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 next case is a leading Second Circuit decision that talks about whether and how conflicts can be waived by the defendant. This is important for the prosecutor because if a conflict was not waived, was not discovered in time, or was not a waivable conflict, the result is almost automatic reversal on appeal of any resulting conviction.

UNITED STATES v. CURCIO, 680 F.2d 881 (2d Cir. 1982)

KEARSE, Circuit Judge:

Defendants Francis Curcio and Gus Curcio, brothers, . . . had retained Jacob D. Zeldes, Esq., and his firm, Zeldes, Needle & Cooper, P.C., to represent them. The court ruled that Zeldes and his firm could represent neither brother in the present case on the grounds that Zeldes's past, continuing, and proposed representation of each defendant presented Zeldes with conflicting interests and that neither defendant had made a knowing and intelligent waiver of his right to be represented by counsel free of any conflict of interest. Because we conclude that, in all the circumstances, the defendants were not given an adequate opportunity to make a knowing and intelligent waiver of their rights to conflict-free representation, we vacate the district court's order and remand the matter for further proceedings. . . .

After hearing from the attorneys, the court questioned Gus Curcio. Gus stated that he was a high school graduate and had attended college for half a semester, that he had previously been a defendant in a felony trial, that Zeldes had advised him of his right to separate and independent counsel, that he understood this right, that he was aware that the court would find counsel for him if necessary, and that he understood that the case might develop in an unanticipated way to make his interest "very adverse" to that of a codefendant. Gus stated that he nevertheless waived his right to conflict-free representation in order to be represented by Zeldes. He also stated that he would waive his attorney-client privilege with respect to any of his communications with Zeldes to the extent that Zeldes wished to use the information on behalf of Francis. The court then asked Gus if he understood the possible conflicts between his and Francis's interests in deciding at trial whether or how to cross-examine witnesses or in deciding whether he or Francis should testify. Gus indicated that he understood, but inquired if he might later be allowed to discharge Zeldes. The court explained that this would be permitted only if "it meant no delay at any time in the proceedings." Gus reaffirmed his waiver on that basis.

The court then examined Francis Curcio along similar lines. Francis stated that he had reached the final year of high school but had not completed it, that he understood his right to separate counsel, that he realized that the court would find counsel for him if necessary, that he knew that conflicts of interest might arise, particularly in the cross-examination of witnesses and the decision whether or not he or Gus should testify, and that he realized that it was impossible to predict with certainty what conflicts might arise. Francis stated that he nevertheless waived his right to an attorney who was free of all conflict in order to retain Zeldes. He also stated that he would waive his attorney-client privilege with respect to any of his communications with Zeldes to the extent that Zeldes wished to use the information on behalf of Gus. . . .

The first task of the trial court is to alert the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit. If each defendant persists in his request for joint representation, the court must assess whether the request is, as to each defendant, knowing and intelligent. This does not mean that the defendant must be able to predict with certainty which dilemmas will present themselves to counsel or how counsel will resolve them. Defendants need not be prescient. Nor need their decision be what an objective observer would deem sensible, prudent, or wise. . . . Rather, the defendants must be informed, and they must have the capacity for making a rational decision. If the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally that he nevertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent and allow his choice to "be honored out of 'that respect for the individual which is the lifeblood of the law.'"

In assessing the level of each defendant's comprehension of the dangers, the court may perhaps devise a variety of methods for gaining the necessary insights. On the whole, we think that questions designed to elicit from the defendant a narrative statement of his understanding are preferable to questions designed to elicit mere "yes" or "no" answers. The former methods are used by the court pursuant to Fed. R. Crim. P. 11 in determining whether to accept an attempted waiver of the right to an attorney with undivided loyalty.

As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he had discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection.

Further, the court's inquiry in each instance should take place after the defendants have had a reasonable time to digest and contemplate the risks posed by joint representation. A reasonable time was not provided in the present case. The hearing, including the court's entire lecture to and questioning of the defendants, was held in less than an hour, squeezed into the luncheon break of a state grand jury. . . . Indeed it appears that Zeldes's efforts during the hearing to make up for this lack of opportunity contributed to the district court's decision to disqualify Zeldes, as the court based its finding that the Curcios' waivers were not knowingly and intelligently made. . . .

