

**REPORT FROM THE FRONT LINES:
THE THOMPSON MEMORANDUM AND THE KPMG TAX SHELTER CASE**

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The brave individuals who have been charged with marketing allegedly illegal tax shelters for KPMG decided to go to trial, and in doing so, they created a rare opportunity to litigate one of the most important questions in corporate criminal defense today: Are there legal limits on how far the government can go to demand that companies buy the government's brand of "cooperation" in order to avoid indictment? The KPMG case (*United States v. Stein*, 05-CR-888 (LAK) (S.D.N.Y.)) raises the specific question whether the government can dictate to a corporation that is under criminal investigation when, and under what terms, a business can advance legal fees to its employees – regardless of existing agreements or past practices. In this article, I will explain how Judge Kaplan's opinion in *Stein* addresses that question, as well as a subsidiary question that is critical for any client who is likely to sit across the negotiating table from a federal prosecutor: Is it unconstitutional for prosecutors to apply particular kinds of pressure on corporations, or is the presence of the factors regarding attorneys' fees, joint defense agreements, and privilege waivers in the Thompson Memorandum enough to generate an unconstitutional *in terrorem* effect on potential defendants?

Background: The Thompson Memo and *U.S. v. Stein*

The effect that the "Principles of Federal Prosecution of Business Organizations," more notorious as the "Thompson Memo,"¹ has wrought on the way that corporations handle allegations of misconduct has been a favorite topic of academics and practitioners. After three years of application, few writers have defended the Thompson Memo as a sensible approach to law enforcement; most have instead criticized its definition of corporate "cooperation" as having perverse consequences on organizations' ability to investigate and uncover wrongdoing.² In order to receive consideration for cooperation – and therefore avoid indictment—a corporation that is under investigation needs to be able to show adherence to nine factors. One of those factors is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the

¹ Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys 1 (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

² For a recent treatment of Thompson Memo issues and a compendium other writings on the topic, see generally William R. McLucas, Howard M. Shapiro, and Julie J. Song, "The Decline of the Attorney-Client Privilege in the Corporate Setting," 96 J. Crim. L. and Criminology 621 (2006).

investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection.”³

The Department’s definition of the sort of “disclosure” and “cooperation” that it considers worthy of favorable consideration is explained at some length later in the Memo:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.⁴

In addition to complete disclosure, the Thompson Memo is concerned with whether a corporation is protecting “culpable employees.” The memo contains no definition of “culpable,” and no information as to whether the company, pursuant to an investigation, is to determine culpability—or whether that assessment rests with the government. In either event, a company can be considered to be suspiciously over-protective of its employees through “advancing [] attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement”⁵

In pre- and post-hearing briefs, the defendants in *Stein* argued that the presence of this language alone has a coercive effect on organizations that want to avoid indictment.⁶ After an unprecedented three-day hearing before Judge Kaplan, in which the court heard testimony from government and defense lawyers who were involved in the discussions regarding KPMG’s cooperation, the defendants argued that “[t]he evidence at the hearing showed that, by dint of the *in terrorem* effect of the Thompson Memo and the prosecution’s multiple heavy-handed references to it at the initial meeting with KPMG to pay all legal fees for partners and employees whose conduct in connection with their work was under any kind of scrutiny or dispute.”⁷ The defendants noted that the terms

³ *Supra* note 1, at 1.

⁴ *Supra* note 1, at 5.

⁵ *Id.* (footnote omitted).

⁶ *See, e.g.*, Defendant Jeffrey Stein’s Memorandum of Law in Support of Advancement of Legal Fees, filed May 22, 2006, at 20-22; Memorandum of Law in Support of Certain Defendants’ Motion to Remedy the Violation of Defendants’ Constitutional Rights to Counsel and a Fair Trial Resulting From the Prosecutors’ Wrongful Interference with Defendants’ Ability to Obtain Advancement of Legal Fees From KPMG, filed January 12, 2006.

