



**For Immediate Release**

**January 28, 2008**

**APPEALS COURT URGED TO UPHOLD DISMISSAL OF  
INDICTMENTS DUE TO PROSECUTORIAL MISCONDUCT**

*(United States v. Stein)*

The Washington Legal Foundation (WLF) filed a brief last week with the United States Court of Appeals for the Second Circuit urging it to uphold the dismissal of indictments against certain employees of KPMG, a major accounting firm. Last year, U.S. District Court Judge Lewis Kaplan dismissed the indictments because KPMG was pressured by the Justice Department to stop advancing legal defense fees to the targeted employees.

In August 2005, DOJ and KPMG entered into a Deferred Prosecution Agreement (DPA) regarding questionable tax shelter plans that KPMG had offered its clients but failed to register with the IRS. The DPA required that KPMG, among other things, terminate its tax practice, pay fines, restitution, and penalties totaling \$456 million, and fully cooperate with the government's investigation. Although there was no express provision in the DPA that KPMG could not pay the attorney's fees of its targeted partners, the prosecutor grilled the company before entering into the DPA about whether it intended to advance defense fees as its policy and practice had previously allowed.

As Judge Kaplan later described it, "KPMG refused to pay [the employees' defense fees] because the government had the proverbial gun to its head." *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006). KPMG officers were mindful of the fact that just a few years ago, DOJ prosecuted Arthur Andersen on charges relating to Enron, which forced the company to fold and lose some 28,000 jobs, even though its conviction was overturned in 2005 by the Supreme Court. Judge Kaplan subsequently dismissed the indictments last year, ruling that KPMG employees' right to due process and counsel were violated; the government subsequently appealed.

In its brief, WLF argued that the appellate court could uphold the dismissal without having to rule on whether or not the employees' rights were violated. The district court's supervisory power constitutes sufficient authority to remedy prosecutorial misconduct.

WLF's brief was drafted with the *pro bono* assistance of Michael J. Gilbert and Steven B. Feirson, partners in Dechert LLP, and Dechert associate Joshua I. Sherman.

\* \* \*

For information, contact WLF Senior Executive Counsel Paul Kamenar at 202-588-0302. A copy of WLF's brief is available on its website at [www.wlf.org](http://www.wlf.org).