

WORKSHOP

**HONEST SERVICES
AND MISUSE OF OFFICE**

Tuesday, March 15, 2011, 1:30 p.m.

Leon County Board of County Commissioners
Chambers, 5th Floor, Leon County Courthouse



**Board of County Commissioners
Leon County, Florida**

www.leoncountyfl.gov

**Agenda Item
Executive Summary**

March 15, 2011

Title:

Workshop on Honest Services and Misuse of Office (and other ethics issues)

Staff:

Herbert W.A. Thiele, County Attorney

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Issue Briefing:

This is a presentation of the federal law entitled "Honest Services" (which has been found by the Court to be defined as "when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interests), along with a "refresher" of other applicable ethics laws and issues for public officials under Chapter 112, Florida Statutes, and Rules of Professional Responsibility.

Fiscal Impact:

This item has no fiscal impact to the County.

Staff Recommendation:

Option #1:

Report and Discussion

Background:

Due to the recent rise in political corruption convictions in Florida, the County Attorney has been asked to speak at several different venues regarding this subject. At the direction of Commissioner Desloge, the Board of County Commissioners offered to direct the County Attorney's Office to hold a workshop on honest services and ethics wherein the constitutional officers and city officials could be invited to attend and take part in.

Analysis:

See attachments.

Options:

1. Accept presentation.
2. Board Direction.

Recommendation:

Board Direction.

Attachments:

1. Honest Services outline.
2. Professional Ethics Opinion of the Florida Bar, 09-01.
3. Excerpts of presentation on gift disclosure and voting conflicts.

HWAT:ea1

HONEST SERVICES AND MISUSE OF OFFICE©

Herbert W. A. Thiele, Esq.
County Attorney
Leon County, Florida

I. Background.

The concept of "honest services" is derived from 18 U.S.C. Chapter 63 on Mail Fraud.

Under 18 U.S.C. § 1341 (Frauds and swindles):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

And, pursuant to 18 U.S.C. § 1343 (Fraud by wire, radio, or television):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The phrase utilized in both §§ 1341 and 1343, “scheme or artifice to defraud,” was defined by Congress in 1988 as “a scheme or artifice to deprive another of the intangible right of *honest services*.” 18 U.S.C. § 1346. (Emphasis supplied.)

Congress specifically enacted 18 U.S.C. § 1346 (Definition of “scheme or artifice to defraud”) in 1988 in reaction to the U.S. Supreme Court decision rendered one year earlier in the case of McNally v. United States, 483 U.S. 350 (1987). In the McNally decision, the U.S. Supreme Court overruled a long line of lower court decisions when it determined that a former public official in the Commonwealth of Kentucky and a private citizen could not be convicted of mail fraud concerning a kickback scheme to require an insurance agent, which provided insurance for the state, to share commissions with certain agencies in which the defendants had an interest, because 18 U.S.C. § 1341 did not prohibit schemes to defraud citizens of their intangible rights to honest and impartial government. However, in enacting 18 U.S.C. § 1346, it was explained by members of Congress that the purpose of the legislation was to overturn the McNally decision and restore the “honest services” mail fraud provision which existed prior to the McNally case. See Joshua A Kobrin, Note, “Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346,” 61 N.Y.U. ANN. SURV. AM. L. 779, 814 (2006). See also United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) (“We have recognized that § 1346 was intended to overturn McNally”); United States v. Walker, 490 F.3d 1282, 1297 n. 16 (11th Cir. 2007) (the honest services amendment was enacted to override McNally).

Although the term “honest services” is not defined in the statute, the statute (18 U.S.C. § 1346) has nevertheless withstood numerous challenges for unconstitutional vagueness. In fact, earlier this year, the statute withstood such a challenge. On June 24, 2010, the U.S. Supreme

Court issued a landmark decision in the case of Skilling v. United States, 130 S. Ct. 2896 (2010), holding that § 1346 was not unconstitutionally vague when properly confined to bribery and kickback schemes. However, the Court found that the nondisclosure of a conflict of interest (also known as undisclosed “self-dealing”) was not a violation of the honest services fraud statute. Therefore, although the scope of honest services fraud was narrowed by the Supreme Court, the law was still found to be constitutional.

II. Honest Services Fraud Pre-Skilling

The following is an overview of a few cases that attempted to define honest services fraud, prior to the U.S. Supreme Court’s decision in the Skilling case.

The Fifth District Court of Appeals stated in the case of United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997), cert. den. 118 S.Ct. 625 (1997), that:

“[H]onest services” contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer-or that he consciously contemplated or intended such actions. For example, something close to bribery. If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.

The Eleventh Circuit Court of Appeals stated in United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007) (citations in text), that:

The term “honest services” is not defined in the statute, but we have found that “when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest.” United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir.1997). “Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest.” United States v. deVegeter, 198 F.3d 1324, 1328 (11th Cir.1999). “If an official instead secretly makes his decision based on his own personal interests-as when an official accepts a bribe or personally

benefits from an undisclosed conflict of interest,” the official has deprived the public of his honest services. *Lopez-Lukis*, 102 F.3d at 1169.

As set forth in the case of United States v. Mangiardi, 962 F. Supp. 49, 51 (M.D. Penn. 1997), aff'd 202 F.3d 255 (3rd Cir. 1999), cert. den. 529 U.S. 1060 (2000):

The typical case of honest services fraud is that the public is not getting what it deserves: honest, faithful, disinterested service from a public official. This concept applies whether the official is bribed or fails to disclose a conflict of interest. Finally, the scheme or artifice must lead to actual or intended actual injury. That is, the official must be performing a discretionary function which the scheme or artifice is intended to influence because it is the exercise of a discretionary function (the “service”) which must be the target of the scheme.

(Citations omitted.)

In the case of United States v. Rybicki, 354 F.3d 124, 139 (2d Cir. 2003), the Second Circuit Court of Appeals found that in the private sector, honest services fraud cases fell into two groups: (a) cases involving bribes or kickbacks, and (b) cases involving self-dealing. “Self dealing” was defined to be a situation where an employee causes his or her employer to do business with an enterprise in which the employee has a secret interest, which is undisclosed to the employer. 354 F.3d at 140.

But, with the recent Skilling decision, the U.S. Supreme Court found that honest services fraud consisted only of bribes and kickback schemes, not undisclosed “self-dealing” or the nondisclosure of a conflict of interest.

III. The Skilling Case

In 2010, the U.S. Supreme Court heard oral arguments in three high profile cases involving prominent public and private officials accused of honest services fraud. During these

hearings various justices reportedly made comments suggesting that the honest services law was vague and perhaps unconstitutional, with Justice Scalia reportedly calling the law “mush.”

The first case heard by the Court, Black v. United States (U.S. Supreme Court Case No. 08-876), involved Conrad M. Black, former chairman of a media company which owned and published several newspapers, including the *Chicago Sun-Times* and *The Daily Telegraph* (in the U.K.). Mr. Black and other corporate officials were convicted of mail fraud and wire fraud for paying themselves bogus “noncompetition fees” and failing to disclose receipt of those fees to the company’s board of directors and audit committee. Mr. Black was also convicted of obstruction of justice, for hiding 13 boxes of company documents at his home. Mr. Black was sentenced to 78 months in prison.

The second case, Weyhrauch v. United States (U.S. Supreme Court Case No. 08-1196) involved former Alaska state representative Bruce Weyhrauch, who was charged with bribery, extortion, conspiracy and mail fraud, for allegedly seeking legal work with an oil services company that was lobbying the state to lower taxes on oil, and then failing to disclose his job search as a conflict of interest. He was convicted and sentenced to five years in prison.

Then, on March 1, 2010, the U.S. Supreme Court heard arguments in the case involving former Enron CEO Jeffrey K. Skilling (Skilling v. United States, U.S. Supreme Court Case No. 08-1394). At its height, Enron was the seventh largest revenue producing company in America and its stock sold at \$90 per share. However, after Enron crashed into bankruptcy in 2001, an elaborate conspiracy was uncovered whereby officials at Enron were found to have overstated the company’s financial position, which propped Enron’s stock prices at artificially high levels. It was alleged by the government that Mr. Skilling personally profited from the conspiracy, and netted \$89 million from the sale of his Enron shares prior to the collapse of the company. Mr.

Skilling was charged with one count of conspiracy to commit honest services wire fraud, plus over 25 counts of securities fraud, making false representations to Enron's auditors, and insider trading. Following his conviction by a jury on 19 of the counts, including the honest services charge, his lawyers appealed, arguing that the honest services law was unconstitutionally vague.

On June 24, 2010, the U.S. Supreme Court's rendered its decisions in the Black, Weyhrauch, and Skilling cases, and in so doing, narrowed the scope of honest services fraud. See Black v. United States, 130 S. Ct. 2963 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010); Skilling v. United States, 130 S. Ct. 2896 (2010). In essence, the Supreme Court held that § 1346 – the federal mail fraud statute – criminalizes only those schemes that involve bribes or kickbacks. On the other hand, the Court found that the nondisclosure of a conflict of interest is not a violation of the honest services fraud statute. Therefore, undisclosed “self-dealing,” which is the taking of official action by a public official or private employee to further his or her own secret financial interests, is not a violation of the honest services fraud statute.

Thus, the U.S. Supreme Court determined that, when properly confined to bribery and kickback schemes only, the honest services fraud statute is not unconstitutionally vague. As the Supreme Court concluded in the Skilling opinion, “our construction of § 1346 establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress’s goal of ‘overruling’ *McNally*.” Skilling, 130 S.Ct. at 2933.

What this means for Jeffrey Skilling is that he did not commit honest services fraud, because it was never alleged or shown that he engaged in bribery or kickback schemes. The government did not allege or show that Skilling solicited or accepted side payments from a third party in exchange for misrepresenting the company's financial position. Whether or not the

reversal of his honest services conviction will impact his other convictions is a matter to be determined on remand.

In addition, pursuant to the Skilling decision, the judgments in the Black and Weyhrauch cases were also vacated and remanded to the lower courts for further consideration. In the Weyhrauch case, on remand, the Court of Appeals for the Ninth Circuit affirmed the district court's denial of the government's request to introduce evidence to prove "a knowing concealment of a conflict of interest," because the nondisclosure of a conflict of interest was no longer a basis for prosecution under honest services fraud. United States v. Weyhrauch, 623 F.3d 707, 708 (9th Cir. 2010).

Meanwhile, on remand from the U.S. Supreme Court, the Seventh Circuit Court of Appeals in the Black case reversed the convictions on certain of the mail and wire fraud counts (those relating to the defendants' mischaracterization of a \$5.5 million payment), and found that a retrial on those counts would be necessary if the government decided to pursue it. However, the Appellate Court affirmed the convictions on the other counts of mail and wire fraud (those concerning the defendants' receipt of \$600,000 for non-existent covenants not to compete), finding that the evidence of "pecuniary fraud" was so compelling that no reasonable jury could have refused to convict. In addition, the Court affirmed the obstruction of justice conviction against Conrad Black. United States v. Black, 625 F.3d 386 (7th Cir. 2010).

IV. Skilling Aftermath

It was widely speculated that the *Skilling* decision would greatly reduce the number of honest services fraud prosecutions. However, as was indicated in a recent article published online in *The National Law Journal*,

[It] appears that rumors of the death of honest services fraud cases were greatly exaggerated. Prosecutors continue to prosecute these cases, and appellate courts continue to readily uphold these prosecutions.

Laurie L. Levenson, *Criminal fraud cases survive Skilling decision*, The National Law Journal (Jan. 3, 2011), <http://www.nlj.com>.

