

Searching for **Federal Misdemeanors**

AFTER A thorough review of a target's conduct and defense counsel's skilled presentation, a federal prosecutor may conclude that although criminal conduct did indeed occur, demanding that the defendant plead guilty to a felony will result in a breakdown of negotiations, and probably a trial which the prosecutor will stand a decent chance of losing. Still, to offer the target a pre-trial diversion n1 in total resolution of the case will be too lenient a result given that the conduct in question indeed occurred and warrants (or at least in the eyes of the prosecutor's supervisors, will seem to warrant) a guilty plea.

n1 "Pretrial Diversion: An Alternative to Full Federal Prosecution?" Cohen, J. & Liebman, J., *NYLJ* (April 6, 1994, p. 1, col. 1).

Realizing that the client might be willing to swallow a misdemeanor plea and, thus, likely avoid jail under the Sentencing Guidelines, defense counsel scrambles to find a misdemeanor to propose to the prosecutor and the "Misdemeanor Committee" in the U.S. Attorney's Office in the Southern District of New York which will have to approve it. (The Eastern District doesn't have such a committee and the procedure is less formalized.) The attorney finds, though, that no misdemeanor is immediately apparent to either side. The prosecutor seems genuinely amenable, but is equally frustrated that such a vehicle to settle the case seems unavailable.

It is true that Title 18 of the United States Code, the principal repository of criminal statutes, is ostensibly parsimonious with worthwhile misdemeanor sections -- that is, except for conduct that is truly of the misdemeanor variety in the first place (for example, importing crustacea, n2 mutilation of currency, n3 flag desecration, n4 reproducing the character of "Smokey the Bear," n5 broadcasting lottery information, n6 dispensing intoxicants in Indian country, n7 shanghaiing sailors n8). In fact, however, there are more than 180 misdemeanors in Title 18, most of which will have little relevance.

n2 18 U.S.C. @ 42.

n3 18 U.S.C. @ 333.

n4 18 U.S.C. @ 700.

n5 18 U.S.C. @ 711.

n6 18 U.S.C. @ 1304.

n7 18 U.S.C. @ 1154.

n8 18 U.S.C. @ 2194.

There are, however, hidden between and among the many sections a number of valuable misdemeanors that do exist, and which may be invoked once the prosecutor has been persuaded that a misdemeanor should be accepted, or at least favorably considered. Sometimes "creativity" is required to fit or even mold the facts or a related or ancillary criminal incident into an otherwise seemingly inapposite misdemeanor statute.

Furthermore, once counsel begins the search, it should not be limited to Title 18. A number of

titles in the U.S. Code (and regulations thereunder) contain criminal statutes, among them a number of valuable **misdemeanors**, particularly in Title 26, the Internal Revenue Code. Bear in mind that prosecutors, for institutional reasons, including the need to maintain good relations with the competing **federal** (or even state) enforcement agencies, are loathe to offer a "tax **misdemeanor**" plea if, for example, FBI agents or Postal Inspectors have been conducting the investigation and will squeal to high hell if the IRS gets the "stat" for the case. And sometimes, for no apparent reason, prosecutors might even insist on a "Title 18" violation.

Title 18 Misdemeanors

Fraud and False Statments. Section 1001, a felony, is the principal "false statement" charge under Title 18. Nine specific provisions contained in Chapter 47 of Title 18, however, allow **misdemeanor** treatment, for example: (1) fraudulent demand against public stocks of or debts due from the United States, involving no more than \$ 1,000 (@ 1003); (2) false statement by a mortgagee regarding the sale of a mortgage to a **Federal** land bank, or the willful overvaluing by an appraiser of land securing such a mortgage (@ 1011); (3) false statement in any book or report of the Department of Housing & Urban Development; or receipt of compensation with intent to defraud HUD; or failure to disclose an interest one has in the property in issue (@ 1012); and (4) certification by a public officer containing material known by him to be false (if no other statute criminalizes the conduct) (@@ 1025 and 1026).

