conflicts of interest. Here the ethical concern is not the merger of the roles of advocate and witness but the adverse effect the content of the lawyer's testimony may have on the client's representation.

Under Model Rule 1.7(b), the representation of a client is generally precluded when it would be materially limited by the lawyer's responsibilities to a third person or by the lawyer's own interests.<sup>262</sup> The lawyer's duty to testify when compelled to do so can be viewed as a responsibility owed to a third person (the court),<sup>263</sup> and the lawyer's

---

259. The closer to the trial the government's intention to call the defense lawyer as a witness is announced, the more disruptive it would be to the defense. Thus, the hardship to the client would increase the later that intention is announced.

260. MODEL RULES Rule 3.7(a)(3); MODEL CODE DR 5-101(B)(4).

261. Lawyers testifying in their clients' proceedings may also raise conflict of interest issues, which are discussed *infra* in text accompanying notes 262-80. These concerns may warrant the withdrawal of the lawyer from representing the client in the proceeding even if the advocate-witness rule does not. Furthermore, the courts' reaction to disqualification motions by prosecutors may be guided more by practical considerations than the rules of ethics, as discussed *infra* in part III.

262. MODEL RULES Rule 1.7(b). The prior Model Code prohibited representations when the lawyer's "professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest." MODEL CODE DR 5-101(A).

263. The lawyer's duty arises from the subpoena ordering the appearance and testimony. The subpoena is issued by the court, and failure to appear can be punished by the

testimony regarding a client's matter might involve the lawyer's own interests as well.<sup>264</sup> Under Model Rule 1.7(b), therefore, the question is whether the testimony would result in a "material limitation" on the lawyer's representation of the client.

The mere fact that a lawyer must appear as a witness does not inevitably create such a limitation.<sup>265</sup> In some situations the lawyer's assertion of the evidentiary attorney-client privilege will shield any information that might impair the representation.<sup>266</sup> In other instances the lawyer's testimony on non-privileged matters may be harmless or even favorable to the client and completely consistent with the client's defense in the criminal action.<sup>267</sup> In these situations there is no limitation on the client's representation created by the lawyer's testimony.<sup>268</sup>

In other situations, a lawyer's testimony might be harmful to the client but not substantially so.<sup>269</sup> For example, a lawyer might be compelled to testify about the payment of the client's fee by another

---

court through its contempt powers. Thus, the lawyer's duty to testify can be viewed as a duty owed the court.

264. This would be true in the forfeiture context since the lawyer is interested in avoiding forfeiture of the fee. Furthermore, the lawyer would be interested in avoiding her own criminal liability under section 1957.

265. Some commentators view the issue differently, concluding that, if the defense lawyer is called as a witness, withdrawal is required regardless of the content of the testimony. Krieger & Van Dusen, *supra* note 73, at 742. Certainly the advocate-witness rule does not always preclude the representation. See *supra* text accompanying notes 257-61. Similarly, the conflict of interest rules here under discussion do not compel withdrawal every time a lawyer is called as a witness in a proceeding involving a client. The focus of the rules pertaining to the conflict of interest that may arise because the lawyer is called to testify in a proceeding involving a client is the content of the testimony rather than the mere merger of the roles of advocate and witness. See WOLFRAM, *supra* note 130, at 383-84. The specter of the defense lawyer testifying at the trial may raise a practical, nonethical issue as to disqualification. See *infra* text accompanying notes 341-49.

266. Reed, *supra* note 185, at 780-81 (at post-trial forfeiture hearing on third party claims, lawyer would have to raise privilege as to client communications not bearing on payment of fee). Privilege is discussed *supra* notes 197-98 and accompanying text.

267. For example, the lawyer may have been told nothing by the client that is inconsistent with the client's assertion of innocence and the legitimacy of the funds from which the fee was paid. Similarly, the lawyer's investigation may also corroborate those contentions. While the prosecution might call the defense lawyer to testify, under these circumstances the lawyer's testimony would not limit the lawyer's representation of the client in any way.

268. See WOLFRAM, *supra* note 130, at 383.

269. Model Rule 1.7(b) focuses on a *material* limitation on the representation. MODEL RULES Rule 1.7(b). The rule apparently contemplates that some limitations on the representation of a client might be immaterial and not warrant withdrawal. See *id.*

person.<sup>270</sup> This might be a fact that embarrasses the client or suggests involvement with the third person,<sup>271</sup> but in many instances it will not result in additional harm to the client.<sup>272</sup> In these instances the testimony could be viewed as a limitation on the representation (the client might feel wronged) but not a material one.

In certain instances, however, the testimony of the lawyer may be substantially adverse to the client and compel the conclusion that the lawyer's representation is materially limited by the lawyer's duty to testify. The best example of such testimony would be when it is apparent that the lawyer's own conduct is being investigated as potentially criminal. For instance, if a lawyer is called as a grand jury witness and his own section 1957 criminal liability is implicated, the lawyer may attempt to protect himself.<sup>273</sup> That self-interest could be a material limitation on the client's representation, since the lawyer might be inclined to deflect blame toward the client whose fee payment created the problem. Another example of testimony that would seriously affect the client's representation is when the lawyer has non-privileged knowledge that is substantially harmful to the client.<sup>274</sup> In these situations, the lawyer's duty to testify might well be viewed as materially limiting the representation of the client.

Even when the lawyer's testimony has this effect, however, the Model Rules' treatment of the conflict permits some representations

---

270. This could occur in a summons enforcement proceeding brought to obtain the information sought by section 6050I. The payment of a cash fee requires disclosure of the name of any third party payor. See *infra* app. 1 (Form 8300). Similarly, in testimony relevant to fee forfeiture, a lawyer could be asked about the identity of the party paying the fee. This would be relevant to the issue of the lawyer's mens rea on the forfeitability of the assets used to pay that fee.

271. Some clients might be embarrassed by the need to have a third party pay legal fees. More likely, however, the payment of the fees by a third person could implicate the client in a broader pattern of criminal activity. The payment could establish a connection and relationship between the defendant and the payor.

272. In many instances the conspiracy implications of the third party payment will be more harmful to the third party (since they will be implicated in the crime of the defendant) than to the defendant himself. Krieger & Van Dusen, *supra* note 73, at 739 (prosecutor may use subpoena of defense lawyer, purportedly regarding the possible forfeiture of fee, to gather testimony regarding the defendant's financial gain from the criminal enterprise to assist in obtaining convictions for continuing criminal enterprise or RICO violations).

273. Here the lawyer could become less concerned with the client's potential criminal liability than with his own.

274. See WOLFRAM, *supra* note 130, at 383-84. For example, the lawyer may have witnessed illegal conduct by the client or have received prejudicial communications from a third party.

to continue. If the client consents after consultation, Model Rule 1.7(b) allows such representations despite the conflict when the lawyer reasonably believes the representation will not be adversely affected.<sup>275</sup> In determining such adverse effect, the drafters' comments focus on "the likelihood that the conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."<sup>276</sup> In some instances when the lawyer's testimony is contrary to the client's interests, a reasonable lawyer might nonetheless conclude that her independent professional judgment would not be impaired by the conflict.<sup>277</sup> If so, an informed client is permitted to consent to the representation despite the conflict, and no ethical problem precludes the representation.<sup>278</sup>

The ethical restraints on conflicts of interest are not drawn so broadly as to preclude a representation merely because the defense lawyer is called as a witness by the prosecution. There will be some instances when the testimony of the lawyer will so involve the lawyer's interests (such as when the lawyer's own criminality under section 1957 appears possible) or will otherwise be so harmful to the client that the representation will be adversely affected and should be

---

275. MODEL RULES Rule 1.7(b)(1).

276. *Id.* Rule 1.7 cmt 4.

277. WOLFRAM, *supra* note 130, at 384 ("Under the general conflict of interest rules, client consent under the Model Rules can remove the adverse-testimony barrier in all but those rare cases in which the lawyer's adverse testimony so sharply conflicts with the client's interests that the client's consent is objectively unreasonable."). The point, of course, is that the possibility of adverse testimony need not necessarily end the representation due to ethical prohibitions.

