CRIMINAL ISSUES IN CIVIL CASES

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Chapter 21

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Criminal Issues in Civil Cases

I. Introduction

What is the difference between a "civil" and a "criminal" violation? The statutes are often the same – fraud, price fixing, pollution, assault. In sum, many cases can be prosecuted either civilly or criminally or both.

No attempt to formalize the difference has ever succeeded. The "Crime-O-Meter" – to detect and rank all evil actions and intentions – hasn't (yet) been built. Some cases come to prosecutors from disgruntled employees, spurned lovers, jealous competitors ... and then take on a life of their own. Ultimately, we rely on the judgment of prosecutors, and their limited resources, to decide what is charged criminally and what it not.

The prospect of criminal charges greatly affects the course of a related civil case, and we have seen an increase in such overlap in recent years. This article addresses some of the issues that arise when criminal issues infringe civil cases, such as:

(1) When should a witness in a civil case assert the Fifth Amendment;
(2) What is the role of a company employee in a corporate civil investigation; and
(3) How should a witness handle parallel civil and criminal proceedings?

II Take Five: The Fifth Amendment in Civil Litigation.

A Who may take the fifth?

An individual? (Yes)
U.S. Const. Amendment V ("No person ... shall be compelled in any criminal case to be a witness against himself...."

A corporation? (No)
***Bellis v. United States*, 417 U.S. 85, 90, 94 S.Ct. 2179, 2184 (1974)("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination....")**

A custodian? (Not really)(*See* Subsection E, *infra*).

B. Even if innocent? (Yes – *Ohio v. Reiner,* 121 S.Ct. 1252 (2001))

The witness must take the Fifth in good faith – that is, not if the answer *could not tend to incriminate* him. To justify the privilege, though, the witness "cannot be required to disclose the very information which the privilege protects. Before the judge may compel the witness to answer, he must be 'perfectly clear ... that the answers *cannot possibly* have such tendency to incriminate'," *Ex Party DeLeon*, 972 S.W.2d 23, 25 (Tex. 1998) (quoting *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814 (1951). *DeLeon* recognized that, if accused of crime at work, the mere fact of employment can be incriminating. *Id.* Indeed, it would be a fact that the prosecutor would have to prove, no matter how obvious.

C. Counsel representing the *company* may have conflict of interest also advising the company's *employee* who might take or consider taking the Fifth.

In criminal litigation, it often is inadvisable for one lawyer to represent both a corporation, especially a large corporation, and any of its employees. As discussed below under the topic of "corporate cooperation," the criminal prosecutor whom the corporation is trying to appease will consider the corporation an entity separate from, and often adverse to, its employees. These issues influence counsel's decision to represent both a company and its employees in some civil litigation, such as security fraud, where criminal prosecution may result.

D. How does your client take the Fifth?

Strictly, the witness must invoke the Fifth himself, not through his attorney. *Meyer v. State,* 360 S.W.2d 518 (Tex. Sup. Ct. 1962) (denying motion to quash subpoena on attorney's representation); *State v. Huff*, 491 S.W.2d 216 (Tex. App. – Amarillo 1973); *Carrillo v. State*, 566 S.W.2d 902 (Tex. Crim. App. 1978); see also *Smith v. State*, 789 S.W.2d 350

(Tex. App. – Amarillo 1990) (cannot show a witness was "unavailable" under the rules of evidence based on his attorney's statement that he would take the Fifth if called). In some instances, where many witnesses are taking the Fifth, agreements among counsel beforehand can shorten the process and eliminate the need for a witness to sit through hours of questioning.

1. To all questions or only some?

A witness can waive his fifth amendment rights. *Rogers v. United States*, 340 U.S. 367, 372-74, 71 S.Ct. 438, 442 (1951) ("Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, [an individual] cannot invoke the privilege where response to the specific question in issue ... would not further incriminate here. Disclosure of a fact waives the privilege as to details. Thus, if the [witness] himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure . . . . As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination."). Thus, it generally is risky to answer some questions and invoke the fifth on others.