Bank Fraud. Bank fraud typically involves an emolument under which a borrower encourages a bank official to "look the other way." While such ancillary conduct may not be the main ingredient of the fraud, that wrongdoing may be a useful means for misdemeanor disposition. Section 215 in the "Bribery and Graft" chapter of Title 18 proscribes the "corrupt" giving, offering or promising (or receiving, soliciting or agreed to) anything of value concerning any business transaction of a financial institution. Since @ 215 is a felony/misdemeanor statute, the misdemeanor portion of the section applies where the value of the benefit does not exceed \$ 1,000; but, obviously, an individualized monetary component of the compensation can be charged for plea purposes. Sections 212 and 213 also provide misdemeanor treatment for offers of loans or gratuities to (and receipts by) bank examiners.

Obstruction. Section 1512 titled "Tampering With a Witness, Victim or an Informant," is a serious felony under the Guidelines; however, @ 1512(c) contains a misdemeanor provision. While ostensibly of limited application, it proscribes the intentional harassing of another person which "hinders, delays, prevents or dissuades" the person from (1) attending or testifying in an official proceeding, (2) reporting to a law enforcement officer or judge the commission of any offense or violation of a probation or parole condition, (3) arresting or seeking the arrest of a person or (4) causing a criminal prosecution or a probation or parole revocation proceeding to be instituted. "Attempts" are also punishable as misdemeanors.

Section 1501 makes it a misdemeanor to assault a process server; @ 1502 criminalizes as a misdemeanor resistance to an extradition agent; @ 1517 prohibits picketing or parading outside a court, or related locations to influence the judge, jurors or witnesses; and @ 1509 prohibits "obstruction of a court order" by a willful attempt to impede the exercise of rights, performance of

duties under a court order, judgment or decree.

A rarely invoked obstruction section, @ 1514, used to dispose of a multi-felony indictment against former Reagan cabinet secretary James Watt in the District of Columbia, makes it a misdemeanor to try to influence a grand jury or court action by writing or sending a communication in relation to "an issue or matter." Watt's written communication to the grand jury (which later indicted him on multiple felony perjury charges which were dismissed on the motion of his special prosecutor as part of the misdemeanor plea deal), was a false document by Watt submitted to the FBI for transmittal to the grand jury, containing factually false information concerning documents subpoenaed by the grand jury.

Government Theft. A number of statutory schemes address specific thefts from the government - in, for example, the health care area -- and they are contained in titles other than Title 18.

Sections 641 through 669, however, contain nearly 20 specific misdemeanor statutes or "felony/misdemeanor" provisions; that is, they depend on the amount of money involved and address thefts or embezzlements involving public, or public-related institutions. Section 641, for example, proscribes the theft, or knowing retention, of stolen property of the government -- making it a misdemeanor to steal government property worth up to \$ 1,000. Other sections address (1) thefts by government employees of salary checks (or the like) which are not properly due to the employee (@ 643); (2) bankers receiving unauthorized deposits of public money (@ 644); (3) marshals, receivers, trustees, etc., converting to their own use properties not belonging to them (@ 645); (4) custodians charged with safekeeping of funds under statutes converting those funds, or failing to deposit funds within their safekeeping responsibility (@@ 648-654); (5) thefts, embezzlements or misapplication by bank examiners, bank officers, officers of lending credit and insurance institutions (and employees) (@@ 655-658); (6) thefts or embezzlements from employment and training funds (and, curiously, obstructions of investigations of such thefts of such funds under the enabling legislation concerning such funds (@ 665), and (7) theft, embezzlement or conversion of funds of moneys, funds, property, etc. of a health care benefit program for thefts, etc., involving sums up to \$ 100 (@ 669).

Bribery, Graft, Conflict Of Interest. The main **federal** "bribery" jurisdiction is contained in @ 201. There are a number of corruption statutes, or statutes sounding in corruption; i.e., @@ 203, 204, 205, 207, 208 and 209, for which **misdemeanor** treatment is provided for non-willful violation of the statutes, under @ 216(a)(2). For example, under @ 203 it is a **misdemeanor** to engage in non-willful giving or receiving of compensation, other than as provided by law, to members (or elected members) of Congress or officials in the executive, legislative or judicial branch of government, concerning a matter in the jurisdiction of the government official or in which the government has a direct and substantial interest.

