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A New Professionalism for Arizona Attorneys: The Elimination of "Zealous" Representation with the Foundation of Civility and Fairness

Paul D. Friedman M.A., Ph.D., J.D.*

Most attorneys have encountered a client who wants the attorney to be a "bulldog," "shark," "snake," or (you pick the noun) to "hammer," "maim," "kill," or (you pick the verb) the adverse party and opposing counsel. Most attorneys graduate law school believing in a "take-no-prisoner" approach without regard for its consequences. This type of approach has resulted in disgruntled attorneys and a public perception that "lawyers are greedy, manipulative and corrupt."[1] In fact, only twenty percent of Americans view attorneys as ethical and honest.[2] Unfortunately, the more clients become acquainted with the legal profession, the more pervasive this opinion becomes.[3]

Since 1984, there has been a sharp decline in the number of attorneys satisfied with their profession.[4] The American Bar Association ("ABA") conducted two national studies in 1984 and 1990, entitled *A National Survey of Career Satisfaction/Dissatisfaction*, that revealed both a shrinking satisfaction within the profession, as well as a growing dissatisfaction with relationships between attorneys.[5] In 1992, seventy percent of California attorneys indicated they would change careers if given the opportunity.[6]

Until 1983, the ABA's Model Code contained Canon 7, entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[7]

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1 Sara Parikh, *Public Perceptions of Lawyers Consumer Research Findings*, 2002 A.B.A. Sec. Litig. 33.

2 Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers*. A.B.A. J., Sept. 1993, at 62.

3 *Id.*

4 *See* Raquel Aviña Hunter, *The Alarming Growth of Dissatisfaction Among Lawyers,* 4 UCLA Women's L.J. 117, 117 (1993) (reviewing Deborah L. Arron, Running From the Law: Why Good Lawyers Are Getting Out of the Legal Profession (1989, 1991)).

5 *Id.* at 117 n.1.

6 Maura Dolan, *Miserable with the Legal Life*, L.A. Times (June 27, 1995), http://articles.latimes.com/print/1995-06-27/news/mn-17704_1_legal-life.

7 Model Code of Prof'l Responsibility Canon 7 (1980).

Unfortunately, attorneys too often confuse zealousness with zealotry.[8] The line between these terms is blurry: "zealous" is defined as conjuring enthusiasm, whereas "zealotry" is defined as extreme fanaticism.[9] Even the State Bar of Arizona's Oath of Admission[10] and Lawyer's Creed of Professionalism[11] is inconsistent with the perceived impression of zealous advocacy. This inconsis-

[8] Paul D. Friedman, *Win-At-All-Costs Litigation: States Reconsider the Damage Done by 'Zealous' Representation*, LAW. USA, June 30, 2008, at 17.

[9] *Id.*

[10] *Oath of Admission*, STATE BAR OF ARIZ., http://www.azbar.org/membership/admissions/oathofadmission (last visited Nov. 11, 2012) ("I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor; I will never seek to mislead the judge or jury by any misstatement or false statement of fact or law . . . .").

[11] *A Lawyer's Creed of Professionalism of the State Bar of Arizona*, ST. BAR ARIZ (May 20, 2005), http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism. Relevant portions of A Lawyer's Creed of Professionalism of the State Bar of Arizona (May 2005) states:

> A. With respect to my client: . . .
>
> 4. I will advise my client against pursuing litigation (or any other course of action) that is without merit and I will not engage in tactics that are intended to delay the resolution of the matter or to harass or drain the financial resources of the opposing party;
>
> 5. I will advise my client that civility and courtesy are not to be equated with weakness. . .
>
> B. With respect to opposing parties and their counsel:
>
> 1. I will be courteous and civil, both in oral and in written communication;
>
> 2. I will not knowingly make statements of fact or of law that are untrue;
>
> 3. In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
>
> 4. I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;
>
> 5. I will not utilize litigation or any other course of conduct to harass the opposing party;
>
> 6. I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests;
>
> 7. I will not utilize delay tactics;
>
> 8. In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful;
>
> 9. I will not serve motions and pleadings on the other party or the party's counsel at such a time or in such a manner as will unfairly limit the other party's opportunity to respond;
>
> 10. In business transactions I will not quarrel over matters of form or style but will concentrate on matters of substance and content;
>
> 11. I will identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.
>
> C. With respect to the courts and other tribunals:

tency is the reason why numerous states removed the word zealous from their Rules of Professional Conduct.[12]

The Arizona Supreme Court adopted the ABA Model Rules of Professional Conduct in 1984.[13] Even though Arizona adopted all but seven of the ABA Model Rules by September 1984, the Arizona Supreme Court did not remove the word "zealous" from the Preamble to the Arizona Rules of Professional Conduct until 2003.[14] Prior to 2003, the Preamble to the Arizona Rules of Professional Conduct stated:

> [A]s an advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system, and that a lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. While it is a lawyer's duty, when necessary, to challenge

1. I will be an honorable advocate on behalf of my client, recognizing, as an officer of the court, that unprofessional conduct is detrimental to the proper functioning of our system of justice;
2. Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;
3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit;
4. I will not file frivolous motions;
5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;
6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as early as possible;
8. Before dates for hearings or trials are set - or, if that is not feasible, immediately after such dates have been set - I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;
9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;
10. I will endeavor to be punctual in attending court hearings, conferences and depositions;
11. I will at all times be candid with the tribunal.

[12] Lawrence J. Vlardo & Vincent E. Doyle III, Where Did the Zeal Go?, 2011, A.B.A. SEC. LITIG. at 1.

[13] ARIZ. R. SUP. CT. 42 ("The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association . . . .").

[14] Preamble, ARIZ. R. SUP. CT. 42 (1983) [hereinafter Preamble 1983] (ammended 1984); Mark I. Harrison, *The New Arizona Rules of Professional Conduct*, ARIZ. B.J., Dec.-Jan. 1985, at 12.

> the rectitude of official action, it is also a lawyer's duty to uphold the legal process. Thus, when an opposing party is well represented, a lawyer can be a *zealous* advocate on behalf of a client and at the same time assumes that justice is being done.[15]

In December 2003, the Preamble to the Arizona Rules of Professional Conduct removed the reference to zealous advocacy. The Preamble currently states:

> [2] As a representative of clients, a lawyer performs various functions . . . . As advocate, a lawyer asserts the client's position under the rules of the adversary system . . . .
> [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is the lawyer's duty, when necessary to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
> [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be an advocate on behalf of a client and at the same time assume that justice is being done.
> [9] In the nature of law practice, however, conflicting responsibilities are encountered . . . .These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.[16]

Along with the Preamble, Arizona established Ethical Rule 3.4 to provide fairness to the opposing party and counsel:

> A lawyer shall not:
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other

[15] Preamble 1983, *supra* note 16 (emphasis added).
[16] Preamble, ARIZ. R. SUP. CT. 42.

material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
   (1) the person is a relative or an employee or other agent of a client; and
   (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.[17]

These changes also coincide with the 1992 Zlacket Rules, which ultimately became Arizona's current disclosure rules.[18] Arizona appointed a bar committee in March 1990 to study Civil Litigation Abuse, including civil litigation problems that were causing undue expense and delay.[19] Consequently, a new Arizona Rule of Civil Procedure, Rule 26.1, was instituted to deal with "discovery abuse and discovery abusers."[20]

Attorneys and prospective attorneys will derive significantly more satisfaction if their peers treat them with respect and civility. Clients will have a sense that lawyers are part of a profession with integrity if there is an open and honest exchange in which they can portray their story without obstruction, dishonesty, or game-playing.

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[17] ARIZ. R. SUP. CT. 42, ARIZ. RULES OF PROF'L RESPONSIBILITY ER 3.4 (2003).

[18] ARIZ. R. CIV. P. 26.1.

[19] *Id.* at cmt. to 1991 amendment.

[20] *Id.*

Arizona has established the rules to institute civility, and law students and current practitioners should understand that the profession no longer condones advocacy approaches that disregard and disrespect opposing parties. Lawyers can effectively advocate for clients without attacking or being dishonest with the adverse party and counsel. Clients should be instructed that attorneys are not "paid mercenaries," and that attorneys form the legal profession with integrity, responsibility, and accountability.

The goal of the adversary system of justice should not be to "win at all costs." Instead, the goal should be for attorneys to advocate to the best of their ability while maintaining civility so that the system provides a "win-win" situation.[21] Civility enables clients and adverse parties to be heard and understood. Respecting opposing counsel and adverse parties increases the positive image of the legal profession with the public, which in turn benefits the profession and community.

[21] Friedman, *supra* note 8.

No More Fear! Why We Are Frightened of Asset Forfeiture and Why We Shouldn't Be

David J. Enevoldsen*

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I. INTRODUCTION

"Media reports about owners losing their life savings or their primary residences without ever being charged with a crime occur far too frequently."[1]

Mr. George Lindsay had a dream: he was going to move to Arizona and build a used car dealership.[2] Between 2002 and 2003, Mr. Lindsay saved money he earned from his successful liquor store in New York.[3] He relocated to Arizona, rented a temporary home, and began to hunt for real estate on which to build the car dealership.[4] Mr. Lindsay's plan was to purchase vehicles from Manheim's Arizona, an auto auctioneer.[5] Because Manheim's did not accept business or personal checks, Mr. Lindsay withdrew $275,000 in cash to purchase the vehicles needed to start his dealership.[6] Mr. Lindsay briefly returned to New York in order to tend to his liquor store.[7] While there, he forgot to pay the rent on his temporary Arizona residence.[8] This mistake cost Mr. Lindsay his dream. The Arizona landlord began the eviction process and entered the apartment.[9] Once inside, the landlord found the $275,000 that Mr. Lindsay had brought to Arizona, and he turned it over to the police.[10] The police seized the money for "forfeiture."[11] In the forfeiture action, the State alleged that Mr. Lindsay brought the money to Arizona to purchase illegal drugs.[12] The government presented evidence to support the forfeiture including an officer's belief that the temporary home "had indicia of a 'stash house,'" because the money predominately consisted of twenty-dollar bills, and it was

1 Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 802 (2009).

2 Verified Claim at 2, 3, *In re* $274,730.00, No. CV 2005-002399 (Maricopa Cnty Super. Ct. March 14, 2005).

3 *Id.* at 4.

4 *Id.* at 2.

5 *Id.* at 3.

6 *Id*.

7 *Id.* at 3-4.

8 *Id.*

9 *Id.* at 4.

10 *Id.*

11 Ruling at 1, *In re* $274,730.00, No. CV 2005-002399 (Maricopa Cnty Super. Ct. . Jan. 1, 2007). Forfeiture is the process by which the government can take away property if it can be shown that the property was used to facilitate or was the profit from a crime. BLACK'S LAW DICTIONARY 722 (9th ed. 2009).

12 *Id.*

kept in a shrink-wrapped bag.[13] Drugs were not found in the house.[14] Mr. Lindsay was eventually vindicated, and the court ordered the return of his money.[15] Unfortunately, to get that order Mr. Lindsay had to hire an attorney and delay his dream of creating a car dealership.

In attempts to show that the innocent are caught in the cross-hairs of a greedy and unjust government's lust for property, the media and law review articles paint horrifying pictures of situations similar to Mr. Lindsay's.[16] A reader is left wondering why the government would take another's property without justification; yet, at the same time, the reader never stops to consider whether the State has a legitimate interest in stopping a criminal activity, that the forfeiture "victim" might be lying, or that critical details might be lacking in the sob stories painted by the press.