278. Model Rule 1.7(b)(2) requires the informed consent of the client for the continuation of the representation even when the lawyer reasonably concludes that the representation will not be adversely affected by the potential limitation on the representation. Thus, the client is permitted to veto the representation even though it appears that no harm will result. Critics are wrong, therefore, when they assert that a lawyer is automatically disqualified by ethics from continuing the representation whenever they are called as fact witnesses. *See, e.g., Zimmerman & Lavine, supra* note 224, at 51. There are exceptions to the advocate-witness rule and the conflict of interest rule that may permit the continuation of the representation despite the defense lawyer's testimony as a witness. Practically, however, the judge may be concerned about appeals resulting from allegations of conflicts of interest. This may cause the judge to be reluctant to allow the representation to continue. Part III of this Article discusses this tendency. *See infra* text accompanying notes 341-50.

discontinued.<sup>279</sup> Unless the lawyer is facing potential prosecution or has non-privileged information seriously harmful to the client, however, the lawyer generally can ethically continue in the representation despite being compelled to testify. Ethics law does not compel disqualification whenever the lawyer is called to testify as a witness.<sup>280</sup>

Many critics of the money laundering laws thus overstate the ethical restrictions on lawyers serving as witnesses. The advocate-witness rule would seldom operate to disqualify the lawyer because the money laundering laws do not provide a likely context for the merger of those two roles. In the one situation where the roles are merged (testimony at trial about forfeiture), exceptions to the advocate-witness rule will sometimes permit the dual roles. Furthermore, while some testimony offered by a defense lawyer would undoubtedly create a conflict of interest sufficient to preclude continued representation of the defendant, not all such testimony would do so. The money laundering laws do allow the prosecutor to disqualify defense lawyers based on ethics rules in some cases. Furthermore, the power of prosecutors to disqualify defense counsel may be expanded by practical considerations to be discussed in Part IV below. It is not true, however, that based on ethics law a prosecutor can effectively choose a defendant's counsel merely by subpoenaing the client's lawyer.

This analysis of the ethical impact of the money laundering laws on lawyers shows that criticisms of the laws' ethical impact are exaggerated. Analyzed carefully, those laws raise no real ethical dilemmas for criminal defense lawyers which would force them to choose between unethical and unlawful conduct or between two different types of unethical conduct. The laws do create contexts in which defense lawyers must use care to act appropriately under ethics law. And they certainly engender situations in which lawyers must act contrary to the interests of their clients and to their own interests as well. But we should not confuse complexity and disadvantage with ethical difficulty. The laws undoubtedly make defense lawyers' professional lives more unpleasant, but they do not force lawyers to act unethically.

The public might find lawyers' ethical protests regarding the application of the money laundering laws to be particularly hollow.

---

279. When such a conflict arises, withdrawal from the representation is mandatory. MODEL RULES Rule 1.16(a)(1); MODEL CODE DR 2-110(B)(2).

280. While trial judges may disqualify defense lawyers to reduce the likelihood of appeal, this is not because ethical rules require it, but rather because of constitutional or practical concerns. This effect of the laws is discussed *infra* in part III.

While lawyers object to the laws' impact on their role as zealous advocates, the public may view the laws as an appropriate extension of lawyers' duties as officers of the court.<sup>281</sup> It is ironic that lawyers (who are trained in investigation, inquiry, and inference and are sworn to uphold the law) seek to be held to a lower standard than that imposed on all other sellers of goods and services when it comes to payments using the proceeds of crime. Members of the public might legitimately ask whether more should be expected of lawyers in terms of ethics rather than less.

The limited effect of the laws upon the ethics of lawyers, however, does not fully describe their impact upon lawyers, clients, and the judicial system. The practical effects of the laws must also be evaluated.

### III. THE PRACTICAL IMPACT

Beyond the ethical impact of the money laundering laws is the laws' practical impact on lawyers.<sup>282</sup> Several harmful practical effects are possible. Below we consider whether the laws "chill" the relationship between clients and lawyers, whether the laws drive some lawyers away from certain cases, and whether the laws empower prosecutors to disqualify defense lawyers.

#### A. *Chilled Relationship between Lawyer and Client*

One frequent objection to the laws' practical effect is that they "chill" the relationship between clients and lawyers.<sup>283</sup> Although

---

281. For a discussion of the tension between the lawyer's roles as zealous advocate and officer of the court, see Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

282. For criticisms based on the practical impact, see Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 658 (1989) (Blackmun, J., dissenting) ("This Court has the power to declare [fee forfeiture] constitutional, but it cannot thereby make it wise."); Wolfeich, *supra* note 1, at 845 (recounting NACDL argument that section 1957 would cripple the adversary system).

283. DuMouchel & Oberg, *supra* note 1, at 60 (section 6050I and fee forfeiture "have the potential to rend the fabric of the attorney-client relationship"); Wolfeich, *supra* note 1, at 847 n.27 (recounting remarks of Representatives that section 1957 chills relationship between lawyers and clients); *id.* at 854 (lawyer testimony on fee forfeiture chills the confidential relationship between lawyers and clients); Brief Amicus Curiae of the American Bar Association, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729) (subpoenas on forfeiture will chill lawyer-client communications); Adams, *supra* note 1, at 151:313 ("The ultimate result [of the money laundering laws being applied to lawyers] may well be a chilling effect on, if not an absolute weaken-

critics seldom identify how this chilling manifests itself,<sup>284</sup> two possibilities come to mind: stifled communication between lawyers and clients, and reduced zeal by lawyers on behalf of clients.<sup>285</sup>

### 1. *Stifled Communication*

The laundering laws might reduce lawyer-client communication in several ways. Lawyers may not ask their clients as much. Clients may not reveal as much to lawyers, with or without questions. Finally, lawyers may not feel as free to advise clients in close cases.

#### a. *Lawyers May Not Ask as Much*

We have already discussed the claim that the laws cause lawyers to ask fewer questions of their clients.<sup>286</sup> Fearing fee forfeiture or section 1957 criminal liability, a lawyer might choose to remain ignorant by avoiding areas of inquiry on the origin of a fee payment. By doing so, the lawyer may hope to preserve a bona fide purchaser defense to forfeiture or to negate the mens rea element of section 1957. As described above,<sup>287</sup> however, the laws' actual impact on lawyer inquiry is likely to be slight.

#### b. *Clients May Not Say as Much*

A second way communication may be hindered by the laws is that regardless of how much the lawyer asks, the client is less willing to talk.<sup>288</sup> The client may fear that the lawyer could be forced to

---

ing of, the attorney-client relationship as it exists today." Cf. Genego, *supra* note 151, at 41 (noting that four government practices are chilling the relationship between clients and lawyers).

284. See, e.g., Zimmerman & Lavine, *supra* note 224, at 54; Wolfteich, *supra* note 1, at 854 (lawyer's testimony on fee forfeiture "chills" the confidential relationship between attorney and client).

285. Some commentators have noted the possibility of the most severe form of "chilling," namely deterrence of the formation of a lawyer-client relationship. See, e.g., Capra, *supra* note 198, at 237 ("what client will seek advice if the very seeking of that advice can be used against him?").

286. See *supra* text accompanying notes 74-89. See also Wolfteich, *supra* note 1, at 847-48 n.27.

287. See *supra* text accompanying notes 82-89.

288. See DuMouchel & Oberg, *supra* note 1, at 66-67 (open communication by client would be "chilled" by attorney giving testimony and "crippled" by the filing of a section 6050I report); Note, *supra* note 73, at 842 (when lawyer tries to qualify as bona fide purchaser to avoid fee forfeiture, effect is to "chill" the relationship between lawyer and client, making the client less likely to speak freely and openly).

provide the government with information harmful to the client.<sup>289</sup>

First it is helpful to identify what information the government will seek under the laundering laws. For section 1957, the government would be investigating whether the lawyer knowingly engaged in a monetary transaction in criminally derived property over \$10,000 that was in fact derived from specified unlawful activity.<sup>290</sup> For section 6050I, the government is entitled to discover the client's and lawyer's identities, the amount of any cash fee over \$10,000, and the involvement and identity of any third party payors.<sup>291</sup> For forfeiture, the government will seek the amount of the fee, the payor of the fee, and the method of payment.<sup>292</sup>

This information sought from the lawyer may well be harmful to the client. Harm can be hypothesized at most stages of the process. If the client is not being investigated but consults a lawyer about possible criminal liability for past acts, a section 6050I report flags the client for the government and reveals that the client has hired a lawyer (probably specialized in criminal defense), the identity of the lawyer, that the client paid a substantial amount (over \$10,000 or there would be no report), and that it was paid in cash.<sup>293</sup> For a client who is already being investigated, the section 6050I report indicates that the client has large amounts of cash. Similarly, the lawyer's testimony or documents on fee payment, subpoenaed by a grand jury investigating forfeiture or the lawyer's section 1957 liability, also may place large amounts of money in the client's hands. This information may help the grand jury find the elements of the underlying charge.<sup>294</sup> Finally, if the lawyer testifies at the client's trial on the issue of forfei-

---

289. See DuMouchel & Oberg, *supra* note 1, at 66 ("If the client simply fears that [disclosure of confidences] could be compelled, the essential open communication would be chilled . . ."); Zimmerman & Lavine, *supra* note 224, at 51 (with grand jury subpoenas to lawyers, "the next thing the client knows, his lawyer is being questioned in secret about his case. How can the client trust or be honest with that lawyer in the future?"). The potentially harmful impact of section 6050I disclosures is described *supra* note 213.

