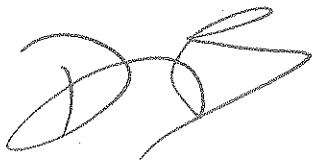

NOTE: THIS ARTICLE WAS WRITTEN PRIOR TO THE ENACTMENT OF § 1957(f)(1), WHICH WAS ADDED TO THE MONEY LAUNDERING ACT AND PROVIDES:

> **"The term "monetary transaction" does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."**

THE MONEY LAUNDERING CONTROL ACT OF 1986: WILL ATTORNEYS BE TAKEN TO THE CLEANERS?

by Edward T. M. Garland and Donald F. Samuel

The Money Laundering Control Act of 1986[1] poses a significant threat to drug dealers. It also threatens bankers, real estate developers, car salesmen and lawyers; not just criminal lawyers, but corporate lawyers, bankruptcy lawyers, bank lawyers and real estate lawyers.

Born in the frenzied closing hours of the 99th Congress, the Money Laundering Control Act reflects the eager — almost frantic — efforts of Congress to deal with the pervasive drug problem in this country. Three months before its passage, basketball star Len Bias and football player Don Rogers died from cocaine overdoses; University of Tennessee's quarterback, Tony Robinson, was arrested on cocaine sale charges. In the New York Times the legislative atmosphere was described as "crazed."[2] The President and First Lady appeared on national television to inveigh against the use of drugs, recommending that prospective consumers "Just say no." The death penalty was proposed in Congress for certain drug offenses.[3] Use of the military to protect the borders from the invasion of drugs was suggested.[4] Life sentences without the possibility of parole were enacted for drug offenses even if no violence and nothing more than marijuana was involved.[5]

It is now a crime to knowingly engage in a monetary transaction with criminally derived property valued at more than $10,000 if the property in fact is derived from specified unlawful activity.

The Problem Facing Congress

Endeavors to curb the use of drugs by outlawing their possession or sale have proved to be relatively ineffectual.[6] A more decisive approach was dictated. Congress focused on money.

Cocaine cannot ordinarily be purchased with a VISA, MASTERCARD or RICH'S charge card. Cash, in ever-increasing quantities, flows from the person who uses a line or two on Saturday night to the ounce or two purchaser, to the kilogram dealer, to the region's wholesaler, to the international importer. Everybody who profits in this enterprise needs to dispose of (*i.e.*, launder) cash. The higher up in the distribution chain, the more cash must be cleansed.

The term "money laundering" was coined (so to speak) long before the passage of 18 U.S.C. §§1956 and 1957.[7] Previous attempts to wage the drug war on the monetary battlefield relied principally on an arsenal of reporting requirements and forfeiture provisions.[8] Currency transactions at a financial institution involving $10,000 must be reported to the IRS.[9] The transportation of currency across international borders must also be reported.[10] The receipt of $10,000 by a trade or business must be reported.[11] The reporting requirements served three purposes: First, the Government could identify individuals involved in substantial monetary transactions. Second, because drug dealers generally are reluctant to furnisht the IRS such information, the ease with which they formerly laundered their currency was crippled. Third, when the criminal violated a reporting requirement, prosecutors could use that peg to convict a person whose principal criminal activity could not be sufficiently proven, the Capone-type prosecution. In short, the creation of

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a new crime provided alternative ways of imprisoning drug dealers. Prosecutions of individuals who violated the reporting requirements proliferated. A jurisprudence of "structuring offenses" was developed: A bank customer who engaged in two $9,000 currency transactions at a bank in one day was considered a felon for engaging in transactions which were designed to evade (or avoid) the reporting requirement.[12]

The forfeiture laws,[13] though not criminal in the traditional sense, impose an additional penalty on convicted drug offenders: depriving them of assets which were used to facilitate their crime or which represent the proceeds of these crimes. The forfeiture laws do not *outlaw* the receipt of the proceeds of an illicit drug transaction, they provide that the Government will seize those assets.[14]

The Congressional Solution

The Money Laundering Control Act cut through the intrigues and subtleties of reporting requirements and went right for the jugular. There is nothing pianissimo about this new law. It does not involve merely the seizure of money. Nor is it limited to drug-related offenses, or to currency transactions. It is now a *crime* to knowingly engage in a monetary transaction with criminally derived property valued at more than $10,000 if the property in fact is derived from specified unlawful activity.[15] It is also a felony to engage in a financial transaction with, or to transport, the proceeds of specified unlawful activity across United States borders if the transaction or transportation is intended to promote any specified unlawful activity or to conceal the source of the money or to avoid any reporting requirement.[16]

