The Potential Forfeiture of Attorneys Fees – A Minefield for Defense Attorneys

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The potential forfeiture of attorney fees is a risk that criminal defense attorneys know all too well. Under federal forfeiture laws, proceeds of underlying alleged criminal activity and properties used to facilitate alleged criminal activity may be seized by the government as long as they can be traced to such alleged criminal activity (the primary provisions authorizing forfeiture of assets are 18 U.S.C. § 982 (pertaining to money laundering); 18 U.S.C. § 981 (§ 982's civil counterpart); *id*. § 1963 (the RICO statute); and 21 U.S.C. § 853 (pertaining to proceeds of violations of controlled substances and continuing criminal enterprise offenses). These assets can include funds clients intend to use to pay for their attorney fees. Importantly, the Supreme Court has determined that forfeiture of fees intended to pay for an attorney does not violate a client's Sixth Amendment right to counsel.

The possibility for forfeiture of attorney fees is an issue that can present itself from first contact with a potential client, and such fee forfeiture can take place anytime, even pre-indictment. This proves challenging, as attorneys often may not necessarily understand—fully or otherwise—the contours of what a criminal investigation is about and/or their client's status within the investigation. Unsurprisingly, the government will often decline to provide details about its ongoing investigation, the scope of the investigation, and/or the status of attorneys' client, among other topics. Moreover, given the relatively low standard necessary for the government to seize such funds and its broad view of where it can seize monies from, attorneys and firms are often left to navigate difficult waters on their own.

This article discusses the current legal landscape on attorney fees forfeiture, how clients and attorneys can challenge fee forfeiture, and due diligence attorneys should consider implementing depending on their case.

The Department of Justice's Justice Manual

The *Justice Manual* sets forth nonbinding guidelines for how the government may seek to forfeit assets or funds that may be used to pay the client's attorney. *See* US Dep't of Just., *Justice Manual* at 9-120.000 et seq. (*Manual*). The *Manual* first acknowledges that attorneys "may not be able to meet the statutory requirements for relief for third party transferees without hampering their ability to represent their clients," so any application for potential forfeiture of attorney fees will "be carefully reviewed" and be "uniformly and fairly applied." *Id*. at 9-120.100. The *Manual* then provides three standards for the forfeiture of attorney fees: (1) if the transfer is part of a "fraudulent or sham transaction," (2) if the lawyer had reasonable cause to know that the asset/funds were subject to forfeiture, or (3) if the lawyer had actual knowledge that the asset/funds were subject to forfeiture. *Id*. at 9-120.102 to 9-120.110.

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If the government intends to initiate a forfeiture process, it must provide written notification that it is doing so, which must be approved by the Assistant Attorney General in the Criminal Division—it cannot be approved solely by a US Attorney's office. *Id.* at 9-120.111 to 9-120.112. Lastly, the *Manual* recognizes that the government cannot demonstrate "actual knowledge of the forfeitability of an asset" by "compelled disclosure of confidential communications made during the course of the representation," but voluntary disclosure is permitted, and the government also may seek discovery of nonprivileged information to prove its case through a subpoena to an attorney. *Id.* at 9-120.113 to 9-120.114 (a subpoena to an attorney for information relating to the representation of a client must also be authorized by the Assistant Attorney General in the Criminal Division and can seek "non-privileged fee information, such as the amount, source and method of payment").

Circumstances Where Government Can Seize Attorney Fees—US Supreme Court

In a series of decisions, the Supreme Court has affirmed that the government can seize attorney fees both pre- and post-conviction in certain circumstances, and, as long as there is probable cause, such seizure does not violate a defendant's Sixth Amendment right to counsel.Caplin & Drysdale, Chartered v. United States.