290. See *supra* text accompanying notes 9-16.

291. See *supra* text accompanying notes 39-43.

292. See *supra* text accompanying notes 47-57. See also DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.610.

293. With this information, the government may initiate an investigation of the client. It could use the FinCEN database to cross-check all currency reports or check the client's tax returns.

294. See, e.g., Shargel v. United States, 742 F.2d 61 (2d Cir. 1984); DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.620. It reveals the client's access to money. In the same way, the information may establish a *prima facie* case of tax evasion.



ture,<sup>295</sup> the information may hurt the defendant in front of the jury by revealing the client's access to large amounts of money.

Although there are some barriers to the disclosure, lawyers could be forced to disclose some information harmful to clients under the laundering laws.<sup>296</sup> Sophisticated clients may already be aware of this

---

295. See *supra* note 256.

296. The first barrier is that presumably the lawyer would only disclose the information if compelled. For section 1957, the compulsion would come in the form of a grand jury subpoena; for section 6050I, in the form of a summons enforcement proceeding; and for forfeiture, in the form of a grand jury or trial subpoena. The lawyer's testimony at the third party hearing is voluntary and could not be called "compelled".

Another barrier is the lawyer's own Fifth Amendment privilege against self-incrimination. Our focus is whether information harmful to the client can be compelled from the lawyer, but if the information is potentially incriminating to the lawyer as well, the lawyer may assert the Fifth Amendment privilege. That claim would be based on the lawyer's potential criminal liability under section 1957. See *Axelrod & Harris, supra* note 44, at 43 ("Because the scope of Section 1957's attorney fee exception is unclear, and because the acceptance of more than \$10,000 in cash is an element of that offense, in certain cases the attorney must consider the claiming of *his own* Fifth Amendment privilege on a Form 8300."); *Wolfteich, supra* note 1, at 861 n.126. No cases on this issue have been reported, but it seems likely that a privilege against self-incrimination claim by a lawyer would shelter at least some information harmful to the client. As for information the lawyer could reasonably claim as potentially incriminating under section 1957, one item is the amount of the fee, because establishing the fee as over \$10,000 satisfies an element of section 1957. Another item is the lawyer's knowledge about the source of the fee, because it could show that the lawyer knew that the fee was criminally derived. As to this information, at least, the lawyer could make a reasonable Fifth Amendment claim in response to government demands.

The Fifth Amendment claim has its limits. The privilege only shields testimonial evidence, so government subpoenas for physical evidence (like documents) in the lawyer's possession would generally not be barred. See *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976). Also, once a lawyer claims the Fifth Amendment, the government can grant immunity and force the lawyer to respond. The willingness of the government to grant immunity to the lawyer will depend on the government's goal. In a section 1957 investigation, immunity for the lawyer is unlikely. Since the lawyer is presumably the target, granting immunity would defeat the purpose of the investigation. In a summons enforcement proceeding under section 6050I, the government might offer the lawyer immunity in exchange for the testimony, depending on whether the government's primary focus is the client or the lawyer. In a grand jury or trial focusing on forfeiture of the fee, the government would presumably grant the lawyer immunity because the goal is forfeiture from the client rather than prosecution of the lawyer. With the lawyer's Fifth Amendment privilege being qualified by the testimonial limitation and the possibility of immunity, a lawyer could not count on the Fifth Amendment to prevent disclosure of all information.

Other barriers that may prevent lawyer disclosure of information harmful to the client include the evidentiary attorney-client privilege and the ethical duty of confidentiality. Neither will prevent all disclosures. The attorney-client privilege would shield some information the government might seek, like what the client told the lawyer on how the client generated the fee. But the attorney-client privilege generally does not cover the

risk from articles in the popular press.<sup>297</sup> Other clients will surely learn of the risk because the lawyer will tell them about it.<sup>298</sup> It would not be surprising to find clients giving less information to their lawyers.<sup>299</sup>

Furthermore, the actual effect on clients may be even greater. The question of whether the laundering laws force lawyers to disclose information harmful to clients is complex. Many lawyers probably do not understand the laws and their application, including the complicating impact of the lawyer's Fifth Amendment privilege and the attorney-client privilege. In their confusion, lawyers may exaggerate the risks of disclosure to protect themselves from claims by clients that lawyers did not warn them that disclosure might be compelled.<sup>300</sup> Even assuming that lawyers understand the laws, when they try to educate the client on exactly what they might have to reveal, the client may not understand. The client may entertain fears of disclosure

---

identity of the client, the fact of representation, the amount of the fee, and identity of third party payors. See *supra* notes 197-98. See also Wolfteich, *supra* note 1, at 854 n.71. As to the ethical duty of confidentiality, it does not shield information from disclosure once a court order is entered. See *supra* notes 209-11. The attorney-client privilege is only some protection and the duty of confidentiality is none. So eventually the lawyer could be compelled to provide some information.

297. See, e.g., *U.S. Seeks to Force Law Firms to Name Clients Paying in Cash*, CHI. TRIB., Nov. 22, 1989, at 4; Campbell & Grady, *supra* note 44, at 25.

298. See DuMouchel & Oberg, *supra* note 1, at 61 ("Of course, counsel must immediately warn [the client] that, should cash fees ever aggregate to over \$10,000, Form 8300 will have to be filed with the Internal Revenue Service, disclosing the client's identity, the nature of the transaction, and so on."); Gershman, *supra* note 191, at 26 ("Clearly, the lawyer must advise the client that the lawyer may have a duty to file a [6050I report] disclosing the client's identity, the amount of cash received, and the date and nature of the transaction. The lawyer should also inform the client of the risks of investigation and prosecution flowing from disclosure of the client's identity and fee information."); Wolfteich, *supra* note 1, at 863 n.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.'"). See also NACDL op. 90-1, *infra* note 300.

299. As to section 6050I, the threat of disclosure would probably not chill a client's communication in the sense that the client would hire a lawyer, have the section 6050I form filed and then relate 75% of the story rather than 100%. It is more likely that the client, upon hearing about the potential disclosure, will be deterred from hiring a lawyer at all. This is the most extreme form of chilling of the lawyer-client relationship.

300. See NACDL Op. 90-1 (lawyer must advise client of risks of complying with Form 8300; lawyer may be liable for malpractice for failing to disclose risks if government gains advantage from the 8300; client consent is required for disclosure) (cited in UNDERWOOD & FORTUNE, *supra* note 83, at 176 n.12 (Supp. 1990)).

not grounded in reality and that cannot be dispelled. This would not be surprising because the advice suggested by some authors is frightening.<sup>301</sup> Clients may be reluctant to confide in lawyers, either because of their own images of what the laws compel lawyers to reveal or because of scary advice from the lawyers themselves.

Thus clients may not talk as freely to their lawyers because of the laws. If clients do not, lawyers will be less informed and therefore provide less effective representation. This is harmful both to the client and to the adversary system, which is premised upon fully informed advocates.

*c. Lawyers May Not Feel Free to Advise*

The laws might also chill the lawyer-client relationship by limiting the advice that lawyers give their clients.<sup>302</sup> These laws may cause lawyers to be more guarded in their advice because they fear flips<sup>303</sup> and stings.<sup>304</sup>

---

301. Wolfteich, *supra* note 1, at 863 n.135 (quoted *supra* note 298).

302. As two authors noted, the chilling goes both ways. See DuMouchel & Oberg, *supra* note 1, at 67.

303. See *id.* (quoting John Wesley Hall, Jr., *A Little Paranoia Doesn't Hurt*, CHAMPION, July 1985, at 21 ("Clients feel tremendous pressure to flip when they know then can cut their exposure. They will often sacrifice anybody to save themselves.")); Genego, *supra* note 156, at 7 (lawyers responding to survey "repeatedly stated that they . . . were less open and more guarded in advising clients because they feared their advice might be misinterpreted and used against them by a client who might later decide to cooperate with the government."); UNDERWOOD & FORTUNE, *supra* note 83, at 178 (Supp. 1990) ("The more a lawyer knows, the more vulnerable he or she is — not only to the prosecutor, but to the client who may decide to cut a deal in which testimony against the lawyer is a part."). The possibility that a client would flip on a lawyer is mentioned in the Department of Justice Guidelines on section 1957. See DOJ MANUAL, *supra* note 16, at 9-105.630 ("Thus, a client's voluntary testimony at trial or a client's voluntary disclosure of communications with his or her attorney — disclosed, for example, in an attempt to 'make a deal' by implicating the attorney in criminal misconduct — may not [be used to establish] actual knowledge."). See also Victoria Slind-Flor, *Defense Bar Up in Arms: Lawyer's Arrest is Criticized by Colleagues*, NAT'L L.J., Aug. 30, 1993, at 30, 30 (defendant facing forfeiture may have "turned" on defense lawyer for a reduction in penalties).

