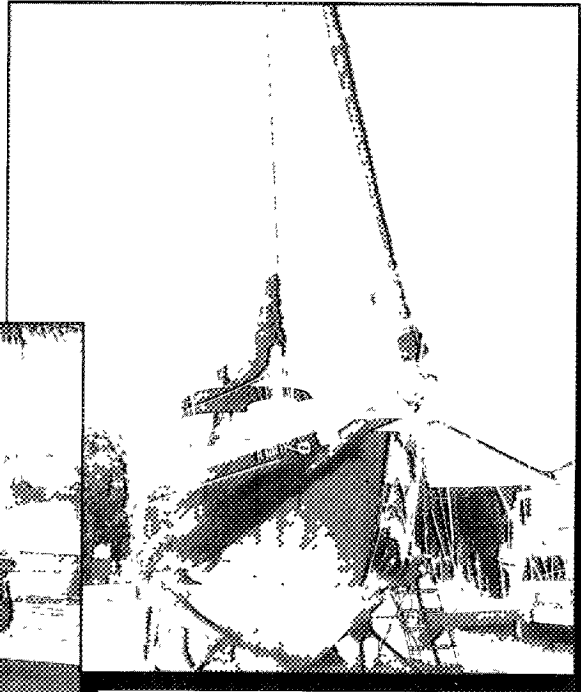
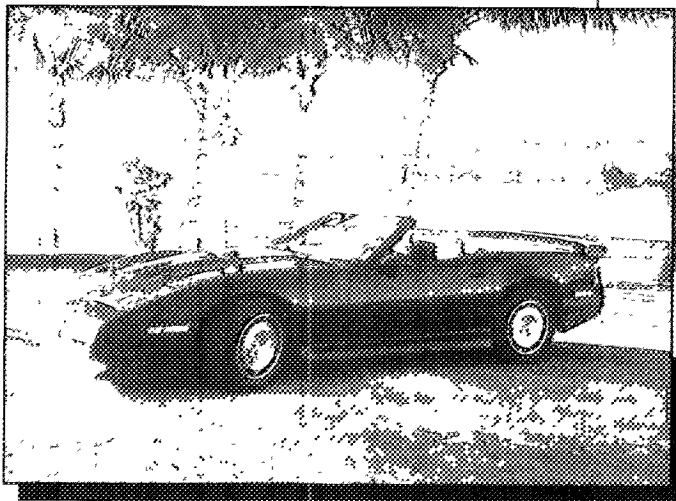


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# Implementing an Asset Forfeiture Program

By VICTOR E. HARTMAN, J.D., C.P.A.



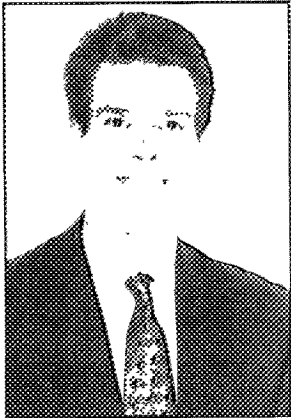
**A** jail sentence often represents an inadequate remedy for a subject convicted of a crime motivated by financial gain. Incarceration does not address the unjust wealth transfer to the subject, nor the expense of a victim, in the case of property crimes. The criminal views the prospect of a jail sentence as a calculated cost of generating revenue. The financial devastation of a victim can cause emotional scars, delay retirement, alter a child's education, or otherwise change a lifestyle. This victimization continues when the subject hires an attorney with the ill-gotten

gains. Recidivism is encouraged because the subject has learned that crime does pay.

Law enforcement agencies that make effective use of asset forfeiture serve their communities by punishing the subject, compensating the victim, and minimizing societal costs. Whether departments create a new asset forfeiture program or reinvigorate an existing one, administrators can take certain steps to enhance this process to include developing a mission statement, implementing forfeiture policies, and initiating asset forfeiture investigations.

## DEVELOPING AND IMPLEMENTING AN ASSET FORFEITURE PROGRAM

Administrators can begin by creating a mission statement that shows how an asset forfeiture program will deter crimes, compensate victims, serve the community, and remain within legal boundaries. Within this statement, administrators should include goals that ensure quality asset forfeiture training and specific objectives (e.g., distribute policy to officers detailing the department's asset forfeiture program) that help establish procedures to determine those cases with



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asset forfeiture potential. Also, the mission statement should include methods to provide positive feedback to those officers who effectively deploy asset forfeiture and reinforce the effectiveness of this law enforcement tool.