A few definitions, and a little more specificity: "unlawful activity" is any felony under state or federal law;[17] "specified unlawful activity" refers to those crimes enumerated as predicate acts under the federal Racketeer Influenced and Corrupt Organizations Act (RICO),[18] which includes mail fraud, wire fraud, bankruptcy fraud, bank fraud, embezzlement, narcotics offenses, as well as scores of other federal and state crimes;[19] "financial transaction" is defined as either the transfer of funds or a transaction involving a financial institution whose activities affect interstate commerce.[20]

With these definitions in mind, the money laundering laws can be better understood: (1) A person who engages in a financial transaction with property which in fact is derived from specified criminal activity, knowing that the property is derived from any state or federal criminal activity[21] with the intent to: (a) promote a specified crime, or (b) conceal the source of the property, or (c) avoid a reporting requirement, is guilty of a felony.[22] (2) A person who transports any monetary instrument across a United States border with the intent to promote a specified crime or to conceal the proceeds of a specified crime is guilty of a felony.[23] (3) A person who engages in a monetary transaction (such as depositing or withdrawing a check or currency in a bank) involving more than $10,000 which is derived from specified criminal activity, knowing that the money is derived from any felony, is guilty of money laundering.[24] "Knowing" of course, includes both actual knowledge and "deliberate ignorance."[25] This article focuses on this last provision, engaging in a monetary transaction with tainted funds.

In its essential profile, §1957 resembles a traditional receiving stolen property offense, except that it is now illegal to receive the proceeds of virtually any illegal activity, not just the hot goods. There are six elements of a §1957 violation: (1) The defendant must engage or attempt to engage (2) in a monetary transaction (*e.g.*, depositing or withdrawing money from a bank) (3) in criminally derived property (4) knowing that the property is criminally derived property and has a value of more than $10,000 (5) and the value of the criminally derived property must exceed $10,000 (6) and the property must be derived from specified unlawful activity.[26]

Though a comparison between this offense and dealing in stolen merchandise or the cash from a bank robbery is alluring, conceptually and practically this new money laundering law stakes out new terrain in the field of criminal culpability. Stolen merchandise and the cash in the bank bag are contraband. They are no different than cocaine. The knowing possession or transfer of contraband is *malum in se*. Money, on the other hand, is not contraband. Indeed, it is "legal tender for all debts, public and private." Money which is traceable back through generations of transfers to an illicit source is not comparable to the cash with the stains from an exploding dye pack. It does not "belong" to

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someone else. A transferee's possession of a stolen car or stolen currency perpetuates the victim's loss. Not so with the proceeds of a drug transaction or proceeds traceable to gambling profits.

Consider the possibilities of this new law. A gambler buys a car. The car dealer deposits the money. If the car dealer knew the money was part of the purchaser's winnings, the dealer faces ten years for money laundering. Consider a bank officer who approves a nominee loan from which he benefits; he pays his doctor for a heart transplant. The doctor, in whom the bank officer confided about his misapplication of bank funds, deposits the money in his bank account. The doctor is guilty of money laundering.

Or this: A lawyer is told by his client that his business is permeated with fraud. He has been indicted. The lawyer accepts a fee in excess of $10,000 and deposits the money in his firm's account. According to the black letter, that's a crime.

There are staggering implications for lawyers, lawyers who do real estate closings, lawyers who advise securities dealers, bank lawyers and, of course, criminal defense lawyers. If your client dabbles in ill-gotten gains and confides in you, his gains had better not become yours.

In recognition of the threat the law poses to criminal defense attorneys, Rep. Bill McCollum (R-Fla.) proposed an amendment to §1957 prior to its passage which would have exempted *bona fide* attorney fees from the scope of the statute.[27]

...it is now illegal to receive the proceeds of virtually any illegal activity, not just the hot goods.

