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Preserving Your Job While Asserting the Fifth Amendment

Today, an employee's ability to assert Fifth Amendment rights in the context of a government investigation and still preserve his job does not necessarily depend on the employee's role in the alleged misconduct, but whether the employer is a private industry or a government agency.

Four decades ago, the U.S. Supreme Court held that public employers could not condition job security on an employee's exercise of the constitutional right against self-incrimination. In recent years, however, representatives of the Department of Justice, through "suggestions" none too subtly made to corporate employers in the infamous Thompson Memorandum, have influenced private employers to do precisely what the Supreme Court has said cannot be done by public employers: force employees to waive their constitutional right or find themselves unemployed.

The legal community's disapproval of the Thompson Memorandum often has focused on the government's policy of seeking corporate waivers of attorney-client and work product protection. More recent criticism has focused on aspects of the government's initiative that have an impact upon the indemnification of attorney's fees, joint defense agreements, sharing information, and the termination of employees.[1]

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Of particular recent concern both to courts and legislators is the coercive effect the Thompson Memorandum has had on private employees who may have to forgo the well-reasoned legal advice that they should assert the right against self-incrimination.

The constitutional prohibition against compelling any person "to be a witness against himself…" applies only in cases of "state action" or comparable federal action. Current legislative and legal examination of the Thompson Memorandum has focused on the applicability of the Fifth Amendment when employees are asked to cooperate in a government investigation of their employer's corporate activity. Currently, the law makes a stark distinction between the rights of public and private employees in such situations, although the policy underlying such distinction is vague and outdated. The widespread coercive effects that businesses feel by virtue of the Thompson Memorandum may be what transfers private employers to the equivalent of state actors.

Public Employers

Because action taken by a public employer by definition is state or federal action, public employees broadly are afforded the protections of the Fifth Amendment during an investigation of their employment conduct. The seminal case on a public employee's Fifth Amendment protections during an investigation of his or her conduct is *United States v. Garrity*.[2] In *Garrity*, the Supreme Court considered an appeal taken by New Jersey state police officers of their state convictions for conspiracy to obstruct justice. The officers were investigated for fixing traffic tickets. At the time they were questioned, the officers were warned that: (1) anything they said could be used against them in a criminal proceeding; (2) that they had the privilege to refuse to answer any question that would tend to incriminate them; but (3) their refusal to answer would result in termination pursuant to New Jersey statute.

The police officers provided answers to the investigators' questions, some of which later were used against them in criminal prosecutions. At trial, the officers objected that these statements were coerced because their refusal to answer would have resulted in them being fired. These objections were overruled and the officers subsequently were convicted. The convictions were affirmed by the New Jersey Supreme Court.

In reviewing the case, the U.S. Supreme Court observed that the choice "imposed on" the police officers was one between self-incrimination or job forfeiture. "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Accordingly, the Court found that the officers' waivers of Fifth Amendment protections were coerced and could not be sustained as voluntary. The convictions were reversed.

Now, public employers are required to give employees a "*Garrity* warning" during an investigation, informing them that any statements made cannot be used to incriminate

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them in a later criminal proceeding when the employee must choose between cooperation and termination. Public employees, however, can be dismissed for refusing to account for their job performance as long as no attempt is made to coerce a relinquishment of the employee's constitutional rights. In sum, a public employee involved in an investigation can be forced to answer specific, narrow questions related to the performance of his official duties or face discharge, as long as he is not compelled to waive the right not to have information used against him at trial as a result of the answers given.[3]

State Action Requirement

The *Garrity* decision and its progeny are specific to public employees because the Fifth Amendment restricts only governmental conduct. "[T]here can be no doubt that the privilege was in large part developed to protect the individual in what was thought to be an unequal contest with the state."[4] The Supreme Court has stated that the Fifth Amendment "will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government" by virtue of the fact that "there is a sufficiently close nexus between the State and the challenged action of the [private entity]."[5] Such a nexus exists either "(1) where the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State'; or (2) where 'the private entity has exercised powers that are traditionally the exclusive prerogative of the State.'"[6]

Private Employers

Because of the absence of state action, private employers generally have been perceived as having the right to terminate employees who assert their Fifth Amendment rights in refusing to cooperate with a government investigation.[7] The U.S. Court of Appeals for the Second Circuit's decision in *United States v. Solomon* illustrates this point, raising the issue of "state action" and the application of Fifth Amendment protections to private self-regulatory organizations.[8] Mr. Solomon, an officer and director of a securities brokerage that was an allied member of the NYSE, provided incriminating testimony to an NYSE investigator, which ultimately was provided to the government and led to a criminal indictment and conviction of one count of creating and maintaining false books and records.

