15. SIXTH AMENDMENT AND INDIVIDUALS

The Sixth Amendment to the U.S. Constitution guarantees the right to the assistance of counsel, which has been interpreted to mean "effective" counsel.

The right to effective counsel has been said to include: the right to an attorney of one's choosing; the right to spend one's own money (indeed, all of it), but not necessarily someone else's money, on a defense; the right to have a defense paid for by the state if one is indigent; the right to conflict-free counsel—a right in which the public also has an interest; and the right to counsel who performs adequately under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. The last right is very important in street crime but rarely leads to litigation in white collar crime.

Representation rights are important to understand in the field of corporate crime principally because the corporation may have a role in individual representation in two ways: by paying for private counsel for employees; and by interacting directly with employees through lawyers who represent the corporation. Thus, the main issues in the corporate crime context relate to the funding of counsel and conflicts of interest. Access to corporate funding of counsel for employees may be afforded by statute and/or by employment contract—according, generally speaking, to whether one occupies a senior position in a large corporation—or may not be legally guaranteed but commonly provided as a matter of a corporation's ordinary business practices.

A. Relevant Legal Provisions

These issues implicate several bodies of law, including the Sixth Amendment of the U.S. Constitution, state corporate codes (this chapter focuses on Delaware, as that is the leading jurisdiction for incorporation), and the ABA's Model Rules of Professional Conduct, all provided below.

U.S. Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense**.

Delaware Code § 145

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request

of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful. . . .

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. . . .

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate. . . .

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section. . . .

ABA Model Rules of Professional Conduct

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. . . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include

the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. . . .

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those

paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

B. Conflicts of Interest

In the following case, the Sixth Amendment right to an attorney of one's own choosing collides with the right to conflict-free counsel, which turns out to have a public interest dimension according to the Supreme Court. This problem often comes up in sophisticated federal criminal practice: A defendant wishes to have a particular lawyer who also happens to have a conflict, the prosecutor thinks that should not be allowed, and the court has to decide what to do. *Wheat* is the foundational case.

WHEAT v. UNITED STATES, 486 U.S. 153 (1988)

Chief Justice REHNQUIST delivered the opinion of the Court.

The issue in this case is whether the District Court erred in declining petitioner's waiver of his right to conflict-free counsel and by refusing to permit petitioner's proposed substitution of attorneys.

Petitioner Mark Wheat, along with numerous codefendants, was charged with participating in a far-flung drug distribution conspiracy. . . . Also charged in the conspiracy were Juvenal Gomez-Barajas and Javier Bravo, who were represented in their criminal proceedings by attorney Eugene Iredale. Gomez-Barajas was tried first and was acquitted on drug charges overlapping with those against petitioner. To avoid a second trial on other charges, however, Gomez-Barajas offered to plead guilty to tax evasion and illegal importation of merchandise. . . .

At the conclusion of Bravo's guilty plea proceedings on August 22, 1985, Iredale notified the District Court that he had been contacted by petitioner and had been asked to try petitioner's case as well.

. . . [T]he Government objected to petitioner's proposed substitution on the ground that Iredale's representation of Gomez-Barajas and Bravo created a serious conflict of interest. The Government's position was premised on two possible conflicts. First, the District Court had not yet accepted the plea and sentencing arrangement negotiated between Gomez-Barajas and the Government; in the event that arrangement were rejected by the court, Gomez-Barajas would be free to withdraw the plea and stand trial. He would then be faced with the prospect of representation by Iredale, who in the meantime would have acted as petitioner's attorney. Petitioner, through his participation in the drug distribution scheme…was thus likely to be called as a witness for the Government at any subsequent trial of Gomez-Barajas. This scenario would pose a conflict of interest for Iredale, who would be prevented from cross-examining petitioner and thereby from effectively representing Gomez-Barajas.

Second, and of more immediate concern, Iredale's representation of Bravo would directly affect his ability to act as counsel for petitioner. . . . [T]he Government contacted Iredale and asked that Bravo be made available as a witness to testify against petitioner, and agreed in exchange to modify its position at the time of Bravo's sentencing. In the likely event that Bravo were called to testify, Iredale's position in representing both men would become untenable, for ethical proscriptions would forbid him to cross-examine Bravo in any meaningful way. By failing to do so, he would also fail to provide petitioner with effective assistance of counsel. Thus, because of Iredale's prior representation of Gomez-Barajas and Bravo and the potential for serious conflict of interest, the Government urged the District Court to reject the substitution of attorneys.

In response, petitioner emphasized his right to have counsel of his own choosing and the willingness of Gomez-Barajas, Bravo, and petitioner to waive the right to conflict-free counsel. Petitioner argued that the circumstances posited by the Government that would create a conflict for Iredale were highly speculative and bore no connection to the true relationship between the co-conspirators. If called to testify, Bravo would simply say that he did not know petitioner and had no dealings with him; no attempt by Iredale to impeach Bravo would be necessary. Further, in the unlikely event that Gomez-Barajas went to trial on the charges of tax evasion and illegal importation, petitioner's lack of involvement in those alleged crimes made his appearance as a witness highly improbable. Finally, and most importantly, all three defendants agreed to allow Iredale to represent petitioner and to waive any future claims of conflict of interest. In petitioner's view, the Government was manufacturing implausible conflicts in an attempt to disqualify Iredale, who had already proved extremely effective in representing Gomez-Barajas and Bravo.

. . . The court then ruled:

> [B]ased upon the representation of the Government in [its] memorandum that the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied.

Petitioner proceeded to trial with his original counsel and was convicted. . . .

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." . . . [T]his right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.

In previous cases, we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware. While "permitting a single attorney to represent codefendants . . . is not per se violative of constitutional guarantees of effective assistance of counsel," a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel. As we said in *Holloway*:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence

> prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Petitioner insists that the provision of waivers by all affected defendants cures any problems created by the multiple representation. But no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Both the American Bar Association's Model Code of Professional Responsibility and its Model Rules of Professional Conduct, as well as the rules of the California Bar Association (which governed the attorneys in this case), impose limitations on multiple representation of clients. . . . Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

For this reason, the Federal Rules of Criminal Procedure direct trial judges to investigate specially cases involving joint representation. In pertinent part, Rule 44(c) provides:

> [T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Although Rule 44(c) does not specify what particular measures may be taken by a district court, one option suggested by the Notes of the Advisory Committee is an order by the court that the defendants be separately represented in subsequent proceedings in the case. This suggestion comports with our instructions . . . that the trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.

To be sure, this need to investigate potential conflicts arises in part from the legitimate wish of district courts that their judgments remain intact on appeal. As the Court of Appeals accurately pointed out, trial courts confronted with multiple representations face the prospect of being "whip-sawed" by assertions of error no matter which way they rule. If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. On the other hand, a district court's refusal to accede to the multiple representation may result in a challenge such as petitioner's in this case. Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel.

Thus, where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented. . . .

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

For these reasons we think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses. In the circumstances of this case, with the motion for substitution of counsel made so close to the time of trial, the District Court relied on instinct and judgment based on experience in making its decision. We do not think it can be said that the court exceeded the broad latitude which must be accorded it in making this decision. Petitioner of course rightly points out that the Government may seek to "manufacture" a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision. . . .

Viewing the situation as it did before trial, we hold that the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate petitioner's Sixth Amendment rights. Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was "right" and the other "wrong". The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court. . . .

The following case involves a famous prosecution in which the Second Circuit approved a trial judge's decision to prevent attorneys, including for the notorious mafia boss John

Gotti, from representing at trial defendants on grounds that the lawyers' "house counsel" status and other factors created non-waivable conflicts under *Wheat*.

UNITED STATES v. LOCASCIO, 6 F.3d 924 (2d Cir. 1993)

ALTIMARI, Circuit Judge:

On July 18, 1991, a grand jury in the Eastern District of New York returned a thirteen count superseding indictment against [John] Gotti and [Frank] Locascio. The indictment also named two other defendants, Salvatore Gravano and Thomas Gambino, who are not parties to this appeal. All four defendants were charged with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), for unlawfully conducting and participating in the affairs of a criminal enterprise through a pattern of racketeering activity. The charged enterprise was the Gambino Organized Crime Family of La Cosa Nostra ("the Gambinos," "The Gambino Family," or "the Gambino Crime Family"). Gotti was charged as the head of the organization, and Locascio was accused of being the "underboss," or second-in-command.

Gravano was charged as the "consigliere," or advisor, to Gotti. Following the indictment, Gravano pleaded guilty to a superseding racketeering charge and testified at length at trial against Gotti and Locascio. The charges against Gambino, a "captain" in the organization, were severed. . . .

The government's proof to support the allegations that Gotti and Locascio had been in command of an extensive criminal enterprise was comprised mostly of lawfully intercepted tape-recorded conversations of the defendants-appellants and other alleged members of the Gambino Family. The government introduced tape recordings from four different locations over an eight-year period. . . .

The tape recordings, combined with Gravano's testimony, presented to the jury a picture of a large-scale enterprise involved in various criminal activities. The jury heard evidence on the structure and inner workings of the Gambino Family, and learned of the miscellaneous crimes with which Gotti and Locascio were charged: murders, obstruction of legal proceedings, conspiracies, gambling operations, and loansharking activities. . . .

Prior to trial, the district court disqualified [the] attorney for . . . Gotti. . . . Gotti . . . now contend[s] that this [disqualification was] unwarranted and violated [his] Sixth Amendment rights.

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The accused, however, does not have the absolute right to counsel of her own choosing. As the Court stated in *Wheat*,

> while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal

> defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Similarly, although a criminal defendant can waive her Sixth Amendment rights in some circumstances, that right to waiver is not absolute, since "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." The question of disqualification therefore implicates not only the Sixth Amendment right of the accused, but also the interests of the courts in preserving the integrity of the process and the government's interests in ensuring a just verdict and a fair trial.

In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused's chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict.

There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation, or because of the counsel's prior representation of a witness or co-defendant. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial. . . .

Bruce Cutler served as Gotti's attorney in previous criminal trials in federal court. Prior to trial, the government moved to disqualify Cutler from acting as Gotti's attorney. Although the motion also dealt with the disqualification of other Gotti attorneys, only the disqualification of Cutler has been challenged on appeal.

The district court granted the motion to disqualify on several grounds. Judge Glasser, in a thoughtful and well-reasoned opinion, found that Cutler had acted as "house counsel" to the Gambino Crime Family by receiving "benefactor payments" from Gotti to represent others in the criminal enterprise. The district court based this conclusion on excerpts from the government's taped transcripts, which left "little doubt that Gotti paid significant sums of money for legal services rendered to others."

