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ARTICLES

# CONVERTING RETAINED LAWYERS INTO APPOINTED LAWYERS: THE ETHICAL AND TACTICAL IMPLICATIONS

Gerald F. Uelmen*

## I. THE SCENARIO

The enactment of the Comprehensive Forfeiture Act of 1984[1] gave federal prosecutors a potent new weapon: the ability to remove retained counsel from the defense by seeking forfeiture of his or her fee. The Act provides that the proceeds of a criminal enterprise belong to the government, and the government's ownership relates back to the time the proceeds were acquired. Thus, a lawyer who agrees to defend one accused of operating a criminal enterprise faces the risk that the outcome of the case may include a determination that his or her retainer belongs to the government. The burden this imposes upon a defendant's sixth amendment right to counsel has been addressed in several recent cases[2] and articles.[3] The purpose of this article is to explore some of the ethical and tactical implications of one of the "solutions" proposed for this dilemma: to simply appoint retained counsel to continue representing the defendant pursuant to provisions of the Criminal Justice Act (CJA).[4] The issue arises in

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1. Pub. L. No. 98-473, § 301, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837, 2040.

2. United States v. Thier, 801 F.2d 1463 (5th Cir. 1986); United States v. Estevez, 645 F. Supp. 869 (E.D. Wisc. 1986); United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

3. Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 707 (1985) [hereinafter cited as Reed]; Landers, *Attorney Fee Forfeiture: Can It Be Justified? Yes*, 1 CRIM. JUST. 8 (1986) [hereinafter Landers]; Taylor & Strafer, *Attorney Fee Forfeiture: Can It Be Justified? No*, 1 CRIM. JUST. 9 (1986).

4. 18 U.S.C. § 3006A. Other alternatives proposed as "solutions" to the dilemma in-

the context of the following scenario:

> Lawyer accepts a $50,000 retainer to represent Client who is the target of a federal grand jury investigation of cocaine trafficking. One month later, a federal indictment is handed down, charging Client with engaging in a "continuing criminal enterprise" (CCE) in violation of 21 U.S.C. § 848, and seeking forfeiture of all proceeds of that enterprise, including any funds paid as attorneys' fees. Lawyer moves to dismiss the allegations seeking forfeiture of attorneys' fees. In denying the motion, the trial court enters an order providing:
>
> (a) Lawyer is appointed to represent client pursuant to the provisions of the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, with all CJA payments to be returned to the government if Client's funds are available to compensate Lawyer.
>
> (b) The trial is bifurcated, to require separate determination of the factual issues relating to guilt or innocence and the factual issues relating to forfeiture of attorneys' fees.

This scenario has actually been suggested as one answer to the quandary created by forfeiture of attorneys' fees in "guidelines" issued by the U.S. Department of Justice.[5] By the simple expedient of ***appointing*** the lawyer who was retained, the client can be assured of continued representation by the lawyer of his choice, while the lawyer is assured that he or she will be compensated regardless of the outcome of the case. If the lawyer declines the appointment, another lawyer can be appointed, since the right to counsel does not guarantee the appointment of counsel of choice. Thus, the dilemma is resolved by treating the right to counsel as a fungible commodity.

The bifurcation of the trial is suggested as a means of avoiding the problem of the lawyer's conflict in having an interest in the outcome of the transaction he or she is litigating. In upholding the constitutionality of forfeiture of attorneys' fees, U.S. District Judge David Edelstein wrote:

> The court notes that there is a potential conflict between the

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clude: (1) Insure that the monies or assets used to pay for legal fees were acquired prior to the defendant's alleged criminal conduct and have no nexus to the criminal charges. Reed, *supra* note 3, at 777; (2) Require the client to sign documents stating that the money did not come from illicit sources. Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 CRIM. JUST. 2 (1986); (3) Require that the client provide reasonable assurances that the fee comes from a legitimate source and have the client agree to waive the lawyer-client privilege with regard to information concerning the source of the fee. Landers, *supra* note 3, at 48. These alternatives also raise tactical and ethical implications.

5. Justice Department Guidelines on Forfeiture of Attorneys' Fees, § 9-111.210; 38 CRIM. L. RPTR. 3001-02 (Oct. 2, 1985).