Section 205, one of the two principal conflict of interest provisions, makes it a misdemeanor for one to non-willfully, but other than in the proper discharge of his duty, act as an agent or attorney to prosecute an action against the United States, or in which it has a direct and substantial interest. Section 207, another complicated "conflict" statute which has felony and misdemeanor treatment depending on willfulness element, places restrictions on the ability of former government employees or elected officials -- some lifetime, some two-year, some one-year depending on the former

employee's role in the matter while an employee -- from acting in post-government work to influence certain government action.

Section 208 proscribes a government employee from acting personally and substantially as a government official without disclosing a financial interest that he (or enumerated individuals such as family members) may have in the matter that comes before him in his role as a government official. Section 209 makes it a misdemeanor to supplement the salary of government officials; @ 210 makes it a misdemeanor to pay or offer payment, and @ 211 prohibits a solicitation or obtaining of payment, to procure an appointive office.

Blackmail. In a little-noted provision, likely useful in the context of an investigation of broader criminal conduct, @ 873 makes it a **misdemeanor** to demand or receive money or other valuable thing in consideration for not informing against any violation of **federal law**.

Bankruptcy. Crimes involving the bankruptcy process are usually prosecuted as felonies. Nonetheless, there are three specific misdemeanor provisions under Title 18, @@ 154, 155 and 156, which while having limited application, may still be useful to the practitioner. Section 154 proscribes trustees, court officers, etc., from purchasing estate assets or refusing reasonable opportunities for inspections by parties in interest and the trustee. Section 155 enjoins a party in interest from fraudulently entering into an agreement to fix compensation to be paid to another party in interest out of the assets of the bankrupt estate. Last, @ 156 prohibits "for compensation" bankruptcy petition preparers other than attorneys (or their staffs) from "knowingly disregarding" the bankruptcy laws or rules.

Aider and Abettor Liability. When assessing the possible applicability of all of these sections the availability of @ 2 -- aider and abettor status -- is worth considering for the client. Specifically, even though one's client may not fit specifically as an individual whose conduct is proscribed by a Title 18 or non-Title 18 statute, he or she may still qualify as an "aider or abettor."

Conspiracy. A prosecutor may insist that your client allocute to conduct that will implicate a codefendant and for that reason is reluctant to allow a misdemeanor plea -- not a particularly compelling reason, since the client's plea allocution can implicate the codefendant anyway. It may be worthwhile to note, however, that @ 371, the standard "conspiracy" section, makes it a misdemeanor to commit a conspiracy -- the same rules apply, requiring an overt act in furtherance -- to violate a misdemeanor criminal statute.

Other Misdemeanors

While the Title 18 misdemeanors are easier to find because they are located in one volume, sprinkled around the various other titles of the United State Code are many oftentimes arcane or limited, but nonetheless useful, misdemeanor sections that may be made to apply -- sometimes, indeed, by stretching the facts or intent of the statute -- to the particular case.

The following list is by no means exhaustive, but proposes to list some of the more worthwhile possibilities -- bearing in mind that a first step for the practitioner would be to scan the indices to the particular volumes implicated by the case. In addition, a Lexis-Nexis search using "imprison" and "not more than one year" or "not more than six months" should spit out all there is to find on the

subject, perhaps more than 500 entries. For those not so facile with a computer, Marjorie J. Pearce of Stillman and Friedman, the *jeune-doyenne* of the "non-felony," has compiled exhaustive computerized list of **federal misdemeanor** sections.

Tax Offenses. Tax offenses are prosecuted under Title 26, the Internal Revenue Code -- usually as felonies, under @ 7201 (tax evasion), @ 7206 (false returns) or 18 U.S.C. @ 371 (a so-called "Klein conspiracy" to violate the tax laws). Still, there are a number of **misdemeanor** sections that apply to violations of the **federal** tax laws. Remember, however, that bureaucratic reasons may impede efforts to gain a prosecutor's approval of a tax count. Tax pleas require participation and approval by the Tax Division of the Justice Department, which requires the United States Attorney's Office to yield some control -- particularly by way of timing -- to the Tax Division.

Assuming that one can overcome these hurdles, the following **misdemeanor** provisions are available: simple failure to file any **federal** tax return; simple failure to pay any **federal** tax; simple failure to keep any record; simple failure to supply information -- if the failure to do any of these is willful and violates a statute or regulation (all under @ 7203).

