

## *How the Noir Novel Informs Your Compliance Program*

In the Work Matters column in the December 3 Issue of the Texas Lawyer, in an article entitled, "Ten Phrases Lawyers Hear That Portend Disaster" author Michael Maslanka explored his love of noir fiction, which I share, through listed 10 phrases that show the "it" so famous in noir novels is coming. The ten warning signs that he listed are as follows:

1. *"Isn't it obvious?"* I hear this from managers when a company refuses to hire a disabled applicant, as in, "Isn't it obvious that a man with one arm can't do this job?" The manager unwisely forecloses the inquiry required by the Americans With Disabilities Act: An employer must determine if the employee can perform the essential functions of the job, with or without a reasonable accommodation.

Another example is when a supervisor says, "Isn't it obvious that we don't want to hire a convicted felon for this job?" That person unwisely ignores the EEOC's new emphasis that automatic exclusion of an applicant with a criminal record may be a proxy for race discrimination.

2. *"This is a no-lose case with a guaranteed two-comma verdict."* Listen to this quotation from Proverbs 28:20: "[H]e that maketh haste to be rich shall not be innocent." Isn't that the truth?

From the fictional Gordon Gekko to the all-too-real Bernie Madoff, those who greedily grasp after riches may be slow to reveal their lack of integrity. They show their true character only under careful attention and scrutiny. The best antidote: Be a person of character. As W.C. Fields wisely remarked, "You can't cheat an honest man."

3. *"We must decide today!"* Here is the greatest enemy of an integrity-based decision: time pressure. "Fire the employee now!" "We have to get this order of widgets out by 5 p.m. — no ifs, ands or buts."

To paraphrase H.L. Mencken, decisions made under unnecessary time pressures usually are "swift, sure, and wrong." When under pressure to do something "now," the wise attorney should ask the client, "If we had 10 times as much time to make this decision, would it be the same decision?"

4. *"That's the other side's problem."* I hear this from time to time, and I bet many lawyers do. These two statements always are cause to take a timeout:

- "That's not our problem; it's the other side's problem"
- "Let them worry about that."

When people start saying things like that, ask whether they're doing so because the statements are true or because the underlying issue involves unpleasant facts that it's easier not to acknowledge. Recall Ben Franklin's wise advice: "Half a truth is often a great lie."

Litigators and deal makers hear phrases like these. Events are percolating along, and someone on the team asks, "Should we be doing this?" or "Does the other party know about this issue?" When the question answers itself, it's time for the lawyer to ask whether truth or convenience is driving the client's position. Convenience never trumps ethics.

5 *"Everybody else is doing it."* Here is just some of what I have heard in 31 years of practicing law:

- "Companies in my industry don't pay overtime, so why should I?"
- "The guy with the company down the road fired the union organizer among the employees, and nothing happened to him."
- "Don't tell me what I can't do; I'm paying you for telling me what I can do."

Those who win the race to the bottom still lose. Stephen Cope, in his book "The Great Work of Your Life: A Guide for the Journey to Your True Calling" explains that "The Bhagavad Gita" teaches that it is better to follow one's true dharma and fail than to follow others' false dharma and succeed monetarily. And, let's face it: The truth comes out in the end.

6. *"We can't change course now. We have too much invested."* This is false-dichotomy territory. How can a lawyer break through this either/or mindset? Mary C. Gentile offers advice in her book, "Giving Voice to Values: How to Speak Your Mind When You Know What's Right." She suggests changing the frame. Reject "We did not get what we wanted." Embrace "What did we learn from this experience?"

Failing to do so conjures up, for me, lines from W. H. Auden's "The Age of Anxiety": "We would rather be ruined than changed/We would rather die in our dread/than climb the cross of the moment/and let our illusions die." Change course. It's the smart play.

7. *Another pair of eyes on the project? You're joking, right? What a waste."* True, projects are overlawyered and overanalyzed. But active resistance to advice is a telling sign that something maybe seriously amiss. Take it as a warning to press all the more for that other set of eyes.

An ostrich-like attitude of self-delusion can lead to disaster. Listen to Proverbs 1:30-31: "They would none of my counsel: they despised all my reproof. Therefore shall they eat the fruit of their own way, and be filled with their own devices."

8. *"We've always thought about it this way, and we always will."* I can do no better than Justice Felix Frankfurter, who decided a legal issue one way in 1943 and then completely reversed course in 1949. He gave this explanation in his opinion in *Henslee v. Union Planters Bank*: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Genius.

9. *"It is what it is."* Huh? This phrase now is used principally by those who want to sound insightful and wise but who are just dazed and confused. Only Buddhist monks are allowed to talk like Buddhist monks.

10. *"You are the most wonderful person I have ever met. We were meant to start this business/do this deal/win this suit."* Beware flattery without facts, especially when it comes too fast, too soon. It is a sign of a sociopath. They target their victims (people they can use), compromise their targets' integrity, exploit them and toss them aside when finished. The whole cycle starts with false flattery.

These also have application for the compliance practitioner. If you hear a third party mention any of these, either in the due diligence process or in your relationship going forward, you need to

drop what you are doing and begin an investigation. If you hear anyone in your company utter these, move post-haste as well. But most of all, these phrases should remind you just how great this classic American fiction is and how you can use it to inform your compliance program.

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For those of you unaware, the Houston Texans will play the New England Patriots in Foxboro this weekend. I have friendly wagers with two of my favorite Patriot fans, Matt Kelly, Editor of Compliance Week and Jay Rosen, Vice President, Language Solutions Merrill Brink International. For the Compliance angle, see the piece by Matt entitled, "Sportsmanlike Conduct". Go Texans!

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