

Government Requests for Privilege Waivers and Other Forms of Cooperation:

The Latest in the Challenge to the Thompson Memo

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I. INTRODUCTION

Government regulators and investigators monitor “health care providers, practitioners and vendors and associated health care joint ventures and other self-referral relationships” for potential Medicare/Medicaid fraud and abuse.¹ Accordingly, health law practitioners share the concerns of the ABA’s Task Force on the Attorney-Client Privilege (Task Force) that the policies set forth in the Thompson Memorandum (Thompson Memo) have resulted in both an increased number of requests for privilege waivers and an erosion of the privilege itself.² Moreover, a question of equal concern is whether the unintended effect of the Department of Justice’s (DOJ’s) privilege waiver and other cooperation policies has been to encourage certain practices that may run afoul of numerous provisions of the ABA Model Rules of Professional Conduct including, but not limited to, Model Rule 3.8 (Special Responsibilities of a Prosecutor), Model Rule 4.2 (Communications with Persons Represented by Counsel), Model Rule 4.3 (Dealing with Unrepresented Persons), and Model Rule 4.4 (Respect for Rights of Third Persons).

This article summarizes the DOJ’s privilege waiver and other cooperation policies. It then examines the recent trends and practices that have arisen from these policies. Next, it identifies the ethical concerns raised by these trends. Finally, it explores the various proposed responses and resolutions designed to address the ethical issues implicated by these practices, including the latest initiative to persuade the DOJ to reverse its waiver policies.

II. GOVERNMENT’S CORPORATE COOPERATION POLICIES

On January 20, 2003, then Deputy Attorney General Larry Thompson issued a memorandum to Heads of Department Components entitled “Principles of Federal Prosecution of Business Organizations.”³ The Thompson Memo identified nine factors to guide Department prosecutors in making the determination of whether to charge a business organization.⁴ The fourth of these nine factors calls for the “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of [the business organization’s] agents, *including, if necessary, the waiver of corporate attorney-client and work product protection . . .*”⁵ According to the Justice Department, this provision is necessary to enable “the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition[,] [these requests] are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”⁶

The Thompson Memo also discourages corporations from advancing defense costs to employees in connection with an investigation or related proceedings.⁷ It provides that such conduct may be interpreted by the government as “protecting [] culpable employees and agents.”⁸ Thus, “a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys’ fees, through retaining employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement” may be interpreted as indicia of a company’s failure to cooperate.⁹ Deputy Attorney General Thompson has defended the practice of pressuring companies to cut off payment of defense costs for their employees on the ground that “they [the

employees] don't need fancy legal representation" if they have not engaged in any wrongdoing.¹⁰

While considerable debate persists regarding whether the DOJ's policies and practices have, in fact, resulted in an increase of waiver requests,¹¹ the empirical data compiled on this subject tends to establish that these concerns are well-founded.¹² Moreover, several recent investigations have illustrated that the Justice Department's privilege waiver and other cooperation policies have given rise to a growing list of ethical concerns for both the defense bar and government attorneys.

III. RECENT TRENDS STEMMING FROM REQUESTS FOR PRIVILEGE WAIVERS AND OTHER FORMS OF COOPERATION

A. Criminal Liability Based Upon False Statements to Private Attorneys Conducting Corporate Internal Investigations

(1) *United States v. Sanjay Kumar, et al.*, 1:04-Cr-00846 (E.D.N.Y. 2004)

On April 8, 2004, three executives of the software company Computer Associates (CA) pleaded guilty to obstructing justice and conspiring to commit securities fraud.¹³ The facts that provided the basis for the pleas arose out of claims that the defendants participated in backdating licensing agreements and other false documents that led the company to improperly book more than one billion dollars of revenue to meet the earnings estimates of Wall Street Analysts.¹⁴ Specifically, in early 2002, the U.S. Attorney's Office for the Eastern District of New York, the Federal Bureau of Investigation (FBI), and the Northeast Regional Office of the Securities Exchange Commission (SEC) began investigating CA's accounting practices.¹⁵ In February 2002, CA's Board of Directors retained a law firm to conduct an internal investigation after learning of the Justice Department's and SEC investigations.¹⁶ According to the government, the interviewees provided "false and misleading justifications" of those practices when outside counsel interviewed them.¹⁷ Moreover, the Audit Committee of CA's Board of Directors retained a second outside law firm to conduct a separate investigation into CA's accounting practices.¹⁸ The government asserts that false statements were also provided to lawyers from this second firm during their investigation.¹⁹

After these interviews, CA waived all privileges and provided the results of the internal investigation to federal investigators.²⁰ The government concluded that the executives must have known the company's outside counsel would forward their false statements to the government and therefore had knowingly, intentionally and corruptly conspired to "obstruct, influence and impede" the government's investigation into the accounting irregularities.²¹

