

# THE SODERQUIST CENTER

## **Promise to Stop Pressure Tactics Not Believable**

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In 2003, the DOJ began its own version of “let’s make a deal”. It pressured corporations to waive the attorney-client privilege when their employees were under investigation for white-collar crimes. The DOJ also demanded corporations stop paying the employees’ attorneys fees. Any corporation who refused DOJ demands risked criminal indictment for its employees’ alleged wrongdoing.

The DOJ’s tactics provoked criticism from *Ethics Matters*, legal scholars, white-collar criminal defense lawyers and members of Congress. U.S. Senators Arlen Specter (R – Pennsylvania) and Patrick Leahy (D – Vermont) threatened to pass legislation to stop DOJ’s tactics.

On August 28, 2008, the DOJ announced it would abandon its controversial prosecution tactics. This is the second time, however, in less than two years the DOJ promised to stop its prosecutors’ unethical practices. Can we trust the DOJ to keep its new promise?

### **DOJ’s first promise**

In 2007, the DOJ lost an embarrassing court decision. Manhattan District Judge Lewis Kaplan dismissed federal criminal charges against 13 former KPMG accounting partners because of federal prosecutors’ conduct. Federal prosecutors threatened to indict KPMG; unless the corporation told its employees and partners KPMG would stop paying the attorneys’ fees of any person who refused to cooperate fully with federal investigators. KPMG also placed a financial cap on what it paid in attorneys’ fees. Some KPMG former partners could not afford to hire the attorneys of their choice and gave prosecutors statements without the benefit of legal counsel. Judge Kaplan held the DOJ’s tactics violated the former partners’ 5th Amendment right to remain silent and their 6<sup>th</sup> Amendment right to a fair trial.

After Judge Kaplan’s decision, the DOJ issued new prosecution guidelines. Before a federal prosecutor could ask a corporation to waive the attorney-client privilege, the prosecutor had to get permission from a higher ranking deputy U.S. attorney. In only rare cases would the DOJ consider the corporation’s payment of its employees’ attorneys’ fees in deciding whether the corporation cooperated in an investigation.

Nothing changed, however, after the new policy's announcement. Federal prosecutors continued the abusive practices.

### **Attorney-Client Privilege Act**

In response to the DOJ's failure to stop its controversial prosecution practices, Senators Specter and Leahy introduced the Attorney-Client Protection Act of 2007. The Act prevents any U.S. attorney in a civil or criminal enforcement action from conditioning an organization's treatment on disclosing any communication protected by the attorney-client privilege or work product. Prosecutors cannot evaluate an organization's cooperation in an investigation based on the organization's payment of its employees' attorneys' fees. The Act also prevents U.S. attorneys from forcing an organization to fire or sanction an employee who exercises a constitutional right, such as the 5<sup>th</sup> Amendment right to remain silent. Violation of the Act is a felony.

Almost three dozen former U.S. attorneys, the National Association of Criminal Defense Lawyers (NACDL), American Bar Association (ABA), the American Civil Liberties Union (ACLU), U.S. Chamber of Commerce, and Association of Corporate Counsel, support the Act.

The DOJ opposes the Act. It was to prevent the Act's passage the DOJ announced on August 28, it would stop its controversial tactics. Also, on that day a federal appeals court upheld Judge Kaplan's decision in the KPMG case.

Senators Specter and Leahy praised the DOJ's policy change. There is no reason, however, for them to abandon passage of the Attorney-Client Protection Act. Why should anyone believe the DOJ's promise to halt its unethical prosecution tactics, since DOJ prosecutors ignored previous DOJ changes in prosecution guidelines?

Also, the DOJ announced it is considering appealing Judge Kaplan's KPMG decision to the U.S. Supreme Court. Why consider appealing a decision declaring unconstitutional the tactics the DOJ says it is abandoning? Rather than relying on untrustworthy DOJ promises, Congress needs to pass the Attorney-Client Protection Act immediately to protect corporations and their employees from the DOJ.