> interest of counsel and his client regarding the specific assets that would be subject to forfeiture. The attorney's interest would be for the preservation of his fees while the client would seek to preserve his own assets. *See People v. Csabon*, 103 Misc. 2d 1109, 1110, 427 N.Y.S.2d 571, 572 (Sup. Ct. 1980) (attorney who had agreed to pay fine for convicted client was disqualified from arguing motion to reduce or vacate the fine); D[isciplinary] R[ule] 5-101 (lawyer should refuse employment when his own interests may impair his independent professional judgment); D[isciplinary] R[ule] 5-103 (lawyer should avoid the acquisition of an interest in the cause of action or subject matter of litigation he is conducting for his client). This conflict may be avoided either by bifurcating the trial or through the use of civil forfeiture provisions, 21 U.S.C. § 881. Defendant could retain or be appointed independent counsel to represent his interests at the forfeiture proceeding. This procedure would protect the defendant's right to conflict free counsel, while enabling the government to obtain the fruits of the alleged narcotics enterprise.[6]

There are a number of practical problems with this scenario. First, it is not clear that courts have the power to appoint lawyers for defendants who are "prospectively" indigent under the CJA.[7] Second, CJA rates are limited to maximum hourly rates of $60 in court, $40 out of court,[8] and maximum compensation per case of $2,000.[9] Third, there is no provision to compensate appointed counsel for representation of a client during the grand jury investigation preceding indictment,[10] or for a civil forfeiture proceeding following conviction.[11] Fourth, if counsel retained for the criminal trial has a conflict in

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6. *In re* Grand Jury Subpoena Dated Jan. 2, 1985, 605 F. Supp. 839, 850 n.14 (S.D.N.Y. 1985).

7. The court is required, "after appropriate inquiry," to find that the defendant "is financially unable to obtain counsel." 18 U.S.C. § 3006A(b). Appointment of counsel is also authorized upon a finding "that the person is financially unable to pay counsel whom he had retained." 18 U.S.C. § 3006A(c). An argument in favor of the appointment of counsel by the court analogizes the financial inability brought about by a forfeiture situation to that where a defendant cannot hire a lawyer because "all available funds are subject to a superior, contingent claim, and a private lawyer will not accept the risk of nonpayment. *Cf.* United States v. Kelly, 467 F.2d 262, 266 (7th Cir. 1972)," such as where all available funds have been used to post a bond. Landers, *supra* note 3, at 12.

8. 18 U.S.C. § 3006A(d)(1).

9. *Id.* at § 3006A(d)(2). The maximum can be waived for "extended or complex representation" upon approval of the chief judge of the circuit, *id.* at § 3006A(d)(3), but courts generally refuse to compute excess compensation at the maximum hourly rate. *See, e.g.*, United States v. Hildebrant, 420 F. Supp. 476 (S.D.N.Y. 1976).

10. United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986).

11. 18 U.S.C. § 3006A(a); *cf.* United States v. $2,500 in U.S. Currency, 689 F.2d 10 (2nd Cir. 1982); Resek v. State, 706 P.2d 288 (Alaska Sup. Ct. 1985).

litigating the forfeiture of his fee, how can the same conflict be avoided by another attorney "retained" to litigate the forfeiture? For purposes of this inquiry, however, these practical problems will be ignored and this paper will focus on the ethical dilemma the scenario presents. Can retained counsel accept an appointment under these circumstances? Can retained counsel refuse an appointment under these circumstances?

## II. ACCEPTING THE APPOINTMENT

The acceptance of a client by a lawyer involves a complex set of professional and personal judgments. Regardless of whether the client has been directly approached by the lawyer, or has been proffered by an appointing court, the lawyer cannot and should not accept a client unless he or she concludes that:

(1) He or she possesses "the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services";[12]

(2) He or she has adequate time to pursue the matter with reasonable diligence. "When an attorney takes on more than he can properly handle, he jeopardizes both his client's cause and the public interest in sound and efficient administration of justice";[13]

(3) The intensity of any personal feeling of repugnance for the client will not impair the effectiveness of representation of the client;[14]

(4) The employment is not adverse to a client, a former client, the lawyer's own self-interest or any other conflicting interest;[15]

(5) Representation of the client is not likely to result in an unreasonable financial burden on the lawyer.[16]

Under the scenario described above, the lawyer has already considered these factors and accepted the client at the time the retainer was paid. The subsequent government effort to forfeit the retainer, however, requires re-evaluation of the fourth and fifth considerations.