For example, in 2005 Michael Scanlon pled guilty to charges of bribery, mail and wire fraud, and honest services mail and wire fraud, for his role in conspiring with former lobbyist Jack Abramoff to defraud Abramoff's Native American casino clients. Scanlon subsequently helped bring 20 other lobbyists and public officials to justice, including Abramoff, former Rep. Tom DeLay, and former Rep. Bob Ney. However, following the *Skilling* ruling in 2010, Scanlon filed a motion to modify his plea agreement, stating that did not have "fair notice" that his conduct was criminal. Scanlon's motion was denied. The court, citing *Skilling*, determined that, "A criminal defendant who participated in a bribery or kickback scheme... cannot tenably complain about prosecution under § 1346 on vagueness grounds." *United States v. Scanlon*, ___ F. Supp. 2d ___, 2010 WL 4867613 at 5 (D.D.C., Nov. 30, 2010). On February 11, 2011, Scanlon was sentenced to 20 months in federal prison. He was also ordered to pay over \$20 million in restitution.

As Ms. Levenson concluded in her article,

Skilling did not give a green light to politicians or executives to be dishonest and courts are not eager to allow such defendants to walk away unscathed. Even after *Skilling*, the greediest of defendants are still being held accountable for their actions.

Levenson, The National Law Journal (Jan. 3, 2011).

V. Examples.

Below is a sampling of cases from the past few years involving bribery and kickback schemes. Many of the cases are quite recent.

1. United States v. Kemp, 379 F. Supp. 2d 690 (E.D. Penn. 2005), aff'd 500 F.3d 257 (3rd Cir. 2007), cert. den. 128 S.Ct. 1329 (2008). In this case, a jury convicted Corey Kemp, the former treasurer of the City of Philadelphia, former bank executives, and others for various offenses, including honest services mail/wire fraud. In essence, the then city treasurer received payments and gifts (such as NBA All-Star game tickets, Super Bowl tickets and accommodations, trips, construction of a deck, personal loans, loans for relatives, and a loan to his church) in exchange for City business. The former city treasurer was given a 10-year sentence, and the two bank executives each received 2-year sentences. On appeal, the United States Court of Appeal, Third Circuit, affirmed the convictions.

2. United States v. Sorich, 523 F.3d 702 (7th Cir. 2008). Two of the defendants, in this case, including Robert Sorich, were high level employees in the Office of Intergovernmental Affairs (an office of the mayor of the City of Chicago), and two others were department officials. Three of the four defendants were convicted by a jury of mail fraud, wherein the defendants were found to have doled out thousands of city civil service jobs based on political patronage and nepotism. The scheme, which had apparently been going on for years, included filling out sham interview forms to assure certain persons would be hired. The defendants were convicted by a jury and sentenced, the longest sentence being 46 months.

The defendants appealed their convictions; contending that their behavior, while dubious, was not criminal, and that the honest services mail fraud statute was unconstitutionally vague. The defendants also argued that they did not make any money from the scheme, nor did they deprive the city or the people of Chicago of any money or property. However, the Seventh

Circuit Court of Appeals affirmed the convictions and sentences, concluding that the defendants' actions did constitute mail fraud, that the mail fraud statute was not unconstitutionally vague as applied to the facts of the case, and that the jobs which were doled out by the defendants were indeed a kind of property.

3. United States v. Woodward, 459 F.3d 1078 (11th Cir. 2006). In this case, a 29-year veteran of the Atlanta Police Department and his wife were convicted of mail fraud, conspiracy to commit mail fraud, and deprivation of honest services, and sentenced for three years and two years, respectively, plus ordered to pay restitution, for operating a business that charged persons a fee to recover money and property held at the police department. The police officer would use confidential information obtained through his position with the police department to locate potential clients, and after locating the clients, the defendants would then lead the clients to believe that the only way the money and property could be reclaimed was through their business operation, which charged a substantial fee (the property can actually be reclaimed directly at the police department for no charge). The defendants also falsified powers of attorney in order to reclaim money and property. On appeal, the Eleventh Circuit Court of Appeals affirmed the convictions and sentences.

4. United States v. Walker, 490 F.3d 1282 (11th Cir. 2007). This case involved Charles W. Walker, a former Georgia state legislator who was convicted of 127 counts of conspiracy, mail fraud, and income tax evasion, and sentenced to over 10 years in prison. Among other things, the defendant, who owned a personnel agency that provided temporary workers for hospitals and other businesses, used his influence to get legislation passed to benefit Grady Hospital in Atlanta, and in return received business favors from Grady Hospital, relating

to the utilization of his personnel agency. The defendant's personnel agency also provided personnel services to Medical College of Georgia, which he failed to disclose.

5. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007). In this case, the federal Appeals Court found that a public servant's actions did not constitute mail fraud. The defendant, a section chief in the State of Wisconsin's Bureau of Procurement, presided over the selection of a travel agent for the state. During the bid process, two travel agencies emerged as the top contenders. One agency was based in the state and the other based out of state. The evaluation team selected the out of state agency, and the section chief requested a delay, apparently believing that her boss would not approve of the selection. It was then agreed by the evaluation team that the matter would be re-bid on a best and final basis, as allowed by state law. Ultimately, the in-state travel agency got the bid. Three months later the section chief received a \$1,000 raise. The defendant was subsequently convicted in the United States District Court, Eastern District of Wisconsin, of mail fraud with regard to the selection of the state's travel agent. The defendant appealed, and the Seventh Circuit Court of Appeals reversed the conviction, ordered an acquittal, and stated as follows:

[The subject federal statutes] have an open-ended quality that makes it possible for prosecutors to believe, and public employees to deny, that a crime has occurred, and for both sides to act in good faith with support in the case law. Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

484 F.3d at 884.

6. Alabama. Former Alabama governor Don Siegelman was convicted of bribery, conspiracy to commit mail fraud, mail fraud and obstruction of justice, and sentenced to a seven-year prison term, for receiving a \$500,000 donation to his campaign to establish a state lottery in exchange for appointing the donor of the funds to a board which regulated hospital construction. Siegelman subsequently filed an appeal, and on March 6, 2009, a panel of three judges for the 11th Circuit Court of Appeals in Atlanta upheld five of the seven charges, struck two of the fraud counts, and ordered a new sentencing hearing. United States v. Siegelman, 561 F. 3d 1215 (11th Cir. 2009).

However, on June 29, 2010, the U.S. Supreme Court vacated the judgment of the 11th Circuit Court of Appeals, and remanded Mr. Siegelman's case in light of the Supreme Court's ruling in the Skilling case, which held that the honest services mail fraud statute criminalizes conduct involving bribery and kickbacks only. Siegelman v. U.S., 130 S. Ct. 3542 (2010). On August 31, 2010, Mr. Siegelman filed a brief with the Court of Appeals, requesting a dismissal of all charges. This case has received significant press coverage, including a segment on *60 Minutes*.

On December 22, 2009, the United States Circuit Court, Eleventh Circuit, affirmed in part, vacated in part, and remanded the District Court's decision concerning William Luther Langston, former Executive Director of the Alabama Fire College, with the Chief Judge beginning the Court's opinion with the following statement:

Once again, our circuit is presented with an appeal involving an Alabama official and his part in a massive case of public corruption. The facts of this case should be an affront to every decent law-abiding citizen in the State of Alabama.

United States of America v. William Luther Langston, 590 F. 3d 1226, 1228 (11th Cir. 2009).

Langston was convicted by a federal jury of 36 counts of mail fraud, wire fraud, theft of federal funds, conspiracy, money laundering, and conduct giving rise to criminal forfeiture, for diverting Fire College funds to himself, family, and friends. Among other things, he had the Fire College provide jobs which required no work to various family members and friends, buy appliances for his son, pay for the tuition of his grandsons at a private school, purchase motorcycles, build a house for a friend, and buy a house and furnishings for himself. He was sentenced to 125 months' imprisonment, plus three years of supervised release, and ordered to pay \$1,428,945 in restitution. Upon appeal, the Circuit Court found that the government had erroneously indicted Langston as an agent of the State of Alabama, rather than as an agent of the Fire College, and thus vacated 17 of the counts, remanding to the district court for further proceedings. However, the Circuit Court did affirm the remaining counts and also concluded that Langston's sentence was substantively reasonable. The Court commented that although some counts of conviction were being vacated, this would likely not affect Langston's prison term, only the amount of restitution.

On October 4, 2010, eleven individuals, including four current state legislators for the State of Alabama, were charged for their roles in a wide-ranging conspiracy regarding the bribery of state legislators for their votes to allow electronic Bingo gambling machines in the state. The federal indictment alleges that, during 2009-2010, Alabama State Senators Larry P. Means, James E. Preuitt, Quinton T. Ross, Jr., and Harri Anne H. Smith "corruptly solicited, demanded, accepted and agreed to accept money and things of value" in exchange for their favorable vote and influence on the gambling legislation. For example, it is alleged that State Senator Preuitt, who had previously voted against the gambling legislation, was promised \$2

million in campaign contributions and the use of country music stars for his reelection campaign, in exchange for his vote in favor of the legislation.

State Senator Smith was charged with one count of conspiracy, two counts of bribery, one count of extortion, 11 counts of honest services mail and wire fraud, and four counts of money laundering. Means was charged with one count of conspiracy, two counts of bribery, two counts of attempted extortion, and 11 counts of honest services mail and wire fraud. Preuitt was charged with one count of conspiracy, one count of bribery, one count of attempted extortion, 11 counts of honest services mail and wire fraud, and one count of making a false statement. Ross was charged with one count of conspiracy, two counts of bribery, two counts of attempted extortion and 11 counts of honest services mail and wire fraud.

7. Illinois. On December 9, 2008, former Illinois Governor Rod R. Blagojevich was arrested and charged with conspiracy to commit mail and wire fraud and solicitation of bribery, and was subsequently indicted for committing racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents. The charges alleged that he used his office to seek or obtain money, campaign contributions and employment for himself and others in exchange for official actions, including trying to leverage his authority to fill the U.S. Senate seat vacated by President Obama.

Mr. Blagojevich's high profile case went to trial in June 2010, but the jury was deadlocked, failing to reach a verdict on 23 of the 24 counts against the former governor. He was convicted of one count of making false statements to the FBI. A retrial is scheduled for April 2011.

Blagojevich's former chief of staff, John Harris, pleaded guilty to one count of participating in a scheme to commit wire fraud, and agreed to testify against Blagojevich.

Christopher Kelly, his former advisor and fundraiser, was also indicted, but died of an intentional overdose on September 12, 2009. Robert Blagojevich, brother of the former governor, was also indicted on four counts for his participation in the alleged schemes, but the jury could not reach a verdict in his case and he will not be retried.

On February 1, 2010, Chicago Alderman Isaac "Ike" Carothers pleaded guilty to federal corruption charges and was sentenced to 28 months in prison, for accepting \$40,000 in home improvements from a developer, in exchange for supporting a rezoning in favor of a development project known as Galewood Yards. Galewood Yards, which, at the time, was the largest undeveloped tract of land within the Chicago city limits, was a former rail yard, and city planners recommended that the property remain an industrial site. However, a developer, Calvin Boender, wished to transform the property into a commercial and residential development, which required a zoning change. Boender was successful in pushing the rezoning through, and the property now contains a 14-screen movie theater, union training center, and 187 single-family and multi-family residences.

In March of 2010, following a jury trial, Calvin Boender, the developer of Galewood Yards, was convicted of one count of bribery, two counts of illegal campaign contributions and two counts of obstructing justice. He was sentenced to 46 months in federal prison.