In *Caplin & Drysdale, Chartered v. United States*, the Court considered a post-conviction forfeiture under 21 U.S.C. § 853 that seized funds from a defendant that he would have used to pay his lawyer. 491 U.S. 617 (1989). The Court started with the proposition that the Sixth Amendment guarantees defendants the right to be represented by qualified counsel whom the defendant can afford to retain or who is willing to represent a defendant who does not have funds; however, "a defendant may not insist on representation by an attorney he cannot afford." *Id.* at 624. The Court noted the burden that forfeiture law "imposes on a criminal defendant is limited" and it does not prevent a defendant with assets—forfeitable or not—from retaining their attorney of choice. *Id.* at 625.

The Court then distinguished between forfeitable and nonforfeitable assets, recognizing "there will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets[.]" *Id.* Noting that the idea "that the Sixth Amendment puts limits on the forfeiture statute" is "untenable," the Court held the Sixth Amendment's "protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel." *Id.* at 625–26. The Court then provided a concrete example of this concept: "[a] robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended," and no lawyer has the right to accept stolen property or ransom money in payment of a fee—"the privilege to practice law is not a license to steal." *Id.*

In finding that the forfeiture was constitutional, the Court emphasized that the forfeiture statute provided that all "right, title, and interest in property [constituting or derived from any proceeds obtained from the crime] vests in the United States upon commission of the act giving rise to forfeiture." *Id.* at 625 n.4. Given the vesting language, the Court found the defendant "did not hold good title" to the property and there "is no constitutional principle that gives one person the right to give another person's property to a third party" (i.e., a lawyer). *Id.* at 628. The Court concluded that the strong governmental interest in recovering forfeitable assets was greater than a Sixth Amendment interest in permitting a defendant to use assets adjudged as forfeitable to pay for their defense. *Id.* at 631.

United States v. Monsanto

In *United States v. Monsanto*, a companion case decided the same day as *Caplin & Drysdale*, the Court considered the government's pretrial restraining order under the same forfeiture statute (21 U.S.C. § 853) to prevent a defendant from using certain assets to pay for his lawyer. 491 U.S. 600 (1989). Although the

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challenge to the assets was pretrial, the Court noted that the property at issue was forfeitable and that the application of the forfeiture statute only concerned the restraint of assets that were traceable to the alleged crime. *Id.* at 602–03, 614.

The defendant argued that the forfeiture statute interfered with his Sixth Amendment right to counsel as the "mere prospect of post-trial forfeiture is enough to deter a defendant's counsel of choice from representing him." *Id.* at 614. The Court disagreed, finding that the assets in a defendant's possession "may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615. Arguing that the government had a substantial interest in the tainted property (even pretrial), the Court added that "it would be off to conclude that the government may not restrain property . . . based on a finding of probable cause, when we have held that (under appropriate circumstances), the government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense." *Id.* at 615–16. The Court concluded that if the government can forbid the use of forfeited assets to pay an attorney post-trial, no "constitutional violation occurs when, after probable cause is adequately established, the government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Id.* at 616.

United States v. Kaley

More recently, in *United States v. Kaley*, defendants challenged pretrial restraint of their assets under the same forfeiture statute (21 U.S.C. § 853) that kept them from hiring counsel of choice, arguing that the trial court should conduct a determination of whether there was probable cause for the asset freeze based on a grand jury indictment. 571 U.S. 320 (2014). The Court first noted, "an asset freeze depriving a defendant of that interest is *erroneous* only when unsupported by a finding of probable cause." *Id.* at 337 (emphasis in original). Rejecting the request that such a hearing is constitutionally required when there is a potential interference with the Sixth Amendment right to counsel of choice, the Court held: "[A] n adversarial process is far less useful to the threshold finding of probable cause, which determines only whether adequate grounds exist to proceed to trial and reach that question. The probable cause decision, by its nature, is hard to undermine, and still harder to reverse. So the likelihood that a judge holding an evidentiary hearing will repudiate the grand jury's decision strikes us, once more, as 'too slight' to support a constitutional requirement." *Id.* at 339 (citation omitted). This approach is consistent with how the Court has treated challenges to grand jury indictments, so that "[i]f the question in a pre-trial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides." *Id.* at 340.