On the same day these guilty pleas were accepted, the SEC filed civil actions against the three former executives, claiming that they also obstructed the Commission's investigation "by wrongly deceiving [CA's] outside counsel, and derivatively the government."²² Thus, the false statements made to outside counsel are alleged to have also constituted a false statement that obstructed the SEC investigation.²³

Finally, on September 22, 2004, the government continued its investigation by indicting CA's former Chief Executive Officer and Chairman, Sanjay Kumar, and its former Head of Worldwide Sales, Stephen Richards.²⁴ Again, the government alleges that false statements made to private counsel constitute the obstruction of justice:

Shortly after being retained in February, the Company's Law Firm met with the defendant SANJAY KUMAR and other CA executives in order to inquire into their knowledge of the practices that were the subject of the Government Investigations. During these meetings, KUMAR and others did not disclose, falsely denied and otherwise concealed the existence of the [allegedly fraudulent] practice. Moreover, KUMAR and others concocted and presented to the Company's Law Firm an assortment of false justifications, the purpose of which was to support their false denials of the [allegedly fraudulent] practice. KUMAR and others knew, and in fact intended, that the Company's Law Firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impede the Government Investigations.²⁵

The defendants have moved to dismiss this count of the indictment.²⁶

(2) *United States v. Greg Singleton*, H-04-514-SS (S.D. Tex. 2006)

On March 8, 2006, former Dynege, Inc. (Dynege) natural gas trader Michelle Valencia, thirty-four, and former El Paso Merchant Energy (El Paso) natural gas trader Greg Singleton, thirty-eight, were charged in a second superceding indictment with conspiracy, false reporting, wire fraud and obstruction of justice related to the transmission of allegedly inaccurate trade reports to industry newsletters that used the reported trades to calculate the "index" price of natural gas in August 2000.²⁷ As in *Kumar*, the obstruction of justice count is based upon statements made to private attorneys during the company's internal investigation.²⁸

Specifically, the government alleges that in July 2002, the U.S. Attorney's Office for the Southern District of Texas

began investigating El Paso's natural gas trading practices. On November 13, 2002, El Paso issued a press release announcing that it had retained an outside law firm (Outside Lawyers) in connection with the investigation "to analyze the accuracy of the information that El Paso Merchant Energy reported to trade publications."²⁹ On November 22, 2002, the Outside Lawyers interviewed Singleton regarding the accuracy of the pricing information and it is alleged that Singleton provided false information during the interview.³⁰ Following a waiver of the attorney-client privilege, the government learned about the alleged false statements made to the Outside Lawyers and relied upon them as a basis for the obstruction count:

On or about November 22, 2002, El Paso's Outside Lawyers met with defendant GREG SINGLETON at his criminal defense attorney's office to interview him regarding the practices that were the subject of the CFTC and FERC investigations. During the interview, defendant GREG SINGLETON did not disclose, falsely denied, and otherwise concealed that he had provided false information to trade publication. Defendant GREG SINGLETON believed that El Paso's Outside Lawyers would inform government agencies of his statement during the interview. In fact, El Paso provided a memorandum of defendant GREG SINGLETON's interview to the CFTC, the FERC, and the USAO.³¹

Defendant Singleton has moved to dismiss this count of the second superceding indictment.³²

B. "Real Time Disclosures" of Results of Investigation

(1) *United States v. ABB Vetco Gray, et al.*
4:04-cr-00279 (S.D. Tex. 2004)

ABB Vetco Gray Inc. and ABB Vetco Gray UK Ltd., the United States and United Kingdom subsidiaries of Swiss company ABB Ltd., are suppliers of systems, products, and services for onshore and offshore oil and gas drilling and production.³³

In late October 2003, ABB Ltd. made public a preliminary agreement to sell two of its upstream oil, gas, and petrochemicals subsidiaries, Vetco Gray UK, Ltd. (Vetco UK), based in Aberdeen, Scotland, and Vetco Gray, Inc. (Vetco US), based in Houston, Texas.³⁴ During the ensuing months of due diligence, questionable payments, totaling more than \$1.1 million, were found to be made by the subsidiaries to officials in connection with large-scale engineering projects in Nigeria, Angola, and Kazakhstan.³⁵ The findings were voluntarily turned over to the SEC and the DOJ.³⁶ Additionally, the company

"agreed to provide 'real-time disclosure' of the results of a joint investigation conducted by lawyers for ABB Ltd. and lawyers representing the purchasers of ABB's Vetco Gray group companies."³⁷

On July 6, 2004, the two subsidiaries pleaded guilty to criminal and civil violations of the anti-bribery provisions of the FCPA. As part of the plea agreement, each company agreed to pay a fine of \$5.25 million.³⁸

C. Government Demands That Organizations Demonstrate Cooperation by, Among Other Things, Declining Requests for Fee Advancements and Indemnification

