

**STATE OF FLORIDA  
Case No. SC 09-1910**

**NINETEENTH STATEWIDE GRAND JURY**

**First Interim Report**

**A STUDY OF PUBLIC CORRUPTION IN FLORIDA  
AND RECOMMENDED SOLUTIONS**



**December 17, 2010**

**Ft. Lauderdale, Florida**

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### **CERTIFICATION OF REPORT**

**We, the members of the Nineteenth Statewide Grand Jury, find that public corruption continues to be an issue of great importance in all aspects of government, politics, and business throughout the State. We have been asked to address an enormous issue which is broad in scope and long in history. We take on this challenge with sincere appreciation for the gravity of the undertaking. We hope our words are heard and our recommendations are followed. Better efforts to prevent and penalize corruption are necessary in order to stop fraud, waste, and abuse of our State resources. Given the serious fiscal limitations at all levels of government, anti-corruption efforts must stop the theft and mismanagement of vital public funds. This mismanagement and theft penalizes taxpayers by driving up the cost of all government services. Therefore, we call for an immediate repeal of what can only be referred to as *Florida's Corruption Tax*.**

**The cadets at our nation's military academies swear an oath to neither lie, cheat, steal, nor tolerate those who do. There is no reason we should hold our public officials to a lesser standard.**

## **Introduction**

Public corruption is a vast topic that can be expounded upon in tomes or taught to children in the form of the Golden Rule. The work of government becomes more complex as society grows and needs become greater, but fundamentally government must be based on a shared trust and integrity.

After receiving testimony from witnesses over the last ten months, we find that these recommendations are still as valid today as they were a decade ago. We recommend these ideas be considered in the upcoming legislative session, and continuing sessions, until they are passed.

In seeking to reduce public corruption, we must determine on behalf of the citizens of the State of Florida how to define and punish public officials who transcend the bounds of what is considered to be ethical conduct. What is considered to be ethical may depend on the person asked. There are those who feel transparency should prevail regardless of the impact on the elected official's individual privacy, others acknowledge that some private life must be allowed to exist in order to attract outstanding and willing candidates. A balance must be struck between the citizens' right to honest government and the right of public officials to serve those they are elected to represent without fear of prosecution for unintentional hyper-technical violations.

We first sought to understand what corruption is - what it looks like and what behaviors and activities we hope to deter. We considered the type of individual we expect in public service: an honorable and ethical person. "Honor" is an elusive term. "Honor is the good opinion of the people who matter to us, and who matter because we regard them as a society of equals who have the power to judge our behavior."<sup>i</sup> "A willingness to subordinate one's individual inclinations to the greater good, will naturally be regarded as honorable; disloyalty

and selfishness will be correspondingly dishonorable.”<sup>ii</sup> Honor is seen as a “virtue” because it connotes this ideal.<sup>iii</sup>

It is important to distinguish between honor and ethics. For example, honoring one’s duty to an employer may dictate remaining mute about unscrupulous behavior; however, good ethics dictates becoming a whistleblower.

Traditionally the virtue of honor was seen as a fusion of honor and ethics. A person needed to recognize and strive towards a universal standard of virtue, rather than just a local or temporal standard.<sup>iv</sup> While the use of the term “honor” has faded in our culture, the term “ethics” has risen in prominence. It has been said that “ethics” involves thinking systematically about conduct; whereas, making “moral” choices is about determining right and wrong. Ethics draws on standards that have evolved over time but persist and therefore help identify what is right and proper in the current environment or society. Ethics can refer to principles of action that implement or promote more timeless moral values. “Moral character” is an internal mechanism developed to make decisions with honesty and fidelity. In the end, a person’s character is what allows him to act (or not) on the determinations he makes between right and wrong.<sup>v</sup>

## **The Convening of the Nineteenth Statewide Grand Jury**

This Grand Jury was impaneled in February of 2010 upon the petition of Governor Charlie Crist to the Supreme Court of Florida. Specifically, Governor Crist stated in his petition that the following should be addressed statewide:

1. Examine criminal activity of public officials who have abused their powers via their public office;
2. Consider whether Florida’s prosecutors have sufficient resources to effectively combat corruption;

3. Address the effectiveness of Florida's current statutes in fighting public corruption;
4. Identify any deficiencies in current laws, punishments or enforcement efforts and make detailed recommendations to improve our anti-corruption initiatives;
5. Investigate crimes, return indictments, and make presentments; and
6. Examine public policy issues regarding public corruption and develop specific recommendations regarding improving current laws.

## **Politics and History**

It has been said that the history of corruption is really the history of reform following corrupt actions. This can be seen in the motives of the Revolutionary generation in establishing our country. One of their greatest tasks was creating a nation unlike the British system which they viewed as corrupt and full of patronage, bribery, and graft. Thus, the 1787 Constitution of the United States created a government with a strong system of checks and balances. Despite the checks and balances, our system has not fully prevented corruption, and our history is riddled with examples of public service immoralities.

The present Florida Constitution was last revised and adopted in 1968 and has subsequently been amended. Under the Florida Constitution, Florida's State government is divided into Legislative, Executive, and Judicial branches. Following the idea of separation of powers, Florida's Constitution states that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."<sup>vi</sup> While the Governor is vested with the supreme executive power, Florida has a uniquely collegial form of State government in which the Governor shares responsibility with the Cabinet for administration through various boards.<sup>vii</sup>

Florida ranks as the fourth largest state in the union with over eighteen and a half million residents and may soon overtake the third largest state - New York.<sup>viii</sup> This massive population and significant growth means the Governor and Cabinet are unable to directly manage the executive branch due to Florida's increasingly larger and more complex government which has blurred the lines of executive responsibilities. During a four-year term, the Governor will make approximately 6,000 appointments of special officers to boards, commissions, water management districts, and various other agencies and organizations. Some of the Governor's board appointments include the professional and occupational boards which have statewide responsibilities, while others include local and regional boards.<sup>ix</sup>

Florida's governmental structure is anything but clear or easy to understand. It is no wonder why the citizens of Florida are often confused as to who is responsible when it comes to holding our government officials accountable.

## **History of the Florida's Code of Ethics**

If democracy is sustained by public trust, it is understandable why we need rules addressing ethics, conflicts of interest, and disclosure of personal finances. The increase in laws and regulations in these areas appears to be a result of diminishing public trust in government. We have learned that public confidence began a decline in the early 1960s and continued to decline until the Watergate scandal led to an all time low in public trust of government. Following Watergate, ethics became a major issue in national politics.<sup>x</sup> However, attention to ethics is usually scandal-driven and short-lived.<sup>xi</sup> In order to increase public trust, public servants must improve their ethical behavior and reputation since public confidence is likely related to the public perception of ethical practice.<sup>xii</sup>

Ethics is action you can defend publicly and comfortably. The burden of ethics is that there is no checklist or computer program that can teach you every ethical decision; personal judgment and responsibility are necessary. In recognizing this, we turn to Florida's attempt to regulate ethical conduct. Florida has a Constitutional requirement for a code of ethics which was established under Chapter 112, part III, F.S.

Prior to 1967, Florida relied on "common law" cases to address governmental ethics. In 1967 the Legislature enacted the beginning of what eventually would be called the "Code of Ethics for Public Officers and Employees" (hereinafter "the Code"). That same year the Florida Constitution Article III, Section 18 was amended to provide that "A code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interest shall be prescribed by law." In 1998, the voters passed a constitutional amendment proposed by the Constitutional Revision Commission which moved the constitutional requirement for a code of ethics under Article II, section 8(g).

Initially the Code applied only to state officers and employees. In 1969, public officers and employees of all counties, cities, and other political subdivisions were added to the Code. In 1970, the Legislature enacted criminal sanctions into the Code, making violations misdemeanors punishable by a fine not to exceed \$1,000 or imprisonment for up to one year. Following the Watergate crisis in 1974, the Legislature responded by requiring public disclosure of various financial interests, creating tighter restrictions on conflicts of interests, and establishing a Commission on Ethics to provide a means of administrative enforcement of the Code. Witnesses testified that with administrative penalties in place, the Legislature no longer felt the need for criminal penalties.

In 1975, the Commission on Ethics was prescribed the authority to investigate, and civil fines were enacted for violations. In 1976, Governor Askew organized the first citizen initiative constitutional amendment petition in order to enact into law what he felt the Legislature failed to do. Thus, the “Sunshine Amendment” was passed and is now part of the State Constitution under Article II, section 8. Section 8 titled “Ethics in government” states that “A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.” To secure this right, Section 8 requires:

- Full and public disclosure of financial interests be disclosed by any elected constitutional officer or any candidate for such office.
- All public officers and candidates for any public office to file full and public disclosure of their campaign finances.
- Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by actions.
- Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of their retirement benefits and pension.
- A two year prohibition for members of the legislature or statewide elected officers from representing another person or entity for compensation before the same governmental body or agency of which the individual was a member or officer. Members of the legislature have this same prohibition during their term of office and it is expanded to include appearing before judicial tribunals for these reasons.
- An independent commission (Florida Commission on Ethics) to conduct investigations and issue reports on all complaints concerning breach of public trust by public officers and employees.
- A code of ethics be created for all state employees and nonjudicial officers which prohibits conflicts of interest between public duty and private interests.

Since this constitutional revision, the Code of Ethics has undergone additional revisions usually as a response to some form of scandal and public outcry. We will discuss additional reforms to the Code of Ethics as they relate to our recommendations.

## Previous Reports Addressing Anti-Corruption Reform in Florida

In determining how to address anti-corruption efforts in the State of Florida, it is important to understand the history and development of Florida's state, county, and local government and previous anti-corruption efforts.

We heard testimony regarding the 1999-2000 Public Corruption Study Commission which was tasked by Governor Jeb Bush to complete a comprehensive review of current laws, policies, and procedures and to make recommendations on how Florida might better prevent and respond to acts of public corruption. We have reviewed the Study Commission's recommendations regarding government corruption laws and learned that many of those recommendations have been adopted by the Legislature, although slowly and many not until years later.

Unfortunately, there were several crucial recommendations of the Public Corruption Study Commission that were not adopted by the Legislature. Some of the proposals that were not accepted are as follows:

- Make it a second degree felony to "refrain from performing a mandatory constitutional or statutory duty or cause another person to refrain from performing such duty," with corrupt intent to obtain a benefit for any person, or to cause harm to another person;
- Make it a second degree felony to criminally misuse one's official position with the following language:
  - (1) It is unlawful for any public servant to corruptly use, or attempt to use, his or her official position or any public property or public resource which may be within his or her trust, to:
    - (a) Establish any business relationship between the public servant's own agency and any business entity in which the public servant receives or has an expectation of receiving a benefit; or
    - (b) Perform his or her official duties to secure for himself or herself a benefit that is not generally available to the public.;

- Expand the jurisdiction of the Statewide Prosecutor to include any violation of Ch. 838, F.S., which concerns the offenses by public servants;
- Require elected officials to be educated in ethics laws, the public records law, the "Sunshine Law," and the criminal laws regarding government corruption;
- Give the Commission the authority to initiate investigations based upon receipt of sufficient evidence, as judged by an extraordinary majority of the Commission;
- Allow the Commission to investigate situations when referred directly to the Commission by the Governor, the Comptroller (now, CFO), the State Attorneys; and others (law enforcement or regulatory agencies such as the Florida Bar, DBPR, Elections Commission, etc.).

The Public Corruption Study Commission is not the only body who has studied public corruption in recent years. As recently as this past year, Palm Beach County convened a Grand Jury to investigate matters of public corruption. While a majority of the Palm Beach County Grand Jury's work focused on local issues specific to Palm Beach County, they also addressed issues that can be applied to the State or local governments outside of Palm Beach County.

One of the strongest recommendations the Palm Beach Grand Jury proposed was for the Legislature to create a sentencing enhancement for crimes committed "under the color of law". This is a solid recommendation and will be discussed in much greater detail later in this report.

## **Present Day Corruption in Florida**

In order for government to function, the people must have faith in their elected officials. Unfortunately, one only needs to read the newspaper headlines across the State of Florida to realize that public corruption is pervasive at all levels of government. Recent public opinion polls show that a record number of Americans believe public officials are untrustworthy. Anti-

corruption reform is critical to restoring that trust. Reform is essential to remedy the perception that those in leadership roles fail to set a noble example of service and are instead assumed to be egotistical and corrupt. When the legislature fails to act after its own members flagrantly abuse their positions, the citizens lose respect, faith, and interest in the government. Vigorously attacking public corruption will begin to repair this breach of trust. The best and brightest will not be discouraged from government or civil service, and more ethical and moral citizens will be interested in running for office. We believe the citizens of Florida deserve public servants who will take action for the good of the whole even if it does not benefit them individually. While there are many good officials in Florida, our government buildings and elected bodies should be overflowing with leaders who are not afraid to set a higher standard for their conduct and serve as role models for the public.

In order to reduce corruption and increase ethical behavior in the public sphere, we must also define “public service.” Public service is more than just government service alone and includes quasi-governmental agencies and many non-profit organizations funded in part by public dollars. Therefore, any organization and its employees or agents can be defined as public servants when the mission leans towards the public rather than private side of service.

Those in public service must understand the power they hold is for the benefit of the people. This raises the question of whether or not ethics laws and legislation go far enough to encompass public service performed by entities beyond strictly official governmental agencies.

Broadly defined, “Public Corruption” is the “abuse of public roles or resources or the use of illegitimate forms of political influence by public or private parties.”<sup>xiii</sup> Others have stated that political corruption is the betrayal of an office or duty for some consideration.<sup>xiv</sup> Public corruption is a catchall for many abuses including bribery, graft, extortion, nepotism, kickbacks

and outright theft. The definitions in use vary among local, state and federal authorities, further complicating matters. The federal government has defined public corruption crimes as those which involve abuses of the public trust by government officials.<sup>xv</sup>

Much of the way our federal and state government is structured today is in response to massive public corruption scandals and accompanying public outrage in the past. For example, the civil service system was created so that public jobs would be filled based on merit and not on a system of patronage. Codes of ethics for Congress were created in 1964 after a probe into the dealings of the Secretary of State. Limitations on campaign contributions by individuals and corporations were established in 1971 and were further tightened following the revelation that President Nixon received massive amounts of illegal corporate and personal contributions during his presidential campaign. The Foreign Corrupt Practices Act was passed in 1977 to prohibit gifts or payments to foreign officials by American companies after it was discovered U.S. multinational companies hid vast sums of their balance sheet to have available to bribe foreign governments. In 1978, the Ethics in Government Act required financial disclosure requirements on federal officeholders and allowed independent counsel to investigate allegations of corruption against them. Since the 1970's federal laws have been used to prosecute state as well as local officials. The same checks and balances that are the hallmark of our system of government have resulted to some degree in the frustration of prosecution of public corruption as the U.S. Supreme Court has ruled certain campaign finance laws and federal mail-fraud statutes to be unconstitutional.<sup>xvi</sup>

The timing of this Report is intentional. We recommend the 2011 Legislative Session address our concerns with urgency, so this report focuses primarily on recommendations to changes in laws of the State of Florida. Certainly, there are many factors to be considered in

developing new legislation. We cannot ignore the reality that it is often hard to impose more severe restrictions on one's own interests. We believe that the time for action is now, and we urge the Florida Legislature and other governmental bodies to address anti-corruption efforts using our findings and recommendations as a starting point.

We are not the first state, country, or society to address public corruption, and it is unrealistic to believe we will be able to eliminate the problem. However, we have determined that there are certain measures which would reduce the capacity of those who would use a Florida public office for malfeasance. The best anti-corruption approach involves not only deterrence through oversight and punishment, but also prevention through education. With this in mind, we turn to our recommendations which are followed by supporting facts and findings from testimony and evidence we received.

We have reviewed the current anti-corruption laws in the State of Florida, and according to testimony and statistics, we find that they are not being utilized to their full potential. We have determined that public officials are often not being punished under the public corruption laws in Florida for four main reasons:

1. The act is not criminalized;
2. The cases are too difficult to prove due to their definitions and extra elements of proof;
3. The punishments imposed too lenient and do not fit the crime; or
4. The prosecutor decides to charge another crime or accept a plea in order to allow a defendant to avoid the negative publicity of public corruption charges.

# **RECOMMENDATIONS**

*“Where a man assumes a public trust, he should consider himself a public property.”<sup>xvii</sup>*

Thomas Jefferson

We have heard testimony and received evidence about Florida and federal anti-corruption criminal laws. Our Report will look at the more significant anti-corruption crimes in Florida<sup>xviii</sup> and what steps the Florida Legislature should take to improve these laws and punish those public officials and servants who willfully violate them.

1. **“Public servant”**
2. **“Corruptly” or “with corrupt intent”**

## **I. CRIMINAL REVISIONS**

Our first group of recommendations addresses Chapter 838 which is titled “Bribery; Misuse of Public Office.”

### **A. Amendments to Chapter 838 Terminology**

1. **We recommend the Legislature redefine the term “public servant” under F.S. 838.014(6).**
  - a. **Amend F.S. 838.014(6)(a) to read:**  
**“Any officer or employee of a governmental entity.”**
  - b. **Create F.S. 838.014(6)(e) to state:**  
**“Any officer, director, partner, manager, representative, or employee of a nongovernmental entity, private corporation, quasi-public corporation, quasi-public entity or anyone covered under chapter 119 that is authorized by law or contract to perform a governmental function or provide a**

**governmental service on behalf of the state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service.”**

**“ ‘Governmental function’ or ‘governmental service’ for purposes of Chapter 838 means performing a function or serving a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.”**

**“ ‘Governmental entity’ as defined under F.S. 11.45(1)(d)**

We have heard testimony that the impediments to prosecuting criminal violations under Chapter 838 are due in large part to the current definition of “public servant” provided for under F.S. 838.014(6):

- (6) “Public servant” means:
  - (a) Any officer or employee of a state, county, municipal, or special district agency or entity;
  - (b) Any legislative or judicial officer or employee;
  - (c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
  - (d) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

After hearing testimony of witnesses, we conclude that this definition presents a major obstacle to charging and prosecuting crimes under Chapter 838. This narrow definition of “public servant” prevents numerous prosecutions of corrupt individuals who are serving a governmental function or service but are not within reach of the law as written. This Grand Jury was convened to address our criminal anti-corruption laws among other concerns. Our first and most critical recommendation is to amend the definition of “public servant.” Many of our governmental duties have been shifted to private or semi-private entities and actors who do not fall within the existing narrow definition and thus escape prosecution under anti-corruption laws.

It is important to understand how the present definition of “public servant” came to be defined. In 2003, the “Paul Mendelson Citizens’ Right to Honest Government” bill was passed. This bill was mostly successful at addressing numerous problems with Chapter 838 including increasing the level and severity of bribery and unlawful compensation. According to a witness who prosecutes public corruption offenses, increasing the criminal penalties has helped achieve cooperation from targets of investigations and increased the prosecutor’s bargaining power. While the “Paul Mendelson” bill strengthened several provisions of our public corruption laws, it also greatly weakened the definition of “public servant” and thus drastically reduced the overall effectiveness of our public corruption laws.

Prior to this bill, “public servant” was defined as follows:

"Public servant" means any public officer, *agent*, or employee of government, whether elected or appointed, including, but not limited to, any executive, legislative, or judicial officer; any person who holds an office or position in a political party or political party committee, whether elected or appointed; and any person participating as a special master, receiver, auditor, juror, arbitrator, umpire, referee, consultant, administrative law judge, hearing officer, or hearing examiner, or *person acting on behalf of any of these*, in performing a governmental function; but the term does not include witnesses. Such term shall include a candidate for election or appointment to any such office, including any individual who seeks or intends to occupy any such office. It shall include any person appointed to any of the foregoing offices or employments before and after he or she qualifies.

The original bill proposed amending the term “public servant” to state:

- (6) "Public servant" means:
- (a) Any officer or employee of a state, county, municipal, or special district agency or entity;
  - (b) Any legislative or judicial officer or employee;
  - (c) Any officer, director, partner, manager, representative, or employee of a *nongovernmental entity* that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service;
  - (d) Any person, except a witness, who acts as a master, receiver, auditor, juror, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
  - (e) A candidate for election or appointment to any of the

positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

However, due to an amendment, the definition to “public servant” was changed to its present state. The present definition not only omitted within the definition of “public servant” any reference to an agent of government or a person acting on behalf of an agent or employee of government as had previously been included, but this amendment also struck out language which would have included nongovernmental entities who perform a governmental function or service. Thus, it managed to omit anyone who is not directly an “officer or employee of a state, county, municipal, or special district agency or entity.” We find the Legislature must address the definition of “public servant” and we request that consideration be given to the language we have recommended.