2. Can witness refuse to answer without giving a valid reason?

Only once: Refusing to answer without a valid reason, for example in a deposition, can expose a witness to contempt if the court has ordered the witness to answer or granted a motion to compel. *See In Re Buzz*, 965 S.W.2d 41 (Tex. App. – Ft. Worth 1998) (at initial deposition, witness answered some questions but not others without invoking the Fifth: initial answers did not waive Fifth Amendment, and witness could take Fifth after motion to compel granted); *SEC v. First Financial*, 659 F.2d 660 (5th Cir. 1981) (witness may be held in contempt for refusing to answer questions for no reason after being ordered to answer by the Court). In the face of a court order that the witness answer questions, the witness must invoke his Fifth Amendment privilege to justify not answering.

3. Is there a required legal formula for taking the Fifth?

There is no required legal formula to take the Fifth. For example, it should be sufficient to say: "I decline to answer based on my Fifth Amendment rights explained in *Ohio v. Reiner*."

4. Can witness change his mind?

A witness who testified at a deposition likely can change his position and invoke the Fifth at trial – because the Fifth must be asserted "proceeding by proceeding" – although this is within the judge's discretion. *Nichols v. Collins*, 802 F.Supp. 66, 77 (S.D. Tex. 1992) ("a witness' testimony in a prior proceeding or other disclosure of incriminating facts does not amount to a perpetual waiver of the privilege in all subsequent proceedings," so a witness's testimony in Nichols' first trial (which ended in a mistrial) did not waive the witness's Fifth Amendment rights at Nichols' second trial), *aff'd in part, rev'd in part on other grounds,* 69 F.3d 1255 (5th Cir. 1995).

Similarly:

Testifying at a criminal deposition does not waive a Fifth Amendment privilege in a subsequent trial. *United States v. Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976).

Testimony before a grand jury proceeding does not waive the privilege against self-incrimination at trial. *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979).

Witness who filed an affidavit in support of a new trial motion could assert Fifth Amendment privilege at the trial. *Jeffries v. United States*, 215 F.2d 225, 226 (9th Cir. 1954).

Testifying at a preliminary hearing would not waive Fifth Amendment privilege for trial. *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991).

Testifying at one trial does not waive a Fifth Amendment privilege for a subsequent trial. *United States v. Gary*, 74 F.3d 304, 312 (1st Cir. 1996).

Counsel's submission of an offer of proof as to what a defendant would say at a hearing is not a waiver; "waivers of privilege with respect to future testimony are not readily inferred." *United States v. Bryser*, 857 F.Supp. 306, 307 (S.D.N.Y. 1994).

Submitting an affidavit to support a defendant's motion for severance does not waive the affiant's Fifth Amendment rights, and the affiant can still invoke the Fifth at his own trial or the defendant's trial. *United States v. Trejo-Zamrano*, 582 F.2d 460, 464 (9th Cir. 1978) ("[Co-defendant] Jesus [did not] waive his right to refuse to give self-incriminating testimony when he executed the incriminating affidavit in support of [defendant] Frank's severance motion. A waiver of the Fifth Amendment privilege at one stage of a proceeding is not a waiver of that right for other stages.").

Similarly, it is within the judge's discretion whether to allow a witness who took the Fifth at a deposition to change his position and testify at trial. In this second situation, the judge obviously will be concerned about the prejudice of surprise, which sometimes can be cured by a continuance to allow another deposition.

E. The Fifth Amendment applies to production of documents, too.

The Fifth Amendment protects individuals against the required production of documents, when the act of production is "testimonial." *Fisher v. United States,* 425 U.S. 391, 408, 96 S.Ct. 1569, 1579 (1976). The records of a sole proprietorship are protected from disclosure just as the records of an individual. *Bellis v. United States*, 417 U.S. 85, 87-88, 94 S. Ct. 2179, 2182-82 (1974); *United States v. Doe,* 465 U.S. 605, 104 S.Ct. 1237 (1984); *In re Grand Jury Subpoena (Kent)* 646 F.2d 963, 968 (5th Cir. 1981); *Boyd v. United States*, 116 U.S. 616, 634-35, 6 S.Ct. 524, 534-35 (1886); *Natural Gas Pipeline Company of America v. Energy Gathering, Inc.,* 86 F.3d 464, 469 (5th Cir. 1996). As the Fifth Circuit explained in *Kent:*

> [T]he testimonial component involved in compliance with an order for production of documents "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded." ... A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness. There would then be 'testimonial compulsion'.