There are also other **misdemeanor** IRS provisions, although somewhat rarely used: (1) willful providing of "false or fraudulent" information in connection with withholding taxes or withheld tax exemptions (@@ 7204, 7205); (2) furnishing of false documents to the IRS (@ 7207); (3) failure to obey a summons issued by the IRS to appear or produce materials as required under various Code sections (@ 7210); (4) false statement by purchaser (or lessee) calculated to lead a person to believe that a portion of the sale (or lease) price consists of a **federal** tax (@ 7211); and (5) attempt to interfere with a government employee's effort to administer the tax laws. (curiously, if the offense is "committed only by threat of force") (@ 7212).

There are also a series of misdemeanors that address misconduct by IRS employees concerning tax disclosure and other wrongdoing (see @@ 7213, 7213A, 7215 and 7216).

SEC. 15 U.S.C. @ 78u(c) makes it a misdemeanor to fail or refuse, without just cause, to attend and testify or produce documents in obedience to a subpoena of the SEC.

Labor. 29 U.S.C. @ 186 criminalizes as a misdemeanor payments made by employers to labor unions, or their representatives or consultants. Similarly, the section makes it illegal as a misdemeanor for the union or its representatives to solicit such payments from employers -- if the thing of value involved does not exceed \$ 1,000.

Customs Violations. Most Customs violations are prosecuted as felonies under 18 U.S.C. @@ 542-545. But 19 U.S.C. @ 1304(k) makes it a misdemeanor to, with intent to conceal the information therein, deface, destroy, cover, obliterate or alter any mark required under the provisions of the Customs laws.

Social Security. Under 42 U.S.C. @ 1307, the intentional defrauding of a person by false representation, and the false representation to the Social Security Administration which seeks to communicate that an individual is a proper beneficiary of the Social Security Act, constitute misdemeanor.

Public Health. 42 U.S.C. @ 1320a-7b(a) makes it a **misdemeanor** to knowingly and willfully make a false statement or representation of a material fact in an application for payment or benefit

under a **federal** health care program by a person other than the provider. (It is a felony for the provider to engage in such conduct.) It is also a misdemeanor under @ 1320a-7b(e) to accept assignments improperly and repeatedly.

Bank Fraud. 12 U.S.C. @ 2607 (a), (b) and (c) make it a misdemeanor to give or accept fees, kickbacks or anything of value as part of real estate settlement service involving a federally-related mortgage loan. It is also a misdemeanor to split fees concerning the rendering of real estate settlement service concerning such loans.

Environmental. The Toxic Substances Control Act (TSCA), 15 U.S.C. @ 2614, designed to protect the environment through the comprehensive regulation of certain harmful substances, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. @ 6928(d), which addresses the storage, and handling of hazardous waste, provide for misdemeanor treatment for these violations. Under TSCA it is also a misdemeanor to knowingly and willfully fail to establish or maintain required records, or allow the inspection of a facility involved with chemical substances.

Controlled Substance. 21 U.S.C. @ 844 makes a knowing or intentional "simple possession" of a controlled substance (without a valid prescription or order) a misdemeanor. It is also a **misdemeanor** to knowingly or intentionally possess any list I controlled substance intentionally obtained under a registration issued to the possessor, if the registration has been revoked or suspended or the registrant has ceased to do business. (If the defendant has a prior conviction for any narcotics offense under **federal** or state law, such "simple possession" is a felony.)

Food & Drug. There are a number of misdemeanors in Title 21 that address meat inspectors (@ 676), poultry inspectors (@ 678), serums, toxins and viruses (@ 198), diseased livestock (@ 117) and animal importation (@ 104). Sections 16 and 17 combine to criminalize as a misdemeanor the importation into states or territories of any dairy or food product that is falsely labeled or branded, or falsely labeled or branded as to where they are made, produced or grown.

Conclusion

Imagination is often a crucial component of a lawyer's ability. Frequently, the attorney must look at the criminal conduct under scrutiny and widen his or her focus in trying to resolve the case. If a misdemeanor statute criminalizes conduct that the client committed -- even though it is not directly in the headlight of the prosecutor's scrutiny -- it may fit the defense counsel's purpose. More important, it may even fit the prosecutor's purpose.