The district court further determined that Cutler's participation in government-taped conversations at which illegal activity was discussed would impair his representation of Gotti. Specifically, the court noted that Cutler's mere presence at trial could make him an "unsworn witness" before the jury in explaining his own conduct and interpreting Gotti's conversations on the tapes. Even if Gotti waived the conflict, and even if the government did not intend to call Cutler as a witness, the district court found that Cutler's representation would still compromise the integrity of the proceeding.

Third, the district court found that Cutler's prior representation of Michael Coiro, a potential government witness, gave rise to a conflict of interest. The court reasoned that this conflict mandated disqualification both because Cutler was privy to events surrounding an obstruction charge, and because Cutler's cross examination of Coiro at trial would be circumscribed by the prior representation.

Finally, the district court also found disqualification warranted because of the implication by Gotti in taped conversations that he had paid Cutler money "under the table." This made Cutler a potential accomplice as well as a potential witness to Gotti's tax fraud.

In conclusion, the district court noted that it was mindful that disqualification is a drastic remedy for conflict problems, but that no less severe alternatives were viable. The court therefore held that "the grave peril the continued representation by [Cutler] poses to the integrity of the trial process" mandated disqualification.

Gotti now appeals the district court's ruling, arguing that the disqualification was an abuse of discretion. We disagree, and affirm the disqualification on two grounds: (1) Cutler's role as house counsel to the Gambino Crime Family; and (2) Cutler's anticipated role as an "unsworn witness" for Gotti had he been allowed to serve. . . .

Gotti argues that the facts before the district court did not merit the conclusion that Cutler had acted as "house counsel" to the Gambino Crime Family. Rather, Gotti argues that Cutler was merely his personal attorney.

Ethical considerations warn against an attorney accepting fees from someone other than her client. As we stated in a different context, the acceptance of such "benefactor payments" "may subject an attorney to undesirable outside influence" and raises an ethical question "as to whether the attorney's loyalties are with the client or the payor." In this context, proof of house counsel can be used by the government to help establish the existence of the criminal enterprise under RICO, by showing the connections among the participants.

Contrary to Gotti's assertions, there was sufficient evidence for the district court to determine that Cutler had acted as house counsel to the Gambino Crime Family. For example, the court cited one conversation in which Gotti, in the time-honored tradition of legal clients, complained about his legal fees:

> I gave youse [sic] 300,000 in one year. Youse [sic] didn't defend me. I wasn't even mentioned in none of these [expletive deleted] things. I had nothing to do with none of these [expletive deleted] people. What the [expletive deleted] is your "beef?" . . . . Before youse [sic] made a court appearance, youse [sic] got 40,000, 30,000 and 25,000. That's without counting [attorney] John Pollok. . . .. You standing there in the hallway with me last night, and you're plucking me. . . . . "Tony Lee's" lawyer, but you're plucking me. I'm paying for it. . . . . Where does it end?

> Gambino Crime Family? This is the Shargel, Cutler and who do you call it Crime Family.

Gotti thus demonstrated that he was incurring the legal fees for representation of others. As support for disqualification, the government indicated that it would introduce the testimony of Michael Coiro, who would testify that he had paid nothing to Cutler and another attorney for their services to him, presumably because Gotti paid for his defense.

Cutler's role as house counsel to the Gambinos raised a credible issue of the ethical propriety of his representation of Gotti in this case. An attorney cannot properly serve two masters, and the evidence before the district court indicated that Cutler had represented the Gambino Family as a whole. Moreover, Cutler's status as house counsel was potentially part of the proof of the Gambino criminal enterprise. We cannot say that the district court abused its discretion in disqualifying Cutler on this basis, considering the volume of proof of Cutler's proximity to the affairs of the Gambino Crime Family offered by the government in this case.

An even stronger basis for disqualification, however, was the possibility that Cutler would function in his representational capacity as an unsworn witness for Gotti. An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation.

Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination.

The district court disqualified Cutler partially on the ground that his representation of Gotti would place him in the role of such an unsworn witness. The clearest support for this finding was Cutler's presence during the Ravenite Apartment discussions taped by the government. The government was legitimately concerned that, when Cutler argued before the jury for a particular interpretation of the tapes, his interpretation would be given added credibility due to his presence in the room when the statements were made. This would have given Gotti an unfair advantage, since Cutler would not have had to take an oath in presenting his interpretation, but could merely frame it in the form of legal argument.

Gotti argues, however, that the district court erred in disqualifying Cutler where the government had no intention of calling Cutler. He also maintains that Cutler's presence and participation on the government's tapes could have been redacted to eliminate references to and statements by Cutler, thereby eliminating the unsworn witness

problem. The first contention is meritless, since the district court explicitly and correctly noted that "whether the government will or will not call . . . Cutler . . . has no significance for this motion." The second contention is equally unavailing, since the district court explicitly found that redaction of the tapes would have eviscerated the government's case. We are not in a position to second-guess the district court's clearly supported factual findings on review. Moreover, we agree with the district court that the government's case should not be unfairly impaired so that an accused can continue with conflicted counsel.

The unsworn witness problem arises not only in relation to the Ravenite tapes, but to other grounds cited by the district court in support of disqualification. For example, the court found that Gotti's references to Cutler's acceptance of fees "under the table" were relevant to the government's case on the tax fraud count. Had Cutler argued Gotti's defense to that count, he would not only have had a conflict of interest but he would have been arguing as to events in which he was allegedly involved.

We are aware that disqualification is a drastic remedy to the unsworn witness problem. We are also, however, cognizant that this is an unusual case, in that Cutler had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family: he is recorded on government tapes when discussions of allegedly illegal activity took place; he is allegedly involved in the tax fraud count against Gotti; his role as house counsel could be used to prove the criminal enterprise; and his representation of government witnesses caused a conflict with his representation of Gotti. Although we are cognizant of the right of the accused to secure representation, we are also conscious of the institutional interest in protecting the integrity of the judicial process. If an attorney will not perform his ethical duty, it is up to the courts to perform it for him. Bruce Cutler had no place representing John Gotti in this case, and the district court properly determined that he should be disqualified. . . .

Although disqualification is a drastic measure, the district court is in the best position to evaluate what is needed to ensure a fair trial. Here, the district court made careful findings of fact on each disqualification, and supported its decisions with well-reasoned opinions. We conclude that the district court properly exercised its discretion . . . .

Conflicts of interest may also arise when corporate counsel offers to represent an employee simultaneously with the corporation. As you read the following ethics opinion out of New York, consider how these issues may be further complicated by anti-solicitation rules.

NEW YORK COUNTY LAWYERS ASSOCIATION

PROFESSIONAL ETHICS COMMITTEE

FORMAL OPINION 747

June 9, 2014

TOPIC: Whether corporate counsel's offer to represent corporate employee or former employee constitutes improper solicitation within the meaning of Rule of Professional Conduct (RPC) 7.3.

DIGEST: A lawyer representing a corporation in a lawsuit has arranged to interview unrepresented corporate employees and former employees, who are potential parties or witnesses, for purposes of learning relevant information. The corporation has requested the lawyer to offer to represent the individuals in connection with the lawsuit if the lawyer would not have a conflict of interest and the individuals would benefit from representation. If the lawyer reasonably concludes based on an interview that the multiple representation is permissible under the conflict of interest rules, the lawyer may personally offer to represent the employee or former employee without violating the rule against solicitation (RPC 7.3).

RULES OF PROFESSIONAL CONDUCT: 1.6, 1.7, 1.13, 7.3

OPINION: Corporations and other entities frequently provide legal representation to current or former officers or employees who are potential testifying witnesses or parties in legal proceedings. In some situations, the corporation is contractually or statutorily obligated to provide legal representation, or has an internal policy so providing. In other situations, the decision to provide counsel to corporate constituents is made on an ad hoc basis in connection with the particular lawsuit. The corporation may compensate separate counsel for representing the corporate constituent or, where consistent with conflict of interest rules, for jointly representing multiple constituents. However, for financial and/or strategic reasons, the corporation may prefer that its own lawyer concurrently represent one or more corporate constituents, insofar as it is permissible under the conflict of interest rules. The corporation may therefore authorize its lawyer to offer representation to an otherwise unrepresented employee or former employee who may benefit from representation in a lawsuit. One question this raises is whether, consistently with the rule against solicitation, the lawyer may personally offer to represent the employee or former employee. This opinion addresses the question in the context where the lawyer begins by interviewing the current or former employee as a non-client to learn potentially relevant information and, based on the information acquired, concludes that a joint representation of the corporation and employee is permissible.

By way of background, the ordinary practice is for the corporation's lawyer initially to meet with the employee or former employee in his or her capacity as a non-client who is a potential witness, not as a prospective client. The corporation may arrange the

meeting or the lawyer may do so independently. The purpose will be to learn relevant information from the individual in order to advance the representation of the corporate client in the lawsuit. The lawyer will provide any necessary warnings under Rules 1.13(a) and 4.3 to ensure that the individual understands the lawyer's role as counsel only for the corporation.[6] One reason to make clear at this stage that the lawyer represents only the corporation is to avoid assuming a confidentiality obligation to the current or former employee under Rule 1.18. In communications with the witness, the lawyer should avoid assuming a confidentiality obligation to the employee that might later conflict with the lawyer's duties to the corporation.

After interviewing the employee, the lawyer should be in a position to determine whether the employee would benefit from legal representation. If not, establishing a lawyer-client representation solely to benefit the corporate client may be impermissible from the perspective of the individual, who may be misled regarding the need for a lawyer or who may be burdened by a representation that exclusively benefits the employer. If the representation is established in bad faith, it may also be impermissible from the perspective of the opposing party, who may be disabled by Rule 4.2 from communicating directly with the represented employee. Whether a lawyer may permissibly represent an employee or former employee exclusively for the corporation's benefit, where the individual has no need of legal services as a party or potential testifying witness in the lawsuit, is a question beyond the scope of this opinion. For purposes of this opinion, we assume the representation does serve the interests of the current or former employee as well as the corporate employer.