⁷ Post-Hearing Memorandum of Law in Support of Certain Defendants’ Motion to Remedy the Violation of Defendants’ Constitutional Rights to Counsel and a Fair Trial Resulting From the Prosecutors’ Wrongful

of the Thompson Memo are not merely hortatory for prosecutors: “The Thompson Memo itself makes clear that prosecutors are expected to consider its provisions. It is not optional. In paragraph 1B, under the heading, ‘Charging a Corporation: General’, the memo notes: ‘Comment: In *all* cases involving corporate wrongdoing, prosecutors *should* consider the factors discussed herein. (Emphasis added.)”⁸ Indeed, it can be argued that the most important change that the Thompson Memo made regarding DOJ’s charging policies was that the “guidelines” are *binding* on prosecutors, and not advisory.⁹ In addition, memos and notes that were produced by the government showed that the precise issue of advancement of fees was featured on the prosecutors’ agenda in advance of their first meeting with KPMG lawyers in February 2004. Taken together, these factors seriously undermine one prosecutor’s testimony that “reference to the payment of legal fees in the Thompson memo [was not] something that was considered ... during the course of the [KPMG] investigation.”¹⁰

The mandatory nature of the Thompson Memo is not lost on defense counsel. It cannot be gainsaid that if a company decides to ignore any individual factor set forth in the Thompson Memo, or any subset of factors, it does so at its own peril. At the conclusion of the hearings in the KPMG case, Judge Kaplan told lawyers for the government that if, as they argued, it is true that the Thompson Memo alone could not “in and of itself” dictate a company’s position on advancement of attorneys’ fees, then the people at the Department of Justice were “lousy drafters” and should “start all over again.” He said that the message that compliance with this provision of the Thompson Memo is somehow optional, or required only when specifically pressed in a particular case, “is certainly not what [DOJ has] said to the defense bar of America.”¹¹ KPMG’s General Counsel, who left the federal bench to assume the role, agreed with this assessment, saying in court papers that “it was critical that the firm be in full compliance with the Thompson guidelines.”¹²

Key facts in *United States v. Stein*

Three themes emerged from the events that led up to KPMG’s signing a deferred prosecution agreement in August 2005: (1) KPMG initially went to the government with the Thompson Memo firmly in mind, but had not reached a final decision internally about whether to advance attorneys’ fees; (2) prosecutors pressed their advantage with the vulnerable accounting firm and moved the company closer to cutting off fee advancement at every opportunity; and (3) prosecutors maintained a hands-on approach and pressured KPMG to determine which employees were “cooperating” with the ongoing investigation and which were not, and therefore, for whom advancement of fees would reflect poorly on the firm.

Interference with Defendants’ Ability to Obtain Advancement of Legal Fees From KPMG, filed May 22, 2006, at 1.

⁸ *Id.* at 7.

⁹ U.S. Dep’t of Justice, Criminal Resource Manual sec. 163 (2005).

¹⁰ Transcript of hearing in *United States v. Stein*, May 8, 2006, at 268 (testimony of Shirah Neiman).

¹¹ Mark Hamblett, “Judge Scores Position of U.S. on Legal Fees,” *New York Law Journal*, May 11, 2006, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1147251932838>.

¹² Lynnley Browning, “U.S. Tactics on KPMG Questioned,” *New York Times*, June 28, 2006, at C1.

In February 2004, KPMG’s lawyers (led by Robert Bennett of Skadden, Arps, Meagher, Slate & Flom) met for the first time with prosecutors from the United States Attorney’s Office for the Southern District of New York. Notes taken by an IRS agent who was present for the meeting, as well as Skadden partner Saul Pilchen, were largely similar. Both indicated that lead prosecutor Shirah Neiman told Skadden that, in evaluating whether KPMG should advance attorneys’ fees to employees in accordance with past practice, but absent any legal obligation to do so, “misconduct cannot be rewarded.”¹³ In addition, Pilchen underlined the following comment in his notes, attributed to Assistant United States Attorney Justin Weddle: “if u have discretion re fees – we’ll look at that under a microscope.”¹⁴