A department must remain attentive of the resources required to operate a forfeiture program. To some extent, managers may need to adjust investigators' caseloads to compensate for the additional tasks associated with asset forfeiture. Further, administrators should create or expand analytical positions to assist with the investigation, seizure, storage, and disposition of assets. In addition, training and administrative costs also will consume resources. A department must remain prepared to demonstrate its commitment to asset forfeiture by devoting resources to the program.

Once a department has established the mission of the forfeiture program and has outlined its benefits, administrators should present

the program to investigators in a manner that encourages them to use it in their investigations. To this end, several ways exist to advance the use of asset forfeiture within a department. First, chief executives should involve all relevant individuals in the drafting of the forfeiture mission statement, goals, and objectives. Further, administrators should establish policy to review every case under investigation for asset forfeiture potential, and to acknowledge investigators, a department could publish a newsletter about successful seizures and other asset forfeiture matters. Once motivated, investigators will seek training and liaison with other agencies in an effort to help accomplish this mission.

#### **MANAGING AN ASSET FORFEITURE PROGRAM**

Although it might not constitute the most rewarding aspect of asset forfeiture, indispensable legal and procedural requirements exist that departments must meet. Because

forfeiture laws vary between jurisdictions and case law changes frequently, departments must have a knowledge of the legal requirements and a mechanism for ensuring their compliance. For example, officers should realize the need for a seizure warrant early in the investigation not only to avoid serious liability issues, but to structure the investigation in a way that will gather the necessary facts to meet the elements of the warrant. After a seizure, investigators must provide timely legal notice to subjects and interested third parties. If a subject contests a forfeiture, the investigator must work with the prosecutor to ensure that legal discovery issues do not compromise an investigation.

Once a department seizes assets, they must safeguard the property until they resolve all legal issues. This process may begin with the removal of the property from the subject's custody and usually ends with the return of the property to a victim or an innocent owner or its sale at an auction. Some of the administrative tasks may include the towing of automobiles for safekeeping and appraising, storing jewelry, counting and depositing cash into a bank account, and maintaining real estate. Prior to seizing animals, departments must remember that the maintenance of livestock, race horses, and other animals during litigation can prove problematic.

The only effective way to ensure that the department remains in compliance with the law, and its internal policies, is to develop and maintain a procedures manual. A department can benefit greatly by

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reviewing the policy manual of an agency with a successful forfeiture program before developing or updating its own procedures manual.

### **INITIATING AN ASSET FORFEITURE INVESTIGATION**

Once a department has developed a mission statement and implemented forfeiture policy, investigators can initiate forfeiture investigations. Although forfeiture laws vary, two legal theories have evolved. One, commonly known as the facilitation theory, involves a subject's use of property to facilitate a criminal act, and the other involves the proceeds of a criminal offense—commonly known as the proceeds theory.

Common investigative techniques and legal issues involve both theories. First, asset forfeiture should remain one of the investigative priorities of the case. Once officers develop an investigative strategy, the search for assets can begin. This process includes surveilling subjects, debriefing sources, issuing subpoenas, and searching public records.

At some point in the case, the investigator should brief the forfeiture attorney on the status of the case. Depending on the jurisdiction and the facts involved, the forfeiture attorney may have the option of bringing a criminal or civil forfeiture action against the property. Pros and cons exist when using either of these methods of forfeiture. A civil action generally allows for earlier seizure of assets, but risks flight by the subject. A criminal forfeiture action allows for both the seizure of assets and the arrest of

the subject, but risks dissipation of assets because this action generally occurs at the conclusion of an investigation. Although the incarceration of the wrongdoer should remain the highest priority of the investigation, officers must give careful consideration to asset seizure early in the investigation to ensure a successful outcome.

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Defense attorneys commonly use the approach that the property belongs to an innocent owner—usually a spouse. In some cases, investigators can defeat this defense by obtaining evidence that the alleged “innocent owner” had knowledge that the property was involved in the criminal conduct. Additionally, the U.S. Supreme Court has found that the prosecution of the defendant and the forfeiture of property does not constitute double jeopardy.<sup>1</sup>

#### **Facilitation Theory**

The facilitation theory allows the government to seize property when it facilitates certain criminal conduct.<sup>2</sup> This theory proves most applicable in drug investigations and allows for the forfeiture of property involved in the

manufacture, delivery, and sale of controlled substances. In practical terms, this can include real estate used to store drugs, automobiles and boats used to transport drugs, and other facilitating property, such as cash and firearms.

