BNA, INC.

WHITE COLLAR CRIME REPORT

BNA Employee-Owned Since 1947

VOL. 2, NO. 3 92-98 MARCH 2, 2007

INTERNAL INVESTIGATIONS

Conducting Employee Interviews After *Stein* and the McNulty Memorandum

BY ROBERT R. STAUFFER & THOMAS P. MONROE

Since its advent in January 2003, former Deputy Attorney General Larry D. Thompson's Jan. 20, 2003, memorandum titled Principles of Federal Prosecution of Business Organizations (the ''Thompson Memorandum'') guided federal prosecutors and white collar defense attorneys alike in navigating the waters of white collar investigations and prosecutions. Although the Thompson Memorandum specifically focused on guidance regarding federal prosecutions of corporations, its strictures inevitably informed the defense of both corporations as well as individuals employed at such companies.

Over time, however, the Thompson Memorandum came to be criticized by the judiciary, members of Congress, former senior Justice Department officials, and members of the bar and civic groups on both the so-called ''right'' and ''left.'' It was attacked as being too heavy-handed, promoting a ''culture of waiver,'' and, most drastically, by U.S. District Court Judge Lewis A. Kaplan as being unconstitutional in part. *See United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). On Dec. 12, 2006, in the wake of this criticism, Deputy Attorney General Paul McNulty announced that the DOJ was making significant revisions to the Thompson Memorandum, which were encapsulated in the Principles of Federal Prosecution of Business Organizations (the ''McNulty Memorandum'').

Robert R. Stauffer is a partner in Jenner & Block's Chicago office. He is a member of the firm's litigation department, white collar criminal defense and counseling, and health care law practices. Thomas P. Monroe is an associate in Jenner & Block's Chicago office. He is a member of the firm's litigation department, white collar criminal defense and counseling, professional liability litigation, and products liability and mass tort defense practices.

The McNulty Memorandum made several significant changes to DOJ policy, including: (1) limitations on the privileged information prosecutors can seek; (2) procedural safeguards requiring prosecutors to obtain internal DOJ approval before asking a company to waive the attorney-client privilege and work-product protection; and (3) a prohibition on prosecutors' consideration of the payment of employees' legal fees except in ''extremely rare cases'' where the company advances fees in an effort to hinder a government investigation. The practical effect of these changes is yet to be determined.

Much has been written about the McNulty Memorandum's provisions and on the bill introduced by Sen. Arlen Specter (R-Pa.) on the same subject. Little attention has been paid, however, to what the McNulty Memorandum means for practitioners representing corporations and their executives. *Stein* and the McNulty Memorandum provide an opportunity to re-examine how investigations in general and employee interviews in particular should be conducted. After describing how we got to this point, including background on the Thompson Memorandum, the *Stein* opinions, and the McNulty Memorandum, this article highlights several areas in which the ''common wisdom'' regarding the conduct of internal investigations may warrant reexamination.

Background: The Thompson Memorandum

At the turn of the century, the American community watched as several high-profile corporate scandals unfolded. In response, on July 9, 2002, President Bush established the Corporate Fraud Task Force headed by then-U.S. Deputy Attorney General Larry D. Thompson. Shortly after his appointment, Thompson issued the guidance bearing his name, which identified several factors U.S. attorneys were required to consider in determining whether to indict a business entity. The text of the memo is available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

Among those factors was a company's advancement of legal fees to employees. Thompson was quoted in the press defending the termination of payments of legal fees by companies on behalf of their employees because the employees ''don't need fancy legal representation'' if they are not guilty of criminal wrongdoing. Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, Wall St. J., June 4, 2004, at A1.

The Thompson Memorandum also provided that federal prosecutors ''may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its investigation, and to waive attorney-client and work-product privileges.'' The memorandum went on to define the meaning of cooperation: ''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.'' Consequently, the Thompson Memorandum incentivized corporations facing potential indictments to waive privileged information, including summaries of interviews conducted by the corporation.

