

Compliance & Ethics Professional

December
2017



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Meet Michael Levin

Senior Director of Compliance,
Ethics & Business Practices
Freddie Mac in McLean, VA

See page 16

27

The components of strong
cybersecurity plans, Part 2:
Security assessment

Mark Lanterman

33

Don't sing the misprison
blues: A little known
compliance risk

Daniel Coney

39

Get the most out of
your compliance
committee

Steve Shoop

43

Caught
doing the
right thing

Marjorie Maier

by Daniel Coney, CCEP, CFE, CFCS

Don't sing the misprision blues: A little known compliance risk

- » Misprision of a felony is a little known criminal statute that is often used as a “lesser offense” plea tool and represents a compliance risk, particularly when dealing with third parties.
- » Misprision is in a family of offenses related to obstruction of justice and is a close relative to the charge of accessory after the fact.
- » The elements of the crime involve both knowledge of a crime committed by a third party and some attempt at suppression or concealment of the crime.
- » A lie (commission or omission) that tends to hide the fact that somebody else committed a crime, particularly if it protects one's interests, puts a person in the crosshairs of a prosecution for misprision.
- » Your risk planning and compliance training should be thinking about how market factors, profit motive, and individual motivations can lead to the temptation toward misprision, and how to mitigate that risk.

There are numerous ways of solving law enforcement problems in roundabout ways. The IRS famously put Al Capone's murderous reign to an end with a conviction for tax fraud. Martha Stewart folded sheets on the inside of a prison cell, not because they caught her for insider trading, but because she lied about it.



Coney

Little known in the federal criminal code is Title 18, United States Code, Section 4, known as “misprision of a felony.” The statute reminds me of yesteryear, when in high school civics we were taught that we all have a responsibility in this republic to uphold the law and help bring felons to justice. After all, they have committed a crime against society, and you are part of that social compact. In

the Midwest where I grew up, reporting to the police was a given. It isn't everybody's experience, but I grew up in a Mayberry-esque time and place. That feels like so very long ago—a time of nostalgic innocence.

The statute is simple and has repercussions for compliance officers and their companies. In a nutshell, if you know about a crime (specifically a felony) and you conceal and fail to report that crime to authorities, then you become guilty of a felony yourself. It falls into a family of offenses related to obstruction of justice. It is a “little” cousin to witness tampering (18 USC §§1512, 1513); obstruction (18 USC §§1505, 1509, 1510, 1511, 1516–1520); principals (18 USC §2); accessory after the fact (18 USC §3); false statements (18 USC §1001); and perjury (18 USC §§1621–1623). Put bluntly, deception

and quibbling very often will run you afoul of criminal law.

There is a nuance between misprision and accessory after the fact, the difference being only a matter of degree. The Federal courts hold to *Bratton v. United States*¹ related to a like statute no longer on the books. Here there could not be mere knowledge of the crime, but some attempt at suppression or concealment of the crime of the principal. The degree of aid rendered comes into play as to whether you make yourself an accessory after the fact or are merely failing to act.

In a 2014 case named *United States v. Baumgartner*,² a Tennessee state judge found himself on the wrong end of misprision. He helped a defendant avoid various legal hurdles in exchange for providing drugs and sex to him. Relevant in this decision was that the deceptive statements made by the judge did not have to be made to federal authorities to derive a federal nexus for prosecution.³ Further, the court concluded the judge's deception materially concealed the nature and scope of the underlying and continuing felony, the benefit of which inured to him by masking his criminal exposure. The court said, "...each statement could have had the effect of making the detection of the conspiracy more difficult." Exactly to the point! If your deception tends to hide the fact that somebody else committed a crime, particularly if that lie tends to put you in a favorable light (or out of the light), then that is exactly what misprision is.