Kent, 646 F.2d at 968.

United States v. Doe, 465 U.S. 605, 612-13, 104 S.Ct. 1237, 1242 (1984), similarly held that an individual's fifth amendment privilege may extend to the physical act of producing records. By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. *Id.*

However, a custodian of corporate records may not "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment . . . even though production of the papers might tend to incriminate [the custodian] personally." *Braswell v. United States*, 487 U.S. 99, 100, 107, 108 S.Ct. 2284, 2286, 2289 (1988) (internal quotation marks omitted). This holding is based on the rationale that allowing a corporate custodian to invoke the Fifth to resist a subpoena directed to him in his official capacity would be tantamount to allowing the corporation to invoke the Fifth even though corporations have no privilege against self-incrimination. While the corporate custodian may not invoke the Fifth to resist compliance with a subpoena for corporate records, "the Government . . . may make no evidentiary use of the 'individual act' against the individual. . . . The Government has the right, however, to use the corporation's act of production against the custodian." *Id.* at 117-18.

In civil cases, this means counsel should consider, when appropriate, whether to produce documents or whether to object on the grounds that production of the documents could be used as evidence against the client, in which case counsel may advise the client to assert a Fifth Amendment privilege rather than produce the requested documents.

F. The Adverse Inference or other instruction

1. Against a party who takes the Fifth.

Generally, the decision in a civil case whether to admit one's invocation of the Fifth Amendment into evidence is in the district court's discretion. *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 210 (5th Cir.1983). There is no constitutional bar to the admission of this evidence, and it may be admitted if it is relevant and not otherwise prohibited by the rules of evidence. *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). Under Rule 403 of the Federal Rules of Evidence, the evidence will be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See Farace,* 699 F.2d at 209-11 (error to admit that plaintiff took the Fifth in a criminal investigation: prejudicial effect outweighed the probative value of that evidence, which should have been excluded).

If a witness who takes the Fifth at an early proceeding but later changes his position and testifies, then his original invocation of the Fifth should not be used against him. *Harrell v. DCS Equipment Leasing Corp.*, 951 F.2d 1453, 1464 (5th Cir. 1992); *Farace,* 699 F.2d at 209-11.

2. Against the witness' employer?

The same rules of evidence govern whether to admit an employee's invocation of the Fifth in a suit against that witness' employer. *See Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999) (jury instructed that it may consider corporate representative's invocation of fifth against the corporation). The Fifth Circuit observed in *Curtis* that, because a corporation lacks a privilege against self-incrimination, "[u]pon being served with discovery requests, a corporation must appoint agents who can, without fear of self-incrimination, furnish relevant information available to the corporation." *Id.* at 674. The Court therefore concluded that it was not unduly prejudicial to a corporate defendant to allow an adverse inference based on a designated corporate representative's invocation of his Fifth Amendment rights at a deposition because a contrary conclusion "would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents" and "circumvent[] the Supreme Court precedent that corporate entities may not assert a Fifth Amendment privilege." *Id.* (internal quotation marks and citations omitted).

III. Stay of Civil Proceeding Pending Criminal

When a civil defendant faces related criminal prosecution, he is put to a "Hobson's Choice"[1] between (1) testifying to defend his civil proceeding, which might incriminate him in his criminal proceeding, or (2) taking the Fifth, which might forfeit his defense to the civil proceeding. Courts have recognized a solution: to stay the civil case until the criminal case is resolved.