In sum, the main focus of the Thompson Memorandum was an ''increased emphasis on and scrutiny of the authenticity of a corporation's cooperation.'' Or as one assistant attorney general put it:

> The message we're sending to Corporate America is twofold: Number one, you'll get a lot of credit if you cooperate, and that credit will sometimes make the difference between life and death for a corporation. Number two, if you want to ensure that credit, your cooperation needs to be authentic: you have to get all the way on board and do your best to assist the Government.

Christopher A. Wray, assistant attorney general, in remarks to the Association of Certified Fraud Examiners Mid-South Chapter (Sept. 2, 2004), http://www.usdoj.gov/criminal/press_room/speeches/2004_2954_rmks2CFC_TN090204.pdf.

The *Stein I* Opinion Regarding Reimbursement of Legal Fees

In early 2002, the Internal Revenue Service issued nine summonses to KPMG. The summonses related to an IRS investigation of potentially abusive tax shelters as well as an audit of KPMG. On July 9, 2002, the government filed a petition in the U.S. District Court for the District of Columbia to enforce the summonses. Approximately 16 months later, KPMG executives were called to testify before a Senate committee investigating potentially abusive tax shelters. They received a hostile reception.

In the aftermath of the government's enforcement of the summonses and KPMG's meeting with the Senate, KPMG hired an outside law firm to devise a ''new cooperative approach'' with the government in the hope of avoiding indictment. During a Feb. 25, 2004, meeting between the government and KPMG's representatives and outside counsel, one of the assistant U.S. attorneys warned that KPMG's payment of legal fees for employees being investigated would be viewed as rewarding their ''misconduct,'' and that if KPMG had any discretion in not paying fees, its actions would be placed ''under a microscope.'' Although the government later argued that KPMG's decision to cap the legal fees it paid to employees was not made at the government's behest, the *Stein* court found that no one at the meeting could have failed to draw the conclusion that the U.S. Attorney's Office wanted KPMG to limit its financial support for its employees' legal defense. *Stein*, 435 F. Supp. 2d at 344.

Kaplan found that although KPMG had a long history of advancing and paying legal fees for employees who had been sued for wrongdoing, the company heeded the government's warning and limited legal fees it would pay to an employee to $400,000. KPMG also required that the employee ''cooperate'' fully with the government or face having support withdrawn. Failure to cooperate was understood to include, among other actions, invoking the Fifth Amendment privilege against self-incrimination. KPMG also made clear that it would stop paying legal fees if the employee was charged with criminal wrongdoing, and it steered its employees toward attorneys who ''understand cooperation is the best way to go in this type of case.'' *Id.* at 340-44.

On Aug. 29, 2005, KPMG entered into a deferred prosecution agreement with the government, thereby avoiding a criminal indictment, absent breach of the agreement. Shortly after this agreement was reached, the government indicted several current and former KPMG employees. *Id*. at 349.

The employees moved to dismiss the indictment or to recover their attorneys' fees on the ground that the government had improperly interfered with their right to receive fees from KPMG. The employees' motions were based on two constitutional arguments: that the limitations placed on their rights to have their legal expenses reimbursed violated the due process clause of the Fifth Amendment, and that the government's interference with their right to reimbursement violated their right to effective assistance of counsel under the Sixth Amendment. *Id.* at 350-51.

Kaplan held that the Thompson Memorandum's requirement that U.S. attorneys consider payment of legal fees in making charging decisions violates the Constitution's Fifth Amendment due process clause. He agreed that the government could consider the payment of legal fees where the payments were made solely as part of a scheme to obstruct an investigation, thus opening the door to a revision of the legal fees provision of the Thompson Memorandum. However, he concluded that the U.S. Attorney's Office ''compounded the [due process] problem that the Thompson Memorandum created'' with regard to legal fees by placing the issue of KPMG's payment of its employees' legal fees near the top of its agenda in discussions with the firm's counsel and making clear such payment would not be looked upon favorably. *Id.* at 362-65.