Consider the rest of Mr. Lindsay's story. Just after the court ordered the release of Mr. Lindsay's money, the police conducted an investigation completely unrelated to him.[17] Throughout the course of that investigation, the police executed search warrants on two houses.[18] During the execution of the warrant on one house, Mr. Lindsay jumped out of a window and fled.[19] Police apprehended him and found approximately 911 pounds of marijuana in the house from which he fled.[20] The approximate street value of the marijuana was $2,753,843.[21] Thus, the police were ultimately correct in their suspicion that Lindsay was in fact trafficking drugs. The police had properly identified Mr.

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[13] *Id.*

[14] *Id.* at 1-2 ("No drugs or drug paraphernalia were found in the house. A drug sniffing dog did not alert on the money or anywhere else in the house.").

[15] *Id.* at 2.

[16] *See* Mike Fishburn, *Gored by the Ox: A Discussion of the Federal and Texas Law that Empower Civil-Asset Forfeiture*, 26 RUTGERS L. REC. 4, 4 (2002) (describing the forfeiture of a vehicle owned by a husband and wife after the husband used the car in connection with prostitution); Moores, *supra* note 1, at 777–79 (describing a forfeiture of over $403,000 in cash discovered with eleven ounces of marijuana when police served a search warrant in connection with an investigation of a self-defense shooting); *Cash Seizures by Police Prompt Court Fights*, NPR (June 16. 2008), http://www.npr.org/templates/story/story.php?storyId=91555835 (describing police efforts to seize property for forfeiture as part of a series entitled "Dirty Money: Asset Seizures and Forfeitures"); *Forfeiture Victim Stories*, FEAR.ORG, www.fear.org (last updated Nov. 12, 2009) (describing a number of different forfeitures allegedly without any basis beyond governmental greed).

[17] State's Application at 3, *In re* $274,730.00, No. CV 2005-002399 (Maricopa Cnty Super. Ct. March 6, 2007).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 3-4.

[21] This value was compiled from the average cost of medium-quality marijuana as listed on PriceOfWeed.com. *Data for the Price of Weed in: Arizona, United States*, PRICEOFWEED, http://www.priceofweed.com/prices/United%20States/Arizona.html (last visited Jan. 12, 2013).

Lindsay's temporary home as a stash house and also correctly identified Mr. Lindsay as an illegal drug trafficker.[22]

This Article argues that forfeiture is a necessary tool in the government's fight against crime. Forfeiture provides mechanisms to protect the innocent. It offers a way to hurt criminal enterprises that criminal convictions simply cannot achieve. Forfeiture also provides a way to compensate crime victims, and it brings needed funding to law enforcement for the benefit of taxpayers.

Part II of this Article provides a brief background of forfeiture. Part III discusses some misunderstandings surrounding forfeiture. Part IV explains why forfeiture is an important law enforcement tool. Finally, Part V concludes by showing that asset forfeiture is needed and that it should not be feared.

II. BACKGROUND: WHAT IS FORFEITURE?

"[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise."[23]

Forfeiture occurs when a state takes ownership of property that is presumed to be associated with a crime.[24] Forfeiture allows the state to take assets that represent the means or gains of illegal activity.[25] Asset forfeiture generally revolves around the legal fiction that the property itself can be tried and convicted.[26] Upon a successful "conviction" of the property, the rights to the item typically transfer to the government.[27]

To get a forfeiture order from a court, the government usually proceeds against the property and not the person involved with the crime.[28] Depending on a prosecutor's discretion, the government can pursue suspects in a criminal action.[29] Regardless, the fate of the suspect is often determined separately from the fate of the property involved in the crime.[30]

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[22] *See* State's Application at 3, *In re* $274,730.00, No. CV 2005-002399 (Maricopa Cnty Super. Ct. March 6, 2007).

[23] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974).

[24] *See supra* text accompanying note 11.

[25] *E.g.*, 18 U.S.C. § 981(a)(1) (2006) (enumerating activities that will result in civil forfeiture of property).

[26] Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.").

[27] 18 U.S.C. § 981(f) (2006) (In civil forfeitures "[a]ll right, title, and interest in property. . . [forfeited] . . . shall vest in the United States upon commission of the act giving rise to forfeiture . . . .").

[28] *Waterloo Distilling Corp.*, 282 U.S. at 581.

[29] *See id.*

[30] *See id.*

A. *The Origins of Forfeiture*

Forfeiture has roots tracing back to ancient practices of destroying property when such property was involved in the death of a person.[31] This practice expanded to include property that was associated with crimes in general.[32] During the middle ages, the tradition shifted from destruction of forfeited property to the transfer of property rights to the king.[33] This practice of transferring rights has, in a very general sense, been retained through present day.[34]

Under English common law, forfeiture expanded to include both the wrongdoing of an individual and the wrongdoing of the property.[35] Common law forfeiture included possessions owned by felons.[36] When a person was convicted of a felony, all of his property—both real and personal—was forfeited to the Crown.[37]

The tradition of forfeiture found its place in the United States primarily through admiralty law.[38] Early American government used forfeiture as a mechanism to acquire captured vessels or their cargo after the vessel's crew had committed crimes.[39] In each of these situations, the Supreme Court held that the government must prove the guilt of the property in question, rather than only convict the vessel's owner himself.[40] Thus, the government did not need to criminally convict a person in order to take away his property if such property had been involved with a crime. Before long, the states and federal government had established statutory mechanisms to forfeit property.

B. *Classifying Forfeiture*

From this history, several major types of forfeiture emerged: *in rem*, *in personam*, criminal, and civil forfeitures.

In rem[41] forfeiture involves an action against the property itself, and it does not require an action against a person directly. No action is required against a person because *in rem* forfeiture employs the legal fiction that a piece of prop-

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31 *See* discussion *infra* Part II.A.

32 *See* discussion *infra* Part II.A.

33 *See* discussion *infra* Part II.A.

34 *See* discussion *infra* Part II.A.

35 *See* M. MICHELLE GALLANT, MONEY LAUNDERING AND THE PROCEEDS OF CRIME 83 (2005).

36 *Id.*

37 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

38 George A. Kurisky, Jr., *Civil Forfeiture of Assets: A Final Solution to International Drug Trafficking?*, 10 HOUS. J. INT'L L. 239, 250–51 (1988).

39 *See* Harmony v. United States, 43 U.S. 210 (1844); *The Palmyra*, 25 U.S. 1, 8 (1827).

40 *See generally* Bennis v. Michigan, 516 U.S. 442, 446-47 (1996).

41 The Latin translation of *in rem* is "against a thing." BLACK'S LAW DICTIONARY 864 (9th ed. 2009).

erty is guilty of an offense.[42] *In rem* actions require that a state have jurisdiction over the property.[43] The state need only prove that there is a nexus between a criminal act and the property;[44] it does not need to prove that the property owner is guilty of any offense.[45]

In contrast, *in personam* forfeitures require that a property owner be convicted of a criminal offense.[46] In such a situation, the specific property is not the focus of the action. Rather, a substitute property that was not used in the commission of a criminal offense can satisfy the forfeiture judgment.[47] If the state successfully convicts the defendant and can prove that the defendant profited from the offense for which he was convicted, then the state can obtain an *in personam* judgment.[48]

Additionally, forfeitures are classified as either civil or criminal.[49] Criminal forfeiture occurs as a by-product of a criminal case against an individual. Items used to facilitate a criminal offense or that represent proceeds of the criminal offense are forfeited upon a defendant's conviction.[50] The government also has the option of pursuing a civil forfeiture,[51] and in this situation the government must prove by a preponderance of the evidence that the crime occurred.[52]

Criminal forfeitures are usually *in personam* because such forfeitures target the criminal defendant.[53] Criminal forfeitures can, however, also be *in rem*.[54] If a criminal forfeiture is *in rem*, the state must prove a nexus between the property and the offense that was grounds for the criminal conviction.[55] Civil forfeitures are always *in rem* on the federal level,[56] while many states permit the initiation of civil *in personam* actions.[57] Thus, although civil forfeitures are generally *in rem*, they can also be *in personam*.

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[42] Austin v. United States, 509 U.S. 602, 615 (1993) ("[F]orfeiture has been justified [based on the theory] that the property itself is 'guilty' of the offense . . . .").

[43] Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

[44] *See* 18 U.S.C. § 981(a)(1) (2006).

[45] *Id.*

[46] GALLANT, *supra* note 35.

[47] United States v. McGinty, 610 F.3d 1242, 1246-47 (10th Cir. 2010); United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999).

[48] 21 U.S.C. § 853(a) (2006).

[49] 18 U.S.C. §§ 981, 982 (2006).

[50] *Id.* § 982(a)(1).

[51] *Id.* § 981.

[52] *Id.* § 983(c)(1).

[53] United States v. Wendling, 359 F. Supp. 2d 850, 853 (D.N.D. 2005).

[54] FED. R. CRIM. P. 32.2(b)(1)(A).

[55] *Id.*

[56] United States v. Sandini, 816 F.2d 869, 872 (3d Cir. 1987).

[57] *E.g.*, ARIZ. REV. STAT. ANN. § 13-4312(A) (2011).

C. *The General Forfeiture Process*[58]

The civil forfeiture procedure begins with seizing the property, continues by notifying the owners of the property,[59] advances to a stage where the state is required to prove the property was somehow involved in a crime,[60] and progresses to a point where claimants have an opportunity to demonstrate innocence or rebut the government's position.[61] There is also an opportunity for victims of the underlying criminal offense to assert a claim against the property.[62] The property is returned if the claimant is successful.[63] If the state successfully proves its case and the claimant fails to rebut it, the property is forfeited.[64] Upon forfeiture, if any victims exist, they will receive some or all of the property.[65]

Criminal forfeiture follows a similar process.[66] Notice is required, and if a defendant is found guilty of the underlying offense, a court will enter a preliminary order of forfeiture.[67] If there are additional interest holders in the property, then a separate hearing is held to determine whether they should forfeit their interests.[68] Once the property is forfeited, there is an opportunity for victims to assert claims for compensation against the property.[69]

As discussed, the civil forfeiture procedure begins with a seizure. A state has the authority to seize any property subject to forfeiture.[70] Typically, the government must obtain a seizure warrant before taking property;[71] however, exceptions exist when the state has filed a complaint with the court or there is probable cause to think the property is subject to forfeiture.[72]

After seizure, the government is required to provide notice to the property owners.[73] Property owners have the right to file a claim with the seizing

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[58] This Part describes the procedural aspects of forfeiture at a federal level.

[59] 18 U.S.C. § 983(a) (2006).

[60] *See id.* §§ 981(a)(1), 983(c).

[61] *Id.* § 983(a)(4)(B).

[62] *See, e.g.*, United States v. Ramunno, 599 F.3d 1269 (11th Cir. 2010).

[63] *See, e.g.*, *In re* $26,980.00, 18 P.3d 85 (Ariz. Ct. App. 2000).

[64] *See, e.g.*, *In re* 2120 S. 4th Ave., 870 P.2d 417 (Ariz. Ct. App. 1994).

[65] *See* 21 U.S.C. § 853(i)(1) (2006); *Ramunno*, 599 F.3d 1269.