304. Genego, *supra* note 151, at 7 (at least eleven attorneys reported "specific instances of having been approached by purported witnesses or potential clients who were working for the government and who, in their disguised capacity, attempted to engage the attorney in misconduct.").

In September, 1990, Professor Welling spoke with three prominent defense lawyers at a conference on money laundering. The lawyers were Harvey Silets of Silets & Martin in Chicago; Charles Blau of Johnson & Gibbs in Dallas; and Kirk Munroe of Richey, Munroe & Rodriguez, P.A. in Miami. Two of these lawyers thought that they had been solicited by agents disguised as potential clients. See also *United States v. Belcher*, 927

### 1. *Flips*

A flip occurs when the client gives evidence to the government against the lawyer, usually in exchange for more lenient treatment. For example, a client indicted for drug trafficking might approach the government and offer to testify that his lawyer knew that the \$15,000 fee was derived from drug trafficking, raising possible section 1957 liability for the lawyer. Or a client might offer to testify that her lawyer suggested that she could avoid any reports of cash transactions by not paying the lawyer cash and by using two cashier's checks of \$7500 each. This testimony would raise potential liability for the lawyer under section 6050I<sup>305</sup> and the anti-structuring statute.<sup>306</sup>

In giving the government new opportunities to prosecute lawyers in connection with their work, the laundering laws give clients new leverage against their lawyers. Lawyers are wary of this leverage because they fear that the government would prefer to prosecute defense lawyers rather than the usual suspects.<sup>307</sup> As one defense lawyer put it, "If you were a prosecutor would you rather have a drug dealer or a local criminal lawyer in the dock?"<sup>308</sup>

Of course, if the client's testimony described above were true, it would expose the kind of unsavory legal advice and lawyer misconduct the laws were designed to extinguish. These communications are appropriately chilled.

Yet clients sometimes lie, and lawyers' fear of flips will cause even legitimate lawyers to eye clients with suspicion, thus undermining their relationship. One problem with this criticism of the laws is that if a client is inclined to lie, the client is going to lie regardless of what the lawyer says. These clients will tell the government what

---

F.2d 1182 (11th Cir. 1991) (lawyer indicted under 18 U.S.C. § 1001 and 31 U.S.C. § 5324 as part of laundering sting).

305. I.R.C. § 6050I(f)(1) (1988).

306. 31 U.S.C. § 5324 (1988).

307. See DuMouchel & Oberg, *supra* note 1, at 67; Hall, *supra* note 303, at 21; *IRS Serves Summonses to Force Disclosure*, NAT'L L.J., Mar. 19, 1990, at 6 ("We cannot allow . . . the war against drugs to become the war against lawyers . . ." said Neal R. Sonnett . . . Mr. Sonnett called the government's action 'a nationwide assault upon criminal defense lawyers,' and predicted that 'hundreds of lawyers . . . will go to jail for this. '); Richard Fricker, *U.S. Targets Lawyers*, A.B.A. J., May 1990, at 19 ("This is an attack on the criminal bar," Smallwood said . . . "The government is making lawyers their first target. "). The Justice Department denies any policy of "targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases." DOJ FORFEITURE GUIDELINES, *supra* note 61, at 9-111.530.

308. DuMouchel & Oberg, *supra* note 1, at 67; Hall, *supra* note 303, at 21.

they think it wants to hear without regard to what the lawyer actually said. Lawyers should not be chilled from rendering legitimate advice because with a client who decides to lie, the content of the lawyer's advice makes no difference anyway.

Even so, somewhere between clients who are telling the truth and clients who are deliberately lying are clients who misunderstand legitimate advice.<sup>309</sup> Lawyers who fear prosecution might forego complicated but legitimate advice for fear the client would misunderstand and then testify against the lawyer. If so, their clients would be deprived of legitimate advice.

## 2. *Stings*

Another practical impact is that lawyers' communication to clients may be chilled by fear of stings.<sup>310</sup> Stings are investigations where government undercover agents create an opportunity and invite the target to commit a crime. Regardless of whether the government is using this undercover approach, defense lawyers fear they are being targeted for stings by purported clients who are actually government agents trying to catch them in violations of section 1957 or section

---

309. For instance, assume a client hires a lawyer and tenders the \$15,000 retainer in cash. The lawyer tells the client about the § 6050I reporting requirement, and the client questions the lawyer. The lawyer might provide three pieces of advice:

(1) A section 6050I report is not required if the client pays the \$15,000 with a personal check.

(2) A section 6050I report can be avoided if the client pays the retainer with a \$15,000 cashier's check purchased from a bank, although the bank will file a cash transaction report.

(3) All reports of cash transactions can be avoided if the client pays the retainer with two \$7500 cashier's checks purchased from different banks.

Advice (1) is clearly legal and is being commonly given. See Fred Strasser et al., *Fee-Reporting Requirements Get Even Tighter*, NAT'L L.J., Dec. 17, 1990, at 5 (quoting Terrance Reed). Advice (3) is clearly illegal. Advice (2) is less clear. The express language of section 6050I(f) suggests it may be illegal. See I.R.C. § 6050I(f) ("No person shall for the purpose of evading the return requirements of *this section* — (A) cause or attempt to cause a trade or business to fail to file a return required *under this section*. . . . or (C) structure or assist in structuring . . . any transaction with one or more trades or businesses.") (emphasis added). But a policy argument could be made to support the legality of the advice because the lawyer is not counseling the avoidance of all reports, but is counseling the client to set up the transaction so that one type of report rather than another is filed. The government has a right to notice of cash transactions but not necessarily cash transactions at a lawyer's office. The point is that the line between legal and illegal advice is fuzzy even for lawyers, and it may be lost on the client.

310. See *supra* note 303.

6050I.<sup>311</sup> Such fears limit candor.<sup>312</sup>

For lawyers giving illegal advice or otherwise committing crimes under these laws, we hope they are scared into legitimacy by the threat of a sting. Conversely, it could be said that lawyers giving only legitimate advice, they have nothing to fear from stings. As described above, though, the line between legal and illegal advice is not always vivid. Even indulging the assumption that a government agent would not lie, the agent would want the investigation to bear fruit and so would have some incentive to construe ambiguity against the lawyer. The temptation for the government agent to distort the facts is not as great as it is with flipping clients who hope to trade the lawyer's criminal liability for relief from their own troubles, but government agents do have some incentive. Even honest lawyers, therefore, might legitimately fear the possibility of stings based on the laundering laws.<sup>313</sup>

Yet lawyers have always faced the threat of flips and stings, even before the laundering laws were adopted. A client might flip and testify that the lawyer suborned perjury,<sup>314</sup> obstructed justice<sup>315</sup> or tampered with witnesses.<sup>316</sup> A sting might target lawyers for bribery, like Operation Greylord in Chicago.<sup>317</sup> Still, the laundering laws not only

---

311. *See id.* For example, the government might send in an agent posing as a client who hires the lawyer and pays a fee of \$15,000 in cash but demands that the lawyer forego the section 6050I report. There is some evidence the government is using this approach. *See* United States v. Belcher, 927 F.2d 1182 (11th Cir. 1991) (lawyer indicted under 18 U.S.C. § 1001 and 31 U.S.C. § 5324 as part of laundering sting; not section 1957 or section 6050I, but clearly government is using stings against lawyers). *See generally* Genego, *supra* note 151, at 3 ("The techniques prosecutors are using [including] . . . attempts to entrap attorneys through 'clients' who are in fact working with the government — are seen by the defense bar as part of a general prosecutorial program to target vigorous and successful attorneys for government harassment and to discourage attorneys from representing criminal defendants.") The Department of Justice denies this. *See supra* note 307.

312. *See* Genego, *supra* note 151, at 7, where the author reports that at least 11 lawyers mentioned that they thought they had been the target of a sting operation. Professor Genego does not draw any conclusion specifically related to these reports. We might predict the reaction of lawyers to being targeted for sting operations. Lawyers might be chilled in what they say to clients or in their zeal or willingness to represent these clients.

313. A sting may begin as a flip, but once it ripens into a sting, meetings are generally taped, and risk to the lawyer that other parties will lie about what was said decreases.