Kaplan also agreed that the government's implementation of the Thompson Memorandum infringed the defendants' Sixth Amendment right to counsel, stating:

> The government here acted with the 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. In these circumstances, it is not unfair to hold it accountable.

Id. at 366-67. After a lengthy discussion of the appropriate relief, Kaplan declined to dismiss the indictments and determined that sovereign immunity prevented him from ordering the United States to pay the defendants' legal fees. Instead, the judge stated that KPMG, which was not a party to the criminal case but which had appeared voluntarily, could agree to pay the defendants or the defendants could file a civil complaint against KPMG requesting a summary proceeding in which the court could order KPMG to advance the fees. *Id.* at 377-78.

The *Stein II* Opinion Regarding Witness Statements

Within days of the *Stein I* decision, nine of the *Stein* defendants moved to suppress statements they had given to the government, claiming their statements had been coerced because the company had threatened them with sanctions if they did not cooperate with the government, including cutting off reimbursement of legal fees and/or terminating their employment.

Each of the defendants had received a form letter stating that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, provided that the individual ''cooperate with the government and . . . be prompt, complete and truthful.'' Six of the nine individuals who received this memorandum had already left KPMG by the time they received it. Shortly thereafter, the government sent KPMG's outside counsel a letter stating that two current employees were not cooperating with the government. Within days, outside counsel forwarded counsel for the individual employees a copy of the government's letter. The cover letter stated in relevant part:

> Absent an indication within the next ten business days from the government that your client no longer refuses to meet with the government pursuant to its standard proffer agreement, KPMG will cease payment of [the client's legal] fees.

It added,

> Finally, please note that KPMG will view continued non-cooperation as a basis for disciplinary action, including expulsion from the Firm.

Shortly after receiving this letter, one of the current employees gave a statement to the government in order to keep his position with the firm. The other current employee returned for a proffer but still failed to provide all the information the government requested. The firm terminated her legal fees and ultimately she was terminated by the firm. *United States v. Stein*, 440 F. Supp. 2d 315, 321-23 (S.D.N.Y. 2006).

In negotiations with the government following these events, KPMG urged the government to forgo an indictment, in part because the firm had successfully pressured employees to give statements to the government. *Id.* at 323-24.

All nine defendants who received the memorandum detailing the conditions for having their legal fees reimbursed moved to suppress their statements. In analyzing whether any of the individual defendants' statements were coerced, Kaplan noted that there are numerous reasons why the employees may have given statements, including but not limited to: continuing to receive reimbursement of their fees where reimbursement was conditioned on cooperation; negotiating pleas; obtaining a cooperation agreement; persuading the government not to indict; and, in some cases, avoiding loss of employment. *Id.* at 329.

Relying on the U.S. Supreme Court's decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967) (state cannot condition privilege against self-incrimination on threat of removal of office), Kaplan first denied the motions of six current and former employees who argued that their statements were coerced solely on the basis that ''KPMG's conditioning of further payments on cooperation [was] followed by their decisions to proffer.'' The judge found that the sequence of events alone was ''not enough absent some reliable proof that the proffers in question were coerced rather than voluntary acts.'' *Id.*

Kaplan also found no coercion with regard to the statements by the defendant who was fired because she refused to cooperate. In declining to suppress her statements, he held that the totality of the circumstances showed that the defendant ''at all times acted in what she regarded as her best interests without regard to whether KPMG would cut off payment of her fees or terminate her employment.'' The judge specifically noted that the defendant only spoke to the government several months after receiving the letter threatening to cut off reimbursement of her legal fees and later gave a deposition in a civil action. *Id.* at 333.