[66] *See* § 853.

[67] *Id.* §§ 853(d), (n)(1).

[68] *Id.* § 853(n).

[69] *Id.* § 853(i).

[70] 18 U.S.C. § 981(b)(1) (2006).

[71] *Id.* § 981(b)(2).

[72] *Id.*

[73] *Id.* § 983(a).

agency.[74] If a claim is filed, the state must either return the property or file a complaint in district court against the property.[75]

If the government initiates an action, the state bears the burden of proving that there was a "substantial connection" between the property and the criminal activity.[76] If the state succeeds, the claimant can still obtain the return of his property by showing that either he lacked knowledge of the criminal activity that gave rise to the forfeiture, or if he did know, he did all that was reasonably expected under the circumstances.[77] If the claimant succeeds, or if the state simply fails to carry its burden of proof, the government must immediately return the property.[78]

If there were victims of the criminal conduct that gave rise to the forfeiture, those victims can petition the state and seek compensation from some or all of the forfeited property.[79] The seizing agency must convey the appropriate amount to victims once the property is forfeited.[80] Exceptions to this requirement exist when: (1) there is "substantial difficulty" determining the losses of the victim; (2) the value of the forfeited property is miniscule in comparison to the expenses of the government in forfeiting the property; or (3) there are a large number of victims and remitting the property to all of them would result in awards that are so small distribution is impractical.[81]

After property is forfeited and victims have received all they are entitled to, the state retains any remainder.[82] The seizing agency either uses or sells the property and deposits the proceeds in the U.S. treasury.[83] If the property is contraband, such as drugs or paraphernalia, the government must dispose of it.[84] In some situations, however, state agencies can use seized drug paraphernalia for law enforcement or education purposes.[85]

While civil forfeiture begins with a seizure, criminal forfeiture begins with a notice. The state must notify a defendant that, in addition to seeking a criminal conviction, the state also intends to seek an order of forfeiture.[86] Provided that the government gave notice, upon a finding of guilt a court must determine

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[74] *Id.* § 983(a)(2)(A).
[75] *Id.* § 983(a)(3)(A).
[76] *Id.* § 983(c)(1), (3).
[77] *Id.* § 983(d)(1)-(2).
[78] 28 U.S.C. § 2465(a) (2006).
[79] 28 C.F.R. § 9.8 (2010).
[80] *Id.*
[81] *Id.* § 9.8(d).
[82] *See id.* § 9.8(i).
[83] 41 C.F.R. §§ 102-41.50, 102-41.75 (2011).
[84] *Id.* §§ 102-41.65, 102-41.235.
[85] *Id.* § 102-41.220.
[86] FED. R. CRIM. P. 32.2(a).

whether the government successfully established a nexus between the property sought for forfeiture and the underlying offense.[87] When making this decision, the court can use evidence from the criminal trial.[88] If necessary, the court can hold an additional hearing to determine whether the state established the nexus.[89] Upon request, the court can employ a criminal jury for determining additional issues regarding the forfeiture.[90] If the court finds that the state established the nexus, then the court must enter a preliminary order of forfeiture.[91] Once the court enters the preliminary order, the state can seize the property.[92] The preliminary order becomes final, with respect to the defendant, after sentencing.[93]

After the order is finalized with respect to the defendant, the state must notify any other potential interest holders of the property.[94] If additional claimants come forward, the court must hold a hearing to determine such persons' interests in the property.[95] The third party or the state can engage in discovery, if necessary, pursuant to civil procedural rules.[96] Finally, after the hearing, the court will either return the property to the claimant or enter a final order of forfeiture.[97]

The same rules regarding victims in civil proceedings apply to victims in criminal proceedings.[98] Generally, a victim of the crime that gave rise to forfeiture is entitled to assert a claim against the property.[99] If meritorious, the victim is entitled to compensation paid from the property.[100]

In essence, both civil and criminal forfeiture follow largely the same process. Both require that there be notice and that there be a nexus between the criminal activity and the property. Criminal forfeiture, however, requires a finding of criminal guilt before the court can hold a forfeiture hearing. In both situations, once property is forfeited, the court can convey the property to victims or to the state (if there were no victims).

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87 18 U.S.C. § 982(a)(1) (2006); FED. R. CRIM. P. 32.2(b)(1)(A).

88 FED. R. CRIM. P. 32.2(b)(1)(B).

89 *Id.*

90 *Id.* 32.2(b)(5)(A). Note, however, that there is no general right to a jury in criminal forfeiture proceedings. *Id.* 32.2(e)(3).

91 *Id.* 32.2(b)(2)(A).

92 *Id.* 32.2(b)(3).

93 *Id.* 32.2(b)(4)(A).

94 *Id.* 32.3(b)(5)(A).

95 *Id.* 32.2(c)(1).

96 *Id.* 32.2(c)(1)(B).

97 *Id.* 32.2(c)(2).

98 28 C.F.R. § 9.1(a) (2010) (indicating that the procedures apply to criminal, civil, and administrative forfeitures).

99 *Id.* § 9.8.

100 *Id.*

D. Grounds for Federal Forfeiture

At the federal level, a wide range of possible crimes can initiate forfeiture. There is an equally wide range of statutory sources of authority for forfeitures. All of these regard criminal violations of federal law.

The principal forfeiture provisions in the United States Code allow criminal conduct to form the basis of either a criminal or civil forfeiture.[101] Offenses that can give rise to a forfeiture action are enumerated in Chapter 46 of the criminal title.[102] Specifically, these offenses include: money laundering,[103] trafficking of nuclear or chemical weapons,[104] bribery,[105] counterfeiting and forgery,[106] fraud,[107] smuggling,[108] theft or embezzlement,[109] unlawfully manufacturing explosives,[110] vehicular crimes,[111] terrorism,[112] and immigration-related crimes.[113] Other sections of the Code's criminal title cover provisions for the forfeiture of property involved in other crimes. Apart from those offenses already mentioned, these crimes include: offenses related to production or distribution of illegal obscene materials,[114] human trafficking,[115] running illegal gambling businesses,[116] RICO violations,[117] child pornography,[118] trafficking in illegal cigarettes,[119] transportation of individuals for illegal sexual activity,[120] and possession of firearms by convicted felons.[121] The Code hardly centralizes statutory authority regarding forfeiture.

Indeed, a number of provisions authorizing forfeiture are found outside the criminal title of the United States Code. Excluding those already mentioned, these other provisions authorize forfeitures for offenses including: food stamp

101 *See* 18 U.S.C. §§ 981-82 (2006).
102 *Id.*
103 *Id.* §§ 981(A), 982(a)(1).
104 *Id.* § 981(B)(i).
105 *Id.* §§ 981(C), 982(a)(2)(A).
106 *Id.* §§ 981(C), 982(a)(2)(B).
107 *Id.* §§ 981(C)-(D), 982(a)(2)(A)-(B)(a)(3), (a)(8).
108 *Id.* §§ 981(C), 982(a)(2)(B).
109 *Id.* §§ 981(C), 982(a)(2)(A).
110 *Id.* §§ 981(C), 982(a)(2)(B).
111 *Id.* §§ 981(F), 982(a)(5).
112 *Id.* § 981(G)-(H).
113 *Id.* § 982(a)(6)(A).
114 *Id.* § 1467.
115 *Id.* § 1594(e)(1).
116 *Id.* § 1955(d).
117 *Id.* § 1963.
118 *Id.* § 2253.
119 *Id.* § 2344.
120 *Id.* § 2428.
121 *Id.* § 3665.

fraud,[122] trafficking in contraband oil,[123] archaeological crimes,[124] whaling crimes,[125] fishing crimes,[126] fur crimes,[127] illegally seizing marine mammals,[128] trafficking in endangered animals,[129] illegally taking wildlife,[130] copyright crimes,[131] crimes related to customs,[132] drug crimes,[133] trafficking in illegal firearms,[134] and tax crimes.[135]

Therefore, a wide range of criminal conduct can trigger a federal forfeiture action. The United State Code's criminal title lists many of the offenses and many are located elsewhere. There is little centrality in how the forfeiture statutes are laid out.

E. State and Local Forfeitures

State and local governments can seize property connected to criminal activity.[136] Just like the federal government does, states specifically enumerate a wide range of criminal conduct that can trigger a forfeiture proceeding.[137] While state forfeiture statutes generally follow the same basic pattern as that of federal forfeiture, there are some differences.

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122 7 U.S.C. § 2024(e), (f) (2006).

123 15 U.S.C. § 715f (2006).

124 16 U.S.C. § 470(b) (2006).

125 *Id.* § 916(g).

126 *Id.* §§ 957(g), 1860, 3606, 3637, 5010(c), 5106(g), 5154(c)(2), 5509, 5606(d).

127 *Id.* § 1171(b).

128 *Id.* § 1376.

129 *Id.* § 1540; 22 U.S.C. § 1978(e)(2) (2006).

130 16 U.S.C. § 3374 (2006).

131 17 U.S.C. § 506(b) (2006).

132 19 U.S.C. §§ 1462, 1466(a), 1497(a)(1), 1592(c)(11), 1594(b), 2609 (2006); 22 U.S.C. § 401 (2006).

133 21 U.S.C. §§ 853(a), 881 (2006).

134 26 U.S.C. § 5872 (2006).

135 *Id.* § 7302.

136 *See generally* ARIZ. REV. STAT. ANN. § 13-3105 (2011) (where deadly weapons are subject to forfeiture when used in commission of a violent crime). *See also* PORTLAND, OR. CODE § 14B.50.010(C) (2011) (where a motor vehicle used to commit prostitution is subject to forfeiture).

137 *See generally* ARIZ. REV. STAT. ANN. § 13-3105 (2011).