314. *See* 18 U.S.C. § 1622 (1988).

315. *See id.* §§ 1501-16.

316. *See id.* § 1512.

317. *See, e.g.,* United States v. Roth, 860 F.2d 1382 (7th Cir. 1988); Ward v. United States, 845 F.2d 1459 (7th Cir. 1988). *See also* Edward Frost, *Top PI Lawyer Convicted*, A.B.A. J., May 1991, at 28 (lawyers will be "chilled" by lawyer's conviction for bribing

increase the number of opportunities for flips and stings, they also describe conduct that lawyers can be envisioned doing. Thus the laws provide new opportunities for the government and an increased awareness of the risks for lawyers.

### 3. *Subdued Zeal*

Another manifestation of the "chilled" relationship between clients and lawyers may be generally reduced advocacy. Because clients are worried about what lawyers may have to reveal and lawyers are worried about clients flipping, the relationship is less trusting. Even if communication is not reduced, the relationship could be otherwise affected. In such an atmosphere, it would not be surprising to find that lawyers unconsciously reduce the intensity of their efforts for clients.

#### B. *Lawyers Driven Away from Some Cases*

In addition to concerns that the money laundering laws chill the lawyer-client relationship, another danger is that the laws cause lawyers to decline particular cases<sup>318</sup> or particular types of cases.<sup>319</sup> Some

---

witnesses). Another example of such stings is *United States v. Feaster*, 843 F.2d 1392 (6th Cir.), *cert. denied*, 488 U.S. 898 (1988) (lawyer advising an undercover agent on evasion of taxes charged with aiding preparation of a false tax return).

318. *See, e.g.*, *United States v. Bassett*, 632 F. Supp. 1308, 1309 (D. Md. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987) (lawyers facing possible forfeiture of assets gave notice to the court that their continued appearance in the case was conditional on their fees being exempt from forfeiture); Brickey, *Tainted Assets*, *supra* note 1, at 54 (describing a hypothetical case where a defense lawyer is deterred from taking a case by the threat of section 1957 liability); Peter L. Zimroth, *When Defense Goes Begging*, NAT'L L.J., June 25, 1990, at 13 (describing how four lawyers representing General Noriega asked to resign from the case because of fee forfeiture); Linda P. Campbell, *Drug War Spotlight is on Legal Fees Issue*, CHI. TRIB., Oct. 29, 1989, at 21 (lawyer turns down three clients because they could not assure lawyer fee was untainted).

319. UNDERWOOD & FORTUNE, *supra* note 83, at 409 ("The potential effect of [fee forfeiture] provisions on the ability of RICO and CCE defendants to retain counsel is obvious.") (presumably this is a criticism); *id.* at 177 (Supp. 1990) ("For the private defense bar there is no bright side to *Caplin & Drysdale*."); Genego, *supra* note 167, at 842; Krieger & Van Dusen, *supra* note 73, at 739 (lawyers may refuse to be retained in cases involving fee litigation); Margolin & Battson, *supra* note 73, at 27 (lawyers driven out of RICO and CCE cases); Haddad, *supra* note 73 at 848 ("Criminal defense attorneys are avoiding these problems by simply refusing to represent clients who may be subject to asset forfeiture."); Roderick D. Vereen, Note, *Attorneys' Rights to Fees Under the CFA of 1984: The 'Bona Fide Purchaser'*, 16 S.U. L. REV. 407, 415 (1989) (decision by United States Supreme Court in favor of fee forfeiture may cause chilling effect on attorneys who would otherwise represent RICO defendants); Brief Amicus Curiae of the American Bar

say the laws cause defense lawyers to quit federal criminal law altogether.<sup>320</sup> The reasons given for lawyers quitting is that they are intimidated by the government's increased power,<sup>321</sup> which forces them to face the risk of losing their fees<sup>322</sup> and the increased risk of prosecution.<sup>323</sup> Furthermore, the steps lawyers must take to avoid liability under these laws are inconvenient,<sup>324</sup> complicated, and an additional time drain on the regular workload.<sup>325</sup> For some lawyers, the argu-

---

Association at 2, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729) (brief on petition for certiorari) ("The mere prospect of fee forfeiture may deter many lawyers from undertaking a criminal representation."); Richard L. Fricker, *Dirty Money*, A.B.A. J., Nov. 1989, at 64 (lawyers avoiding cases with forfeiture or drugs); Anne Stark Gallagher, *RICO Risks*, A.B.A. J., Oct. 1989, at 28 (lawyers shying away from drug cases); *IRS Launches Crackdown on Attorneys' Cash*, MONEY LAUNDERING ALERT, No. 3, Dec. 1989, at 2 ("The strains of the government's pursuit and the fee seizures have caused some lawyers to renounce narcotics defense work."); Campbell, *supra* note 318, at 24 (lawyers shying away from drug cases).

320. DuMouchel & Oberg, *supra* note 1, at 60 ("Some members of the defense bar might be forced out of the field altogether . . ."); Genego, *supra* note 151, at 39 (sixteen lawyers reported quitting federal criminal law altogether); Mass, *supra* note 73, at 678 ("If complex cases were increasingly handled through appointment, many successful defense lawyers might leave the field, choosing to enter more financially rewarding areas of practice."); Gershman, *supra* note 191, at 22 ("Many . . . defense attorneys will be driven out of defense work" by, inter alia, section 6050I reporting requirements and fee forfeiture); Fricker, *supra* note 319, at 64 ("Many [criminal defense lawyers] are simply getting out of criminal law . . ."); Margolin & Battson, *supra* note 73, at 29-30 (initial government success with forfeiture "sent seismic shocks through the community of defense lawyers, deterring many from the honest pursuit of a noble profession." [footnote omitted]).

321. Genego, *supra* note 151, at 41 (discussing the "sense of fear and intimidation" experienced by criminal defense lawyers).

322. The fears of fee forfeiture are described in UNDERWOOD & FORTUNE, *supra* note 83, at 177 (Supp. 1990) ("[T]here is little doubt but that the Forfeiture Act, as construed in *Caplin & Drysdale*, places the 'white powder bar' in the awkward position of economic dependence on the restraint and good will of the Justice Department.") (footnotes omitted); Mass, *supra* note 73, at 675 (attorneys would not be willing to undertake long, complex defenses if there is a possibility that their fees will be forfeited); Gallagher, *supra* note 319, at 28 (after forfeiture held constitutional, some lawyers may change their practices, shunning the now risky representation of defendants in RICO and narcotics cases).

323. Fear of prosecution under section 1957 is described in Wolfteich, *supra* note 1, at 867 (describing a "host of uncertainties" under 1957 that may deter a lawyer from taking a case); Gallagher, *supra* note 319, at 28 (describing threat of prosecution under section 1957 as "special concern" of lawyers in RICO and narcotics cases).

324. For example, lawyers avoiding the reach of section 1957 would need to plan to limit the fee to below \$10,000 or wait until after indictment to deposit the funds. Lawyers dealing with section 6050I would have to file Form 8300. All this is inconvenient and distracting. See also Brickey, *Tainted Assets*, *supra* note 1, at 54.

325. The lawyer would have to research the laws to understand what is required. This is time-consuming (as I well know) because the laws are so different from each other (one substantive crime, one tax reporting requirement, and one criminal sanction) and



ment goes, the cases are not worth it.

There is evidence that the laundering laws are driving lawyers away from some types of cases. Empirical evidence appears in Professor Genego's study,<sup>326</sup> which found that 14% of lawyers surveyed had declined a specific case or cases as a result of government practices often associated with the laundering laws.<sup>327</sup> Case law supports the fact that some attorneys refuse to take a case if fee forfeiture is threatened.<sup>328</sup> Finally, there is substantial anecdotal evidence that lawyers are being driven away from certain types of cases.<sup>329</sup> Although the extent is hard to gauge,<sup>330</sup> the evidence indicates that some lawyers are being deterred by practices associated with the

---

they are complex and new. They are not codified together, but are scattered throughout titles 18, 21, and 26 of the U.S. Code. Moreover, the laws are complicated by regulations (for section 6050I) and Department of Justice guidelines (for section 1957 and fee forfeiture).

326. See Genego, *supra* note 151, at 2.

327. Professor Genego's study is based on data he collected by sending questionnaires to members of the National Association of Criminal Defense Lawyers. The questions focused on five specific prosecution practices, including the receipt of grand jury subpoenas, the receipt of summonses from the IRS, the government's use of confidential informants at defense meetings involving multi-defendant representation, attempts to forfeit money paid to attorneys or to prevent a defendant from using his or her assets to pay attorney's fees, and efforts to disqualify an attorney from representing a particular defendant. Grand jury subpoenas to lawyers are associated with the laundering laws because subpoenas are used to seek fee forfeiture information. Two other practices, IRS summonses under section 6050I and attempts to forfeit money paid to attorneys under forfeiture laws, are directly attributable to the laundering laws. To a large extent, Professor Genego's survey reflects the impact of the laundering laws.