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12. CAL. RULES OF PROFESSIONAL CONDUCT Rule 6-101(1) (1975), quoted in Lewis v. State Bar, 28 Cal. 3d 683, 621 P.2d 258, 170 Cal. Rptr. 634 (1981). *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

13. Lopez v. Larson, 91 Cal. App. 3d. 383, 400, 153 Cal. Rptr. 912, 922 (1979). *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(c) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30 (1979).

15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); CAL. RULES OF PROFESSIONAL CONDUCT Rules 4-101, 5-101-02 (1987).

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(b) (1983).

The fourth consideration requires the lawyer to assess the conflict of interest created by the need to litigate his or her right to the negotiated fee at the same time the guilt or innocence of the client is being litigated. There are actually three aspects to this conflict: the conflicting self-interest in payment of the agreed-upon fee, the conflicting roles of advocate and witness in litigating the forfeitability of the fee, and the potential prosecution of the attorney for use of the money received. None of these conflicts will be obviated by converting the lawyer from "retained" counsel to "appointed" counsel.

Although an appointment will assure that counsel will be compensated at CJA rates, the agreement to compensate counsel at the retained rate cannot be invalidated. If the defendant is acquitted, his right to utilize his assets to compensate his attorney will not be affected. Thus, the use of forfeiture provisions against attorneys' fees simply converts any agreement to compensate counsel into a *contingency* agreement, the contingency being the successful acquittal of the defendant.

While contingency fees are permitted in some circumstances, their prohibition in criminal cases is absolute. The ABA Model Rules carry forward the prohibition previously contained in Disciplinary Rule 2-106(C) of the Code of Professional Responsibility: "A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." The obvious reason for this prohibition is that a contingency fee arrangement poses an inherent conflict of interest between the client and the lawyer. The conflict has been illustrated by a case which bears a strong analogy to fee forfeiture. In *United States ex rel. Simon v. Murphy*,[17] an attorney agreed to represent a woman accused of murdering her husband, with the understanding that his fees would be paid from the proceeds of the husband's life insurance policy. Since the policy benefits would be paid only if she was acquitted, the fee was rendered contingent on a full acquittal. The potential conflict became a real one when a plea bargain for a plea to second degree murder was offered. Since counsel would receive no fee if the bargain was accepted, his conflicting self-interest precluded competent advice to the client on the desirability of accepting the bargain:

> It is at once apparent that Kramer's contingent fee arrangement was valueless unless his client was acquitted. A plea of guilty would not only destroy relatrix' right to the insurance

17. 349 F. Supp. 818 (E.D. Pa. 1972).

> proceeds, but also counsel's hope for further compensation. It is hard to imagine a more striking example of blatant conflict between personal interest and professional duty. . . .
>
> A conflict of interest arises where the lawyer is faced with the task of giving advice to the client on optional courses of action where the lawyer stands to benefit personally from the adoption of one course to the exclusion of the other. Translated into specifics, we hold that here Kramer's contingent fee agreement created a conflict between his personal interests and those of his client. To put it bluntly, by advising the persistence in a not guilty plea, Kramer had nothing to lose but his client's life.[18]

Because of this conflict, the court granted a writ of habeas corpus invalidating the conviction.

The contingency of forfeiture of the attorney's fee in the event of conviction presents essentially the same conflict. The similarity was recognized by U.S. District Judge Pierre N. Laval in construing the CCE and RICO forfeiture provisions to preclude forfeiture of attorneys' fees:

> A lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict. . . . He might furthermore be found to have accepted a contingent fee in a criminal case in violation of D[isciplinary] R[ule] 2-106(C), since his retention of his fee would depend on gaining an acquittal in the client's trial. The statute would give attorneys a motive to negotiate a guilty plea that did not involve forfeiture, rather than fight the case expending valuable time and increasing the risk of incurring forfeiture.[19]

The only effect appointment of counsel has on this conflict is to adjust the lower parameter. Instead of a "$50,000 or nothing" contingency, the gamble becomes "$50,000 or $2,000." The difference is hardly significant.