Every state has enacted asset forfeiture statutes,[138] as have the District of Columbia and United States territories.[139] Specific offenses authorizing forfeiture vary, although a large number of states focus on drug crimes as grounds for forfeiture.[140] Additionally, some jurisdictions have city-level forfeiture laws. Compared to state statutes authorizing forfeiture, city codes tend to address a very small number of crimes that can give rise to such a forfeiture action. For example, Portland, Oregon allows the forfeiture of vehicles when the vehicle owner drives while intoxicated,[141] the forfeiture of property involved in prostitution,[142] and the forfeiture of property involved in gambling.[143] In contrast, the State of Oregon provides for the forfeiture of controlled substances;[144] of equipment or products involved in any felonies or certain misdemeanors;[145] of property used to contain controlled substances;[146]

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138 *E.g.*, ALA. CODE § 20-2-93 (2011); ALASKA STAT. § 11.46.487 (2011); ARIZ. REV. STAT. ANN. § 13-4304 (2011); ARK. CODE ANN. § 5-64-505 (2011); CAL. PENAL CODE § 186.3 (West 2011); COLO. REV. STAT. § 16-13-504 (2011); CONN. GEN. STAT. § 54-36H (2011); DEL. CODE ANN. tit. 16, § 4784 (2011); FLA. STAT. § 932.703 (2011); GA. CODE ANN. § 16-13-49 (2011); HAW. REV. STAT. § 712A-5 (2011); IDAHO CODE ANN. § 37-2802 (2011); 56 ILL. COMP. STAT. 570/405 (2011); IND. CODE § 34-24-2-2 (2011); IOWA CODE § 809A.4 (2011); KAN. STAT. ANN. § 60-4104 (2011); KY. REV. STAT. ANN. § 218A.410 (West 2011); LA. REV. STAT. ANN. § 40-2604 (2011); ME. REV. STAT. tit. 15, § 5821 (2011); MD. CODE ANN., CRIM. PROC. § 12-102 (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 94C, § 47 (West 2011); MICH. COMP. LAWS § 333.7521 (2011); MINN. STAT. § 609.531 (2011); MISS. CODE ANN. § 41-29-153 (2011); MO. REV. STAT. § 513.607 (2011); MONT. CODE ANN. § 44-12-102 (2011); NEB. REV. STAT. § 28-431 (2011); NEV. REV. STAT. § 453.301 (2011); N.H. REV. STAT. ANN. § 318-B:17-b (2011); N.J. STAT. ANN. § 2C:64-1 (West 2011); N.M. STAT. ANN. § 30-45-7 (2011); N.Y. C.P.L.R. § 1311 (McKinney 2011); N.C. GEN. STAT. § 90-112 (2011); N.D. CENT. CODE § 19-03.1-36 (2011); OHIO REV. CODE ANN. § 2981.02 (LexisNexis 2011); OKLA. STAT. tit. 63, § 2-503 (2011); OR. REV. STAT. § 131.558 (2011); 42 PA. CONS. STAT. § 6801 (2011); R.I. GEN. LAWS § 21-28-5.04.2 (2011); S.C. CODE ANN. § 44-53-520 (2011); S.D. CODIFIED LAWS § 34-20B-70 (2011); TENN. CODE ANN. § 53-11-451 (2011); TEX. CODE CRIM. PROC. ANN. art. 59.02 (West 2011); UTAH CODE ANN. § 58-37-13 (2011); VT. STAT. ANN. tit. 18, § 4241 (2011); VA. CODE ANN. § 19.2-386.22 (2011); WASH. REV. CODE § 10.105.010 (2011); W. VA. CODE § 60A-7-703 (2011); WIS. STAT. § 961.55 (2011); WYO. STAT. ANN. § 35-7-1049 (2011). Note that the previous selections are exemplary only. This is not an exhaustive list because many states, like the federal government, have forfeiture provisions in many locations throughout their respective codes.

139 D.C. CODE § 22-2723 (2011); AM. SAMOA CODE ANN. § 46.4905 (2011); 9 GUAM CODE ANN. § 67.502.1 (2011); P.R. LAWS ANN. tit. 24, § 2512 (2011); V.I. CODE ANN. tit. 19, § 623 (2011). Note that the territories, including the Northern Mariana Islands, have explicit federal authority to engage in forfeiture. 49 U.S.C. § 80303 (2006).

140 *See generally* MICH. COMP. LAWS § 333.7521 (2011); N.H. REV. STAT. ANN. § 318-B:17-b (2011); N.J. STAT. ANN. § 2C:64-1 (2011).

141 PORTLAND, OR. CODE § 14B.50.010(B) (2011).

142 *Id.* § 14B.50.030.

143 *Id.* § 14B.50.040.

144 OR. REV. STAT. § 131.558(1) (2011).

145 *Id.* §§ 131.550(13), 131.558(2).

146 *Id.* § 131.558(3).

of aircraft, vehicles, or ships used to transport controlled substances;[147] of books, records, computers and research used to commit felonies and certain misdemeanors;[148] of proceeds from felonies and certain misdemeanors;[149] of real property used to facilitate felonies or certain misdemeanors;[150] of weapons involved in criminal activity;[151] of property used in attempted crimes, used in solicitation to commit a crime, or used in conspiracies to commit crime;[152] or of personal property used to commit a felony or certain misdemeanors.[153] Perhaps because of the breadth of crimes addressed by state statutes, city forfeiture provisions tend to cover a smaller amount of crimes.

State and city governments have statutes that allow asset forfeitures. Criminal conduct that can give rise to forfeitures at state and city levels is as diverse, if not more so, than the range of conduct that can give rise to a forfeiture action at the federal level.

Modern forfeiture emerged from a long history of condemning property involved in a crime.[154] Forfeiture was incorporated into United States common law, and it was later codified at both federal and state levels.[155] The peculiarity of this process has not gone unnoticed by legal commentators. Accordingly, many myths regarding forfeiture have arisen.

III. The Myths About Forfeiture

"Incredible as it sounds, civil asset forfeiture laws allow the government to seize property without charging anyone with a crime."[156]

Asset forfeiture—in particular, civil forfeiture—has generated a number of critics. Some objections to forfeiture include: (1) the government can take property without proving that the property owner did anything wrong; (2) forfeiture is a way for greedy government officers to take property from the innocent; (3) a person whose property is taken bears the burden of proving that the property is not subject to forfeiture; (4) forfeiture is unconstitutional; (5) rising state proceeds from forfeitures are an indication of government corruption and misplaced priorities; (6) forfeiture is unjust because it requires that someone get

147 *Id.* § 131.558(4).
148 *Id.* §§ 131.550(12), 131.558(5).
149 *Id.* §§ 131.550(12), 131.558(6).
150 *Id.* §§ 131.550(12), 131.558(7).
151 *Id.* § 131.558(8).
152 *Id.* § 131.558(9).
153 *Id.* §§ 131.550(12), 131.558(10).
154 *See* discussion *infra* Part II.A.
155 *See* discussion *infra* Part II.B.
156 *Why Do We FEAR Asset Forfeiture?*, Forfeiture Endangers Am. Rights, http://www.fear.org (last visited Jan. 12, 2013).

an attorney to protect his or her assets; and (7) the government can virtually take any person's money—because any narcotics canine will alert to any currency because all money is contaminated with cocaine.[157] Each of these objections is either fully or partially in error.

A. Myth # 1: The Government Can Take Your Property without Proving You Committed a Crime

This objection centers on the forfeiture of property belonging to a person who has not been criminally convicted.[158] Proponents of this position focus on civil forfeiture, and they frequently do not object to criminal forfeiture. For example, the Institute for Justice, a strong anti-forfeiture advocate, drafted model state forfeiture legislation that would abrogate civil forfeiture but would authorize criminal forfeiture.[159] This objection's primary concern is that without any evidence of wrongdoing, American citizens are being deprived of their possessions. However, such an argument is actually a problem with perception. The assumption underlying the objection is that a criminal conviction connotes *actual* guilt.

In an era where sensational murders are highly publicized and where a defendant's guilt is decided by the general public well before a jury is asked to decide it, many people may argue that a criminal trial's result has little to do with the defendant's actual guilt.[160] Rather, a verdict in a criminal trial depends on whether the state has satisfied its burden[161] and acted properly

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157 Radley Balko, *The Forfeiture Racket*, REASON (February 2010), http://reason.com/archives/2010/01/26/the-forfeiture-racket/singlepage.

158 *See generally* Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 87 (2001) ("Civil forfeiture practices drew sharp criticism because they did not contain basic safeguards required in criminal cases, thereby placing ordinary citizens at substantial risk for the loss of their property without any evidence of criminal wrongdoing.").

159 ASSET FORFEITURE: MODEL STATE LAW, INST. FOR JUST. § 100.04 (April 19, 2011), http://www.ij.org/images/pdf_folder/legislative/ijmodelassetforfeiturelaw.pdf (authorizing criminal forfeitures); *Id.* § 100.06 ("There is no civil asset forfeiture.").

160 *See* Wayne J. Pitts, et al., *The Legacy of the O.J. Simpson Trial*, 10 LOY. J. PUB. INT. L. 199, 200 (2009) (O.J. Simpson was the defendant in a highly publicized case where the public generally believed that he was guilty; however, he was found innocent in his criminal trial); Ashley Hayes, *Casey Anthony Not Guilty of Murder, Other Charges in Daughter's Death*, CNN JUSTICE (July 5, 2011), http://articles.cnn.com/2011-07-05/justice/florida.casey.anthony.trial_1_george-and-cindy-anthony-caylee-marie-anthony-defense-team?_s=PM:CRIME (where there was a general public outcry when Casey Anthony was found not guilty because there was strong public sentiment that she had committed the crime).

161 *In re* Winship, 397 U.S. 358, 361 (1970) (requiring "proof beyond a reasonable doubt" for a guilty verdict).

throughout the investigation.[162] Because protection of criminal defendants is founded on the premise that it is "[b]etter that [ten] guilty men go free than that one innocent man be punished,"[163] it is possible a guilty person may not be criminally convicted. There is no such corresponding belief regarding property—because no fear of imprisoning "guilty" property exists. Thus, a valid civil forfeiture can still occur when the defendant-owner of the property was found not guilty.

An argument that forfeiture is unjust if a criminal conviction is not obtained is an effort to transfer the criminal protections surrounding personal liberty to the protection of the owner's property. However, criminal protections are separate from those the law applies to property in the civil realm. A classic example of this separation occurred with O.J. Simpson.[164] After being found not guilty in a criminal trial, O.J. Simpson was later found guilty and liable in a subsequent civil suit.[165] The jury in the civil case awarded a judgment of $33.8 million against Simpson—despite Simpson not being *criminally* liable.[166] Forfeiture is no different. The absence of a criminal conviction does not mean the owner of the property was completely innocent, nor does it mean that the state failed to prove the owner's guilt. It simply means that the state did not, or was not able to, meet the very high standard of proof required for a criminal conviction.[167]

Nonetheless, the government must still prove its case. The state always has an initial burden of proving that criminal conduct occurred.[168] Thus, civil forfeitures require that the state convict the property owner, just not exclusively through a criminal conviction. If the state fails to do so, the property cannot be forfeited. The earlier example of Mr. Lindsay serves as a perfect illustration. Even though Mr. Lindsay was clearly involved in illegal drug trafficking, the court correctly denied the state's application for forfeiture.[169] This is not because Mr. Lindsay was innocent of the crime, but because the state failed to

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[162] *See generally* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring the suppression of defendant's statements during custodial interrogation unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

[163] *In re* Dean, 90 Cal. Rptr. 473, 474 (Cal. Ct. App. 1970).

[164] Pitts, *supra* note 160, at 200–01.

[165] *Id.*

[166] *Id.* at 200.

[167] *In re* Winship, 397 U.S. 358, 361 (1970).

[168] 18 U.S.C. § 983(c)(1) (2006) ("[T]he burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.").

[169] *See* State's Application at 3, *In re* $274,730.00, No. CV 2005-002399 (Maricopa Cnty Super. Ct. March 6, 2007).

meet the required burden of proof.[170] Therefore, the government does not automatically retain forfeited assets once they are seized.

B. Myth # 2: Forfeiture is Just a Way for Greedy Government Officials to Steal Money from the Innocent

Another common concern is that forfeiture incentivizes states to initiate forfeiture actions solely because of governmental avarice.[171] The fear is that if police see dollar signs, they will seize property solely to line their coffers, rather than to seek justice. This in turn means that law enforcement will often seek out property and ignore the duty to control crime.

A major problem with this objection is that it assumes forfeiture does nothing to combat underlying criminal conduct. However, that is not the case—forfeiture is a powerful weapon against crime. It is a mechanism capable of many things, including: harming criminal organizations; eliminating the means to engage in crime; de-incentivizing criminal activity by removing its proceeds; funding other law enforcement activities; and offering compensation to crime victims.[172] Because forfeiture has an effect on crime, it is an error to believe that the use of forfeiture does *nothing but* fuel greed. Even if greed does underscore an agency's choice to initiate forfeiture, the forfeiture action still has a positive effect on criminal activity.