328. See, e.g., *United States v. Monsanto*, 836 F.2d 74, 76 (2d Cir. 1987), *aff'd*, 852 F.2d 1400 (1988) (en banc), *rev'd*, 491 U.S. 600 (1989); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987).

329. In September, 1990, Professor Welling spoke with three prominent criminal defense lawyers at a conference on money laundering. The lawyers were Harvey Silets of Silets & Martin in Chicago; Charles Blau of Johnson & Gibbs in Dallas; and Kirk Munroe of Richey, Munroe & Rodriguez, P.A. in Miami. All three said they had changed their practices to decline cases upon hearing that certain elements were involved. The factor that made them most likely to refuse a case was large scale drug trafficking. See also Campbell, *supra* 318, at 24 (lawyers shying away from drug cases); Gallagher, *supra* note 319, at 28 (Milwaukee attorney chilled into refusing drug cases); Fricker, *supra* note 319, at 64 ("I'm getting calls from all over the country," says Sonnett. "Many are simply getting out of criminal law or are just refusing to take cases involving forfeiture."").

330. Professor Genego identifies two possible biases affecting the validity of the study. First, the population (members of NACDL) may have been more likely to have been affected by the prosecutorial practices in question. Second, the likelihood that a lawyer would respond to the questionnaire probably is greater if the lawyer had been the subject of any of the practices. Genego, *supra* note 151, at 5. Professor Genego believes that the results are significant in spite of these possible biases. *Id.*

money laundering laws from taking certain cases.<sup>331</sup>

But why should we worry? What is the harm if some lawyers are disinclined to take the kinds of cases where these laundering issues come up? One obvious harm is to defense lawyers themselves. For them the laws mean there are now fewer clients in the world for whom they are willing to work, so their caseload and income might decrease.<sup>332</sup> This impact will be hard on defense lawyers, but it is probably not the type of harm that would kindle a rejection of the laundering laws.

The second harm which results from driving attorneys out is harm to clients because their choice of counsel is limited as a practical matter.<sup>333</sup> They may not get to hire the lawyer they would most prefer. Yet the effect of the laws on clients' choice of counsel should not be overstated. Several factors operate to prevent wide scale abandonment of federal criminal defense work. For one thing, those most experienced and renowned for their work in this field might be reluctant to turn their backs on such cases. Such expertise and reputation would make the opportunity costs in turning to other work high.<sup>334</sup> Additionally, these lawyers might be inclined to deal with the added

---

331. Lawyers not driven away are making changes. *See, e.g.,* Genego, *supra* note 151, at 3, 7 & 39 (46% say they made some changes in their practice, including keeping fewer records or far more records); Axelrod & Harris, *supra* note 44, at 6, 42 (results of survey showing that "[s]ome attorneys who accepted cash fees in the past no longer do so because of the difficulty of resolving problems flowing from section 6050I . . .").

332. Gershman, *supra* note 191 at 22 ("Many . . . defense attorneys will be driven out of defense work, unwilling to deal with the pressures, harassment, and potential loss of income" caused by prosecutors using, *inter alia*, § 6050I and fee forfeiture). Concern over the threat to income raised by fee forfeiture is expressed in Campbell, *supra* note 318, at 24 (forfeiture "puts every privately retained attorney's income and professional career in jeopardy. . . . I don't believe the problem can be overstated." (quoting Michael Monico, a former federal prosecutor)).

333. *See* Brickey, *Tainted Assets*, *supra* note 1, at 55-56 (describing courts' fears of the "in terrorem" impact of fee forfeiture on the availability of private counsel); Margolin & Battson, *supra* note 73, at 27; Brief Amicus Curiae of the American Bar Association at 16, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729)

The choice of counsel is probably not so limited by the exit of some attorneys that the Sixth Amendment right to counsel is implicated. At least as to fee forfeiture, that choice of counsel issue was resolved in *Caplin & Drysdale* and *Monsanto*. As to whether the result would change when courts consider the combined impact of forfeiture and section 6050I and section 1957, it seems unlikely.

334. Recognition of the opportunity costs is implicit in a comment by defense lawyer Allen Smallwood. In lamenting how lawyers are being called before grand juries, he said, "I wish there was a way for me to make a good living doing something else." Fricker, *supra* note 307, at 19.

risks and complexity of such cases by charging a suitably higher fee. Perhaps these higher fees would also attract other capable lawyers to this field of practice even if others, more risk-averse, abandon it. In short, normal market forces might well operate to keep some of the best criminal defense lawyers in the field or to encourage other lawyers to enter it, despite the difficulties presented by the money laundering laws. It is not clear, therefore, that the range of counsel for defendants to choose from will be seriously reduced by the laws.<sup>335</sup>

In addition to the effect on lawyers and clients, other practical impacts of the laundering laws can be seen in terms of harm to the adversary system. This argument asserts that the system is based on adversaries having independent strength and roughly equivalent power and that the laws tilt the balance too much in favor of the government, thus skewing the process.<sup>336</sup> Furthermore, the argument goes, deterring defense lawyers from taking complex cases inhibits their education and development, again making them less worthy adversaries.<sup>337</sup> Finally, court-appointed defenders are good,<sup>338</sup> but they are not funded or equipped to take over all the cases that private law-

---

335. See Brickey, *Tainted Assets*, *supra* note 1, at 55-56.

336. Genego, *supra* note 151, at 41 (four practices' practical impact on lawyers "impede the proper functioning of adversary process by affecting one side's ability to prepare and present its case on the merits."); DuMouchel & Oberg, *supra* note 1, at 66 (adversary system needs strong and independent advocates); *id* at 82 (forfeiture and section 6050I are hurting the adversary system; independent defense bar is important to the adversary system); Mass, *supra* note 73, at 677-78 (fee forfeiture unbalances system); Zimroth, *supra* note 318, at 13 ("The demise of the private defense bar, . . . will mean a serious diminution of the adversary system and therefore of an independent judiciary.").

This argument is related to a constitutional argument raised in *Caplin & Drysdale*. See *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617 (1989). (arguing that the forfeiture statute was invalid under the Due Process Clause of the Fifth Amendment because it permits the government to upset the balance of forces between the accused and the accuser) (citing *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). The Supreme Court rejected this argument on the basis that the fact that the power could be abused does not render the law facially invalid. See *Caplin & Drysdale*, 491 U.S. at 634-35. Although the law is not unconstitutional based on the potential for abuse, it might be unwise for that reason. The concept of "equality of arms" in the criminal justice system is thoroughly explored in Jay S. Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007 (1990).

337. See Brief Amicus Curiae of the American Bar Association at 8, *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729) (brief on petition for certiorari) ("[B]y deterring counsel from accepting many important criminal cases, fee forfeiture may inhibit the education and development of defense attorneys qualified to undertake such representation."). The ABA brief does not explicitly identify the harm resulting from inhibited development of defense lawyers. Inhibited development is harmful to the individuals involved for obvious reasons. We have assumed that it is also harm-

yers may reject.<sup>339</sup>

Should the best and most experienced defense lawyers decide to abandon federal criminal law, the system would undoubtedly suffer. Surely defendants and our sense of justice are not best served by a chronic adversarial mismatch in the most complex criminal cases. Until the flight of the best defense lawyers<sup>340</sup> from the field is more clearly documented, such an effect on our criminal justice system remains speculative. But some danger signals are present, and this practical impact should not be ignored.

### C. Prosecutors' Power to Disqualify Defense Lawyers

We have analyzed the situation where the prosecutor, alleging a need to call the defense lawyer as a witness, can have the lawyer disqualified from representing the client.<sup>341</sup> We noted above that this is not an ethical issue because ethics law generally does not compel the disqualification.<sup>342</sup> The disqualification may result because of judges' fear that if the lawyer who will be testifying is not disqualified, the client may be able to get any conviction reversed based on a violation of the right to effective assistance of counsel.<sup>343</sup> Clients may succeed

---

ful to the system because underdeveloped defense lawyers are easier and less worthy adversaries for prosecutors.

338. See Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361 (1991).

339. See Krieger & Van Dusen, *supra* note 73, at 739. *But cf.* Feeney & Jackson, *supra* note 338, at 407-09 (type of defense counsel is not an important determinant of outcome, but best criminal defense lawyers clearly do make a difference).