### **Specific Examples of a Failed Definition**

To underscore the problem with the definition of “public servant,” we will provide some examples. We heard from witnesses and FDLE investigators who provided us with background of a complaint concerning the mismanagement of funds by a for-profit corporation (hereafter “Company”) who was contracted to perform services for a non-profit organization (hereafter “Agency”). The Agency was formerly a department of state government which received funds from the federal government to perform the governmental function of aiding citizens. Due to privatization, the divisions within the department were allowed to operate with almost no agency oversight. The Company was paid with government funds, performed a government service, but their excesses were immune to prosecution because they are not public servants. This investigation started after an anonymous letter was provided to law enforcement detailing numerous specific complaints involving allegations of bid rigging, kickbacks, and bribery. After a lengthy investigation, it was determined that contracts awarded had appearances of impropriety

due to personal relationships, nepotism, and the way in which they were awarded. The Company then spent money on what appeared to be excessive program costs including clothes, laptops, field trips, and elaborate graduation ceremonies with champagne toasts. Even if probable cause could be established for criminal charges in this instance for bribery, kickback, or bid tampering, the employees or recipients of this government funded contract could not have been charged under Chapter 838 as they are not “public servants.” They are, in fact, a non-profit organization receiving funding of federal money which flowed through the State and County. All of this is frustrating and absurd. It is clear that any entity which contracts to perform services for the state must be held accountable for any violation of criminal laws just as any governmental employee.

Another example showed criminal investigations into payoffs of community service hours which were never performed but were signed for completion. Community service hours are frequently ordered to be completed while a defendant is placed on probation. Community service hours can be completed at pre-approved locations as determined by the Department of Corrections. When a probationer completes community service hours, he or she is required to have the completed hours signed as verification prior to submitting the form to his or her probation officer for credit. During one investigation, it was revealed that a suspect who was signing for completed hours was being paid cash to falsify the hours completed. The State Attorney’s Office considered charges including bribery and unlawful compensation, both under Chapter 838. Ultimately, the State Attorney’s Office determined it could not file charges in part due to the definition of “public servant” because the suspect was employed by a private non-profit corporation and not an agency or governmental unit. It is clear that this suspect was receiving a bribe to falsify a potential public record and should fall under some prosecution for bribery. If it was determined that this person does not fall under the definition of “public

servant,” then the State should have the option of considering another viable charge such as commercial bribery which is presently unconstitutional as we will discuss later. Ultimately, no one was criminally prosecuted.

In a third investigation, a non-governmental organization contracted with the county to provide alternatives to incarceration and social services. Part of the services the organization provided were pre-trial release services to arrested criminal adult defendants. During an undercover investigation, law enforcement paid cash to two individuals who supervised defendants in the pre-trial release program. In exchange for the cash payments, the pre-trial release employees allowed the undercover officers to avoid reporting and other requirements of the pre-trial release program. The State Attorney’s Office concluded the two employees failed to meet the definition of “public servant” and thus any charges under Chapter 838 for bribery, official misconduct, or unlawful compensation could not be charged. The pre-trial release program was determined to receive funding from the county to perform what would otherwise be a governmental function or service; however, because the program was being contracted to a private non-governmental organization, the employees did not fall under the definition of “public servant.”<sup>xix</sup> Commercial bribery was not an option here either as it has been held unconstitutional. Ultimately, no one was criminally prosecuted.

Privatization of home inspections by private social service providers is another topic we investigated. This revealed home inspectors, paid by taxpayer dollars, were falsifying records about conducting home visits. These individuals are paid for travel and they must submit a voucher stating that they traveled to a certain home and conducted a visit. This travel is approved by a supervisor. In addition, when a home inspector arrives at the home he or she is visiting, a visitation log and affidavit are also signed by the home owner. The investigation

revealed travel vouchers submitted for travel which never occurred and forged homeowners' signatures. In one instance an agency client was not even placed at the home the inspector alleged visiting. The State Attorney's Office declined prosecuting any violation of Chapter 838 as the definition of "public servant" did not cover a home inspector who was contracted by a state agency to perform these visits. The only applicable law that could be charged was falsifying official documents which is a second degree misdemeanor offense. The crime for falsifying official documents has since been increased to a third degree felony. However, this does not address why someone receiving public funds to perform a governmental function is not treated the same as a governmental employee whose position has not been privatized.

Privatization is not only occurring with probation and pre-trial release services; our prisons have been and will likely continue to be privatized. Witnesses have testified that they are concerned with private prison guards who accept bribes, but cannot be prosecuted in the same way as a prison guard who works in a state run prison.

These are just a few examples of situations in which the term "public servant" has prohibited criminal prosecution of individuals receiving public funds to perform governmental services or functions. The time has come for the Legislature to close this appalling loophole. If policymakers are inclined to increase privatization, they must make sure this corruption issue is addressed so that hidden unpunished corruption costs are not added on top of the state's bill.

2. **We recommend removing the definition and the element of "corruptly" or "with corrupt intent" from Chapter 838 and all criminal violations therein and be replaced with "knowingly" or "intentionally."**

Before proceeding into our justification for this recommendation, we must provide a little background. Chapter 838 and the Code of Ethics (Chapter 112, Part III) frequently overlap in

the actions they seek to prohibit. A major difference between Chapter 838 and the Code of Ethics is that Chapter 838 is criminal, while the Code of Ethics usually provides for only civil penalties.<sup>xx</sup> Criminal penalties typically require an intentional act while civil may not. We have heard that Chapter 838 punishes both the public servant as well as the person who participated in the criminal offense; whereas, the Code of Ethics typically only punishes public officials or employees. Civil violations under the Code of Ethics require a lesser standard of proof than any criminal violations under Chapter 838. In addition, because of different procedural rules, evidence which is admissible in a civil case may not be admissible in a criminal case.

From testimony we have heard and in reviewing the statutes, we have learned that F.S. 112.313(2) (soliciting or accepting gifts) and 112.313(4) (unauthorized compensation) align closely with F.S. 838.015 (bribery) and 838.016 (unlawful compensation for official behavior). Therefore, the Legislature has shown the ability to criminalize portions of the Code of Ethics under Chapter 838.

While the prohibited conduct may overlap between Chapter 838 and the Code of Ethics, there are distinctions where the two Chapters seek to punish similar action. We have heard testimony that the Legislature used the words “corruptly” or “with corrupt intent” throughout Chapter 838 in order to differentiate criminal and civil penalties for the similar action. The Legislature wanted to provide an additional hurdle for prosecuting conduct which might also be a violation under the Code of Ethics. We find this distinction unnecessary as the criminal statutes already requires criminal intent and a higher burden of proof; therefore, we recommend the additional language of “corruptly” or “with corrupt intent” be removed from Chapter 838.

We have repeatedly heard from law enforcement and prosecutors that the use of the word “corruptly” or “with corrupt intent” makes charging violations under Chapters 838 more difficult

than other criminal statutes and may require additional evidence such as testimony from one of the actors involved. Under F.S. 838.014(4), “corruptly” or “with corrupt intent” means “acting knowingly and dishonestly for a wrongful purpose.” We find the additional element of “corruptly” or “with corrupt intent” should be removed from bribery, unlawful compensation, official misconduct, and bid tampering.

Bribery is criminalized under F.S. 838.015 and states:

- (1) “Bribery” means *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit not authorized by law with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.
- (2) Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that the public servant had assumed office, that the matter was properly pending before him or her or might by law properly be brought before him or her, that the public servant possessed jurisdiction over the matter, or that his or her official action was necessary to achieve the person's purpose.
- (3) Any person who commits bribery commits a felony of the second degree...

Unlawful compensation or reward for official behavior under F.S. 838.016 states:

- (1) It is unlawful for any person *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.
- (2) It is unlawful for any person *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission which the person believes to have been, or which is represented to him or her as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty.
- (3) Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.
- (4) Whoever violates the provisions of this section commits a felony of the second degree...

Official misconduct is criminalized under F.S. 838.022 which presently states:

- (1) It is unlawful for a public servant, *with corrupt intent* to obtain a benefit for

any person or to cause harm to another, to:

- (a) Falsify, or cause another person to falsify, any official record or official document;
  - (b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or
  - (c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.
- (2) For the purposes of this section:
- (a) The term “public servant” does not include a candidate who does not otherwise qualify as a public servant.
  - (b) An official record or official document includes only public records.
  - (3) Any person who violates this section commits a felony of the third degree...

We have heard testimony that the language and definition of “corruptly” or “with corrupt intent” has limited the effectiveness of Florida’s criminal anti-corruption laws by placing an extra burden beyond the requirement of criminal intent that is standard in criminal offenses. We acknowledge there are cases in which corrupt intent has been found; however, this additional burden requiring a public servant’s intent to be “corrupt” is not necessary.<sup>xxi</sup> We find that the standard criminal burden of “intentionally” or “knowingly” is sufficient to establish a public servant has acted with scienter (guilty knowledge) as to separate these offenses from an unintentional violation which may be civil.

We also find that in certain circumstances it is entirely appropriate to punish similar actions both civilly and criminally. Under F.S. 112.311 the Legislature has determined that the law should protect against any conflict of interest and establish standards for the conduct of elected officials and government employees as a declaration that the integrity of government is essential. Public officials and those bound by the Code of Ethics are rightfully held to a higher standard. In accordance with testimony, we are only aware of two similar violations between the two Chapters, but as we will discuss later under section II, we are recommending more. We find that due to the extra burden of proof, public officers and those subject to Chapter 112, Part III, need not worry about criminal prosecution unless their action was intentional and can be proven

beyond a reasonable doubt, in which case they should be punished criminally and civilly for certain violations.

Bid tampering, F.S. 838.22, also requires “with corrupt intent” as referred to in the preceding recommendation. We heard one reason bid tampering is hard to prove is because procurement laws, in some instances quite properly, do not necessarily require that the lowest bid be accepted, allowing the selection of a most qualified bid. The awarding of contracts involves subjective decisions which make it difficult to prove criminal intent without some form of illicit payment or insider knowledge. The additional burden of “corrupt intent” seems an unnecessary hurdle in bid tampering or bid rigging schemes.

Numerous states specify that violations of the state’s ethics law are also violations of criminal law.<sup>xxii</sup> Other states, like Florida, have criminal statutes in addition to ethics laws. We find if the Legislature does not want to criminalize the Code of Ethics, then it must make stronger criminal statutes to prohibit certain intentional unethical acts by public officers and employees. We find the Legislature should remove the words “corruptly” or “with corrupt intent” throughout Chapter 838.

- B. We recommend the Legislature strengthen bid tampering under F.S. 838.22.**
- a. Make a new subsection which addresses the situation in which a public servant knowingly fails to use the competitive bidding process for the procurement of commodities or services when required to do so by law, ordinance or other rule or regulation to include federal rules or regulations for grants.**
  - b. Prohibiting a public servant from intentionally splitting bids in order to avoid the competitive bidding process.**
  - c. Rename the statute “Bid tampering or bid rigging.”**

Currently, under F.S. 838.22, bid tampering is criminalized as follows:

- (1) It is unlawful for a public servant, with *corrupt intent* to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to:
  - (a) Disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed.
  - (b) Alter or amend a submitted bid, documents or other materials supporting a submitted bid, or bid results for the purpose of intentionally providing a competitive advantage to any person who submits a bid.
- (2) It is unlawful for a public servant, with *corrupt intent* to obtain a benefit for any person or to cause unlawful harm to another, to circumvent a competitive bidding process required by law or rule by using a sole-source contract for commodities or services.
- (3) It is unlawful for any person to knowingly agree, conspire, combine, or confederate, directly or indirectly, with a public servant to violate subsection (1) or subsection (2).
- (4) It is unlawful for any person to knowingly enter into a contract for commodities or services which was secured by a public servant acting in violation of subsection (1) or subsection (2).
- (5) Any person who violates this section commits a felony of the second degree...

The laws regulating the government procurement process are vulnerable to corruption. According to testimony from a veteran prosecutor who has worked public corruption cases, his office receives many complaints alleging corruption of the bidding or procurement process. Unfortunately, his office rarely prosecutes these crimes because Florida's bid tampering law is too restrictive in the criminal actions it prohibits. By comparison, we have heard federal laws are better at prohibiting criminal bidding schemes. According to the U.S. Department of Justice, bid rigging is one of the most common violations prosecuted by the Antitrust Division.<sup>xxiii</sup>

The Federal Sherman Antitrust Act prohibits agreements among competitors to fix prices, rig bids, or engage in other anti-competitive activity. The Antitrust Division of the Department of Justice is responsible for prosecution of violations of the Sherman Antitrust Act. Violations of the act include a felony conviction and a fine up to \$1 million for individuals and up to \$100 million for corporations. In addition, victims may seek civil damages of up to three times the amount of the damages suffered.<sup>xxiv</sup>

Bid rigging is a fraud on the bidding process whereby an agreement is made among competitors or potential bidders as to who will win a potential contract. Bid rigging can also occur when a purchaser solicits bids to purchase goods or services outside of the proscribed process.<sup>xxv</sup> The bidders agree in advance who will submit the winning bid. Due to this bidding scheme, the purchaser receives bids which are inflated. According to Department of Justice,<sup>xxvi</sup> there are four basic bid rigging schemes as follows:

***Bid Suppression:*** In this type of scheme, one or more competitors agree not to bid, or withdraw a previously submitted bid, so that a designated bidder will win. In return, the non-bidder may receive a subcontract or payoff.

***Complementary Bidding:*** In this scheme, coconspirators submit token bids which are intentionally high or which intentionally fail to meet all of the bid requirements in order to lose a contract. "Comp bids" are designed to give the appearance of competition.

***Bid Rotation:*** In bid rotation, all co-conspirators submit bids, but by agreement, take turns being the low bidder on a series of contracts.

***Customer or Market Allocation:*** In this scheme, co-conspirators agree to divide up customers or geographic areas. The result is that the coconspirators will not bid or will submit only complementary bids when a solicitation for bids is made by a customer or in an area not assigned to them. This scheme is most commonly found in the service sector and may involve quoted prices for services as opposed to bids.

We have heard testimony that Florida's bid tampering law is narrower in scope than the federal bid rigging statute. Florida's bid tampering law is confined to situations whereby a public servant, co-conspirator, or contractor engage in: 1) tampering with the bidding process by disclosing material information concerning a bid; 2) altering or amending a submitted bid; or 3) circumventing the competitive bidding process using a *sole-source contract* with the corrupt intent to provide another person a benefit or to harm another person.

According to our review, a definition of sole-source contract is not provided in Chapter 838 or anywhere else in the Florida statutes. However, based on a State of Florida Attorney General opinion, it appears that an example of sole-source contract is one when one vendor is provided a contract and this vendor contracts other vendors to perform some function which

should have been bid out.<sup>xxvii</sup> The term does not appear to be defined in Florida Administrative Code, but it is found in Rule 57-60.004 to prohibit Space Florida (an independent special district to promote the space industry) from entering sole-source contracts with prospective vendors unless specific conditions are authorized. These conditions require the contract be preapproved with justification. A justifiable reason would include when only a specific vendor is capable of providing the goods or services. We are unaware of any case law to help us interpret Florida's bid tampering statute. We find that by limiting bid tampering to sole-source contracts under F.S. 838.22(2), our bid-tampering statute would allow numerous other bid rigging schemes whereby bids are submitted in order to circumvent the lawful bidding process.

### **Bid Splitting**

We have received testimony that one way the bidding process is circumvented may involve a public servant splitting the proposal so that an entire contract is not competitively bid out; rather, the bid goes out in smaller contracts. This is called bid splitting. Bid splitting is a common scheme whereby request for proposals or bids are separated out into individual projects in order to avoid reaching monetary threshold caps which may require a more strict bidding process. What would be a serious criminal violation, in the context of structuring transactions designed to avoid reporting dollar thresholds, turns into a common government practice that avoids oversight and public bid through structured procurement payments. According to testimony, bid splitting is not presently a criminal violation under Florida law, but may be under federal law. Clearly, the State of Florida should have a criminal statute to prohibit bid splitting.

We heard testimony about a public servant who was able to circumvent the bidding process by bid splitting, bid tampering, and bid rigging. This public servant was ultimately charged with bid tampering. Due to Florida's limited criminal law on bid tampering, he was able

to avoid other criminal charges for schemes we find should have been illegal. We heard testimony about an investigation and prosecution of this public servant and others who were former employees of the Florida Fish and Wildlife Conservation Commission (FWC). In addition, we heard about a private contractor who was charged, as well as other contractors who apparently were involved in bidding schemes, but who have not yet been charged.

Investigators and two witnesses explained a massive criminal enterprise which spanned more than five years. This case is being prosecuted by the Office of the Statewide Prosecution in the Tampa Bureau which charged the defendants with racketeering and conspiracy to commit racketeering with sixty-six predicate offenses including official misconduct, theft, organized scheme to defraud, and bid tampering. This case also provides insight into numerous problems with our State's present efforts to prevent corruption even within its own agencies.

We heard testimony from witnesses about their illegal activities while working as supervisors at FWC. According to the first witness he often split out a building contract in order to avoid having to go through certain state procurement rules. He explained that he would bid out different parts of the building process (such as roof, drywall, or electrical) as it allowed him to avoid bidding out the entire contract to one general contractor. In essence, he was acting as a general contractor in order to avoid procurement regulations and get the work done quicker. However, according to an investigator, by acting as the general contractor he appeared to have been paying too much for the jobs he was bidding out either because he didn't understand what he was doing or because he was intentionally overpaying these contractors. While the first witness claimed he was saving money for the State in the long-run, the State lost the proper oversight of the job and overpaid certain contractors for the services they provided. This witness was not specifically charged for this bid splitting scheme.

In addition, we heard about bid rigging schemes between the first witness and numerous contractors. We also learned of kickbacks the second witness received from a vendor. From testimony we received, these two public servants and contractors appear to have engaged in numerous bid rigging schemes including bid suppression, complementary bidding, and bid rotation. We learned that the long-standing relationship between the two witnesses and a particular vendor eventually developed into a massive bid-rigging scheme that completely subverted any protection the State guidelines would have given. These two witnesses consistently offered projects to a particular vendor, who would then submit bids using the names and information belonging to his friends' companies. The bids would be manipulated to ensure that a particular company or vendor would win. In most cases, the vendor would actually perform the work, and the payment issued to the bid-winning vendor would be re-directed with some payment being made for the use of the company name in the bid-rigging scheme. In some instances, the work actually performed was different than what was described when bids for the project were officially solicited and different than what invoices described. In at least one case, we heard that no work was intended or performed, and the relationship between the vendor and the first witness coupled with the unmonitored bidding process allowed for blatant fraud. These two witnesses also received benefits in the form of goods and services in exchange for the continued promise of contracts being awarded by way of the manipulated bid process. Testimony was that these two witnesses appeared to have confidence in the work quality of the particular vendor, and they participated in the scheme to get work done faster and at cheaper prices from a reliable vendor. In light of the fact that there is no true record of what work was actually done by whom, there is no way to know for sure how much the State may have lost based on this fraud over several years. In at least one instance, money was paid for a bogus

project and costs were inflated to cover the use of “middlemen.” As we will discuss later in our Report, procedures must be implemented to ensure the benefit of a true competitive bidding process and that there must be an effective audit process to avoid the manipulation of the system.

The Legislature must make sure any bid tampering statute applies to private entities receiving public funds to perform a governmental function or service, even when that private entity is receiving federal grant funds through the State or county. During the previously mentioned testimony on the state agency paying the company for training and champagne toasts, there was an appearance of impropriety in the bidding process of certain contracts. In some instances, state programs are federally funded. Any amendments to the state’s procurement standards should clearly provide that it is a criminal violation to circumvent the federal procurement rules when operating under a federal grant while performing a state governmental function. We find when a nongovernmental entity is being paid to perform a state or local governmental function or service, even with federal grant money, the employees of the nongovernmental entity should be held to the same standards as a state or local governmental employee.

In considering bid splitting language, we refer the Legislature to F.S. 287.057(9) which states: “[a]n agency shall not divide the solicitation of commodities or contractual services so as to avoid the requirements of subsections (1)-(3).” We find that the Legislature should incorporate this idea into a criminal violation, expanding it beyond state agencies to include avoiding the procurement requirements under state, county, or municipal statute or ordinance, as well as any federal procurement requirements received by a nongovernmental entity in relation to a grant.

As it presently stands, the scope of the bid tampering statute is too narrow and therefore the statute's use is limited. For this reason we find the Federal Sherman Antitrust Act should be considered when addressing our bid tampering statute and expanding our laws to prohibit bid rigging schemes. In order to clarify the activities we believe should be prohibited, the title of the statute should be changed to clearly reflect the intent to prohibit bid tampering as well as bid rigging.

**C. We recommend the Legislature address commercial bribe receiving and commercial bribery under F.S. 838.15 and 838.16 by striking “common-law duty” and defining “statutory duty.”**

Commercial bribe receiving is under F.S. 838.15 and states:

- (1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common-law duty to which that person is subject as:
  - (a) An agent or employee of another;
  - (b) A trustee, guardian, or other fiduciary;
  - (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
  - (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
  - (e) An arbitrator or other purportedly disinterested adjudicator or referee.
- (2) Commercial bribe receiving is a third degree felony.....

Commercial bribery is stated under F.S. 838.16 as follows:

- (1) A person commits the crime of commercial bribery if, knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty, the person confers, offers to confer, or agrees to confer a benefit on the other.
- (2) Commercial bribery is a third degree felony...

In Roque v. State, the Florida Supreme Court held that Florida's commercial bribe receiving law under F.S. 838.15 was unconstitutionally vague.<sup>xxviii</sup> Since commercial bribery under F.S. 838.16 refers to F.S. 838.15, it is most certainly unconstitutionally vague as well. Since the Florida Supreme Court's 1995 decision in Roque, the Florida legislature has failed to address this statute and instead has left a void in our criminal statutes.