8. Detroit. In June of 2009, Detroit City Council President Pro Tem Monica A. Conyers pleaded guilty to one count of conspiracy to commit bribery, and was sentenced to 37 months in federal prison to be followed by two years of probation. Mrs. Conyers admitted to receiving cash payments from a representative of Synagro Technologies, Inc., a Houston-based waste management company, for her vote in favor of a multi-million dollar sludge hauling contract between the City and Synagro. Mrs. Conyers is the wife of U.S. Representative John

Conyers, Jr., who is Chairman of the House Judiciary Committee. Her chief of staff, Samuel L. Riddle, Jr., was also indicted on charges for extortion, conspiracy to commit extortion, attempted extortion, mail fraud, bribery, and for making false statements to the FBI in relation to the Synagro contract, as well as for other deals. He is presently in prison on unrelated charges.

9. New Jersey Mayors. Three New Jersey mayors, a deputy mayor, plus numerous other public officials and political figures were arrested on July 23, 2009, as part of a major FBI sting dubbed "Operation Bid Rig" that netted the arrest of 44 people in New Jersey and New York. Peter Cammarano III, who, at the time, was the youngest ever elected mayor of Hoboken, subsequently pleaded guilty in April 2010 on one count of conspiracy to commit extortion under color of official right, for accepting \$25,000 in cash contributions from an undercover agent posing as a developer, in exchange for exercising his official influence and authority. He received a two-year prison sentence.

Dennis Elwell, former mayor of Secaucus, was charged with conspiracy to commit extortion, attempted extortion, and accepting corrupt payments, for accepting a \$10,000 cash bribe from an undercover agent in exchange for his help with a hotel development. His trial is set for February 2011. Anthony R. Suarez, mayor of Ridgefield, was charged with conspiracy to commit extortion for agreeing to accept \$10,000 in cash from a government informant posing as a developer. However, he was acquitted by a federal jury following a two-week trial in October 2010. Leona Beldini, former deputy mayor of Jersey City, was sentenced to three years in prison plus a fine of \$30,000, following her conviction for conspiracy to commit extortion, for accepting \$20,000 in illegal campaign contributions in exchange for agreeing to help an undercover informant with real estate deals.

10. Connecticut. Former Hartford Mayor Eddie A. Perez was convicted by a jury in June 2010 on five felony counts for receiving a bribe, conspiracy to fabricate evidence, accessory to the fabrication of evidence, conspiracy to commit first-degree larceny by extortion, and criminal attempt to commit first-degree larceny by extortion. He allegedly received free remodeling work on his home from a city contractor, plus tried to extort a \$100,000 payoff from a developer on behalf of a political ally. He was sentenced to three years in prison, to be followed by three years probation.

In 2004 former Connecticut Governor John G. Rowland pleaded guilty to one count of conspiracy to commit honest services fraud relating to discounted renovations done on his vacation home, and served approximately eleven months in prison.

In 2003 former Bridgeport Mayor Joseph P. Ganim was convicted of racketeering, racketeering conspiracy, extortion, mail fraud, bribery, conspiracy, and filing false tax returns, relating to bribes and kickbacks received in promoting city contracts with various companies. He was sentenced to nine years in federal prison, fined \$150,000, ordered to pay \$148,617 in restitution, and ordered to forfeit \$175,000 in property.

11. Louisiana. On November 13, 2009, former Louisiana Congressman William Jefferson was sentenced to 13 years in prison following his conviction on 11 counts of bribery, money laundering, honest services fraud, and using his office as a racketeering enterprise, stemming from charges that he accepted \$478,000 in bribes to promote business ventures in Africa. He was also ordered to forfeit over \$470,000. One of the more notable aspects of this case was the FBI's discovery of \$90,000 cash in Mr. Jefferson's freezer.

12. New Mexico. On December 29, 2009, the United States Court of Appeals, Tenth Circuit, affirmed the convictions of Joseph Ruiz, former New Mexico Deputy Insurance

Superintendent, on multiple counts of honest services mail and wire fraud, corrupt solicitation, and extortion. See United States v. Ruiz, 589 F. 3d 1310 (10th Cir. 2009). Mr. Ruiz's scheme involved detecting licensing violations by various insurers, then threatening the insurers with fines unless they contributed to two charities with which he and his boss were associated. If an insurer refused to make the requested charitable contribution, then the fine amount was higher than the amount of the contribution sought by Ruiz. When an insurer suggested contributing to a different charity, Ruiz demanded that the insurer pay the fine instead. The government showed that Ruiz solicited more than \$150,000 in donations from insurers for the two charities. In addition, one of the charities used its donated funds to purchase children's books that were authored by Ruiz, for which he then received over \$1,500 in royalties. He was sentenced to 48 months in prison and ordered to pay \$105,000 in restitution and penalties.

13. Escambia County, Florida. In 2006, W.D. Childers, former president of the Florida Senate and chairman of the Escambia County Commission, was convicted of violating Florida's Government-in-the-Sunshine Law, a misdemeanor, and served 49 days in jail. Also in 2006, Childers was found guilty of two charges of bribery and unlawful compensation, for allegedly orchestrating the county's purchase of property for a \$6.2 million soccer complex from associates of Childers. Mr. Childers was found to have bribed a fellow commissioner, who subsequently committed suicide, with a "collard-green pot" full of cash for his assistance in pushing through the project. He served a 3-1/2 year prison sentence, and was released on June 17, 2009. In June 2010, the 11th Circuit Court of Appeals overturned the bribery conviction, ruling that Childers' constitutional right to confront his accuser had been violated. However, the Florida Attorney General's Office subsequently requested, and was granted, a rehearing of this matter by the full assembly of appellate judges. A hearing date has not yet been set.

14. Palm Beach County, Florida. In June 2007 the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, pleaded guilty for his involvement in a public corruption conspiracy stemming from the unlawful use of his elected position to promote and conceal significant financial ventures, including land deals which netted him millions of dollars. He also accepted significant travel gratuities, including free airfare valued at approximately \$100,000, from a developer in return for voting favorably on measures for the developer. He was convicted of a single count of honest services fraud and sentenced to prison for five years. He was also ordered to forfeit two parcels of real estate worth approximately \$9 million, as well as \$175,000 in cash.

However, in light of the U.S. Supreme Court's ruling in the Skilling case, Mr. Masilloti is presently challenging his honest services fraud conviction. So far, this effort has not proved successful, as a U.S. Circuit Judge for the 11th Circuit recently determined that the conviction would stand because Masilloti's crimes involved bribes and kickbacks. In the meantime, Mr. Masilloti has been transferred from prison to a halfway house in Palm Beach County, and is scheduled to be released in February 2011.

Mr. Masilotti's ex-wife also had to forfeit \$400,000 in cash, which she received in a divorce settlement, as the money came from one of the tainted land deals brokered by Masilotti. In addition, William Boose, a former land use attorney and lobbyist from Palm Beach, pleaded guilty for his involvement in Masilotti's land deals, and served 15 months in federal prison. Rather than being disbarred, Mr. Boose was suspended from the practice of law for three years.

In 2008, another former Palm Beach County commissioner, Warren H. Newell, was sentenced to five years in prison, followed by two years of supervised release, for conspiracy to commit honest services fraud. Newell concealed his financial interest in a "success fee contract"

relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately \$366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, Mr. Newell concealed that he docked his boat at the yacht center and owed significant boat dockage fees (\$40,000), later receiving forgiveness of his dockage fees as a kickback. He also concealed his financial interest in another land deal which came before the commission. Newell's sentence was subsequently reduced by two years for providing evidence against former Palm Beach County Commissioner Mary McCarty. He was released from prison in September 2010 after serving the reduced sentence.

On January 8, 2009, Palm Beach County Commissioner Mary B. McCarty resigned her post, stating that she had failed to disclose free and discounted hotel rooms provided to her by a company doing business with the county, and also had failed to recuse herself on county bond issues that benefited companies that employed her husband. The benefits to the McCarty's were said to have been in the amount of \$300,000. Mrs. McCarty pleaded guilty to depriving the public of her honest services, and was sentenced on June 4, 2009, to serve a prison term of 42 months, to be followed by three years of supervised release, and must pay a fine in the amount of \$100,000. The McCarty's had previously forfeited \$272,000 to the U.S. government. Her husband was sentenced to a prison term of eight months.

The Palm Beach County Commission has adopted several ethics reforms, including the creation of an ethics commission and an inspector general as an independent "watchdog." On November 2010, Palm Beach County voters approved an amendment to the Palm Beach County Charter that would expand the jurisdiction of the ethics commission and inspector general.

15. Levy County, Florida. On December 4, 2009, a jury found former Levy County Commissioners William Samuel Yearty and Robert Anthony Parker guilty on charges of one count of conspiracy to commit bribery and one count of bribery, in connection with their offers of approval for real estate developments in exchange for money and other inducements. Yearty was also convicted of one count of knowingly making a false or fraudulent statement to a federal investigator. Parker was sentenced to 6 months of house arrest, 5 years of probation, and 500 hours of community service. Yearty was sentenced to 33 months in federal prison, followed by 3 years of probation, and was fined \$10,000.

16. Dixie County, Florida. On August 6, 2009, former County Commissioners Alton Land and John Lee Driggers, along with retired building and zoning inspector Billy Keen, Jr., were convicted for solicitation of bribes, conspiracy to commit that offense, and lying to federal agents, for accepting money and other inducements to approve rezonings and real estate developments. Keen was also convicted of federal program fraud for obtaining grant funds in his girlfriend's name to renovate his personal home. Keen received a 78-month prison sentence, and was ordered to forfeit a house and pay \$32,010 in restitution. On January 13, 2010, Land and Driggers were both sentenced to 37 months in federal prison.

Two Cross City officials, Councilman Marcellus Dawson and City Superintendent Johnny Miller Green, were convicted on January 8, 2010 of conspiracy and accepting bribes. Greene was also convicted for making false statements to the FBI. The officials allegedly offered their approval of building projects to an undercover agent in exchange for money and other inducements. Dawson accepted \$1,600 and Greene accepted \$600 from the undercover agent. Green was sentenced to 6 months of house arrest, 5 years of probation, and 500 hours of

community service. Dawson was sentenced to 27 months in prison to be followed by two years of probation.

On October 9, 2009, former Dixie County Attorney Joseph T. (Joey) Lander was convicted of six felony counts of mail fraud and 11 felony counts of money laundering, for fraudulently requiring developers to pay him personally for performance bonds for developments, plus using his position to entice others to invest in his start-up vitamin business. It is estimated that he pocketed over \$1 million during a period of 18 months. He was sentenced to 87 months in federal prison plus three years probation, ordered to pay a \$50,000 fine and \$1,600 in court costs, and had to forfeit his co-ownership in a local weekly newspaper.

17. St. Johns County, Florida. On July 31, 2009, former St. Johns County Commissioner Thomas G. Manuel pleaded guilty to one count of bribery for taking a \$10,000 bribe from a developer to obtain approvals for a development known as Twin Creeks. According to the Factual Basis filed in this case by the U.S. government, Mr. Manuel met with an attorney for the developer and the developer, and pressured the developer to make charitable donations to various organizations. The attorney and developer informed the FBI of this matter and began recording conversations with Mr. Manuel. Mr. Manuel continued to tell the developer to make contributions to various charitable organizations, or the developer's future business before the County Commission would be in jeopardy. Mr. Manuel subsequently accepted \$10,000 in cash and then \$50,000 in cash from the developer for Mr. Manuel's continued support. After accepting the \$50,000 cash payment, Mr. Manuel was immediately detained by the FBI and the \$50,000 was seized. He was sentenced to 21 months in prison, to be followed by 16 months of house arrest and three years probation.