We recognize that criminal proceedings in the district court must be moved along with dispatch, especially if a defendant remains incarcerated pending trial. But recognition must be given to the fact that a defendant's right to counsel of his choice, albeit not absolute, is a right of constitutional dimension. Hence, the district

court should not require that a defendant who would resist the government's efforts to disqualify his attorney assess the problems instantly or make his decision without pause for reflection. Rather, the court should advise the defendant of his right to separate and conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision. If a reasonable time is not allowed to the defendant, both the opportunity for the defendant to make a knowing and intelligent decision and the opportunity for the court to assess correctly whether such a decision has been made are minimized. . . .

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.

[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).

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 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*, No Civ-08-1125-C, 2010 WL 1558554 (W.D. Okla. Apr. 19, 2010) (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.").

This situation is meaningfully distinguishable from the one addressed in *Rivera v. Lutheran Medical Center*, 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Kings Cnty. Sup. Ct. 2008), aff'd, 73 A.D.3d 891, 899 N.Y.S.2d 859 (2d Dep't 2010), in which the court found that a hospital's counsel had improperly solicited current and former employees who were witnesses in the lawsuit. The court found that the firm's motivation for offering to represent the individuals was not to provide them necessary legal services but "to gain a tactical advantage in th[e] litigation by insulating them from any informal contact with plaintiff's counsel." *Id.* at 185. Unlike the situation addressed in this Opinion, Rivera evidently was not a case where the entity's lawyer communicated with employees first to secure their information and later to extend the corporate employer's offer of assistance, but one where the primary, if not exclusive, purpose of the communication from its inception was to establish a legal representation in order to insulate the witnesses from opposing counsel's informal contact. Rivera would not be inconsistent with the procedure and principles outlined in this Opinion.

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.

[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.

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.

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,* 486 U.S. 153, 159, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988). 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, supra,* at 159, 108 S. Ct., at 1697. 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,* 473 U.S. 305, 370, 105 S. Ct. 3180, 3215, 87 L. Ed. 2d 220 (1985) (Stevens, J., dissenting). 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,* 82 F.2d 672, 677 (CA10 1936). Petitioner appears to concede as much, see Brief for Petitioner 40, n.25, as respondent in *Monsanto* clearly does, see Brief for Respondent in No. 88-454, pp. 36–37.

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." Brief for Petitioner 40–41. 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. *Ibid.*

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." 21 U.S.C. § 853(c) (1982 ed., Supp. V). 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,* 133 U.S. 1, 10 S. Ct. 244, 33 L. Ed. 555 (1890). *See* S. Rep. No. 98-225, p. 200, and n.27 (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, supra,* at 19, 10 S. Ct., at 248.

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, *see, e.g.,* Brief for American Bar Association as *Amicus Curiae* 6, 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,* 464 U.S. 16, 27–28, 104 S. Ct. 296, 302–03, 78 L. Ed. 2d 17 (1983). 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." 837 F.2d, at 649. 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,* 461 U.S. 1, 23, 103 S. Ct. 1610, 1622, 75 L. Ed. 2d 610 (1983) (Brennan, J., concurring in result). 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." 837 F.2d, at 649. . . .

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. The next case states that this is true even when the procedural structure of forfeiture law seems to prevent access to what might ultimately be determined to be one's own money.

KALEY v. UNITED STATES, 571 U.S. 320 (2014)

Justice KAGAN delivered the opinion of the Court.

A federal statute, 21 U.S.C. § 853(e), authorizes a court to freeze an indicted defendant's assets prior to trial if they would be subject to forfeiture upon conviction. In *United States v. Monsanto*, 491 U.S. 600, 615, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989), we approved the constitutionality of such an order so long as it is "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." And we held that standard to apply even when a defendant seeks to use the disputed property to pay for a lawyer.

In this case, two indicted defendants wishing to hire an attorney challenged a pre-trial restraint on their property. The trial court convened a hearing to consider the seizure's legality under Monsanto. The question presented is whether criminal defendants are constitutionally entitled at such a hearing to contest a grand jury's prior determination of probable cause to believe they committed the crimes charged. We hold that they have no right to relitigate that finding.

Criminal forfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes. *See* 21 U.S.C. § 853(a). Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and "lessen the economic power" of criminal enterprises. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989); *see id.*, at 634, 109 S. Ct. 2646 ("Forfeiture provisions are powerful weapons in the war on crime"). The Government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged

communities, and support law enforcement activities like police training. *See id.*, at 629–30, 109 S. Ct. 2646. Accordingly, "there is a strong governmental interest in obtaining full recovery of all forfeitable assets." *Id.*, at 631, 109 S. Ct. 2646.