In appealing his conviction, Mr. Solomon claimed that the incriminating testimony was coerced in violation of the Fifth Amendment and the holding in *Garrity*. Specifically, he claimed that he provided testimony during the NYSE's investigation because he was aware of a provision in the NYSE Constitution that empowered the Exchange to suspend him if he refused to cooperate. Furthermore, Mr. Solomon argued that the NYSE was sufficiently connected to and regulated by the Securities Exchange Commission (SEC) so as to attribute the NYSE's conduct to the government. The circuit court rejected this argument, finding that the NYSE's inquiry was in pursuance of its own interests and obligations, not as an agent of the SEC or the government.

The Court declined to determine the extent to which a nongovernmental source can coerce incriminating statements without violating the Fifth Amendment. Rather, in noting that the position in which Mr. Solomon found himself was "not a particularly pleasant one," the Court found that "the rule excluding involuntary confessions does not protect against hard choices when a person's serious misconduct has placed him in a position where these are inevitable."

A similar conclusion was reached in *DL Cromwell Investments, Inc. v. NASD Regulation, Inc.*[9] The defendants were employees of a private brokerage firm that was a member of the NASD. Under threat of sanction from the NASD, the defendants provided incriminating testimony to an investigative arm of the NASD. This testimony was used in a subsequent criminal prosecution. The defendants objected, arguing that their Fifth Amendment rights had been violated because the NASD investigation was concurrent to and in conjunction with an investigation of the same conduct by the U.S. Attorney's Office. The Second Circuit rejected the defendants' argument despite evidence of document sharing and meetings between the NASD and the government to discuss the case.

Until the much-publicized Judge Lewis Kaplan decision in *United States v. Stein* this past summer, the only case in which the actions of a private entity were deemed state action to support a Fifth Amendment claim was the Second Circuit's decision in *United States ex rel. Sanney v. Montanye*.[10] In that case, the defendant appealed his conviction for assault arguing that the incriminating statements he made to his private employer were obtained in violation of his Fifth Amendment rights because the statements were made during a polygraph examination administered by his employer at the government's behest. The Second Circuit found that the employer's actions could be attributed to the government, stating that "[t]he controlling factor is not the public or private status of the person from whom the information is sought but the fact that the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement." Mr. Montanye's statements were not found to be involuntary, however, because the threat of losing a position that he had held for only two days was not severe enough to constitute a "substantial economic sanction."

The finding of state action, like in the *Montanye* case, is uncommon. Rather, the dichotomy between public and private employees as established in *Garrity* generally has remained. Recent focus on the government's repeated intrusion into the private workplace, as dictated by the principles in the Thompson Memorandum, raises questions whether this dichotomy is still justified. *United States v. Stein* has drawn much attention to this issue in the past year.

In *Stein II*, the second opinion in the criminal tax shelter case brought against former KPMG employees in the U.S. District Court for the Southern District of New York, Judge Lewis Kaplan held that KPMG's actions, taken in an effort to satisfy the government that the accounting firm was cooperating fully with the dictates of the Thompson Memorandum, were attributable to the government. Accordingly, waivers made by KPMG employees, who were given the option of either cooperating fully with government interviews or losing their jobs or corporate payment of attorney's fees, were coerced and involuntary. Judge Kaplan suppressed certain incriminating statements of these employees as violative of the Fifth Amendment.[11]

Finding that KPMG's actions were attributable to the government, Judge Kaplan noted that the Thompson Memorandum "quite specifically tells a company under investigation, as was KPMG, that a failure to ensure that its employees tell prosecutors what they know may contribute to a decision to indict and, in this case, destroy the company." Furthermore, the Court noted the close involvement of the U.S. Attorney's Office in KPMG's internal decision-making process.

Finding a clear nexus between the government and the specific conduct at issue, the Court said that the government, both through the Thompson Memorandum and the actions of the U.S. Attorney's Office, "quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights."[12] The government has appealed this decision. Just days ago, Judge Kaplan indefinitely postponed the trial, citing concerns that the individual defendants would not be able to pay their lawyers because of KPMG's practices.[13]

As *Stein II* demonstrates, the Thompson Memorandum perpetuates a policy that effectively forces corporate employees to face the same Hobson's choice as that of the police officers in *Garrity*—cooperation or termination—a choice determined to be unconstitutional by the Supreme Court. Moreover, it is not a choice unique to the KPMG employees, as a growing number of corporations enter into deferred prosecution agreements or otherwise attempt to curry favor with the Department of Justice.[14] Many believe the government's position is without justification.[15] Furthermore, the government's actions in these cases effectively erase the line between public and private employees and the differing legal standards applied to each group.