18. Monroe County, Florida. In 2005 former Monroe County Mayor John L. "Jack" London pleaded guilty to one count of tax fraud for the receipt of a \$29,000 bribe from a lobbyist hired by a real estate developer to help obtain building permits for a Marathon hotel project. The funds were used to satisfy a real estate lien on property London owned in Ireland. As part of his plea Mr. London also agreed to testify in the government's case against former County Attorney James T. Hendrick, who had acted as a conduit between London and the lobbyist. However, prior to the trial of Hendrick, Mr. London died of natural causes. In 2007 Hendrick was found guilty of one count of conspiracy, one count of obstruction of justice, and two counts of witness tampering, and received five years probation. On appeal, the 11th Circuit Court of Appeals upheld the convictions but found the sentence to be unreasonable (i.e., not tough enough) and remanded the case for resentencing. On September 11, 2009, Mr. Hendrick was re-sentenced to probation, plus house arrest, a \$50,000 fine, and 1,500 hours of community service.

19. Broward County, Florida. In the early morning of September 23, 2009, three Broward public officials were arrested in a federal sting dubbed "Operation Flat Screen." Broward County Commissioner Josephus ("Joe") Eggleston was charged with conspiring to launder money and filing a false tax return, for his role in the laundering of more than \$900,000 through a Bahamas bank account. Mr. Eggleston pleaded guilty to these charges and was sentenced to 30 months in prison. He agreed to cooperate with state prosecutors in the cases involving his co-conspirators.

Broward County School Board member Beverly Gallagher was charged with five counts of honest services fraud, one count of extortion and one count of bribery, for allegedly accepting \$12,500 in cash, boat trips and restaurant meals, to steer school board construction projects to

undercover FBI agents posing as subcontractors. She subsequently pled guilty to the charge of bribery and was sentenced to 37 months in prison to be followed by three years of supervised release.

Former Miramar City Commissioner Fitzroy Salesman was also arrested for mail fraud, extortion and bribery, for allegedly receiving \$3,340 to steer two city construction contracts to undercover FBI agents. A videotape showed Salesman accepting cash from the undercover agents. A jury convicted him of two counts of bribery and two counts of extortion under color of official right, but acquitted him of the honest services mail and wire fraud charges. He was sentenced to 51 months in prison.

In 2007, former Broward County Sheriff Ken Jenne, who was also a former state prosecutor and former state senator, was convicted of one count of mail fraud and three counts of income tax evasion, for receiving money and favors from various vendors, including his former law firm. He served 10 months in prison and was ordered to pay a fine and taxes due. He recently lost an appeal before the First District Court of Appeal to restore the state pension he forfeited following his conviction.

In September 2007, former City of Hollywood Commissioner Keith Wasserstrom was convicted on two felony counts of official misconduct for failing to disclose financial ties to a sludge company that won an \$18 million contract with the city. He was sentenced to 60 days in jail and four years probation, which he appealed. A state appeals court recently upheld the conviction.

On July 6, 2010, former Broward County Commissioner Diana Wasserman-Rubin was arrested on seven counts of unlawful compensation in violation of Section 838.016, Florida Statutes, for voting on several grant applications that were written by her husband, a grant writer.

Approval of the grant applications resulted in bonuses of \$45,000 being paid to her husband. At other times she abstained from voting on the properties affected by the grants, but she did not state that she had a voting conflict, nor did she file Form 8B (Memorandum of Voting Conflict) as required by Section 112.3143, Florida Statutes.

On October 4, 2010, Broward County School Board Member Stephanie Kraft was charged with unlawful compensation, bribery, official misconduct, and conspiracy to commit unlawful compensation/bribery, in connection with helping a developer to reduce his development fees for a building project by more than \$500,000. Kraft's husband, Mitchell Kraft, also faces charges. It is alleged that the developer paid Mitchell Kraft to sway Stephanie Kraft, and pursuant to Mitchell Kraft's influence, Stephanie Kraft placed the developer's request for a reduction in development fees on the School Board's agenda.

In June of 2010, City of Tamarac Commissioner Patricia Atkins-Grad was arrested on charges of allegedly accepting \$6,300 from developers in exchange for voting in favor of their developments.

Former City of Tamarac Deputy Mayor Marc Sultanof was charged on November 2, 2010, with three counts of official misconduct, one count of bribery, one count of unlawful compensation, and one count of conspiracy to commit unlawful compensation, for allegedly accepting \$30,000 from two developers in exchange for voting in favor of their developments.

In 2010, the Broward County Commission adopted a more stringent code of ethics. The new code prohibits county commissioners as well as county staff from accepting gifts of any value from lobbyists, employers of lobbyists, vendors, or contractors of the county. This means that items as small as a mint or a cup of coffee cannot be accepted from lobbyists or vendors. In addition to the gift ban, county commissioners and staff must keep a disclosure log, which will

be available online, of all contact with lobbyists. The code of ethics will be enforced by an inspector general, who will be hired in 2011.

20. Miami. On November 13, 2009, Miami Commissioner Michelle Spence-Jones was charged with grand theft of the second degree for allegedly funneling \$50,000 in grant funds to a family business. She was subsequently charged on another second degree grand theft charge, as well as a bribery charge, for allegedly accepting money for her vote on an ordinance to change the name of a street. Her trial is presently set for January 18, 2011.

On November 13, 2009, Miami Commissioner Angel Gonzalez was charged with a misdemeanor count of exploitation of public position for orchestrating his daughter's employment at a construction company without her actually having to report for work. Earlier in the year Gonzalez was cited for failing to report \$135,000 in rental income on his financial disclosure forms, but he amended the forms and paid a \$2,500 fine.

On November 30, 2009, City of West Miami Mayor Cesar Raul Carasa was charged with two counts of exploitation of official position, relating to his use of a city-issued cell phone to make personal long distance phone calls to the Dominican Republic and other locations outside the United States in excess of \$70,000.

21. Orange/Osceola County, Florida. Since 2001, the Government Accountability Unit of the Orange/Osceola State Attorney's Office has investigated nearly 50 public officials, political candidates and consultants, for public corruption and election law violations. Most of the cases were dropped, but three did result in guilty verdicts.

On April 27, 2010, Orange County Commissioner Mildred Fernandez was arrested by the Florida Department of Law Enforcement. She was subsequently indicted on 14 counts, for allegedly committing bribery and grand theft, and for accepting illegal cash campaign

contributions to her mayoral campaign, in exchange for agreeing to push building projects through the Planning Department. Her case is expected to go to trial in May 2011.

In 2006, Ernest Page, a former Orlando City Commissioner, was convicted of bribery and corruption, for allegedly threatening to stop a condominium conversion project if the developers did not include him in the deal. He was sentenced to 3-1/2 years in prison.

In 2006, Robert M. ("Bob") Day, the former Osceola County Property Appraiser, was sentenced to six months in county jail following his conviction of felony grand theft. He allegedly utilized county employees to work on his re-election campaign and to perform repairs to his home while on county time.

22. Hillsborough County. Florida Senator Jim Norman, a former member of the Hillsborough County Commission, is presently under a federal grand jury investigation regarding a \$500,000 gift received by Norman's wife in 2006 from a late Hillsborough County businessman. The Normans assert that the money was a loan to purchase a house in Arkansas; however, there is apparently no written agreement or repayment schedule for the loan.

VI. Other Developments.

Statewide Grand Jury. At the request of Governor Charlie Crist, the Supreme Court of Florida entered an order on December 2, 2009, directing the impanelment of a statewide grand jury for a period of 12 months to investigate crimes committed by local and state officials when acting in their official capacity. The Honorable Victor Tobin, Chief Judge in and for the Seventeenth Judicial Circuit (Broward County), was designated as the presiding judge over the statewide grand jury.

On December 29, 2010, the Statewide Grand Jury issued its First Interim Report entitled "A Study of Public Corruption in Florida and Recommended Solutions." The Report is 127

pages in length and is divided into three sections: (1) Criminal Revisions, which includes an examination of the anti-corruption crimes in Florida and suggests steps to expand and strengthen the existing laws; (2) Regulatory Enforcement, which includes recommending that the Commission on Ethics be authorized to self-initiate investigations; and (3) Education, Training and Culture, which recommends mandatory training in ethics. According to the Report, Florida has led the nation in the number of public officials convicted of a federal offense. The Report states that between 1998 through 2007, 824 public officials in Florida were convicted of a federal offense. New York was second with 704 convicted public officials, and Nebraska had the fewest.

PROFESSIONAL ETHICS OF THE FLORIDA BAR**OPINION 09-1
December 10, 2010**

A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts. Lawyers communicating with agency personnel are cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. If a lawyer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, the lawyer should ask State Agency's lawyer if the person is represented in the matter before making the communication.

[Note: This opinion was approved as revised by the Board of Governors at its December 10, 2010 meeting.]

RPC: 4-4.2, 4-4.3

Opinions: 78-4, 87-2

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the Inquiring Lawyer's letter are as follows.

Inquirer's firm represents financial institutions in applying for charter approvals and other necessary approvals with State Agency and federal regulatory agencies, and also in regulatory issues that may arise with such agencies. Occasionally, Inquirer's firm may represent clients in administrative or judicial proceedings in which State Agency is the opposing party.

Inquirer's firm currently is representing four clients in administrative or judicial proceedings involving State Agency which handles state regulatory matters involving the licensing, examination, and supervision of financial institutions. Legal counsel for State Agency has

advised Inquirer's firm that all communications to any employee of State Agency from any lawyer in the firm pertaining to any of the firm's clients must go through the legal department of State Agency, even when such client matters are not connected in any way to the four litigation cases. The Inquirer asks whether Inquirer's firm is prohibited by Rule 4-4.2 from directly communicating with all employees of State Agency, when such communications do not pertain to any adversarial proceeding between the firm's clients and State Agency.

Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar is the governing ethical standard:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

The Comment to the rule states, in relevant part:

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter...and the uncounseled disclosure of information relating to the representation.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability...

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Several issues must be considered in responding to the requested advisory opinion. The first is whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule. As indicated in the comments to Rule 4-4.2 quoted above, a lawyer would be ethically precluded from communicating with employees of governmental entities or agencies who are considered represented by the government's lawyer for purposes of this rule with regard to matters on which the agency is known to be represented by a lawyer unless the entity's lawyer consents to the communication.

Florida Ethics Opinion 78-4 addresses this sometimes difficult question of who within an organizational structure is considered to be a "party" within the meaning of the rule. (Opinion 78-4 was decided under the old Code of Professional Responsibility, which prohibited ex parte contacts with a "party" represented by counsel. While the current rule refers to a "person" represented by counsel, the rationale of the opinion nevertheless remains applicable here.) Attempting to balance one party's need to conduct pre-suit investigation by interviewing certain members of the opponent corporation against the organization's interest in preventing the unadvised disclosure of particular information, the Committee declined to adopt a rule that would prohibit all contacts with organizational employees no matter how removed from the conduct in question. Instead, the Committee found ex parte communications improper only with regard to employees who are "officers, directors or managing agents" but not other employees "unless they have been directly involved in the incident or matter giving rise to the investigation or litigation." In Florida Ethics Opinion 87-2, the Committee extended the rationale of

Opinion 78-4 to government entities and noted that the Comment to Rule 4-4.2, in addition to precluding direct contact with an agency's management, also would preclude unauthorized communications with persons whose acts or omissions in connection with the matter could be imputed to the organization.

Thus, regarding a matter in which State Agency is represented, Inquirer and the firm must obtain the consent of State Agency's lawyer before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

The second issue that must be addressed is when the prohibition arises. Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible. See Florida Ethics Opinion 94-4. Moreover, the Comments limit the scope of the Rule to those circumstances where "the lawyer knows that the person [agency] is in fact represented in the matter to be discussed." Thus, an agency lawyer need not enter a formal appearance in order to "in fact" represent his or her agency on a particular matter, nor must the agency lawyer give other lawyers formal notice of such representation. However, as suggested by the Comment, there must be actual knowledge by the non-agency lawyer of representation by the agency lawyer on the matter being discussed in order for Rule 4-4.2 to apply; but such actual knowledge may be inferred from the circumstances. As a consequence, Inquirer and the firm are not precluded from communicating with employees or any other employee of State Agency regarding subjects unrelated to those specific matters on which the representation of the State Agency's lawyer is known to Inquirer and the firm. In this instance, however, the Inquirer or members of the firm may be required to identify himself or herself as a lawyer representing a client to comply with Rule 4-4.3 Dealing with Unrepresented Persons.