The acceptance of an appointment under these circumstances not only subjects the client to a potential conflict of interest with his lawyer, it also puts the lawyer in jeopardy of professional discipline for violating a clear professional mandate. Unlike other potential conflicts which the client can waive, the prohibition of contingent fees in criminal cases is absolute.[20]

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18. *Id.* at 823.

19. United States v. Badalamenti, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

20. *In re* Steere, 217 Kan. 276, 536 P.2d 54 (1975); Schoonover v. State, 218 Kan. 377, 543 P.2d 881 (1975).

The second aspect of the conflict posed for counsel is the conflict of roles between advocate and witness. The forfeiture of attorneys' fees presents several factual issues which require the retained attorney's testimony for resolution. How much was paid in fees? By whom was it paid? What information did the attorney have about the source of the funds? These issues make any attorney who agrees to represent the defendant an essential witness to his prosecution, regardless of any subsequent appointment by the court. Continued representation under these circumstances would violate Rule 3.7 of the ABA Model Rules, which provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.

The second exception is designed for situations in which attorneys' fees are an element of the recovery sought, and the attorney is testifying on behalf of his client. The rationale for Rule 3.7 has been explained in these terms:

> The basis for the professional rule regarding appearance as both advocate and witness is twofold. First, it is designed to protect the integrity of the advocate's professional role by preserving the distinction between advocacy, which is based on reason and subject to objective evaluation, and testimony, which is based on the witness's moral qualifications and is evaluated in terms of individual credibility. . . . Second, it is a corollary to the rule that an advocate may not inject personal belief as to cause into argument before the jury. The proscription against appearing as advocate and witness eliminates the opportunity to mix argument and fact.[21]

This rationale necessitates a prohibition which cannot be overcome by client consent. Thus, the appearance of a lawyer in the dual role of attorney and witness against the client would deprive the client of the sixth amendment right to effective assistance of counsel. As the U.S. Court of Appeals for the Fifth Circuit concluded in *Uptain v. United States*: "No lawyer could function as a persuasive advocate

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21. T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS & MATERIALS 236 (2d ed. 1983 Supp.) (quoting *Final Draft Model Rules of Professional Conduct, Appendix Legal Background* Rule 3.7 Commentary (1983)).

before a jury when he is the crucial witness against his own client."[22] Giving counsel a CJA appointment does not remove these issues or alleviate the conflict. Neither does the bifurcation of the trial or use of civil forfeiture provisions. Counsel is still put in a position of having to ultimately appear as a witness against his or her client. This conflict hampers the representation of the client long before counsel is called to the witness stand. As described by U.S. District Judge John L. Kane, Jr.: "The threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel."[23]

A third aspect of the conflict of interest posed for counsel arises from the risk of his own prosecution for use of the money received as his fee. The continuing criminal enterprise statute contains a criminal prohibition of the direct or indirect use or investment of monies which constitute the proceeds of drug violations.[24] While this prohibition applies only to those who "participated as a principal" in the violation which produced the proceeds, an attorney whose relationship with the client precedes the current retainer may face a significant risk of prosecution.

The possibility of having to defend against a criminal charge creates a potential conflict in penal interest as to evidentiary disclosures regarding the transfer of monies and information. Where the presentation of evidence may equally affect the penal interests of both defendants and defense counsel, a cognizable conflict may occur under the fifth and sixth amendments.[25]

Thus, in reconsidering whether representation of the client is adverse to the lawyer's own self-interest after a forfeiture is alleged, a lawyer who accepts an appointment is agreeing to represent conflicting interests and to perform conflicting roles. The conflict does not even appear to be the kind of conflict that a client can waive.[26]

However, the lawyer must also re-assess the fifth and final consideration. Will representation of the client result in an unreasonable financial burden on the lawyer? Ultimately, the answer to this ques-

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22. 692 F.2d 8, 10 (5th Cir. 1982).

23. United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985).

24. 21 U.S.C. § 854.