A. When Can a Stay be Sought?

If the civil witness/defendant has already been indicted, then the risk of criminal prosecution (and the need for the stay) is clear. If the civil witness/defendant has *not* been indicted, he will have to convince a sometimes skeptical judge that the risk is real and imminent. The "Hobson's Choice," however, exists before or after indictment, as any testimony given in a civil case before indictment may be used by prosecutors. In the leading case of *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979), the Fifth Circuit ordered a stay even before indictment. *Id.*, at 1086-89 (reversing denial of stay, balancing the interests involved, when movant had appeared before a grand jury five times, his lawyer believed he was a "target, and company was cooperating with the government in the criminal investigation: Denying a stay would require the plaintiff "to choose between his silence and his lawsuit"); *see also Kmart Corp. v. Aronds*, Civ. No. H-96-1212 (S.D. Tex. Dec. 11, 1996). Notably, the party obtaining the stay in *Wehling* was a plaintiff in the civil suit.

Whether to grant a stay constitutes a discretionary call by the trial court. Courts have

[1] "Hobson's choice", [Thomas Hobson 1631 English liveryman who required every customer to take the horse nearest the door]: an apparently free choice when there is no real alternative." Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1979.

held that the following factors are relevant to the determination of whether to grant a stay: "1) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendants have been indicted; 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest." *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 7 F.Supp.2d 523, 526-27 (D.N.J. 1998).

B. Who seeks the stay?

As in *Wehling*, the civil litigant can seek a stay pending developments in his criminal investigation or case, to prevent having "to choose between his silence and his lawsuit."

However, the *prosecution* also can seek a stay of a civil case, to prevent the use of civil discovery – not available in criminal law – that would aid the defense or expose the government's case. Criminal proceedings (except in some states) lack depositions, interrogatories, requests for admission and other discovery tools that are available in civil cases. In fact, under the so-called federal *Jencks* Act, the prosecution need not even reveal the identity of its witnesses or their prior statements or testimony *until trial.* There are many reasons for these limits on discovery, including that the Department of Justice had a hand in writing them. A civil defendant facing criminal charges might be perfectly willing to take the Fifth and suffer an adverse inference in his civil trial if he also then got to discover and depose the government's witnesses before the criminal trial. In that circumstance, prosecutors might move to stay the civil case, and such requests are often granted.

C. What is stayed: the whole case or rather a part of discovery?

The court has discretion to stay an entire civil case, including even the obligation to file an answer, or only a part of discovery, if a more limited stay will serve the required purposes.

D. How long does stay last?

In granting a stay, the court is balancing the civil witness/defendant's right to defend his civil case with his right not to incriminate himself. But a stay also delays the opposing civil party *its* day in court. A criminal defendant faces jeopardy through the end of his trial, through his sentencing, and even through his appeal. Depending on the facts, the court has discretion whether to order a stay throughout appeal.

E. See attached Motion for Stay and Order in *United States v. Fastow* where the Court stayed Defendant's obligations to file an Answer or respond to discovery during the pendency of criminal proceedings.

IV. Corporate Cooperation/Waiver of Privilege/Throwing Employees Overboard

Our criminal law is not supposed to punish defendants for exercising their right to trial, but it may (and does) reward defendants who accept responsibility for their crimes, cooperate with governmental authorities, and show remorse and rehabilitation. In the last decade, punishments for federal crime have increased dramatically. Many carry life in prison (such as for a third narcotics offense or for a securities fraud affecting a major public company). As the gap in punishment between losing a trial and pleading guilty widens, the distinction between rewarding cooperation and punishing defendants for exercising their right to trial evaporates, and innocent as well as guilty people will decide they must give up their right to trial. Many corporations fear that merely being indicted will expose them to intolerable costs, which they will take extreme action to avoid. The fear of excessive punishment, plus the methods of cooperation, are eroding traditional notions of the adversarial system.

A. In 1999, and again in 2003, the Department of Justice issued memoranda describing factors it would consider in deciding whether to prosecute a corporation that had committed a crime.

According to these memos (called the "Holder Memo" and the "Thompson Memo") corporations must "cooperate" with the prosecution to receive leniency in charging decisions or punishment. A copy of the Thompson Memo is attached. The

federal Sentencing Guidelines provide similar incentives for corporations to "cooperate."