It is appropriate for one to fear that greed within the system will lead to corrupt practices. However, the forfeiture process already contains checks to prevent greed. In any federal civil forfeiture proceeding, the government must prove "by a preponderance of the evidence, that the property is subject to forfeiture" before property can be forfeited.[173] Additionally, innocent property owners are entitled to the return of their property.[174] Administrative forfeitures must satisfy due process requirements and federal seizing agencies must report to the Committees on the Judiciary of the House of Representatives and the Senate.[175] Forfeitures are not conducted behind closed doors without indepen-

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[170] *Id.*

[171] *E.g.*, Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1635 (2002) ("Giving law enforcement agencies a financial interest in civil asset forfeiture is problematic because it may shift law enforcement objectives to maximizing forfeiture proceeds rather than deterring crime."); Joseph Cramer, *Civilizing Criminal Sanctions - A Practical Analysis of Civil Asset Forfeiture under the West Virginia Contraband Forfeiture Act*, 112 W. VA. L. REV. 991, 1016 (2010) ("This monetary incentive has the potential to encourage agencies to investigate and pursue individuals based on the amount of property they possess rather than on the threat they pose to public safety.").

[172] *See* discussion *infra* Part IV.

[173] 18 U.S.C. § 983(c)(1) (2006).

[174] *Id.* § 983(d)(1).

[175] *Id.* § 983(a)(1)(E).

dent review. This system of checks and balances helps prevent corruption and greed.

If there are appropriate checks on the government to prevent the arbitrary taking of property from both the innocent and criminal, then any corruption existing in the system is a reflection of something outside the forfeiture process and not a function of the forfeiture process itself. Corruption occasionally happens—but is not caused by forfeiture. For example, imagine that an agency is staffed by conspirators who oppress the populace and take what they want by threatening arrest or physical force. In the meanwhile, judges and legislators look the other way, despite a duty to stop such unlawful force. Such a hypothetical does not demonstrate that the American justice system is problematic; rather, it demonstrates that unchecked corruption is problematic.

If greed motivates the use of forfeiture and forfeiture has a positive effect on reducing criminal activity, then no problem exists so long as the forfeiture process has a mechanism to protect against corruption. If no such checks and balances exist, then there is a severe problem. However, the federal government, like most state governments, requires that before any forfeiture order is issued, the state must prove the forfeited property is related to criminal activity. Additional checks, such as independent oversight, could prevent forfeiture from being nothing more than a way for the government to pillage the innocent.

C. Myth # 3: Statistics Indicating Rising State Incomes from Forfeiture Demonstrates Government Corruption

Another concern is that increases in forfeited assets may indicate the government is more interested in acquiring wealth than in dispensing justice.[176] The amount of money seized by state agencies is often available through Freedom of Information Requests or through other public resources.[177] Opponents of forfeiture believe that state income rising as a result of increased use of forfeiture indicates that the state is driven only by greed.[178] However, such a perception has a flawed logic. The objection assumes that only greedy people increase income (i.e., a person is greedy, therefore the person will increase his income). However, it is incorrect to conclude that because greedy people seek

[176] *E.g.*, HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 32 (1995) (listing an increase in cash and property seized by Michigan law enforcement as one of many indications of corruption by the police).

[177] *AFP Freedom of Information Act,* U.S. DEP'T JUSTICE, http://www.justice.gov/jmd/afp/03foiainfo/index.htm (last updated Jan. 2013).

[178] MARIAN R. WILLIAMS, ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 11 (2010) ("Such growth in the amount of forfeiture is the result of governmental officials responding to incentives. All people work to better their position. Just as private citizens are motivated by self-interest, so too does it motivate government officials.").

to increase their incomes, *only* greedy people see their incomes increase. Likewise, it is incorrect to conclude that because the government has seen an increase in income, the government is driven by greed. Such an approach ignores the possibility that other motivating factors (besides greed) may contribute to the increased revenue generated by forfeiture. For example, increased revenue may simply reflect the state's desire to utilize an effective tool against crime.

Thus, the assumption that the government's effective use of forfeiture is driven only by greed is flawed. Although greed is a common trait among humans, it is inappropriate to assume that law enforcement agencies lack an equally compelling desire to catch and stop criminals. Rising state incomes from forfeiture may merely be a reflection of the efficacy of state practices.

D. Myth # 4: The Forfeiture Claimant Must Prove a Negative Because He Bears the Burden of Proving that the Property is Not Subject to Forfeiture

Another frequently cited problem is that the forfeiture "victim," which in this context generally signifies someone whose property was seized for forfeiture as opposed to someone who was injured by the conduct underlying the forfeiture,[179] bears the initial burden of proving that the property is not subject to forfeiture.[180] The justification for such a burden is that the government can seize property and it is incumbent on the property owner to prove why the property should be returned.

Although not entirely correct today, this myth was pragmatically true in the past. Accordingly, this is one area where anti-forfeiture advocates deserve credit for creating positive change. Prior to the enactment of the Civil Asset Forfeiture Reform Act ("CAFRA"), the government was required to show probable cause that governmentally-seized property was subject to forfeiture.[181] Upon such a showing, the burden shifted to claimants and required proof by a preponderance of the evidence that the property was not subject to forfeiture.[182]

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[179] *E.g.*, *Why Do We FEAR Asset Forfeiture?*, *supra* note 156 (this website consistently refers to persons whose property has been forfeited as "victims," including a page for "Victim Stories" about allegedly unjust forfeitures by the government).

[180] *E.g.*, United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting) ("[T]he current allocation of burdens and standards of proof requires that the claimant prove a negative, that the property was not used in or to facilitate illegal activity, while the government must prove almost nothing.").

[181] *See* One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986).

[182] *See id.* at 761; United States v. One 1974 Porsche 911-S, 682 F.2d 283, 285 (1st Cir. 1982); United States v. One 1977 Lincoln Mark v. Coupe, 643 F.2d 154, 156 (3d Cir. 1981).

The problem with this standard was that because probable cause is such a low burden of proof, it was very easy for a state to make its case. The burden almost automatically shifted to the claimant to prove—by a much higher standard—that his property was not subject to forfeiture. Therefore, the state was able to effectively take property from the public and force the claimant to prove the property was wrongfully forfeited. From the onset, in customs actions, the plaintiff carries the burden to prove the property is not subject to forfeiture.[183]

In 2000, led largely by the efforts of Representative Henry Hyde, Congress enacted the CAFRA.[184] CAFRA made a number of changes to the federal forfeiture scheme, including a change in the burden of proof. Under CAFRA, the government bears the initial burden of proving its case by a preponderance of the evidence; CAFRA thereby abrogated the old rule that required the state to only make a showing of probable cause.[185]

Some jurisdictions require the state to prove beyond a reasonable doubt that the property is subject to forfeiture,[186] while a minority of states only requires a showing of probable cause.[187] In a contested action, a state should have to use the preponderance standard when proving that the property is subject to forfeiture. This is the same requirement as in other civil settings, like a tort cause of action.[188] On this point, anti-forfeiture advocates deserve credit for inspiring an appropriate check on the federal government; however, state level forfeiture still needs more change.

E. Myth # 5: Forfeiture is Unconstitutional

Another concern is that forfeiture is inherently unconstitutional. There are a number of different constitutional objections to forfeiture. For example, critics argue that forfeiture violates the Fourth Amendment prohibition against unreasonable searches and seizures,[189] the Fifth Amendment Due Process

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183 19 U.S.C. § 1615 (2006).

184 Moores, *supra* note 1, at 782. Representative Hyde believed that forfeiture was unjust (and he had published a book about the perceived inequities of civil forfeiture). *See generally*, HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS (1995).

185 18 U.S.C. § 983(c)(1) (2006).

186 Zachary Townsend, *The Drug Asset Forfeiture Procedure Act is Inconsistent with the Proportionate Penalties Clause of the Illinois Constitution*, J. DUPAGE COUNTY BAR ASSOC., July 2010, at 44.

187 *Id.*

188 86 C.J.S. Torts § 112 (2011).

189 William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CALIF. L. REV. 1309 (1992).

Clause,[190] the Fifth Amendment prohibition against self-incrimination,[191] the Sixth Amendment right to counsel,[192] and the Eighth Amendment prohibition against excessive fines.[193]

Although some of these issues remain unresolved, the United States Supreme Court has made some noteworthy rulings regarding the constitutionality of forfeiture. The question of excessive fines is of particular concern to this Article. First, both civil and criminal forfeiture are subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment.[194] The Excessive Fines Clause provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[195] Forfeiture is considered punitive, rather than remedial.[196] A court must therefore determine whether the forfeited property is excessive in relation to the crime.[197] This determination is particularly important when property has allegedly been used to facilitate a criminal offense.[198] Some courts have held that property sought for forfeiture, like proceeds, can never be excessive because proceeds represent the direct profit of criminal activity—profits the criminal should never have had in the first place.[199] Other courts have held that forfeiture of proceeds can be excessive.[200] In any event, the requirement that a court analyze whether a forfeiture is excessive places an additional important check on the government and prevents government agencies from seizing significant assets related to a single minor crime.

It would likely require a full article, or more, to properly address all the potential constitutional issues related to the forfeiture process. For this Article, it suffices to say that case law involving constitutional challenges establishes additional limitations on the forfeiture process. Still, no legal challenges have resulted in a flat ban of forfeiture.

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190 Stacey Levin, *Forfeiture of Attorneys' Fees in RICO and CCE Cases: A Denial of Due Process and the Right to Choice of Counsel*, 74 IOWA L. REV. 249 (1988).

191 Christine M. Durkin, *Civil Forfeiture under Federal Narcotics Law: The Impact of the Shifting Burden of Proof Upon the Fifth Amendment Privilege Against Self Incrimination*, 24 SUFFOLK U. L. REV. 679 (1990).

192 Todd Barnet, *Trampling on the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 OHIO N.U.L. REV. 1 (1995).

193 Michele M. Jochner, *The Unjustified Expansion of the Double Jeopardy Doctrine to Civil Asset Forfeiture Proceedings*, 84 ILL. B.J. 70 (1996).

194 Austin v. United States, 509 U.S. 602, 622 (1993).

195 U.S. CONST. amend. VIII.

196 *Austin*, 509 U.S. at 621-22.

197 *Id.* at 622-23.

198 *See* United States v. Bajakajian, 524 U.S. 321, 333 (1998).

199 *E.g.*, United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005); United States v. 22 Santa Barbara Drive, 264 F.3d 860, 874-75 (9th Cir. 2001).

200 *E.g.*, United States v. Jalaram, Inc., 599 F.3d 347, 358 (4th Cir. 2010).

F. Myth # 6: Forfeiture is Unjust Because It Requires that the Innocent Retain an Attorney

Another common concern is that forfeiture is unjust because it requires claimants to procure an attorney in order to get their property back.[201] The reasoning underlying this objection is that because forfeiture actions are complex and because criminal defendants are entitled to counsel as a matter of course, claimants should be granted counsel when seeking the return of their property. The major problem with this reasoning is that (much like the belief that the government can seize property without proving any underlying criminal conduct)[202] it confuses the purpose for heightened protections afforded defendants in *criminal* cases. The Constitution requires the government provide counsel to indigent defendants indicted for a criminal offense[203] because without the aid of counsel, an innocent person lacking an understanding of the law risks losing his or her freedom.