Circumstances Where Government Cannot Seize Attorney Fees—US Supreme Court

Most recently, the Supreme Court announced a scenario in *Luis v. United States* where the government cannot seize funds for a client's attorney. 136 S. Ct. 1083 (2016). In *Luis*, the trial court entered an order freezing the defendant's *untainted* assets to preserve them in case there was a conviction and funds traceable to the violation could not be located so that the assets could be used to pay any fine, restitution, or forfeiture. Unlike previous cases in which the government froze assets connected to the crime, here "[t]he relevant difference consists of the fact that the property here is untainted; i.e., it belongs to the defendant, pure and simple. In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime." *Id.* at 1090.

Previous decisions upholding asset freezes did not support issuing one in this context because "both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was 'tainted,' and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing (or otherwise disposing of) the assets." *Id.* That difference was crucial, so

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"insofar as innocent (i.e., untainted) funds are needed to obtain counsel of choice, we believe that the Sixth Amendment prohibits the court order that the Government seeks." *Id.* at 1093. Simply requiring the appointment of counsel would not be sufficient because "[t]he upshot is a substantial risk that accepting the Government's views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect." *Id.* at 1095.

Luis provides at least one significant limitation on the government's power to freeze assets before trial when a defendant can show they are untainted by any criminal conduct so that they can be used to retain counsel of choice.

Defendants' Right to Challenge Seizure of Attorney Fees

The Supreme Court has declined to decide whether a defendant has a constitutional right to a hearing on "whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Kaley*, 571 U.S. at 324 n.3. The Court in *Kaley* observed, however, that "lower courts have generally provided a hearing to any indicted defendant seeking to lift an asset restraint to pay for a lawyer. In that hearing, they have uniformly allowed the defendant to litigate . . . whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 324. Moreover, the government conceded at oral argument in *Kaley* its belief that a defendant has a constitutional right to such a hearing. The oral argument exchange was as follows:

JUSTICE KENNEDY: Do you concede that there must be a traceability hearing?

[DEPUTY SOLICITOR GENERAL] DREEBEN: If the defendant seeks one, yes. And there was the opportunity in this case for a hearing and the defendants—

JUSTICE KENNEDY: I mean, in the general run case. So you agree that due process does require a traceability hearing?

MR. DREEBEN: Yes. The defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense or another way—

JUSTICE KENNEDY: And the defendants have the burden of proof in that hearing?

MR. DREEBEN: That would be up to this Court's decision.

JUSTICE KENNEDY: What is your view as to what the Constitution requires in that respect?

MR. DREEBEN: I'd be happy to have the defendants bear the burden of proof, but I think the courts typically have placed the burden of proof on the government to show traceability, and the government, therefore, presents limited evidence, but it's all against the background of the crime not being called into question. Transcript of Oral Argument at 44–45, Kaley, 571 U.S. 320 (2014).

A number of circuit courts have agreed that a defendant does have a right to such a hearing. For example, the Sixth Circuit has provided a framework to guide and define such a hearing, only when the defendant can "(1) demonstrate to the court's satisfaction that [he/she] has no assets and (2) make a prima facie

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showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." *United States v. Jamieson*, 427 F.3d 394, 406 & n.3 (6th Cir. 2005) (citing *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) and collecting cases from Second, Fourth, Seventh, Ninth, and Tenth Circuits). If a defendant makes the required showings, "the burden then shifts to the prosecution to establish, by probable cause at an adversarial hearing, that the restrained assets are traceable to the underlying offense." *Jamieson*, 427 F.3d at 406. The Sixth Circuit continued that "due process should be honored when a defendant's Sixth Amendment right to counsel of choice is threatened by virtue of the restraint of his funds[,]" and "the opportunity to be heard is non-existent when a district court grants a [pre-trial restraint] based only on the indictment." *Id*. at 407.