In line with that interest, § 853(e)(1) empowers courts to enter pre-trial restraining orders or injunctions to "preserve the availability of [forfeitable] property" while criminal proceedings are pending. Such an order, issued "[u]pon application of the United States," prevents a defendant from spending or transferring specified property, including to pay an attorney for legal services. *Ibid.* In *Monsanto*, our principal case involving this procedure, we held a pre-trial asset restraint constitutionally permissible whenever there is probable cause to believe that the property is forfeitable. *See* 491 U.S., at 615, 109 S. Ct. 2657. That determination has two parts, reflecting the requirements for forfeiture under federal law: There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime. *See* § 853(a). The Monsanto Court, however, declined to consider "whether the Due Process Clause requires a hearing" to establish either or both of those aspects of forfeitability. *Id.*, at 615, n.10, 109 S. Ct. 2657. . . .

The grand jury's indictment in this case charges a scheme to steal prescription medical devices and resell them for profit. The indictment accused petitioner Kerri Kaley, a sales representative for a subsidiary of Johnson & Johnson, and petitioner Brian Kaley, her husband, with transporting stolen medical devices across state lines and laundering the proceeds of that activity. The Kaleys have contested those allegations throughout this litigation, arguing that the medical devices at issue were unwanted, excess hospital inventory, which they could lawfully take and market to others.

Immediately after obtaining the indictment, the Government sought a restraining order under § 853(e)(1) to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses. Included among those assets is a $500,000 certificate of deposit that the Kaleys intended to use for legal fees. The District Court entered the requested order. Later, in response to the Kaleys' motion to vacate the asset restraint, the court denied a request for an evidentiary hearing and confirmed the order, except as to $63,000 that it found (based on the parties' written submissions) was not connected to the alleged offenses. . . .

This Court has twice considered claims, similar to the Kaleys', that the Fifth Amendment's right to due process and the Sixth Amendment's right to counsel constrain the way the federal forfeiture statute applies to assets needed to retain an attorney. *See Caplin & Drysdale*, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528; *Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512. We begin with those rulings not as mere background, but as something much more. On the single day the Court decided both those cases, it cast the die on this one too.

In *Caplin & Drysdale*, we considered whether the Fifth and Sixth Amendments exempt from forfeiture money that a convicted defendant has agreed to pay his attorney. *See* 491 U.S., at 623–35, 109 S. Ct. 2646. We conceded a factual premise of the constitutional claim made in the case: Sometimes "a defendant will be unable to retain the attorney of his choice," if he cannot use forfeitable assets. *Id.*, at 625, 109 S. Ct. 2646. Still, we held, the defendant's claim was "untenable." *Id.*, at 626, 109 S. Ct. 2646. "A defendant has no Sixth

Amendment right to spend another person's money" for legal fees—even if that is the only way to hire a preferred lawyer. *Ibid.* Consider, we submitted, the example of a "robbery suspect" who wishes to "use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended." *Ibid.* That money is "not rightfully his." Ibid. Accordingly, we concluded, the Government does not violate the Constitution if, pursuant to the forfeiture statute, "it seizes the robbery proceeds and refuses to permit the defendant to use them" to pay for his lawyer. *Ibid.*

And then, we confirmed in Monsanto what our "robbery suspect" hypothetical indicated: Even prior to conviction (or trial)—when the presumption of innocence still applies—the Government could constitutionally use § 853(e) to freeze assets of an indicted defendant "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." 491 U.S., at 615, 109 S. Ct. 2657. In Monsanto, too, the defendant wanted to use the property at issue to pay a lawyer, and maintained that the Fifth and Sixth Amendments entitled him to do so. We disagreed. We first noted that the Government may sometimes "restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense." *Id.*, at 615–16, 109 S. Ct. 2657. Given that power, we could find "no constitutional infirmity in § 853(e)'s authorization of a similar restraint on [the defendant's] property" in order to protect "the community's interest" in recovering "ill-gotten gains." *Id.*, at 616, 109 S. Ct. 2657. Nor did the defendant's interest in retaining a lawyer with the disputed assets change the equation. Relying on *Caplin & Drysdale*, we reasoned: "[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Ibid.* So again: With probable cause, a freeze is valid.