25. Gov't of Virgin Islands v. Zepp, 748 F.2d 125, 135-39 (3rd Cir. 1984); *See* Reed, *supra* note 3, at 778 n.179.

26. Even if the conflict could be waived, the right to choice of counsel is compromised if the only choice given the defendant is to proceed with his chosen lawyer burdened by a conflict of interest, or proceed with another lawyer who is not so burdened.

tion may turn on the lawyer's willingness to compromise the standards he or she ordinarily sets for himself or herself. The retained lawyer can set his or her own standard of competence, as long as it does not fall below the constitutional minimum. The standard of competence for appointed counsel is externally imposed.

Every lawyer who accepts a court appointment to represent a client makes a commitment to provide "competent" representation. Obviously, there is a quantitative and qualitative difference between the minimal demands of "competency" and the elaborate steps that many retained counsel take to prepare and try a case. Just as a Volkswagen and a Rolls-Royce can both provide transportation to a given point, a deputy public defender one year out of law school can provide "competent" representation to the same extent as Edward Bennett Williams. The problem arises, however, when an attorney who accepts a case with the understanding that he is being hired to provide a Rolls-Royce defense is given a Volkswagen budget. The financial resources available always impose a limitation on tactical options. Options that retained lawyers consider essential may be viewed as unnecessary extravagances by appointed counsel, or more to the point, by the judges to whom appointed counsel must present their requests for compensation and reimbursement of expenses. As Justice Harry Blackmun once stated: "In any event, a rich defendant may have the right to waste his money on unnecessary and foolish trial steps, but that does not, in the name of necessary constitutional equality, give the indigent the right to squander government funds merely for the asking."[27] The dilemma, of course, is that retained counsel who accepts appointment is, in reality, agreeing to lower his or her standards. A judge in charge of the public purse might view those "higher" standards as an "unnecessary and foolish" squandering of money, but a lawyer committed to presenting the best defense that resources will permit is applying a different measure.

A lawyer might avoid the dilemma by convincing himself/herself that the risk of being limited to appointive rates is low enough to be acceptable. If the defendant is acquitted, of course, the agreed upon retainer can be retained. Thus, the lawyer can provide the same standard of representation, facing the prospect of financial ruin only if the client is convicted. Every retained lawyer who accepts appointment faces that gamble.

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27. Slawek v. United States, 413 F.2d 957, 960 (8th Cir. 1969).

## III. REJECTING THE APPOINTMENT

While the courts have occasionally asserted the power to compel a lawyer to accept court-appointed clients over his or her objection,[28] it appears clear that the CJA confers no such power on the federal courts. In *Ferri v. Ackerman*,[29] the U.S. Supreme Court held that attorneys appointed to represent indigent clients in federal criminal proceedings are not entitled to the absolute immunity from malpractice claims conferred upon judges and prosecutors. In so holding, however, the Court noted that it was "not implausible" that the increased risk of such liability in indigent cases might deter lawyers from taking such appointments. Significantly, the Court avoided the problem by assuming lawyers were free to decline such appointments. Noting that the risk of malpractice liability must be offset by the level of compensation offered to ensure a steady supply of lawyers, the Court left that equation for Congress to resolve.[30]

Evaluating the factors by which a lawyer determines whether to accept a client requires a form of intensive self-assessment and examination of conscience that only the lawyer involved can perform. The courts must presume that this professional judgment is made in good faith. If a lawyer's assessment of his own competency, existing workload, intensity of personal feelings, potential conflicts, or current financial ability is to be second-guessed and overridden by an appointing court, the effectiveness of the ensuing attorney-client relationship may be doomed from the start.

The necessity for courts to defer to the good faith judgments of attorneys who seek to decline appointment has been recognized in the reported decisions of Florida and Ohio. In *Easley v. State*,[31] the Florida District Court of Appeal reversed a judgment of contempt against a lawyer who filed a client's affidavit concurring in the lawyer's own assessment of incompetence after the trial court denied a previous motion to withdraw.[32] The trial court interpreted counsel's action as "a scheme to secure release from appellant's obligation as an attorney to assist the court in the representation of indigent criminal defendants."[33] On appeal, the court concluded that counsel who believes himself incompetent to represent a client, despite a court or-

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28. *E.g.*, State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981). *See* Uelmen, *Simmering on the "Backburner": The Challenge of Yarbrough*, 19 LOY. L.A.L. REV. 285 (1985).