In order to understand why this law was held unconstitutional and what the Legislature can do to remedy this law, we must first discuss the concepts of due process and vagueness. In

order to be constitutional, criminal statutes must give a reasonable person sufficient notice of what conduct is likely to be proscribed.<sup>xxix</sup> Without being on notice of exactly what conduct violates the law, reasonable people cannot be expected to act in accordance with the law. Furthermore, the laws should be clear to prohibit arbitrary and discriminatory enforcement.

In order to make this statute constitutional, the legislature needs to amend the statutes so that it addresses the concerns of the Florida Supreme Court. The Court felt that F.S. 838.15 was too open-ended to limit prosecutorial discretion in a reasonable manner and also felt that it was too broad in that it proscribed every violation of an employee's statutory or common law duty, no matter how trivial or obscure, regardless of whether it resulted in harm or not.<sup>xxx</sup> As suggested almost fifteen years ago, "if the legislature could find statutes from other states which contain more specific language than found in sections 838.15 and 838.16, these would be more likely to be upheld."<sup>xxxi</sup> This Grand Jury does not view this task as insurmountable as we have heard the federal government and numerous states have enacted commercial bribery statutes that have survived judicial scrutiny.

The need for this statute in Florida is illustrated by a mortgage fraud prosecution in Polk County, Florida, by the Office of Statewide Prosecution in two separate cases. We have been presented with arrest affidavits that detail illicit payments to and from mortgage brokers, mortgage lender sales associates, and mortgage lender executives in the subprime mortgage industry, all for the purposes of improperly influencing the approval of bad loans. These loans totaled millions of dollars and the illicit payments and kickbacks topped hundreds of thousands.

Were the legislature to fix these useful and necessary commercial bribery statutes, they would be additional tools for prosecutors to use to fight overall corruption. Of course, within

that area there should be distinctions made in the statutes for different levels and gradations of bribes based on the dollar amount paid.<sup>xxxii</sup>

Additionally, it is our recommendation that the drafters include the newly drafted statute as a predicate crime for use in racketeering prosecutions under Chapter 895. It would appear that this is a recommended method for addressing crimes such as the one involving mortgage fraud.

We also find that the Legislature should consider whether commercial bribery needs to fall under Chapter 838. As was stated by the 1999 Florida Public Corruption Study Commission, “[s]hould the Legislature craft a revision of the language of s. 838.15 that it believes is constitutional, the provision does not relate to public servants, and should be placed elsewhere in the Florida Statutes.”<sup>xxxiii</sup>

This Grand Jury is concerned that the reason this statute has not been addressed is because it could very well target the private commercial interests that lobby our Florida Legislature. This *commercial bribery tax*, passed on to each consumer, raises the costs of goods and services throughout the market place. As it stands now, commercial bribery is not unlawful under Florida law and it will remain this way until the Legislature is forced to address these statutory flaws. In our opinion, it would take little effort and have no budgetary impact to re-draft these statutes so that they address the constitutional concerns outlined by the courts.

### **Honest Services Fraud and federal laws**

We have heard testimony from numerous witnesses about the federal statute commonly referred to as “honest services fraud.” Under 18 USC §1341, it is a criminal act to further “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” Section 1346 defines the §1341 term “scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right of

honest services.” In a recent U.S. Supreme Court case, Skilling v. U.S., the Court overturned a conviction for honest services fraud and held that “[i]n proscribing fraudulent deprivations of ‘the intangible right of honest services,’ §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks.”<sup>xxxiv</sup> In that case, the defendant was convicted in the lower court of “honest services” wire fraud among other things. The alleged misconduct did not entail a bribe or a kickback and was thus held to fall outside the covered crimes of honest services fraud.

We have heard testimony from state and federal prosecutors about the effectiveness of the honest services fraud statute. Some state prosecutors have testified that a law similar to the federal honest services fraud would be beneficial to the state. It is our belief, however, that specific modifications to existing state criminal statutes are a better alternative than attempting to craft a new structure based on a federal model. While the Legislature was right to hold off any action while the U.S. Supreme Court was reviewing the cases mentioned above, the Legislature now must decide if the U.S. Supreme Court has given enough guidance to craft a constitutional statute. Since certainty is of great value in criminal law, we think the better course is to modify the existing statutes which we outline in our Report.

This discussion raises the other issue of the effectiveness of corruption prosecutions in the state system versus the federal system. While not the focus of this Report, it does bear comment. There are two distinct advantages to law enforcement in the federal system – superior resources and secrecy. The government’s resources allow them to develop corruption cases over years and particularly in this area, that makes a big difference. While it seems odd to discuss secrecy in a report on transparency, we must acknowledge that without secrecy, witnesses are reluctant to come forward against powerful political figures. The Florida Sunshine law and open

criminal discovery system are good tools of open government, but they make investigating and successfully prosecuting these types of cases more difficult.

Chapter 838 is the crux of Florida's anti-corruption strategy. Improved statutory language to capture illicit conduct is an achievable goal that will aid law enforcement as well as the citizens of Florida.

**D. "Under the Color of Law"**

**We recommend that a statute be enacted which enhances the level and degree of any crime committed by a public official while acting within his or her official duties, other than crimes of public corruption including Chapters 104, 112, 838, and 839.**

We heard testimony about the 2010 "under the color of law" bills which failed to make it out of committee in the Legislature. These bills followed a recommendation of the Palm Beach Grand Jury. This enhancement would mean that criminal offenses committed by one who is acting or purporting to act in the performance of his or her official duties would be increased by one degree of classification and one level of severity, unless acting or purporting to act in the performance of official duties is a necessary element of the underlying crime.<sup>xxxv</sup> For example, the crimes of official misconduct, bid tampering, and bribery would require the following: the offense occurs by a "public servant"; the offense occurs in the performance of the official's public duties; and the offense does not subject the official to a higher offense reclassification. These changes would be more in line with the federal laws on the subject.

Several similar bills were proposed during the 2010 Legislative session; however, they all died in committee or were withdrawn and none were addressed by the Legislature as a body. Senate Bill (SB) 1546 and its companion House Bill (HB) 347 sought to add the "under color of law" reclassification by enacting Florida Statute (F.S.) 775.0862. SB 734

and HB 489 are similar and both provided the enhancement by enacting F.S. 775.0876. We support the concept of a reclassification of certain criminal offenses for “under the color of law.”

Underscoring our recommendation is testimony that officials or public servants charged with a public corruption crime often desire to plea to another crime in order to avoid the stigma of a public corruption offense. The “color of law” enhancement would prevent the public official or servant from benefiting from this type of plea bargain and would secure a conviction to a crime involving public corruption. If a prosecutor needs to charge another crime such as theft or scheme to defraud, the public still has the satisfaction of knowing the misconduct has been identified as public corruption due to the fact the actor committed the crime “under the color of law.” We find that the Legislature in its entirety should fully consider and debate this “under color of law” recommendation during the 2011 session.

## **Penalties under the Code of Ethics**

In our study of Florida’s civil and criminal public corruption laws, we determined our laws fail to criminalize several necessary wrongs that the Code of Ethics punishes civilly. In 1975, the Commission on Ethics was given the authority to administer the enforcement of the Code of Ethics, and civil penalties replaced criminal penalties for violations of the Code of Ethics. There has been an increasing debate about whether or not violations of the Code of Ethics should carry criminal penalties. During the 2010 Legislative session SB 1546 and its companion HB 347 proposed to add the following language to certain sections of the Code of Ethics: “In addition to being subject to penalties under s. 112.317, a person who violates this subsection commits a misdemeanor of the first degree...” These bills would have criminalized

ethical violations of soliciting or accepting a gift, unauthorized compensation, or misuse of public position. The Palm Beach County Grand Jury also recommended that the “Legislature likewise amend Section 112, Part III, Florida Statutes to include a criminal sanction for knowing violations of state ethics laws.” While we are not fully adopting these ideas as proposed, we find the concept that certain provisions of the Code of Ethics need to be criminalized is absolute. Our findings and recommendations should lead the Legislature in a unified direction. We find the Legislature should hear the citizens of this state and the grand juries who have now twice called for criminalization of certain violations of the Code of Ethics.

We looked at legislation from the 2010 legislative session and reviewed prior legislation changing the public corruption laws. We heard from former legislators who explained the politics behind the making of our civil and criminal anti-corruption laws. We understand that passing legislation to address public corruption is not an easy task due to politics as well as legitimate differences of opinions on how to regulate a person’s ethics. While Florida has taken bold action in the past, the State presently ignores the reality that current laws do not go far enough to punish and deter those who are intentionally violating the law. Our first recommendation in this section is to criminalize certain actions which are presently civil penalties under Chapter 112, Part III. (Code of Ethics). We will leave to the Legislature to determine the best way to criminalize intentional violations of specific provisions of Chapter 112, Part III. This recommendation is quite large in scope and is one of our most important.

#### **E. Conflicts of Interest**

We heard two examples in the Code of Ethics which already have a criminal counterpart. First, F.S. 112.313(2) prohibits a public officer, employee of an agency, local government attorney, or candidate for nomination or election from soliciting or accepting gifts or anything of

value based on an understanding that it was provided to influence a vote or official action. Second, F.S. 112.313(4) prohibits a public officer, employee of an agency, or local government attorney or his or her spouse from receiving unlawful compensation or anything of value when such person knew or should have known with the exercise of reasonable care that it was given to influence a vote or official action. These two violations under Chapter 112, Part III, have similar criminal prohibitions under F.S. 838.015 and 838.016, dealing with bribery and unlawful compensation for official behavior. Even though these criminal violations may not fully capture all of the actions prohibited by F.S. 112.313(2) and 112.313(4), we find they sufficiently criminalize the behavior we want to punish under these sections.

We have also heard that numerous parts of the Code of Ethics are not criminal but should be considered for criminal punishment. We find that the Code of Ethics already has defined and interpreted language for several actions we are seeking to criminalize; therefore, we recommend the Legislature consider either criminalizing portions of the Code of Ethics or use language from the Code of Ethics to create criminal provisions under Chapter 838. While we favor criminalizing certain willful prohibitions of the Code of Ethics under Chapter 838 rather than Chapter 112, we recognize the difficulties this may impose and therefore leave it to the Legislature to address. According to a witness, criminalizing the Code of Ethics involves more than merely making it a criminal violation if done willfully or with knowledge. Many of the violations under the Code of Ethics are vague, and in one witness's opinion, criminalizing the Code of Ethics would provide harsh penalties for vague prohibitions. However, we are only recommending portions of the Code of Ethics be criminalized and find that action must be taken under Chapter 112 or Chapter 838. If additional criminal penalties were provided for under the

Code of Ethics, the Legislature must consider whether or not the provisions being criminalized are too vague to fairly provide adequate notice to a public official or potential violator.

The penalties under the Code of Ethics can be found in F.S. 112.317, as well as at the end of other sections within Chapter 112, Part III. We will include a portion of F.S. 112.317 concerning penalties for public officials which states:

(1) Violation of any provision of this part, including, but not limited to, any failure to file any disclosures required by this part or violation of any standard of conduct imposed by this part, or violation of any provision of [s. 8, Art. II of the State Constitution](#), in addition to any criminal penalty or other civil penalty involved, shall, under applicable constitutional and statutory procedures, constitute grounds for, and may be punished by, one or more of the following:

(a) In the case of a public officer:

1. Impeachment.
2. Removal from office.
3. Suspension from office.
4. Public censure and reprimand.
5. Forfeiture of no more than one-third salary per month for no more than 12 months.
6. A civil penalty not to exceed \$10,000.
7. Restitution of any pecuniary benefits received because of the violation committed. The commission may recommend that the restitution penalty be paid to the agency of which the public officer was a member or to the General Revenue Fund.

It is our recommendation that if sections of the Code of Ethics were criminalized under Chapter 112, then F.S. 112.317(1) should be amended to include language such as: **“anyone who violates 112.313(3), (6), (7) or 112.3143(2), (3), (4) ‘willfully’ or ‘intentionally’ commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”** We find these sections of Chapter 112, Part III need to be criminalized and this is one possible way to accomplish this without having to write new criminal laws under Chapter 838.

These provisions of the Code of Ethics already address the evils that we feel should be criminally punished when done intentionally. We anticipate great resistance to this recommendation as it potentially holds the legislators who would pass these laws to criminal liability for what previously was only a civil violation. We hope this will not dissuade the

Legislature from acting and urge legislators to work in the interest of the public first and foremost. One way this can be accomplished is through tougher criminal laws since we have often heard our civil laws have no teeth. We recognize that there are many ethical legislators and public officers who take pride in their conduct and urge them to be leaders in implementing our recommendations. Only those who intentionally violate these provisions relating to their public office should fear criminal punishment. The public is tired of officials who abuse their position or ignore conflicts of interest.

**Criminalize conflicts of interest of the Code of Ethics.**

- a. **We recommend criminalizing voting conflicts of interest under F.S. 112.3143(2), (3) and (4).**

112.3143 Voting Conflicts.

(2) Concerning state public officers

(3) Concerning county, municipal, or other local public officers

(4) Concerning appointed public officers

We also find voting conflicts of interest should be criminally punished. In Florida, voting conflicts of interest for state public officers; county, municipal, or other local public officers; and appointed public officers are governed under F.S. 112.3143. In essence, the law tells public officials that they have a fiduciary duty to the public and that they must separate themselves from anything given to them while serving in this fiduciary duty. When a public official has a conflict, he or she should step aside and disclose the conflict. The only benefit the public official should receive is for the public, not for the public official or anyone else. The State provides a

floor and public officials can choose to set higher prohibitions. While Florida has not criminalized voting conflict of interest, other states have. As used in this section the term “public officer” includes any person elected or appointed to hold office in any agency, including any person serving on an advisory body. The term “relative” means any father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

Voting conflicts of interest for state public officers are covered under F.S. 112.3143 which states:

(2) No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private 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 shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

Voting conflicts of interest for county, municipal, or other local public offices are covered under F.S. 112.3143 which states:

(3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in [s. 112.312\(2\)](#); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

(b) However, a commissioner of a community redevelopment agency created or designated pursuant to [s. 163.356](#) or [s. 163.357](#), or an officer of an independent special tax district elected on a one-acre, one-vote basis, is not prohibited from voting, when voting in said capacity.

Voting conflicts of interest for appointed public officers are covered under F.S. 112.3143 which states:

(4) No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter.

(a) Such disclosure, indicating the nature of the conflict, shall be made in a written memorandum filed with the person responsible for recording the minutes of the meeting, prior to the meeting in which consideration of the matter will take place, and shall be incorporated into the minutes. Any such memorandum shall become a public record upon filing, shall immediately be provided to the other members of the agency, and shall be read publicly at the next meeting held subsequent to the filing of this written memorandum.

(b) In the event that disclosure has not been made prior to the meeting or that any conflict is unknown prior to the meeting, the disclosure shall be made orally at the meeting when it becomes known that a conflict exists. A written memorandum disclosing the nature of the conflict shall then be filed within 15 days after the oral disclosure with the person responsible for recording the minutes of the meeting and shall be incorporated into the minutes of the meeting at which the oral disclosure was made. Any such memorandum shall become a public record upon filing, shall immediately be provided to the other members of the agency, and shall be read publicly at the next meeting held subsequent to the filing of this written memorandum.

(c) For purposes of this subsection, the term "participate" means any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction.

In order to look for potential conflicts of interests, the Center for Public Integrity analyzed disclosure forms filed in 2002 by the 147 Florida legislators for the year 2001 and determined:

- 36.1% sat on a legislative committee with authority over a professional or business interest,
- 38.1% had financial ties to businesses or organizations that lobby state government, and
- 15% received income from a government agency other than the state legislature.<sup>xxxvi</sup>

We do not believe that conflicts of interest are unusual and view them as inevitable. Not all conflicts are necessarily bad. For example, a city council member voting on an issue that is

emotionally important to him or her should not declare he or she has an emotional conflict and not vote. We heard testimony that conflicts which should be regulated are the ones in which the integrity of the official action could be questioned and public trust undermined. A public officer starts off in an ethically neutral position until that officer uses or abuses the office and decides on issues for personal interest or gain rather than for the public good. We find the Legislature should criminalize certain voting conflicts of interest. We understand this is a difficult recommendation for the legislature as it has the potential to change the way Legislators and public officers act when considering a vote. However, that is the impact we are seeking. We do not desire more criminal laws in order to burden an already overwhelmed criminal justice system. We hope and expect that these additional laws will scarcely be used because they have the desired effect of making public officers stop and think about whether they have a conflict of interest to disclose prior to voting and whether the conflict requires the officer to recuse him or herself from voting.

We heard that legislators have created different voting standards for themselves due to the large volume of votes they undertake. According to testimony, legislators do not always know if the vote would lead to a special private gain or loss. While taking this under consideration, we find this to be an insufficient reason. Other states have criminalized voting conflicts of interest; surely Florida can take a step forward and do the same. We understand the Legislature votes on many issues and do not seek to criminally punish a mere incidental benefit such as a road being built that make's a legislator's commute more enjoyable. We find these concerns have already been addressed in our voting conflict of interest laws and for that reason find these concerns are unlikely justified. Because the laws we are recommending have been interpreted, they are a good starting place to look when trying to criminalize voting conflicts.

Therefore, we leave it to the Legislature to consider whether it is best to criminalize voting conflicts of interest under Chapter 112 or under Chapter 838; or whether new approaches are needed to address these shortcomings in our anti-corruption laws.

Should the Legislature deem our present voting conflict of interest laws ill suited for criminal penalties due to vagueness or other concerns, we find the Legislature should look to other states' statutes.<sup>xxxvii</sup> We received Kentucky's voting conflict of interest law (which only addresses their legislature), which provides a useful model for creating a criminal voting conflict of interest provision. Kentucky's statute KRS 6.761 states:

- (1) A legislature shall not intentionally participate in the discussion of a question in committee or on the floor of the General Assembly, vote, or make a decision in his or her official capacity on any matter:
  - (a) In which the legislator, or any relative, or the legislator's business associate will derive a direct monetary gain or suffer a direct monetary loss as a result of the legislator's vote or decision; or
  - (b) Which relates specifically to a business in which the legislator owns or controls an interest of ten thousand dollars (\$10,000.00) or more, or an interest of more than five percent (5%).

The term "relative" shall be defined in accordance with 112.3135(1)(d).

- (2) A legislator who has a personal or private interest in a bill proposed or pending before the General Assembly shall also be subject to the Senate or House Rule which governs the procedures for conflict of interest and recusal.
- (3) A legislator may vote on legislation affecting his or her salary, expenses, benefits, and allowances, as provided by law. A legislator may participate in the discussion of the question in committee and on the floor of the General Assembly, vote, or make a decision on a matter if any benefit or detriment which accrues to the member of the General Assembly, as a member of a business, profession, occupation, or other group, or to a relative of the legislator or a business interest specified in subsection (1)(b) of this section is of no greater extent than the benefit or detriment which accrues generally to other members of the business, profession, occupation, or other group.
- (4) The right of legislators to represent their constituencies is of such major importance that legislators should be barred from voting on matters of direct personal interest only in clear cases and if the matter is particularly personal.
- (5) Any person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

**b. We recommend criminalizing self-dealing conflicts of interest under F.S. 112.313 (3) and (7).**

Specifically, we seek to have the following provisions of the Code of Ethics criminalized either under Chapter 112, Part III, when the offender “willfully” or “intentionally” violates the laws or under Chapter 838:

- a. 112.313 Standards of conduct for public officers, employees of agencies, and local government attorneys.

(3) DOING BUSINESS WITH ONE’S AGENCY

(7) CONFLICTING EMPLOYMENT OR  
CONTRACTUAL RELATIONSHIP

F.S. 112.313 provides for the standards of conduct for public officers, employees of agencies, and local government attorneys. The covered standards of conduct include solicitation or acceptance of a gift, doing business with one’s agency, unauthorized compensation, salary and expenses, misuse of public position, conflicting employment or contractual relationship, disclosure or use of certain information, restriction on postemployment, standards and conduct for legislatures and legislative employees, employees holding office, professional and occupational licensing board members, lobbying by former local officers, board of governors, and board of trustees. Under F.S. 112.313, “the term ‘public officer’ includes any person elected or appointed to hold office in any agency, including any person serving on an advisory board.” The term “agency” is defined under F.S. 112.312(2) to mean “any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, subdivision, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.” A “local government attorney” is defined under F.S. 112.313(16) to mean “any individual who routinely serves as the attorney for a unit of local government.”

We will discuss each of the provisions of Chapter 112 which we are recommending criminalizing. Under F.S. 112.313(3) it states:

**(3) Doing business with one's agency.**--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:

- (a) October 1, 1975.
- (b) Qualification for elective office.
- (c) Appointment to public office.
- (d) Beginning public employment.