Within two weeks, KPMG and Skadden had apparently formulated an approach to addressing fee advancement in which KPMG would cap fees at \$400,000 and condition their payment on any partner or employee “cooperating fully with the company and the government.” In addition, all payments would cease for anyone charged with criminal wrongdoing. In a letter sent by the KPMG deputy general counsel to a wide audience of employees, KPMG urged full cooperation with the investigation and explained the benefits of independent legal counsel for anyone who sought the services of an attorney. This section of the letter upset members of the prosecution team – at least one of whom (Weddle) had already expressed a desire to interview employees without immunity (or with weak proffer agreements) in order to gain material for cross-examination. Weddle pronounced the letter one-sided and of the wrong tone. After he communicated this view to KPMG, the firm put out an additional “Q & A” document that emphasized that counsel was not *needed* for those being interviewed by the government.

In the process negotiating the contents of the letter to employees regarding fee advancement, Skadden asked the government for its definition of cooperating employees, and asked to be notified if, in the government’s view, any employees or partners were not cooperating. “From that point forward, the government took full advantage.”¹⁵ It sent a series of letters to Skadden, providing updates on which employees were cooperating and which were not, and thereby prompting Skadden to send letters to these employees threatening to cut off fees “[a]bsent an indication from the government within the next ten business days that your client no longer refuses to participate in an interview with the government.”

One of the defendants who was outflanked by KPMG’s counsel and the government was Carol Warley, a tax partner in the Houston office. Although her particular case was mentioned only briefly in Judge Kaplan’s opinion,¹⁶ the facts regarding her defense as adduced during discovery place the government’s tactics in this case in stark relief. It is undisputed that Warley, with her lawyer, had agreed to an initial interview with the government. After the interview, her lawyer sent to the United States

¹³ *United States v. Stein*, S1 05 Crim. 0888 (S.D.N.Y. June 26, 2006), at 15-16.

¹⁴ *Id.*

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 18.

Attorney's office a letter explaining that he thought that the interview had been conducted in an abusive and unfair manner, and that she would only consent to a second interview if she were assured that she was a subject, and not a target, of the investigation, and if the interview were videotaped. After this letter, the assistant United States attorneys who were investigating the case placed Warley on the "uncooperative" list because she had made "unreasonable" demands over and above the office's standard proffer agreement. Warley, the sole wage earner for ill husband and daughter, finally agreed to a second interview with no additional conditions, and when she arrived, was served with a grand jury subpoena.¹⁷

Ultimately, KPMG in 2005 signed a deferred prosecution agreement that required it to continue to comply with the government's running definition of "cooperation." For example, KPMG agreed to continue to provide information about its current and former partners, employees and agents, and to use "reasonable best efforts" to make available not only its current personnel, but also its former partners and employees, many of whom it discharged during the course of its efforts to impress the government with its cooperation. More generally, KPMG agreed to "cooperate fully and actively with the Office, the IRS, and with any other agency of the government designated by the Office ('Designated Agencies') regarding any matter relating to the Office's investigation about which KPMG has knowledge or information."

Based on these facts, Judge Kaplan made the following findings. First, he concluded that "the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO."¹⁸ Second, although KPMG "sought an indication from the USAO that payment of fees in accordance with its settled practices would not be held against it," the USAO "deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum."¹⁹ Third, "the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys," going over and above the language of the Thompson Memo to instruct KPMG as to how to advise its employees of their need for legal representation, and encouraging KPMG to depart from well-established past practice in paying fees. Fourth, "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO."²⁰

¹⁷ Defendants' Pre-Hearing Memorandum, filed May 24, 2006, at 15-18 (citing to correspondence and other exhibits).

¹⁸ *Stein*, at 32.