29. 444 U.S. 193 (1979).

30. *Id.* at 204-05.

31. 334 So. 2d 630 (Fla. 1976).

32. *Id.* at 635.

33. *Id.*

der to provide such representation, has a duty "to communicate his feelings of lack of competence" to the client:

> There is no finding, nor indeed on the evidence could there be, that appellant did not in good faith feel his inadequacy to handle felonies. Moreover, in accord with the ethical obligations of an attorney, we think it was incumbent upon appellant to communicate his feelings of lack of competence to the defendant.[34]

The Florida court recognized that a lawyer's own conclusions about his competency, his conflicting loyalties, his availability, his solvency, and his feelings of repugnance are likely to interfere with the lawyer-client relationship, regardless of the fact that an appointing court may disagree with those conclusions:

> The court's finding of appellant's competence in criminal matters wouldn't make it a fact; and nothing in the evidence impeaches appellant's assertion to the contrary. Furthermore, appellant never actually *refused* to represent [defendant] in contravention of the court order. He simply informed the defendant, as he should have, that he felt incompetent to represent him and thereafter filed a motion consistent with the desires of his client. He could have done no less and is not guilty of contempt for doing so.[35]

A similar dilemma was presented to the Ohio Court of Appeals in *State v. Gasen*.[36] There, the trial court appointed a deputy public defender to represent a criminal defendant over the lawyer's objection that he could not effectively represent the client and that to do so would violate the Code of Professional Responsibility, because the defendant was already represented by another lawyer who had failed to appear. Significantly, the court of appeals held that a lawyer's duty to decline to represent a client is no different when the attorney is appointed by the court than it would be if the client walked in off the street:

> Clearly, the ethics of the legal profession demand that any attorney, private or public, decline to represent a party when such attorney is unable, for valid reasons, to fully and adequately prepare such party's case, or when such party is already represented by competent counsel. Failure of an attorney to *decline* to perform such representation may result in disciplinary

34. *Id.* at 632.
35. *Id.* (emphasis original).
36. 48 Ohio App. 2d 191, 356 N.E.2d 505 (1976).

measures being taken against him.[37]

Since the duty to decline employment arises from such a complex matrix of ethical judgments by the attorney involved, it is difficult to imagine any circumstances in which a court would be justified in substituting its judgment for that of the attorney.

Once a lawyer declines to accept appointment, his or her withdrawal requires the court to appoint another lawyer. The objection of the client to this arrangement should be clearly noted for the record. In effect, the client has been deprived of his chosen counsel simply because the utilization of forfeiture procedures compelled chosen counsel to withdraw. The issue *now* posed is, even assuming the forfeiture procedure was unconstitutional, will any sixth amendment violation be "cured" by the appointment of alternative counsel? That question should be of interest to counsel contemplating withdrawal, since he or she may be in a unique position to make the record necessary to preserve the client's rights.

Where chosen counsel is compelled to withdraw by the grant of a motion to disqualify, the United States Supreme Court held the order could not be appealed prior to trial in *Flanagan v. United States*.[38] In urging that such orders should be immediately subject to appeal, the question was raised whether post-judgment appeal is an inadequate remedy, because a standard of "harmless error" would be applied. In other words, would someone deprived of chosen counsel be required to show that substitute counsel was so inadequate as to cause a result different than was expected if represented by chosen counsel? Such a burden could rarely be met. In responding to this question, Justice Sandra Day O'Connor noted that some denials of sixth amendment rights require no showing of prejudice because prejudice is assumed. She offered three examples:[39]

> (1) Denial of the right to self-representation;[40]
> (2) Denial of the appointment of counsel altogether;[41]
> (3) Denial of counsel's request to be replaced because of a conflict of interest.[42]

In each of these situations, the protected right goes beyond concern

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37. *Id.* at 193, 356 N.E.2d at 507 (emphasis original).
38. 465 U.S. 259 (1984).
39. *Id.* at 267-68.
40. Faretta v. California, 422 U.S. 806 (1975). *See* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).
41. Gideon v. Wainwright, 372 U.S. 335 (1963).
42. Holloway v. Arkansas, 435 U.S. 475 (1978).

for the objective fairness of the proceeding. On the other hand, Justice O'Connor suggested that some disqualifications of counsel might require a showing of prejudice for reversal and thus "cannot be adequately reviewed until trial is complete."[43] While no examples of the latter category were offered, there is a strong implication that the disqualification in question in *Flanagan* itself might present such an issue. In *Flanagan*, four Philadelphia police officers who were jointly indicted insisted on being represented by the same retained law firm. Despite the clients' willingness to waive the conflict, the court disqualified counsel from further representation of any of the four officers.