We heard testimony about the need to prevent conflicts of interest between public officials and their sources of employment. We were presented with the 1999 Florida Public Corruption Study Commission report which recommended “[a] new s. 838.20 is proposed that will make it unlawful for a public servant to corruptly establish any business relationship between the public servant’s own agency or any business entity. The penalty for a violation of the new section is felony of the second degree.”<sup>xxxviii</sup> We heard examples whereby county commissioners conceal or fail to disclose the nature of their conflict of interest in a business which is awarded a contract by a governmental entity. We are aware that other states have criminalized similar conflicts of interest.<sup>xxxix</sup> For example, Indiana conflict of interest law IC 35-44-1-3 prohibits (with exceptions omitted):

Sec. 3. (a) A public servant who knowingly or intentionally:  
(1) has a pecuniary interest in; or  
(2) derives a profit from;  
a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony.

We find that an employee of an agency who intentionally does business with his or her own agency has a potential conflict of interest which should be criminalized under certain circumstances. We find the Legislature should criminalize the relevant portions of this section under the Code of Ethics or under Chapter 838. We further find the Legislature should consider the recommendation of the Florida Public Corruption Study Commission to create a new F.S. 838.20 in accordance with their suggested language.

The Code of Ethics also prohibits a public officer or employee of an agency from conflicting employment or contractual relationship under F.S. 112.313(7) which states:

**(7) Conflicting employment or contractual relationship.**

(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

1. When the agency referred to is that certain kind of special tax district created by general or special law and is limited specifically to constructing, maintaining, managing, and financing improvements in the land area over which the agency has jurisdiction, or when the agency has been organized pursuant to chapter 298, then employment with, or entering into a contractual relationship with, such business entity by a public officer or employee of such agency shall not be prohibited by this subsection or be deemed a conflict per se. However, conduct by such officer or employee that is prohibited by, or otherwise frustrates the intent of, this section shall be deemed a conflict of interest in violation of the standards of conduct set forth by this section.

2. When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

(b) This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by

law or ordinance.

Here again the Legislature has recognized a conflict of interest for certain public officials or employees. We find a conflicting employment or contractual relationship should be criminalized when it rises to a certain level. While we have not received testimony how this should be criminalized, we recognize other states have criminalized similar conflicts of interest.<sup>x1</sup>

#### **F. Misuse of Public Position**

##### **We recommend criminalizing misuse of public position under F.S. 112.313 (6).**

Misuse of public position is addressed under F.S. 112.313(6) which states:

**(6) Misuse of public position.--**No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with [s. 104.31](#).

Currently, misuse of public position is only a violation under the code of ethics. Based on testimony, we make recommendations to revise this section and make it applicable both civilly under the Code of Ethics and criminally under Chapter 838. The term “corruptly” should be removed from misuse of public position as a civil ethical violation under Chapter 112. We find it odd that this term is used when it does not appear to be used in other sections of the Code of Ethics and fits more in line with the Legislature’s use of that the term in the criminal Chapter 838. The wrongful acts of an official using his or her public position to secure a benefit should be a civil violation, whether done “corruptly” or not. We find concerns that by removing “corruptly” it will punish a public officer who receives a token of gratitude for doing his or her job to be without merit since misuse of public position requires the act be done “to secure a special privilege...” We heard testimony about a legislator who wanted to secure parking for a football game in a full lot. When the legislator was told he would not be let in, he tried to use his public position of authority to gain access to the parking lot. We find no reason that actions such

as this should require a corrupt element to be a civil violation of the Code of Ethics. According to a witness, Palm Beach County has removed the “corrupt” element from their newly adopted Code of Ethics. We applaud this and find our Legislature should follow suit.

In addition, we find misuse of public position should be criminalized in some manner. One option would be to place the crime under the criminal offense of official misconduct, F.S. 838.22. Presently official misconduct is limited in what it prohibits and does not appear to be a criminal counterpart to misuse of public position. We find the Legislature could add a subsection under official misconduct using similar language found in misuse of public position. If the Legislature decides to criminalize misuse of public position under Chapter 838, we find something more than intent may be needed in order to distinguish it from a civil violation. We recommend that the Legislature consider looking at other states to determine at what level an official’s actions rise to become criminal misuse of public position.<sup>xli</sup> An additional element of criminal responsibility beyond criminal intent (*mens rea*) may not be necessary as other states do not appear to require additional elements beyond criminal intent for misuse of public position. Kentucky’s Ethics Code 6.731(3) criminalizes “[a] legislator, by himself or through others, shall not *intentionally*”... “[u]se or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in direct contravention of the public interest at large.” It appears other states have criminalized similar misuse of public position violations while Florida only makes this an ethical violation.

Another way criminal misuse of public position could be distinguished from a violation under the Code of Ethics is by requiring the criminal action to reach a certain monetary threshold, such as \$300 (which is the amount for felony grand theft). If a monetary amount were required to be met before the action became criminal, then we find the Legislature should track

F.S. 812.014 in order to determine the “value” of a special privilege, benefit, or exemption received. We find that the Legislature should criminalize misuse of public position either under Chapter 838 or Chapter 112.

### **Conclusion**

Under numerous provisions of Florida’s criminal laws, the criminal action is enhanced depending upon the monetary amount taken. We recommend the Legislature include monetary amount thresholds in any provisions that are criminalized. Therefore, those who intentionally receive a greater benefit are more severely punished.

We find public officers and specified others should be criminally accountable when they intentionally misuse their public position or when they violate certain conflicts of interest. The Legislature should criminalize F.S. 112.313(3), (6), and (7) along with F.S. 112.3143 (2), (3), and (4) either under Chapter 112 or under Chapter 838.

## II. REGULATORY ENFORCEMENT

### A. Offices of Inspector General

We have received testimony detailing the vital role inspectors general offices play in the fight against public corruption. We must ensure offices of inspectors general are able to perform their vital role if we are truly going to go after those who seek to steal, waste, and abuse our taxpayer money. The purpose of an office of inspector's general is to:

foster and promote public accountability and integrity in the general areas of the prevention, examination, investigation, audit, detection, elimination and prosecution of fraud, waste and abuse through policy research and analysis; standardization of practices, policies, and ethics, encouragement of professional development by providing and sponsoring educational programs, and the establishment of professional qualifications, certification, and licensing.<sup>xliii</sup>

We have been informed that effective offices of inspectors general “hold government officials accountable for efficient, cost-effective government operations and to prevent, detect, identify, expose and eliminate fraud, waste, corruption, illegal acts and abuse.”<sup>xliiii</sup> If government holds these ideals to be as significant as we do, it will make sure offices of inspectors general are created in the most effective way, funded so they can do their job and structured so they can execute their duty.

1. **Create an independent “Office of State Inspector General” whose role shall be to oversee the inspections and investigations performed by all other state agency inspectors general.**
2. **F.S. 20.055 needs to be rewritten so that state agency inspectors general have more independence.**
  - a. **The Inspector General of each agency should be appointed by a State Inspector General with written consent of the agency head.**
  - b. **An agency inspector general should only be allowed to be removed upon “good cause shown.” In addition, we recommend that both the**

**State Inspector General and the agency head be required to agree in writing on the removal of an agency inspector general.**

- c. An agency inspector general should be given twenty one (21) days notice prior to removal.**

We heard from witnesses who served for and worked with offices of inspectors general (OIG). We understand the important role they play in ensuring government at all levels fosters and promotes accountability and integrity. The citizens are best served when OIG's are established in such a way as to insure they function independently and honestly. F.S. 20.055 establishes agency inspectors general in each state agency "to provide a central point for coordination of and responsibility for activities that promote accountability, integrity, and efficiency in government." Each agency inspector general is provided specific duties which it must perform for the agency in which it is established.

The inspector general for each agency is appointed by the agency head and *reports to* and is *under the general supervision* of the agency head. An agency inspector general may be *removed from office by the agency head*. Any agency head under the Governor and Cabinet shall notify the Governor and Cabinet seven days prior to any removal of an inspector general. The agency head or agency staff should not prevent an inspector general from carrying out any audit or investigation. Agency inspectors general must have certain educational and employment experience to ensure that they understand how to perform the important function of conducting audits. After any final audit report is concluded, the agency inspector general must submit the report to the agency head.

In addition to its auditing functions, agency inspectors general are to "initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government." Agency inspectors

general are required to receive complaints about and implement the Florida Whistle-blower's Act. Investigations are to be carried out "free of actual or perceived impairment to the independence of the inspector general or the inspector general's office." At the conclusion of any certain investigations which are not confidential, the inspector general must submit findings to the subject of the investigation and allow the individual or entity twenty days to respond in writing prior to issuing a final report. The agency inspector general must submit a final report with specific findings to the agency head along with all written complaints the agency inspector general received concerning the investigation.

Under the Office of the Governor, a chief inspector general is created. For offices under the Governor, the chief inspector general and the Governor must be notified seven days prior to any agency head taking action to hire or fire an inspector general. For agencies under the Governor, the inspector general must provide a copy of any complaint to the chief inspector general.

After receiving lengthy testimony on this issue we have determined that agency inspectors general are not as independent from their agency head as they should be. We were made aware of situations where an inspector general was pressured by an agency head or removed for conducting investigations or audits which made an agency head look bad. While we believe there are numerous safeguards which are intended to prevent pressure from an agency head and promote independence, the threat of termination will always be an unspoken pressure. We find that allowing an agency head the power to hire and fire is simply too great for an agency inspector general to be truly independent of that agency head. We therefore find the need to establish a Office of State Inspector General who will be responsible for hiring, firing, and supervising the agency inspectors general.

In order to ensure agency inspectors general are not always operating under the fear they could be terminated, F.S. 20.055 must state that agency inspectors general can only be terminated “upon good cause shown with the approval of both the agency head and the State Inspector General.” The present structure where an inspector general can be fired and hired by an agency head contradicts the purpose of an agency inspector general to function independently from an agency head. An investigator with an agency inspector’s general office described an internal investigation he conducted into the abuse of P-cards, theft, and mismanagement rampant within the agency. In order to avoid the appearance that the investigation was not being conducted independently, the agency inspector general requested FDLE’s assistance with conducting the investigation. This contradiction can be solved by following our recommendations. We applaud this decision, but have heard that not all inspectors general have made the same decision. In addition, even though fraud was rampant within this agency, those who supervised the employees who committed the fraud are still employed and some were even promoted. Based on the testimony we received it is evident that action should have been taken by the agency based on the fact those who supervised the employees who stole should have known about the theft but did nothing to prevent it. In fact, according to one witness, supervisors even sought out the employee to help circumvent the procedural requirements for purchasing. We find this lack of action to terminate those in charge may have had different results if an inspector general was truly independent of the agency head and did not fear repercussions for saying what needs to be said to the agency head about terminating employees high up within the agency.

Testimony was presented about a proposed bill which would have increased the termination of inspector general’s notification period from seven to twenty-one days. We find

the additional time would allow the public and the inspector general additional time to investigate the motives for the termination and voice any objections if it were being done out of fear of investigation or auditing, or out retribution.

**3. Provide additional resources to offices of inspector general.**

- a. Investigations by any offices of inspector general should be exempt under Chapter 119 public records laws similar to law enforcement investigations.**
- b. Inspectors general offices at any governmental agency or entity should be allowed to conduct investigations without having to notify the agency head, executive director, or any other person outside of the IGO of an ongoing investigation.**

In creating OIG's, certain powers must be given to inspectors in order to carry out their investigations effectively. One of these powers is the ability to conduct an investigation free from the public records law until the investigation is concluded. The public records law under Chapter 119 presently allow citizens to obtain information from public offices in order to promote transparency. It is recognized however that certain instances exist in which the need for secrecy trumps the need for transparency. One such instance where secrecy should rule is when there is an active investigation. Presently certain law enforcement investigations are exempt from public records until an investigation is complete. This allows the investigations to be conducted without the alleged violator knowing about the investigation. We can think of numerous reasons why investigations need to remain secret, such as destruction of evidence and tampering with witnesses. However, some investigations are not exempt from the public records laws when conducted by OIG's. We find that investigations by OIG's should be exempt from public records laws in order to promote the ability to conduct an investigation without a suspect impeding the investigation.

While F.S. 20.055 states that an agency head cannot prevent investigations by an OIG, it also states the OIG must report to the agency head. In some circumstances, this has led to IG's notifying the agency heads when an investigation is being conducted. An IG and the investigators serve at the will of the agency head and thus an agency head can put up road blocks to an investigation without preventing or prohibiting an investigation. Examples were demonstrated where agency heads notified others of the investigation or applied subtle pressures to the IGO without technically preventing the investigation to be carried out, this should be prevented by allowing the IG to report investigations to the agency head after the investigation has been concluded. In addition, IGO's often conduct investigations into law enforcement officers. The law requires IG's to inform law enforcement of a pending investigation. This could lead to impediments during the investigation. We find IG's should be able to conduct investigations into law enforcement officers and maintain the discretion as to when law enforcement is notified.

In addition, under F.S. 20.055, the target of the investigation is required to receive notice of the investigations and is allowed twenty days to respond. We find this too should be discretionary until the investigation is complete. Although it may sometimes be helpful to notify the person or entity of the investigation, this should not be required until an investigation is complete.

4. **A tip line and website should be created for any Inspector General's Office so that the public or an employee knows where to complain.**
5. **Inspector General's Offices should have designated sworn law enforcement officers within their office.**
6. **Inspector General's Offices should be required to be certified by the Association of the Inspector General (AIG) to ensure they have established consistent standards and procedures for audits and investigations.**

Additional suggestions were conveyed to us regarding better execution of the IGO's oversight and investigative functions. In addition to needing the proper environment and encouragement to report fraud, waste, and abuse, employees must know where to report.

Also, the ability for IGO's to investigate is greatly improved if investigators are sworn law enforcement officers with the power to arrest. One investigator indicated to us that his office only employs sworn law enforcement. Sworn law enforcement have not only received additional training, but they have certain authority that non-sworn officers do not have such as the ability to run background checks and the ability to access law enforcement sensitive databases which may be a useful investigative tool to gather information and the potential criminal history of those inside or outside your agency doing business with the agency.

Another way OIG investigators can gain knowledge is through a certification process. The Association of Inspectors General provides a certification process which requires passing a written test. We have heard testimony that this testing is a valid, valuable process.

OIG's are a powerful and useful tool at detecting and preventing fraud, waste, and abuse. They must be created, funded, and executed in a way to ensure they achieve their maximum potential.

### **Florida's Whistle-blower's Act**

Under Florida statute, state agency inspectors general are responsible for investigating violations of Florida's Whistle-blower's Act

7. **Create a reward program similar to the federal government for any person who provides information which leads to the firing or conviction of any employee who is committing fraud or abuse related to their government employment.**
8. **Ensure the Whistle-blower's Act applies to any employee who utilizes the Act to file a complaint on any entity, business, corporation, or non-profit**

**organization which receives government funding to perform a governmental function or service.**

F.S. 112.3187 is titled the “Whistle-blower’s Act.” The stated intent of this statute is to:

“prevent agencies and independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of the law on the part of a public employee or independent contractor that create a substantial and significant danger to the public’s health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee.”

We heard testimony that the Whistle-blower’s Act is ineffective in part because people do not trust the protections afforded under the act and fear retaliation. People inside or outside of government may believe it is easier to pay a bribe to a bad actor than it is to blow the whistle. The Legislature should consider whether the incentives under the Act could be improved. Incentives could be established similar to the reward program in place at the federal level whereby a reward is given to any person who provides information which leads to the firing or conviction of any employee who is committing fraud or abuse related to government employment. We heard testimony as previously mentioned about massive fraud and abuse within the Florida Fish and Wildlife Commission. In this case, numerous employees had knowledge of and participated in the fraud and abuse. The fraud and abuse was so prevalent that it had to be common knowledge within and outside the agency. It is unsettling that it took five years for an auditor to find these fraudulent P-card submissions. This case is a clear example of the failure of the Whistle-blower’s Act to provide an incentive to report by those within an agency or outside. Rather than reporting the fraud, others approached those who were committing the fraud and requested help in bypassing the internal controls to continue the abuse.

We find that this case confirms that the Whistle-blower's Act is either unknown by the general public or lacks any real incentive for an individual to report fraud or abuse.

To improve the effectiveness of the Act, awareness and education are needed. We heard that employees may not understand the Act and how they are protected from suffering any retribution or firing. As for independent contractors who feel they must pay a bribe to get a contract, the Act must protect them from losing contracts in the future and must provide a better incentive for the contractor to report the crime rather than pay the bribe. Any efforts should be supported by tougher criminal laws. Knowing that those who commit crimes face harsh penalties should encourage reporting the crime rather than participating in it. This carrot and stick approach is the only way the Act will become more effective.

Finally, we emphasize that the public corruption laws of Florida must take into consideration private actors paid by government funds to provide a governmental function or service. One concern is the term "independent contractor" within the Act. We are not sure this language clearly applies to an employee of a private organization which is paid to perform a government function or service. We believe the Legislature should consider language in the Act to specifically apply to any entity, organization, corporation, or individual who receives government or public funds to perform a governmental service or act.

### **Independent Private Sector Inspector's General (IPSIG)**

We have reviewed material which describes the implementation of IPSIG's by the United States Department of Justice in civil and criminal settings. An IPSIG is an independent firm with expertise in legal, auditing, investigative, management, and loss prevention skills. They have been used in the private sector to ensure compliance with relevant laws and regulations and recently as monitors of "deferred prosecution agreements" by the U.S. Department of Justice in

addressing corporate fraud. Independence from interference by the government, as well as the entity being monitored, is critically important and accomplished by a strict set of ethical guidelines. The IPSIG's distinct code of ethical guidelines encompass their individual professional codes of ethics and ensures their allegiance to the public as a whole is both perception and reality.

IPSIG programs have proven effective in reducing waste, inefficiency, abuse and fraud; thus providing greater value to the corporate investors. It is reasonable to conclude that this approach would also offer the citizens of Florida great benefit in cases investigated at the state level. Therefore, we find that there are instances where this type of "independent monitor" may be an effective weapon against public sector corruption.

#### **B. Auditors and Clerks of Court**

The check and balance system established by our founders at the national level is applied in various methods at Florida's state and county level as well. The Auditor General is a state constitutional officer who has fiscal auditing duties for state government. Likewise, each county has a clerk who is responsible for the disbursement of proper expenditures. It is this constitutional check on spending that serves our counties' citizens as a fiscal watchdog.

While we see the value and importance of inspector's general, the first constitutional check on local spending comes from our state's clerks. Their efforts may be supplemented and assisted by inspector's general, sheriffs, local police and other fraud-fighting components of government, but their role is fundamental, and because of this, their liability is personal. This is an important area of government that should be more fully utilized in some areas of our state.

If we hope to slow the theft and mismanagement of government resources, audits must be conducted in a meaningful way. Over the last ten months we have learned corruption by theft

and mismanagement will not be slowed until the procedures and systems are in place to dissuade those who would choose to violate the law.

The Florida Auditor General is created in Article III of the Florida Constitution and is implemented under Chapter 11, F.S. The Auditor General is appointed by a majority vote of the Legislative Auditing Committee and is subject to confirmation both the House and the Senate. The Auditor General is to perform his or her duties independently, but under the general policies of the Legislative Auditing Committee. The Auditor General serves at the pleasure of the Legislature. An Auditor General is required to be a licensed CPA with at least ten years of experience.

The Auditor General is provided with the authority to audit any governmental entity and certain nonprofit entities. Some audits are required to be done by Florida Statutes and typically are required on an annual period of time. Audits may also be performed at the direction of the Legislative Auditing Committee or at the discretion of the Auditor General. The auditor general performs five types of audits including: financial statement audits, operational audits, information technology audits, Florida Educational Finance Program (FEFP) attestation engagements, and quality assessment reviews of state agency inspectors general.

An annual financial audit is done by the Auditor General's Office on the State of Florida, most of the district school boards, state universities, and others. Operational audits focus on an agency's legal compliance, internal controls, and reliability of records and reports. These audits are usually focused on a high risk topic area such as insurance or banking regulation. In addition, the Auditor General audits state agency inspectors general at least every three years to review the quality of audits the IGO is conducting. The Auditor publishes approximately 200 reports a year with around 1200 findings and recommendations. The vast majority of these

findings are related to deficiencies in internal controls. Internal controls are important as they ensure that information is being reported accurately, fraud and losses are being detected, and efficient and effective functions are in place. Often, problems with internal controls are computer system related.

1. **Strict criteria must be in place for the use of P-cards.**
2. **Auditors who monitor P-card usage should regularly request spot check samples of P-card detailed purchases and purchase orders so that they may perform occasional forensic audits to confirm actual purchase of goods.**

We heard testimony referred to earlier about the lack of oversight at FWC. One glaring problem at that this agency's southwest Florida location was that P-cards and purchase orders were used for personal expenses and false receipts were submitted to cover the tracks of these illicit purchases. Over the years these expenses from one facility totaled over four hundred thousand dollars on P-cards alone – approximately 50% of which were determined to be supported by fraudulent receipts. The problem was so severe that homes were illicitly furnished with thousands of dollars in new furniture, kitchens were redone, and personal items such as lingerie were all purchased using taxpayer money. Had a forensic audit been conducted earlier on, instead of a mere accounting audit to confirm that these payments matched the forged receipts, the problem could have been caught earlier and the taxpayers could have been saved from the theft that occurred.