Kaplan did, however, suppress two individuals' statements. He suppressed the statements of one employee who testified the only reason he gave a proffer to the government was because he feared losing his job. The judge also suppressed the statements of a former employee who testified that the only reason he gave certain statements was because, in light of his financial situation, he felt compelled to do so because KPMG conditioned payment of his legal fees on his cooperation with the government. *Id.* at 330-33.

The McNulty Memorandum

The KPMG decisions were trumpeted by bar associations, academics, and members of the defense bar as needed breakthroughs in curtailing abuses by prosecutors, and some argued that the opinions opened the door for further reforms. On Dec. 7, 2006, then-Chairman of the Senate Judiciary Committee Specter proposed the Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006), which if passed would prohibit prosecutors from basing a charging decision on any valid assertion of the attorney-client privilege or work-product protection. The bill also would prevent prosecutors from considering whether a company pays its employees' legal fees or retains employees who refuse to cooperate with a government investigation by asserting the Fifth Amendment privilege. Perhaps most remarkably, it would prohibit DOJ from considering the furnishing of attorney-client or work-product material by a company in its charging decision—either as a plus (in the case of a voluntary waiver by a company) or a minus (where the company refuses to waive).

Five days after Specter introduced the Attorney-Client Privilege Protection Act of 2006, DOJ announced revisions to the Thompson Memorandum and issued the McNulty Memorandum. The McNulty Memorandum contains new guidelines for federal prosecutors in determining whether a corporation has cooperated in a government investigation and new guidelines in deciding whether to bring criminal charges. *See* Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

The new guidelines limit prosecutors' discretion to request waivers of the attorney-client privilege and work-product protections, and require approval from high-level Department of Justice officials for most waiver requests. The McNulty Memorandum also virtually prohibits prosecutors from taking into account a corporation's advancement of attorneys' fees to employees in determining whether the corporation should receive credit for cooperation. Unlike the Attorney-Client Privilege Protection Act of 2006, however, the McNulty Memorandum is silent as to whether DOJ can consider a company's retention of employees who refuse to cooperate with the government. It also allows prosecutors to consider a company's refusal to provide purely factual material to the government, and it permits prosecutors to give credit in the charging determination to a company that agrees to waive the attorney-client or work-product protections.

In January 2007, clearly dissatisfied with the scope of the changes in the McNulty Memorandum, Specter reintroduced the bill to the Senate when Congress convened on Jan. 4. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

Internal Investigations After *Stein* and the McNulty Memorandum

In the wake of the accounting fraud scandals, the criminal charges stemming from the conduct of Hewlett-Packard's internal investigation,[1] and the *Stein* opinions, there is now likely to be more scrutiny of the manner in which an investigation is conducted. This is particularly true with respect to employee interviews. Not only must the investigators avoid deceptive or illegal conduct (as in the HP investigation), they must be sensitive to the legitimate rights and concerns of employees as recognized in the *Stein* opinions.

A company's internal investigation is generally motivated by at least two interests. The company's obvious primary goal is to avoid an indictment or other enforcement action. The company also wants to demonstrate to the public that it takes government charges seriously and avoid a public relations nightmare that could harm the company's reputation with consumers, distributors, suppliers, and governmental regulatory bodies.

Equally important to those two considerations, however, the company should conduct the investigation in a manner that considers and promotes the company's relationship with its employees. *Stein* makes clear that when the company interviews employees about allegations of wrongdoing, it must balance the tension between ferreting out misconduct and doing so in a way that protects an employee's rights and concerns.

The process of striking the balance between those two tensions often is difficult for at least three reasons. First, employee interviews typically occur at the beginning of the investigative process and sometimes before the company knows who the principal wrongdoers are. Consequently, it is unclear whether the employee's interests are adverse to the company's interests, which sometimes makes it difficult for the employee to comprehend that investigating counsel represents the company, not the employee. Second, it is not unusual for the employee to ask investigating counsel whether the employee should retain personal counsel. Courts have not resolved the appropriate way for counsel to respond to that question. Third, the company and investigating counsel typically know that the government may require the company to waive the privilege and disclose interview summaries even under the McNulty Memorandum or that the corporation may do so voluntarily to gain credit for cooperating with the government. Under the *Stein II* rationale, disclosures of interview summaries may raise Fifth Amendment implications.