The final question that must be resolved is whether, because State Agency has a general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects. The Comments described above suggest that this is not the intent of the Rule. In addition, the Comments to the Rule expressly recognize that lawyers with an "independent justification" may

communicate with a represented party.

Florida Ethics Opinion 78-4 also addresses this issue. The Professional Ethics Committee addressed two questions:

(1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the (Rule)?

The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney.

Florida Ethics Opinion 87-2 extended the rationale of Opinion 78-4 to government agencies, as discussed above, and made no exception for contacts with personnel of government agencies.

In view of the Comments' clarification that there must be knowledge that the other party is represented in a particular matter and that the bar on communications does not apply to matters outside the representation, Rule 4-4.2 should not be read to bar all communications with government officials and employees merely because the government entity retains a general counsel or other continuously employed lawyers. Conversely, the rule cannot be read to allow lawyers representing a client to approach represented public officials and employees to make inquiry about a matter, the status of a matter, or obtain statements about a matter without affording such officials and employees an opportunity to discuss with government counsel the advisability of entertaining the communication. If the lawyer representing a client knows that the public official or employee is represented in the matter, the lawyer must obtain the prior consent of the government lawyer. If the lawyer representing a client does not know that the public official or employee is represented in a matter, the lawyer should inquire whether the person is represented in the matter. In all instances, to comply with other provisions of the Rules, the lawyer must identify himself or herself to the public official or employee as a lawyer who is representing a client. Rule 4-4.3 and Florida Ethics Opinion 78-4.

In conclusion, Rule 4-4.2, as clarified by its Comments, prohibits

communications with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party. Rule 4-4.3 and Florida Ethics Opinion 78-4.

Lawyers communicating with agency personnel must be cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. The right to communicate directly with agency personnel about matters unrelated to those on which the agency lawyers are providing specific legal representation must not be used as a vehicle for engaging in communications that are barred by the rule. If the Inquirer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, Inquirer should ask State Agency's lawyer if the person is represented in the matter before making the communication. In all instances, the Inquirer may be required to identify himself or herself as a lawyer who is representing a client.

[Revised: 12-14-2010]

X. PROHIBITION AGAINST UNAUTHORIZED COMPENSATION/GIFTS

A. Public officers, employees, local government attorneys, and their spouses and minor children, are prohibited from accepting any compensation, payment, or thing of value when the official knows or, with the exercise of reasonable care, should know that it is given to influence a vote or other action in which the official was expected to participate in his/her official capacity. F.S. 112.313(4).

B. The Commission has found this standard violated when a legislator received a lobbyist-paid hunting trip, when a legislator received a lobbyist-paid trip to Key West, when a mayor received free cable television service from the city's cable franchisee, and when city officials received free memberships from a country club leasing its facilities from the city. Also, this provision would be violated were an employee of the Department of Children and Family Services to receive \$100 for participation in a brief survey regarding a company doing business with the Department (CEO 01-2); but see CEO 04-11 (violation unlikely under circumstances where school superintendent received "to-be-forgiven" home loan). In CEO 08-12, a fair market value, arms-length residential rental to a school board member was not found to violate the statute. In CEO 09-21, a public officer not knowing the identity of contributors to a fund to help her ill son-in-law was a factor in there being no violation of the statute.

C. The Third District Court of Appeal held the statute unconstitutionally vague in Barker v. Commission on Ethics, 654 So. 2d 646 (Fla. 3d DCA 1995), but the Supreme Court reversed in Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. S. Ct. 1996). The First District Court of Appeal held the statute not to be unconstitutionally vague. Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

NOTE: THE STATUTE NOW HAS APPLICABILITY TO "PRIVATIZED" CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS. F.S. 112.3136.

XI. GIFT PROHIBITIONS AND DISCLOSURES FOR "REPORTING INDIVIDUALS" AND "PROCUREMENT EMPLOYEES"

A. "Reporting Individuals" and "Procurement Employees" (RIPes) also are subject to the detailed gift law provided in F.S. 112.3148.

1. "Reporting individuals" are defined to include persons who are required by law to file the full financial disclosure statement specified in Art. II, Sec. 8, Fla. Const. (CE Form 6), and persons required to file the limited financial disclosure statement specified in FS 112.3145 (CE Form 1). F.S. 112.3148(2)(d); and see F.S. 112.3136 regarding chief administrative officers of political subdivisions. "Procurement employees" are defined to

include any employee of an officer, department, board, commission, or council of the executive branch or judicial branch of state government who participates through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, or auditing or in any other advisory capacity in the procurement of contractual services or commodities as defined in F.S. 287.012, if the cost of such services or commodities exceeds \$1,000 in any year. FS 112.3148(2)(e).

2. Local government attorneys who are RИPEs (by virtue of filing limited disclosure) generally are only the city attorney or the county attorney. Assistant city or county attorneys, attorneys for local government boards, and attorneys for special districts are not RИPEs. See CEO's 83-56, 84-5, 85-49. District School Board attorneys are not RИPEs, unless they come within a generic definition [e.g., "purchasing agent" as defined in Section 112.3145(1)(a)3. Florida Statutes (a F.S. 287.017 CATEGORY ONE purchasing agent).]

3. Based on information submitted by State and local agencies, the Commission prepares lists of persons required to file full and limited disclosure. F.S. 112.3145(6). These lists are helpful as a starting point for information about who is a reporting individual.

B. Prohibition against RИPEs Soliciting Gifts: A RИPE is prohibited from soliciting any gift from a lobbyist who lobbies the RИPE's agency, from the partner, firm, employer, or principal of such a lobbyist, or from a political committee or committee of continuous existence as defined in the election laws (FS 106.011), if it is for the personal benefit of the RИPE, another RИPE, or a parent, spouse, child, or sibling of a RИPE. FS 112.3148(3).

1. The prohibition against solicitation is comprehensive, there is no valuation threshold, and it applies even to food and beverages.

2. The gift must be for the personal benefit of the RИPE, a family member, or one or more other RИPEs. Therefore, a RИPE cannot solicit lobbyists for contributions toward a banquet for other RИPEs. But, solicitation of a gift intended for one's agency or for a charity, for example, is not prohibited. CEO 91-52. Under the facts of CEO 09-21 (fund established to benefit ill son-in-law of county commissioner), solicitation was not found.

C. General Rule on Accepting Gifts: Subject to specific, limited exceptions, a RИPE (and any other person on behalf of the RИPE) is prohibited from knowingly accepting a gift which he or she knows or reasonably believes has a value exceeding \$100: (1) directly or indirectly from a lobbyist who lobbies the RИPE's agency or from a political committee or committee of continuous existence; or (2) directly or indirectly made on behalf of the partner, firm, employer, or principal of such a lobbyist. FS 112.3148(4).

1. On the issue of knowledge, note that Commission Rule 34-13.310(4), F.A.C., provides that "reasonable inquiry" should be made of the source of the proposed gift to determine whether it is prohibited. [All further citations to Commission rules are to F.A.C. Chapter 34-13.]

2. Where the gift is given to someone other than a RИPE by one of the prohibited group of donors and is given with the intent to benefit the RИPE, the gift is considered an indirect gift to the RИPE. Rule 310(6). This rule also provides examples of what would be considered prohibited and permitted indirect gifts, as well as the factors the Commission considers in determining whether an indirect gift has been made. See CEO 99-6 (Republican Party fundraiser at Disney World attended by public officers) and CEO 05-5 (city officials accepting admissions to speedway suite). See also CEO 06-27 (city paying travel expenses for

companions of city officials) and CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation). In CEO 08-2, it was determined that appearances by the Attorney General in public service announcements promoting a Florida conference for women (although constituting a gift) would not constitute an indirect gift from a prohibited donor. CEO 09-21 (fund established to benefit ill son-in-law of county commissioner) did not find an impermissible indirect gift.

3. Exceptions. Aside from the exemption for gifts from relatives, there are only three express exceptions to the general rule against accepting gifts worth more than \$100 from one of the prohibited group of donors:

a. When the gift is accepted on behalf of a governmental entity or a charitable organization. In this instance, the recipient may maintain custody of the gift for only the time reasonably necessary to arrange for the transfer of custody and ownership of the gift. FS 112.3148(4). These gifts need not be reported. Rule 400(2)(d). Note that Rule 320(1)(b) defines "charitable organization" to mean an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a).

b. When the gift is from one of certain kinds of governmental entities (an entity of the legislative or judicial branch, a department or commission of the executive branch, a county, a municipality, an airport authority, a water management district created pursuant to FS 373.069, the South Florida Regional Transportation Authority, the Technological Research and Development Authority, a county, a municipality, or a school board), provided that a public purpose can be shown for the gift. FS 112.3148(6)(a)&(b). These gifts must be reported; however, in CEO 01-14, the Commission on Ethics found that office space made available by a municipality to a Legislator for use as his district office was not a "gift." Note that Rule 320(2) defines "public purpose," specifies that there must be a public purpose for the entity's having given the gift and for the RIPE's accepting the gift, and concludes that there is no public purpose for a gift involving attendance at a spectator event unless the donee has direct supervisory or regulatory authority over the event, persons participating in the event, or the entity which gave the tickets. See also CEO 91-53 (county provides telephone service to legislative delegation).

c. When the gift is from a direct-support organization (DSO) specifically authorized by law to support a governmental entity, so long as the RIPE is an officer or employee of that governmental entity. FS 112.3148(6)(a)&(b). These gifts must be reported. See CEO 92-14 (DSO for state university).

D. Gift Disclosures for RИPEs.

1. Quarterly Gift Disclosure (CE Form 9): Each RIPE must file this form to list each gift worth over \$100 accepted by the RIPE, except for gifts from relatives, gifts required to be disclosed on other forms, and gifts the RIPE is prohibited from accepting. The deadline is the last day of the calendar quarter following the calendar quarter in which the gift was received. The form need not be filed if no reportable gift was received during the calendar quarter. However, note that the Commission rule requires a RIPE to disclose a gift reportable on this form received during the time the RIPE held his or her public position, regardless of whether the position was vacated before the form is due. The form is filed with the Commission. FS 112.3148(8); Rule 400.

2. Annual Gift Disclosure (CE Form 10). Each RIPE must file this form to list each gift worth over \$100 received by the RIPE: from a governmental entity, for which a public purpose can be shown; or from a direct-support organization. The deadline is July 1 of

the year following the year in which the gift was received. The form is filed along with the annual financial disclosure form. A procurement employee files with the Commission on Ethics. The form need not be filed if no reportable gift was received. FS 112.3148(6)(d); Rule 410. The report filed by a reporting individual or procurement employee who left office or employment during the calendar year covered by the report shall be filed by July 1 of the year after leaving office or employment at the same location as his or her final financial disclosure statement or, in the case of a former procurement employee, with the Commission on Ethics.

E. Gift Prohibitions for Donors

1. A lobbyist who lobbies a RIPE's agency; the partner, firm, employer, or principal of a lobbyist; another on behalf of the lobbyist or partner, firm, principal, or employer of the lobbyist; and a political committee or committee of continuous existence are prohibited from giving, either directly or indirectly, a gift that has a value in excess of \$100 to the RIPE or any other person on the RIPE's behalf. FS 112.3148(5)(a).

2. Exceptions to this prohibition mirror those for RИPEs: a gift worth over \$100 may be given if it is intended to be transferred to a governmental entity or charitable organization; a gift worth over \$100 may be given by certain governmental entities if a public purpose can be shown for the gift; a gift worth over \$100 may be given by a direct-support organization to an officer or employee of the agency supported by the DSO.