### **C. Codes of Ethics and Ethical Standards**

***“The ultimate answer to ethical problems in government is honest people in a good ethical environment.”<sup>xliv</sup>***

John F. Kennedy

We heard and been well informed about Florida's Code of Ethics (Chapter 112, Part III), the Florida Commission on Ethics, and locally created codes of ethics and commissions on ethics. While we have outlined areas of 112 that need to be criminalized, we fully realize that there are other areas where minor transgressions or lapses do not require criminal enforcement. We do not want to make the fear of the risk of an ethical lapse in a technical area keep good people from public service. Criminal enforcement needs to be reserved for the most serious of misconduct. There are other areas, however, where a civil remedy is sufficient. However, even in that existing arena, there are some modifications we find are warranted.

**1. Increase the maximum civil penalty from \$10,000 to \$100,000.**

The maximum fines that can be imposed by the Commission on Ethics is presently set at \$10,000. We learned the Elections Commission has the ability to issue higher fines and has done so in the past. We also received testimony that the public feels the cap of \$10,000 is too small and the Legislature has considered raising the cap to \$100,000 per fine. Increasing the cap does not mean that all violators will get such a serious fine, but by increasing the cap a broader range of civil penalties can be imposed separating the minor violations from the more egregious. We find the Legislature should increase the cap to \$100,000 as it would be more of a deterrent and more justly set apart the violations based on severity. We point out that the Commission on Ethics has no enforcement authority and that it goes to the Governor to be enforced.

**2. Amend F.S. 112.3143 by replacing the language "special private gain or loss" with "any gain or loss."**

**3. Prohibit any public officer who knowingly has a conflict of interest from attempting to influence the outcome of any vote, decision, recommendation, finding, or report relating to the public officer's office.**

**4. Change voting conflict of interest standard for appointed State officials to mirror the standard for local officials.**

5. **Amend F.S. 112.3143(3)(a) to prohibit staff members of conflicted county, municipal or other local public officials from attempting to influence other members of the board or commission.**
6. **Create a “blind trust” provision under the Code of Ethics and require certain public officers to place private financial interests into a "blind trust."**

We have already discussed the need for criminalizing conflicts of interest, but we will now discuss what other changes should be made to the Code of Ethics concerning civil and administrative conflicts of interest issues.

We heard testimony that an area of great confusion surrounds the phrase “special private gain” under the Code of Ethics F.S. 112.3143 which governs voting conflicts of interest. The Commission on Ethics gets a substantial volume of complaints regarding county or city commissioners who vote after the attorney for the county or city commission told the commissioner it was proper to vote based on the attorney’s understanding of “special private gain.” Often the Commission of Ethics has later determined the attorney’s interpretation of “special private gain” was wrong. The Commission has taken the position that the commissioner or attorney should have gotten an opinion from the Commission on Ethics. All of this could be avoided, according to a witness, if the phrase was amended to “any gain.” While this is a lesser standard, it is clearer. As long as the person voting discloses the conflict and is then permitted to vote, then that person need not worry about a violation.

In addition, the Florida House and Senate have rules requiring disclosure of potential conflicts of interest and abstention from voting.<sup>xlv</sup> House and Senate rules can be stricter than the Florida statutes. Both Senate and House rules regarding conflict of interest use the term “special private gain”. Senate Rule 1.20 requires every Senator, unless excused, to be present and vote on each question in Chamber or committee. “However, a Senator *may* abstain from

voting if, in the Senator's judgment, a vote on a question would constitute a conflict of interest as defined in section 112.312(8), *Florida Statutes*." Senate Rule 1.39 requires a Senator who has a conflict of interest to disclose "any personal, private, or professional interests in a bill that would inure to that Senator's *special private gain* or special gain of any principal to whom the Senator is obligated." However, "[a] Senator is *not* disqualified from voting on a measure when, in the Senator's judgment, a conflict of interest is present." The disclosure shall be filed immediately *after* the vote and may explain the logic of voting or for deciding to disqualify him or herself from the vote. In addition, if a vote was not cast, the Senator must follow F.S. 112.3143(2). In order to be in line with the Code of Ethics, we find that the Senate and House rules will need to change "special private gain" to "any gain".

We heard that voting is permitted by the House rules when a representative's close family members or employer could make a "special private gain," but a disclosure must still be submitted. Allowing a legislator to disclose the conflict after the vote should be changed. An argument has been made that a legislator should be allowed to disclose a conflict after he or she votes because of the large volume of votes; the legislator may not realize the potential conflict on every bill before voting. However, this concern has been greatly exaggerated and legislators are able to check conflicts prior to votes and to disclose such conflicts in advance. We find the Florida Legislature should amend their own rules to require conflicts to be disclosed *prior to* any permitted vote.

We heard about numerous complaints, prosecutions, and headlines regarding public officials who continue to participate or attempt to influence an agency decision or vote even though the public official has a conflict of interest. We find the laws regarding voting conflicts of interest need to ensure there are no loopholes by which officials can try to influence an

agency's decision making process when the official has a conflict. In addition, we have heard testimony that the current law may allow a public official who has a conflict in the matter and cannot participate in the vote to then use his or her staff in an attempt to influence a vote or decision. We find this is clearly something that should be prohibited and it should be an easy fix to the voting conflict of interest law under F.S. 112.3143. We further find that the laws should prohibit a public official from attempting to influence staff about any matter in which the public official has a conflict that requires the official to abstain from voting. We likewise find this is an easy fix under F.S. 112.3143.

We also heard that appointed State officials are treated differently from elected State officials in that appointed State officials are not presently prohibited from voting on matters in which they have a conflict of interest. We find this too is an easy fix and is something the Legislature should amend under F.S. 112.3143.

We have received testimony about the need to require a "blind trust" under Florida law. A "blind trust" provision has been created in other states and the federal government in order to allow a public official to place private financial interests into such a trust. The idea is that certain public officials' ability to access potential financial conflicts of interest should be limited by setting these assets into a trust. This helps prevent an appearance of impropriety when a public official is making policy decisions that may affect his or her financial interest. The Commission on Ethics has recommended the following when establishing a "blind trust" provision:

- Require the Governor, Lieutenant Governor, and each Cabinet member to use a "blind trust;"
- The legislature as well as county and municipal governments should consider whether other public officers should be included;

- The newly created provision should provide that the public official's economic interests in the blind trust will not give rise to either a prohibited conflict of interest or a voting conflict of interest under the Code of Ethics, thereby protecting the public officer or official from unwarranted accusations;
- The official should be prohibited from exercising any control over the trust, except for general directions regarding investment goals, requests for distributions;
- Officials would be prohibited from learning about the trust's investments, except to the limited extent necessary for personal tax returns;
- The interests in a blind trust should be reported on the official's financial disclosure statements;
- Limit who can serve as a trustee; prohibit the trustee from investing trust assets in businesses which the trustee knows are regulated by or doing significant business with the official's public agency;
- Provide for full disclosure if the blind trust is terminated; and finally,
- Require that the blind trust must be approved by the Commission on Ethics.

We find that the need for a “blind trust” is evident and should not require much Legislative effort to enact such a provision. Florida needs to catch up with the numerous other states and federal government which have already enacted the idea of a “blind trust”.

We find that conflicts of interest provisions need to provide as much guidance as possible in order for a public official to understand what is required to be disclosed and when he or she needs to abstain from voting.

7. **Create a state electronic portal and program which allows all required financial and gift disclosure forms as well as all other filings with the Commission on Ethics to be filed electronically.**
8. **Require that public officials who file “Memorandum of Voting Conflict” forms 8A and 8B check *all* disclosures of the officer’s interest.**
9. **Make it a misdemeanor criminal offense for any public official who fails to file a required disclosure form within ninety (90) days after the required date of filing.**

10. **Mandate that a gift disclosure form be filed even if the person subject to disclosure has not received any gifts, thus affirmatively stating he has received no gifts.**
11. **Require the person receiving a gift under F.S. 112.3148(5)(b) be subject to the reporting requirements.**
12. **Make the gift reporting amounts based on an annual dollar figure rather than on an individual gift basis.**
13. **More clearly define "procurement employee" for purposes of the gift law under F.S. 112.3148(2)(e).**
14. **Clarify that contributions to federal campaigns are excluded from the definition of "gift" under F.S. 112.312.**
15. **Require that the financial disclosure law cover board members of local community redevelopment agencies and local government finance directors.**

In 1990, a special session was convened and a comprehensive revision was enacted regarding the state's laws on gifts and honoraria in response to a series of media articles about lavish trips and gifts legislators were receiving and not reporting. In 1999, as discussed earlier, the Public Corruption Study Commission completed its review and many of the recommendations were enacted including amendments to the gift laws. In 2005, the Legislature in another special session enacted the "expenditure ban" which prohibits State legislative and executive branch lobbyists and principals from providing certain officials and employees with expenditures (gifts) which have a lobbying purpose. We have heard that gifts were normal practice at all level of governments in the past, but the wisdom of allowing gifts is being questioned more and more as time goes on. In 2011, the Legislature should again make needed revisions to the laws on gifts and financial disclosure.

In 1999 and 2006 surveys done by The Center for Public Integrity, Florida received a "D" grade and ranked 25th among the states in disclosure laws.<sup>xlvi</sup> The ranking is based on a 43-question survey that measures public access to information on legislators' employment,

investments, personal finances, property holdings, or other activities outside the legislature. State statutes and disclosure forms were analyzed and state ethics officers were interviewed by the Center for Public Integrity.

According to witnesses, the process for filing certain forms with the Commission on Ethics, such as voting conflict and financial disclosure forms, should be improved. Forms 8(a) and 8(b) concern public officials disclosing when they have a conflict of interest in voting. We heard that this form presently has a section for disclosing the public official's conflict by checking boxes which detail the reason for the conflict. The form does not require the public official to check off all of the conflicts that may apply; therefore, the public official may fail to disclose all of the potential conflicts. We find that it is in the best interest of the public as well as the public official to require an official to check off all conflicts that apply under these forms.

In addition, we heard the process for filing forms with the Commission on Ethics would be greatly improved if submitted electronically. Electronic filing could require the filer to check all that apply and acknowledge that the filer had done so. There have been problems with filers completing the forms accurately and completely. By requiring the forms to be filed electronically, the filer would not be able to advance to the next screen unless the filer had completely filled out everything required on that screen. In one witness's independent and unofficial study of financial disclosure forms (Form 6), the forms were usually filled out incorrectly, even by judges. Often the filer fails to fill out everything required. Electronic submission would eliminate the problems of incomplete forms and ensure the intended disclosure to the public.

We received testimony there is presently a loophole of sorts with the filing of required disclosure forms. The problem is that someone who files a required disclosure and falsifies

information may be charged with an ethics violation as well as criminal charges; however, filing no paperwork at all is not a crime as it is only a civil ethics violation. This is a clear shortfall in the law. For example, if a public official or servant who is required to disclose the receiving of a gift fails to file a gift disclosure form, the official or servant cannot be criminally punished, but may face a civil ethics violation. If that same official or servant does file a false gift disclosure form, the official or servant could be charged with an ethics and a criminal violation. This is because official misconduct under the Code of Ethics is civil and there is no parallel criminal violation as there is for other ethics violations. A public official may determine it is better to not file and face civil penalties then risk disclosing a false statement which could subject the official to criminal penalties. According to testimony, a survey conducted by the *Sun-Sentinel* found that out of approximately 30,000 disclosure reports which should have been filed, only 600 were filed. It is evident that the strategy in politics is that it is better to simply not file and pay a fine if caught. We find there should be a criminal offense for failing to file a required form. If official misconduct were criminalized in accordance with our earlier recommendation, this may address this concern. We have heard a suggestion that the Legislature should give a limited time period to allow for accidental delays in the filing. We further find that any criminal violation should be a sufficient enough deterrent to encourage filing so that the citizens have the transparency that was intended in the Code of Ethics.

We were informed by a witness that the Commission on Ethics receives numerous questions about why certain individuals are required to file financial disclosure forms while other individuals are not. Two groups of individuals who are not presently covered by the financial disclosure laws are board members of local community redevelopment agencies and local

government finance directors. According to testimony we received, these groups should be required to file a financial disclosure form.

We also heard testimony about the complicated rules regarding when a gift has to be disclosed depending on the individual receiving or giving the gift and the amount of the gift. The gift laws are found under F.S. 112.3145 and 112.3148. We have heard that for reporting individuals (those required to file financial disclosures) and procurement employees, the law prohibits solicitation or acceptance of any gifts in excess of \$100 or more from lobbyist; partner, firm, or employer of lobbyist; or the principal of a lobbyist. Under F.S. 112.3148(8), the law allows a reporting individual to take gifts in excess of \$100, but requires the receiver to fill out a gift disclosure form (Form 9) if the gift is from anyone other than a “relative.” We have heard that this gift disclosure form is required to be filed quarterly. We have heard that many reporting individuals or procurement employees are not familiar with this rule and are surprised when they learn they may be required to fill out a gift disclosure form because they accepted lodging at a friend’s house over a weekend. Additionally, and more concerning, we have heard that lobbyists are not reporting under F.S.112.3148(5) which requires a lobbyist to file all gift they provided to anyone subject to the gift reporting laws if the gift was between \$25 to \$100. We have heard testimony that lobbyist not reporting gifts they provide is a big problem that needs to be addressed. We find that the Legislature should consider the testimony we received that this law is ineffective and consider how it could be enforced. Presently a violation for a lobbyist not reporting the gift is a civil violation. Tougher sanctions could be considered, but the tougher issue is catching those who violate this rule. The Legislature should require the receiver of a gift from a lobbyist to also report any gifts between \$25 to \$100. This would ensure the lobbyist would report as they would know the gift is likely to be reported by the one receiving the gift.

Another consideration is willful violators or repeated violators subject to an additional penalty of suspension from lobbying for a period of time or barred from giving any gifts. This would be a lobbyist gift debarment or suspension list.

In addition, we heard that a lobbyist in theory could give a gift of \$100 to a reporting individual every day and the reporting individual would not have to report the gift. If the lobbyist also did not report this, it may never be discovered. Even if the lobbyist did report the gift, it seems that a lobbyist giving a reporting individual \$100 a day would be playing the system. If we seek to prevent some threshold amount whereby we determine any more is buying influence, than we should consider the amount on an annual basis. We have heard testimony that other states have tougher restrictions on gift bans than Florida. Many states have an annual restriction on the amount allowed. We find the Legislature should consider limiting the amount of gifts based on an annual basis as other states have done.

We have heard that all of this is overly complicated and some administrations, like Governor Chiles, have had a policy of no gifts. We have heard those argue that gifts are always given for some reason, even if never spoken. We understand that the Legislature has a complete gift ban and we find this idea has merit in certain situations and should also be considered. However, we have heard from public officials and even board volunteers who find that a complete gift ban could be problematic. We have heard that a complete gift ban would create difficult situations such as not being allowed to accept a ride, a pen, a glass of water, or any food whatsoever, even during a long meeting a board member or commissioner may be serving as a volunteer. A complete gift ban may be taking it too far in some circumstances, but be a good idea in others. We have heard one solution is to prohibit lobbyist from any gifts over \$25. We find this may be one potential solution the Legislature should consider.

We also find the Legislature should consider whether allowing an elected official to receive a gift of more than \$100 from anyone other than a lobbyist as long as it is reported should be prohibited. We have heard other states do not allow for gifts to elected officials unless from a relative or family member, even if they are reported.

We heard the term “procurement employee” under the gift law, F.S. 112.3148(2)(e), covers a wide range of State employees that are identifiable based on their employment related activities. We have heard that there have been some questions about whether an individual qualifies as a “procurement employee.” We find that this term should be clearly defined in order to aid agencies and employees to determine who is covered under this term.

The definition of “gift” under F.S. 112.312 presently allows for “contributions or expenditures reported pursuant to chapter 106...” We have heard since this definition refers to Florida’s campaign finance laws and not the federal laws, that it has led to a complaint being filed with the Commission on Ethics that a candidate who received a campaign contribution under federal law was receiving a gift. While the complaint was dismissed, we find the Legislature should amend the definition of “gift” to clarify that contributions to federal campaigns are also not considered gifts.

Many public officials are hard working individuals who sacrifice their time and possibly financial interests to perform public service; however, this is a choice that a public official has made and as a public official, the official is representing the public and not the individual’s personal benefit. We find public officials have often forgotten why they choose to serve and instead think that they are deserving of certain benefits due to who they are as a person, rather than who they represent. We have heard testimony from a county commissioner who stated he has a no gift policy as he personally does not feel it is right. In rare circumstances where public

duty justifies, such as ribbon cuttings and honorarium, the witness stated he may make an exception. Public officials must understand that gifts are not an entitlement to office and public officials should choose a policy prohibiting all gifts.

We heard that campaign donations are not considered gifts; so while we are trying to reduce the appearance of gifts improperly influencing a public official, lobbyists and others can still contribute to a candidate's campaign and provide other services which may still influence a public official's patronage. We find gift laws are only a small step at limiting the perception that public officials are being influenced by gifts, money, or benefits bestowed upon them from those outside their office.

We received testimony about how procurement contracts could be awarded to a bidder who may then contribute to an elected official's charity of choice. We heard this is in fact common and that it has been upheld in litigation. A contractor or vendor who has been awarded a contract may be prohibited from donating directly to an official's campaign; so in order to circumvent this, a donation is made to the public official's charity. This makes public officials look desirable to boards as they have ability to raise large amounts of money. Since it is unlikely that there was ever anything stated between the contractor and the public official, proving any unlawful quid pro quo would be difficult. Rather, the problem is that there is an appearance of impropriety and this appearance needs to be addressed. We find that public officials should be careful to disclose any situation whereby they are voting on a contract and then receiving a contribution to a charity they are associated with. The onus must be for full disclosure by the public official. While we want charitable contributions, we don't want them to be made for dirty reasons. We find the Legislature should consider how to address contributions to charities by

contractors or others in which a public official has ties to and how this should be disclosed by a public official once the official becomes aware of the donation.

Florida's gift and disclosure laws are a step in the right direction; however, they should be revised from time to time as needed. We find the financial disclosure law serves an important role in informing the public about a public official's financial interest and allows the public to ensure a public official is serving the public's interest and not his or her own financial interest. We find gift laws serve the role of ensuring that the decisions made by our public officials are not being improperly influenced by outside influences. These ethical laws serve as an important and necessary reminder to public officials that they serve the public.

### **Commission on Ethics**

We heard from numerous witnesses about the Commission on Ethics. The Commission on Ethics is a non-paid and appointed body consisting of nine members. "The Commission serves as the guardian of the standards of conduct for officers and employees of the state and of a county, city, and other political subdivisions of the state."<sup>xlvi</sup> Complaints received by the Commission must be made under oath on the form prescribed by the Commission and a copy must be sent by the Commission to the respondent (accused violator) within 5 days. Unless the alleged violator requests in writing that the records and proceedings are made public, the complaints will be confidential up to the point at which either the complaint is dismissed by the Commission or the Commission finds "probable cause."

If the Commission finds a complaint insufficient to indicate a possible violation of the ethics laws, the complaint is dismissed without investigation, but with an order explaining reasoning. The Commission or the Executive Director can order an investigation of a complaint. An investigator will prepare a written report at the conclusion of the investigation and the report

will be provided to the respondent, who is given time to reply. The Commission "advocate" (prosecutor) prepares a written probable cause recommendation, which also is provided to the respondent, who can provide a written reply. A "probable cause" hearing before the Commission allows oral argument by the respondent and advocate (no evidence taken) and allows the complainant to observe. If probable cause is found, the Commission can order a hearing or allow the respondent 14 days to request a public hearing. If it is determined that there was a violation, either the respondent and advocate negotiate a stipulated settlement agreement, or the case is set for a hearing before an administrative law judge (ALJ) with the Division of Administrative Hearings (DOAH). Any recommended order made by an ALJ is reviewed by Commission for a final determination. Clear and convincing evidence standard applies to complaint proceedings. Penalties are imposed by disciplinary officials (typically the Governor), not by the Commission, which can only recommend penalties. If a legislator is found to have violated the Code of Ethics, the matter is referred to the State Senate or House to impose a penalty. According to a witness, this is because separation of powers in the Florida constitution provides that no person belonging to one branch may exercise any powers provided to another branch and the Constitution specifically stipulates that the legislative branch be the sole judge of members' qualifications, elections, and returns.<sup>xlviii</sup> The Commission's final order is subject to appeal to the District Court of Appeal.

We also heard testimony about the Commission's oversight of financial disclosure and executive branch lobbying. The Commission manages financial disclosure requirements for approximately 37,000 public officers and employees statewide. This is handled primarily through four employees and through the Commission's website. Fines for financial disclosure violations are \$25 a day for late annual filings with a cap of \$1,500. The Commission is also

responsible for managing the Executive Branch lobbyist registration and reporting system (legislative branch lobbyists are subject to the Legislature's program, which is virtually identical). To lobby in front of the executive branch for policy or procurement, a person must register prior to lobbying. Lobbying firms must report the compensation they receive from their clients on a quarterly basis. The fines for violating the executive branch lobbying registration requirements are \$50 a day for late filings with a cap of \$5,000. We heard that witnesses have suggested to the Commission that the financial disclosure and other forms be submitted electronically. Requiring forms to be submitted electronically would ensure the filer completed all of the questions before proceeding to the next screen. In addition, the form could require the filer to acknowledge that he or she read and understood the document and responses being filed. We find the benefits of electronic filing outweigh the costs and the Legislature should fund electronic filing immediately.

