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SPECIAL REPORT: WHITE-COLLAR CRIME

AIM IS TO THWART DEFENSE BY DENYING **ATTORNEY FEES**

by **Norman A. Moscowitz**

When an employee is indicted for a job-related crime it is common and lawful for the employer to pay legal fees and costs. Indeed, Florida's corporation statute provides for it.

It is good corporate policy. Litigation of any kind is an extraordinary expense that an employee doing his job should not have to bear personally. The cost of defending a white-collar criminal case can be particularly high, and the middle of a criminal investigation is not a good time for an employee to feel abandoned.

In the last few years, however, Department of Justice prosecutorial guidelines, memorialized in the "Thompson Memorandum," have sought to discourage corporations under criminal investigation from paying employee legal fees. Under these guidelines, the prosecutor making the decision whether to indict is required to take into account the corporation's "cooperation."

Such cooperation now means more than ending the illegal practices and instituting a compliance program to prevent future violations. It includes a package of concessions that run contrary to long-settled legal practice, such as waiver of the corporation's attorney-client privilege and turning over of its own lawyers' work files. With regard to "culpable" employees — as identified by the prosecutor — it means termina-



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tion and cutting off legal fees.

A corporation generally decides whether to advance employee legal costs early in a criminal investigation, before it is likely to know whether it will want to settle the case or fight. The threat implicit in these guidelines is a potent one that makes that decision more difficult. If the corporation advances fees, it risks compromising its chances for a favorable resolution down the road.

You don't have to be a cynic to conclude that is precisely the point of the

policy — to deter corporations early in an investigation from advancing legal fees. It appears to be working. In a number of prominent recent cases, in exchange for nonprosecution agreements, corporations have agreed to such "cooperation," either refusing to advance legal fees or doing so under terms which are favorable to the government.

There is no legitimate prosecutorial policy for this tactic. Its application isn't limited only to cases in which the government contends legal fees are being advanced to "obstruct" the investigation by keeping employees in line. As shown below, it is threatened even when a corporation is already cooperating and has given up the fight.

The only reason for the government to play this card is the obvious one — it puts increased pressure on the indicted employee to plead guilty. Out of work and unemployable, he or she is likely to lack the financial resources to mount a vigorous defense. The policy is, as one judge noted, little more than the government putting its "thumb on the scales."

Violated right to counsel

The government's response to that criticism isn't particularly compelling. It comes down to, as then-U.S. Deputy Attorney General Lawrence Thompson put it, if you didn't do anything wrong you don't need "fancy legal representation."

But anyone ever involved in a white-collar criminal case, as a prosecutor, defense lawyer or defendant, knows that's not true. It's just as expensive to defend an innocent client as a guilty one. In any event, as the U.S. Supreme Court recognized in a recent decision written by Justice Antonin Scalia, every defendant has a right to counsel of her own choice. The government should not be interfering with that right.

The issue has come to a head in a pending criminal case against KPMG employees in U.S. District Court in Manhattan. The defendant employees moved to dismiss the indictment on the grounds that the government had violated their constitutional rights by improperly interfering with KPMG's advancement of their legal fees.

The case presents a revealing example of corporate behavior under the Thompson Memorandum's guidelines.

KPMG and its employees were under criminal investigation for tax shelter fraud. KPMG believed, probably rightly, that an indictment would lead to its collapse. To persuade the government not to indict, it "cleaned house," terminating senior personnel involved in the fraudulent shelters and offered complete cooperation.

In meetings to discuss a resolution, the prosecutors made clear that in deciding whether to indict they would count payment of employees' legal fees against KPMG.

While KPMG decided to pay legal fees, it did so under severe limitations. First, it set a cap. Second, in a step it characterized as "precedent-setting," it conditioned payment on full cooperation by the employee. Any employee who refused to do so (e.g., testify with-

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out immunity) would be denied payment and would be terminated. It also agreed that it would cease payment of legal fees for any employee who was indicted.

These efforts resulted in a deferred prosecution agreement (i.e., a criminal charge without a conviction) in which KPMG admitted extensive wrongdoing, paid a \$465 million fine, accepted restrictions on its practice, and agreed to continue full cooperation in all criminal and civil investigations.

On June 26, the U.S. District Court judge concluded that the government, despite its denials, had pressured KPMG to cut off payment of legal fees to the indicted defendants. He held this was a violation of their constitutional rights to counsel and to a fair trial.

The remedy, however, is complicated. At this stage, it does not include dismissal of the indictment but permits the defendants to sue KPMG for payment of their legal fees.

This is the first ruling on this issue and is not binding elsewhere. But it presents a compelling portrait of gov-

ernment overreaching which should stimulate further debate, including within the Justice Department, over the Thompson Memorandum's policies on negotiating corporate pleas.

Important considerations

While it is not clear yet what will happen in the wake of the KPMG decision, a corporation deciding whether to advance legal fees should consider the following about current practice under the Thompson Memorandum.

First, not all federal prosecutors seek to impose a fee cutoff as a condition of a corporate settlement. Second, the memorandum recognizes an "exception" for payment of legal fees required by state law. Under that circumstance, payment "should not be considered a failure to cooperate."

Florida law permits a corporation to advance legal fees. If, pursuant to the statute, a corporation's articles or by-laws require such payment, its doing so should not be held against it.

Finally, under the circumstances of a particular case, the corporation's plea and cooperation may be sufficiently valuable to warrant a favorable disposition, even when coupled with the corporation's insistence on payment of employees' legal fees. That has happened in a number of cases in the Southern District of Florida.

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