After the initial interview, the lawyer should also be in a position to determine whether a joint representation of the corporation and employee is permissible under Rules 1.7 and 1.13(d) with the respective clients' informed consent. *See* N.Y. City Bar Assoc. Comm. on Prof'l and Jud. Ethics, Formal Op. 2004-2 (2004) (discussing representation of a corporation and its constituents in a government investigation). Rule 1.7, the conflict of interest rule, is implicated when the lawyer's representation of two or more clients "will involve the lawyer in representing differing interests," which is often the case when the lawyer represents both a corporation and its individual employee in connection with a lawsuit. In that event, the representation is permissible only if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to

[6] When an organization's interests may differ from those of the organization's individual constituent (e.g., officer or employee), Rule 1.13(a) requires the organization's lawyer to advise the individual that the lawyer represents the organization, not the individual. Rule 4.3 requires a client's lawyer communicating with an unrepresented person to avoid stating or implying that the lawyer is disinterested; to avoid giving legal advice other than to retain counsel; and, if the person misunderstands the lawyer's role in the matter, to "make reasonable efforts to correct the misunderstanding." In some circumstances, lawyers elaborate on the required warnings or provide additional legal information, such as an explanation that the organization will control the attorney-client privilege with regard to the constituent's statements to counsel. *See generally United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997); Gary H. Collins & David Z. Seide, WARNING THE WITNESS: A GUIDE TO INTERNAL INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE (ABA 2010).

each affected client" and "each affected client gives informed consent, confirmed in writing." Among other things, "informed consent" requires an understanding of the risks of, and alternatives to, the joint representation; whether and to what extent confidences will be shared between the joint clients; and what will occur if a client withdraws from the joint representation or a later conflict arises that precludes continuing the joint representation.

If the lawyer reasonably concludes that the current or former employee would benefit from legal assistance and that the conflict of interest rules allow joint representation, the lawyer may seek to convey the corporation's willingness to compensate the lawyer to represent the employee. This raises a question concerning the application of Rule 7.3(a), which forbids "solicitation . . . [b]y in-person or telephone contact" with an individual who is not "a close friend, relative, former client or existing client." Rule 7.3(b) defines "solicitation" for purposes of this Rule to mean

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

Rule 1.0(a), in turn, defines "advertisement" to mean "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

Under Rule 7.3(b), the question of whether the lawyer properly may offer in-person (rather than in writing) to represent the corporation's employee following the conclusion of the interview depends on whether the "primary purpose" of the lawyer's "private communication" with the employee "is the retention of the lawyer or law firm, and a significant motive for [the communication] is pecuniary gain." We conclude that conveying the corporation's offer, and following up if the employee expresses interest, would not constitute a "solicitation" for several reasons.

First, the primary purpose of the in-person meeting at its inception is not to offer the lawyer's services to the employee, but to interview the employee as a potential witness. Indeed, in many cases, that may turn out to be the exclusive purpose of the meeting, if the lawyer concludes that the employee does not require legal representation or that the lawyer cannot provide it. Second, when the lawyer initially offers to represent the employee, the lawyer is acting on behalf of the corporation, as its lawyer and agent, primarily for purposes of conveying the corporation's offer to secure legal representation for an employee in need of legal assistance. The corporation could, of course, have one of its non-lawyer officers or its in-house counsel extend the offer on behalf of the corporation. But, as the corporation's lawyer and agent, the lawyer may be in a better

position to do so, because the lawyer may be better qualified to answer questions and provide information about the implications of the representation. Moreover, in conveying the corporation's offer and, if the employee is interested, following up by offering representation, the lawyer's "primary purpose" is not to secure legal fees from a new client but to render competent representation to a current corporate client by enabling it to fulfill its objective (and, in some cases, its statutory or contractual obligation or internal policy) of making legal assistance available to an employee who may need counsel. *See, e.g.*, *Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n* (finding that offering to represent corporate client's former employees at corporation's expense was not improper solicitation: "[D]efense counsel was attempting to represent its client, the corporation, and also to protect the interests of the former employees whose conduct forms the basis for Plaintiff's claims in this case. In addition, Defense counsel would have spent a great deal of time with these individuals, regardless of whether they were clients, in order to fully and competently represent Defendant."). . . .

CONCLUSION: When a corporation's lawyer conveys in person or by telephone an offer to represent a corporate employee in connection with a lawsuit, the application of the solicitation rule, Rule 7.3(a), depends on the factual context and the lawyer's motivation. Under *Rivera*, the communication would be improper if the lawyer's motivation was exclusively "to gain a tactical advantage in th[e] litigation by insulating [witnesses] from any informal contact with plaintiff's counsel." However, we conclude that an offer of representation at the corporation's request would be proper where the lawyer initially interviews the employee as a non-client witness in order to learn relevant information and subsequently determines that the individual is in need of legal services as a party or potential testifying witness and that the concurrent representation would be permissible.

Note that Model Rule 4.2, the ethics rule against lawyers contacting represented persons directly without going through counsel, presents potential complications for prosecutors in the investigation of corporate crime. When corporations (as they commonly do) arrange counsel for their employees early in an investigation, prosecutors will be prohibited (including by acting through their agents) from engaging in the surreptitious and surprise contacts that are common and often effective in the investigation of street crime. *See* United States v. Hammad, 858 F.2d 834 (2d Cir. 1988); *see also* Massiah v. United States, 377 U.S. 201 (1964) (finding a Sixth Amendment dimension to government contacts with charged defendants represented by counsel).

Even if individual corporate employees do not yet have their own counsel, Rule 4.2 may restrict prosecutors and their agents. Some courts have held that if a corporation is represented by counsel (as nearly all are), contact with employees, at least at the management level, may constitute contact with a "represented person," on the theory that a corporation is a "person" that can be communicated with only through its human agents. *See, e.g.*, Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990); Meachum v. Outdoor World Corp., 654 N.Y.S.2d 240 (Sup. Ct. 1996);

see also U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, Crim. Resource Manual § 296 (summarizing the uneven state of the law on contacts with represented corporations and advising federal prosecutors to study local law before acting).

C. Funding of Counsel

On the matter of who bears the costs of lawyers in corporate crime investigations and prosecutions, policy considerations intersect with constitutional law.[7] As always, follow the money. One cannot think about the Sixth Amendment issues here without thinking about the economics. Recall that the Delaware General Corporation Law includes several provisions regarding mandatory and permissive indemnification, as well as permissive fee advancement. The Constitution does not impose any such regulations on corporations, of course, but it is an open question the extent to which the Constitution may limit government action that affects access to corporate funding of counsel.

CAPLIN & DRYSDALE, CTD. v. UNITED STATES, 491 U.S. 617 (1989)

Justice WHITE delivered the opinion of the Court.

We are called on to determine whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought. Because we determine that no such exemption exists, we must decide whether that statute, so interpreted, is consistent with the Fifth and Sixth Amendments. We hold that it is.

In January 1985, Christopher Reckmeyer was charged in a multicount indictment with running a massive drug importation and distribution scheme. The scheme was alleged to be a continuing criminal enterprise (CCE), in violation of 84 Stat. 1265, as amended, 21 U.S.C. § 848 (1982 ed., Supp. V). Relying on a portion of the CCE statute that authorizes forfeiture to the Government of "property constituting, or derived from . . . proceeds . . . obtained" from drug-law violations, § 853(a), the indictment sought forfeiture of specified assets in Reckmeyer's possession. At this time, the District Court, acting pursuant to § 853(e)(1)(A), entered a restraining order forbidding Reckmeyer to transfer any of the listed assets that were potentially forfeitable.

Sometime earlier, Reckmeyer had retained petitioner, a law firm, to represent him in the ongoing grand jury investigation which resulted in the January 1985 indictments. Notwithstanding the restraining order, Reckmeyer paid the firm $25,000 for preindictment legal services a few days after the indictment was handed down; this sum was placed by petitioner in an escrow account. Petitioner continued to represent Reckmeyer following the indictment.

[7] For a discussion of legal funding arrangements in a number of high-profile white collar cases as well as complications that may arise as a result of these arrangements, see Andrew Ross Sorkin, *Wall St. Debates Who Pays Legal Bills*, N.Y. TIMES (Aug. 12, 2013, 8:50 PM), https://dealbook.nytimes.com/2013/08/12/wall-st-debates-who-should-pay-legal-bills.

On March 7, 1985, Reckmeyer moved to modify the District Court's earlier restraining order to permit him to use some of the restrained assets to pay petitioner's fees; Reckmeyer also sought to exempt from any postconviction forfeiture order the assets that he intended to use to pay petitioner. However, one week later, before the District Court could conduct a hearing on this motion, Reckmeyer entered a plea agreement with the Government. Under the agreement, Reckmeyer pleaded guilty to the drug-related CCE charge, and agreed to forfeit all of the specified assets listed in the indictment. The day after the Reckmeyer's plea was entered, the District Court denied his earlier motion to modify the restraining order, concluding that the plea and forfeiture agreement rendered irrelevant any further consideration of the propriety of the court's pretrial restraints. Subsequently, an order forfeiting virtually all of the assets in Reckmeyer's possession was entered by the District Court in conjunction with his sentencing.

After this order was entered, petitioner filed a petition under § 853(n), which permits third parties with an interest in forfeited property to ask the sentencing court for an adjudication of their rights to that property; specifically, § 853(n)(6)(B) gives a third party who entered into a bona fide transaction with a defendant a right to make claims against forfeited property, if that third party was "at the time of [the transaction] reasonably without cause to believe that the [defendant's assets were] subject to forfeiture." *See also* § 853(c). Petitioner claimed an interest in $170,000 of Reckmeyer's assets, for services it had provided Reckmeyer in conducting his defense; petitioner also sought the $25,000 being held in the escrow account, as payment for preindictment legal services. Petitioner argued alternatively that assets used to pay an attorney were exempt from forfeiture under § 853, and if not, the failure of the statute to provide such an exemption rendered it unconstitutional. The District Court granted petitioner's claim for a share of the forfeited assets. . . .

Petitioner contends that the statute infringes on criminal defendants' Sixth Amendment right to counsel of choice, and upsets the "balance of power" between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment. We consider these contentions in turn.

Petitioner's first claim is that the forfeiture law makes impossible, or at least impermissibly burdens, a defendant's right "to select and be represented by one's preferred attorney." *Wheat v. United States*. Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford." *Wheat*. Petitioner does not dispute these propositions. Nor does the Government deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. Applying these principles to the statute in question here, we observe that nothing in § 853 prevents a defendant from

hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel. Thus, unlike *Wheat,* this case does not involve a situation where the Government has asked a court to prevent a defendant's chosen counsel from representing the accused. Instead, petitioner urges that a violation of the Sixth Amendment arises here because of the forfeiture, at the instance of the Government, of assets that defendants intend to use to pay their attorneys.

Even in this sense, of course, the burden the forfeiture law imposes on a criminal defendant is limited. The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing. Nor is it necessarily the case that a defendant who possesses nothing but assets the Government seeks to have forfeited will be prevented from retaining counsel of choice. Defendants like Reckmeyer may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future. The burden placed on defendants by the forfeiture law is therefore a limited one.