According to testimony we received, the Commission has received approximately 6,000 complaints and rendered about 2,500 formal binding opinions since 1975. From 1999 through February of 2010, the Commission received 2,421 complaints. During this time period, about 50% of the complaints were investigated and of those complaints, approximately 65% had no probable cause and only 35% of the time probable cause was found. Once probable cause was found, about 94% ended up with probable cause being found by the Commission. The important points to ascertain are that about half of the complaints do not even make it to an investigation stage and of those that do, the majority result in a finding of no probable cause. Most of the complaints received concern actions of public officials from medium and small counties and cities rather than actions by Legislators. Based on this information, we conclude that the procedures used by the Commission on Ethics have sufficient safeguards to protect alleged

violators from accusations which cannot be proven. In addition, the Code of Ethics F.S. 112.317(7) provides that anyone who files a complaint with malicious intent to injure, false allegations, or reckless disregard shall be liable for costs plus attorney's fees.

In 2009, the Commission consisted of 28 employees and had an appropriation of \$2,455,796, which was a cut of \$528,000 from 2007's appropriation. We find the work of the Commission on Ethics to be a vital tool to ensure the citizens of Florida have a watchdog over our government officials and employees. We are concerned that the Commission is beholden to the Legislature to appropriate their budget. The Legislature regulates its own body, so in theory, the Commission is free to do its work without concern or pressure from its sole funding source. Of course, it is conceivable that legislators may have constituents, friends, family members, or campaign contributors with matters before the Commission, which could create a potential conflict of interest when it comes to determining funding for the Commission. The Legislature should consider ways to protect the Commission and its budget so that the Commission can perform its important watchdog role independently without concern for whom it may upset.

We heard testimony concerning the Miami-Dade Commission on Ethics and Public Trust that is relevant to our concerns above. The Miami-Dade Commission on Ethics is funded by the County Commission. We heard that over the last couple of years its budget has been reduced, making it difficult for the Miami-Dade Ethics Commission to do its job. According to a witness, the Mayor (strong mayor system) directed the County Commission to cut the Miami-Dade Ethics Commission's budget and the County Commission complied. The Mayor also directed all Miami-Dade agencies to cut their budgets by 5% and accused the Ethics Commission of not making the cuts to employee salaries. The Ethics Commission took the position that they are an independent agency and can determine how to make the cuts. According to testimony, this

struggle occurred while the Miami-Dade Ethics Commission investigated the Mayor's former chief of staff and one county commissioner. According to a witness, a county commissioner noted the appearance of vindictive actions being taken against the Miami-Dade Ethics Commission. This political scenario took place even though the Miami-Dade Commission on Ethics is structured to function as an independent agency. Likewise, the Florida Commission on Ethics is structured to be a separate independent agency yet depends on another body for funding. We heard testimony that the local commissions of ethics require their funding to be approved by the voters with a ceiling.

**16. Give the Commission on Ethics limited authority to self-initiate investigations based on a super-majority vote of the Commissioners.**

We heard from experts who shared extensive knowledge about the Commission on Ethics and how it can be improved. Much debated is the idea of giving the Commission the authority to self-initiate investigations. Some public officials fear this would give too much authority to the Commission on Ethics. According to testimony, one role of the Commission is to clear public officials of invalid complaints, which happen frequently. Public officials who are acting ethically should welcome an investigation as it will clear them from public allegations which could harm their reputation. The idea of allowing the Commission on Ethics to self-initiate complaints dates back to a 1999 Public Corruption Study Commission, which recommended that the Legislature "give the Commission the authority to initiate investigations based upon receipt of sufficient evidence, as judged by an extraordinary majority of the Commission." Witnesses we heard, including attorneys who present before the Commission, support this idea. The real question is how self-initiated complaints should originate. One group has sided with the Study Commission idea requiring a super-majority of Commissioners voting to initiate an independent complaint. The other side has argued that the Chairman of the

Commission on Ethics should determine whether or not to self-initiate complaints. Some say that giving this role to the Chairman puts too much power in one person's hands like a "Star chamber." Those in favor of the Chairman having this authority told us that these concerns were overblown as the Commission and Chairman have shown they can act in a fair and nonpartisan way. In agreement with the 1999 Study Commission, we find that the Commission on Ethics should be given the authority to initiate complaints on its own. While determining how complaints are initiated is not our primary concern, we find the majority of witnesses preferred that complaints be initiated by a vote of the super-majority of the Commission.

**17. Rewrite the Code of Ethics so that it clearly applies to any persons, entities, or non-profit organizations who are receiving public funds to perform a government function or service.**

In 1977, the Commission on Ethics ruled that the Code "does not apply to a person whose relationship with a governmental entity is as an 'independent contractor,' rather than as a public officer or employee."<sup>xlix</sup> Over the years, the Commission has dismissed complaints when the relationship proved to be one of contractor rather than employee. In 2009, the SB 252, Chapter 2009-126, was enacted relating to local government and creating s. 112.3136, F.S. This new provision of the Code of Ethics applies the conduct, financial disclosure, gift, and honoraria provisions to employees, directors, and officers of private entities serving as the chief administrative officer, executive officer, or employee of a political subdivision by making them public officers and employees who are subject to penalties as prescribed under F.S. 112.317(e). Under F.S. 1.01(8), a "political subdivision" includes "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state." This makes the private contractors and employees who are working for a political

subdivision subject to certain Code of Ethics requirements. By including private employees who serve as employees of a political subdivision in the definition of a public officer and employee, F.S. 112.3136 is expanding the reach of the Code so that it encompasses entities and its officers, directors, and employees of a political subdivision, whether privately hired or not. Lobbying firms and lobbyist are however excluded. While this loophole has been in existence for years, certainly the need to apply the Code to private entities and employees who receive public funds to complete jobs has risen over time as governmental agencies have turned more and more to privatization and outsourcing. As we have discussed, this loophole also exists in criminal statutes under the term “public servant.” Clearly the definition of “public officer and employee” under the Code of Ethics should be addressed by the Legislature. While F.S. 112.3136 does attempt to reign in those private contractors and employees while employed by a political subdivision, it is limited and may not be the best approach for all of the Code of Ethics. We find the Code of Ethics should include language similar to what was done under F.S. 112.3136 or otherwise clarify that the Code of Ethics applies to all individuals and entities who are paid to perform a government function or service as discussed throughout this Report.

We are troubled by the numerous cases we heard in which an individual escapes punishment under the Code because he or she is not considered to be a public officer or employee of an agency according to the definitions in the law. While we applaud the fact the Legislature closed a loophole for political subdivision employees in 2009, more must be done to capture all entities and employees who are serving as an employee of any governmental entity or performing the functions and duties of a public officer or employee. We find that if a private entity or employee is being paid by public funds to perform a government function or service, that person should be considered a public officer or employee under the Code.

18. **Make the definitions under the Code of Ethics uniform and located in one place if possible under F.S. 112.312 rather than beginning sections with additional definitions for that particular section.**
19. **Consolidate the definitions for “public officer” under the Code of Ethics.**
20. **Remove the word “corruptly” from F.S. 112.313(6) misuse of public position.**
21. **Clarify that the Commission on Ethics has the authority to interpret any criminal section of the Code in order to impose civil penalties.**

In addressing our state laws concerning public corruption, we learned that terminology used by the Legislature determines whether or not a person is covered under the statute. As we studied Chapters 112 and 838 in detail, we learned that uniform terms are not used. Chapter 112 uses terms such as “public officer”, “employee of an agency”, or “public officer or employee.” Chapter 838 covers “public servants.” This assortment of terms makes the statutes all the more unwieldy. It is our understanding that part of this confusion is due to the terms provided for within the State Constitution, in which case those terms must be defined. One definition is used in F.S. 112.3173 in order to define the term “public officer or employee” as used in Article II, Section 8, of the Florida Constitution. Another definition for “public officer” is provided under 112.313(1) and 112.3143(1)(a). The statute is further complicated by the fact that the term “employee of an agency” is used rather than “public employee.” The Legislature needs to find a uniform definition for “public officer or employee” that can be used throughout Chapter 112, Part III, and which takes into consideration that many governmental offices and employee jobs are now in the hands of private companies who are being paid state tax dollars to perform governmental services. If one uniform definition cannot be created, then we recommend the following changes be made to present definitions in order to ensure that private officers and employees performing governmental services are included within the Code of Ethics.

- Change the definition of “public officer or employee” under F.S. 112.3173(2)(c) to include the definition of “public servant” so that it encompasses privatized individuals and institutions performing a government function. We recommend the definition read as follows:  
 “‘Public officer or employee’ means an officer or employee of any public body, political subdivision, or public instrumentality within the state, and includes anyone who is a ‘public servant’ in accordance with s. 838.014(6).”
- In order to address other sections which use the term “public officer” and “employee of an agency,” the term “government entity” which is presently used within the definition of “Agency” under F.S. 112.312(2) needs to be defined. The definition for “governmental entity” is presently defined under F.S. 11.45(1)(d); however, it should be expanded for purposes of Chapter 112, Part III to state as follows:  
 “‘Government entity’ means a state agency, a county agency, or any other entity, however styled, that independently exercises any type of state or local governmental function. This term includes any non governmental entity, private corporation, quasi-public corporation, or quasi-public entity that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a government entity to the extent that it relates to the performance of the governmental function or provision of the governmental service.”  
 “ ‘Governmental function’ or ‘governmental service’ for purposes of this chapter means performing a function or serving a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.”

We find the Legislature should develop common terminology in defining and labeling whom is covered under the statutes.

We reiterate here an earlier recommendation to remove the word “corruptly” in the violation of misuse of public office under F.S. 112.313(6).

We heard testimony that the Commission on Ethics has determined it does not have authority to construe provisions under the Code of Ethics which include criminal penalties. Specifically, we heard testimony that the Legislature should clarify F.S. 112.3217 relating to the prohibition against contingency fees which provides for criminal penalties. The Commission on

Ethics has taken the position that it does not have the authority to determine what a contingency fee contract is and that this is a matter for a state attorney's office because it involves a criminal penalty. We heard testimony that any provisions of the Code of Ethics which are criminalized in the future need to clearly allow the Commission on Ethics the authority to interpret and provide that any violation may also result in civil penalties as provided for in the Code of Ethics.

As to F.S. 112.3217, the Legislature should also consider whether this particular section should remain a criminally punishable offense rather than one subject to civil sanctions under Chapter 112, Part III. According to testimony, the Legislature should consider that this section was criminalized to address a pari-mutuel lobby which may no longer be a concern and that the Commission on Ethics can better regulate this law than can the State Attorney's Offices which lack the time and resources to prosecute these misdemeanor offenses.

We believe these recommendations will clarify and improve the Code of Ethics. The Code needs to be uniform and clear as to whom it covers. If the provisions are to be meaningful, the Commission on Ethics must have the authority and resources to use them.

**22. We recommend metropolitan counties establish a code of ethics and a commission on ethics and public trust similar to the Miami-Dade Commission on Ethics and Public Trust.**

The Code of Ethics allows for a county or municipality to create a "Commission on Ethics and Public Trust." The Code provides that local governments may impose on its own officers and employees additional or more stringent standards of conduct and disclosure requirements than what is specified in the Code (so long as the requirements do not conflict with the Code). We heard testimony on the creation and effectiveness of local commissions on ethics and find that there is a need for them particularly in larger local governments. We heard testimony that local commissions on ethics exist in Miami-Dade County, Palm Beach County,

Jacksonville, and Broward County. There are major differences in how these commissions were established and the resulting abilities and powers given to them.

We heard testimony about the establishment of the Miami-Dade Commission on Ethics and Public Trust in 1996. The Miami-Dade Commission has investigators who can look into ethical violations of the county code. The Miami-Dade Code of Ethics applies to every public servant in Miami-Dade and includes all county and municipal government employees and officials. Similar to the State Code of Ethics, the Miami-Dade Code of Ethics regulates conflicts of interest, gifts, lobbying, and non-criminal violations which can be handled before the Miami-Dade Commission on Ethics. While the Miami-Dade Code of Ethics also created criminal misdemeanor violations for certain offenses, we heard that these criminal misdemeanor violations are rarely prosecuted by the local state attorney's office because the state laws are preferred. Miami-Dade ethics commissioners are appointed with the county commissioners' approval. The County Commission also selects the Director of the Miami-Dade Commission on Ethics from names referred by a committee. The Miami-Dade Commission on Ethics was modeled on the idea that investigators and commissioners must be free from political influence and above corruption.

Following a Palm Beach Grand Jury Report, Palm Beach County established a Code of Ethics along with a Commission on Ethics which was largely based on the Miami-Dade model. We heard that not all local commissions on ethics have been established in the same manner. For example, we heard Jacksonville's commission on ethics lacks any real enforcement power and is not at all like the Miami-Dade model. According to testimony, when Broward County initiated its Commission on Ethics, many on the Broward County Commission opposed giving the ethics commission the authority needed to investigate and enforce the local code of ethics.

We find that local codes of ethics and local commissions of ethics and public trust help to ensure that local government officials and servants behave ethically; therefore, we strongly encourage other counties to enact codes of ethics and commissions on ethics similar to Miami-Dade and Palm Beach.

We find that counties with established commissions which are not presently similar to the Miami-Dade Commission should revise their structure and authority to be in line with the Miami-Dade model. Local ethics commissions should be given the authority to investigate independently by a super majority vote or based upon a sworn complaint. Violations must carry sufficient consequences to deter and punish public officials. County commissions should not try to limit the authority of a commission on ethics or inadequately fund the commission.

Local governments should ensure that their codes of ethics provide clear conflict of interest regulations. Specifically, we heard testimony that counties, municipalities, special districts, school districts, and the like need to keep the staff independent of those who are voting on matters. Commissioners or decision makers should not be allowed to sit on committees which will make recommendations to the commission or decision making body. Like the State Commission on Ethics, local ethics commissions presently have a public records exemption for a complaint or any records relating to the complaint or to any preliminary investigation. In addition, a complaint and the preliminary proceedings are exempt from public meetings requirements. During the 2010 Legislative session, a bill was introduced and passed which extends the public record and public meeting exemptions to any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than provided for by state statute.<sup>1</sup> After hearing testimony, we conclude that the exemptions are necessary and should continue to be reenacted by the Legislature. These

reenactments require legislative action every five years. This renewal requirement concerns us because it is conceivable the Legislature would decide it no longer wanted these investigations to be exempt, especially if a legislator who fears investigation or has been the object of one works against the exemptions.

#### **D. Election Laws, Campaign Financing, and the Elections Commission**

Chapters 97 through 106 are collectively known as the Florida Elections Code. Chapter 104 governs election laws and provides for criminal violations. Chapter 106 covers campaign financing, the Division of Elections, the Elections Commission and civil penalties for violations. Under F.S. 106.22 the duties of the Division of Elections includes prescribing required filing forms, preparing and publishing manuals and brochures about the requirements of the election laws, preserving filings, preparing and publishing reports, making certain audits and field investigations, and reporting to the Elections Commission the failure of any candidate to file a required report or information. The Division of Elections has power to conduct investigations and can compel records thru subpoena. The Division of Elections also provides advisory opinions to supervisors of elections, candidates, political committees, committees of continuing existence, political parties and others regarding elections laws.

#### **Election and campaign finance**

##### **1. Expand prohibition in F.S. 106.15(3) to include any “public servant.”**

F.S. 106.15(3) states that “[a] candidate may not, in the furtherance of his or her candidacy for nomination or election to public office in any election, use the services of any state, county, municipal, or district officer or employee during working hours. We have previously discussed our concerns throughout this Report that privatization and outsourcing have lead to more individuals performing functions previously performed by state government. We

are concerned that the present list of excluded individuals is not broad enough to include individuals who are not government employees, but are paid with public funds to perform a governmental function or service. We find we need to include “public servants” in accordance with our earlier definition, or that this section prohibit candidates from using the services of publicly funded individuals who perform a governmental service or function.

2. **Mandate that filing officers (Division of Elections, county supervisors of elections, and city clerks) report to the Elections Commission any potential violation of election or campaign finance laws.**

We heard from a witness with the Department of State, Division of Elections regarding the need to require filing officers to report potential election or campaign finance law violations. Certain filings are required to be filed with either the Division of Elections, county supervisor of elections, or city clerk, depending upon the office the candidate is seeking or serves. Currently, a filing officer or employee of an elections office who receives a filed document and who observes a potential violation of election or campaign laws is not required to report any such suspected violation. It is up to the receiving filing officer to determine if the matter should be investigated further and reported. We heard that filing officers may have knowledge that a candidate has improperly filed his or her campaign finance report. Typical investigations for election law and campaign finance law violations are due to candidates underreporting amounts of donations they collect or due to candidates falsifying treasury reports. If it is not reported, we must hope a citizen will find the violation and file a complaint. We find it would be in the interests of fairness and honesty that filing officers be required to report all violations that come to their attention to the Elections Commission within a prescribed period.

3. **Amend F.S. 106.15(4) so that a candidate cannot solicit or knowingly accept any political contribution in a building owned or leased by a governmental entity.**

According to F.S. 106.15(4) a candidate cannot solicit or knowingly accept any political contribution in a building owned by a governmental entity. We heard the practice of soliciting political contributions in government office buildings technically is allowed to take place if the property is leased rather than owned by a governmental entity. We heard that this apparent loophole in the law could be easily fixed by adding the word “leased” within the section.

**4. We recommend the Legislature strike the two year statute of limitations under F.S. 106.28. Amend F.S. 106.06(3) to conform with any new statute of limitations period.**

Under F.S. 775.15, the general statute of limitations for offenses provides that the prosecution for a first degree felony must commence within four years after it is committed and for all other lesser felony offense within three years. Prosecution for a first degree misdemeanor must commence within two years after the date of the offense and a second degree felony or a noncriminal offense must commence within one year. With the exception of continuing criminal offenses, a crime is committed and the statute of limitations begins to run when every element of the crime has occurred. However, there are exceptions provided for within this general rule and throughout the statutes. F.S. 775.15(12)(b) provides that “[a]ny offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, *within 2 years from the time he or she leaves public office or employment*, or during any time permitted by any other part of this section, whichever time is greater.”

Another of the exceptions to the general statute of limitations rule is found under F.S. 106.28 which states, “[a]ctions for violation of this chapter must be commenced before 2 years have elapsed from the date of the violation.” We heard testimony from law enforcement and attorneys that this statute of limitations for campaign finance violations under Chapter 106 has lead to an inability to prosecute some violations under Chapter 106. For example, we heard

about an elected mayor who appeared to have underreported his contributions which could have been a violation of F.S. 106.07(5). An investigation into the alleged activities of the mayor did not begin until four years later. Under F.S. 775.15(12)(b) the investigation could have proceeded because the mayor was in office or would not have been out of office for more than two years. However, due to the two year limitation from the date of violation imposed under F.S. 106.28, the mayor could not be prosecuted for any violation of Chapter 106.

Other sections of the Florida Elections Code do not have this statute of limitations provision. We find that the limitations period should be extended. We heard that one possible reason for the shorter limitations period under Chapter 106 is because candidates want to prepare for the next election campaign without worrying about attacks into past filings of reports under Chapter 106. We do not find this to be a sufficient reason to make an exception under Chapter 106. By deleting this limitations restriction, candidates would be subject to the same limitations period as the rest of the Elections Code as provided under F.S. 775.15(5). In addition, the requirement that candidates' records be kept by the campaign treasurer under F.S. 106.06(3) would need to be amended in conformity with any new statute of limitations period.

**5. Create a separate civil violation for a candidate or official who is a repeat late filer under F.S. 106.07.**

Florida requires candidates to file certain information such as campaign contributions on a scheduled basis. Under F.S. 106.07, someone who is late faces a civil penalty. We have heard that federal laws have a provision for candidates who repeatedly files late. We find the Legislature should create escalating fines for repeat late filers, and follow federal laws on penalties for repeated late filers.

Without a penalty for repeated late filings, the Elections Code lacks any deterrent present in the campaign finance law with respect to candidates and committees who repeatedly fail to

file financial reports within the prescribed timeframe. Currently, these violations are simply addressed by a penalty structure which imposes a standard fine for late filings. It has been observed that some candidates and/or committees routinely fail to file timely reports knowing the penalty is much lighter than the potential benefit. It is suspected that these reports are being withheld in order to deceive or otherwise confound the opposition as to the true fundraising ability of the late filer. Thus the late filer is garnering an unfair advantage.

The method for determining what constitutes a *Repeat Late Filer* should be established by the Division of Elections based on federal laws.