This amendment passed the House on two occasions,[28] but when the Conference Committee deliberated on the amalgamation of the House and the Senate versions of the money laundering laws, the amendment was jettisoned.[29] Though no published report was issued by the Conference Committee, comments by two members revealed that the amendment was believed to be unnecessary because the Sixth Amendment consecrated the attorney-client relationship and shielded financial transactions which reflect the payment of *bona fide* fees from the Act.[30] Revealing the frantic pace at which Congress was trying to pass this constituent-pleaser, the initial proponent, Rep. McCollum, also acknowledged that the amendment was deleted because of "the lateness of the hour."[31]

Being stripped of the legislative shield on the theory that Congess did not intend the arrow to reach attorneys provides little comfort.

The Department of Justice Response

Indeed, the ever-vigilant Department of Justice put more bow to the flight of the arrow. On January 15, 1987, in its initial instructions to prosecuting attorneys,[32] the Department did not exempt attorneys. On the contrary, the exposure of attorneys was made explicit by the caveat "Approval By The Assistant Attorney General Of The Criminal Division Is Required For [§1957] or Any §1956 Charge If The Defendant Is An Attorney And The Proceeds Represent Attorneys' Fees."[33]

This initial memorandum became formal policy when the Department of Justice issued the draft of its "blue sheet" on August 3, 1987 relating to the prosecution of money laundering offenses.[34] After reviewing the structure of §1957, this "Prosecutive Policy" outlined the Department's position on charging attorneys with a money laundering offense. The following guidelines were established:

1. No prosecution will be initiated with respect to *bona fide* attorneys' fees paid to a criminal defense attorney for representation in a criminal case unless there is proof beyond a reasonable doubt that the attorney had *actual knowledge* of the illegal source of the property.[35]

1a. Fees paid by *another* are not *"bona fide"* if the fee is paid to protect that other person's identity or legal interests or any other interests of the overall criminal venture. Such payments may not be *bona fide*, but there is no presumption that they are not. If the attorney's obligation runs to the client without conflict, a third-party fee is considered *bona fide*.[36]

1b. Sham transactions, such as nominee payments or willful efforts to defeat the forfeiture laws are not *bona fide*.[37]

1c. There is no need to prove that the attorney was part of the criminal activity from which the property was derived.[38]

2. Such proof of actual knowledge must consist of evidence other than confidential communications between the attorney and his client.[39]

2a. Willful blindness is not enough to prove actual knowledge in deciding whether to *initiate* a prosecution.[40]

2b. While willful blindness is no

enough to *initiate* a prosecution, it *will* suffice for a conviction.[41]

2c. A confidential communication *may* be used at trial if other evidence would suffice to establish the attorney's knowledge beyond a reasonable doubt.[42]

2d. The Government may not furnish the information to the attorney in order to establish actual knowledge.[43]

3. Proof of actual knowledge may not consist of evidence of what the attorney learned preliminary to or during the representation and in furtherance of the obligation to represent the client effectively.[44]

The Guidelines are inadequate. Indeed, even if the Guidelines *were* adequate, the fact that they are no more than "guidelines" negates any protection they offer. Within the four pages of the Guidelines' treatment of attorneys *qua* defendant, there are three disavowals of the authority of the Guidelines to confer or create any rights, expectations or benefits.[45] Courts which have been asked to enforce similar DOJ guidelines have uniformly refused.[46] In light of the unenforceability of the guidelines, an attorney would be foolish to rely upon the guidelines for protection. At the whim of the Department, or a recalcitrant U.S. Attorney, an attorney could be prosecuted even if he did not have "actual knowledge" of the source of his fee. Perhaps a prosecutor would argue that the attorney "should have known" of the source. An attorney suspected of being crooked may be the victim of a more "expansive" interpretation of the Act. The Administration may change, bringing in new DOJ deputies and assistants with different views about statutory construction. Needless to say, no *ex post facto* defense is available. And speaking of statutory construction, any reliance on the Conference Committee members' statements about the reason for abandoning the McCollum amendment[47] would be ill-advised. A basic tenet of legislative interpretation provides that when Congress defeats or withdraws an amendment, its terms are presumed to have been rejected.[48] The DOJ certainly viewed the rejection of the McCollum amendment as its ticket to prosecute attorneys who do no more than receive *bona fide* attorney fees.

Would You Sell A Used Car to This Man?