There is little guidance in the law for how a corporation must address these tensions. The common wisdom has been that an employee must be told:

- counsel represents solely the corporation (and not the employee) and is conducting an investigation for the purpose of formulating legal advice for the corporation and preparing for anticipated litigation;
- counsel has determined that it is necessary to talk with the employee in order to formulate the legal advice and prepare for anticipated litigation;
- the employee will be asked about certain matters relevant to the investigation and is expected to provide complete and accurate information;
- the investigation is confidential, and the information provided by the employee is confidential, but the corporation itself will determine whether to keep the information confidential and may ultimately decide to disclose it; and
- the employee should not disclose confidential information to anyone without the consent of the appropriate official (such as in-house counsel).

Given the developments described above, a corporation embarking on an internal investigation must give careful consideration to whether this common wisdom reflects the best practice in a particular case. Below we identify some of the issues a corporation should consider.

Does investigating counsel have a duty to advise the employee to hire an attorney?

Typically, investigators do not tell an employee that he should hire separate counsel. While *Stein* does not

[1] In 2006, Hewlett-Packard undertook an internal investigation to determine the source of media leaks. As part of the investigation, HP's investigators posed as reporters and board members to obtain private phone records. When the investigators' methods became public, the FBI and the California attorney general opened criminal investigations, and several high-ranking HP executives, including the board chair and general counsel, were dismissed. At least one person involved in the investigation has pleaded guilty.

ISSN 1559-3185

answer whether investigators should do so, it does create a context for re-examining this question.[2]

The starting point is the rules of professional conduct. The text of those rules, however, does not answer the issue of retaining separate counsel, focusing instead on identifying the existing counsel's client. While the rules vary from state to state, both the model rule and the individual states' rules typically require only that the lawyer identify her client in certain situations and advise the employee that she does not represent him. Model Rule of Professional Conduct 1.13(f) provides that when "dealing with an organization's [employees], a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." The actual versions of Rule 1.13 that have been adopted by various states, however, vary from the Model Rule. Some states, for example, provide that a lawyer must inform the employee of the identity of the client when it is "apparent" that the organization's interests "may be adverse" to those of the employees. *See, e.g.*, D.C. Rules of Prof'l Conduct R. 1.13(b). Other states provide that the lawyer must inform the employee of the client's identity "when it appears" that the organizations' interests "may differ" from those of the employees. *See, e.g.*, N.Y. Code of Prof'l Responsibility DR-5-109(a) (2002).

The comments to Model Rule 1.13, however, go further. As the advisory comments explain:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation . . . . Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Model Rules of Professional Conduct R. 1.13 (Comments 10 and 11) (2002).

While most states have not included these comments in their professional rules, many states, including Arkansas, North Carolina, Pennsylvania, Tennessee, and Texas, have done so. Thus, investigating counsel should review the professional rules, comments to those rules, and cases interpreting those rules before beginning witness interviews. Moreover, investigating counsel also should review the professional rules for the applicable district court to make sure that those rules do not include these important comments. For example, while the Illinois rules of professional conduct do not incorporate these comments, the rules for the Northern District of Illinois do. Finally, even if investigating counsel concludes that Comments 10 and 11 were not incorporated into the governing set of rules, counsel should remember that the court may still look to the comments to the model rules for guidance. *See, e.g., Professional Serv. Indus. Inc. v. Kimbrell*, 758 F. Supp. 676, 683-84 (D. Kan. 1991) (examining comments to Model Rule 1.13(d)).