¹⁹ *Id.*

²⁰ As an important corollary to these findings, Judge Kaplan also found that the defendants were legally justified in expecting advancement of fees: "KPMG had an unbroken track record of paying the legal expenses of its partners and employees incurred as a result of their jobs, without regard to cost. All of the KPMG Defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses in connection with the government's investigation and, if they were indicted, defend against any charges that arose out of their employment by KPMG." *Stein*, at 38. Evidence was introduced that KPMG

The Constitutional Parameters of “Cooperation”

The Sixth Amendment: In analyzing the transferability of Judge Kaplan’s opinion to other cases and other contexts, it is useful to contrast aspects of his ruling with the way the constitutional issues were teed up by the defendants and *amici curiae*.²¹

The challenge presented by this case, by and large, was identifying the kind of constitutional action best characterized the harm wrought by the government’s conduct both *pre* and post-indictment. The Supreme Court has already established the parameters of the *post*-indictment issue. “[T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which [the Supreme Court] has operated in Sixth Amendment cases.” *United States v. Wade*, 388 U.S. 218, 237-38 (1967). Moreover, the rules governing this aspect of the Sixth Amendment right to counsel were made all the more clear by the recent decision in *United States v. Gonzalez-Lopez*,²² for which Judge Kaplan appeared to be waiting to issue his decision (his decision was issued the morning after *Gonzalez-Lopez*, and quoted and cited the opinion). The Court in *Gonzalez-Lopez* held that the Sixth Amendment right to counsel insures the fairness of our adversarial system of criminal justice, and therefore, its deprivation cannot be subject to a harmless error analysis. Building on its Confrontation Clause precedent two terms before in *United States v. Crawford*, in which the Court held that meeting the broad purpose of a constitutional right was not the same as observing the right itself, Justice Scalia wrote for the *Gonzalez-Lopez* majority, “It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be the best.”²³

All of which begs the question, does the Sixth Amendment right to counsel vest *pre*-indictment in such a way that the government’s actions can violate it? There are obvious modalities for arguing that this must be the case, given the Court’s willingness to protect the judicial process itself. The judicial process begins pre-indictment – with interrogations, line-ups, proffers, and any number of instances in which “the government’s role shifts from investigation to accusation,” at which point the assistance of counsel “is needed to assure that the prosecution’s case encounters ‘the crucible of meaningful adversarial testing.’”²⁴ When the Thompson Memo applies, the government, by necessity (as found by Judge Kaplan, regardless of the government’s assertions to the contrary in this case), must determine whether there are “culpable” individuals before

had paid more than \$20 million in defense costs for four employees who had been involved in a previous, unrelated criminal proceeding.

²¹ The author and Mark I. Levy of Kilpatrick Stockton LLP were attorneys of record for *amici* the National Association of Criminal Defense Lawyers. The brief was written for NACDL and the New York Council of Criminal Defense Lawyers by Lewis J. Liman, Stephen M. Rich, and Jennifer A. Kennedy of Cleary Gottlieb Steen & Hamilton LLP.

²² No. 05-352 (June 26, 2006).

²³ *Id.* at 5.

²⁴ *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

deciding whether a corporation is improperly in assisting said individuals. However, this line of argument has been rejected in decisions such as *Moran v. Burbine*, whose holdings have depended on the rationale that the dangers posed by custodial interrogation (and other pre-trial procedures) alone do not implicate the procedural fairness with which the Sixth Amendment is concerned.

Logically extending the Sixth Amendment right to counsel to the pre-indictment time period (and therefore to be able to recover fees that should have been paid pre-indictment), the defendants argued that “the prosecutors had an affirmative obligation to ensure that the Government’s gross interference with KPMG’s practice of advancing attorneys’ fees did not result in cutting off of legal fees upon indictment.”²⁵ This “affirmative obligation” was grounded in a series of forfeiture cases that began, improbably, with *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). In *Caplin & Drysdale*, the Court held a third party did not have a Sixth Amendment “interest” in *forfeitable* monies held by another party that would otherwise be available to pay attorneys’ fees. The decision turned in large part on the nature of forfeiture statutes (which provide that title transfers to the government at the time of the criminal conduct), as well as on the showing that the government must make to prove that no other party has a legitimate property interest in forfeitable money or property. Subsequently, a series of federal appellate courts held that a defendant whose right to counsel is jeopardized by pretrial forfeiture is entitled to substantial process before that money is taken away.²⁶