B. Companies have undertaken the following "cooperation," hoping to avoid prosecution:

-- waiving the work product immunity and even the attorney-client privilege and to produce documents and other information to the government about the matter under investigation (such as the results of internal investigations or witness interviews).

-- urging employees to cooperate with the prosecution and firing them if they don't, and interviewing in its own investigation only those employees whom the government approves.

-- not providing lawyers, or even documents, for accused employees when the employee lacks the money to pay a lawyer individually, this puts employees at the mercy of the government.

One court has concluded that the government's treatment of a corporation's advancement of defense costs to its indicted employees as an act of non-cooperation may violate the employees' Fifth and Sixth Amendment rights:

> The Thompson Memorandum's treatment of advancement of defense costs no doubt serves the government's interest in obtaining criminal convictions in complex business cases. So too the actions of the USAO in this case. But the government's proper concern is not with obtaining convictions. As a unanimous Supreme Court wrote long ago, the interest of the government in a criminal prosecution is not that it shall win a case, but that justice shall be done. Justice is not done when the government uses the threat of indictment – a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees – to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law. If those whom the government suspects are culpable in fact are guilty, they should pay the price. But the determination of guilt or innocence must be made fairly – not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.

United States v. Stein, No. S105CRIM0888LAK, ___F.Supp.2d___, ___, 2006 WL 1735260, at *33 (S.D.N.Y. Jun 26, 2006)(internal quotation marks and citations omitted).

C. Waiver of Work Product and Attorney-Client Privilege

In most circuits, a waiver of work product or attorney-client privilege to the prosecution is a waiver to the world. *In re Columbia/HCA*, 293 F.3d 289 (6th Cir. 2002); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *In re Steinhardt Partners*, 9 F.3d 230 (2nd Cir. 1993); *United States v. M.I.T.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Electric Corp. v. Republic of Phillipines*, 951 F.2d 1414 (3rd Cir. 1991). Thus, companies that produce privileged materials to the government open themselves to civil discovery of those materials from opposing parties. Such materials can be extremely damaging, as their purpose is often to reveal to the government the very wrongdoing that may be the subject of civil litigation.

The Eighth Circuit alone has recognized a "limited" or "selective" waiver of privilege to the government in *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1977). Following bribery allegations, Diversified's Board conducted an internal investigation and provided its privileged report to the SEC. A private plaintiff subpoenaed the report, but the Eighth Circuit quashed the subpoena on the grounds that production would discourage companies from investigating wrongdoing and cooperating with law enforcement.

Other courts have suggested that a company can prepare an internal investigation as part of a "common interest privilege" with the government, but this view has not gained wide acceptance.

The Department of Justice will propose changes to the Federal Rules of Evidence to codify "limited" or "selective" waiver of work product and attorney-client privilege. Such a rule, if adopted, would lead to stronger demands for investigation and waiver from the government and will raise practical questions, such as what *public* use the government could make of such information. Until then, most company representatives try to deal with this conundrum by trying to share only factual information with the government but not the lawyers' thoughts, impressions, strategy, or advice to their clients. Courts have endorsed stronger protection for "opinion work product" and "attorney client" material than for "fact-based work product." *See Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *In re Cendant*, 343 F.3d 658, 663 (3rd Cir. 2003); Comments of Judah Best, U. of Texas School of Law 28th Annual Corporate Counsel Institute (2006).

V. Obstruction of Justice

The government has recently prosecuted high profile persons for destroying documents in litigation (*U.S. v. Arthur Anderson* and *U.S. v. Frank Quattrone*) and for lying to investigators or even company counsel in government investigations (*U.S. v. Martha Stewart* and *U.S. v. Greg Singleton*). The growing use of the obstruction statutes, like pressure for corporate "cooperation," is an assault on traditional notions of the adversary system.

A. 18 U.S.C. §1512(b)

1. 18 U.S.C. §1512(b) makes it a felony crime to:

> Knowingly corruptly persuade a person with intent to withhold or alter documents in an official proceeding.

2. *United States v. Arthur Andersen*

When Enron came under SEC investigation, its accounting firm Arthur Andersen internally predicted that "we will be in the [SEC's] crosshairs" and instructed its staff to "follow the document [destruction] policy" noting that documents destroyed the day before a lawsuit are not available to the plaintiff. Days later, when Andersen received a subpoena, it instructed staff to "stop shredding: we've been officially served."