F. Gift Disclosures Applicable to Donors.

1. **Quarterly Gift Disclosure (CE Form 30):** A lobbyist who lobbies a RIPE's agency, or the partner, firm, employer, or principal of such a lobbyist, who makes or directs another to make a gift having a value over \$25 but not over \$100 to a RIPE of that agency, must file this form to report the gift. Each political committee or committee of continuous existence which makes or directs another to make a gift having a value over \$25 but not over \$100 to a reporting individual or procurement employee must file this form to report the gift. In addition, the donor must notify the intended recipient at the time the gift is made that the donor, or another on the donor's behalf, will report the gift. The report is filed with the Commission, except with respect to gifts to RИPEs of the legislative branch (of State government), in which case the report shall be filed with the Division of Legislative Information Services in the Office of Legislative Services. FS 112.3148(5)(b); Rule 420.

a. The disclosure requirement does not apply to the following gifts: those which the donor knows will be accepted on behalf of a governmental entity or charitable organization; those from a direct support organization (DSO) to a RIPE of the agency supported by the DSO; or those from an entity of the legislative or judicial branch, a department or commission of the executive branch, a water management district created pursuant to FS 373.069, the South Florida Regional Transportation Authority, the Technological Research and Development Authority, a county, a municipality, an airport authority, or a school board.

b. The deadline is the last day of the calendar quarter following the calendar quarter in which the gift was made. The same gift need not be reported by more than one person or entity, and the form need not be filed if no reportable gift was made during the calendar quarter.

c. Note that the Commission rule requires the donor to disclose a gift reportable on this form, regardless of whether the donor is within the prohibited group at the time the form is due.

2. **Annual Gift Statements by Governmental Entities and DSOs.** No later than March 1 of each year, each governmental entity or DSO which has given a gift worth over

\$100 to a RIPE during the previous calendar year (where the gift is exempted) must give the RIPE a statement describing the gift, the date of the gift, and the value of the total gifts given by the entity or DSO to that RIPE during the calendar year. A governmental entity may provide a single statement covering gifts provided by the entity and any associated DSO. No form has been promulgated by the Commission for this statement. FS 112.3148(6)(c); Rule 430.

G. Gifts from Relatives:

1. Gifts solicited or accepted by a RIPE from a relative are not prohibited or reportable by either the RIPE or the relative, regardless of whether the relative is a lobbyist or the partner, employer, or principal of a lobbyist. FS 112.3148(1); Rules 300(3), 320(4), 400(2), 420(7).

2. The definition of "relative" is expansive, including not only family members such as in-laws and step-relatives, but also persons engaged to RИPEs, persons who hold themselves out as or are generally known as intending to marry or form a household with the RIPE, and any person having the same legal residence as the RIPE. FS 112.312(21).

H. The Definition of "Gift." Although comprehensive in many respects, including what may be provided to the donee directly, indirectly, or through another, the definition of "gift" [FS 112.312(12)] contains several important exceptions. Since the definition is uniformly applicable to the prohibitions and disclosures, this has the effect of exempting transactions within an exception to the definition of gift (e.g., gifts from relatives, items received in exchange for equal or greater consideration) from being prohibited or subject to disclosure. (As the definition contains a long list of examples of what is a gift and what is not, it is not quoted here; only major concepts and exceptions are reviewed.)

1. Included in the definition are several items that might not normally be considered a gift. These include the use of real or personal (tangible and intangible) property; a preferential rate or terms on a debt, loan, goods, or services, which rate is not a government rate or available to similarly situated members of the general public by virtue of certain private attributes; transportation (other than transportation provided by an agency in relation to officially approved governmental business), lodging, and parking; personal and professional services; and any other service or thing having an attributable value. Free publicity or exposure for members of the Legislature can constitute a "gift" (CEO 05-11), as it can for a city commissioner (CEO 08-29).

2. If equal or greater consideration is given (within 90 days of receipt of the gift), it is not a gift; "consideration" does not include a promise to pay or otherwise provide something of value unless the promise is in writing and enforceable through the courts. F.S. 112.312(12)(a) and 112.312(12)(d). Based upon this concept, the Commission's rule specifies that salary, benefits, services, fees, or other expenses (including travel expenses when a public purpose for the travel exists) received by a RIPE from his or her public agency do not constitute gifts. However, services rendered by the RIPE on behalf of the RIPE's agency by use of official position do not count as consideration for a gift from a person or entity other than the agency. CEO 01-19, CEO 05-5 (regarding speedway admissions). The rule provides that substantiating equal or greater consideration is the responsibility of the donee. CEO 01-13. This can be done by providing information demonstrating the fair market value of items of merchandise, supplies, raw materials, or finished goods provided by the donee to the donor. In the case of personal labor or effort for the benefit of the donor, the length of time, value of the service provided, and whether others providing similar services for the donor received a comparable gift will be reviewed by the Commission. Rule 210. CEO 01-13.

3. There is a significant exclusion for salary, benefits, services, fees, commissions, expenses, and even gifts associated primarily with the donee's employment or business, or with the donee's service as an officer or director of a corporation or organization. CEO 09-1. Rule 214 states that this means those things associated with the donee's principal employer or business occupation and unrelated to the donee's public position. **EXAMPLE:** Fees or even gifts received by a RIPE from a client of his or her private law practice, with no other relationship between the RIPE and the client, would not be a prohibited or reportable gift. However, in CEO 92-33 tickets from one's agency to theater performances were not considered "benefits" under the rule, unlike benefits typically associated with employment.

4. Contributions or expenditures reported under the campaign financing law, campaign-related personal services provided by volunteers, and any other contribution or expenditure by a political party are exempted.

5. An honorarium or expense related to an honorarium event paid to a RIPE or spouse is exempted. These are treated exclusively under the honorarium law.

6. Effective January 1, 1997, food and beverages consumed at a single sitting or event came within the definition of gift. Chapter 96-328, Laws of Florida. Therefore, a cup of coffee or a meal may be prohibited or reportable, depending on value.

I. **The Definition of "Lobbyist."** A "lobbyist" is defined to mean any natural person who is compensated for seeking to influence the governmental decisionmaking of a RIPE or the agency of a RIPE or for seeking to encourage the passage, defeat, or modification of any recommendation or proposal by a RIPE or the RIPE's agency; it also includes any person who did so during the preceding 12 months. FS 112.3148(2)(b); Rule 240.

1. A lobbyist is being compensated when receiving a salary, fee, or other compensation for the action taken. Rule 240. Thus, any employee of an organization, including the chief executive officer or a salesperson, who is contacting the agency as part of his or her job may be lobbying. On the other hand, an unpaid volunteer member of a nonprofit organization who seeks to influence governmental decision making will not be a lobbyist (but see 4, below, for a possible exception).

2. All types of governmental decisionmaking or recommendations are included, whether they fall in the area of procurement, policy making, investigation, adjudication, or any other area. Rule 240(3).

3. A purely informational request made to an agency and not intended in any way to directly or indirectly affect a decision, proposal, or recommendation of a RIPE or an agency does not constitute lobbying. One must have the intent to affect a decision, proposal, or recommendation and take some action that directly or indirectly furthers or communicates one's intention. Rule 240(4).

4. For agencies that have established by rule, ordinance, or law a registration or other designation process for persons seeking to influence decision making or to encourage the passage, defeat, or modification of any proposal or recommendation by such agency or an employee or official of the agency, a "lobbyist" includes only a person who is required to be registered or otherwise designated as a lobbyist in accordance with that process or who was so required during the preceding 12 months. FS 112.3148(2)(b). However, the local registration system must be at least as broad in defining who is a "lobbyist" as the Legislature's registration system in order to define who is a lobbyist for purposes of the gift and honoraria laws.

J. **Valuation of Gifts.**

1. The general method for valuation uses the actual cost to the donor (less taxes and gratuities) rather than fair market value of the gift, but several exceptions are provided. The Commission's Rule specifies that "actual cost" means the price paid by the donor which enabled the donor to provide the gift to the donee; if the donor is in the business of selling the item or service (other than personal services), the donor's actual cost includes the total costs associated with providing the items or services divided by the number of units of goods or services produced. FS 112.3148(7); Rule 500(1).
2. Personal services provided by the donor, meaning individual labor or effort performed by one person for the benefit of another, are valued at the reasonable and customary charge regularly charged for such service in the community in which the service is provided. FS 112.3148(7)(a); Rule 500(2).
3. Compensation provided by the donee to the donor is deducted from the value of the gift in determining the value of the gift. Under the Commission's rule, compensation includes only payment by the donee to the donor and excludes personal services rendered by the donee for the benefit of the donor. However, recall that services by the donee may constitute equal or greater consideration, with the result that no gift has been made. The compensation principle gives rise to the so called "\$100 deductible," under which the official pays all but \$100 of the value of the gift in order to be allowed to accept the gift; but see H.2 above regarding the requirement of payment within 90 days.
4. If the actual value attributable to a participant at an event cannot be determined, the total costs are prorated among all invited persons, including nonRIPEs. FS 112.3148(7)(c).
5. Transportation is valued on a round-trip basis and is a single gift, unless only one-way transportation is provided. Transportation in a private conveyance is given the same value as transportation provided in a comparable commercial conveyance. The rule specifies that this means a similar mode and class of transportation which is available commercially in the community; transportation in a private plane is valued as an unrestricted coach fare. If the donor transports more than one person in a single conveyance at the same time, the value to each person is the same as if it had been in a comparable commercial conveyance. FS 112.3148(7)(d); Rule 500(4).
6. Lodging on consecutive days is a single gift. Lodging in a private residence is valued at \$44 per night (the per diem rate less the meal rate provided in FS 112.061). FS 112.3148(7)(e).
7. Where the gift received by a donee is a trip and includes payment or provision of the donee's transportation, lodging, recreational, or entertainment expenses by the donor, the value of the trip is equal to the total value of the various aspects of the trip. Rule 500(3).
8. Food and beverages consumed at a single sitting or event are considered a single gift, valued according to what was provided at that sitting or meal; other food or beverages provided on the same calendar day are considered a single gift, valued at the total provided on that day. FS 112.3148(f). If the gift is food, beverage, entertainment, etc. provided at a function for more than ten people, the value of the gift is the total value of the items provided divided by the number of persons invited, unless the items are purchased by the donor on a per person basis.
9. Tickets and admissions to events, functions, and activities are a frequent source of inquiries. Generally, the rule is that the value is the face value of the ticket or admission fee, but if the gift is an admission ticket to a charitable event AND is given by the

charitable organization, that portion of the cost which represents a charitable contribution is not included in valuing the gift. F.S. 112.3148(7)(k) and CEO 04-12 (opining as to a charitable golf tournament). Rule 500(5) provides a number of specific examples and principles for valuing this type of gift, especially relating to football tickets, booster fees, and seating in a skybox. Skybox tickets given by a county for professional basketball playoff games would be valued at the cost of admission to persons with similar tickets. CEO 95-36 and CEO 96-02. Multiple tickets received at one time by a RIPE to be used by the RIPE or given to others are valued by multiplying the number of tickets given times the face value of each (CEO 92-33).

10. Where the donor is required to pay additional expenses as a condition precedent to being eligible to purchase or provide the gift, and where the expenses are for the primary benefit of the donor or are of a charitable nature, those expenses are not included in determining the value of the gift. **EXAMPLES:** A lobbyist's golf club membership fees, for the personal benefit of the lobbyist, are not included when valuing the gift of a round of golf; and the portion of a skybox leasing fee allocated to the FSU Foundation, Inc. (expenses of a charitable nature) is not included in the value of a skybox seat. Rule 500(7) and CEO 94-43.