However, the principle supporting the appointment of counsel for criminal defendants does not translate to property. After all, if it did, the government would be required to provide counsel for indigent defendants in any action. For example, if one man sues his neighbor in an adverse possession action, even though the neighbor risks losing his property the court will not appoint him an attorney. If the neighbor says nothing before the court, arguably because he cannot afford an attorney and lacks an understanding of the law, a default judgment may be entered against him. The neighbor is not granted a state-appointed attorney even if he is indigent. Conversely, federal forfeiture provides indigent defendants greater protections than exist in other settings. If a correlate criminal action exists, a court can appoint a criminal defendant's attorney to also represent the defendant in a civil forfeiture proceeding.[204] This phenomenon does not occur in other legal situations. For example, if a man is indicted for murder and has been appointed counsel, a court would generally not appoint the attorney to also represent the defendant in a wrongful death action arising from the same murder.

Further, the practical effect of a default order in other situations is often far more severe than a default order in a forfeiture proceeding. In a civil case, if a defendant fails to respond, an entry of a default order establishes liability.[205] At that point, damages are either proven at a hearing or by showing that the amount of damages can be ascertainable from definite figures or is susceptible

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[201] *E.g.*, Rulli, *supra* note 158, at 88 ("[T]here must be access to competent legal help at all stages of forfeiture proceedings, especially for those who cannot afford an attorney.").

[202] *See* discussion *supra* Part III.A.

[203] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

[204] 18 U.S.C. § 983(b)(1)(A) (2006).

[205] United States v. Di Mucci, 879 F.2d 1488, 1497 (7th Cir. 1989).

to mathematical computation.[206] Because most forfeiture actions are *in rem*, the exemplary civil counterpart is a case with definitive damages. A forfeiture case's equivalent in other civil settings requires that the defendant remain silent for entry of default. But in a forfeiture proceeding—even if the property owner says nothing—the state must still prove by a preponderance of the evidence that the property is subject to forfeiture.[207] Accordingly, federal forfeiture procedure places a much greater burden on the state than on any other actor in an equivalent type of case.

While potentially legitimate, concerns that forfeiture may require an innocent person to retain an attorney are not concerns exclusive to forfeitures, but to the entire judicial system. To the extent that a defendant must seek out counsel due to the complexity of the legal system, there may be some injustice. However, this is not a problem unique to forfeiture.

G. Myth # 7: Because All Money is Contaminated with Cocaine, Forfeiture Allows Police to Take Money from Anyone Without Having to Demonstrate Criminal Activity

Another major concern is that in alleged situations involving drug trafficking or money laundering related to drug trafficking, the government would rely on a narcotics canine alert to suspicious currency in order to connect the money to drugs. Because studies have indicated that as much as ninety percent of all currency is tainted with cocaine, all money potentially could be considered suspicious—thus, the government could effectively take any person's money simply by its virtue of being in circulation.[208]

Although it is true that a large percentage of currency in circulation is contaminated with cocaine,[209] narcotic canines alerting to cocaine-tainted currency are not alerting to the cocaine itself. Rather, the canines are alerting to an ephemeral by-product of street-grade cocaine called methyl benzoate.[210] While cocaine molecules can adhere for extended periods of time to currency, methyl benzoate deteriorates rapidly and loses approximately ninety percent of its

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206 *Id.*

207 18 U.S.C. § 983(c)(1) (2006). If the owner is successful in a federal case, like any other civil case, he may recoup litigation expenses from the government. 28 U.S.C. § 2465(b)(1) (2006).

208 *See* Andy G. Rickman, *Currency Contamination and Drug-Sniffing Canines: Should Any Evidentiary Value be Attached to a Dog's Alert on Cash?*, 85 KY. L.J. 199 (1997).

209 *E.g.*, Adam Negrusz et al., *Detection of Cocaine on Various Denominations of United States Currency*, 43 J. FORENSIC SCI. 303, 626–29 (1998) (finding cocaine in amounts up to 10 micrograms per bill on randomly selected bills that had been drawn from general circulation).

210 K.G. Furton et al., *Odor Signature of Cocaine Analyzed by GC/MS and Threshold Levels of Detection for Drug Detection Canines*, 2 CURRENT TOPIC FORENSIC SCI. 329 (1997).

potency within 120 minutes.[211] This fact is significant because a canine's alert to currency suggests that the currency was recently near drugs; thus, the issue of whether the money was in contact with drugs at some unascertainable time in the past is irrelevant.

Anti-forfeiture advocates promote a number of myths about forfeiture. A small number of the common objections are rooted in fact, and occasionally forfeiture—like any other process in the legal system—needs revision. However, complaints about forfeiture tend to be erroneous. The forfeiture process encompasses checks and balances to ensure that the government does not seize the property of innocents. Further, it is difficult to ignore all of the benefits that forfeiture provides.

IV. WHY FORFEITURE IS SUCH AN IMPORTANT TOOL FOR LAW ENFORCEMENT

"Asset forfeiture has the power to disrupt or dismantle criminal organizations that would continue to function if we only convicted and incarcerated specific individuals."[212]

The use of forfeiture has a number of benefits that also supplement existing crime control tools. For example, by removing proceeds of crime, forfeiture allows a state to de-incentive crime; forfeiture removes the means by which criminals carry out criminal activity; forfeiture provides compensation to victims of criminal activity; and forfeiture provides a way to fund law enforcement for the benefit of taxpayers.

A. The Risk of Forfeiture De-Incentivizes Crime

One of the major societal benefits of asset forfeiture is that it removes the incentive underlying a large amount of criminal activity. Many crimes are committed with the goal of obtaining profit. Forfeiture targets that goal in a way that criminal conviction sometimes cannot. For example, imagine a transaction in which a person is paid to transport drugs to a buyer and then to transport the payment back to the seller. If the police intercept the courier while he is delivering money back to the seller and the state can prove that the courier is money laundering, then the courier may likely be incarcerated. But, if the money, which does not belong to the courier, is not taken by the state, then little is done to the criminal organization itself. It is irrelevant to a high-level drug dealer if a low-level courier is sent to prison. However, if the drug pay-

[211] *Id.* at 332.

[212] *Asset Forfeiture Program*, U.S. DEP'T JUST., http://www.justice.gov/jmd/afp/index.html (last updated Jan. 2013).

ments were seized and forfeited by the state, the whole purpose of the organization would be thwarted and the criminal enterprise would be injured.

As the threat of forfeiture becomes more pervasive, the ability to profit from crime declines. Because profit is often related to the purpose for committing crime, attacking the profit component of criminal activity is an assault on the criminal enterprise itself. This assault can be used in conjunction with criminal convictions of individual criminals.

B. Forfeiture Eliminates the Ability to Engage in Crime

In addition to eliminating the proceeds of crime, forfeiture also targets property that is used in facilitating crime. By taking away the tools necessary to carry out illegal activity, forfeiture makes it very difficult for criminals to carry on their trade. There are a number of examples of the efficacy of this approach. In reacting to a surge in fatalities related to illegal street races, the city of San Diego, California, enacted an ordinance allowing the forfeiture of a vehicle used in street racing.[213] To combat the street racing, the city previously attempted to increase arrests and prosecutions, to provide negative press coverage, and to offer legal races at a local stadium.[214] The enactment of the forfeiture ordinance had more of an impact on illegal street racing than did the other methods, combined.[215] Similarly, the city of Portland, Oregon, enacted an ordinance allowing for the forfeiture of drunk drivers' vehicles.[216] Data compiled over a five-year span revealed that the owners of vehicles subjected to forfeiture were only half as likely to be rearrested than those owners whose vehicles had not been forfeited.[217]

Taking away the mechanism through which a criminal commits an offense reduces the likelihood that he is capable or willing to re-engage in such an offense. There are a number of studies across the nation supporting this assertion, including those of San Diego and Portland.

C. Forfeiture Provides a Mechanism to Help Victims

Another important feature of forfeiture is its ability to immediately compensate crime victims.[218] In an ordinary criminal proceeding, victims are left

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213 SAN DIEGO, CAL., MUNICIPAL CODE §§ 52.5301, 52.5303 (2011).

214 JOHN L. WORRALL, *Asset Forfeiture, in* PROBLEM-ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES 23 (2008).

215 *Id.*

216 PORTLAND, OR. CODE § 14B.50.010(B) (2011).

217 Ian Crosby, *Portland's Asset Forfeiture Program: The Effectiveness of Vehicle Seizure in Reducing Rearrest Among "Problem" Drunk Drivers*, NAT'L CRIM. JUST. REFERENCE SERVICE, https://www.ncjrs.gov/policing/por673.htm (last visited Jan. 12, 2013).

218 *See* discussion *supra* Part II.C.

with restitution as a means of recovering losses.[219] If the criminal defendant is indigent and incarcerated, victims are unlikely to recover their losses for quite some time, if at all. However, if the defendant has forfeitable assets, a victim is guaranteed immediate recovery at least to the extent of those assets. Although assets are usually insufficient to completely compensate a victim's injuries, forfeiture provides victims with something beyond a vague promise that at some point in the future a criminal may pay back restitution.

D. Forfeiture Helps Fund the Fight Against Crime

Finally, forfeiture helps fund the fight against crime. Because a state can utilize forfeited assets that are not relinquished to victims, forfeiture can support other crime control activities (e.g., aiding in the purchase of equipment for police officers). This all benefits taxpayers because the forfeited assets themselves come from crime.

V. CONCLUSION

Even though asset forfeiture has some strong opponents, forfeiture provides a necessary tool in the fight against crime. Despite the many myths spread by anti-forfeiture advocates, forfeiture has a number of checks that prevent law enforcement agencies from getting carried away by greed. Forfeiture removes the means and profits of criminal activity, compensates victims, and offers a way to fund law enforcement. Accordingly, society should stop being afraid of forfeiture and instead support it.

[219] *See* 18 U.S.C. § 3663 (2006).

MAKING "PRACTICE READY" PRACTICE READY: ARIZONA'S ATTEMPT TO STREAMLINE THE FINAL PROCESS FOR ADMISSION TO THE BAR

Jason Forcier*

I. INTRODUCTION

Beginning with the first of the year, 2013 brings with it a number of rule changes from the Supreme Court of Arizona. Most notably is the change to Rule 34, Application for Admission.[1] The rule change is the result of an initiative from each of the deans of Arizona's three law schools: Phoenix School of Law, University of Arizona, and Arizona State University.[2] The new change will provide many beneficial results: it will allow students to start transitioning from the theory of law to the practice of law; lead to a fundamental change in the structure of the current legal education model; allow students to graduate "practice ready;" ensure a better, more learned, and practiced attorney; provide the public-at-large better trained and better equipped attorneys; and ease the financial burden of new attorneys by allowing employers to hire new attorneys closer to their graduation date.

Prior to the rule change, Arizona—like most states—only allowed graduates of law schools to take the state bar exam.[3] However, under Arizona's new rule change law students in their final semester may now be certified to take the Arizona bar exam, so long as the student meets certain qualifications and is within 120 days of graduation.[4]

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[1] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf.

[2] Petition to Amend Arizona Supreme Court Rule 34 (Jan. 4, 2012), http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1152290871.pdf; *see also Court Rules Forum*, ARIZ. SUPREME CT., http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/1618/view/topic/Default.aspx (last visited Jan. 21, 2013).