Even if the Guidelines were scrupulously obeyed by all prosecutors and courts, the Money Laundering Control Act as thus construed is a disastrous law. As applied to all commercial ventures, whether service industries or merchandise retailers, the Act represents an ill-fated adventure which is sure to miscarry. Consider these problems:

1. The Guidelines erect a shield only around criminal defense attorneys. All other attorneys, as well as doctors, bankers, realtors, car salesmen and real estate developers may be prosecuted if they choose to remain (blissfully) ignorant that the funds they received were the proceeds of *any* unlawful activity — if, in fact, the funds were derived from specified unlawful activity.[49] It is unclear how one is supposed to know such things. The guidelines,[50] as well as a monograph prepared by the DOJ,[51] suggest that circumstantial evidence is sufficient to establish a defendant's knowledge. These sources list examples of the circumstances which would "put someone on notice" that he is receiving money from someone who is a criminal: for example, "conducting business at irregular hours," "acceptance of a commission above market rates," "use of suspicious identification," "knowledge that the legitimate income of the purchaser is insufficient to afford the purchased goods." Apparently, the drug courier profile, as well as the mail fraud perpetrator profile, the bank embezzler profile, the pornographer profile and the counterfeiter profile[52] will become part of the curriculum of seminars for every profession.

2. When does the defendant have to acquire knowledge of the source of the money? *Not* at the time he receives the money, but at the time he engages in a financial transaction — *i.e.*, puts the money in or withdraws the money from his bank.[53] Suppose a real estate developer sells property to a man wearing no gold necklaces who is known to be a securities dealer. A ten-year note is executed. Two years later, the newspaper reports that the securities dealer was indicted on charges that he was engaged in a widespread mail fraud

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scheme. The developer may not deposit additional installment payments without exposing himself to a §1957 charge. A bank may not continue to receive monthly payments if it held the securities dealer's mortgage.

A related problem exists if money is paid into a fund and the donor is later learned to be a perpetrator of specified criminal activity. A banker sets up a scholarship fund at a university. A year later, the school officials learn that he was incarcerated for embezzlement. Not only can no more money be received from the donor, the funds in the account may not be taken out: withdrawing the money is a "financial transaction."

3. What is "property" derived from criminal activity? Will proceeds of a mail fraud scheme be traced from one asset to the next indefinitely? What about commingled funds? Will the proceeds-in/first-out; proceeds-in/last-out theory apply?[54] Consider a criminal who uses a house, purchased with "insider trading" money, as collateral for a loan to pay a doctor's bill. If the doctor knows about the source of the collateral, is the doctor a money launderer when he deposits the money in his account?

4. Note that the money need not be used for the benefit of the criminal. A mobster sends his mother to a nursing home; a drug dealer sends his daughter to college; an embezzler sends a check to United Way. If it's dirty money, the nursing home, the college and the charity are prohibited from engaging in transactions with it.

5. Though the Government may not inflict knowledge on a criminal defense attorney, all others are subject to the knowledge being acquired in that way. A developer is told by an FBI agent that his long-time customer cheats people through the mail; the developer may make no future deposits. A DEA agent writes a letter to a bank advising the loan officer that one of the bank's borrowers bribes college athletes. The bank cannot accept anymore payments.

There are staggering implications for lawyers, lawyers who do real estate closings, lawyers who advise securities dealers, bank lawyers and, of course, criminal defense lawyers.

Criminal Defense Attorneys

Despite the superficial gesture ofered criminal defense attorneys by the DOJ Guidelines, the threat to the Sixth Amendment right to effective assistance of counsel is striking:

1. The Guidelines proclaim that willful blindness is not enought to initiate a prosecution.[55] That is not to suggest that the Government will not rely on that theory at trial; just that a prosecution will not be initiated if that is the theory. An attorney would do well, then, willfully to remain blind.

2. There is no provision in the Guidelines for cases in which a client has engaged in specified criminal activity and hires an attorney with the proceeds — all of which is actually known by the attorney — but the attorney is confident that the defendant has a strong defense. Perhaps the statute of limitations for the specified criminal activity has run years ago; or an obvious fourth amendment violation would lead to the suppression of essential evidence; or a classic entrapment defense appears viable. If an attorney takes a fee from a defendant under such circumstances, the attorney is still guilty of money laundering.

An interesting corollary to the entrapment circumstance is presented by the prospect of a defendant using "sting" money to hire an attorney. Suppose a county commissioner receives $25,000 from an undercover FBI agent to vote "Aye" on a zoning matter. He is indicted. He pays his attorney $15,000 from the sting money. Is that property derived from specified unlawful activity?