11. Membership dues paid to one organization during any 12 month period are considered a single gift. FS 112.3148(7)(g).

12. Unless otherwise noted, a gift is valued on a per occurrence basis, meaning each separate occasion on which a donor gives a gift to a donee. F.S. 112.3148(7)(i); Rule 500(6).

K. Multiple donors.

1. In determining whether a gift is prohibited, the value of the gift provided to a RIPE by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. The value of the portion provided by any lobbyist or other prohibited donor cannot exceed \$100; if it does, the RIPE cannot accept the gift. Rules 310(5), 510(2). CEO 08-19.

2. Regardless of whether the gift is provided by multiple donors, the RIPE must disclose it if the value of the gift as a whole exceeds \$100. Rule 510(1). CEO 08-19.

3. In determining whether a donor must disclose a gift (\$25-\$100) or provide a statement to the RIPE about the gift (over \$100), the value of the gift provided by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. If that value exceeds the threshold, the donor must disclose the gift or provide the statement. Rules 420(9), 430(4), 510(3). CEO 08-19.

******[NOTE: IN ADDITION TO THE GIFT AND HONORARIA LAWS CODIFIED AT SECTIONS 112.3148 AND 112.3149, FLORIDA STATUTES, THE LEGISLATURE ENACTED, IN A DECEMBER 2005 SPECIAL SESSION, CHAPTER 2005-359, LAWS OF FLORIDA, WHICH ADDRESSES LEGISLATIVE AND EXECUTIVE-BRANCH LOBBYING AT THE STATE LEVEL. THE LAW ADDS NEW AND SUBSTANTIAL OBLIGATIONS, PROHIBITIONS, AND REQUIREMENTS. HOWEVER, WHILE THE NEW LAW MAY APPLY TO CERTAIN LOBBYING-RELATED GIFTS, EXPENDITURES, OR ACTIVITIES MADE BY OR ON BEHALF OF LOCAL GOVERNMENTS TO STATE LEVEL OFFICIALS, IT DOES NOT APPLY TO SUCH ITEMS OR ACTIVITIES DIRECTED AT LOCAL GOVERNMENT OFFICIALS. NEVERTHELESS, THE NEW LAW DID NOT REPEAL ANY PROHIBITION OF SECTIONS 112.3148 AND 112.3149, WHICH CONTINUE TO APPLY AT BOTH THE STATE AND LOCAL LEVELS.]******

THE COMMISSION ON ETHICS HAS DEVELOPED RULES AND CONTINUES TO RENDER ADVISORY OPINIONS REGARDING THE PORTION OF THE NEW LAW WHICH IT WILL ADMINISTER (EXECUTIVE-BRANCH PORTION, SECTION 112.3215, FLORIDA STATUTES); AND THE LEGISLATURE HAS ESTABLISHED INTERIM LOBBYING GUIDELINES FOR THE HOUSE AND SENATE.] See CEO 06-4 (executive branch lobbying, agency officials and employees buying tickets to association's annual legislative reception), CEO 06-6 (engagement party or wedding gifts paid for by lobbyists), CEO 06-7 (donations to the Department of Agriculture and Consumer Services and its direct-support organization given by principals of lobbyists), CEO 06-11 (Governor and staff traveling on trade mission paid for by Enterprise Florida, Inc.), CEO 06-14 (corporate donations used to underwrite costs of annual Prudential Financial-Davis Productivity Awards), CEO 06-15 (corporate gifts and donations to the United Way for the annual Florida State Employees' Charitable Campaign), CEO 06-17 (promotional items given away by insurance provider to state employees attending benefit fairs), CEO 06-18 (discounted cellular telephone service offered to Department of Revenue employees by company whose lobbyists are registered to lobby the executive branch), CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation), CEO 07-8 (lobbying firms and prohibited indirect expenditures), CEO 08-2 (Attorney General appearing in public service announcements), and CEO 09-1 (Citizens Insurance board member). Also, see FS 112.3215(1)(d) regarding what is an "expenditure." Many government entities have been found not to be an "agency" for purposes of FS 112.3215 (CEO 08-19). Expenditures from one who lobbies any executive branch agency have been found to be prohibited as to certain officials or employees of all executive branch agencies (CEO 08-19). Reimbursement to a public agency, as opposed to an agency employee, has been found not to be a prohibited expenditure (CEO 08-26).

gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer

F.S. 112.3143.

[NOTE: GAIN OR LOSS TO AN ENTITY (FOR EXAMPLE, A CORPORATION) IN WHICH A NATURAL PERSON OWNS A SUBSTANTIAL INTEREST NECESSARILY CONSTITUTES GAIN OR LOSS TO THE NATURAL PERSON. CEO 90-54, Question 2; CEO 06-20, note 6; CEO 08-7, Question 1].

1. A "principal by whom the officer is retained" includes: the officer's employer (CEO 78-27); a client of the officer's legal or other professional practice (CEO 84-11, CEO 84-1, CEO 76-107, CEO 78-59, CEO 79-2, CEO 85-14, CEO 08-7, Question 1; but see CEO 03-7 regarding an "of counsel" relationship); a corporation for which the officer serves as a compensated director (CEO 84-107); and clients of an official who is an insurance agent (CEO 94-10)—but, compare CEO 09-19. However, a non-lawyer employee of a law/lobbying firm was not found to be retained by clients of the firm other than her clients, although she would be retained by the firm (CEO 08-13). A corporation which wholly owns a corporation which wholly owns another corporation which employs a city council member is a parent organization of a corporate principal by whom the council member is retained (CEO 03-13). Depending on the facts of a given situation, persons or entities other than the person or entity who signs one's paycheck can also be one's employer or principal. CEO 06-21; In re Irving Ellsworth, Comm. on Ethics Compl. No. 02-108 (final order 06-024), affirmed, per curiam, as Ellsworth v. Commission on Ethics, 944 So. 2d 359; and CEO 09-2. Note that the principal-agent relationship must exist at the time of the vote; the voting conflicts law addresses present (not past or possible future) employment. CEO 06-5, CEO 09-9.

2. Situations where the person or entity in question has not been found to be a "principal by whom the officer is retained" include: the officer's church (CEO 90-24); the officer's landlord (CEO 87-86, CEO 08-12); a homeowner's association of which the officer is a member (CEO 84-80); a non-profit corporation of which the officer is an uncompensated director (CEO 84-50; CEO 08-4, Question 4; CEO 09-7); the hospital where the officer is on the medical staff (CEO 84-3, CEO 02-16); customers of the officer's retail store (CEO 76-209); a person with whom the officer merely holds a contractual relationship (CEO 08-1); a volunteer fire department from which a city commissioner does not receive funds and for which he is not an officer or director (CEO 08-22); and a developer for whom an insurance broker previously obtained a policy (CEO 09-19).

3. One's "relative" is defined to include only one's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. F.S. 112.3143(1)(b). Note that a measure affecting a public officer's relative's private firm (e.g., an officer's husband's employer) or its clients can, but does not necessarily, inure to the special private gain or loss of the relative (CEO 07-5, CEO 08-30).

4. "Business associate" is defined to mean "any person or entity engaged in or carrying on a business enterprise with a public officer, public employee, or candidate as a

partner, joint venturer, corporate shareholder where the shares of such corporation are not listed on any national or regional stock exchange, or coowner of property." F.S. 112.312(4). In order for persons to be "business associates" they must be engaged in a common business undertaking (a "business enterprise"); it is not sufficient that they merely hold a nominal status in relation to one another; see CEO 98-9 in which the Commission found that common ownership of a houseboat used for recreational (not commercial) purposes (even via ownership of shares of stock of a for-profit corporation holding title to the houseboat) did not make the owners business associates of one another. Also, see CEO 01-17 (county commissioner member of educational/networking forum not a business associate of other forum members by virtue of forum membership). In CEO 08-4, it was determined that other directors of a bank's board of directors are not, by virtue of being directors, business associates of a county commissioner/bank director. In CEO 08-12, a residential landlord and tenant were not found to be business associates via the rental. CEO 09-2 did not determine that persons who merely held responsibilities for a corporation were business associates; and see CEO 09-12. Note that the definition has been found to require a present, not a past or possible future, relationship (CEO 09-12).

5. A "public officer" is any person elected or appointed to hold office in an agency, including persons serving on an "advisory body." F.S. 112.3143(1)(a). NOTE NEW F.S. 1002.33(25)(a), SUBJECTING BOARD MEMBERS OF "PRIVATE" CHARTER SCHOOLS TO F.S. 112.3143.

6. Note that members of school boards are subject to the voting conflicts law (F.S. 112.3143) regarding measures which would inure to the special private gain or loss of their relatives (e.g., measures to hire their relatives to school positions), even though the anti-nepotism law (F.S. 112.3135), as opposed to FS 1012.23(2), is not applicable to school boards and school districts. CEO 87-50, AGO 72-72, AGO 82-48.

B. Voting Conflict Duties of State Public Officers

1. Unlike local public officers (dealt with below), State-level public officers are not prohibited from voting on any measure. However, if the measure is one which will inure to a State public officer's special private gain or loss, or to that of the various persons or entities enumerated in the statute, he or she must make a disclosure of interest via CE Form 8A. CEO 08-20, CEO 09-1, CEO 09-8. Similar to appointed local officers, appointed State officers have requirements regarding "participation" in certain matters that are not applicable to elected officers. FS 112.3143(2) & (4) and CE Form 8A.

C. Voting Conflict Duties of Local Public Officers

1. If there is a voting conflict under the terms of the statute, a local official holding an elective position must:
 - a. Abstain from voting on the measure;
 - b. Before the vote, publicly state to the assembly the nature of his or her interest in the matter; and
 - c. Within 15 days of the vote, file a memorandum of voting conflict (Commission Form 8B) with the person responsible for recording the minutes of the meeting, who incorporates the form in the minutes.

[Note that elected officials are not subject to the same limitation on their ability to "participate" in the matter as appointed officials; and note that one appointed to fill a position normally filled by election is not an appointed official (CEO 87-14, CEO 09-9). "Participate" is defined in F.S.

112.3143(4)(c) to mean "any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction."]

2. Local officials holding appointive positions must follow more complex guidelines. If they do not intend to "participate" in the measure, they follow the same procedures as elected officials: make the oral declaration, abstain, and follow up with the written form within 15 days. If they do intend to "participate," they must abstain but must make their disclosure before they participate. This is accomplished by either:

a. Filing the memorandum of voting conflict (Form 8B) prior to the meeting, in which case the memorandum is to be provided immediately to the other members of the agency and is to be read publicly at the next meeting after its filing; or

b. If the disclosure has not been made prior to the meeting at which the measure will be considered or the conflict was unknown prior to the meeting, making the disclosure orally at the meeting before "participating," followed by the written memorandum (Form 8B) within 15 days after the oral disclosure, which would be provided immediately to the other members of the agency and be read at the next meeting after its filing.

D. Special Private Gain or Loss--Size of the Class of Persons Affected

1. Obviously, a measure to reduce taxes would inure to the private gain of each taxpayer, including the public officials who are to vote on the proposal. The Commission has recognized that the concept of "special" gain must relate to the number of persons affected, stating:

[w]hether a measure inures to the *special* private gain of an officer or his principal will turn in part on the size of the class of persons who stand to benefit from the measure. Where the class of persons is large, a special gain will result only if there are circumstances unique to the officer or principal under which he stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, the possibility of special gain is much more likely. [CEO 77-129.]

2. On the one hand, where the official would be the only beneficiary of the measure, there clearly would be "special" gain. See CEO 89-16 (citizen advisory task force member prohibited from voting to recommend the approval of his own application to receive community development block grant funds).

