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DOJ loses thirteen KPMG tax indictments through prosecutorial misconduct

by Kurt Schulzke on [August 29, 2008](#)[\[edit\]](#)

The U.S. Department of Justice took another ethical black eye yesterday, this time from the 2nd Circuit Court of Appeals in Manhattan. The court held — in a widely watched KPMG tax fraud case — that DOJ attorneys illegally interfered with the defendants’ access to legal counsel, protected under the 6th Amendment to the United States Constitution.

At its launch in October 2005, the DOJ touted the case — against thirteen KPMG partners and employees — as “the largest criminal tax case ever filed.” Perhaps they should have christened it “The Titanic.” In the related [press conference](#), U.S. Attorney Michael J. Garcia pompously proclaimed, with requisite moralistic gravitas:

It is hard to imagine anything that can serve to undermine our voluntary system of taxation more than the crimes charged today, where so many professionals banded together with wealthy individuals, to perpetrate this massive fraud on the tax system. This was an orchestrated case of deliberate tax evasion, and not legitimate tax planning. Professionals, including lawyers, accountants, bankers, so-called investment advisors and their firms, as well as taxpayers, should be on notice that the Government will pursue even the most complicated tax fraud schemes designed to help the wealthy evade paying their fair share.

Mr. Garcia is apparently lacking somewhat in imagination. For even greater undermining impact, how about Department of “Justice” prosecutors who blatantly disregard the Constitution, deliberately cheat and lie to gain unfair advantage over defendants to the extent that appeals courts dismiss indictments? The 6th amendment has been in place for close to 225 years. You’d think that someone at DOJ might read it once in a while.

In any event, here’s the operative language from yesterday’s 2nd Circuit [opinion](#):

We hold that KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s overwhelming influence, and that KPMG’s conduct therefore amounted to state action. We further hold that *the government thus unjustifiably interfered with defendants’ relationship with*

counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants.

What can accountants and other professionals learn from this case? First, keep in mind that 2nd Circuit opinions are binding only in the 2nd Circuit. However, what the 2nd Circuit says in financial fraud cases often carries considerable weight in other circuits as well. Second, the ruling in this case has applicability way beyond tax fraud prosecutions. Similar situations crop up constantly in white collar criminal cases of all stripes — insider trading, other securities fraud, foreign corrupt practices act and false claims, among others.

That said, here are some takeaways all offered in the context of a hypothetical discussion meaning that this is not legal advice:

1. Be warned that the firm or corporation that insists on your undivided loyalty will cut your legal throat in a heartbeat — up to an including abandoning you to criminal prosecution — whenever it sees an advantage in doing so. Therefore, you would be well-advised not to confide in corporate legal counsel if you have the slightest suspicion that you might be suspected of wrongdoing.
2. Never trust federal prosecutors. While there are notable, honorable exceptions so many prosecutors are inveterate liars and constitutional scofflaws that you must assume they all are until proven otherwise.
3. In light of 1. and 2., if you are contemplating joining a firm or corporation, insist on a legal defense funding clause requiring the company to pay your legal fees without limitation or cap in the event that you are sued, investigated or prosecuted in relation to your corporate duties.
4. Hope that if you are prosecuted, your friendly prosecutors and “cooperating” employer will — like those in the KPMG case — be dumb enough to collude in depriving you of your 6th Amendment right to legal counsel and that you’ll draw a series of judges smart enough to realize they did.

More later on today’s DOJ [press conference](#) announcing DOJ policy “reforms” addressing some of its misconduct in the KPMG case. In a nutshell, the real problem is *not* that the DOJ lacks adequate policies preventing this kind of misconduct. Rather, the DOJ has too many prosecutors who are willing to violate the rules in pursuit of pleas and convictions. It’s a matter of personal ethics that no policy reform can cure.

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