Nonetheless, 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, and if there was no risk that fees paid by the defendant to his counsel would later be recouped under § 853(c). It is in these cases, petitioner argues, that the Sixth Amendment puts limits on the forfeiture statute.

This submission is untenable. Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Walters v. National Assn. of Radiation Survivors*. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, 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. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense. "[N]o lawyer, in any case, . . . 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." *Laska v. United States*. Petitioner appears to concede as much, as respondent in *Monsanto* clearly does.

Petitioner seeks to distinguish such cases for Sixth Amendment purposes by arguing that the bank's claim to robbery proceeds rests on "pre-existing property rights," while the Government's claim to forfeitable assets rests on a "penal statute" which embodies the "fictive property-law concept of . . . relation-back" and is merely "a mechanism for preventing fraudulent conveyances of the defendant's assets, not . . . a device for determining true title to property." In light of this, petitioner contends, the burden placed on defendant's Sixth Amendment rights by the forfeiture statute outweighs the Government's interest in forfeiture.

The premises of petitioner's constitutional analysis are unsound in several respects. First, the property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges. In § 853(c), the so-called "relation-back" provision, Congress dictated that "[a]ll right, title and interest in property" obtained by criminals via the illicit means described in the statute "vests in the United States upon the commission of the act giving rise to forfeiture." As Congress observed when the provision was adopted, this approach, known as the "taint theory," is one that "has long been recognized in forfeiture cases," including the decision in *United States v. Stowell. See* S. Rep. No. 98-225 (1983). In *Stowell,* the Court explained the operation of a similar forfeiture provision (for violations of the Internal Revenue Code) as follows:

> "As soon as [the possessor of the forfeitable asset committed the violation] of the internal revenue laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the . . . [possessor]." *Stowell*.

In sum, § 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture. Concluding that Reckmeyer cannot give good title to such property to petitioner because he did not hold good title is neither extraordinary or novel. Nor does petitioner claim, as a general proposition that the relation-back provision is unconstitutional, or that Congress cannot, as a general matter, vest title to assets derived from the crime in the Government, as of the date of the criminal act in question. Petitioner's claim is that whatever part of the assets that is necessary to pay attorney's fees cannot be subjected to forfeiture. But given the Government's title to Reckmeyer's assets upon conviction, to hold that the Sixth Amendment creates some right in Reckmeyer to alienate such assets, or creates a right on petitioner's part to receive these assets, would be peculiar.

There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right. While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, we are

not about to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights.

Petitioner's "balancing analysis" to the contrary rests substantially on the view that the Government has only a modest interest in forfeitable assets that may be used to retain an attorney. Petitioner takes the position that, in large part, once assets have been paid over from client to attorney, the principal ends of forfeiture have been achieved: dispossessing a drug dealer or racketeer of the proceeds of his wrongdoing. We think that this view misses the mark for three reasons.

First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. *See* 28 U.S.C. § 524(c), which establishes the Department of Justice Assets Forfeiture Fund. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.

Second, the statute permits "rightful owners" of forfeited assets to make claims for forfeited assets before they are retained by the Government. *See* 21 U.S.C. § 853(n)(6)(A). The Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.

Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. *See Russello v. United States*. This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent." The notion that the Government has a legitimate interest in depriving criminals of economic power, even insofar as that power is used to retain counsel of choice, may be somewhat unsettling. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Morris v. Slappy*. Again, the Court of Appeals put it aptly: "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug

merchant claims that his possession of huge sums of money . . . entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense." . . .

The Court in *Caplin & Drysdale* held that the Sixth Amendment right to counsel does not include the right to spend someone else's money on a criminal defense, including money that the government has a legal right to take by forfeit. In *Kaley v. United States,* 571 U.S. 320 (2014), the Court held that this is true even when forfeiture law allows the government to freeze assets, and thereby block the accused's access to funds that could be used to pay for a defense, upon a grand jury's finding of mere probable cause and before a trial on the merits. In *Luis v. United States*, 136 S. Ct. 1083 (2016), the Court held that the Sixth Amendment *does* bar the government from using an asset freeze to prevent a defendant from accessing funds for the purpose of paying counsel if those funds are frozen only as "substitute assets" under forfeiture law—that is, monies that are not tainted by criminal proceeds but which the government seeks to forfeit as a substitute for "dirty" money that, for whatever reason, the government can no longer find or obtain.

Problem 15-1

What is the difference, for purposes of law and legal theory, between "house counsel" for the mob and counsel for the corporation when each deals with witnesses in an investigation? Why is the former treated as a situation rife with conflict, while the latter viewed as routine and necessary?

The next case involves KPMG again, this time on review before the Second Circuit after the trial judge harshly criticized the government. The initial district court opinion in *Stein*, which we read in Chapter 12, found that the government, through the state action of its enforcement policies and practices, deprived certain KPMG employees of both their Fifth and Sixth Amendment rights. On the government's appeal to the Second Circuit, the appellate court, as you will see, addressed only the part of the district court ruling that related to the Sixth Amendment right to counsel.

It seems under the reasoning of this case that perhaps there *is* a Sixth Amendment right to spend someone else's money on your defense in certain circumstances. Does the court's constitutional analysis hold up? What are the limits of this case?

UNITED STATES v. STEIN, 541 F.3d 130 (2d Cir. 2008)

DENNIS JACOBS, Chief Judge:

The United States appeals from an order of the United States District Court for the Southern District of New York (Kaplan, J.), dismissing an indictment against thirteen former partners and employees of the accounting firm KPMG, LLP. Judge Kaplan found that, absent pressure from the government, KPMG would have paid defendants' legal fees and expenses without regard to cost. Based on this and other findings of fact, Judge

Kaplan ruled that the government deprived defendants of their right to counsel under the Sixth Amendment by causing KPMG to impose conditions on the advancement of legal fees to defendants, to cap the fees, and ultimately to end payment. Judge Kaplan also ruled that the government deprived defendants of their right to substantive due process under the Fifth Amendment.

We hold that KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action. We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants. In light of this disposition, we do not reach the district court's Fifth Amendment ruling.

In January 2003, then-United States Deputy Attorney General Larry D. Thompson promulgated a policy statement, Principles of Federal Prosecution of Business Organizations (the "Thompson Memorandum"), which articulated "principles" to govern the Department's discretion in bringing prosecutions against business organizations. The Thompson Memorandum was closely based on a predecessor document issued in 1999 by then-U.S. Deputy Attorney General Eric Holder, Federal Prosecution of Corporations. Along with the familiar factors governing charging decisions, the Thompson Memorandum identifies nine additional considerations, including the company's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." Mem. from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003). The Memorandum explains that prosecutors should inquire

> whether the corporation appears to be protecting its culpable employees and agents [and that] a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

. . . In December 2006—after the events in this prosecution had transpired—the Department of Justice replaced the Thompson Memorandum with the McNulty Memorandum, under which prosecutors may consider a company's fee advancement policy only where the circumstances indicate that it is "intended to impede a criminal investigation," and even then only with the approval of the Deputy Attorney General.

Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006).

After Senate subcommittee hearings in 2002 concerning KPMG's possible involvement in creating and marketing fraudulent tax shelters, KPMG retained Robert S. Bennett of the law firm Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") to formulate a "cooperative approach" for KPMG to use in dealing with federal authorities. Bennett's strategy included "a decision to 'clean house'—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now [Defendants-Appellees] here—to leave their positions. . . . Stein resigned with arrangements for a three-year $100,000-per-month consultancy, and an agreement that KPMG would pay for Stein's representation in any actions brought against Stein arising from his activities at the firm. KPMG negotiated a contract with Smith that included a similar clause; but that agreement was never executed.

In February 2004, KPMG officials learned that the firm and 20 to 30 of its top partners and employees were subjects of a grand jury investigation of fraudulent tax shelters. On February 18, 2004, KPMG's CEO announced to all partners that the firm was aware of the United States Attorney's Office's ("USAO") investigation and that "[a]ny present or former members of the firm asked to appear will be represented by competent coun[sel] at the firm's expense."

In preparation for a meeting with Skadden on February 25, 2004, the prosecutors—including Assistant United States Attorneys ("AUSAs") Shirah Neiman and Justin Weddle—decided to ask whether KPMG would advance legal fees to employees under investigation. Bennett started the meeting by announcing that KPMG had resolved to "clean house," that KPMG "would cooperate fully with the government's investigation," and that its goal was not to protect individual employees but rather to save the firm from being indicted. AUSA Weddle inquired about the firm's plans for advancing fees and about any legal obligation to do so. Later on, AUSA Neiman added that the government would "take into account" the firm's legal obligations to advance fees, but that "the Thompson Memorandum [w]as a point that had to be considered." Bennett then advised that although KPMG was still investigating its legal obligations to advance fees, its "common practice" was to do so. However, Bennett explained, KPMG would not pay legal fees for any partner who refused to cooperate or "took the Fifth," so long as KPMG had the legal authority to do so.

Later in the meeting, AUSA Weddle asked Bennett to ascertain KPMG's legal obligations to advance attorneys' fees. AUSA Neiman added that "misconduct" should not or cannot "be rewarded" under "federal guidelines." One Skadden attorney's notes attributed to AUSA Weddle the prediction that, if KPMG had discretion regarding fees, the government would "look at that under a microscope."

Skadden then reported back to KPMG. In notes of the meeting, a KPMG executive wrote the words "[p]aying legal fees" and "[s]everance" next to "not a sign of cooperation."

On March 2, 2004, Bennett told AUSA Weddle that although KPMG believed it had no legal obligation to advance fees, "it would be a big problem" for the firm not to do so given its partnership structure. But Bennett disclosed KPMG's tentative decision to limit the amount of fees and condition them on employees' cooperation with prosecutors.

Two days later, a Skadden lawyer advised counsel for Defendant-Appellee Carol G. Warley (a former KPMG tax partner) that KPMG would advance legal fees if Warley cooperated with the government and declined to invoke her Fifth Amendment privilege against self-incrimination.

On a March 11 conference call with Skadden, AUSA Weddle recommended that KPMG tell employees that they should be "totally open" with the USAO, "even if that [meant admitting] criminal wrongdoing," explaining that this would give him good material for cross-examination. That same day, Skadden wrote to counsel for the KPMG employees who had been identified as subjects of the investigation. The letter set forth KPMG's new fees policy ("Fees Policy"), pursuant to which advancement of fees and expenses would be

> [i] capped at $400,000 per employee;
>
> [ii] conditioned on the employee's cooperation with the government; and
>
> [iii] terminated when an employee was indicted.

The government was copied on this correspondence.

