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WHITE-COLLAR CRIME

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Assault on Thompson Memo: KPMG and Beyond

It appears that the erosion of the foundation of the federal government's approach to prosecution of business organizations, as articulated in the Thompson Memorandum, may not be limited to Judge Kaplan's momentous decisions in the KPMG case.

The principles underlying the government's method are the subject of the authors' November 2005 article.[1] That article discussed the waiver of corporate attorney-client and work product protection and the government's policy of seeking the cooperation of subject organizations in investigations through the production of such privileged materials and communications. However, recent criticism of the Thompson Memorandum and its underlying policies has focused on other aspects of the government's initiative. Policy statements from the American Bar Association and decisions in the KPMG prosecution have challenged the government's position regarding a corporation's relationship with its employees during a government investigation.

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ABA Presidential Task Force

In 2004, the ABA established the Presidential task force on Attorney Client Privilege (the task force), a highly regarded group of practitioners and academicians, in reaction to concerns about government attacks on the privilege in the context of corporate investigations. After the task force conducted extensive hearings and issued a thorough report on the issue, the ABA adopted a resolution in August 2005 strongly opposing the "routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage." In further response to this policy position, the ABA and other organizations petitioned the U.S. Sentencing Commission to amend its organizational Sentencing Guidelines to appropriately reflect the sanctity of the attorney-client privilege and work product doctrine.

On April 5, 2006, the Sentencing Commission voted unanimously to reverse a November 2004 amendment to the guidelines that added commentary stating that an organization's willingness to waive the privilege and/or doctrine could be relevant to a determination that the entity was cooperating with the government and therefore eligible for a reduced penalty. Unless Congress acts to modify or reverse the Sentencing Commission's decision, it will become effective Nov. 1, 2006.

Last month, the task force issued another report focusing its attention on those aspects of the Thompson Memorandum urging prosecutors to consider a business organization's conduct with its employees in determining its level of cooperation.[2] Of particular concern to the task force was that part of the Thompson Memorandum stating:

> [W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.[3]

Concluding that the implementation of these principles threatens to undermine fundamental values, such as access to effective representation and the preservation of constitutional rights, which have long been recognized by the ABA, the task force opined that the government's reliance on any of these factors should be opposed by the ABA.

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The ABA House of Delegates adopted a recommendation setting forth such opposition during the ABA's annual convention in August.[4] The recommendation identifies four factors that the government should not take into consideration in determining whether a business organization has been cooperative in the context of a government investigation:

(1) that the organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee;

(2) that the organization entered into or continued to operate under a joint defense, information sharing and common interest agreement with an employee;

(3) that the organization shared its records or other historical information relating to the matter under investigation with an employee; and

(4) that the organization chose to retain or otherwise declined to sanction an employee who exercised his or her Fifth Amendment right against self-incrimination in response to a government request for an interview, testimony, or other information.

The recommendation defines "employee" to include current and former employees, officers, directors or agents of the organization.

Indemnification of Attorneys' Fees

Observing that business organizations routinely deal with the issue of whether they should provide lawyers for individual employees and potential conflicts of interests that may require the individual to obtain separate counsel, the task force said that systems put in place to deal with these issues have always worked well and that it is "inappropriate for the enforcement community to interfere with the decision-making of organizations through pressures exerted under cooperation policies." Because such decisions often are made at the beginning of an investigation, before all relevant facts have been collected, the task force noted that an organization may be forced to act prematurely in order to be seen as cooperating fully with the government. This result damages the organization, undermines its relationship of trust and confidence with its employees, and deprives the individual employee of the support and resources needed to defend himself. Accordingly, the task force argues that the government's policy effectively denies individuals of the specialized representation to which they otherwise may be entitled by contract or state law.[5]

A U.S. District Court for the Southern District of New York prosecution involving former employees of accounting giant, KPMG, has received tremendous attention lately due to the exact scenario depicted in the task force's report. Two recent opinions authored by District Court Judge Lewis Kaplan in the case further bolster the position taken by the task force after its lengthy study of the issue.