(1) *United States v. Jeffrey Stein, et al.*, 05 Cr. 888
(S.D.N.Y. 2006)

On November 18, 2003, the U.S. Senate's Permanent Subcommittee on Investigations conducted hearings into allegations that KPMG marketed and sold allegedly fraudulent tax shelters.³⁹ KPMG fervently defended its tax strategies during these Senate hearings.⁴⁰ Regardless, KPMG became a target of a grand jury investigation following the hearings.⁴¹

In February 2004, it became "public knowledge" that the DOJ was investigating "certain tax services that were offered by the firm during the 1996-2002 time period."⁴² By spring 2005, KPMG was reportedly "fighting for its life" as it sought to ward off a potential indictment for its alleged participation in the creation of fraudulent tax strategies.⁴³

On June 16, 2005, KPMG issued a press release in which it stated that its tax strategies, which it had defended for several years, were "unlawful."⁴⁴ KPMG stated further that it regretted that the shelters had ever been offered and pledged that "those responsible for the wrongdoing have been separated from the firm."⁴⁵

In August 2005, KPMG entered into a Deferred Prosecution Agreement (DPA) with the Justice Department.⁴⁶ The DPA required KPMG to ratify a "Statement of Facts" relating to the tax shelter strategies.⁴⁷ The Agreement explicitly prohibits KPMG from taking any position or asserting any fact that is inconsistent with the Statement of Facts:

KPMG agrees that it shall not, through its attorneys, agents, partners or employees, make any statement, in litigation or otherwise, contradicting the Statement of Facts . . . Any such contradictory statement by KPMG, its present or future attorneys, agents, partners or employees shall constitute a breach of this Agreement and KPMG shall thereafter be subject to prosecution

. . . . The decision as to whether any such contradictory statement will be imputed to KPMG for the purpose of determining whether KPMG has breached this Agreement shall be at the sole discretion of the [United States Attorneys'] Office.⁴⁸

KPMG was further obligated to “waive any privileges (subject to a few narrow exceptions) as against the government, while being permitted to preserve those privileges as against third parties”⁴⁹

The defendants moved to dismiss the indictment contending, among other things, that “. . . as part of its cooperation with the prosecutors [], KPMG was induced (a) to refuse to make payment for legal fees incurred by current or former partners during the pre-indictment investigation, unless they agreed to ‘cooperate’ with the government, including being interviewed by the prosecutors concerning the subject matter of the investigation, and (b) with respect to any such partner who was ‘cooperating’ with the prosecutors, to refuse to make payment for legal fees if the partner were indicted on criminal charges brought by said prosecutors.”⁵⁰

In June 2006, the court, following a three-day hearing, ruled that the government violated the defendants’ Fifth and Sixth Amendments rights by causing KPMG to cut off payment of legal fees and other defense costs upon indictment.⁵¹

As to the finding that the Thompson Memo’s fee advancement provisions violated the defendants’ Fifth Amendment substantive due process rights, the court explained that the right to fairness in the criminal process is a fundamental liberty interest entitled to substantive due process protection.⁵² “[N]either liberty nor justice would exist if fairness to criminal defendants were sacrificed.”⁵³ After finding that the government, pursuant to the dictates of the Thompson Memo, coerced KPMG to withhold funds lawfully available to the defendants,⁵⁴ the court observed that “[f]ew if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum []. It would be irresponsible to take the chance that prosecutors might view it as ‘protecting culpable employees and agents.’”⁵⁵ Accordingly, the Thompson Memo “. . . discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional right to defend themselves” in violation of the Due Process Clause.⁵⁶

The court’s finding that the Thompson Memo, on its face and as applied, also violated the defendants’ Sixth

Amendment right to counsel is premised on the government’s interference with the defendants’ ability to choose legal representation. The court explained that the Sixth Amendment right to counsel “guarantees more than the mere presence of a lawyer at a criminal trial. It protects [] an individual’s right to choose the lawyer or lawyers he or she desires and to use one’s own funds to mount the defense that one wishes to present.”⁵⁷ The court held that even though the “advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant[,] [such facts would still be] insufficient to justify the government’s interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves”⁵⁸ In doing so, it emphasized that our judicial system is necessarily intolerant of any such interference:

No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise [their constitutional] rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system.⁵⁹

IV. ETHICAL CONCERNS RAISED BY RECENT TRENDS

A. Interference with Fifth Amendment Protections

“One major problem [with cooperation policies that call for the waiver of the attorney-client privilege and to count a corporation’s advancement of fees or promises to support targeted employees as strikes against the organization] is that these kinds of policies invite investigating counsel to bow to the pressure to become participants in a sotto voce effort to obtain incriminating information from corporate constituents without basic procedural protections.”⁶⁰ Accordingly, the practical effect of these practices is to give the government free license “to obtain information from individuals without any of the procedural protections our criminal justice system ordinarily affords to those accused of crimes.”⁶¹