[3] *See* NAT'L CONF. BAR EXAMINERS & AM. BAR ASS'N SEC. LEGAL EDUC. & ADMISSIONS TO THE B., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012 vii (2012), http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf [hereinafter COMPREHENSIVE GUIDE TO BAR ADMISSION].

[4] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf.

Although Arizona's change is not unprecedented,[5] it is potentially revolutionary in its effect upon law students' approach to their legal education and graduation. A handful of other states do have provisions to take their respective bar exams early, but those exceptions are extremely limited and do not allow for a designed program of mass application to the early examination exception.[6] Rule 34 effectively allows Arizona's law schools to create a certification program that students may voluntarily participate in. To take the bar exam early, his or her school must certify that the student: (1) is expected to graduate within 120 days of the examination, (2) is in good standing, (3) has satisfied all graduation requirements, except for no more than eight outstanding semester hours at the time of the examination, (4) is not enrolled in more than two semester hours prior to the examination, and (5) the student's school has determined he or she is academically prepared for the examination.[7]

II. The Rule in Context

Arizona will be joining eight other states in offering the bar exam to students during their final semester.[8] What makes Arizona's rule different from other states allowing early testing is the number of law students able to take advantage of the rule change.

The first part of Arizona's rule change employs language allowing any law student to take the bar exam early, so long as they graduate within 120 days of the exam.[9] The primary result of the rule change allows students who graduate in May to qualify to take the February bar exam.[10] The rule change could also allow students who complete their degree requirements during the summer to

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[5] Comprehensive Guide to Bar Admission, *supra* note 3, at 1.

[6] *Id.* at 3.

[7] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf.

[8] *See* Comprehensive Guide to Bar Admission, *supra* note 3, at 3. Indiana applicants within 100 days of graduation and with fewer than five credit hours remaining for their degree may take the bar exam. *Id.* Texas applicants must be within four semester hours of graduation to take the bar exam. *Id.* Iowa requires applicants to receive their degree within forty-five days of taking the bar exam. *Id.* Kansas and North Carolina allow students to take the bar exam within thirty days of graduation. *Id.* Mississippi, Nebraska, and Wisconsin all allow students to take the bar exam within sixty days of graduation. *Id.* However, graduates of Wisconsin law schools are not required to take the state's bar exam to join the Wisconsin Bar. Wis. Sup. Ct. R. 40.03.

[9] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf. The rule requires ABA approved or conditionally approved law schools to certify that the eligible student is expected to graduate within 120 days of the exam. *Id.*

[10] *See id.*

qualify for the July bar exam, so long as the school confers the degree within the 120-day limitation.[11]

The second part of the rule change limits the course of study during the final semester to no more than ten hours.[12] Students are limited to no more than two semester hours of course study during the month of the exam and the month prior to the bar exam, and no more than eight hours following the bar exam.[13] The course credit limitation permits students to set a realistic class schedule, yet balances the need for bar preparation with completion of necessary credit hours for graduation.

Although the idea is not original, Arizona's changes are rather unique by allowing the longest pre-graduation period in which law students may take the bar exam, and the greatest amount of unearned credit hours necessary for graduation. As a result, the rule change has a more dramatic affect upon Arizona law students and how they will approach their studies than has been seen in other early exam states. Courses for early bar takers following the bar exam will likely need to be accelerated to ensure graduation in May with the rest of their class, though the 120-day limitation allows for graduation as late as the end of June.

III. Positive Change

A. Providing a Fundamental Change in Legal Education

Fundamentally, this change has the effect of overhauling how students approach law school. Students can now choose whether to graduate with their bar exam results already in hand. Furthermore, students who currently attempt to graduate early—in five semesters—can choose to remain in school for another semester, taking additional classes as they would have under the old rules, while receiving their bar results at the same time. Compared to other states offering early examination, Arizona's rule incorporates a near full-time class schedule with early bar examination.[14]

B. Creating "Practice Ready" Attorneys

The primary goal of law schools and students is to graduate with the ability to practice law. Therefore it makes sense to complete the transition from the study (theory) of law, to the practice of law as rapidly as possible. The bar exam is an extension of the theory of law; though a two-day comprehensive

[11] *See id.*

[12] *See id.*

[13] *Id.*

[14] *See supra* note 8 and accompanying text.

written examination, the exam does not include a practical component.[15] Completing the transition from theory to practice more swiftly creates an environment allowing new attorneys to enter the workforce timely and efficiently.

Ultimately, the end game is the same. All graduates must complete the same steps for admission to the Arizona bar as under the old rule. The only difference is the timeline of admission and how the time between taking the exam and when the results are released is used. Under the new rule, law students spend that time learning more about the law; a benefit to the student and to the public-at-large.

C. Easing Financial Burdens

Law school is not an inexpensive commitment for students. Last year, the average debt for law school graduates was reported between $75,700 and $125,000.[16] Given that students must begin repaying their student loans after six months,[17] from a May graduation until the time Arizona releases exam results in October nearly the entire six-month grace period is elapsed.[18] Graduates will still have to wait for the character and fitness background checks to be completed (generally five to seven months) before they are accepted to the Arizona bar.[19] Thus pre-rule change, student loan repayments are likely to begin prior to a student being admitted to the Arizona bar and securing a job. The new rule change can help reduce the transition period from student to practicing attorney.

IV. Opposition to the Change

Opposition to the rule change was limited and best articulated by Arizona's Attorney Regulation Advisory Committee (ARC).[20] The ARC's principle con-

[15] *See Admission by UBE-Testing in Arizona*, Ariz. Jud. Branch, http://www.azcourts.gov/cld/AttorneyAdmissions/AdmissionbyUBEtestinginArizona.aspx (last visited Jan. 21, 2013).

[16] Debra Cassens Weiss, *Average Debt of Private Law School Grads is $125K; its Highest at These Five Schools*, ABA J. (Mar. 28, 2012, 4:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

[17] Press Release, Sallie Mae, Student Loan Repayment to Begin after Six-Month Grace Period Expires (Nov. 2, 2007), https://www1.salliemae.com/salliemaenew/Web/Templates/News/NewsReleaseDetail.aspx?NRMODE=Published&NRNODEGUID=%7BA88161D1-4A1C-4DB5-9A26-732B6147FA23%7D&NRORIGINALURL=%2Fabout%2Fnews_info%2Fnewsreleases%2F110207.htm–&NRCACHEHINT=Guest.

[18] Petition to Amend Arizona Supreme Court Rule 34 (Jan. 4, 2012), http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1152290871.pdf.

[19] *Arizona Bar Exam Applications July 24 and 25, 2012*, U. Ariz., http://www.law.arizona.edu/career/AZCABarInfofall.cfm (last visited, Jan. 21, 2013).

[20] Letter from the Hon. William J. O'Neil, Chair, Attorney Regulation Advisory Committee, to Hon. Rebecca W. Berch, Chief Justice of the Arizona Supreme Court (May 8, 2012) (on file with the Clerk of the Arizona Supreme Court State Bar of Arizona), http://azdnn.dnnmax.com/

cern with the rule change is that students may become disruptive, distracted, and overstressed while attempting to balance classes with bar preparation.[21] Agreeing with the ARC, Arizona Assistant Secretary of State Jim Drake also opposed the rule change, commenting:

> "My fear is that it will negatively impact the third year of the educational experience and essentially turn the third year into a bar prep course . . . . I don't think that's the right way to go. I see this more as a marketing idea." Getting students admitted to the bar sooner can only help the law schools' rate of placing graduates in legal jobs, and thus their *U.S. News & World Report* rankings, he added.[22]

However, the final draft of the petition approved by the Court addresses these concerns. First, the school must certify its students to take the bar exam early, assessing both the student's abilities and academic resume prior to certification.[23] Second, the student is limited to no more than two semester hours during the month of the exam and the preceding month.[24] The bulk of the course studies—no more than eight semester hours—are reserved for after the bar exam.[25]

As a result, the adjustments made to the rule change permit students to take a very limited course load prior to the bar exam, e.g. a school bar prep course, which virtually eliminates the possible negative effects outlined by the ARC and the Assistant Secretary of State. Potentially, schools can also choose to

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Portals/0/NTForums_Attach/1619391875571.pdf. *See Court Rules Forum*, *supra* note 2; *see also* Memorandum from the Hon. William J. O'Neil, Chair, Attorney Regulation Advisory Committee, to the Hon. Rebecca W. Berch, Chief Justice of the Arizona Supreme Court (Nov 9, 2012) (on file with the Clerk of the Arizona Supreme Court State Bar of Arizona), *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/111901481058.pdf. *But see* Memorandum from Lawrence Ponoroff, Dean, University of Arizona James E. Rogers College of Law, Douglas J. Sylvester, Dean, Arizona State University Sandra Day O'Connor College of Law, Shirley Mays, Dean, Phoenix School of Law, to the Hon. Rebecca W. Berch, Chief Justice of the Arizona Supreme Court (Jun. 29, 2012) (on file with the Clerk of the Arizona Supreme Court State Bar of Arizona), http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1629595517971.pdf.

[21] *See* sources cited *supra* note 20.

[22] Karen Sloan, *A Possible Head Start for Law Students*, NAT'L L. J. (Dec. 3, 2012), *available at* http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202579889247.

[23] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf. *See* Supplemental Information Regarding Early Bar Proposal, Petition to Amend Arizona Supreme Court Rule 34 (Nov 8, 2012), http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1118495521471.pdf; *see also Court Rules Forum*, *supra* note 2.

[24] *See* sources cited *supra* note 23.

[25] Order Amending Arizona Supreme Court Rule 34 (Dec. 10, 2012), http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf.

offer a for-credit bar prep class that will incorporate the two semester hours prior to the bar exam as part of an overall program for the student's final semester. Secretary Drake is correct that law schools have a self-interest in boosting their *U.S. News & World Reports* ranking, but students also have a valid interest in securing a job in the legal industry. Ultimately, that is the goal at hand for law students: to graduate with a *juris doctor*, pass the bar exam, gain admittance to the state bar, and get a job as an attorney—all as quickly as possible.

V. CONCLUSION

Arizona's attempt to fundamentally change how law students approach the taking of the bar exam is a positive change. By raising the bar (pun intended), students can now position themselves—through planning and hard work—to graduate law school "practice ready" and each one will enter the legal profession with his or her bar results in-hand. Though passing the bar exam does not ensure admittance to the bar, it does allow the transition from law student to attorney to be more efficient and beneficial. The adage told to law students around the country is "the first year they scare you to death, the second year they work you to death, and the third year they bore you to death."[26] With the changes to Rule 34, Arizona is transitioning from boring students to graduating new attorneys who are "practice ready" for admission to the state bar.

[26] *See, e.g.*, *Scare You to Death, Work You to Death, and Bore You to Death*, NAT'L JURIST (Nov. 2, 2009, 8:11 AM), http://www.nationaljurist.com/content/scare-you-death-work-you-death-and-bore-you-death.

What's in a (Trade) Name? Distinguishing Practices in the Legal Field

Kevin Carson Whitacre*

I. Introduction: The Past and Future of Trade Name Regulation in the Legal Field

On August 30, 2012, the Arizona Supreme Court approved an amendment to Ethical Rule ("ER") 7.5(a) allowing Arizona attorneys the use of trade names.[1] This ruling is appropriate because it furthers lawyers' Constitutional right of free speech and will inherently improve the commercial marketplace for legal services. Counterarguments warning of trade name misuse are misplaced due to the checks included in the rule that serve to reduce any negative effects trade names might have on the public and the legal profession. Ultimately this rule change will aid practitioners and the public alike.