In *Stein I*, the Court found that the provision of the Thompson Memorandum dealing with the advancement of legal fees by corporate employers, both alone and coupled with the actions of the Southern District's United States Attorney's office, violated the Fifth and Sixth Amendment rights of the individual KPMG defendants. Specifically, he found that the government's actions in following the dictates of the Thompson Memorandum caused KPMG to reverse longstanding company policy and cut off the payment of employees' legal fees, thereby depriving such employees of the effective assistance of counsel and the right to a fair trial. Accordingly, the Court found that the government was required to adhere to its representation that any payment by KPMG of the defense costs of the individual KPMG defendants is acceptable to the government and will not otherwise prejudice KPMG.[6]

One month later, in July 2006, Judge Kaplan issued another opinion suppressing certain statements of two individual defendants, finding that the statements had been "deliberately" coerced by the government (*Stein II*). Under pressure from the government to cooperate, KPMG pressed its employees to grant government requests for pre-indictment interviews and threatened to stop payment of legal fees should the employees refuse cooperation. Persuaded that the government was responsible for the pressure KPMG exerted on its employees, the Court suppressed certain of the statements obtained by the government.[7] These opinions support the task force's position that a corporation's payment of employee legal fees should not be a factor in weighing a corporation's cooperation because the individual employee's constitutional rights may be compromised.

Joint Defense

• ***Joint Defense, Information Sharing and Common Interest Agreements.*** The task force report also argues that the government's consideration of common interest agreements in determining an organization's level of cooperation in an investigation serves to undermine the legitimate interests of both the organization and the employee. In order to effectively and responsibly conduct its own internal investigation, an organization will often find it necessary to share confidential and, sometimes, privileged information with counsel representing its current or former employees. The law has acknowledged the necessity of such information sharing by recognizing that joint defense or similar types of agreements are valid and that they promote effective representation by counsel.

Stating repeatedly that a business organization must be free to take whatever actions it deems appropriate, lawful and consistent with good corporate governance, the task force report sets forth various scenarios under which the government's rejection of an organization's cooperation because of such common interest agreements is unfair. First, the principles of the Thompson Memorandum may have a chilling effect on a corporation's willingness to cooperate with the government for fear that the government may take the position that the organization already has demonstrated a lack of cooperation by previously entering into a common interest agreement. Second, even if an organization desires to cooperate with the government, there are many legitimate reasons it may wish to maintain its joint defense agreements, primarily to further examine the extent or significance of the individual parties' conduct. The effect is that the government's position in this

regard hinders an organization's ability to conduct a thorough investigation, creating a catch-22 for any organization deciding whether to enter into common interest agreements with its employees.[8]

Sharing Information

• ***Sharing Information Outside the Context of Common Interest Agreements.*** The task force report similarly concludes that the government's disapproval of a corporation sharing any information with counsel for current or former employees involved in the investigation also hinders a corporation's ability to conduct a complete investigation and serves to insert the government improperly into an organization's corporate governance decisions. Moreover, the government's position interferes with the individual employee's ability to gather facts necessary to prepare an adequate defense. As noted by the task force, Rule 3.4(g) of the ABA Model Rules of Professional Conduct makes it improper for a lawyer to "request a person other than the client…to refrain from voluntarily giving relevant information to another party." The government's conduct pursuant to the Thompson Memorandum seems to induce corporations to do just that.