These comments do not clearly establish an ethical duty by an attorney to advise an employee suspected of wrongdoing to retain separate counsel. Although the comments are ambiguous, they do provide a disgruntled employee a basis for arguing that counsel should have advised him to retain separate counsel. To date, it does not appear that any court has issued a published opinion regarding whether counsel has an ethical obligation to advise an employee suspected of wrongdoing to retain separate counsel. However, *Kimbrell* provides an example of how at least one court views the breadth of Rule 1.13. A company that purchased an environmental engineering company subsequently received an Environmental Protection Agency citation relating to certain actions performed by the acquired company before the acquisition. The acquiring company terminated the former president's employment and filed a lawsuit against the former president of the environmental engineering company. The former president moved to disqualify counsel because he had "bared his soul" in a meeting attended by the acquiring company's counsel, and claimed that the attorneys violated Rule 1.13(d). Although the court focused only on whether the attorneys had a duty to identify the actual client (as opposed to whether the attorneys had a duty to advise the former president to retain independent counsel), the court highlighted the ethical tensions in such situations:

> it might be said that the lawyer's duty of diligent representation requires him to discover as much information as he can from a co-worker with interests potentially adverse to those of the entity, even if that person is severely disadvantaged. However, although the lawyer's co-workers are not entitled to the full loyalty that a client deserves, they may have grown accustomed to treating the lawyer as if he owed full loyalty to them, and may not understand that he has served them only because they were serving the common master. Fairness therefore dictates that they not be lulled into confiding in someone who might become an adversary's lawyer. To learn confidences under false pretenses would be taking unfair advantage of non-clients, and must be avoided even if the information might be useful to the client.

Id. at 683 (citing 1 Hazard & Hodes, § 1.13:501 at 430).

While the court ultimately denied the motion to disqualify, it concluded that Rule 1.13(d) was intended "to require a *Miranda*-type warning when it [is] likely a corporate officer could be confused over whether the corporate counsel [is] likewise representing his interests."

While *Kimbrell* does not address whether counsel has a duty to advise an employee to retain separate counsel, the court's opinion should serve as a cautionary reminder of the ethical tensions inherent in Rule 1.13. And although no court has specifically held that an attorney must advise an employee to retain separate counsel if the employee is known to be involved in the alleged wrongdoing, the comments to the Model Rule and, where applicable, the state and district court rules at least create the possibility that an employee could maintain that a lawyer has an ethical duty to advise an employee to retain independent counsel. Indeed, it may only be a matter of time until an employee who was in-

[2] Even if investigating counsel determines she does not have a duty to advise an employee to retain separate counsel, it is incumbent upon the attorney to make sure the employee understands that the lawyer represents the corporation rather than the employee. An employee may believe the lawyer is representing him even when the conventional warning is given. *See, e.g., In re Grand Jury Subpoena*, 416 F.3d 333 (4th Cir. 2005) (employee claimed he believed that corporate counsel was representing him where counsel told employee that he represented the company but also said that counsel could represent the employee if no conflicts of interest existed).

terviewed by counsel sues both the company and the investigating counsel because the employee was not told he should retain separate counsel.[3]

A contractual employee who was not advised that he should retain separate counsel might also claim that the company breached a contractual duty of good faith and fair dealing. Accordingly, the company and investigating counsel should know the employee's contractual status before interviewing the employee. Likewise, the company and its lawyers should review any applicable union contracts to determine whether the company has a legal obligation to act in good faith with respect to unionized employees. Finally, although the general rule is that a company does not have a "duty of good faith and fair dealing" absent an express written contract,[4] the company should not forget Kaplan's caution that the failure to respect employees' interests may harm the company's interest "in recruiting and retaining top flight personnel." 435 F. Supp. 2d at 380.

Should investigating counsel tell the employee that there is a realistic chance that the company will waive the privilege?