The implementation of these policies in *Kumar* “reflect[s] a significant development in criminal-law enforcement [because] [i]n certain circumstances, private counsel retained by a company become in effect representatives of the government, so that misleading counsel carries the same criminal sanctions as misleading federal authorities.”⁶² The Singleton indictment provides additional support for this proposition.⁶³ Model Rule 4.4 appears to frown on the practice of seeking indictments under these circumstances. It mandates that “[i]n repre-

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senting a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [] a [third] person.”⁶⁴ Moreover, the comment to the rule provides:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons . . .⁶⁵

“It is hard to square [the] policy [of requesting privilege waivers generally] with either Model Rule 4.4’s mandate . . . or the admonition of the accompanying comment . . .”⁶⁶ It is even more challenging to do so when the practice results in obstruction of justice charges based upon statements made to investigating counsel. In circumstances in which the government has “. . . essentially enlist[ed] private companies and their counsel in doing the work of law enforcement agencies without making this connection clear to those interviewed in the course of internal investigations[,]”⁶⁷ a serious question arises as to whether investigating counsel and prosecutors are respecting the rights of third persons within the meaning of Rule 4.4.⁶⁸

Additionally, a privilege waiver that constitutes the enlistment of private attorneys in law enforcement initiatives raises concerns regarding a conflict with Rule 3.8’s directive that the prosecutor “. . . shall [] make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”⁶⁹ *Kumar, Singleton, and ABB Vetco Gray Inc.* illustrate that if the government has demanded a privilege waiver or real-time disclosures, it may also be obligated under Rule 3.8 to make reasonable efforts to ensure that the employee/target of an investigation has received information regarding his right to counsel (and self-incrimination) prior to the commencement of questioning by private counsel.⁷⁰

B. Interference with Sixth Amendment Protections

The Thompson Memo’s fee advancement provisions are perhaps even more problematic than the policies and practices outlined above. The *Stein* court is definitive in its holding that “[t]he Thompson Memorandum *on its face* and the [government’s] actions were parts of an effort to limit [the] defendants’ access to funds for their defense” in violation of the Sixth Amendment.⁷¹ In light of the clarity of this pronouncement, it would be a challenging exercise to contend that these policies and practices do not also do offense to the Model Rules.

Thus, government lawyers that demand or pressure business organizations to cease the advancement of fees do so at the risk of interfering with the Sixth Amendment rights of the accused in violation of Rule 4.4. Moreover, this practice appears to do offense to Rule 3.8’s call for prosecutors to work to ensure that defendants are afforded procedural justice and that outcomes of criminal proceedings are based upon sufficient evidence (and not the inability of the accused to defend himself).⁷²

C. Deferred Prosecution Agreements That Prohibit a Company or Its Employees from Asserting Facts Inconsistent with Those Outlined in the Agreement

“[E]thical standards are the primary means of regulating and defining the role of the lawyer.”⁷³ As evidenced by the title of Model Rule 3.8, “Special Responsibilities of a Prosecutor,” the prosecutor is subject to enhanced ethical obligations that do not apply to other lawyers:

[The prosecutor’s ethical obligations] include not only a heightened duty to ensure the fairness of the process by which a criminal conviction is attained, but also, as a corollary, a duty to avoid the public perception that criminal proceedings are unfair—hence, the duty to play in the center of the court. These responsibilities take account of the prosecutor’s superior power, yet exist even where there is relative equality of resources between the prosecution and defense, as may be true in some corporate criminal prosecutions.⁷⁴

Thus, “[t]he professional obligation to ‘seek justice’ places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other.”⁷⁵

Stein involves a deferred prosecution agreement in which the company “agrees that it shall not, through its attorneys, agents, partners or employees, make any statement, in litigation or otherwise, contradicting the Statement of Facts.”⁷⁶ While this may not sustain an allegation of prosecutorial misconduct, such an agreement is problematic under the Model Rules for at least two reasons.

First, it is elementary that criminal defendants have a right to establish a defense by presenting witnesses under the Sixth Amendment.⁷⁷ Moreover, courts have consistently held that “judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant’s right to present a defense.”⁷⁸ A provision of a DPA that prohibits the company or its employees from contradicting its statement of facts under threat of criminal prosecution, at a minimum, creates the unfortunate appearance that the Sixth Amendment rights of the

accused are being disregarded in contravention of Model Rule 4.4.

