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APPEALS COURT UPHOLDS DISMISSAL OF INDICTMENTS DUE TO PROSECUTORIAL MISCONDUCT *(United States v. Stein)*

The Washington Legal Foundation (WLF) scored a major victory last week when the United States Court of Appeals for the Second Circuit upheld the dismissal of indictments against certain employees of KPMG, a major accounting firm. U.S. District Court Judge Lewis Kaplan dismissed the indictments last year because KPMG was pressured by the Justice Department to stop advancing legal defense fees to the targeted employees in order to avoid indictment of the company.

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 and even drafted language used in a company memo to the employees urging them to cooperate with prosecutors.

As Judge Kaplan later described it, "KPMG refused to pay [the employees' defense fees] because the government had the proverbial gun to its head." 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.

The Second Circuit ruled that KPMG, in limiting the advancement of fees to its employees, was acting at the behest of the Justice Department and, therefore, was a state actor that deprived the employees of their Sixth Amendment right to counsel. "This is a tremendous victory for employees and businesses who have been unfairly prosecuted by the Justice Department and forced to waive their constitutional rights," said Paul Kamenar, WLF's Senior Executive Counsel.

WLF's brief, filed as part of WLF's CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, was drafted with the *pro bono* assistance of Michael J. Gilbert Steven B. Feirson, and Joshua I. Sherman of Dechert LLP.

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