**6. Eliminate “3-pack” advertising under F.S. 106.021(3)(d).**

F.S. 106.021(3)(d) allows expenditures by a political party or committee to advertise jointly for three or more candidates without it being considered a contribution to any candidate. F.S. 106.08 limits campaign contributions to a candidate at \$500. A candidate wishing to run an advertisement supporting his or her campaign would be required to pay for any such advertisement. “3-pack” advertising was created for the purpose of allowing an advertisement to be paid by a political party or committee which directly supports three or more and does not require any of the candidates to count the ad as a campaign contribution. We have heard this exception to what would otherwise be prohibited is being abused. Part of the problem is the rule does not specify how much time must be allocated to each candidate within the message. We heard this has lead to advertisements which promote one candidate while two other candidates are hidden within the ads. Often these are television messages and this requirement is satisfied by including the names on the written “sponsored by” segment at the tail-end of the ad. We find

that this means of advertising is deceptive and is simply a means to skirt the contribution limits. We find the “3-pack” advertising exception should be eliminated.

7. **The Legislature should define the term “residency” to require a candidate actually live in the district at the time the candidate is running for or elected to serve any office.**

Along with the Florida Constitution, Chapters 97-106 are titled the “Florida Election Code.” Chapter 97, Part I, provides for the qualifications and registration of elected officials and candidates. Under the Florida Constitution Article III, Section 15(c), each legislator shall be “an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election.” Article IV, Section 5(b) provides that the governor, lieutenant governor, and any cabinet member “must be an elector ...who has resided in the state...” Under Article V, section 8, “No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court.” Under Article VIII, Section 1(e), county commissioners shall elect “One commissioner residing in each district...” The Florida Constitution also requires residency for homestead, public defenders, state attorneys, and State Supreme Court justices. Under Article VI, Section 2, an “elector” is considered to be in the county where registered if he or she is a citizen of the United States who is eighteen years or older and “who is a permanent resident of the state.” The Constitution provides no more specific definition for residency. Residency requirements may be prescribed for county and municipal offices in accordance with the Florida Constitution.

There is no statutory definition for residency. F.S. 97.021 provides for definitions related to the Florida Election Code. However, neither Chapter 97 nor any other statute defines the terms “resides,” “resided,” or “resident.” The Department of State is provided the authority to

handle complaints under the election code through an informal dispute resolution process. However, we were told by a witness that the Department of State does not handle residency complaints. We were also told that the Elections Commission does not handle residency complaints as they lack the specific authority to handle qualifications issues.

We heard from FDLE that they will frequently receive complaints alleging that a candidate is not qualified to run for office as the candidate does not reside in that district. FDLE has investigated these complaints for criminal violations and where appropriate, brought the case to a state attorney's office for prosecution. However, investigators have told us that prosecutors repeatedly turn down prosecutions of residency violations because there is no constitutional or statutory definition for "resident" or "residency" and case law interpretations of the term are too vague to allow for prosecution of residency violations.

We heard that cities and counties have had an easier time dealing with this issue by enacting special residency requirements that clarify what it means to live in one's district. The City of Deerfield Beach requires candidates sign an affidavit affirming they have lived in the city limits within the last twelve months. Because this affidavit is more specific than the affidavit required by state officials running for office, an individual in violation of Deerfield's ordinance was charged with filing a false affidavit or official document.

However, an elected State Representative who used another's address and paid \$200 a month rent was considered a resident under the current case law definition. We heard testimony of a candidate who moored his boat in the district to gain residency. Case law has defined the term "resident" to mean one's legal residence equates to permanent residence, domicile, or permanent abode.

We heard that defining residency for the Governor, Lieutenant Governor, Cabinet and Legislature, may present an additional problem as most of them reside in places other than where their office is in Tallahassee. In addition, constitutional officers, such as judges, whose qualifications are defined in the Florida Constitution would require a constitutional definition of “resident.” Another area for consideration is the residency requirements of those who are appointed to office. We find residency should be defined and that the Elections Commission should be given specific authority to investigate residency violations.

We recommend the Legislature provide for a grandfather clause to prevent presently seated public officials from being held in violation of the statute.

A candidate who violates the residency requirement in the future should be removed immediately from their illegally obtained seat and should be subject to civil penalties.

### **Elections Commission**

Under F.S. 106.24 the Florida Elections Commission is created within the Department of Legal Affairs, Office of the Attorney General. The Elections Commission is a separate budget entity and agency head. The Elections Commission is composed of the Governor and nine members who are appointed from both political parties and confirmed by the Senate. Commissioners serve for four year terms and the Chair is appointed by the Governor. Lobbyists are prohibited from serving on the Commission and commissioners are barred from lobbying. Commissioners can serve two terms and are paid travel and per diem only. No more than five members may be from one political party at any given time. In addition, commissioners cannot be politically active or hold or run for public office. An executive director serves at the pleasure of the Commission and employs a staff to carry out the duties of the Commission. A trust fund is established to help pay for the Commission’s activities and to pay rewards for information

leading to fraud convictions related to voting. The Commission budget is submitted to the Legislature via the Governor.

The Commission investigates all violations of Chapters 104 and 106, but “only after having received a sworn complaint or information reported to it under this subsection by the Division of Elections. Such sworn complaint must be based upon personal information or information other than hearsay”...“The commission shall investigate only those alleged violations specifically contained within the sworn complaint.” The Commission must determine whether or not there is probable cause based on the facts alleged in the sworn complaint. At this stage, the alleged violator is provided with a copy of the investigator’s report and may respond to the Commission prior to a determination of probable cause. If probable cause is found, the Commission should attempt to enter into a “consent agreement” regarding the disposition of the complaint. In addition, once probable cause is found, the Commission should consider whether to refer the matter to a state attorney’s office for criminal prosecution. A person who knowingly files a false or meritorious complaint commits a misdemeanor offense.

According to testimony the largest number of cases where complaints were found legally sufficient by the Elections Commission within past 3 years is as follows:

- 110 cases relating to violations of F.S. 106.143 (disclaimers/ads)
- 106 cases relating to violations of F.S. 106.07 (reports)
- 66 cases relating to violations of F.S. 106.19 (excessive contributions, false reports, fail to report)
- 20 cases relating to violations of F.S. 106.11 (expenditures)
- 13 cases relating to violations of F.S. 106.08 (contributions)

We recommend the Elections Commission be improved by implanting the following changes.

8. **Change the way the Elections Commission is allowed to initiate investigations under 106.25(1), by striking the sentence “[s]uch sworn complaints must be based upon personal information or information other than hearsay.”**
9. **Provide Elections Commission and staff independent authority to investigate based on a super majority vote by the Commission to be initiated.**
10. **Amend the Commission’s jurisdiction under 106.25(3) to include “willful” criminal violations and “willful and non-willful” civil violations.**
11. **Have the Elections Commission follow the Administrative Procedure Act as does the Commission on Ethics and provide the Elections Commission with final order authority rather than DOAH.**

Several witnesses with vast knowledge about the Elections Commission provided their expert opinions and knowledge about how the Commission could be improved. We see a need to change the way complaints are allowed to be filed with the Elections Commission. As discussed earlier regarding the Commission on Ethics, a sworn complaint identifies who is making the complaint and the basis for the complaint, and anyone who intentionally files a false and malicious complaint is subject to sanctions. Presently the Elections Commission cannot initiate complaints based only on a sworn complaint. We heard the Legislature did not believe all of the safeguards provided for a complaint received by the Commission on Ethics were sufficient for complaints to the Elections Commission. In 2007, the Legislature passed legislation requiring an elections complaint to be based on personal information which was not based on hearsay. While recent case law has softened the definition of “hearsay” in the context of complaints before the Elections Commission, witnesses still opine that this requirement is too strict. We understand the argument, but feel that the proper solution is to allow the Commission to start its own investigations based on a supermajority. This avenue of investigation will allow commencement of meritorious actions but still provide the safeguards of the current filing restrictions.

We also heard the Florida Elections Commission was modeled after the Federal Elections Commission (FEC). The FEC has an enforcement program. The FEC has exclusive jurisdiction over civil enforcement.<sup>li</sup> Cases are generated through complaints filed by the public, referrals from other state and federal agencies, and the FEC's own monitoring procedures.<sup>lii</sup> The FEC reviews every report filed by a political committee and if a report is determined to be incomplete or inaccurate, it can audit a committee "for cause."<sup>liii</sup> Unlike the Federal Elections Commission, the Florida Election Commission does not review every political committee filing and does not have the ability to initiate its own investigation or audit. The Florida Elections Commission is also able to initiate an investigation referred to it from the Division of Elections. Under F.S. 106.22 the Division of Elections shall report any failure to file a report or information which is required to be filed or any apparent violation. However, the Division of Elections does not review every report filed, rather this statute requires random audits and investigations be done from time to time. We have not heard whether or not the Florida Elections Commission actually receives many referrals from the Division of Elections. However, we find the Florida Elections Commission needs to have authority to conduct its own investigations if they receive information which leads them to develop "probable cause." Similar to our proposal regarding the Commission on Ethics having the ability to self-initiate investigations, we find the Elections Commission should likewise be able to self-initiate investigations after a vote by a super-majority of the Commissioners.

We also heard testimony that final order authority for the Elections Commission lies with DOAH rather than with the Elections Commission. If final order authority resided with the Elections Commission, as it does with the Commission on Ethics, then general administrative law would be followed whereby DOAH would make a recommended order, but the matter would

return to the Elections Commission for final order. This allows the parties to file written exceptions to the DOAH order for the Elections Commission to consider. We have heard that the reason the Elections Commission was stripped of its ability to issue final orders was because many were concerned about the fairness of the Elections Commission. Historically, the Elections Commission has been known to on occasion not follow a DOAH recommended order of not guilty and instead impose penalties. The party would often accept the final order by the Elections Commission rather than appeal. However, a witness testified that this period was isolated and is unlikely to return again due to the structure and fairness of the current operating Elections Commission. We find that the Legislature should consider returning the final order authority to the Elections Commission.

**12. Give the Elections Commission both the authority and the ability to investigate residency violations by candidates.**

As discussed earlier, the term “resident” is not statutorily or constitutionally defined. While one witness recommended the definition of “resident” be defined under Chapter 97, another witness explained that the Elections Commission does not have the authority to investigate qualification issues under Chapter 97. Even if the Legislature were to define residency violations, the Legislature would need to give the Elections Commission some process for determining possible violations prior to an election. A similar provision as allowed for under F.S. 104.271(2) would need to be included to allow for “expedited hearings of complaints filed under this subsection.” We find the Legislature should give the Elections Commission the authority to investigate residency violations as a qualifications issue. Also needed is a process whereby this volunteer commission which presently meets four times a year could investigate and conclude residency violations prior to an election.

**E. Convicted and Suspended Vendor Lists**

1. Create a “temporary suspended list” for any vendor who is charged or indicted for a “public entity crime.”
2. Department of Management Services (DMS) must proactively debar vendors based on state court record reviews instead of waiting or relying on self reporting.
3. A single debarment list should be maintained which encompasses all contractors who have been barred by the State or any county or city.
4. The Florida Legislature should amend F.S. 287.133(2)(a) and other subsequent subsections to give DMS more discretion in length of suspension.
5. Any vendor or person convicted of a felony or a crime of dishonesty (excluding worthless checks) should be barred from entering into any procurement contracts for 5 years from the date of conviction or 5 years from the individual’s release from a prison sentence, probation, community control, control release, conditional release, parole, or court ordered or lawfully imposed supervision or other sentence that is imposed as a result of the conviction, whichever is later.
6. Any vendor or person convicted of a crime involving theft or procurement related crime *with the State of Florida* should be barred from entering into any contracts with the State of Florida for life.

We received testimony from witnesses about denial, revocation, and suspension of vendors’ rights to transact business with public entities. Under F.S. 287.133 a “convicted vendor list” is established to be kept by Department of Management Services (DMS). A convicted vendor list provides the names and addresses of those who have been disqualified from the public purchasing and contracting process. This list is published and updated quarterly. “Upon receiving reasonable information from any source that a person has been convicted, the department shall investigate and determine whether good cause exists to place that person or an affiliate of that person on the convicted vendor list.” A person may request a hearing prior to being placed on this list and be heard by an administrative law judge.

In addition, DMS keeps a “suspended vendor list” which it publishes and updates. A vendor can be placed on a suspended vendor list if an agency notifies DMS that a vendor has failed to perform on their contract or has violated the terms of a contract. A vendor remains on the suspended vendor list until the vendor satisfies the terms of the contract and the agency request that the vendor’s name is removed. We heard from witnesses that state agencies often fail to report vendors to DMS who breach a contract because they find other ways to handle the breach. We heard some reasons for this include: long term relationships with the vendor, the vendor may have other contracts pending with the agency, or the agency decides the process for having a vendor placed on the list is too burdensome for the agency given the rights provided for the vendor. It is supposed to be a privilege and not a right to contract with the state. However, due the statute providing vendors a right to a hearing that requires an administrative law judge to weigh certain factors, we heard agencies decide not to notify DMS of a vendor who fails to perform on a contract and commits fraud under the contract.

We find that these lists have the potential to be beneficial in notifying state agencies and local agencies which also use these vendors, that a vendor should not be used; however, we heard the number of vendors on these lists is minimal as the lists are under-reported.

As for the convicted vendor list, we were told another reason this list is not being utilized is because DMS does not receive notification of the convictions from the clerks. The current system relies on vendors to self-report and this is not happening. If a vendor does not report, we heard that DMS may not ever learn of the convicted vendor. In addition, the clerks of court are not required to notify DMS when a vendor is convicted. We heard that when public officials are convicted of a specified offense, clerks of court are required to notify DMS so forfeiture of pension proceedings can begin. We find that clerks of court should be required to notify DMS of

any public entity crime conviction and then that DMS should have the responsibility to immediately check those reported convictions against any approved vendor list. Relying on self-reporting by convicted fraudsters is perhaps not the best way to safeguard taxpayer dollars.

We have also heard the idea of creating a “temporary suspended vendor list.” We have learned that a vendor may continue to be awarded contracts with the State even though the vendor has been arrested for a public entity crime. A temporary suspended list would allow DMS to place vendors who have been arrested but are not yet convicted on a list so that they cannot continue to enter contracts during the often lengthy criminal process. The vendor shall be removed from the temporary suspended list upon any charge being dismissed, nolle prosequi, or for any conviction other than one involving a public entity crime. Law enforcement and prosecuting agencies need to report arrests and prosecutions in order to ensure DMS is aware of a vendor being charged with a public entity crime.

The process under F.S. 287.133 for how DMS receives the names of vendors who have been convicted of a “public entity crime” must be rewritten to ensure that DMS receives the information of a vendor’s public entity crime conviction. The present system of self-reporting is not sufficient. Unless DMS is given the personnel and ability to police the entire vendor list (maybe within the Inspector General’s Office), the Florida Legislature needs to find another way to ensure a vendor’s conviction is reported. Therefore, we recommend that clerks of the court be required to report within thirty (30) days to DMS State Purchasing whenever a vendor is convicted of a public entity crime or DMS be given additional resources to monitor the state vendor list. This could be modeled after the requirement under F.S. 112.3173(4) whereby the clerk of a court is required to notify the Commission on Ethics who notifies the appropriate

retirement system with the assistance of DMS whenever a public officer or employee is convicted of a specified offense.

This would prevent contractors who have been debarred from one city to practice in another. In addition, counties and municipalities who presently do not have a debarment list should create one.

The Grand Jury recommends the bottom and the ceiling for how long a person or affiliate can be placed on a convicted vendor list be left up to DMS. Therefore, the more egregious violators could be permanently suspended and the minor violators or vendors who have sought to remedy the wrong could be shorter than the current three year requirement which in some cases may not be warranted.

### **III. EDUCATION, TRAINING AND CULTURE**

#### **A. Ethics**

##### **1. Require elected or appointed officials subject to the Code of Ethics to:**

- a. Undergo ethics training prior to or within sixty (60) days of holding office.**
- b. Undergo yearly updates on new legislation.**

##### **2. Recommend that local agencies designate a chief ethics officer who is responsible for ensuring the officers and employees of the agency are trained and educated. State agencies should also designate a chief ethics officer.**

We heard that the Code of Ethics does not require public officials, officers, or employees receive training. It is up to each governmental agency to address ethics training and to ensure any required training by that agency is completed. We heard from witnesses who conduct ethics training for agencies and elected officials, their work is of vital importance to elected officials and governmental employees.

We find whether training needs to be mandatory or not depends upon whether the training is for public officials, officers, or employees. Specifically, we heard that training is severely lacking in Florida for elected public officials who comprise most of the referrals to the Commission. According to testimony, public officials are more likely to get into trouble than employees because they encounter more situations where the Code of Ethics applies to them. We heard the Commission frequently is told by public officials that they did not understand the definition of a “special private gain” after a complaint has been filed against them for a voting conflict violation. This ambiguous term provides just one example of many public officials who have told the Commission they failed to understand the Code. We hope our recommendations to revise this and other vague terms and phrases in the statutes will be enacted, so training can focus on conducting government business ethically rather than studying terms and definitions in the statutes. We find training for public officials should be required under the Code of Ethics. A public official should complete this training within sixty (60) days of taking office

In the past, staff for the Commission on Ethics traveled across the state and trained hundreds of people at a time. However, due to budget cuts, the Commission on Ethics no longer travels to conduct training as it once did. We heard that the Commission on Ethics is best suited to train public officials, officers, or employees. We find that training should be done by the Commission on Ethics who will need to be adequately funded in order to provide this training. We find the idea of an education section for Commission on Ethics a good idea.

Regarding the online ethics program available, witnesses stated that when individuals take these online programs, they do not pay attention to the program and instead text, e-mail, or do other things. According to testimony, if online training is to work, it would need to be a

closed environment with a quiz at the end. An objection to the use of quizzes is that it creates yet more regulations.

While the State Commission on Ethics provides advice on the state Code of Ethics, we have heard that local officials, officers, and employees who are subject to a local code of ethics must be informed where they can seek guidance on ethical questions as it pertains to their local code of ethics. We find that local and state agencies that are subject to a local code of ethics should designate a specially trained individual to be in charge of answering any questions regarding ethics. We heard numerous examples of commissioners who rely on the advice of an attorney only to later find out they were misinformed. An ethics expert at the local level and within each local agency would help to prevent misinterpretations of applicable code of ethics. When a public official does violate an ethics law, the damage could be reduced if that person realizes or acknowledges the misdeed and quickly consults an ethics officer for guidance on immediate actions that can be taken to rectify the situation. Ethics officers could provide advice for a local public official, officer, or employee who violates an ethics law. The ethics expert would need to make public officials and employees aware of the services he or she provides. We also find that state agencies should designate a chief ethics officer to ensure officers and employees of the agency are compliant and understand the Code of Ethics, public records laws, and the open government requirements.

Some of these ideas have been implemented by the Office of the Governor. In 2007, the Governor issued Executive Order 07-01 adopting a “Code of Ethics by the Office of the Governor.” The Code of Ethics by the Office of the Governor applies to all employees within the Office of the Governor and imposes standards that often go beyond the state Code of Ethics. A “Code of Personal Responsibility” was also ordered to apply to all employees of the Office of

the Governor. In addition, each agency secretary is required to designate a chief ethics officer. Each agency secretary is also required to undergo mandatory training and then arrange similar training for employees on an annual basis. The Order also created an Office of Open Government within the Office of the Governor. This office was ordered to provide guidance to the Office of the Governor and agencies under the Office of the Governor with guidance on integrity and transparency. A public records person is to be specially designated within each agency. Finally, we will mention this Order created an Office of Citizen Services in part to address what could be done to improve citizens' ability to access government services and monitor results. We find this Executive Order provides a model example of what state, as well as local agencies should consider when addressing how ethics, training, transparency, and access can be improved within their agency.

We heard the ethical conduct of employees is largely dependent on the example set by supervisors and officers. Witness testimony regarding Florida Fish and Wildlife provides a clear example that this is accurate. We heard that supervisors engaged in practices to circumvent P-cards, bidding, and other authorized spending procedures. We even heard that while this was common knowledge within the Agency, nothing was done to stop this fraud and abuse of the system from occurring. We heard testimony that because management and supervisors were abusing the procedures of the Agency, other employees also started acting unethically. For example, we were told employees would steal items such as flat screen televisions from the office. Depending upon the position of the employee, the supervisor often took no action. Due to the unethical conduct at the supervisory level, a systemic acceptance of corruption was born.

We find training will only go so far unless management leads by example. In addition, we find employees and management must be reminded frequently about the importance of

ethical conduct. We find possible ways to accomplish ethical conduct reminders would be to post code of ethics prominently throughout the office. In addition, Florida should begin an advertising campaign to encourage ethical behavior and to report those who are acting unethically.

We find education, training, and oversight are all needed in order to ensure public officials, officers, and employees are acting responsibly and ethically.

We also heard about the educational training done by the Commission on Ethics and how the Commission uses its funding for trainings held across the state. We find educating public officials and servants on the Code of Ethics should be specifically funded by the Legislature.

According to a witness who has both served on and appeared before the Commission on Ethics, it is one of the best run and most professional government entities in the State of Florida.

We have heard that often public officials are unclear whether they have a conflict and need guidance. We have heard testimony that when in doubt, it is always better to disclose. Taking the highest ethical ground is the best way to avoid trouble. However, as public officials also have a duty to vote, they need to be able to receive guidance. In addition, public officials may be called to vote immediately or soon after a potential conflict reveals itself. Clearly, public officials need a place to turn to find answers on conflicts of interest. At the federal level, the Office of Government Ethics (OGE) has jurisdiction over noncriminal conduct by executive branch personnel and provides guidance on the federal conflict of interest statutes. The Florida Commission on Ethics appears to be the State's counterpart. We heard that public officials can call the Commission on Ethics to receive an opinion about conflicts of interest. A public official should seek advice rather than violate the law and claim ignorance.