Second, the agreement appears to be inconsistent with Rule 3.8's mandate that the prosecutor make reasonable efforts to ensure that the accused is afforded procedural justice and that the government's obligations to seek the truth are being fulfilled. Reasonable people will always differ as to the point where legitimate pressure ends and improper coercion begins. It is clear, however, that "when the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes improper interference with a defendant's right of access to the witness."⁷⁹ Thus, it must also follow that the free choice (and obligation) of a witness to provide truthful testimony must remain free from external pressure. In a case in which the company and its employees have previously taken and defended a position inconsistent with the Statement of Facts in the DPA, a legitimate question arises as to whether the prosecutor is fulfilling his obligation and responsibility as a minister of justice in accordance with Rule 3.8.

V. THE ABA'S RESPONSE TO THE THOMPSON MEMORANDUM

In September 2004, the ABA established its Task Force to "evaluate issues and recommend policy related to the attorney-client privilege and work product doctrine."⁸⁰ In August 2005, the Task Force, with the assistance of the nation's leading academics, private practitioners, and government lawyers, produced a comprehensive report designed to "inform the public and the legal profession of the importance of the privilege and work-product doctrine, to relate each of these principles to the competing demands for access to protected information, and to assist the ABA in developing policies that strike the balance given these competing demands."⁸¹ The report set in motion, at least, three significant policy statements and initiatives designed to protect against the erosion of the privilege.

First, in August 2005, the ABA's House of Delegates accepted and passed Resolution 111 that, among other things, affirmed the ABA's strong support for the preservation of the attorney-client and work-product privileges and stated its opposition to policies and practices that have the effect of eroding these protections.⁸² Next, the ABA and the National Association of Criminal Defense Lawyers (NACDL), working in concert with other interested organizations, spearheaded the effort to develop empirical data to establish that the concerns regarding the erosion of the privilege were, in fact, well founded.⁸³ Finally, the ABA worked closely with a broad coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—to persuade the U.S. Sentencing Commission to

reverse the 2004 privilege waiver amendment to the Federal Sentencing Guidelines. On April 5, 2006, the Commission voted unanimously to reverse the 2004 privilege waiver amendment to the Guidelines by removing the language at U.S.S.G. § 8C2.5, App. N. 12 with regard to waiver.⁸⁴

In the wake of these initiatives and accomplishments, the ABA now stands poised to take on what is perhaps its most ambitious task to date: coaxing the DOJ to modify its waiver policy by eliminating the portion of the Thompson Memorandum relating to privilege waivers. On May 2, 2006, ABA President Michael S. Greco made a direct appeal to Attorney General Alberto Gonzales in a correspondence in which he "urge[d] [the DOJ] to consider modifying the [] Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition as a condition for receiving cooperation credit during investigations."⁸⁵ President Greco's correspondence includes a separate memorandum of suggested revisions to the Thompson Memo.⁸⁶ As to privilege waivers, it provides:

[T]his Memorandum amends the Thompson Memorandum by striking the following portion of § II.A.4.: ". . . including, if necessary, the waiver of corporate attorney-client and work product protection." As amended, § II.A.4. directs that federal prosecutors consider ". . . the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."⁸⁷

The same week this appeal was made to Attorney General Gonzales, President Greco, along with members from the Pennsylvania Bar Association met with, Senator Arlen Specter, Chairman of the Committee on the Judiciary.⁸⁸ President Greco, on behalf of the ABA, called for the Senate Judiciary Committee to hold a hearing on this issue and to provide it with information that might result in congressional action to address it.⁸⁹ Although a hearing date has not yet been set, it is already being reported that "a bipartisan group of lawmakers is considering asking the U.S. Department of Justice to change its policy of demanding waivers as evidence of a defendant's cooperation."⁹⁰

Instances in which the Justice Department reverses course on a policy initiative—in the absence of a change of administration—are rare. However, commentators, attorneys, and courts have now had the benefit of more than three years to assess the ethical concerns raised by the government's cooperation policies. In light of the recent decision in *Stein*, as well as, the ABA Task Force's proposed resolutions, the DOJ may conclude that it has no other choice.

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END NOTES

¹ Dan K. Webb et al., CORPORATE INTERNAL INVESTIGATIONS, § 2.04[9] (citing Peregrine and Nodzenski, Expanded Enforcement of the Fraud and Abuse Laws, 23 JOUR. Health and Hosp. L. 1 (1990)); Bookin and Tickle, The Medicare Kickback Statute: Elements and Defenses, 1994 Complex Crimes Journal at 60, Section of Litigation (ABA 1995)). The Department of Justice (DOJ), along with the Federal Bureau of Investigation (FBI) and Office of the Inspector General for the Department of Health and Human Services (DHHS), are the law enforcement agencies with primary responsibility for conducting healthcare fraud and other investigations affecting the healthcare industry. *Id.*

² Transcript of Record, ABA Task Force on Attorney-Client Privilege, Public Hearing (Feb. 11, 2005) (citing Memorandum from Deputy Attorney General Larry Thompson (Thompson Memo) to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003)).

