



Federal Prosecutors Now Rebuked

While corporate scandals are still making headlines, the government's treatment of companies and their employees is also getting much deserved attention. In fact, there have been several well-justified challenges to U.S. policy, which has too long condoned federal prosecutors taking a

pro-indictment stance against their corporate targets if they provide legal fees for their indicted employees.

The issue dates back to the 1999 Department of Justice "Holder Memorandum," detailing guidelines for federal prosecutors to follow in deciding whether to charge corporations. Following outcry from high-profile corporate scandals, from Enron to Tyco, Deputy U.S. Attorney General Larry D. Thompson's 2003 memorandum updated the policy to make federal prosecutors' pro-indictment stance virtually binding if companies pay legal costs.

Recently, a federal trial judge in New York City, Lewis Kaplan, took offense in a high-profile tax-fraud criminal case brought by the Justice Department against KPMG. He severely scolded prosecutors for bullying, coercing and threatening KPMG with a corporate tax-fraud prosecution unless they cut off payment of legal fees to the dozen-plus employees who were ultimately indicted.

In fact, records of meetings between federal prosecutors and KPMG counsel point to repeated and prominent coercion. Government attorneys said, "If you (KPMG) have discretion regarding payment of legal fees, we (the government) will look at you under a microscope." KPMG got the message and avoided prosecution by entering into a "Deferred Prosecution Agreement."

In a disarmingly straightforward written opinion, Judge Kaplan wrote that the government violated the individual KPMG employees' constitutional rights to counsel and to a fair trial. And as a matter of tradition and right, in this country, he stressed, employers have a duty to cover the legal expenses of their employees charged as a result of doing their jobs.

Acting on a motion by the individual defendants to dismiss their indictments, and after a highly unusual hearing in which federal prosecutors and private outside counsel for KPMG were forced to testify, Judge Kaplan wrote: "Those who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend."

While Judge Kaplan has refrained from dismissing the indictments as a remedy, he has placed tremendous pressure on KPMG and the government to advance the costs of legal defense for the indicted defendants. If KPMG

falters, Judge Kaplan may very well dismiss the criminal charges because of this "prosecutorial misconduct."

As a defense attorney, when the case you are trying to a jury is captioned "United States of America v. John Q. Public," it is daunting. It's patently unfair for individual employees to be left to defend themselves, without company backing, against a limitless supply of government lawyers and investigators armed with time and money.

Whatever the case's outcome, it is a breath of fresh air. A thoughtful federal judge rebuked overzealous

government attorneys for attempting to deny American citizens a fundamentally fair trial, which must include unfettered access to legal counsel. Prosecutors take an oath to seek justice, not to ring up "wins." What better example of our country's checks and balances when a single judge can make the government protect the Constitution it is sworn to defend.

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