Amici went a step further and, goaded by Judge Kaplan’s highly piqued remarks about the coercive effects of the Thompson Memo itself, argued that indictment is not a “magical moment” at which the Sixth Amendment attaches – and used the Thompson Memo’s unique directive to prosecutors to determine “culpability” to cut a narrow pre-indictment swath:

There could be no conduct that more centrally implicates the Sixth Amendment than a prosecutor’s direction to a corporation to cut off the payment of attorneys’ fees to individuals whom the prosecution believes to be criminally culpable. The very purpose and effect of such conduct is to weaken the defense when and if the prosecution brings criminal charges. There would be no reason for the prosecution to take such action but for its contemplation that it will bring criminal charges – what other reason could the prosecution have for cutting off attorneys’ fees in circumstances such as these other than that counsel might be necessary.²⁷

In his ruling on the Sixth Amendment issue, Judge Kaplan took a straightforward path. He ruled that the government’s continuing conduct violated the Sixth Amendment

²⁵ Post-Hearing Memorandum of Law, *supra* note __, at 13.

²⁶ See Brief of *Amici Curiae* of the New York Counsel of Defense Lawyer sand the National Association of Criminal Defense Lawyers, at n.6 (collecting cases).

²⁷ *Id.* at 11-12.

after it indicted the defendants, and that those the defendants are entitled to those fees.²⁸ His analysis of the Sixth Amendment harm caused by the government in this case is difficult to find fault with: “the dispositive question is whether the government’s law enforcement interests in taking the specific actions in question sufficiently outweigh the interests of the KPMG Defendants in having the resources needed to defend as they think proper against those charges.” He concluded that the government cannot possibly assert a legitimate interest in insuring that a defendant cannot retain counsel in a complicated white collar criminal case – “regardless of the legal standard of scrutiny applied.”²⁹

Although Judge Kaplan ruled that the chain of events set in motion prior to indictment had an actionable post-indictment effect, he analyzed pre-indictment conduct in a different context. “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.”³⁰ Judge Kaplan dispelled the prosecution’s concern that all sorts of pre-indictment conduct would be open to Sixth Amendment scrutiny under this rule. This is so, he ruled, because the Thompson Memo is remarkably open about the government’s “purpose of minimizing these defendants’ access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions.”³¹

However, all of the defendants were advanced fees before indictment up to the \$400,000 cap, and only one defendant went over that cap. Therefore, the pre-indictment conduct “must be evaluated in a very different context,” according to Judge Kaplan. He agreed, therefore, to entertain a motion to suppress proffer and other pretrial statements that the defendants made “that they conceivably would not have made had they not [been] induced to do so by the threat of having payment of their legal fees cut off.”³²

Fifth Amendment: The Court’s Fifth Amendment analysis begins with the question, what type of harm *is* this, exactly? Neither the parties, nor *amici*, argued that this case fell within the “shocks the conscience” rubric of the Due Process Clause (tempting though that argument often is, courts tend to allow the government to pressure potential defendants in all kinds of ways before indictment). Nonetheless, something is very wrong with a picture in which the government asserts that demanding the cessation of fee payment, the waiver of attorney-client privilege, and the termination of employees who assert their Fifth Amendment rights are all necessary to prevent the a company from “circling the wagons.”³³ First, it is difficult to take this assertion at face value, given that the Thompson Memorandum nowhere suggests that these factors come into play only when the prosecutors detect obstructive behavior. Second, there is no logical relationship between the valid assertion of a privilege (*see United States v. Arthur Andersen*) nor the payment of attorneys’ fees for employees (*see Gagnon v. Scarpelli*, 411 U.S. 778 (1973)),

²⁸ This is subject to a second proceeding in which the defendants will be able to show their entitlement to fees – see discussion *infra*.

²⁹ *Stein*, at 59-60.

³⁰ *Id.* at 56.

³¹ *Id.*

³² *Stein*, at 67.