So how does this happen in a corporate context? A recent case out of my office is a

great example. Though it is public record, I will keep the name of the company generic—let's just call them ABC Technologies. The company pled to a Bill of Information, charging Misprision of a Felony, as part of a plea deal in one of the Federal judicial districts in the Gulf area. The underlying issue was

In a 2014 case
named *United States*
v. Baumgartner, a
Tennessee state judge
found himself on
the wrong end of
misprision.

a Clean Water Act (CWA) violation. The CWA was enacted to prevent, reduce, and eliminate water pollution and thus prohibits the discharge of oil in harmful quantities into waters of the United States or in connection with activities under the Outer Continental Shelf Lands Act or the

Deepwater Port Act, including those waters through the contiguous zone as far as 200 miles into the ocean.

Our investigation focused on an oil production platform in the Gulf of Mexico located on a federal lease, approximately 80 miles south of the coast. In the process of producing oil and gas, oil platforms generate "produced water," which, when brought to the surface, is polluted with oil and various chemicals from both the earth's crust and those used in the process of production. The amount of produced water is substantial, and the only reasonable way to deal with the quantities is to treat the water such that "clean" water can be discharged back into the ocean. The Environmental Protection Agency (EPA) issues permits to platform operators under the National Pollutant Discharge Elimination System (NPDES) program. The permit establishes limits on the type and amount of pollutants that can legally be discharged.

One of the major obligations of production operators is to report any oil sheens that occur because a sheen is prima facie evidence that a reportable oil spill has occurred.⁴ To that end, the NPDES permit requires the operator to minimize the discharge of dispersants, surfactants, and detergents. This is necessary because these substances tend to emulsify oil and disguise the sheen, thus making detection more difficult. In this particular case, the produced water was so polluted that the cleaning process did not result in water that met CWA standards for discharge.

ABC Technologies contracted with the platform operator to provide chemical management services, and for a two-year period sold chemicals to the operator and provided associated consulting services on the platform. Among the chemicals sold was Cleartron ZB-103, which the foremen on the platform requested despite ABC not recommending its use. Employees of the platform operator ordered more than 4,000 gallons of Cleartron from ABC that was subsequently introduced as a dispersant to hide oil sheens from the produced water. ABC employees were aware of how the production operators used Cleartron, knew that such use was prohibited, and did not report it to authorities. ABC employees also inaccurately recorded the use of Cleartron in reports, contributing to the regulatory inspectors' inability to detect its improper use on routine inspections.

As a result of the plea deal, the company was sentenced to a one-year probation, agreed to pay a \$1 million criminal fine, and paid another \$250,000 to a community service

ABC Technologies was not the one dumping waste, but they knew about it, profited from it, and took steps to conceal it.

program at a nearby estuary. The judgment included many provisions that mirror a compliance agreement, and the EPA took the lead on the administrative resolutions, such as a debarment action or compliance agreement. Their plea deal avoided far graver criminal charges. Further, the individuals responsible could have been charged as well. Though avoiding some of the worst consequences, this is still a pretty expensive compliance failure.

Note that the compliance risk developed out of the misconduct of the business partner. ABC Technologies was not the one dumping waste, but they knew about it, profited from it, and took steps to conceal it. Where profit is a motive, or individuals have a stake, either through bonuses or performance reviews that tie to these business relationships, there is going to be the temptation to look the other way. The question is, what are you doing to mitigate it? The risks involved with dealing with third parties should be part of your risk planning and compliance training—and remember, misprision will have you singing the blues.*

The opinions in this article are the authors and do not necessarily represent the position of any government agency.

1. See 73 F.2d 795 (10th Cir. 1934), June 21, 2017. Available at <http://bit.ly/2g0PHKr>.
2. "USA v. Richard Baumgartner, No. 13-5580 (6th Cir. 2014)" Justia Law, N.p., September 24, 2014. Available at <http://bit.ly/2g1reVv>.
3. Volokh, Eugene: "Misprision of felony" *The Washington Post*, September 29, 2014. Available at <http://wapo.st/2yfT5LQ>.
4. See 40 C.F.R. § 110.3(b). Title 40 C.F.R. § 110.4 prohibits the addition of dispersants or emulsifiers.

Daniel Coney, CCEP, CFE, CFCS (Danconey@comcast.net) has been a law enforcement professional for nearly 33 years, with the last 25 years being both an agent and supervisor in four different Office of Inspector General organizations. Dan can also be reached on LinkedIn at bit.ly/li-DanielConey