

Legal News

Employees denied right to counsel

September 8, 2008

On the same day that the Department of Justice issued revised standards for weighing corporate cooperation with its investigations, the Second Circuit Court of Appeals affirmed the dismissal of the government's prosecution of 13 former partners and employees of the accounting firm KPMG LLP for tax fraud.

The Aug. 28 opinion by Chief Judge Dennis Jacobs affirms the holding of Judge Lewis Kaplan that the government deprived the defendants of their Sixth Amendment right to counsel.

The court concluded that, by causing KPMG to place conditions on the advance of legal fees to them, cap the fees, and ultimately terminate them, the government tainted the proceedings, and dismissal was required.

In an opinion that quoted heavily from Judge Kaplan, the appellate court agreed with the lower court that, "The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment."

Memoranda

At issue was the 2003 "Thompson Memorandum," named after then-United States Deputy Attorney General Larry D. Thompson, who promulgated the memorandum to articulate principles governing the DOJ's discretion in prosecuting business organizations.

Among the factors prosecutors were to consider under the memorandum was whether a company protected its employees and agents by advancing them attorney fees.

The Thompson Memorandum was later supplanted with the 2006 "McNulty Memorandum," under which a fee advancement policy should only be considered if it is "intended to impede a criminal investigation," and then, only with the approval of the deputy attorney general.

By coincidence, the McNulty Memorandum was supplanted the same day as the Second Circuit's decision. The "Filip Memorandum" formally bars prosecutors from pressuring companies to waive legal protections.

KPMG

In the course of investigating KPMG, government prosecutors, consistent with the Thompson Memorandum, prevailed on KPMG to cap employee reimbursement for attorney fees at \$400,000, condition that upon the employee's cooperation with the government, and terminate reimbursement once an employee was indicted.

KPMG was rewarded for its cooperation by avoiding indictment itself, and it entered into a deferred prosecution agreement, pursuant to which it paid a \$456 million fine.

The 13 employees who were ultimately indicted moved to dismiss the indictment based on the government's interference with KPMG's advancement of their attorney fees.

Judge Kaplan found that, but for "reckless government interference," KPMG would have advanced the defendants their attorney fees, and dismissed the indictment.

The Second Circuit agreed.

Judge Jacobs wrote, "Since defense counsel's objective in a criminal investigation will virtually always be to protect the client, KPMG's risk was that fees for defense counsel would be advanced to someone

the government considered culpable. So the only safe course was to allow the government to become (in effect) paymaster.”

In a sharp rebuke to the government’s tactics, the court wrote, “The government conceded at oral argument that it is in the government’s interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government’s interest that every defendant receive the best possible representation, it cannot also be in the government’s interest to leave defendants naked to their enemies.”

Because it was undisputed the defendants were unable to retain the counsel of choice as a result of the termination of fee advancements upon indictment, and a defendant denied choice of counsel need not show prejudice, the court held it was proper to dismiss the indictment.

Attorney Michael J. Gilbert, of Dechert LLP in New York, who wrote an amicus curiae brief on behalf of the **Washington Legal Foundation** in support of the defendants, praised the court’s decision.

Gilbert said, “It is pretty clear between the Second Circuit opinion, and the revised guidelines, that [the days of the Thompson Memorandum] are over. It is progress all around.”

Milwaukee attorney Nathan Fishbach, of Whyte Hirschboeck Dudek S.C., a former assistant U.S. attorney, who specializes in white collar crime, also praised the ruling, and the Filip Memorandum.

“The key,” he said, “is that cooperation is still a vital part of the consideration. The government will still give credit for factual information discovered through internal investigations.”

In contrast, documents prepared as part of the investigation will be protected, and won’t be sought.

Fishbach said the government will continue to seek privileged information only in two circumstances: where the communications were in furtherance of a crime; and where the corporation asserts advice of counsel as a defense.

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