The first prong—that a defendant has no other assets with which to pay their attorney—can be demonstrated to the court's satisfaction via a "flexible and pragmatic inquiry into the defendant's overall financial picture." *United States v. Wood*, 2016 WL 8131240, at *6 (E.D. Ky. Oct. 3, 2016). There must be more than a mere recitation; a defendant must make a sufficient evidentiary showing that there are no sufficient alternatives or otherwise unrestrained assets to pay for counsel of choice. *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013); *see also United States v. Patel*, 888 F. Supp. 2d 760, 770 (W.D. Va. 2012) (defendant submitted affidavits, documents, bills, and checks providing a detailed view of the defendant's current financial situation and the need for the restrained assets to pay for counsel). The second prong may be satisfied with affidavits and other supporting materials. *See Wood*, 2016 WL 8131240, at *7–8 (defendant submitted a sworn affidavit, financial arrangements, and other supporting materials to raise legitimate and nonfrivolous doubt about forfeitability). A defendant "getting the hearing," however, "is not the same as [a defendant] getting the funds. Probable cause . . . is indeed a relatively low bar." *Id*. at *8 (citing *Kaley*, 571 U.S. at 338).

Attorneys' Duty to Inquire as to Client's Source of Attorney Fees

Courts have held that attorneys have at least some duty to inquire as to the source of attorney fees being paid by their clients. Several sources give rise to this duty. The Fifth Circuit, for example, based an attorney's duty to inquire on an attorney's general ethical obligation, stating that "[a]s a general matter of professional ethics, an attorney 'may not accept the fruits of the crime as a fee, for knowingly accepting the fruits of crime in return for valuable services is simply a form of aiding and abetting crime . . . .' [citation omitted] For this reason, an attorney must '"audit" a client sufficiently so as to avoid becoming part of a criminal scheme that includes disposing of ill-gotten gains.'" *FTC v. Assail, Inc.*, 410 F.3d 256, 264 (5th Cir. 2005) (quoting 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 9.32, at 9-136 (3d ed. Supp. 2005)). (Although *Assail* "did not involve criminal charges," both lawyers appealing the decision to return attorney fees "were retained for potential criminal representation." *Id.* at 264.) Courts have also relied on an "officer-of-the-court rationale in holding that an attorney did have a duty of inquiry." *Id.* at 264 ("[t]his court adheres to the well-established doctrine that [a]ttorney, after being admitted to practice, becomes an officer of the court exercising a privilege or franchise. As officers of the court, attorneys owe a duty to the court that far exceeds that of lay citizens.") (citing *CFTC v. Co. Petro Mktg. Grp., Inc.*, 700 F.2d 1279 (9th Cir. 1983)). Additionally, the American Bar Association (ABA) recommends lawyers voluntarily take steps to ensure that they are not handling criminal proceeds. *See Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (ABA Apr. 23, 2010) (recommending lawyers to, among other things: (1) conduct enhanced client due diligence and transaction monitoring for high-risk clients; (2) verify the true identity of each client, as well as the beneficial owner; (3) obtain information to understand the client's circumstances and business; and (4) satisfy themselves as to the ownership and the source of the funds). In 2013, the ABA followed up with a formal opinion on client due diligence, further embracing the recommendations in the *Good Practices Guidance*, and reiterating that "[a]n appropriate assessment of the client and the client's

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objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold." ABA Comm. on Ethics & Pro. Resp., Formal Op. 463 (May 23, 2013) (Client Due Diligence, Money Laundering, and Terrorist Financing).

Courts have found that the scope and trigger for an attorney's duty to inquire varies case by case. For example, in *In re Moffitt*, 846 F. Supp. 463 (E.D. Va. 1994) (*aff'd* on relevant grounds by *United States v. Moffitt*, 83 F.3d 660 (4th Cir. 1996)), a defendant paid a law firm $103,800 in attorney fees. *Id.* at 465. The firm told the defendant that the firm could not accept "funny money," *id.* at 470, but never asked the client to identify the source of the funds, nor did the firm inquire what, if any, legitimate sources of funds the client had. *Id.* at 474. After the defendant pled guilty and his property was forfeited, the firm petitioned to keep its attorney fees. *Id.* at 465. The firm argued it was a bona fide purchaser under the criminal forfeiture statute (21 U.S.C. § 853(n)(6)(B)) because at the time the fee was received, the firm was "reasonably without cause to believe that the property [i.e., the cash fee] was subject to [criminal] forfeiture. …" *Id.* The court rejected this argument, reasoning that "[t]he circumstances at bar, especially the use of large sums of cash in relatively small bills, required that the Law Firm partners inquire directly of [defendant] as to the source of the money." *Id.* at 477. The court added that "when confronted with circumstances essentially similar to those at bar attorneys should inform prospective clients that they cannot pay fees with drug proceeds and that such proceeds are subject to forfeiture, even in the attorney's hands." *Id.* at 474.