³ Thompson Memo at 1.

⁴ *Id.* at 1.

⁵ *Id.* at 3 (emphasis added). The Thompson Memo, which calls for an “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation” (*id.*), expanded the policies outlined in a memorandum issued by former Deputy Attorney General Eric H. Holder in 1999. See Memorandum from Deputy Attorney General Eric H. Holder to Head of Department Components and U.S. Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999).

⁶ Thompson Memo at 8.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* The Securities and Exchange Commission (SEC) has developed cooperation policies and practices that are consonant with those issued by the DOJ. See Task Force Report at 16-18 for a detailed analysis of the Seaboard Report and other SEC cooperation practices.

¹⁰ Laurie P. Cohen, *In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, A1.

¹¹ The Justice Department has taken the position that federal law enforcement officials rarely request privilege waivers and that the attorney-client privilege is not under attack. See Interview with United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, UNITED STATES ATTORNEY’S BULLETIN (Nov. 2003) (acknowledging that while he has heard repeated complaints from the defense bar regarding a rise in requests for privilege waivers, he “[does not] see evidence of such a widespread practice”); see also Panel Discussion, Lessons from the Courtroom, ABA Criminal Justice Section’s 20th Annual Institute on White Collar Crime (Mar. 2, 2006) (former Deputy Attorney General James B. Comey remarking that he has never seen evidence of widespread requests for privilege waivers).

¹² In March 2006, a diverse coalition of organizations, which includes the Association of Corporation Counsel (ACC), the National Association of Criminal Defense Lawyers (NACDL), and the ABA, conducted a survey amongst their respective constituencies to compile data regarding the effect of the government’s privilege waiver and other cooperation policies and practices. See The Decline Of the Attorney Client Privilege in the Corporate Context, Survey Results (Mar. 2006) (*available at* <http://www.acca.com/Surveys/atyclient2.pdf>). Seventy-eight percent (78%) of the more than 1,400 in-house and outside corporate counsel surveyed responded that a “culture of waiver” now exists in which governmental agencies expect business organizations under investigation to waive the attorney-client or work-product privileges. *Id.* at 3. Specifically, 52% of in-house respondents and 59% of outside respondents indicated a “marked increase in waiver requests as a condition of cooperation.” *Id.* Both in-house and outside counsel reported that the government’s leading justification for requesting waivers is the DOJ’s policies. *Id.* at 4.

¹³ Minute Entry, *United States v. Kaplan*, 1:04-cr-00330 (E.D.N.Y. Apr. 8, 2004); Minute Entry, *United States v. Rivard*, 1:04-cr-00329 (E.D.N.Y. Apr. 8,

2004); Minute Entry, *United States v. Zar*, 1:04-cr-00331 (E.D.N.Y. Apr. 8, 2004).

¹⁴ Information at ¶ 18, *United States v. Kaplan*, 1:04-cr-00330 (E.D.N.Y. Apr. 8, 2004); see also Information at ¶ 19, *United States v. Rivard*, 1:04-cr-00329 (E.D.N.Y. Apr. 8, 2004); Information at ¶ 19, *United States v. Zar*, 1:04-cr-00331 (E.D.N.Y. Apr. 8, 2004).

¹⁵ Kaplan Information at ¶ 18.

¹⁶ *Id.* at ¶ 19.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 21.

¹⁹ Kaplan Information at ¶ 21.

²⁰ James J. Farrell and Jeremy G. Suiter, *The Cooperation Comundrum*, WALL STREET LAWYER, Vol. 8-No. 2 (July 2004).

²¹ Kaplan Information at ¶¶ 19-21.

²² See SEC Complaint at ¶ 27, SEC v. Kaplan, 04 Civ. 1465 (E.D.N.Y. filed Apr. 8, 2004), *available at* <http://www.sec.gov/litigation/complaints/comp18665a.htm>; see also SEC Complaint at ¶ 32, SEC v. Rivard, 04 Civ. 1464 (E.D.N.Y. filed Apr. 8, 2004), *available at* <http://www.sec.gov/litigation/complaints/comp18665b.htm>; SEC Complaint at ¶ 34, SEC v. Zar, 04 Civ. 1463 (E.D.N.Y. filed Apr. 8, 2004), *available at* <http://www.sec.gov/litigation/complaints/comp18665c.htm>.

²³ Kaplan Complaint at 4.

²⁴ Indictment, *United States v. Sanjay Kumar*, et al., 1:04-cr-00846, ¶¶ 51-59 (E.D.N.Y. Sept. 22, 2004); see also Press Release, FORMER COMPUTER ASSOCIATES EXECUTIVES INDICTED ON SECURITIES FRAUD, OBSTRUCTION OF JUSTICE: FORMER GENERAL COUNSEL PLEADS GUILTY, Company Enters Into Cooperation Agreement, U.S. Department of Justice (Sept. 22, 2004).