On March 12, KPMG sent a memorandum to certain other employees who had not been identified as subjects, urging them to cooperate with the government, advising them that it might be advantageous for them to exercise their right to counsel, and advising that KPMG would cover employees' "reasonable fees."

The prosecutors expressed by letter their "disappoint[ment] with [the] tone" of this memorandum and its "one-sided presentation of potential issues," and "demanded that KPMG send out a supplemental memorandum in a form they proposed." The government's alternative language, premised on the "assum[ption] that KPMG truly is committed to fully cooperating with the Government's investigation," [and] advised employees that they could "meet with investigators without the assistance of counsel." KPMG complied, and circulated a memo advising that employees "may deal directly with government representatives without counsel."

At a meeting in late March, Skadden asked the prosecutors to notify Skadden in the event any KPMG employee refused to cooperate. Over the following year, the prosecutors regularly informed Skadden whenever a KPMG employee refused to cooperate fully, such as by refusing to proffer or by proffering incompletely (in the government's view). Skadden, in turn, informed the employees' lawyers that fee advancement would cease unless the employees cooperated. The employees either knuckled under and submitted to interviews, or they were fired and KPMG ceased advancing their fees. For example,

Watson and Smith attended proffer sessions after receiving KPMG's March 11 letter announcing the Fees Policy, and after Skadden reiterated to them that fees would be terminated absent cooperation. They did so because (they said, and the district court found) they feared that KPMG would stop advancing attorneys fees—although Watson concedes he attended a first session voluntarily. As Bennett later assured AUSA Weddle: "Whenever your Office has notified us that individuals have not . . . cooperat[ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and . . . to take personnel action, including termination."

In an early-March 2005 meeting, then-U.S. Attorney David Kelley told Skadden and top KPMG executives that a non-prosecution agreement was unlikely and that he had reservations about KPMG's level of cooperation: "I've seen a lot better from big companies." Bennett reminded Kelley how KPMG had capped and conditioned its advancement of legal fees. Kelley remained unconvinced.

KPMG moved up the Justice Department's chain of command. At a June 13, 2005 meeting with U.S. Deputy Attorney General James Comey, Bennett stressed KPMG's pressure on employees to cooperate by conditioning legal fees on cooperation; it was, he said, "precedent[ ]setting." KPMG's entreaties were ultimately successful: on August 29, 2005, the firm entered into a deferred prosecution agreement (the "DPA") under which KPMG admitted extensive wrongdoing, paid a $456 million fine, and committed itself to cooperation in any future government investigation or prosecution.

On August 29, 2005—the same day KPMG executed the DPA—the government indicted six of the Defendants. . . . A superseding indictment filed on October 17, 2005 named ten additional employees. . . . Pursuant to the Fees Policy, KPMG promptly stopped advancing legal fees to the indicted employees who were still receiving them.

On January 12, 2006, the thirteen defendants (among others) moved to dismiss the indictment based on the government's interference with KPMG's advancement of fees. In a submission to the district court, KPMG represented that

> the Thompson memorandum in conjunction with the government's statements relating to payment of legal fees affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees. . . . In fact, KPMG is prepared to state that the Thompson memorandum substantially influenced KPMG's decisions with respect to legal fees. . . .

At a hearing on March 30, 2006, Judge Kaplan asked the government whether it was "prepared at this point to commit that [it] has no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs to these defendants and that if it were to elect to do so the government would not in any way consider that in determining whether it had complied with the DPA?" The AUSA responded: "That's always been the case, your Honor. That's fine. We have no

objection to that. . . . They can always exercise their business judgment. As you described it, your Honor, that's always been the case. It's the case today, your Honor." . . .

We review first the government's challenges to the district court's factual findings, including its finding that but for the Thompson Memorandum and the prosecutors' conduct KPMG would have paid employees' legal fees—pre-indictment and post-indictment—without regard to cost. Next, . . . we decide whether the promulgation and enforcement of KPMG's Fees Policy amounted to state action under the Constitution and whether the government deprived defendants of their Sixth Amendment right to counsel. . . .

The government points out that the Thompson Memorandum lists "fees advancement" as just one of many considerations in a complex charging decision, and thus argues that Judge Kaplan overread the Thompson Memorandum as a threat that KPMG would be indicted unless it ceased advancing legal fees to its employees.

. . . KPMG was faced with the fatal prospect of indictment; it could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government. As Judge Kaplan noted, KPMG's chief legal officer, Sven Erik Holmes, testified that he considered it crucial "to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum." Moreover, KPMG's management and counsel had reason to consider the impact of the firm's indictment on the interests of the firm's partners, employees, clients, creditors and retirees.

The government reads the Thompson Memorandum to say that fees advancement is to be considered as a negative factor only when it is part of a campaign to "circle the wagons," i.e., to protect culpable employees and obstruct investigators. . . . But even if the government's reading is plausible, the wording nevertheless empowers prosecutors to determine which employees will be deprived of company-sponsored counsel: prosecutors may reasonably foresee that employees they identify as "culpable" will be cut off from fees. . . .

Nor can we disturb Judge Kaplan's finding that "the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys." During the March 11 phone call between the prosecutors and Skadden, AUSA Weddle demanded that KPMG tell its employees to be "totally open" with the USAO, "even if that [meant admitting] criminal wrongdoing," so that he could gather material for cross-examination. On March 12, the prosecutors prevailed upon KPMG to supplement its first advisory letter with another, which clarified that employees could meet with the government without counsel. In addition, prosecutors repeatedly used Skadden to threaten to withhold legal fees from employees who refused to proffer—even if defense counsel had recommended that an employee invoke the Fifth Amendment privilege.

Finally, we cannot say that the district court's ultimate finding of fact-that absent the Thompson Memorandum and the prosecutors' conduct KPMG would have advanced

fees without condition or cap-was clearly erroneous. The government itself stipulated in Stein I that KPMG had a "longstanding voluntary practice" of advancing and paying employees' legal fees "without regard to economic costs or considerations" and "without a preset cap or condition of cooperation with the government . . . in any civil, criminal or regulatory proceeding" arising from activities within the scope of employment. Although it "is far from certain" that KPMG is legally obligated to advance defendants' legal fees, a firm may have potent incentives to advance fees, such as the ability to recruit and retain skilled professionals in a profession fraught with legal risk. Also, there is evidence that, before the prosecutors' intervention, KPMG executed an agreement under which it would advance Stein's legal fees without cap or condition (and negotiated toward an identical agreement with Smith). . . . Indeed, KPMG itself represented to the court that the Thompson Memorandum and the prosecutors' conduct "substantially influenced [its] determination(s) with respect to the advancement of legal fees." . . .

Judge Kaplan found that "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO." The government protests that KPMG's adoption and enforcement of its Fees Policy was private action, outside the ambit of the Sixth Amendment. . . .

Actions of a private entity are attributable to the State if "there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself." The "close nexus" test is not satisfied when the state "[m]ere[ly] approv[es] of or acquiesce[s] in the initiatives" of the private entity, or when an entity is merely subject to governmental regulation. "The purpose of the [close-nexus requirement] is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Such responsibility is normally found when the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."

Although Supreme Court cases on this issue "have not been a model of consistency," some principles emerge. "A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies."

The government argues: KPMG simply took actions in the shadow of an internal DOJ advisory document (the Thompson Memorandum) containing multiple factors and caveats; the government's approval of KPMG's Fees Policy did not render the government responsible for KPMG's actions enforcing it; even if the government had specifically required KPMG to adopt a policy that penalized non-cooperation, state

action would still have been lacking because KPMG would have retained the power to apply the policy; and although the prosecutors repeatedly informed KPMG when employees were not cooperating, they did so at KPMG's behest, without knowing how KPMG would react. We disagree.

KPMG's adoption and enforcement of the Fees Policy amounted to "state action" because KPMG "operate[d] as a willful participant in joint activity" with the government, and because the USAO "significant[ly] encourage[d]" KPMG to withhold legal fees from defendants upon indictment. The government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions. The government is therefore legally "responsible for the specific conduct of which the [criminal defendants] complain[ ]."

. . . State action is established here as a matter of law because the government forced KPMG to adopt its constricted Fees Policy. The Thompson Memorandum itself—which prosecutors stated would be considered in deciding whether to indict KPMG—emphasizes that cooperation will be assessed in part based upon whether, in advancing counsel fees, "the corporation appears to be protecting its culpable employees and agents." Since defense counsel's objective in a criminal investigation will virtually always be to protect the client, KPMG's risk was that fees for defense counsel would be advanced to someone the government considered culpable. So the only safe course was to allow the government to become (in effect) paymaster.

The prosecutors reinforced this message by inquiring into KPMG's fees obligations, referring to the Thompson Memorandum as "a point that had to be considered," and warning that "misconduct" should not or cannot "be rewarded" under "federal guidelines." The government had KPMG's full attention. It is hardly surprising, then, that KPMG decided to condition payment of fees on employees' cooperation with the government and to terminate fees upon indictment: only that policy would allow KPMG to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive.

To ensure that KPMG's new Fees Policy was enforced, prosecutors became "entwined in the . . . control" of KPMG. They intervened in KPMG's decisionmaking, expressing their "disappoint[ment] with [the] tone" of KPMG's first advisory memorandum, and declaring that "[t]hese problems must be remedied" by a proposed supplemental memorandum specifying that employees could meet with the government without being burdened by counsel. Prosecutors also "made plain" their "strong preference" as to what the firm should do, and their "desire to share the fruits of such intrusions." They did so by regularly "reporting to KPMG the identities of employees who refused to make statements in circumstances in which the USAO knew full well that KPMG would pressure them to talk to prosecutors." . . . The prosecutors thus steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases. Such "overt" and "significant encouragement" supports the conclusion that KPMG's conduct is properly attributed to the State. . . .

An adversarial relationship does not normally bespeak partnership. But KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed.

We therefore conclude that KPMG's adoption and enforcement of the Fees Policy (both before and upon defendants' indictment) amounted to state action. The government may properly be held "responsible for the specific conduct of which the [criminal defendants] complain[ ]," i.e., the deprivation of their Sixth Amendment right to counsel, if the violation is established.

The district court's ruling on the Sixth Amendment was based on the following analysis (set out here in précis). The Sixth Amendment protects "an individual's right to choose the lawyer or lawyers he or she desires," and "to use one's own funds to mount the defense that one wishes to present." The goal is to secure "a defendant's right to spend his own money on a defense." Because defendants reasonably expected to receive legal fees from KPMG, the fees "were, in every material sense, their property." The government's interest in retaining discretion to treat as obstruction a company's advancement of legal fees "is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves." Defendants need not make a "particularized showing" of how their defense was impaired, because "[v]irtually everything the defendants do in this case may be influenced by the extent of the resources available to them," such as selection of counsel and "what the KPMG Defendants can pay their lawyers to do." Therefore, the Sixth Amendment violation "is complete irrespective of the quality of the representation they receive."