In the standard warning, counsel advises the employee that the company *may* choose to waive the privilege. However, many white collar defense practitioners believe that over the past several years, the government has become increasingly likely to require a corporation to waive its privileges. And even in the absence of an express waiver request, a company looking to obtain credit for cooperation may choose to waive the privilege and disclose the contents of employee interviews. Thus, simply advising the employee that the conversation is "privileged" and that the "corporation, not the individual employee, will make any decisions about whether to disclose the privileged information," may not be enough to make an employee realize that his statements may be given to a prosecutor.

While the McNulty Memorandum should reduce both the frequency with which U.S. attorneys request privilege waivers and the types of privileged information that they may request, this does not mean that issues about whether to waive the privilege are removed from consideration. The McNulty Memorandum still allows the prosecutors to ask the company to produce "purely factual" materials after obtaining written approval from the U.S. Attorney, and it still allows the government to consider a voluntary privilege waiver in determining whether the corporation will receive cooperation credit. *See, e.g.*, Andrew Weissman and Ana Bugan, *Thompson Gunners*, the Daily Deal, 2007 WLNR 1619356 (Jan. 29, 2007); Pamela MacLean, *"McNulty Memo" on Attorney-Client Privilege Blasted By Critics*.

Courts have not provided guidance on whether the company should advise employees that the company is "strongly considering" or "will" waive the privilege as opposed to "may" decide to waive the privilege. However, in light of Kaplan's ruling in *Stein II* that a statement to the government can be suppressed if the employee's sole reason for speaking to the government was out of fear of being discharged or having his legal fees be reimbursed, an employee may move to suppress a statement to the company as violating his Fifth Amendment rights, regardless of whether the decision to disclose the statement was made in response to the government's request or by the corporation independent of an express request.

It also is foreseeable that an employee may develop theories for bringing civil claims against a company that discloses information to the government, arguing that the employee was not adequately warned of this possibility. Such claims might be based on breach of a duty of good faith or, if the employee contends that the company concealed an existing intent to share the information with the government, on fraud. Thus counsel conducting the interviews should consider the company's intent with respect to disclosure of information and should be conscious of the risks in determining exactly what interviewees will be told.

Should the company notify employees before producing witness statements to the government?

Under the common wisdom, the company typically does not inform employees before producing witness statements to the government. While there is no authority suggesting that the company has a duty to do so, the *Stein* opinions' focus on the company's role on assisting with the government's investigation may encourage claims that the company has such an obligation or that the company violated a duty to the employee by failing to provide advance notice of a disclosure. For example, if investigating counsel informs a contractual employee at the time of the interview that the company "may" waive the privilege, the employee may claim that the company had a contractual duty under the implied covenant of good faith and fair dealing to advise the employee if the status of company's decision as to whether to waive the privilege changes.

While employees may try to make such claims in the future, the viability of such claims is questionable. As discussed in more detail below, as a general rule, a company can compel an employee to provide information about his suspected wrongdoing, and indeed, the company can discipline the employee for failing to cooperate with the company's investigation. Thus, it is unlikely that a court would take the drastic step of sanctioning the company for producing a statement that the company had a legal right to obtain. Instead, the proper remedy for the employee would be to have the statement suppressed in a criminal action, which is precisely the remedy Kaplan employed in *Stein II*.

Should investigating counsel tell the employee he has a right to remain silent?

Under the conventional wisdom, investigators do not typically inform an employee that he has a right to remain silent because the Fifth Amendment constrains only the government, not private parties. Thus, the corporation—without government pressure—can require an employee to give a truthful statement, even if the employee must incriminate himself in the process. See *Nuzzo v. Northwest Airlines Inc.*, 887 F. Supp. 28 (D. Mass. 1995) (rejecting argument by employee, who was terminated for failing to cooperate in investigation, that privilege against self-incrimination applied where company was likely to provide employee's statements to federal grand jury). The corporation can, if it chooses, discipline the employee for not cooperating with the investigation. *Mayberry v. Mundy Contract*

[3] Such a claim would be consistent with other efforts by nonclients to sue lawyers for breach of their ethical duties, using tort theories such as civil conspiracy and aiding and abetting. *See, e.g.,* Douglas R. Richmond, *Professional Services Liability Trends*, 742 PLI/Lit 237 (2006) (collecting cases).