²⁵ Kumar Indictment at ¶ 53.

²⁶ *United States v. Kumar et al.*, 1:04-cr-00846, Motion to Dismiss Counts Six and Seven of Superseding Indictment (Oct. 24, 2005).

²⁷ Second Superseding Indictment, *United States v. Greg Singleton*, 4-04-00514-SS (S.D. Tex. 2006).

²⁸ *Id.* at 16-21.

²⁹ *Id.* at 19 (internal quotations omitted).

³⁰ *Id.*

³¹ Singleton Second Superseding Indictment at 20.

³² Defendant Greg Singleton’s Motion to Dismiss Count Ten of the Second Superseding Indictment, 4-04-00514-SS (Apr. 7, 2006).

³³ Press Release, U.S. Department of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004) (*available at* http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* See also Assistant Attorney General Christopher A. Wray, Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005).

³⁸ ABB Vetco Gray, Inc. Press Release at 1; see also Minute Entry, *United States v. Vetco Gray, Inc., et al.*, 4:04-cr-00279 (S.D. Tex. 2004); Corporate Crime Reporter, *ABB Units Plead Guilty to Bribery*, 18 Corporate Crime Reporter 28(1) (Jul. 6, 2004).

³⁹ See Statement of KPMG LLP Before the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate (Nov. 18, 2003).

⁴⁰ *Id.*

⁴¹ Memorandum of Law in Support of Defendant Jeffrey Eisheid’s Motion to Dismiss Indictment at 6, *United States v. Jeffrey Stein, et al.*, 05 Cr. 888 (S.D.N.Y. 2006).

⁴² Press Release, *KPMG Statement Regarding Department of Justice Matter*, KPMG (June 16, 2005) (referring to scope and time period of the DOJ’s investigation).

⁴³ John R. Wilke, *KPMG Faces Indictment Risks on Tax Shelters: Justice Officials Debate Whether to Pursue Case; Fears of ‘Anderson Scenario’*, WALL STREET J. (June 16, 2005); see also *Leonard Post, Deferred Prosecution Agreement Criticized*,

NEW YORK LAW J. (Feb. 9, 2006).

⁴⁴ Press Release, *KPMG Statement Regarding Department of Justice Matter*, KPMG (June 16, 2005).

⁴⁵ *Id.*

⁴⁶ Deferred Prosecution Agreement between KPMG and the U.S. Department of Justice (Aug. 2005).

⁴⁷ *Id.* ¶¶ 2, 15.

⁴⁸ *Id.* ¶ 15.

⁴⁹ Memorandum of Law in Support of Defendant Jeffrey Eischeid's Motion to Dismiss Indictment at 8, *United States v. Jeffrey Stein, et al.*, 1:05 cr. 00888 (S.D.N.Y. 2006).

⁵⁰ 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 at 13, *United States v. Jeffrey Stein, et al.*, 1:05 cr. 00888 (S.D.N.Y. 2006).

⁵¹ Opinion, *United States v. Jeffrey Stein, et al.*, 1:05 cr. 00888 (S.D.N.Y. Jun. 26, 2006) (hereinafter *Opinion*).

⁵² *Id.* at 45-47.

⁵³ *Id.* at 46 (internal quotations and citations omitted).

⁵⁴ The court relied upon, among other things, e-mails and meeting notes between KPMG's counsel and the government to support this finding. *See id.* at 10-22. One meeting note reflected that a federal prosecutor told KPMG that "if [you] have discretion [regarding] fees — we'll look at that under a microscope." *Id.* at 17 (emphasis in original).

⁵⁵ *Opinion* at 51.

⁵⁶ *Id.* at 52.

⁵⁷ *Id.* at 55 (internal citation omitted).

⁵⁸ *Id.* at 60.

⁵⁹ *Opinion* at 55 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964)).

⁶⁰ Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. 859, 952 (2003).

⁶¹ *Id.*

⁶² George Ellard, *Making the Silent Speak and the Informed Wary*, 42 Am. Crim. L. Rev. 985, 986 (2005); *see also* Alex Berenson, *3 Plead Guilty in Computer Associates Case*, N.Y. TIMES, Apr. 9, 2004, at C1.

⁶³ *See supra* notes 27-32 and accompanying text.

⁶⁴ Model Rules of Prof'l Conduct, R. 4.4 (2003).

⁶⁵ *Id.* at cmt. 1.

⁶⁶ *Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. at 952.

⁶⁷ *Id.* at 953.