Most of the state action relevant here—the promulgation of the Thompson Memorandum, the prosecutors' communications with KPMG regarding the advancement of fees, KPMG's adoption of a Fees Policy with caps and conditions, and KPMG's repeated threats to employees identified by prosecutors as being uncooperative—pre-dated the indictments of August and October 2005. (Of course, after the indictments were filed KPMG ceased advancing fees to all thirteen of the present defendants who were still receiving fees up to that point. As explained, this was also state action.) So we must determine how this pre-indictment conduct may bear on defendants' Sixth Amendment claim.

"The Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: it does not attach until a prosecution is commenced." "Attachment" refers to "when the [Sixth Amendment] right may be asserted"; it does not concern the separate question of "what the right guarantees," i.e., "what the substantive guarantee of the Sixth Amendment" is at that stage of the prosecution. The Supreme Court has "pegged commencement [of a prosecution] to 'the

initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" "The rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" . . .

Although defendants' Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment. As Judge Ellis explained in *United States v. Rosen*, "it is entirely plausible that pernicious effects of the pre-indictment interference continued into the post-indictment period, effectively hobbling defendants' Sixth Amendment rights to retain counsel of choice with funds to which they had a right. . . . [I]f, as alleged, the government coerced [the employer] into halting fee advances on defendants' behalf and the government did so for the purpose of undermining defendants' relationship with counsel once the indictment issued, the government violated defendants' right to expend their own resources towards counsel once the right attached."

Since the government forced KPMG to adopt the constricted Fees Policy—including the provision for terminating fee advancement upon indictment—and then compelled KPMG to enforce it, it was virtually certain that KPMG would terminate defendants' fees upon indictment. We therefore reject the government's argument that its actions (virtually all pre-indictment) are immune from scrutiny under the Sixth Amendment.

We now consider "what the [Sixth Amendment] right guarantees." The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Thus "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him."

The government must "honor" a defendant's Sixth Amendment right to counsel:

> This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. . . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

This is intuitive: the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason.

Consistent with this principle of non-interference, courts have identified violations of the Sixth Amendment right to counsel where the government obtains incriminating statements from a defendant outside the presence of counsel and then introduces those statements at trial. Likewise, the government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from "participat[ing] fully and fairly in the adversary factfinding process."

Defendants-Appellees do not say that they were deprived of constitutionally effective counsel. Their claim is that the government unjustifiably interfered with their relationship with counsel and their ability to mount the best defense they could muster. . . .

The holding of *Caplin & Drysdale* is narrow: the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it. It is easy to distinguish the case of an employee who reasonably expects to receive attorneys' fees as a benefit or perquisite of employment, whether or not the expectation arises from a legal entitlement. As has been found here as a matter of fact, these defendants would have received fees from KPMG but for the government's interference. Although "there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."

It is axiomatic that if defendants had already received fee advances from KPMG, the government could not (absent justification) deliberately interfere with the use of that money to fuel their defenses. And the government concedes that it could not prevent a lawyer from furnishing a defense gratis. . . . And if the Sixth Amendment prohibits the government from interfering with such arrangements, then surely it also prohibits the government from interfering with financial donations by others, such as family members and neighbors—and employers. In a nutshell, the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain.

The government points out that KPMG's past fee practice was voluntary and subject to change, and that defendants therefore could have had no reasonable expectation of the ongoing advancement of fees. But this argument simply quarrels with Judge Kaplan's finding that absent any state action, KPMG would have paid defendants' legal fees and expenses without regard to cost. Therefore, unless the government's interference was justified, it violated the Sixth Amendment.

The government is sometimes allowed to interfere with defendants' choice or relationship with counsel, such as to prevent certain conflicts of interest. However, the government has failed to establish a legitimate justification for interfering with KPMG's advancement of legal fees. . . .

Judge Kaplan found that defendants Gremminger, Hasting, Ritchie and Watson were unable to retain the counsel of their choosing as a result of the termination of fee advancements upon indictment. The government does not contest this factual finding, and we will not disturb it. A defendant who is deprived of counsel of choice (without justification) need not show how his or her defense was impacted; such errors are structural and are not subject to harmless-error review. . . .

The remaining defendants . . . do not claim they were deprived of their chosen counsel. Rather, they assert that the government unjustifiably interfered with their relationship with counsel and their ability to defend themselves. . . . We agree: these defendants can easily demonstrate interference in their relationships with counsel and impairment of their ability to mount a defense based on Judge Kaplan's non-erroneous findings that the post-indictment termination of fees "caused them to restrict the activities of their counsel," and thus to limit the scope of their pre-trial investigation and preparation. Defendants were indicted based on a fairly novel theory of criminal liability; they faced substantial penalties; the relevant facts are scattered throughout over 22 million documents regarding the doings of scores of people, the subject matter is "extremely complex," technical expertise is needed to figure out and explain what happened; and trial was expected to last between six and eight months. As Judge Kaplan found, these defendants "have been forced to limit their defenses . . . for economic reasons and . . . they would not have been so constrained if KPMG paid their expenses." We therefore hold that these defendants were also deprived of their right to counsel under the Sixth Amendment. . . .

The following recent trial court decision deals with conflicts and state action in the context of privilege waiver rather than funding of counsel. It is most important for its fact pattern, which can serve as a kind of roadmap to the dangers that individual corporate employees may face from dealing with corporate counsel in the earlier phases of an investigation. Never a bad idea to have personal counsel review any agreement that corporate counsel asks one to sign!

UNITED STATES v. TOURNANT, **2023 WL 5276776 (S.D.N.Y. Aug. 15, 2023)**

LAURA TAYLOR SWAIN, Chief United States District Judge

In May 2022, Mr. Tournant was indicted on a number of charges alleging that he engaged in a scheme to defraud investors while he was employed at Allianz Global Investors U.S. LLC ("AGI"), a company which was a subsidiary of Allianz SE ("Allianz"), one of the world's largest financial services firms. Mr. Tournant worked as a portfolio manager at AGI, overseeing a number of high-profile investment funds worth billions of dollars.

Most notably, Mr. Tournant oversaw the management of a group of funds known as the Structured Alpha Funds (the "Funds"), a series of private investment funds that employed bespoke investment strategies which were "marketed . . . as providing broad

market exposure while maintaining specific risk protections to safeguard against losses in the event of a market crash." The Indictment alleges that Mr. Tournant, as manager of this funds group, engaged in a scheme to deceive and defraud investors by essentially "understating the risk to which investors' asserts were exposed, and therefore how the returns they touted were actually generated." This scheme was allegedly carried out by Mr. Tournant (and his employees) in three ways: (1) by "overstat[ing] the level of independent oversight that AGI US and its parent company Allianz were exercising over the Funds' strategy," (2) by "misrepresent[ing] the hedging and other risk-mitigation strategies they were undertaking to protect investor funds," and (3) "fraudulently alter[ing] documents" that AGI provided to investors and failing to "disclose relevant risk information" to investors. In March 2020, following the onset of the pandemic, the Funds lost more than $7 billion in market value, and were eventually shut down. The indictment alleges that Mr. Tournant personally benefited from this fraudulent scheme, earning over $60 million during the relevant time period.

The Securities and Exchange Commission ("SEC") began investigating the Funds' closure, notified Allianz of its civil inquiry in August 2020, and filed its civil complaint against Allianz in September 2020. Allianz also initiated its own internal investigation into the circumstances surrounding the Funds' collapse. The United States Attorney's Office for the Southern District of New York (the "Government") began a separate criminal investigation into the Funds around the same time. The Government's investigation, however, remained covert for some time, and was not formally announced to Allianz until June 10, 2021.

In the fall of 2020, Mr. Tournant and other Allianz employees retained counsel in connection with the SEC's investigation. First, Mr. Tournant retained Milbank LLP ("Milbank") as his personal counsel to represent him in connection with the internal investigation and the SEC investigation. Second, two different law firms, Sullivan & Cromwell ("S&C") and Ropes & Gray (collectively, the "Firms"), began a joint representation of Allianz and Mr. Tournant, in connection with the internal investigation and the SEC civil matter. The Firms also assisted Allianz in conducting its internal investigation. Mr. Tournant signed an engagement letter with S&C on November 17, 2020, which set out the terms and scope of the joint representation. In the Agreement, Mr. Tournant acknowledged that he understood both the "benefits and the risks involved" with proceeding with a joint representation and stated that, should S&C conclude that a conflict of interest had arisen between Mr. Tournant and Allianz, S&C would "discuss the situation" with Mr. Tournant "with a view to arriving at a mutually agreeable solution." The Agreement also provided that, if Allianz deemed it appropriate, Allianz could release Mr. Tournant's confidential information to the Government and could waive any applicable claim of privilege, which would "mean that the protections of the attorney-client privilege that [Mr. Tournant] may have for such [confidential materials] would no longer apply."

The investigations continued throughout the winter and spring of 2021. On May 5, 2021, Allianz (together with S&C) presented the preliminary findings of Allianz's internal

investigation to the SEC. Allianz denied any wrongdoing and maintained that "the collapse [of the Fund] had been caused by the unforeseeable market downturns" of the early pandemic. On May 20 and 21, 2021, Stephen Bond-Nelson, another Allianz portfolio manager who worked on the Funds alongside Mr. Tournant, testified before the SEC. During his testimony, Mr. Bond-Nelson was represented by his individual counsel, as well as by the Firms (who appeared on behalf of both Mr. Bond-Nelson and Allianz). Mr. Bond-Nelson was questioned extensively about the Funds and certain alterations that had been made to documents sent out to investors, and he initially maintained that "any alterations had not been fraudulent but had instead been attempts to make investor documents more accurate." During the second day of questioning, however, Mr. Bond-Nelson abruptly adjourned his testimony and refused to answer further questions. His individual counsel then communicated to the SEC that Mr. Bond-Nelson wished to cooperate with the SEC's investigation and with any parallel criminal investigation, and Mr. Bond-Nelson disengaged the Firms as his counsel. Mr. Bond-Nelson thereafter began cooperating with both the SEC and the Government, implicating Mr. Tournant as the "mastermind" who had "directed the fraud" behind the Funds collapse.