[4] *See, e.g., McGee v. Procter & Gamble Distributing Co.*, 445 F. Supp.2d 481, 494 (E.D. Pa. 2006).

   ISSN 1559-3185

Maintenance Inc., 197 Fed. Appx. 314 (5th Cir. 2006) (affirming dismissal of employee's Title VII claims against employer where employer showed that employee gave false testimony in internal investigation); *U.S. v. Sawyer*, 878 F. Supp. 295, 296 (D. Mass. 1995) (employee had obligation to aid in-house counsel in internal investigation). Because an employee does not have a right to remain silent during an interview by the corporation, investigating counsel does not have a legal (or ethical) duty to advise the employee that he can remain silent.

As discussed above, however, investigating counsel may know in advance of the interview that the company is strongly considering waiving the privilege and providing a copy of the statement to the government so that the company can obtain cooperation credit. Even if the company gives the common-wisdom warning that it may waive the privilege, it is possible that the employee will not understand that his or her statement may ultimately end up in the government's hands and, more important, that the government may later use the statement against the employee.

For this reason, some commentators have advocated giving employees ''Adnarim'' warnings (*Miranda* spelled backward) even though existing case law does not require that a Fifth Amendment warning be given by investigating counsel. *See generally* Dennis J. Block and Nancy E. Barton, *Internal Corporate Investigations: Implications of the Attorney-Client Privilege and Work Product Doctrine*, in Internal Corporate Investigations (Brian & McNeil eds., A.B.A. 1992). Such warnings would include an admonition that the employee may retain separate counsel and that the employee may refuse to speak with investigating counsel.

Once again, the *Stein* opinions provide some support for this position by condemning the government's intentional or unintentional use of the company as a proxy for what the government cannot itself do directly: namely, to pressure an employee into giving a statement that may implicate the employee in suspected wrongdoing. Based on the rationale underlying the *Stein* opinions, the employee may argue that the government cannot compel the corporation to strong-arm the employees into giving up their right to remain silent (or dangle the carrot of cooperation credit) and then reap the benefits of that pressure even under the stricter guidelines set forth in the McNulty Memorandum. As Kaplan described it:

> In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick—it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would not talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves.

As discussed above, the remedy in *Stein* was to suppress the statements of the two employees who Kaplan decided were coerced into making statements. *Stein* does not change the status quo as to the company's obligation, and, under the current state of the law, it is unlikely that the company has an obligation to advise of any right to remain silent. However, *Stein* raises the possibility that such an obligation could be found, and that an employee who argues that he was improperly coerced into making a statement that was shared with prosecutors may (in addition to seeking to suppress the statements) claim that the company breached a common law or contractual duty to the employee. Nonetheless, a court likely would find (as Kaplan did when confronted with a similar issue in *Stein II*) that the proper remedy is solely to suppress the statement, and that the imposition of civil liability on the company would result in an unnecessary and drastic remedy since public policy favors the company's ability to investigate and expose employee misconduct. Thus, counsel likely may still conduct an interview without advising an employee that he has the right to remain silent. Because employees may try to make these types of claims in the future, however, counsel and the company should consider these issues before conducting employee interviews.

Conclusion

While *Stein* is being trumpeted as the first step in challenging the government's investigation powers, the re-examination of rights and duties should not end there. The common wisdom as to how an internal investigation and employee interviews are conducted also should be re-evaluated. While avoiding an indictment is an important objective, it is not the only objective, and both investigating counsel and the client must give careful consideration to how investigations are conducted in view of employee rights, government expectations and media interest. As *Stein* demonstrates, the failure to do so may mean that the company trades one set of problems for another.