Investigations involving facilitating property differ in at least two ways. First, the legal threshold to seize facilitating property usually is easier to obtain. The law requires that probable cause exists to show that the property to be seized facilitated an illegal act. Investigators can take a few additional steps to help develop adequate probable cause. For example, during surveillances, investigators should note and fully describe all facilitating property and debrief sources about the subject's use of the property. This can range from something as elementary as observing a subject drive a car to a drug transaction to having a reliable source witness drugs stored in a house.

The timing of seizures during an investigation also remains crucial. Because drug subjects often present a flight risk, investigators should consider seizing property at the time of arrest or during the execution of search warrants. If investigators structure a scenario properly, they can draw subjects and their property (e.g., their vehicle) to a common location. This enables the investigator to accomplish all of the goals in the investigation without risk of flight of the subject or dissipation of assets.

#### **Proceeds Theory**

The proceeds theory allows the government to seize property that represents the proceeds of certain

specified unlawful activities.<sup>3</sup> This theory proves most applicable in white collar investigations and allows for the forfeiture of property representing the proceeds of various economic crimes, investments, scams, and property offenses. The property subject to forfeiture often includes bank accounts, real estate, and automobiles.

Investigators must take certain steps, which often prove complex, to seize property based on the proceeds theory. Similar to the facilitation theory, investigators must identify property and prove ownership before seizure can occur. However, the government also must trace the asset to the crime itself. The investigation becomes more complicated each time the subject converts the proceeds from one form to another.

For officers to establish that an asset represents the proceeds of a criminal offense, they should initiate two investigative steps simultaneously. First, investigators should identify the assets that initiated the criminal offense and trace the proceeds forward. Second, they should identify all known assets controlled by the subject and trace the purchase money backwards. For example, in a typical investment scam the subject will deposit the victim's money into a bank account. Then, the subject usually spends the newly acquired wealth on high-dollar assets. To further complicate issues, the subject may conduct several financial transactions with the funds. By tracing the victim's proceeds forward and the subject's known assets backwards, the investigator eventually will establish that the subject's assets are proceeds of the crime.

In white collar investigations, subjects usually learn of law enforcement's involvement before the agency files criminal charges. This occurs because the investigation may become lengthy and require interviews of many parties. White-collar subjects, as a general

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rule, remain less likely to flee the jurisdiction. However, as the investigation continues, the potential for asset seizures greatly decreases as the subject spends the proceeds, launders the money, and hires attorneys to defend civil and criminal lawsuits. Accordingly, in white collar investigations, the seizure of assets early in an investigation remains the single greatest factor to a successful outcome.

#### **USING ASSET FORFEITURE LAWS APPROPRIATELY**

Asset forfeiture laws at the federal level, and in most states, allow law enforcement to use proceeds of certain seizures for equipment and other needs, especially when the seized property is drug related and there are no victims to compensate. Since the inception of the U.S.

Department of Justice's (DOJ) asset forfeiture fund in the mid-1980s, almost \$2.5 billion have been shared with state and local agencies.<sup>4</sup> Further, asset forfeiture fosters cooperation among federal, state, and local law enforcement agencies through the use of adoption and equitable sharing.<sup>5</sup> When the federal agency agrees to process the seizure under federal forfeiture provisions and remits the proceeds back to the originating agency, this process constitutes equitable sharing. In one statutory requirement for sharing, the U.S. Attorney General must assure that the sharing will encourage further cooperation between the department seizing the assets and the sponsoring federal law enforcement agency.<sup>6</sup>

Because asset forfeiture is not appropriate in every case, administrators should evaluate asset seizures from a policy perspective. Throughout the history of the government's use of asset forfeiture, critics have attempted to prevent law enforcement agencies from expanding their use of this effective law enforcement tool. In an effort to thwart those attempts, law enforcement agencies must ensure that they use asset forfeiture only when they can demonstrate the benefits to the community. For example, some individuals may criticize law enforcement agencies when the value of the seized asset is disproportionate to the offense committed, when the subject is a sympathetic figure (e.g., a single mother), or when a seizure creates a hardship on a third party. Because law enforcement agencies use asset forfeiture as a tool to serve communities, if the public perceives that

agencies abuse this tool, both law enforcement and the community will suffer.