³³ Transcript of May 10, 2006 Hearing at 409:20-25.

and the assessment of whether a particular company is “cooperating.” Third, the Constitution *prohibits* making this logical connection by virtue of its inviolable procedural protections (see *Gonzalez-Lopez* and *Crawford, supra*).

Using this analysis, the parties and *amici* argued that there is a Fifth Amendment liberty interest in – quite obviously – avoiding indictment – and in being subject to a fair process in the meantime. The process provided in *Caplin & Drysdale* informed this argument. *Amici* specifically argued for rational basis review of the government’s asserted interest in cutting off attorneys’ fees pre-indictment, reasoning that, for the three reasons listed above, the government could not survive even such a tame standard.

Judge Kaplan, however, employed strict scrutiny of this “fundamental” liberty interest. Clearly motivated by the outrage that he felt over the government’s conduct, the judge detailed the ways in which he felt that the prosecutors, aided by the Thompson Memo, had tainted the fairness of the criminal justice system from the get-go. Moreover, citing many of the reasons set forth by *amici curiae* business groups who weighed in on the side of the defendants, Judge Kaplan explained the many legitimate purposes served by agreements to pay fees even post-indictment, including the fact that “an employee caught up in an investigation, or even charged with a crime, because the employee did his or her job for the company has at least some claim to assistance” He concluded: “If the government means to take the payment of legal fees into account in making charging decisions only where the payments are part of an obstruction scheme – and thereby narrowly tailor its means to its ends – it would be easy enough to say so. But that is not what the Thompson Memo says.”³⁴ Although the actions of the USAO in this case “compounded the problem that the Thompson Memo created,” the Thompson memo itself failed strict scrutiny by his accounting.

United States v. Stein: The Gift That Keeps On Giving

Judge Kaplan has been criticized – although not yet in print, as far as this author can discern – for having painted this opinion with too broad a brush. While it’s true that his description of the government’s behavior in this case is extremely unusual for a federal district judge, it is well-documented in the record. Moreover, despite his eloquent and lengthy descriptions of the important but amorphous need to protect the fairness of the criminal process, Judge Kaplan’s rulings were, at base, fairly conservative from a legal perspective. After spending a significant amount of time explaining why “the right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection,” he rests his holding on “the only question now before the Court, [which is] whether a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference.”³⁵ As for the Sixth Amendment underpinning of his ruling, while a panel decision of the Ninth Circuit does appear to be the only case that is on all

³⁴ *Stein*, at 51-52.

³⁵ *Stein*, at 46-47.

four corners with *Stein*,³⁶ it does not seem particularly controversial that government behavior that begins before a right formally attaches, but continues after it attaches, is still a violation. Unlike *Moran v. Burbine*, in which the court held that the pre-indictment “taint” of the denial of counsel is not enough under either the Fifth or Sixth Amendment (in most contexts, anyway), this violation of the right to counsel continued explicitly and directly after indictment – it is not a taint argument, it is a full-throated denial of counsel argument.

In any event, the defendants will soon see whether they are entitled to any relief from pre-indictment conduct via the suppression of statements that were made. In order to hold that hearing, and for the defendants to prepare for trial despite the government’s interference with their right to fees, the trial has been postponed from September 2006 to January 2007.³⁷ Judge Kaplan has agreed to exercise his ancillary jurisdiction over KPMG and entertain suit by the former employees against the firm in order to prove their legal entitlement to fees (he rejected defendants’ argument that ordering KPMG to pay its next “fine” installment to the court rather than DOJ was merely injunctive relief, thus overcoming sovereign immunity). So far, KPMG has said that it will go to court rather than pay these fees voluntarily, and the company will likely assert that the matter belongs in arbitration. Will the judge ultimately throw up his hands and dismiss the indictment? Will this case serve as more than a warning shot across the bow to prosecutors that judges are going to start to examine Thompson Memo practices? We are in uncharted territory. We can only hope.

³⁶ *United States v. Harrison*, 213 F.3d 1206 (9th Cir. 2000).

³⁷ *United States v. Stein*, Order issued June 19, 2006.