340. Are the ones leaving the field "the best"? *Cf.* Genego, *supra* note 151, at 40-41 (lawyers most experienced and successful in terms of income were most likely to be subjected to the four practices). See also Gershman, *supra* note 191, at 22 (most talented and aggressive lawyers will be driven out).

341. The discussion of the lawyer as witness issue is found *supra* in text accompanying notes 230-80.

342. The advocate-witness rule would seldom require the disqualification of the lawyer. See *supra* text accompanying notes 237-61. Similarly, except when the lawyer is called to give unprivileged testimony adverse to her client's interests, the ethical rules on conflict of interest would not compel the lawyer's disqualification. See *supra* text accompanying notes 262-90.

343. This concern of the federal district courts is noted in *Wheat v. United States*, 486 U.S. 153, 157, 161 (1988). The Court additionally noted the federal courts have an independent interest that criminal trials in those courts "are conducted within the ethical standards of the profession and that *legal proceedings appear fair to all who observe them.*" *Id.* at 160 (emphasis added). It should be noted that the Court thus indicates that the courts may legitimately be concerned with appearances, even if those concerns exceed the dictates of legal ethics. Under this approach, a judge might well react more

on this claim even if they were fully informed and waived the conflict at the time.<sup>344</sup> The trial judge can constitutionally disqualify the defense lawyer over the client's objection.

Thus disqualification is usually not an ethical problem, and the Supreme Court has concluded that disqualification is not a constitutional problem. The practical impact of disqualification, however, is a problem.<sup>345</sup> Clients are deprived of the lawyers they want and can afford. Lawyers lose the business and the opportunities to help clients to whom they may be committed.<sup>346</sup> For the justice system, disqualification gives a big advantage to prosecutors.<sup>347</sup> The power of the litigants shifts when one litigant has the opportunity to disqualify the opposing litigant's lawyer. Since no similar power resides in defense lawyers, the presumed parity of the advocates is diminished.<sup>348</sup> This

---

negatively than the ethical rules demand to the defense lawyer's continued participation in the trial once called as a witness by the prosecutor. WOLFRAM, *supra* note 130, at 383-84.

Testimony at trial about fee forfeiture is most likely to raise this problem. In this situation, the lawyer is testifying in the criminal trial itself. When that testimony is adverse to the client it might have a negative impact on the issue of guilt on the underlying charge. This testimony is heard by the jury. The lawyer's testimony in summons enforcement proceedings to inquire about the section 6050I reporting of a cash transaction or in a grand jury inquiry into the lawyer's own criminal liability under section 1957 seems less likely to raise this direct prejudicial effect to the defendant-client. Even though the ethical rules might permit this testimony and the continued representation in some situations (that is, the defense lawyer would not be subject to discipline), the trial judge could be expected to exercise her broad discretion over the proceedings to disqualify the defense lawyer despite any claims that the representation would not be adversely affected and that the client had consented. *See, e.g., Wheat*, 486 U.S. at 161-62 (not all subpoenas of defense lawyers should result in their disqualification.); *In re Grand Jury Matter*, 926 F.2d 348 (4th Cir. 1991) (disqualification is not necessary when the information can be provided so as to avoid that result).

344. *Wheat*, 486 U.S. at 163.

345. In one case, the defense lawyer for John Gotti was disqualified by a federal district judge upon the motion of the prosecutor. *United States v. Gotti*, 771 F. Supp. 552 (E.D.N.Y. 1991). News reports indicate that the prosecutor claimed the defense lawyers were potential witnesses to the client's alleged racketeering crimes. Lubasch, *supra* note 225, at 1. (The defense lawyer, Bruce Cutler, claimed that the disqualification was sought because he had been successful in having his client acquitted in three previous trials on other criminal charges). The same allegation was made by the defendant in *Wheat* when the prosecutor sought to deny substitution of counsel. *Wheat*, 486 U.S. at 157.

346. The practical problems of disqualification for defense lawyers and clients are exacerbated because pretrial disqualification of defense lawyers in criminal proceedings are not immediately appealable. *Flanagan v. United States*, 465 U.S. 259 (1984).

347. Capra, *supra* note 198, at 237 (disclosure of adverse information by lawyer "skews the adversary system through *ad hoc* disqualification.").

348. Such a disparity was noted by the dissenters in *Caplin & Drysdale*. In review-

shift of power to prosecutors is a harmful practical impact of the laundering laws.<sup>349</sup>

Thus the money laundering laws do have some harmful practical impacts on clients, lawyers, and the adversary system. The lawyer-client relationship will be chilled by communication being impaired. Although lawyers will probably not be deterred from asking questions, clients may well be deterred from speaking candidly by fears that lawyers will have to disclose information. Moreover, lawyers may be reluctant to give clients good faith, lawful advice on complex matters due to fears of client flips and government stings. With the

---

ing the constitutionality of the forfeiture laws, they found particularly troubling the government's ability under those laws "to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 650 (1989) (Blackmun, J., dissenting). Of particular concern there was the selective use of restraining orders to freeze legal fees of the most talented or aggressive defense lawyers hired by defendants. *Id.* Of course, the power to disqualify a defense lawyer by calling her as a witness is an even more direct way for a prosecutor to exercise power over an opponent.

While courts are understandably concerned about preventing the possibility of reversible error in criminal trials, widespread tactical use of disqualification by the prosecution might lead courts to be more inclined to accept defendant's waivers. The court might choose to assure itself that the client-defendant has made a knowing, voluntary waiver of the right to conflict-free representation. This would protect the legitimate interest of the government in obtaining a conviction not subject to challenge on Sixth Amendment effective representation of counsel grounds, at least if the courts would view the waiver as precluding such claims. *See WOLFRAM, supra* note 130, at 420. It would permit the accused to have counsel of choice.

For a discussion of the need for parity between the advocates in criminal cases in the constitutional context, *see Silver, supra* note 336. *See also Cloud, supra* note 1.

349. It is possible that the "informal professional culture" that is said by some to exist among prosecutors and defense lawyers, discussed at *supra* note 131, may operate as a practical check on abuse of this prosecutorial power to call the defense lawyer as a witness in order to disqualify him. Additionally, the likely complications and controversy generated by the subpoena of a defense lawyer may well serve as a practical check on the power's abuse. One Assistant United States Attorney indicated this in an interview with one of the authors, saying, "Whenever I even think about subpoenaing a defense lawyer, I get a headache." Furthermore, the Department of Justice has adopted internal limits on the use of subpoenas against defense lawyers. In the case of grand jury subpoenas, prior approval must be obtained from the Assistant Attorney General of the Criminal Division. DOJ MANUAL, *supra* note 17, at 9-2.161(a)(E). Review of those requests must balance the need for the information and the potential adverse effects upon the attorney-client relationship, especially the risk that the defense lawyer will be disqualified. Like the Department of Justice guidelines on section 1957 and forfeiture, however, these guidelines are not binding on the government.

At least one U.S. Attorney has stated that subpoenas to defense lawyers regarding present or former clients are extremely rare. Bonner, *supra* note 1, at 803 (fewer than one in 1000 subpoenas issued to attorneys during prior three-year period).

lawyer-client relationship chilled and distrusting, it would not be surprising to see an overall reduction in quality and intensity of advocacy by criminal defense lawyers. Furthermore, there is some evidence that the most experienced defense lawyers are being driven off from cases involving the money laundering laws. Even if other lawyers step in, it will be the community's and criminal justice system's loss if experienced, creative defense lawyers are driven to other kinds of work. Finally, the laws create additional opportunities for prosecutors to disqualify defense counsel in specific cases. This engenders a mismatch that detracts from the quality of the adversary system.<sup>350</sup> The laws may not have harmful ethical impacts, but they do have harmful practical impacts.

### CONCLUSION

In this article we have explored the impact of the federal money laundering laws on lawyers. We are cautious in claiming that our treatment is exhaustive. It is impossible to anticipate all the ways these laws will be used by creative prosecutors and reacted to by equally creative defense lawyers. Moreover, our analysis necessarily relies upon some assumptions regarding the way lawyers and clients act. These assumptions have not been verified and may not be verifiable. We are confident in our conclusions but recognize that other assumptions would justify different conclusions.<sup>351</sup>

We have assessed the impact of the money laundering laws on lawyers in the absence of the Department of Justice's guidelines. This approach is justified by the precatory nature of the guidelines which leaves the potential impact of the laws undiminished. Still, it is important to remember that because these guidelines reduce the laws' effect on lawyers, our discussion has adopted a worst case outlook.