*Flanagan*, however, did not involve a total deprivation of choice of counsel. The clients were left in the position of simply being denied joint representation by the same retained counsel. The order only required that each client choose separate retained counsel. This is very different from an order which deprives the client of any right of choice, foisting an appointed lawyer upon him in lieu of his chosen retained counsel.

The significance of the difference becomes readily apparent in *United States v. Rankin*.[44] In *Rankin*, the defendant's retained counsel was detained in a lengthy murder trial in state court.[45] The federal trial judge ordered the defendant to obtain alternate counsel and he refused, insisting on his original choice of retained counsel. The judge then appointed counsel, allowing one month to prepare the case. By the time the trial was actually concluded, defendant's retained counsel had completed the state trial and was again available. The court held that the refusal to continue the trial was arbitrary and deprived the defendant of his right to counsel of his choice.

> Rankin did select counsel but was denied representation at trial by that lawyer. That this deprivation occurred as a result of the court's refusal to grant a continuance does not obscure the nature of the right at stake. *Chandler v. Fretag*, 348 U.S. 3 (1954).
>
> We have stated that "the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura*, 607 F.2d 52, 55 (3rd Cir. 1979). "Attorneys are not fungible," and "[t]he ability of a defendant to

43. 465 U.S. at 268-69.

44. 779 F.2d 956 (3rd Cir. 1986).

45. Retained counsel was former Philadelphia District Attorney F. Emmett Fitzpatrick, who represented the defendant on appeal.

> select his own counsel permits him to choose an individual in whom he has confidence." *Id.* at 56. Recognizing the importance of these interests, we held "[i]f a defendant chooses a particular lawyer, a court may not take arbitrary action prohibiting the effective use of that counsel." *Id.* at 57.[46]

As might be expected, the prosecution argued that the error in depriving the defendant of chosen counsel was harmless, since appointed counsel provided competent representation at trial. In rejecting this argument, the court relied upon *Flanagan*, comparing the denial of chosen counsel to a denial of the right of self-representation:

> The government argues that Rankin was competently represented by appointed counsel at trial. That, however, is not a relevant consideration. A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. . . . In this respect, the denial of one's selected lawyer is quite different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation.[47]

Returning to the scenario, retained counsel who contemplates refusing assignment must be alert to the importance of the case being in a posture which closely resembles *Rankin*. It should be clear that counsel is not voluntarily withdrawing because continued representation would impose a financial burden. Counsel should indicate, on the record, that ethical considerations preclude continued representation, that those ethical problems rise solely by virtue of the pending claim of forfeiture of attorneys' fees, and that those ethical considerations are not alleviated by the proffered appointment. The record should also clearly show that the client objects to withdrawal of his chosen counsel, refuses to select alternative counsel, and objects to the appointment of alternative counsel. Thus, the record will clearly reflect the actual circumstances: by the simple expedient of alleging forfeiture of attorneys' fees, the prosecution is being given a veto over the defendant's choice of counsel.

## IV. CONCLUSION

The allegation that fees which a defendant has paid to his retained attorney should be forfeited, injects factual issues into a criminal case that cannot be litigated by retained counsel without serious

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46. 779 F.2d at 958.
47. *Id.* at 960.

conflicts of interest and conflicting roles. These conflicts are not alleviated by converting retained counsel into an appointed lawyer. Each lawyer who faces this dilemma must decide for himself or herself whether to accept the proffered appointment. There are serious risks and hazards implicit in either course. It is essential, however, that the ethical and tactical implications be fully explored before the choice is made. Ultimately, there is hope that the courts will continue to respond to the dilemma by squelching its creation. The reason forfeiture of attorneys' fees violates the sixth amendment is precisely because it creates this dilemma.