The Kaleys little dispute that proposition; their argument is instead about who should have the last word as to probable cause. A grand jury has already found probable cause to think that the Kaleys committed the offenses charged; that is why an indictment issued. No one doubts that those crimes are serious enough to trigger forfeiture. Similarly, no one contests that the assets in question derive from, or were used in committing, the offenses. The only question is whether the Kaleys are constitutionally entitled to a judicial re-determination of the conclusion the grand jury already reached: that probable cause supports this criminal prosecution (or alternatively put, that the prosecution is not "baseless," as the Kaleys believe). And that question, we think, has a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries.

This Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime. . . . The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime.

And that inviolable grand jury finding, we have decided, may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom. If the person charged is not yet in custody, an indictment triggers "issuance of an arrest warrant without further inquiry" into the case's strength. *Gerstein*, 420 U.S., at 117, n.19, 95 S. Ct. 854; *see Kalina v. Fletcher*, 522 U.S. 118, 129, 118 S. Ct. 502, 139 L. Ed.

2d 471 (1997). Alternatively, if the person was arrested without a warrant, an indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention. *See Gerstein*, 420 U.S., at 114, 117, n.19, 95 S. Ct. 854. In either situation, this Court—relying on the grand jury's "historical role of protecting individuals from unjust persecution"—has "let [that body's] judgment substitute for that of a neutral and detached magistrate." *Ibid.* The grand jury, all on its own, may effect a pre-trial restraint on a person's liberty by finding probable cause to support a criminal charge.

The same result follows when, as here, an infringement on the defendant's property depends on a showing of probable cause that she committed a crime. If judicial review of the grand jury's probable cause determination is not warranted (as we have so often held) to put a defendant on trial or place her in custody, then neither is it needed to freeze her property. The grand jury that is good enough—reliable enough, protective enough—to inflict those other grave consequences through its probable cause findings must needs be adequate to impose this one too. Indeed, Monsanto already noted the absence of any reason to hold property seizures to different rules: As described earlier, the Court partly based its adoption of the probable cause standard on the incongruity of subjecting an asset freeze to any stricter requirements than apply to an arrest or ensuing detention. *See supra*, at 1108; 491 U.S., at 615, 109 S. Ct. 2657 ("[I]t would be odd to conclude that the Government may not restrain property" on the showing often sufficient to "restrain persons "). By similar token, the probable cause standard, once selected, should work no differently for the single purpose of freezing assets than for all others. So the longstanding, unvarying rule of criminal procedure we have just described applies here as well: The grand jury's determination is conclusive.

And indeed, the alternative rule the Kaleys seek would have strange and destructive consequences. The Kaleys here demand a do-over, except with a different referee. They wish a judge to decide anew the exact question the grand jury has already answered—whether there is probable cause to think the Kaleys committed the crimes charged. But suppose the judge performed that task and came to the opposite conclusion. Two inconsistent findings would then govern different aspects of one criminal proceeding: Probable cause would exist to bring the Kaleys to trial (and, if otherwise appropriate, hold them in prison), but not to restrain their property. And assuming the prosecutor continued to press the charges, the same judge who found probable cause lacking would preside over a trial premised on its presence. That legal dissonance, if sustainable at all, could not but undermine the criminal justice system's integrity—and especially the grand jury's integral, constitutionally prescribed role. For in this new world, every prosecution involving a pre-trial asset freeze would potentially pit the judge against the grand jury as to the case's foundational issue. . . .

Note that, 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 Judge Kaplan again, this time being reviewed by the Second Circuit after letting the government have it in the KPMG case (see the district court decision in *KPMG* in Chapter 12). It seems here 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), at II. 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), at VII n.3.

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*, 487 F. Supp. 2d 721 (E.D. Va. 2007), "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 government, relying on *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, (1989), contends that a defendant has no Sixth Amendment right to a defense funded by someone else's money. In that case, the Supreme Court ruled that a defendant's Sixth Amendment right to retain counsel of choice was not violated when the funds he earmarked for defense were seized under a federal forfeiture statute, because title to the forfeitable assets had vested in the United States. The government focuses on the following passage from *Caplin & Drysdale*:

> . . . 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 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. . . .

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?