Mr. Tournant maintains that this event was a key "inflection point in the Firms' strategy in representing Allianz"—namely, that Mr. Bond-Nelson's testimony and cooperation caused the Firms to shift from their initial strategy of denying any wrongdoing by Allianz and Mr. Tournant, to a new strategy of "shift[ing] the blame" to Mr. Tournant in order to "serve him up as a scapegoat to avoid the worst sanctions for Allianz." As an example of this shift in strategy, the defense points to presentation materials prepared by S&C which expressly state that, "[i]mmediately after Bond-Nelson's SEC testimony," Allianz "assumed control and pledged full cooperation in connection with the investigations" and "[c]ommissioned a forensic review" of the suspected fraud issues involving the Funds. The defense asserts that, at this point in May 2021, the Firms should have realized that the interests of Allianz and Mr. Tournant had diverged to such an extent that joint representation was no longer ethical, and that they should have apprised Mr. Tournant of this potential conflict before continuing the representation.

After Mr. Bond-Nelson's testimony, S&C arranged to meet with Mr. Tournant on June 3, 2021, for the dual purposes of continuing Allianz's internal investigation and helping Mr. Tournant to prepare for his anticipated SEC testimony. At the time the meeting took place, the Government's criminal investigation was still covert and had not been announced to Allianz. Two days before the meeting, S&C re-sent Mr. Tournant (through his individual counsel) a copy of his engagement letter with S&C, and reminded him that, "under the terms of Mr. Tournant's engagement letter with [S&C], AllianzGI could decide to disclose Mr. Tournant's statements to the Firm" to third parties if it so chose. During the meeting, S&C attorneys engaged in a mock cross-examination of Mr. Tournant and asked him about various topics relating to his role in overseeing the Funds, including detailed questions about the altered documents that were sent to investors, and about Mr. Tournant's communications with Mr. Bond-Nelson.

Toward the end of the meeting, the S&C attorneys "ambushed" Mr. Tournant by questioning him about whether he had used a second cell phone, what the phone was used for, and why he had failed to disclose his use of a second phone during prior interviews. They confronted Mr. Tournant with previously undisclosed documents relating to the second cell phone. The meeting concluded shortly after this questioning. The defense asserts that the true purpose of this June 3 meeting was to elicit incriminating information from Mr. Tournant that could be used against him in the Government's criminal proceeding, in an effort to secure cooperation credit for Allianz. After this meeting, Mr. Tournant cut off direct contact with the Firms and, on June 5, 2021, the Firms informed Mr. Tournant that they would be terminating their representation of him, explaining in their termination letters that Mr. Tournant's interests had "potentially diverged from those of the Allianz Entities." The Firms continued to represent Allianz.

On June 10, 2021, the Government contacted Allianz and several employees directly to inform them of the criminal investigation into the collapse of the Funds, and began making document requests to Allianz. Over the next several months, the Government engaged in an intensive investigation into Allianz, an effort which involved "reviewing thousands of documents, engaging subject-matter experts, and interviewing more than 20 individuals, including 10 AGI employees," and in the meantime Allianz continued its own internal investigation into the misconduct. At various points during the Government's investigation, Allianz made presentations to the Government to report on the findings of its internal investigation.

During the course of the criminal investigation, the Government began to suspect that Mr. Tournant had engaged in obstructive conduct with regard to the SEC investigation—specifically, that Mr. Tournant had directed Mr. Bond-Nelson to lie when responding to SEC inquiries about alterations to investor documents. The Government informed Allianz in October 2021 that it was "looking into efforts by Allianz employees to obstruct the SEC investigation," and asked Allianz to "provide the Government with any facts Allianz had learned during its internal interviews regarding the purported rationale for altering risk reports." In November 2021, in response to this inquiry, Allianz provided the Government with "partial summaries" of several interviews conducted during the internal investigation, including the June 3 interview of Mr. Tournant. Further, in January 2022, Allianz provided the Government with a full oral summary of the June 3 interview.

On January 20, 2022, S&C made a presentation to the Government which expressly advocated for the prosecution of Mr. Tournant and others in lieu of charging Allianz. For example, S&C stated that "Tournant, Taylor, and Bond-Nelson engaged in serious misconduct intended to understate [the] risk of the SA Funds," that there was no "knowledge or involvement in the misconduct" by Allianz management, and that a guilty plea by Allianz/AGI was "unnecessary because DOJ action against individuals will satisfy the goals of federal prosecution."

The parties dispute when, precisely, the Government became aware of S&C's prior joint representation of Mr. Tournant and Allianz. The defense asserts that the Government should have "understood that Mr. Tournant was personally represented by the Firms" sometime in 2021 based on several events that occurred during the investigation. The defense states that the SEC was clearly aware of the Firms' joint representation, because the SEC sent legal documents directly to Ropes & Gray as Mr. Tournant's counsel in April 2021, and the Firms appeared as counsel for Mr. Bond-Nelson and Allianz during Bond-Nelson's SEC testimony in May 2021. The defense also notes that, based on the notes summary of the June 3 interview that was provided to the Government in November 2021, it was "clear that the Firms were acting as Mr. Tournant's counsel" during that meeting.

The Government asserts that it did not become aware of the joint representation until January 2022. The Government notes that, during the multiple meetings it had with Mr. Tournant during the fall of 2021 and winter of 2022, Mr. Tournant was either represented by his individual counsel (Milbank) or his present counsel. The Government also notes that, when Allianz shared the June 3 interview materials with the Government, "counsel for Allianz did not disclose that the company had shared counsel with Tournant, a fact that remained unknown to the Government." Shortly after Mr. Tournant's new counsel entered the case (on January 28, 2022), Mr. Tournant's new counsel informed the Government that, during the June 3 interview, Mr. Tournant had been represented by the Firms—which the Government asserts was "the first time the Government learned of the joint representation." It was also during this time that Mr. Tournant's new counsel first raised the defense claims of privilege violations, informing the Government that Allianz's disclosure of Mr. Tournant's confidential information to the Government may have tainted the Government's investigation.

Upon receiving this information, the Government "promptly and carefully evaluated the issue," and concluded that, based on the engagement letters that Mr. Tournant had signed with the Firms, S&C acted "within its rights to provide information to the Government" and that "Tournant's privilege had not been breached by [S&C's] recounting of the [June 3] interview to the Government." Nevertheless, "in an abundance of caution" the Government elected to treat the disputed materials as "potentially privileged." The specific categories of materials (the "disputed materials") that the Government set aside encompassed: "notes of Tournant's statements to [S&C] during the [June 3] interview; references to those statements in Allianz's presentations to the Government; and documents that were (i) produced by Allianz pursuant to the non-waiver agreement, (ii) created during the period that Tournant was jointly represented, and (iii) included Tournant." The disputed materials were segregated by a filter team and made unavailable to the main prosecution team. On Feb 25, 2022, the Government informed Mr. Tournant's counsel that, in bringing any criminal case against Mr. Tournant, it would not rely on any of the disputed materials. . . .

Here, there is no dispute that, barring waiver, Mr. Tournant's communications with his attorneys—including, most notably, his communications with S&C during the June 3,

2021 interview—would be protected by the attorney-client privilege. These communications occurred between Mr. Tournant and his counsel, were intended to be confidential, and were designed, at least from Mr. Tournant's perspective, to provide legal advice.

The attorney client privilege can be waived, either expressly or impliedly. *See In re Grand Jury Proc*. "It is well settled that 'the burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting [the privilege].'" "The party claiming privilege also carries the burden of showing that it has not been waived." *Hollis v. O'Driscoll*. Because "enforcement of a claim of privilege acts in derogation of the overriding goals of liberal discovery and adjudication of cases on their merits . . ; privileges are disfavored and generally to be construed narrowly." *Bowne of New York City, Inc. v. AmBase Corp*. The attorney-client privilege can be expressly waived by the client, including through a contract. *See Lugosch v. Congel* (noting that a client may waive privilege when "the client's communication(s) or the legal advice given [are] shared, in some form or fashion, with a third party," and that a "waiver such as this may be done explicitly or implicitly, or conversely, intentionally or inadvertently").

Here, Mr. Tournant signed an engagement letter with S&C on November 17, 2020, that set out "the terms of S&C's joint representation of you [Tournant] and the Allianz Entities." (Mtn., Exhibit A ("the Agreement")). The Agreement stated, in relevant part, as follows:

> By execution of this Letter Agreement, you acknowledge that you understand the implications of this joint representation, including the benefits and the risks involved. Such benefits include, but are not limited to, the efficiencies from avoiding duplicative efforts by different lawyers and the advice of counsel who has been engaged in the matter and is familiar with its facts, circumstances, and issues. The risks or potential disadvantages of such joint representation may include, but are not limited to, the possibility that if a conflict of interest arises, you may need to proceed solely with Milbank LLP (or another counsel of your choosing) . . .
>
> The mutual interests of the Allianz Entities and you may be best served by sharing oral or written confidential information ("Materials"). Some or all of the Materials may be protected from disclosure to anyone else as a result of the attorney-client privilege, the work-product doctrine, or other applicable privileges. You agree that S&C may share such Materials (when and if S&C deems it appropriate) with the Allianz Entities, representatives of the Allianz Entities, third parties retained by S&C, and other persons. You agree that if management of the Allianz Entities deems it appropriate, the Allianz Entities may decide to release Materials to the government and to other persons outside of the Allianz Entities who agree to keep such Materials confidential, to release Materials in response to legal process, and to waive any applicable privileges to the disclosure of such Materials. You understand that such

> disclosure may mean that the protections of the attorney-client privilege that you may have for such Material would no longer apply.

The Government argues that this Agreement effectuated a clear and valid waiver of any claim of privilege Mr. Tournant might hold over the disputed materials, and that Mr. Tournant has not met his burden of showing a lack of waiver. The defense, however, argues that the Advance Waiver provision was invalidated by the conflict of interest that arose between Allianz and Mr. Tournant during the course of the joint representation. According to the defense, once this conflict of interest arose, S&C had an obligation to either disclose the conflict to Mr. Tournant and obtain a new written waiver; or to terminate the joint representation. The defense points to two bases for this alleged duty to disclose: (1) the provisions of the Agreement that set out S&C's obligations to Tournant; and (2) the basic ethical duties that apply to all attorneys. The Court addresses these arguments in turn. . . .

In particular, the defense argues that S&C failed to abide by the following provision of the Agreement:

> In the event we [S&C] conclude, as the facts concerning the Structured Alpha Matter and the positions of you and the Allianz Entities develop, that the interests of the Allianz Entities and/or other individuals whom we may represent in the Structured Alpha Matters are in conflict with your interests (including, for example, because the Allianz Entities of are the view that the joint representation imposes constraints on its ability to cooperate with any government investigation) such that it may become inadvisable or improper for us to continue to represent you, we will discuss the situation with you with a view to arriving at a mutually agreeable solution. You agree that, if there is such a conflict that we cannot otherwise resolve to our mutual satisfaction, [S&C] may terminate its relationship with you. . . .