The court cautioned that a firm using a term like "funny money" was not "clear and explicit" enough to carry their burden. *Id.* at 474 n.34. The court continued, writing that "[i]f the prospective client answers that the money comes from legitimate sources, attorneys should take whatever further steps or ask whatever further questions may be suggested by the circumstances to satisfy themselves that it is objectively reasonable to believe the answer. To be sure, attorneys are not required to conduct thorough financial investigations of clients before they can accept fees. Rather, they must ask sufficient direct questions and take whatever further steps the client's answers might indicate to ensure that a belief that the funds are legitimate is objectively reasonable." *Id.* at 474. The court concluded that "[n]o precise formula exists to define the appropriate inquiry in all circumstances. Each situation may be different. The polestar is that the attorney's belief must be objectively reasonable." *Id.*

Attorneys should therefore undertake a good faith inquiry to confirm that client funds used to pay attorney fees are not related to and/or traceable to alleged criminal activities. Under *Luis*, untainted attorney fees would not be forfeitable and the inquiry should end. *Luis*, 136 S. Ct. at 1093. But even if an attorney later learns that funds used to pay attorney fees are potentially tainted, evidence of good faith due diligence at the outset may improve an attorney's chance to retain the fees as a bona fide purchaser, or at least a pro-rated portion of the fees that the attorney earned before losing their bona fide purchaser status. *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) ("A criminal defendant cannot pay an attorney for the rendition of future legal services with the expectation that the entire payment will be immune from forfeiture. Rather, the court would have to pro rate the value of services that have been rendered by the attorney, immunizing from forfeiture only those fees earned while meeting the BFP test. For example, if an attorney receives an up-front payment of $5 million for his future legal services and the attorney loses his BFP status a week later (say, because the client is indicted and the attorney learns additional information about his client's guilt), the attorney may keep only the reasonable value of his services prior to losing his BFP status; he may not keep the entire $5 million.").

Even pre-indictment, an attorney should undertake a good faith inquiry to confirm that client funds used to pay attorney fees are not related to and/or traceable to alleged criminal activities. The government is less likely to bring such a forfeiture action pre-indictment, as they will likely not wish to provide

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discovery—even if limited—during a hearing challenging the forfeiture. *Moffitt* demonstrates the importance of this. Although the indictment had not yet been returned when the firm accepted the fee for its services, the court stated that "the absence of notice in an indictment may be one factor among many for courts to consider and weigh in determining whether an attorney was reasonable in believing that the fees were derived from legitimate sources and hence not subject to forfeiture." *Moffitt*, 846 F. Supp. at 472, 476. This presents a real challenge for attorneys, who are unlikely to understand pre-indictment the scope and breadth of the criminal investigation for which they have just been retained. In addition, it is even less likely that the government will be fully forthcoming at this stage about its ongoing investigation relating the attorney's client.

Post-indictment, there is less wiggle room for an attorney to argue that they are not on notice that client funds may be tainted. As long as an attorney has read the indictment and knows that the government is seeking forfeiture of the client's property, they are on notice of the forfeiture and would be unable to satisfy the "without cause to believe" requirement. *Caplin & Drysdale*, 491 U.S. at 633 n.10 ("[G]iven the requirement that any assets which the Government wishes to have forfeited must be specified in the indictment, the only way a lawyer could be a beneficiary of § 853(n)(6)(B) would be to fail to read the indictment of his client.") (internal citations omitted); *see also Monsanto*, 491 U.S. at 604 n.3 ("[I]t is 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 that the property was subject to forfeiture."). As the *Moffitt* court stated, "where an attorney chooses to accept payment in assets named in a forfeiture indictment or a huge cash sum, any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser." *Moffitt*, 846 F. Supp. at 473 n.29.