There are four considerations to discuss when analyzing the decision to allow trade names: 1) the decline of support for such bans in other states, discussed in Part II; 2) free speech rights of lawyers under the First Amendment, discussed in Part III; 3) violations of ER 7.5(a) prior to the rule change, discussed in Part IV; and 4) the rationale of arguments against trade names, discussed in Part V. Before discussion of these considerations, however, an overview of rule 7.5(a) and its amendment provides a basis for such analysis.

A trade name is "[a] name, style, or symbol used to distinguish a company, partnership, or business . . . ; the name under which a business operates. A tradename is a means of identifying a business—or its products or services—to establish goodwill. It symbolizes the business's reputation."[2] In other words, trade names are used to identify a business and as a means of creating a brand.

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[1] Order Amending Rule 42 of the Ariz. Rules of the Sup. Ct., Rule of Prof'l Conduct 7.5(a), Petition for Amendment of Rule 42 of the Ariz. Rules of the Sup. Ct., Rule of Prof'l Conduct 7.5 (a), No. R-11-0046 (Ariz. Aug. 30, 2012). *See also* Ariz. Sup. Ct. R. 42, Rules of Prof'l Conduct ER 7.5(a) (2013).

[2] Black's Law Dictionary 727 (3rd pocket ed. 2006).

Prior to the amendment, ER 7.5(a) read, "A lawyer shall not use a firm name, letterhead or other professional designation that violates ER 7.1.[3] A trade name may not be used by a lawyer in private practice."[4] This effectively limited what a lawyer may title his or her business, and business names under this rule generally consisted of the names of one or more lawyers and a reference to the firm's business structure.[5]

The new amendment adopts the ABA Model Rule, which reads:

> A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.[6]

This provides discretion in how a legal practice may be marketed, subject to limited—albeit important—restrictions.

II. Joining the Majority

The State Bar of Arizona agreed with the proposed change partially because "[s]upport for a total ban on trade names has diminished nationally over the last few decades."[7] In fact, ABA Model Rule 7.5(a)—or language that is functionally equivalent—has been adopted by a majority of jurisdictions.[8]

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[3] Because ER 7.5(a) is in part based on ER 7.1, it is important to understand how ER 7.1 affects the application of ER 7.5(a). ER 7.1 provides that "[a] lawyer shall not make or knowingly permit to be made on the lawyer's behalf a false or misleading communication about the lawyer or the lawyer's services." ER 7.1 (2009). It then defines false or misleading as "a material misrepresentation of fact or law, or [omission of] a fact necessary to make the statement considered as a whole not materially misleading." *Id.*

[4] ER 7.5(a). This rule was effective until January 1, 2013, and the amended rule has been effective since that time. This rule was in line with American Bar Association ("ABA") Model Code DR 2-102(B), which stated, "A lawyer in private practice shall not practice under a trade name." Model Code of Prof'l Responsibility DR 2-102(B) (1969). The ABA Model Code of Professional Responsibility was established in 1969, and it is the predecessor to the ABA Model Rules, which, since its establishment in 1983, is the current model of standards for legal practice. Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of Law 46-47 (3rd ed. 2012).

[5] ER 7.5, Comment 1.

[6] ER 7.5(a), 1.

[7] Comment of the State Bar of Ariz. Regarding Petition to Amend Ariz. Rules of the Sup. Ct., Rule of Prof'l Conduct 7.5(a), Petition for Amendment of Rule 42 of the Ariz. R. Sup. Ct., Rule of Prof'l Conduct 7.5(a), No. R-11-0046 (Ariz.) [hereinafter Comment].

[8] *Id.* at 3.

Prior to the adoption, Arizona was part of a shrinking minority of "seven jurisdictions that still have such a ban."[9]

III. Expansion of First Amendment Rights

The State Bar also posited that the rule prohibiting trade names "could be judicially construed as an overbroad impediment on commercial speech under the First Amendment."[10] In *Bates v. State Bar of Arizona*, decided in 1977, the United States Supreme Court ruled that the ban against lawyer advertising unconstitutionally violated the First Amendment.[11] In *Bates*, Justice Blackmun states, "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an *indispensable role* in the allocation of resources in a free enterprise system."[12] While advertising that indicates a lawyer's services and prices is not the same as an attorney's use of a trade name, there are analogous elements in that both are a form of commercial speech.

Permitting the use of trade names, particularly ones that suggest the locality serviced or the types of services provided, would make the legal community more accessible to the public.[13] The use of trade names would also permit lawyers greater opportunity to distinguish themselves through effective branding. Trade names benefit attorneys and the public by making it easier to differentiate one practice from another, rather than overwhelming consumers with a sea of seemingly similar law firms named after the firm's attorneys.

The use of trade names will serve its understood purpose: increasing public awareness of the differences between various practices in the legal field and assisting firms in establishing reputation and goodwill.[14] Aware that the courts could use *Bates* as precedent to find the rule banning the use of trade names is a First Amendment violation, the State Bar wisely sought reform.

IV. Recorded Ethical Violations of Ethical Rule 7.5(a)

A review of the Arizona Judicial Branch's matrix of disciplinary cases reveals only ten recorded sanctions pertaining to trade name violations from 1981 through 2010.[15] Over the course of twenty-nine years, these ten viola-

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[9] *Id.*

[10] *Id.* at 1, 6.

[11] Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

[12] *Id.* at 364 (emphasis added).

[13] Comment, *supra* note 7, at 4-6.

[14] *See* Black's Law Dictionary, *supra* note 2.

[15] *Attorney Discipline: Disciplinary Cases Matrix*, Ariz. sup. Ct., [hereinafter *Disciplinary Cases Matrix*], http://www.azcourts.gov/attorneydiscipline/DisciplinaryCasesMatrix.aspx (last visited Feb. 10, 2013). The cases are as follows: Rantz (1989); Jenkins (1991); Menor (1997);

tions represent a minimal amount of the total ethics enforcement efforts of the State Bar.[16] This lack of prosecution suggests that the amendment will have little effect on ethics enforcement within the profession.

In each of the ten cases, the violation of ER 7.5(a) is one in a list of violations.[17] Each case in the matrix provides a summary of the violations committed, in which the ER 7.5(a) violations are often mentioned last, if at all.[18] Between the ten cases, there were a total of ninety-three ethical rule violations.[19] Many of the violations committed by the offending attorneys were severe ethical lapses; the use of a trade name paled in comparison to the full extent of the attorneys' unscrupulousness.[20] Listing the use of a trade name alongside tax fraud, unauthorized practice of law, and property damage appears to classify it, in the eyes of the State Bar, as a petty violation—one which the State Bar would not have pursued but for the other violations.[21]

There are no cases where the use of a trade name has been the sole violation.[22] This further supports the theory that it is a minor offense. Given the demonstration that ER 7.5 violations are enforced in addition to lists of other, more serious violations, then it could be argued that the rule is not worth having at all. In many of the above-mentioned cases, the issue before the State Bar was that the lawyers who violated ER 7.5(a) were suspended from practicing law but holding themselves out to the public as though they could.[23] This is a violation of ER 5.5, which deals with the unauthorized practice of law.[24] In

Kirkland, Sivic, and Sodaro (2002); Vice and Zakrajsek (2003); Turley (2004); Dunaway (2007). *See* SUP. CT. ARIZ., DISCIPLINARY CASE MATRIX (1989) 8, *available at* http://www.azcourts.gov/Portals/36/Matrix/Older/1989.pdf; SUP. CT. ARIZ., DISCIPLINARY CASE MATRIX (1991) 5, *available at* http://www.azcourts.gov/Portals/36/Matrix/Older/1991.pdf; SUP. CT. ARIZ., DISCIPLINARY CASE MATRIX (1997) 14, *available at* http://www.azcourts.gov/Portals/36/Matrix/Older/1997.pdf; SUP. CT. ARIZ., DISCIPLINARY CASE MATRIX (JAN. 1 – DEC. 31, 2002) 21, 39, 41, *available at* http://www.azcourts.gov/Portals/36/Matrix/Older/2002MATRIX.pdf; *2003 Disciplinary Case Matrix*, ARIZ. SUP. CT., http://www.azcourts.gov/attorneydiscipline/DisciplinaryCasesMatrix/2003DisciplinaryCasesMatrix.aspx (last visited Feb. 10, 2013); *2004 Disciplinary Case Matrix*, ARIZ. SUP. CT., http://www.azcourts.gov/attorneydiscipline/DisciplinaryCasesMatrix/2004DisciplinaryCasesMatrix.aspx (last visited Feb. 10, 2013); *2007 Disciplinary Case Matrix*, ARIZ. SUP. CT., http://www.azcourts.gov/attorneydiscipline/DisciplinaryCasesMatrix/2007DisciplinaryCasesMatrix.aspx (last visitid Feb. 10, 2013).

[16] *See Attorney Discipline: Disciplinary Cases Matrix, supra* note 15.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See* sources cited, *supra* note 15 and accompanying text.

[24] ARIZ. SUP. CT. R. 42, RULES OF PROF'L CONDUCT ER 5.5; *Attorney Discipline: Disciplinary Cases Matrix, supra* note 15.

such cases, ER 7.5(a) violations are duplicative because they are inherently a violation of ER 5.5, arguably a more serious violation.

It is also possible that the rule is enforced less often by the State Bar because it allegedly harms the legal field, as discussed in Part V, rather than the general public. However, this argument fails to provide a tenable reason to prohibit the use of trade names. Ultimately, ethics enforcement is unlikely to change in a significant way as a result of the amendment.

V. Opposing Arguments

A "[traditional . . . justification for the rule against] the use of a trade name is [that they are] 'undignified' and [undermine] the bar's profession."[25] However, this argument was unsuccessful in defending Arizona's previous attempts to "ban . . . lawyer advertising" in *Bates*.[26] Because of the substantial similarities between advertising and the use of a trade name[27] the argument that trade names may be undignified or undermine the profession is not likely to withstand retorts that such a ban is violative of lawyers' First Amendment rights. In this manner, the Supreme Court's ruling permitting advertising for a legal practice was a significant step toward allowing trade names.

VI. Conclusion: Proper Regulation of Trade Names Improves the Legal Marketplace

In conclusion, the Arizona Supreme Court has aided the public and attorneys by amending ER 7.5(a) to permit the use of trade names. Trade names are clearly considered a minor offense by the State Bar, and it has become increasingly difficult to justify the ban now that a shrinking minority of jurisdictions prohibit the practice. Most importantly, the ban violates lawyers' First Amendment rights by unnecessarily regulating the way an attorney may advertise his or her practice. The counter argument that trade names will be misused is unfounded, as such conduct is still regulated via ER 7.1 and ER 7.5(a). Whatever concerns remain that trade names harm the dignity of the legal field are simply outweighed by the need to protect attorneys' First Amendment rights. As Arizona law firms begin to establish and utilize trade names, both the attorneys who work for them and the public they serve will benefit from this amendment.

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[25] Comment, *supra* note 7, at 4.

[26] *Id.*

[27] *See* discussion *supra* Part III.