The defense asserts that this conflict of interest arose "no later than" May 22, 2021—the time at which Allianz "changed their entire approach and started cooperating" with the Government. In support of this position, the defense notes that, according to S&C's own documents, "immediately after Bond-Nelson's [May 21, 2021] SEC testimony," Allianz "[a]ssumed control and pledged full cooperation in connection with the [Government and SEC] investigations." On May 22, 2021, Allianz initiated a large-scale internal forensic review, a "primary goal of which," according to the defense, was to "build the Government's case against Mr. Tournant and serve him up as a scapegoat." Moreover, in the weeks leading up to the June 3 interview, S&C investigated and developed evidence regarding Mr. Tournant's second cell phone, without his knowledge and with the intent to "ambush" him with this evidence at the interview.

The defense argues that, after these events, it was objectively clear that a conflict had developed between the interests of Allianz and the interests of Mr. Tournant, which triggered S&C's contractual obligation to "discuss the situation with [Mr. Tournant] with a view to arriving at a mutually agreeable solution." According to the defense,

S&C's subsequent failure to discuss the conflict with Mr. Tournant resulted in a material breach of the Agreement. Relatedly, the defense, pointing to a portion of the Agreement in which "S&C and the Allianz Entities" confirmed that they were "not presently aware of any such conflict" of interest at the time the letter was signed, argues that the Agreement "premised S&C's joint representation on the absence of a conflict between Allianz and Mr. Tournant," such that the Advance Waiver provision ceased to be effective at the time that a conflict developed. In other words, the defense appears to argue that the Advance Waiver provision was conditioned on S&C's promise to provide Mr. Tournant with warning of conflicts of interest that could later arise, and that S&C's failure to provide such warnings when needed invalidated the Advance Waiver provision. . . .

The Court concludes, based on the plain language of the Agreement, that, whether or not the provision requiring discussion of a conflict was breached, S&C's failure to apprise Mr. Tournant of the potential conflict did not vitiate the Agreement's Advance Waiver provision. First, the Court notes that it is unclear whether the Agreement's Conflict Disclosure provision was even triggered in this case—the Agreement provides that S&C will "discuss the situation" with Tournant "in the event [S&C] conclude[s] . . . that the interests of the Allianz Entities . . . are in conflict with [Tournant's] interests." The defense argues that the events of late May 2021 should have indicated to S&C that a conflict had arisen between Allianz and Mr. Tournant. However, the Agreement does not impose an obligation on S&C to act when it should have perceived a conflict. Rather, the Conflict Disclosure provision sets a subjective standard, requiring action when S&C itself actually concludes that a conflict exists. Although the defense has presented facts that, in hindsight, may suggest that S&C could or should have concluded earlier that there was a potential conflict, there is no indication that S&C was truly aware of an actual conflict between Allianz and Mr. Tournant, or had reached a conclusion that such a conflict existed, at any time prior to the day that S&C terminated the representation.

Second, and more to the point, nothing in the Agreement indicates that the two provisions the defense cites—the Advance Waiver provision and the Conflict Disclosure provision—were interdependent. The two provisions are located in different paragraphs on different pages of the Agreement, deal with different topics, and discuss the rights and the conduct of different actors. The Advance Waiver provision grants Allianz unilateral control over the disclosure of privileged materials should Allianz determine that such disclosure is appropriate, while the Conflict Disclosure provision deals with the status of the attorney-client relationship between Mr. Tournant and S&C. The latter provision obligated S&C to engage in discussion with Mr. Tournant in aid of seeking a mutually acceptable resolution if it concluded that there was a conflict and provides that, if no such mutually acceptable resolution were reached, S&C had no further obligations to Mr. Tournant and could "terminate its relationship" with him. Nothing in the Conflict Disclosure provision purports to limit Mr. Tournant's grant of disclosure authority to Allianz.

Finally, the record indicates that Mr. Tournant entered into this Agreement knowingly, intelligently, and with the benefit of the advice of his independent counsel. At the time that Mr. Tournant signed the Agreement, he was represented by his own independent counsel from Milbank, who would have been available to advise him fully of the risks, benefits, and implications of signing the joint representation Agreement. . . .

The defense further argues that S&C's conduct invalidated Mr. Tournant's waiver of the attorney client privilege because S&C violated professional ethical rules. Specifically, Mr. Tournant argues that (1) the events of late May 2021 (prior to the June 3 interview) created an un-waivable conflict of interest between Allianz and Mr. Tournant; and (2) in the alternative, even if the conflict was waivable, in order to ethically continue the representation after the events of late May 2021, S&C was required to make full disclosures to Mr. Tournant and obtain his updated consent in writing. As a consequence of this conflict of interest, the defense contends, the Advance Waiver provision "does not apply" and "was not enforceable" following S&C's failure to obtain updated informed consent from Mr. Tournant.

As an initial matter, this defense argument appears to be based on a conflation of two different types of advance waivers—advance confidentiality waivers, and advance conflict waivers. In an advance conflict waiver, a client agrees to waive "the firm's potential future conflicting engagements" as to other clients, so that he may hire the attorney of his choosing despite those potential future conflicts.

In contrast, in an advance confidentiality waiver, a client agrees to waive future claims of attorney-client privilege, thus allowing his attorney to share his otherwise-confidential information with third parties.

The Agreement at issue here features an advance confidentiality waiver, under which Mr. Tournant agreed that Allianz would control the privilege, and that in the future Allianz might decide to release Mr. Tournant's confidential materials to third parties, including government authorities, in which case Mr. Tournant would "waive any applicable privileges to the disclosure of such Materials." The Agreement does not, however, contain an advance conflict waiver regarding the joint representation—Mr. Tournant never agreed to waive any future conflicts of interest by S&C that might later develop during the representation. Instead, the Agreement simply provides that, if an unresolvable conflict of interest should later arise, S&C "may terminate its relationship" with Mr. Tournant.

The defense has made a variety of arguments concerning the actions that S&C should have taken during late May 2021 with respect to the joint representation. For example, the defense argues that S&C was required to apprise Mr. Tournant of the potential conflict "the moment that [the] conflict arose" (i.e., the moment that Allianz shifted its strategy and decided to begin cooperating with the Government investigation), because "once the circumstances change, no blanket waiver is valid," and the attorney must make a "full disclosure of the entire set of [new] information" to the client and obtain a new waiver "in writing." In support of these arguments, the defense relies on portions of an

ethics opinion dealing with advance *conflict* waivers, which suggest that a lawyer engaging in joint representation should "revisit the issues at the time the actual or potential conflicts arise" because, even if an initial conflict waiver is valid, in some cases it may be necessary for the lawyer to secure a "second waiver from [the] client" for a later-arising conflict. (2004 NY Bar Op.)

The defense does not, however, explain how the existence of a conflict of interest (whether waivable or un-waivable) or a breach of state ethical rules could invalidate the wholly separate portion of the Agreement dealing with the waiver of confidentiality. . . .

Moreover, the rule that the defense asks the Court to adopt—under which the Government could be held to account for, and its ability to prosecute alleged criminal activity impeded by, an attorney's failure to apprise joint clients of every potential conflict during the course of the representation prior to the commencement of prosecution of a former client—would be unworkable and highly impractical. As the Government commented at oral argument, such a rule "would require the Government to impermissibly wade into attorney-client relationships on a massive scale" by requiring it to "engage with corporate counsel" in detail about "the status of their joint representation" every time the Government asked "for a voluntary production of documents."

Based on all of these considerations, the Court concludes that the defense has not met its burden of demonstrating that the Advance Waiver provision was invalid and has failed to establish grounds for dismissal of the indictment or further inquiry into the Government's use of the material provided to it by Allianz's counsel on the basis of invasion of Mr. Tournant's attorney-client privilege. . . .

The Court next addresses the defense argument that the Government obtained improper access to privileged materials under circumstances that would render the continued prosecution of this case violative of Mr. Tournant's constitutional rights. This argument fails because (1), as explained above, Mr. Tournant had granted Allianz control over waiver of his claim of privilege with respect to his confidential communications from the outset of the joint representation; (2) the defense has not shown that the Government's interaction with S&C in this case was of a manifestly corrupt character; and (3) the defense has not shown that the Government's general encouragement of cooperation by corporate defendants is of so coercive a character as to be manifestly corrupt and require dismissal of the indictment. . .

The Court concludes that Mr. Tournant has not demonstrated any manifest corruption or violation of his constitutional rights by the Government. First, as explained above, there has been no disclosure of materials as to which Mr. Tournant retained the ability to assert his claim of privilege. It is elementary that a defendant cannot sustain a claim for unconstitutional intrusion into his attorney-client privilege when he has made no showing that his communications were privileged when the government received them. Second, even if the communications had been privileged, nothing in the proffered

evidence indicates that the Government improperly intruded into the attorney-client relationship, or that the Government otherwise took any corrupt or outrageous actions with regard to its relations with S&C and Allianz. . . .

Specifically, the defense argues that S&C's conduct was legally attributable to the Government because the Government's cooperation guidelines incentivize corporations to provide information regarding the misconduct of individual employees. These arguments are insufficient to raise a material issue regarding improper government conduct. . . .

Here . . . there is no indication that a government policy forced Allianz or its counsel to take any particular action, or directly intervened in its decision-making. The decision to include the Advance Waiver provision in the retainer agreement for joint representation was consistent with Allianz's interest in facilitating both its employees' ability to obtain legal services and its own ability to develop its knowledge of the relevant circumstances. Allianz' [sic] decision to invoke the Advance Waiver provision when it perceived that its interests had diverged from Mr. Tournant's (and that it would be in a better position under the Principles if it provided information to the Government) was consistent with Allianz' [sic] self-interest and with the express language of the Advance Waiver provision to which Mr. Tournant had agreed.

The Court accordingly concludes that Mr. Tournant has failed to provide a plausible basis for any inference that the Government's actions in this case were manifestly corrupt and his motion to dismiss the indictment on constitutional grounds must be denied.

Problem 15-2

As anyone familiar with the work of innocence projects—much less anyone paying attention to the criminal justice system—knows, deficient performance by underfunded and less than competent appointed counsel is endemic to the U.S. legal system, even in capital cases. At the same time, numerous defendants in high-profile corporate crime cases have spent tens of millions of dollars on their defenses, some spending well over $50 million on a single defense. What, if anything, is wrong with this situation? How might one go about changing it?