This has a chilling effect—unintended or not—for attorneys representing clients indicted for conduct where forfeiture of fees is in play, and may even deter attorneys from representing such clients. For example, the Third Circuit acknowledged in dicta that "if an indictment or other serious accusation is enough, by itself, to create knowledge of a high probability of the taint that would trigger a duty to investigate the source of a fee, attorneys would be reluctant to take on any clients accused of drug trafficking." *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 811 n.17 (3d Cir. 1994); *see also United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) ("Indeed, as a practical matter, such an inference would deny virtually every defendant accused of an offense carrying a forfeiture penalty of the right to counsel of his or her choice because the risk of not being paid would deter most attorneys from accepting such cases. That, in turn, would shift to the taxpayers the considerable cost of paying counsel appointed to represent those defendants.").

Why does this matter? Forfeiture of a client's assets and/or funds intended to pay attorney fees is a potentially powerful sword for the government. The government has the ability to box out a defendant from retaining their desired counsel and be forced to choose less experienced counsel—all while their individual liberty hangs in the balance. And one wonders if a defendant's chosen response to the government's investigation—to cooperate in the investigation against other potential defendants and/or resolve their alleged criminal liability with a plea rather than staunchly defending against the allegations—plays a role in the government "elect[ing] to hamstring [its] target by preventing [a defendant] from paying his counsel of choice." *Kaley*, 571 U.S. at 345 (Roberts, J., dissenting); *see also id*. at 350 ("[F] ew things could do more to 'undermine the criminal justice system's integrity' [] than to allow the Government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice.").

Although there is some guidance on this issue, there remain swaths of grey that attorneys need to use their best judgment to wade through on a case-by-case basis. *See* 3 F. Lee Bailey & Kenneth J. Fishman,

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Criminal Trial Techniques § 68:6 (attorneys' fees) ("While no precise inquiry applies in all circumstances, an attorney must take sufficient steps to ensure that his or her belief (that the funds are legitimate) is objectively reasonable"). For example, the calculus may be different if an attorney is seeking to represent an individual or a corporate entity, or if fees are being paid by an insurance company or directly by the client. Attorneys may understand that the client is closer to the nerve center of the investigation, which may cause more challenges, or further on the periphery of the matter, which may provide the attorney with more comfort. Attorneys may also understand (or not) the operation of the conspiracy and in particular the alleged flow of money, i.e., who in the conspiracy is said to have received funds from the alleged criminal conduct.

Regardless, the case law makes clear that some amount of good faith inquiry as to the source of assets and/or funds for payment of attorney fees is necessary. For example, an inquiry of a prospective client could include the following, both orally and in a retainer letter:

- That the attorney/firm is not permitted to accept monies for fees and/or costs that are proceeds of criminal activity;
- That the client is making a good faith representation to the best of their knowledge and belief that any payments of fees and/or costs made are not proceeds of criminal activity, but are instead resulting from lawful activities and/or sources; and/or
- That the funds used to pay fees and/or costs are not derived from the activity and/or sources that are the subject of the pending criminal investigation.

If a client retains an attorney post-indictment, the attorney should conduct due diligence using the indictment itself to determine, if possible, whether the funds proposed for payment of attorney fees and costs are related to the alleged criminal charges.

Conclusion

Fee forfeiture has the potential to be a powerful sword for the government. It allows the government to hinder a defendant from paying for their desired defense counsel, leaving defendant potentially with less experienced or less formidable counsel, and paving a potentially easier road to conviction. While attorneys are not exempt from the reach of fee forfeiture, they can exercise due diligence at the outset of engagement with potential clients to inquire into the source of funds.

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