Senate Hearings

On Sept. 15, 2006, the Senate Judiciary Committee held hearings on the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations. Although the title implies a focus on privilege waiver issues, the tone of the hearings indicated a wider base of concern among the testifying experts. In his introductory comments, Senator Patrick Leahy, D-Vt., chairman of the committee, noted concerns that the Thompson Memorandum "has the effect of eroding constitutional and other legal rights" as expressed by the ABA, Justice Kaplan in the KPMG case, and even the editorial board of the Wall Street Journal.[16]

Edwin Meese, III, former U.S. Attorney General, stated that the government has let its prosecutorial zeal "get in the way of its judgment… [and] has violated the Constitution it is sworn to defend." In referencing the KPMG case, he said that where an individual's constitutional rights are implicated, "the government may not do indirectly—through others— what it is forbidden directly to do."[17] Andrew Weissman, a practicing attorney, noted that the factual situation presented in the KPMG case was not unique, but that the Thompson Memorandum has motivated corporations across the country to institute "strict policies that call for firing employees … who do not 'cooperate' with the government." He further stated that as a policy matter, "the DOJ should simply not base its decision to prosecute a company on whether a person has been punished by her employer for asserting a constitutionally guaranteed right."[18]

Finally, Karen Mathis, the president of the ABA, presented a number of reasons that her organization strongly opposes the provision of the Thompson Memorandum that evaluates a corporation's cooperation based on its treatment of employees who exercise their Fifth Amendment rights. First, she noted that the policy is "inconsistent with the fundamental legal principle that all prospective defendants—including an organization's current and former employees, officers, directors and agents—are presumed to be innocent." Second, she asserted that it should be the prerogative of the company to make such decisions independently and that this provision of the Thompson Memorandum served to "improperly weaken" the employee's ability to defend himself and obtain information in criminal actions.[19]

The recent clamor over the government's improper involvement in a corporation's relationship with its employees is another example of how the government has improperly inserted itself into the corporate workplace. Congress has taken note of the excessive intrusions and seems prepared to send a message to the Department of Justice that it should re-evaluate and rein in its methods.[20]

1. See Report of ABA Task Force on Attorney-Client Privilege (August 2006) (available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf).

2. 385 US 493 (1967).

3. See *Uniform Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of N.Y.*, 392 US 280 (1968); William E. Hartsfield, "Investigating Employee Conduct §4:4" (August 2006).

4. *United States v. Solomon*, 509 F2d 863, 868 (2d Cir. 1975).

5. *Blum v. Yartetsky*, 457 US 991, 1004-05 (1982).

6. *D.L. Cromwell Invests., Inc. v. NASD Regulation, Inc.*, 279 F3d 155, 161 (2d Cir. 2002) (quoting *Blum*, 457 U.S. at 1004-05).

7. William E. Hartsfield, "Investigating Employee Conduct," §4.5 (August 2006); Kathleen A. Kedigh, "Employee Misconduct Investigations: Getting to the Truth Without Getting Into Trouble," Journal of the Missouri Bar (March-April 2005).

8. 509 F2d 863 (2d Cir. 1975).

9. 279 F3d 155 (2d Cir. 2002).

10. 500 F2d 411 (2d Cir. 1974).

11. *United States v. Stein ("Stein II")*, 440 FSupp2d 315 (SDNY 2006).

12. Id. at 336-337.

13. Lynnley Browning, "Judge Delays KPMG Tax Trial Over Legal Fees Dispute," The New York Times, Nov. 15, 2006.

14. See Earl J. Silbert & Demme Doufekias Joannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System," 43 Am. Crim. L. Rev. 1225 (Summer 2006) (detailing deferred prosecution agreements of Computer Associates and Bristol-Myers Squibb); David Hechler, "New York AG Presses Companies to Stop Paying Indicted Employees' Legal Bills," Corporate Counsel (Nov. 2, 2006) (describing how New York State Attorney General Eliot Spitzer has pressured companies to stop paying legal fees of employees who face criminal charges).

15. See Report of ABA Task Force on Attorney-Client Privilege ("Task Force Report") at pp. 16-17 (August 2006) (available at http://www.abanet.org/buslaw/attorneyclient/home.shtml); lawprofessors.typepad.com/whitecollarcrime_blog/2006/08/aba_attacks_mor.htm.

16. Testimony of Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee, Sept. 15, 2006 (available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=3986).

17. Testimony of Edwin Meese, III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies, The Heritage Foundation, Sept. 15, 2006 (available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5741).

18. Testimony of Andrew Weissmann, Partner, Jenner & Block LLP, Sept. 15, 2006 (available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5743).

19. Testimony of Karen J. Mathis, President of the American Bar Association, Sept. 15, 2006 (available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5742).

20. See Ellen S. Podgor, "Specter Tells of Upcoming Legislation to Stop Thompson Memo Practices," White Collar Crime Prof Blog, Sept. 15, 2006 (available at http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/week37/index.html) (on Sept. 14, Senator Arlen Specter announced his intention to prepare legislation addressing the Thompson Memorandum).