Asserting that the decision to provide records and historical information relating to the matter under investigation should belong solely to the organization, the task force observes that such information likely is evidentiary in nature and subject to subpoena anyway. Any benefit derived by the government in requiring organizations to withhold such information and granting or denying organizations benefits based on the sharing of such materials is outweighed by the parties' need for the information in preparing an adequate defense.[9]

Termination of Employees

• ***Termination or Sanctioning of Employees Who Assert Their Constitutional Rights.*** Finally, the task force criticizes the government's practice of requiring a corporation to discharge employees who assert their right against self-incrimination when requested to provide interviews or other information to government investigators as a condition of complete cooperation. Finding this policy violates the most basic of American legal principles that all individuals are innocent until proven guilty, the task force says that because the government cannot assume that the mere assertion of the privilege in response to a government inquiry is proof of either noncooperation or guilt, it should not punish a corporation by evaluating its cooperation on the basis of whether it has sanctioned and/or terminated employees who assert the privilege in response to a government request.[10]

This final recommendation by the task force has been a topic of debate among some in the legal community. There is a view that the task force's request that the government not give weight to whether a corporation has sanctioned or terminated an employee who asserts his privilege against self-incrimination may be asking too much. Proponents of this position argue that although an employee's assertion of the Fifth Amendment should not be viewed as an admission of wrongdoing, it should raise a red flag with a corporation attempting to cooperate with the government. In particular, they reason that the government has legitimate concerns regarding the integrity of business records and the propriety of transactions where an employee in a position of authority is retained despite having raised the Fifth Amendment.[11]

On the other hand, many staunchly support the task force's arguments that the assertion of the Fifth Amendment should never be interpreted as an indication of guilt, especially in a business context where the distinction between proper and improper conduct is rarely clear cut. Moreover, it is illogical to expect a corporation that has invested a great deal of time and resources in an employee to make termination decisions about that employee before the conclusion of an investigation. Finally, they note that the government should not interfere with private employment arrangements by granting benefits to a corporation at its employees' expense. This final point is key to the task force's position; while there may be many circumstances in which a corporation makes a business decision to terminate an employee who has asserted his Fifth Amendment privilege, it should not be forced to do so by the government.[12]

The question arises: what will the government do in light of Judge Kaplan's decisions and renewed criticism of the Thompson Memorandum by the ABA? Continuing to prosecute under current policies may put future cases in jeopardy. Some suggest that the best path might be to "issue a new memo, call this one quits, and move onto something a bit more acceptable to the legal community."[13] Others believe, however, that the government will pursue the status quo, as long as sanctions less severe than dismissal, such as in the KPMG case, are the only result of prosecuting business organizations under the Thompson Memorandum policies.[14] Notably, the government has filed a notice of appeal in response to the *Stein II* suppression decision.

The government may take the view that, like Mark Twain's mistakenly published obituary, the reports of the death of the Thompson Memorandum are greatly exaggerated. Recognition and adoption of well-reasoned conclusions such as those of the task force, however, may prove difficult for the government to overcome.

1. Elkan Abramowitz and Barry A. Bohrer, "Waiver of Corporate Attorney-Client and Work Product Protection" New York Law Journal (Nov. 1, 2005).
2. Report of ABA task force on Attorney-Client Privilege ("task force Report") at pp. 2-3 (August 2006) (available at http://www.abanet.org/buslaw/attorneyclient/home.shtml).
3. Memorandum for Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations at pp. 7-8 (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).
4. Peter Lattman, "ABA Takes Aim at Thompson Memorandum, Again," The Wall Street Journal Online (Aug. 9, 2006).
5. Task Force Report at pp. 6-10.
6. *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 1735260 (SDNY. June 26, 2006).
7. *United States v. Stein*, No. S1 05 Crim. 08888 (LAK), 2006 WL 2060430 (SDNY. July 25, 2006).
8. Task Force Report at pp. 10-14.
9. Id. at pp. 14-15.
10. Id. at pp. 16-17.
11. lawprofessors.typepad.com/whitecollarcrime_blog/2006/08/aba_attacks_mor.htm.
12. Id.
13. www.lawprofessors.typepad.com/whitecollarcrime_blog/.
14. Stephen W. Grafman and William F. Boyer, "Judge Kaplan's KPMG Opinion; Ruling Is Right and Wrong," The National Law Journal (Aug. 14, 2006).