An analysis of the deposits made into the DOJ's Assets Forfeiture Fund (Fund) reflects how

external events impact the government's ability to conduct asset forfeiture. The passage of additional asset forfeiture legislation in the mid-1980s resulted in an increase of deposits into the Fund.<sup>7</sup> In

fact, the enforcement of that legislation resulted in an increase in the dollar amount of forfeitures that lasted from the mid-1980s to the early 1990s.<sup>8</sup> However, the increase in forfeitures paralleled an increase

### National Code of Professional Conduct for Asset Forfeiture

1. Law enforcement is the principle objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.
2. No prosecutors' or sworn law enforcement officers' employment or salary shall be made to depend upon the level of seizures or forfeitures they achieve.
3. Whenever practicable, and in all cases involving real property, a judicial finding of probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.
4. If no judicial finding of probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.
5. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.
6. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property where appropriate, and the prompt resolution of claims of innocent ownership.
7. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.
8. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.
9. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.
10. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

*Note. The National Code of Professional Conduct for Asset Forfeiture was developed by the DOJ's Asset Forfeiture and Money Laundering Section*

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in public scrutiny and legal challenges that culminated in a 1994 federal appellate court decision known as *United States v \$405,089.23 in U.S. Currency*.<sup>10</sup> That decision, which held that forfeiture constitutes double jeopardy under certain circumstances, had a significant chilling effect on law enforcement's efforts to pursue asset forfeiture. Although the U.S. Supreme Court ultimately reversed that opinion in 1996,<sup>11</sup> Fund deposits declined during the 2-year period when the lower federal court holding was valid law.<sup>12</sup>

#### **COORDINATING FORFEITURE TRAINING AND LIAISON**

Asset forfeiture training presents an excellent opportunity for a department to instruct its investigators about this law enforcement tool and develop liaison with other agencies. Joint training conferences with local, state, and federal agencies and the district attorney enable all participants to forge partnerships in their local communities. A training agenda should include topics of mutual interest such as legal issues, investigative techniques, and the mechanics of seizing and disposing of assets.

Smaller departments have the most to gain from establishing effective liaison with their state and federal counterparts because they often do not have the resources or expertise to handle complex forfeiture investigations. Also, small departments have the option of working a case jointly with other authorities or submitting the seizure to a federal agency for adoption.

This type of training and liaison also enhances the relationship between the investigator and forfeiture attorney. Depending on the jurisdiction, the forfeiture attorney may be the prosecutor or a civil attorney. Regardless of who holds the responsibility, the investigator and forfeiture attorney working in tandem remains the single most important factor in a successful forfeiture program. Also, training allows

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the participants to learn their role in the forfeiture process and to identify experts in the field who they can call upon to assist in forfeiture cases. The presentation of case examples provides an excellent opportunity for all participants to discuss investigative techniques used to locate assets, the legal basis to seize assets, and the legal requirements to forfeit and dispose of assets. More important, training and liaison promotes teamwork among everyone involved.

#### **CONCLUSION**

Asset forfeiture remains a powerful tool for law enforcement

agencies. It remedies many of the problems that often slip through the criminal justice system, such as addressing the issue of allowing a criminal to profit from crime, and it provides a remedy for the victim. In short, asset forfeiture deprives the subject of ill-gotten gains, compensates the victim, and serves the community.

Initiating a forfeiture program involves addressing a variety of policy issues and administrative aspects. When creating an asset forfeiture program for their department, police administrators first should develop a comprehensive mission to include specific goals and objectives. When developing these management tools, a department must consider priorities, costs, and benefits associated with the program. A department also must establish safeguards to ensure they implement asset forfeiture only when appropriate.

When developing a forfeiture program, policymakers should remain aware of various factors that impact the success of this tool. Management must also consider other benefits and associated costs of a forfeiture program when prioritizing their program, and in an effort to prevent perceived abuses, they should include measures to ensure that each asset seizure is appropriate and has a legal basis.

Administrators should ensure that their officers understand how their asset forfeiture program works and that they receive proper training on asset seizure. Additionally, they should encourage officers to establish liaison with the prosecutor's office and other individuals involved in the forfeiture process.