With these caveats, we can draw several conclusions. The federal money laundering laws make the practice of law less pleasant for

---

350. The dissenters in *Caplin & Drysdale* perceived the harm to the adversary system from fee forfeiture to be considerable. *Caplin & Drysdale*, 491 U.S. at 648 (Blackmun, J., dissenting) ("Had it been Congress' express aim to undermine the adversary system as we know it, it could hardly have found a better engine of destruction than attorney's-fee forfeiture.").

351. This point was made regarding the attorney-client privilege in *Goode*, *supra* note 197, at 313 ("Most of the arguments surrounding the attorney-client privilege are based on unverified, and probably unverifiable, assumptions about the conduct of clients and lawyers. This leaves commentators free to make diametrically opposed, yet plausible assertions, about the real-world consequences of the privilege.").

defense lawyers. The laws take lawyers' time, complicate their workload, require them to take actions contrary to their clients' and their own interests, make collection of fees riskier, and expose them to criminal prosecution for accepting some fees. It is understandable that defense lawyers lament the effect of the laws on their lives.

However, the laws do not place defense lawyers in ethical dilemmas. Critics who claim that the laws force lawyers to choose between the unsavory alternatives of illegal acts and ethical misconduct state the case inaccurately. This is not to say that the money laundering laws do not have an impact on lawyers' ethics. They do create more instances where lawyers must act cautiously to avoid ethical violations. With one exception, though, the laws generate only familiar ethical situations that present the types of pressures that lawyers must resist daily and that are addressed directly in the ethical rules. The exception is the contingent fee issue raised by the application of forfeiture to legal fees, but even that matter rises to the level of an ethical dilemma only through the most wooden and unlikely application of the rule on contingent fees. Arguments against the laws based on irresolvable ethical problems, therefore, are not persuasive.

The laws do have several practical impacts that are troubling. It is likely that the laws and the publicity surrounding them cause clients to be more circumspect in the information they disclose to their lawyers, which may lead to defense lawyers being less informed. Defense lawyers' fear of the laws may hamper them from giving lawful advice to clients or otherwise reduce their zeal. The complications and risks created by the laws may be causing talented and experienced defense counsel to abandon certain types of criminal cases or criminal law altogether. Finally, when coupled with trial courts' desire to avoid reversal, the laws create new opportunities for prosecutors to disqualify defense lawyers by calling them as witnesses. These practical effects are difficult to document or to quantify. They appear, however, to be likely results of the application of the money laundering laws to lawyers, and there is some evidence that they are occurring.

The likely practical impact of the laws is disturbing at two levels. At the personal level, the laws may be reducing the quality of the representation received by some defendants charged with serious crimes. More importantly, at the systemic level the laws may tip the present balance of the adversary process significantly in favor of the prosecution. For the government, the laws may offer the attractive prospect of having less informed, less zealous, less talented, and less experienced opponents. Should a defense lawyer still prove to be too



formidable an adversary, the laws may tempt prosecutors to seek disqualification. We are unwilling to assume that a U.S. Attorney would try to disqualify a defense lawyer just because she's good, without a *prima facie* case of wrongdoing. We trust prosecutors but maintain a healthy skepticism on whether it is wise to give them more power. Such a shift of power toward the government, apparently unintended by Congress, creates legitimate concern about the continuing fairness of the federal criminal justice process.

Certainly society derives numerous, significant benefits from these laws. The money laundering laws are valuable weapons against drug trafficking and other organized crime. We have made no effort in this article to enumerate or assess these benefits. The laws' practical impact tending toward the creation of a perpetual adversarial mismatch in some criminal cases, however, has disturbing implications. In the debate about the money laundering laws' application to criminal defense lawyers, the focus on ethics is unconvincing and too narrow. As this article has explained, the issue is better framed by focusing on the laws' practical impact on the fairness of the criminal justice system.

APPENDIX 1, FORM 8300

Form **8300**  
(Rev. February 1992)  
Department of the Treasury  
Internal Revenue Service

**Report of Cash Payments Over \$10,000  
Received in a Trade or Business**

Failure to file this form or filing a false form may result in imprisonment.  
▶ See instructions.  
Please type or print.

OMB No. 1545-0892  
Expires 09-30-94

1 Check appropriate boxes if: a  amends prior report. b  suspicious transaction

**Part I Identity of Individual From Whom the Cash Was Received**

2 If more than one individual is involved, see instructions and check here ▶

3 Last name 4 First name 5 Middle initial 6 Social security number

7 Address (number, street, and apt. or suite no.) 8 Occupation, profession, or business

9 City 10 State 11 ZIP code 12 Country (if not U.S.) 13 Date of birth (see instructions)

14 Method used to verify identity: a Describe identification ▶ b Issued by c Number

**Part II Person (See Definitions) on Whose Behalf This Transaction Was Conducted**

15 If this transaction was conducted on behalf of more than one person, see instructions and check here ▶

16 This person is an:  individual or  organization 17 If funded by another party, see instructions and check here ▶

18 Individual's last name or Organization's name 19 First name 20 Middle initial 21 Social security number

22 Doing business as (DBA) name (see instructions) Employer identification number

23 Alien identification: a Describe identification ▶ b Issued by c Number

24 Address (number, street, and apt. or suite no.) 25 Occupation, profession, or business

26 City 27 State 28 ZIP code 29 Country (if not U.S.) 30 Date of birth (see instructions)

**Part III Description of Transaction and Method of Payment**

31a  personal property purchased d  business services provided g  exchange of cash  
b  real property purchased e  intangible property purchased h  escrow or trust funds  
c  personal services provided f  debt obligations paid i  other (specify) ▶

32 Specific description of property or service purchased. Give serial or registration number of car, boat, airplane, etc., address of real estate, etc.

33 Total price \$ 00 34 Amount of U.S. currency received \$ 00 35 Amount in \$100 bills or larger \$ 00

36a Amount of cash received in other than U.S. currency (see instructions) \$ 00  
b Specific description of cash received in other than U.S. currency

37 If part of an installment sale, give information below and check box ▶  38 Date of transaction  
a Number of payments b Amount of each payment \$ 00  
c Frequency:  monthly  other (describe) d Balloon payment (amount) \$ 00

**Part IV Business Reporting This Transaction**

39 Name of reporting business 40 Employer identification number

41 Street address (number and street) where transaction occurred Social security number

42 City 43 State 44 ZIP code 45 Nature of your business

46 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Sign Here ( )  
(Authorized signature—See instructions) (Title) (Date signed) (Telephone number of business)  
(Type or print signer's name below)

APPENDIX 1, FORM 8300

Form 8300 (Rev. 2-92)

Page 2

**Multiple Parties**

(Complete applicable parts below if box 2 or 15 on page 1 is checked)

**Part I Continued—Complete if box 2 on page 1 is checked**

3 Last name	4 First name	5 Middle initial	6 Social security number
7 Address (number, street, and apt. or suite no.)			8 Occupation, profession, or business
9 City	10 State	11 ZIP code	12 Country (if not U.S.)
13 Date of birth (see instructions)			
14 Method used to verify identity		a Describe identification ▶	
b Issued by		c Number	

3 Last name	4 First name	5 Middle initial	6 Social security number
7 Address (number, street, and apt. or suite no.)			8 Occupation, profession, or business
9 City	10 State	11 ZIP code	12 Country (if not U.S.)
13 Date of birth (see instructions)			
14 Method used to verify identity		a Describe identification ▶	
b Issued by		c Number	

**Part II Continued—Complete if box 15 on page 1 is checked**

16 This person is an <input type="checkbox"/> individual or <input type="checkbox"/> organization				17 If funded by another party, see instructions and check here ▶ <input type="checkbox"/>	
18 Individual's last name or Organization's name	19 First name	20 Middle initial	21 Social security number		
22 Doing business as (DBA) name (see instructions)				Employer identification number	
23 Alien identification		a Describe identification ▶			
b Issued by		c Number			
24 Address (number, street, and apt. or suite no.)			25 Occupation, profession, or business		
26 City	27 State	28 ZIP code	29 Country (if not U.S.)	30 Date of birth (see instructions)	

16 This person is an <input type="checkbox"/> individual or <input type="checkbox"/> organization				17 If funded by another party, see instructions and check here ▶ <input type="checkbox"/>	
18 Individual's last name or Organization's name	19 First name	20 Middle initial	21 Social security number		
22 Doing business as (DBA) name (see instructions)				Employer identification number	
23 Alien identification		a Describe identification ▶			
b Issued by		c Number			
24 Address (number, street, and apt. or suite no.)			25 Occupation, profession, or business		
26 City	27 State	28 ZIP code	29 Country (if not U.S.)	30 Date of birth (see instructions)	