Finally, consider an attorney who is told the facts of the crime by his client and the attorney honestly and in good faith believes that the defendant is guilty of a crime, but that it is a lesser-included offense which is not a "specified" crime and he takes the fee. Remember that the "knowing" element for §1957 is only that you know the money is derived from any illegal activity.[56] The money must *in fact* be derived from specified unlawful activity, but you need only be aware that the money is derived from some criminal activity. An attorney who believed that he could convince a jury to return a verdict on a lesser-included (non-specified) crime, would be a money-launderer if his client is convicted of the greater (specified) crime.

3. If the client is acquitted of criminal charges, may the attorney rely on that acquittal when he is charged with money laundering? It would seem that the attorney could rely on neither res judicata nor collateral estoppel. Could he not be found guilty of conspiracy to launder money or attempted money laundering if the client is acquitted but the lawyer thought the client was guilty?[57]

4. The Guidelines provide that the Government will not rely on a confidential communication between an attorney and a client to *initiate* a prosecution. Once the prosecution is initiated, however, the Government may use such evidence. Starting November 1, 1987 there is no more parole.[58] Nor may defendants file motions for reduction of sentence anymore.[59] The *Government* may file a motion for reduction of sentence if a defendant cooperates in providing information to the Government.[60] When a client hears that prison door behind him, with no parole and only one way to reduce his sentence, his former attorney is fair and tempting game. Advice to attorneys: "The first thing we do let's kill all the clients."

Of course, if an informant or undercover agent comes in your office wired, the ensuing conversation is not confidential and if you take the fee with sufficient knowledge, the Government will use that communication to initiate a prosecution.

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5. A client confides in you that all his money is derived from specified criminal activity with the exception of a $15,000 inheritance. He reveals his sordid activities in lurid detail. The attorney takes the $15,000 and then is indicted for money laundering. May he breach the privilege at his own trial for money-laundering and explain that though he was told most of the client's money was tainted, his fee was not?

6. A criminal attorney is only protected to the extent that he accepts a fee and acquires knowledge with respect to a particular case. Consider an attorney who represents a client in a second case, either civil or criminal. The knowledge he acquired during the first case, including all the evidence at the first trial, could be used to show that the attorney had knowledge about his client's business and the source of his fee for the second case.

7. Though the Government is not permitted to provide the requisite knowledge to an attorney about the sources of his client's fee, may an attorney ignore an indictment which graphically sets forth the defendant's conduct and identifies assets subject to forfeiture under any of various laws which provide for the forfeiture of ill-gotten gains?[61] Though many courts have held that a client may pay his attorney with assets otherwise subject to forfeiture,[62] the new Money Laundering Act would surely give pause to an attorney before such an identifiable monetary asset is taken as a fee. An attorney might venture to take a fee which may someday be lost in a forfeiture proceeding, but taking a fee which may someday lead to the attorney losing his license and liberty in a criminal proceeding is a different matter.

The DOJ Guidelines' unenforceability is a particularly sinister problem in the context of prosecuting criminal defense attorneys. Our liberty should not repose in the good faith of the prosecutor or his gratuitous restraint. It is no longer "In God We Trust" when we take currency, it is the benevolence of the prosecutor on which we rely. The inevitable result is that defendants will go without retained counsel even if they have legitimate assets. Attorneys will stop accepting fees in marginal cases — cases in which the source of the fee is questionable. When a client comes to my door, he had better be able to prove to me to a fair certainty that the fee is clean. If he cannot satisfy that burden — a burden far more stringent than DOJ's — and if other private attorneys have an equal appetite for freedom, the defendant who cannot *prove* the legitimacy of his asets to an attorney will go without retained counsel.

...attorneys, doctors, bankers, realtors, car salesmen and real estate developers may be prosecuted if they choose to remain ignorant that the funds they received were the proceeds of any unlawful activity

Under the regime of this Machiavellian law, not just the adversarial aspect of the criminal justice system, but the sixth amendment, must yield to the fanatical drive to curb drugs. These are not metaphysical abstractions we are debating. We are talking about marshals walking into your office and taking *you* out because the securities dealer you represented was insiding with Ivan Boesky, and you knew it. If you were suspicious about the source of your client's funds for the real estate deal you closed, you might want to put some of your fee aside for bail.

And the next time a client comes in your office without a certified financial statement, "Just Say No."

Footnotes

1. Anti-Drug Abuse Act of 1986, Pub.L.No 99-570, 100 Stat. 3207-21, (codified at 18 U.S.C. §1956-57 (1987)).

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