Andersen was indicted under 18 U.S.C. section 1512(b). At trial, the district court instructed the jury it could convict.

> [E]ven if [Arthur Andersen] sincerely believed that its conduct was lawful [if it] impeded [the government's factfinding]....

The Supreme Court reversed, noting that businesses have innocent reasons to destroy documents, and §1512(b) requires "corrupt" intent. *United States v. Arthur Andersen*, 544 U.S. 696, 703-08, 125 S.Ct. 2129, 2134-36 (2005).

3. *United States v. Quattrone*

Federal regulators started an investigation into Credit Suisse' allocation of shares in initial public stock offerings to its customers. Banker Frank Quattrone received an email suggesting procedures to "clean up" certain files, which he forwarded to others advising them to "follow these procedures." The next day, Quattrone was alerted to withdraw his email, which he did, but the government still indicted him under §1512(b).

The district court instructed the jury that it could convict if:

> [Quattrone] directed the destruction of documents that were called for by a grand jury subpoena [even if he did not know that those documents were connected to the government investigation].

The Second Circuit reversed, noting there must be some nexus between the documents in question and the proceeding allegedly being obstructed. *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006).

B. 18 U.S.C. §1512(c)

1. 18 U.S.C. §1512(c) makes it a felony crime to:

> Corruptly obstruct or attempt to obstruct any official proceeding.

2. *United States v. Singleton*

Greg Singleton was an energy trader at El Paso Corp. in Houston. The Federal Energy Regulatory Commission ("FERC"), the CFTC, and the Department of Justice all started investigating a practice called "price reporting" at natural gas companies all over the country (concerning whether traders at these companies had provided "false" information to trade magazines that survey the gas market in order to skew the results of their surveys, because gas sales contracts closed at the survey price). El Paso Corp. hired outside counsel to interview employees including Singleton as part of an internal investigation. Counsel warned Singleton and the other employees that the interviews were privileged, that the company controlled that privilege, and that the company might waive its privilege.

According to the government, Singleton lied to the company's counsel about his role in price reporting; he knew that the outside counsel would disclose that interview to the government investigators; and so he obstructed the government investigation in violation of §1512(c). The government secured an indictment of Singleton on this theory, and at the time this paper was written, Singleton was on trial on the charge in the U.S. District Court for the Southern District of Texas.

C. 18 U.S.C. §1513 (retaliation against "whistleblowers")

18 U.S.C. §1513 makes it a felony crime to

> Knowingly with the intent to retaliate, take any action harmful to any person, including interference with [his] lawful employment or livelihood ..., for providing to a law enforcement officer any truthful information relating to the ... possible commission of any federal offense.

D. Obstruction of the *Defense?* The KPMG Deferred Prosecution Agreement

In August 2005, accounting firm KPMG signed a "deferred prosecution" agreement with the Department of Justice to avoid indictment for marketing fraudulent tax shelters that cost the U.S. Treasury many millions of dollars. Under the agreement, KPMG was not prosecuted but it paid over $400 million to the government; signed a "statement of facts" admitting that its shelters were fraudulent; and agreed that its employees "shall not ... make any statement ... contradicting the statement of facts" or the agreement.

The government also indicted sixteen former KPMG partners over the shelters. In their defense, they are seeking witnesses – such as employees of KPMG – but KPMG employees face employment action if they contradict the indictment and thus are unlikely to cooperate with the defense. As of this writing, the KPMG defendants are complaining that the prosecution unfairly interfered with their defense (not only by the deferred prosecution agreement but also by pressuring KPMG to cut off their legal fees).

In addition to criminal litigation, the KPMG shelters have spawned civil litigation involving not only KPMG but also its clients, various law firms, and other advisors. The deferred prosecution agreement also applies to testimony that KPMG employees might give in that civil litigation.

APPENDIX

Larry D. Thompson Memorandum

Motion for Stay and Order in *United States v. Fastow*