3. On the other hand, the Commission advised that a city council member would not be prohibited from voting on a proposed sign ordinance where the council member owned a commercial art shop that produced signs, among other products, and other members who owned an advertising business that recommended and purchased billboard space for its clients and who owned an electrical contracting company that had contracted to do work for a sign company also could vote on the ordinance. As the ordinance would have only an indirect effect on the council members' businesses and there was no indication that the members would be affected by the ordinance to a significantly greater or lesser degree than other affected businesses, the Commission concluded that the ordinance would not inure to the "special" gain of the members. (CEO 86-59)

4. Subsequent decisions by the Commission indicate that the threshold for "special gain" occurs when the official constitutes around 1-2% of the size of the class of persons affected. The Commission has concluded that a vote on an ordinance limiting the number of wrecker businesses on a city wrecker rotation list from 18 to 11 violated the statute when the city councilman worked for one of the 11 wrecker companies. In re Thomas R. Tona, 13 FALR 1845 (Fla. Comm. on Ethics 1989). Similarly, the Commission concluded that a county commissioner had been prohibited from voting to pave the road to his residence, where his was one of 13 residences on the paved portion and he owned the majority of the land abutting one side of the paved portion of the road. In re T. Butler Walker, Comm. on Ethics Compl. No. 92-30 (1994).

5. In groups of a larger size, the Commission advised in CEO 93-10 that a town council member was prohibited from voting on a measure to resolve a real property ownership dispute between the town and 43 private property owners, including the council member; see also CEO 04-10 (measure affecting 55 employees one of whom is relative of public officer requires abstention). In CEO 90-64, the Commission concluded that a city commissioner was prohibited from voting on a renovation project that would benefit property in which he owned an interest, where part of the cost of the project would be assessed against the property owners. There, the commissioner owned 50% of one of 55 parcels that would be affected, the parcels were owned by over 40 persons or entities, and the property's frontage was 2.7% of the total frontage upon which the assessment would be based. In CEO 92-37, the Commission advised that a city commissioner would be prohibited from voting on a measure to add to a local historic preservation district an area that included five hotel or apartment buildings owned by closely-held corporations that were owned by him and his relatives. There, the buildings constituted either 5 of 60 sites to be included or 5 of 168 sites to be included, depending on how the measure was framed. In CEO 95-4, the Commission advised that a county planning commissioner would be prohibited from voting on a comprehensive plan amendment affecting the designation of 1,200 acres of property owned by the planning commissioner, his relatives, and his business associates, where the measure would have affected a total of approximately 32,000 acres.

6. A series of other opinions involve situations where the class of persons affected was sufficiently large that no "special" gain was deemed to occur. In CEO 90-55, the Commission advised that a city mayor was not required to abstain from voting on measures involving the proposed expansion and renovation of a private club of 2,000 members. In CEO 87-18, the Commission concluded that a planning commissioner was not required to abstain from voting on a comprehensive plan amendment that would have affected 29,000 acres because his principal was leasing 300 acres of the affected area. In CEO 90-71, the Commission advised that a town commissioner was not prohibited from voting on issues relating to a project that would benefit his neighborhood and that would be assessed against the property owners in the neighborhood, when the commissioner owned 1.2% of the 83 lots that would be included in the assessment. Also, see CEO 99-12 (regarding an airport authority commissioner), CEO 00-13 (regarding a city commissioner receiving and voting on pension benefits), CEO 06-20 (regarding a county commissioner voting on measures concerning a proposed judicial complex near her properties), and CEO 07-22 (county commissioner voting on matter affecting developers including homebuilder spouse). But see CEO 06-21 (no special private gain where each of a town's residents was similarly impacted by a rezoning vote, notwithstanding the small number of town residents) and CEO 07-17 (no special private gain where votes will impact virtually all of a town's residents similarly).

7. Other decisions involve officials whose interests are proportionately large, when compared to the other members of the class of persons affected. For example, in one case the Commission concluded that a county commissioner should not have voted on the extension of a road along a boundary of her property, where the commissioner owned 260 acres, was one of 32 property owners along the proposed road extension, and was the fifth largest land owner along the road extension, with the next largest land owner having 20 acres. In re Jeanne McElmurray, Comm. on Ethics Compl. Nos. 87-24 & 26 (Stipulated Final Order 1988).

8. Budgets and appropriations acts are another type of measure that have a broad impact, but that may, in one aspect, inure to the gain of the voting official. In CEO 88-20, the Commission advised that a city commissioner was not prohibited from voting on the approval of a city budget that included funding for in-kind services to be provided in connection with the activities of his employer. See also CEO 89-19, CEO 92-43, and CEO 04-6 for situations that involve voting on a city's budget that contains items that the official would be prohibited from voting on if the items were considered individually.

E. Special Private Gain or Loss--Remote or Speculative

1. In some situations the Commission has concluded that any gain or loss resulting from the measure would be so remote or speculative that it could not be said to inure to the official's special gain or loss. In CEO 85-46, the Commission advised that a city commissioner could vote on a petition for annexation of property, where the commissioner's employer had sold the property, retained a mortgage, and also owned adjoining property; see also CEO 09-14 (county purchase of airport buffer where mortgage retained). In CEO 93-4, a city commissioner was advised that he could vote on rent increases for a mobile home park owned by the city and located near a proposed recreational vehicle park he owned, because the possibility that he could in the future justify charging higher rent for his park if the city's park had higher rent was too speculative to conclude that the rent increases would inure to his special gain. See also CEO 05-2 (village affordable housing committee member owner of mobile home park and voting on mobile home park measures), CEO 05-3 (county commissioner and relatives owning interest in parcels of land near proposed road), CEO 05-17 (airport authority member voting on matters concerning road project near her business), and CEO 09-7, note 7, (county commissioner voting to fund EDC where his corporate cash pay-out tied to land sale). In CEO 88-27, the Commission concluded that a city commissioner was not prohibited from voting on the rezoning of property that was being sold contingent upon rezoning, where the commissioner supported another group that was interested in purchasing the same property and the commissioner probably would have been the building contractor for that group in the event the group were to purchase the property. There, the Commission reasoned that the failure of the rezoning measure would not be the only contingency that would have to occur for the commissioner to benefit from the development of the property, as the existing owner would have to agree to sell to the group. However, the Commission noted, if the property were sold to the group, the commissioner could not vote on matters affecting the development of the property so long as he were the contractor for the development. See also CEO 00-8 and CEO 01-18. In CEO 07-14 and CEO 07-15 (identical opinions issued to two city commissioners), the Commission found that any gain or loss would be remote or speculative regarding measures to hire or dismiss city attorneys who might counsel city conduct regarding lawsuits to which the city was a party and to which the commissioners were nominal, private-capacity parties; and also found that city measures to continue or settle the lawsuits, or measures to repeal the ordinance underlying the litigation,

would not cause gain or loss to the commissioners, inasmuch as they were nominal parties not personally responsible for paying for the litigation.

2. Several Commission opinions have involved the impact of nearby development on a business owned by the voting official or employing the official--all of these have concluded that any gain resulting from the development was too remote and speculative to inure to the special gain of the official or employer. See CEO 85-77, CEO 85-87, CEO 86-44, CEO 89-32, CEO 91-70, CEO 06-8, and CEO 06-20. However, compare CEO 01-8. Under the particular facts of a later opinion (CEO 08-1), a city's relinquishment of an outfall (drainage) easement burdening property of a developer upstream from a city councilman's property did not create a voting conflict.

3. Not every instance of indirect gain has been classified as too remote and speculative to constitute "special gain," however. In CEO 88-27, the Commission advised that a city commissioner should abstain from voting on the rezoning of property where his employer had contracted to purchase the property contingent upon its receiving a particular zoning designation from the city. In CEO 93-29, the Commission concluded that a city commissioner would be prohibited from voting on matters involving the city's proposed purchase of property where the commissioner and his son owned interests in the mortgage encumbering the property. The Commission also has found a violation where a city/county planning commissioner voted to rezone a parcel of property to permit a higher density, when the commissioner had assigned his contract to purchase the property to the rezoning applicant and he was owed \$10,000 by the applicant as part of the assignment. In re John S. Mooshie, 15 FALR 382 (1992), affirmed, per curiam, as Mooshie v. State Commission on Ethics, 629 So. 2d 138 (Fla. 1st DCA 1993).

4. In some situations, a series of decisions are made, some of which would inure to the special gain of the official and others of which would not, depending on the circumstances and the extent of the official's private participation in the process. Construction projects provide a good example of this. In CEO 89-45, the Commission considered a situation where a city commissioner owned a steel company that designed and bid steel packages to general contractors and developers, who generally would appear before the city commission prior to the commissioner's having submitted a bid on the proposed project. The Commission advised that if the commissioner had not submitted a proposal at the time of the vote, then any perceived gain to him would be too speculative to require him to abstain. However, if the commissioner had contacted or was in the process of negotiating with the contractor or developer, but had not yet submitted a proposal, then he would be required to abstain. But see CEO 07-7, in which a city councilman whose company was a supplier of a local manufacturer of fire trucks was not presented with a voting conflict regarding a measure to provide financial incentives to the manufacturer in an effort to keep the manufacturer from relocating. See also CEO 00-5 (effect of transient rental ordinance on a grocery store not remote and speculative). Citing the remote and speculative nature of any gain or loss, the Commission determined that no voting conflict would be created were a city commissioner to vote on a measure to amend the city's affordable (work force) housing ordinance, where one of the commissioner's private legal clients was a potential developer of affordable housing within the city. CEO 05-15. And see CEO 06-21 (regarding Town of Marineland).

F. Special Private Gain or Loss-- Procedural or Preliminary Issues

1. Some measures are simply procedural or preliminary to the later actions that would result in actual gain or loss, and therefore do not present voting conflicts for officials who would have voting conflicts if called to vote on more substantive measures concerning the

same subject. See CEO 78-74 (removing item from consent agenda, to enable it to be discussed). However, in CEO 93-10 the Commission concluded that a town council member who was prohibited from voting on a measure to resolve a real property ownership dispute between the town and private property owners, including the council member, also would be prohibited from voting on a measure to order a survey regarding the disputed property. The Commission reasoned that, since the dispute could not be resolved without a survey being done and the resolution of the dispute would inure to the special gain of the council member, the decision not to order a survey would effectively preclude the resolution of the dispute. Therefore, ordering a survey of the disputed property would not simply be preliminary to an issue where gain or loss could occur.

G. Exceptions to the Voting Conflict Rules

1. When the principal retaining the official is a public agency, the Commission has concluded that the official is not prohibited from voting on a measure inuring to the special gain of the agency and is not required to make any specific disclosures. CEO 86-86, CEO 88-20, CEO 91-20. See F.S. 112.312(2) for the definition of "agency."

2. Commissioners of community redevelopment agencies created or designated pursuant to F.S. 163.356 or 163.357, as well as officers of independent special tax districts elected on a one-acre, one-vote basis, are not prohibited from voting. F.S. 112.3143(3)(b). In CEO 86-13, the Commission advised that a CRA official may vote on matters affecting his or her interests but still would be required to publicly announce the conflict and file a voting conflict memorandum; similarly, see CEO 87-66, regarding a community development district supervisor elected on a one-acre, one-vote basis. And see F.S. 163.367(2), a provision outside the Code of Ethics, which independently requires certain disclosures by CRA officials, commissioners, and employees.

3. Public officers are not prohibited from voting on matters affecting their salary, expenses, or other compensation as a public officer, as provided by law. F.S. 112.313(5). See CEO 08-24 and CEO 08-25, regarding voting to appoint oneself to paid mayor or council office. Note also that this provision specifies that local government attorneys may consider matters affecting their salary, expenses, or other compensation as the local government attorney, as provided by law.

NOTE ALSO THE "VOTING REQUIREMENTS LAW," F.S. 286.012. SEE CEO 08-11.