⁶⁸ The interference with an employee's Fifth Amendment rights also is a concern when investigating counsel demands that an employee submit to an interview as a condition of continued employment (even though the company intends to turn over the results of the interview to the government). "Essentially, [employees and government officials] are demanding a waiver of the employee's Fifth Amendment rights as a condition of continued employment. In an interesting contrast, the Supreme Court has found that the government itself cannot make such a demand on its own employees." N. Richard Janis, *Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government*, Washington Lawyer (Mar. 2005) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

⁶⁹ Model Rules of Prof'l Conduct, R. 3.8 (2003).

⁷⁰ Under ordinary circumstances, it would be unusual for private counsel to bear the burden of issuing Miranda-type warnings to an employee. *See* Dan K. Webb et al., *CORPORATE INTERNAL INVESTIGATIONS*, § 9.06[1]. However, "if a private employer can be deemed to be acting as an agent of the government when conducting an investigation" a duty to warn "against self-incrimination and the right to counsel" may exist. *Id.* (citing *Skinner v. Railway Labor Executive Assocs.*, 489 U.S. 602, 614-15 (1989) (the Fourth Amendment is applicable to drug and alcohol testing mandated or authorized by federal railway regulations despite testing being conducted by a private entity)).

⁷¹ *Id.* at 56 (emphasis added). The court's holding appears to be consonant with those of other commentators who have examined this question. *See Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. at 954 ("The only apparent reason for prosecutors to consider fee advancement as a factor in charging, plea negotiation or sentencing position decisions is to make it more difficult for individuals to obtain counsel, or at least to obtain counsel with the resources necessary to function effectively in complex corporate criminal matters."); *see also* Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in *Internal Corporate Investigations (Chapter 2 of Internal Corporate Investigations)* (Brad D. Brian & Barry F. McNeil eds., ABA, 2003); Anitha Reddy, *BearingPoint Is Sued by Its Shareholders: Class Actions Part of Broader Trend, Study Finds*, WASH. POST, Sept. 12, 2003, at E05.

⁷² As reported above, the court also held that "[t]he legal advancement provision [of the Thompson Memo] [also] violates the Due Process Clause." *Opinion* at 53. Thus, the fee advancement provisions of the Thompson Memo appear to conflict with both Model Rules 3.8 and 4.4 on two separate grounds.

⁷³ Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 Fordham L. Rev. 1205, 1207 (2000).

⁷⁴ Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 Fordham Urb. L.J. 607, 615 (1999); *see also* ABA STANDARDS, STANDARD 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court.").

⁷⁵ *Why Should Prosecutors Seek Justice?*, 26 Fordham Urb. L.J. at 615. *See also* ABA Standards for Criminal Prosecution, published by the National District Attorneys Association §§ 33.1; *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁷⁶ *Supra* note 48 and accompanying text.

⁷⁷ *United States v. Williams*, 205 F. 3d 23, 29 (2d Cir. 2000).

⁷⁸ *Id.* (citing *United States v. Golding*, 168 F.3d 700, 705 (4th Cir. 1999) (government intimidation dissuaded witness from testifying and prosecutor further abused his power by commenting on witness's failure to testify); *United States v. Vavages*, 151 F.3d 1185, 1190-92 (9th Cir. 1998) (prosecutor dissuaded witness from testifying and commented on defendant's failure to present corroborating witnesses, and trial judge failed to scrutinize basis for witness's invocation of Fifth Amendment right against self-incrimination); *United States v. Heller*, 830 F.2d 150, 153-54 (11th Cir. 1987) (government intimidation deprived defendant of an important defense witness and induced witness to provide false testimony against defendant)).

⁷⁹ *United States v. Vega-Figueroa*, 234 F.3d 744, 752 (1st Cir. 2000) (quoting *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981)).

⁸⁰ ABA Presidential Task Force on the Attorney-Client Privilege, Report (Task Force Report) at 1 (Aug. 2005).

⁸¹ *Id.*

⁸² ABA Task Force on Attorney-Client Privilege, Recommendation 111 (Aug. 2005) (available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

⁸³ *See supra* note 12 and accompanying text.

⁸⁴ The amendments will be prepared for submission to Congress on May 1, 2006. Unless Congress takes affirmative action to modify or disapprove of an amendment in this package, it will become effective on November 1, 2006.

⁸⁵ Letter from Michael S. Greco, ABA President, to The Honorable Alberto Gonzales, U.S. Attorney General (May 2, 2006) (on file with author), available at <http://www.abanet.org/poladv/acprivgonz5206.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Letter from Michael S. Greco, ABA President, to Senator Arlen Specter, Committee of the Judiciary—Chair (May 9, 2006) (on file with author). *See also* Mary P. Gallagher and Marcia Coyle, *Between a Rock And a Hard Place: Companies Increasingly Urged to Waive Attorney-Client Privilege*, The Connecticut Law Tribune, May 29, 2006, at 2.

⁸⁹ *Id.*

⁹⁰ Leigh Jones, *Millberg Weiss Case Highlights Waiver Controversy*, The National Law Journal, June, 1, 2006, at 1.