Ethics violations are a national concern that extends beyond our State. One only has to read the paper to see headlines at the state and national levels involving public officials being accused of acting unethically. In a recent news article we read how congressional staffers who are privy to inside information have used this information to buy stocks prior to the information being released to the public. While this may look like insider trading and may be an act the public would want to prohibit, previous legislation to prohibit this action fell upon deaf ears. While the federal executive branch may be ethically prohibited from such dealings under federal laws, the U.S. Congress and aides don't have restrictions on their stock holdings and ownership interests in companies they oversee.<sup>liv</sup> Unfortunately some of our national leaders who serve the public fail to understand that they should not benefit financially from their public positions. The failure of the federal government to set higher standards does not excuse our State from taking action. Our State should be a leader when it comes to ethical accountability for our public servants and officials.

Ethics should allow a public official an independent place to stand. We have heard time and time again, ethics laws have allowed public officials to tell others they cannot perform the requested action. Ethics laws are there to not only guide the public official, they help the official point to a rule of law for why the official cannot perform certain requests they will certainly face. Conflicts of interest laws exist to protect the public and the public official from situations that inevitably will occur for all public officials. We find while well intentioned, conflict of interest laws will not prevent an intentional failure to disclose. In certain circumstances, conflicts of interest need to reach a criminal threshold. However, according to testimony, most conflicts of interest violations before the Commission on Ethics are for a lack of understanding the laws. For this reason, training on conflicts of interest is especially important.

It is our understanding that the purpose of the public record exemption is to allow an investigation to be undertaken without the violator's knowledge. If an alleged violator can request in writing that the records and proceedings be made public, then the public record exemption is useless. A citizen or alleged violator could make such a request simply to determine whether or not there is an investigation against him or her. Furthermore, the exemption allows two or more investigators to meet privately without notice, and allowing such a written request would, in fact, allow the alleged violator to be present whenever two or more investigators wanted to discuss the case. We find the public's interest to a fair and honest investigation should overcome an alleged violator's need to know about his or her investigation proceedings before they become public. Investigations conducted in public are less effective and more burdensome on the investigators.

## **B. Election and Campaign Finance**

### **Enact stronger requirements for candidates for state, county, and municipal office to receive education and training regarding election and campaign finance laws.**

This Grand Jury heard testimony from a county commissioner about the importance of education and training for candidates. According to this witness, public officials must be educated that the role of a public official is to serve the citizens and not to benefit their personal ego or wallet. According to this commissioner, politicians must be educated prior to or soon after taking office about the role of a public servant, campaign finance laws, and elections laws. We have heard from witnesses about the complicated campaign finance laws. The state has useful resources online through the Department of State. The Department of State currently trains the supervisors of elections and staff so they can train candidates. We heard one possibility for improving election and campaign finance education is by requiring online training paid for by the candidate. A candidate must acknowledge they have read and understand the

election and campaign finance laws. We have heard though that some candidates do not actually read the laws and others just do not understand them. If we want candidates to understand the laws, we must ensure they are educated on them.

We heard from a commissioner in his experience as both a public official and previously as a lobbyist he has come face-to-face with the very disturbing practices of fellow public officials. Some of these acts were done with nefarious motives, but most were simply a result of a lack of knowledge and understanding of the current regulations. Election and campaign laws constitute an intricate blanket of laws which can lead an honest and sincere public official or candidate to run afoul even with the best efforts to comply. We must promote education and training at the state, county, and municipal level.

### **C. Law Enforcement and Prosecution**

#### **Law enforcement and prosecutors should receive funding in order to pursue public corruption cases.**

Testimony was conveyed from law enforcement investigators and prosecutors regarding the difficulties of investigating and prosecuting public corruption cases. Public corruption cases need specially designated investigators and prosecutors who only handle these types of cases. We heard about Florida Department of Law Enforcement's (FDLE) Office of Executive Investigations which investigates criminal referrals from state agencies such as inspector general's offices and from citizen's complaints. In addition, we heard how FDLE recently started a public integrity section in Tampa. We also heard how some sheriff's offices and police departments have dedicated public corruption investigators. For example, the Miami-Dade Police Department (which covers the entire county) has around twenty-five investigators in its public corruption unit. In addition, the City of Miami Police Department has a small staff of

public corruption investigators. The Miami-Dade State Attorney's Office has staffed investigators in their public corruption unit which has specially designated prosecutors.

We received testimony that law enforcement is receiving more referrals involving public corruption crimes. Unfortunately, we also heard that public corruption units have been reduced in size due to reduced budgets despite the increasing referrals. One agency we heard testimony about is FDLE, whose jurisdiction is the entire state of Florida. FDLE has continually undergone budget cuts and presently has only ten investigators in the Office of Executive Investigations and even fewer in the public integrity section in Tampa. FDLE regional offices investigate public integrity at the municipal level and below while the Tallahassee office investigates officials at the county level and above. Although any agent with FDLE can investigate public corruption, we find that specially designated public corruption investigators within each regional office are preferable.

While we heard about designated public corruption units, they are not the norm at most agencies. We heard that only Miami-Dade, Broward, and West Palm Beach State Attorney's Offices have been able to afford dedicated resources for a public corruption prosecutor or unit. The fact that other state attorney's offices do not have a dedicated public corruption unit may be due to resources, political will, size of the office, or perceived size of the problem. While some state attorney's offices may designate one prosecutor to handle public corruption cases, this prosecutor often splits time with other duties.

Miami-Dade has also created a countywide Office of Inspector General with investigators who have specialized knowledge in handling corruption investigations. This office provides funding for dedicated prosecutors to handle its cases.

Specially trained investigators and prosecutors are needed to handle public corruption cases throughout Florida. Public corruption often involves a high ranking public official; with this comes media attention and pressure. In addition, these cases present difficult legal issues surrounding wiretaps, search warrants, and tracking devices. These cases need to be handled with sensitivity to prevent a public official from being unfairly investigated for another's political advantage. We heard that the FDLE Office of Executive Investigations looks for law enforcement officers with ten to fifteen years of experience who are promoted from within the agency. Miami-Dade State Attorney's public corruption unit includes prosecutors who have been screened for political conflict, have a minimum of three years of experience, and are trained in prosecuting public corruption cases. The laws concerning public corruption are often more complex, and it is important to ensure the investigators and prosecutors handling potential criminal cases have a clear understanding of what is required to prove violations of misuse of public office, elections, and campaigning and the ability to distinguish when a violation may rise to a breach of ethics.

According to an FDLE investigator, it is typical for public integrity investigations to result in a higher percentage of cases that are unfounded. While some public integrity crimes may be unfounded due to the difficulties in investigating them, a lot of the complaints come from political opponents and are not based on anything more than hearsay. We also heard that sometimes in lieu of prosecution, it is better to allow a public official to resign or be removed by the Governor as prosecutions can be lengthy and costly. We heard that it is preferable for the community to have the official removed as quickly as possible and get restitution than it is to go through a lengthy prosecution which distracts the government and delays the community from moving forward. According to statistics provided by FDLE, approximately 20% of its major

public integrity cases lead to arrests over the last decade. When FDLE has served in an assist role to another agency such as law enforcement or an administrative agency, approximately 4% of those public integrity cases led to arrests over the last decade. We find these statistics telling: many public corruption or integrity cases are resolved short of prosecution. Public officials who have not done anything wrong should not fear tougher laws and investigations. Tougher laws and more experienced investigators and prosecutors will lead to catching those who are truly corrupt. We find that law enforcement and prosecutors should have designated public corruption units, especially in larger metropolitan areas. The Legislature should provide funding for these public corruption units in order to protect the citizens and the politicians who serve them.

We also heard that reporting of public corruption by employees often does not occur because employees may not trust that anything will be done to the public servant or official. Public corruption units, according to a prosecutor, have generated trust that corruption is being taken seriously and have led to an increase in public confidence in reporting corruption. We also heard about the important role the media plays in exposing public corruption and find the media can be a useful ally in fighting public corruption.

We heard testimony about how federal public corruption laws are investigated and prosecuted. We received testimony from an Assistant United States Attorney and from other witnesses about the federal system. We were also presented with information about the United States Department of Justice Public Integrity Section Criminal Division which is responsible for the prosecution of public corruption cases. In 2009, the Public Integrity Section Criminal Division prosecuted cases involving all three branches of the federal government, federal elections crimes, and state and local governments.<sup>lv</sup> “The Public Integrity Section was created in 1976 in order to consolidate the Department’s oversight responsibilities for the prosecution of

criminal abuses of the public trust by government officials into one unit of the Criminal Division. Section attorneys prosecute selected cases involving federal, state, or local officials, and also provide advice and assistance to prosecutors and agents in the field regarding the handling of public corruption cases.”<sup>lvi</sup> In 2009, the Public Integrity Section was comprised of approximately 29 attorneys, including experts in extortion, bribery, election crimes, and criminal conflicts of interest.

Public Integrity Section cases generally are either recusals by U.S. Attorney’s Offices, sensitive cases, multi-district cases, referrals from federal agencies, or shared cases with the U.S. Attorney’s Offices. While the majority of federal corruption cases are handled by the local U.S. Attorney’s Offices, at times there may be a conflict with the U.S. Attorney’s Office due to an actual or perceived conflict of interest which could lead to allegations that the U.S. Attorney’s Office did not act fairly and impartially. For example, cases involving the judicial branch often present a conflict of interest because it is also the court in which the local U.S. Attorney’s Office has to appear. Other examples of conflicts are when the target of the investigation is a federal prosecutor, investigator, or employee who may closely work with the local U.S. Attorney’s Office. Such cases are handled by the Public Integrity Section.

The Public Integrity Section also handles the prosecutions of public corruption crimes involving sensitive information such as prosecution of a highly political case, a case with classified information, or a case requiring substantial coordination among different agencies. Multi-district cases are handled by the Public Integrity Section when the allegations cross judicial district lines and fall under the jurisdiction of two or more U.S. Attorney’s Offices. The Public Integrity Section also works closely with Offices of Inspector General (OIG) of the executive branch and frequently receives referrals of possible employee wrongdoing.

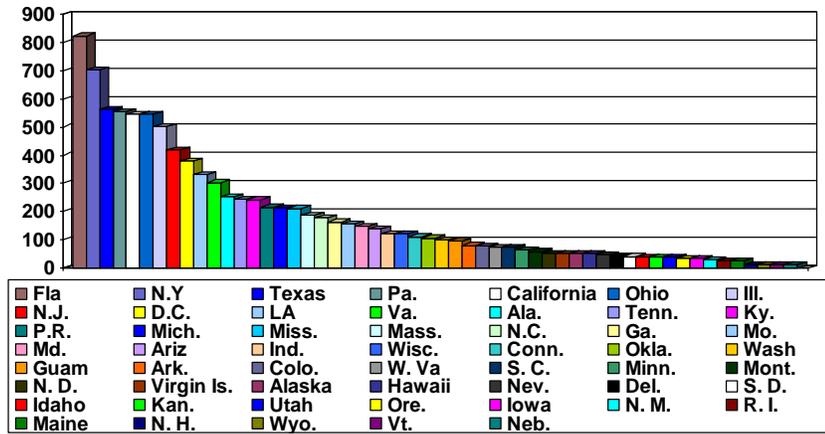
Within the Public Integrity Section is an Election Crimes Branch which oversees all of the federal election crime violations handled by the Department of Justice. Federal election crime cases can be broken down into voter fraud, campaign financing crimes, and patronage crimes. The Election Crime Branch can provide assistance to prosecutors in applying the complex elections laws. Having heard testimony from witnesses on both state and federal elections laws, the Grand Jury concludes that prosecution of election law violations often take a specialized investigator or prosecutor to handle. It appears the federal government has established a mechanism through the Election Crimes Branch to address this concern; however, we are not aware of any such agency within the state which is designed to aid investigators or prosecutors in understanding how to apply the state election or campaign finance laws. The federal government has created the District Election Officer (DEO) Program, a branch within the Public Integrity Section, which is designed to install a trained prosecutor in every U.S. Attorney's Office to handle the prosecution of election law violations. The Assistant U.S. Attorney in each office is appointed to a two year term and receives periodic training in election laws. We are unaware of any such agency in Florida which trains prosecutors on handling elections laws violations, and we have not heard of any state attorney's offices which have a designated and specially trained prosecutor who handles election laws violations. We find it would be beneficial to have specially trained prosecutors in public corruption, election laws, and campaign financing laws at a statewide level in addition to specially trained prosecutors within the state attorney's offices.

The Statewide Grand Jury has heard about the difficulties in gathering statistics on public corruption cases. For example, when a public official negotiates a plea deal to charges which do not involve an element of public corruption, that case disappears from the statistical record.

Another example is the federal indictment against a public official who was involved in a fraudulent scheme involving political fundraising and lobbying. His charges were for mail and wire fraud, aiding and abetting mail and wire fraud, and making false statements to federal agents. On their face, these charges do not reflect crimes involving political corruption, but the public official allegedly used political organizations to disguise payments for consulting services which were rendered by an intermediary. He also transferred contributions between entities and to himself or for his benefit.<sup>lvii</sup> The following statistics most likely fail to accurately capture the true numbers of corruption cases by public officials and servants, but we will provide what has been presented as a starting point for discussion.

In 2009 alone, 1,082 individuals were charged nationwide with public corruption related prosecutions by the United States Attorneys' Offices. State and local officials made up 363 of those charged. In 2009, 1,061 individuals were convicted nationwide for public corruption related prosecutions by the United States Attorneys' Offices.<sup>lviii</sup> Since 2000, Florida's three federal United States Attorney's Office districts had more public corruption convictions than any other state's combined district totals.<sup>lix</sup> According to one witness who provided us the following diagram, Florida led the nation in the number of federally convicted public officials from 1998 through 2007.<sup>lx</sup> According to this testimony, Florida leads the next closest state, New York, by over an 8% margin.<sup>lxi</sup>

## Convicted Public Officials 1998-2007



We also heard from a witness from FDLE who presented State of Florida public corruption arrests and convictions statistics since 2000 gathered by the Florida Statistical Analysis Center. These statistics were gathered from information reported to FDLE by contributing agencies and gathered in Florida’s Computer Criminal History (CCH). CCH is only as accurate as those who report to it and it only gathers information on individuals who were arrested and fingerprinted. Therefore, individuals who were served a notice to appear (typical for misdemeanor offenses), or where the case was direct filed by the state attorney’s office without an arrest, were not fingerprinted and reported. It is unknown how many more cases may have been captured if a better statewide database existed to capture this information and if all relevant agencies reported to it. This data included public corruption offenses found under Chapters 838, 839, and specific subsections of 104. The problem we were told with gathering this information is that the arrest data may have multiple charges and the convictions may not

have been accurately reported. This is in part because clerks of the court are no longer required to enter the disposition of charges into FCIC which is the main database used for gathering criminal statistics statewide.<sup>lxii</sup> Also, as stated previously, often those charged with a public corruption offense plea out to other charges which are not necessarily public corruption crimes such as theft under Chapter 812. Finally, the database allows the reporting agency the option of whether or not to provide the statute involved in an arrest; thus, approximately twenty-four percent of all entries do not include a statute number. With these limitations in mind, 692 arrest charges were made under state public corruption laws and 139 public corruption convictions occurred. Since 2000, 8,241 arrest charges were made under state public corruption laws and 1,126 public corruption convictions occurred.<sup>lxiii</sup>

In addition, we heard that rather than being charged criminally, often public officials only face administrative penalties, Chapter 112 civil violations, or violations of the Sunshine Law. The current methods for gathering accurate statistics are problematic, and we fail to comprehend why reporting information to a central database continues to be such a problem in the State of Florida. We have no firm idea of how many arrests and convictions are occurring statewide, yet it is evident to us that sufficient resources are not being dedicated for public corruption law enforcement, prosecutors, and data management.

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<sup>i</sup> *Honor, A History*, James Bowman, Encounter Books 2006. pg. 4.

<sup>ii</sup> *Id.*

<sup>iii</sup> *Id.* at 7-10.

<sup>iv</sup> *Id.* at 3-6.

<sup>v</sup> *The Ethics Challenge in Public Service*, Carol Lewis and Stuart Gilman, 2005 Jossey-Bass, pg. 6.

<sup>vi</sup> Florida Constitution, Article II, Section 3

<sup>vii</sup> *The Florida Handbook 2009-2010*, Allen Morris, page 2.

<sup>viii</sup> See US Census Bureau, [www.census.gov](http://www.census.gov), *Resident Population - July 2009*.

<sup>ix</sup> *The Florida Handbook*, pg. 3.

<sup>x</sup> *The Ethics Challenge in Public Service*, at 23.

<sup>xi</sup> *The Ethics Challenge in Public Service*, at 23

<sup>xii</sup> *The Ethics Challenge in Public Service*, at 25.

<sup>xiii</sup> *Corruption and the Global Economy*, Kimberly Ann Elliott, Editor, Institute for International Economics, 1997.

<sup>xiv</sup> *The Reader's Companion to American History*, Eric Foner and John A. Garraty, Editors, Houghton Mifflin Company, 1991, pg. 237.

<sup>xv</sup> *Report to Congress on the Activities and Operations of the Public Integrity Section for 2009*, Public Integrity Section, Criminal Division, United States Department of Justice, pg. 1.

<sup>xvi</sup> *The Reader's Companion to American History*, Eric Foner and John A. Garraty, Editors, Houghton Mifflin Company, 1991, pg. 237-240.

<sup>xvii</sup> *The Ethics Challenge in Public Service*, at 27.

<sup>xviii</sup> We have classified public corruption crimes to include, but are not limited to:

- Bribery offenses, 838.015, 838.15 and 838.16 (held unconstitutional);
- Unlawful compensation or reward for official behavior, 838.016;
- Corruption by threat against public servant, 838.021;
- Official Misconduct, 838.022;
- Bid tampering, 838.22;
- Speculation by county or municipal officers, 838.04, 838.05;
- Extortion by officers of the state, 838.11;
- Falsifying records, 838.13;
- Officer or judicial officer withholding records, 838.14, 838.15;
- Misappropriation of moneys by commissioners to make sales, 838.17;
- Officer assuming to act before qualification, 839.18;
- Failure to perform duty required by officer, 839.24;
- Misuse of confidential information, 839.26;
- Willfully refusing or neglecting to perform duties of an official, 104.051(2);
- Fraudulently or corruptly performing duties of an official, 104.051(3);
- Attempting to influence or interfere with voting elector by election employee, 104.051(4);
- Remuneration by candidate for services, support, etc., 104.071;
- Aiding, abetting, advising, or conspiring to violate elections code, 104.091;
- False or malicious charges against, or false statements about, opposing candidate, 104.271;
- Prohibited political activities of state, county, and municipal employees, 104.31;
- Violations of campaign contribution limitations, 106.08; and
- Falsifying a material fact; making false, fictitious, or fraudulent statement; or making or using false documentation within the jurisdiction of the Department of the State.

<sup>xix</sup> We also note that F.S. 907.044 directs OPPAGA to annually evaluate Florida's pre-trial release programs.

However, according to a report we received, OPPAGA had not evaluated this pre-trial release program in the twenty

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plus years it had been in existence. We also note that under Chapter 907 which deals with pre-trial release services, there are no criminal penalty provisions. This may be something the Legislature should consider.

<sup>xx</sup> We note that a few provisions include misdemeanor violations such as F.S. 112.3217 for giving or receiving contingency fees or F.S. 112.3188(2)(c)4 relating to confidential information provided to an Inspector General.

<sup>xxi</sup> State v. Castillo, 877 So.2d 690 (Fla. 2004). In this case the Florida Supreme Court stated “the evidence of the officer’s words and actions demonstrated his understanding that A.S. was violating the law when he stopped her, and his releasing A.S. without legal consequence after having sex with her demonstrates his corrupt intent in soliciting an unlawful quid pro quo.”

<sup>xxii</sup> National Conference of State Legislatures, *Ethics: Criminal Penalties for Public Corruption/Violations of State Ethics Laws* (April 2007), available at <http://www.ncsl.org/default.aspx?tabid=15319>.

<sup>xxiii</sup> United States Department of Justice, Antitrust Division, *Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-Disaster Rebuilding Projects 3*, available at [http://www.justice.gov/atr/public/guidelines/disaster\\_primer.htm](http://www.justice.gov/atr/public/guidelines/disaster_primer.htm)

<sup>xxiv</sup> *Id.* at 2.

<sup>xxv</sup> *Id.* at 3.

<sup>xxvi</sup> *Id.* at 3.

<sup>xxvii</sup> Fla. AGO 2009-49, 2009 WL 3302033 (Fla.A.G. 2009).

<sup>xxviii</sup> Roque v. State, 664 So.2d 928 (Fla. 1995).

<sup>xxix</sup> Criminal Law: 1996 Survey of Criminal Law. Mark Dobson, 21 Nova. L. Rev. 101 (Fall 1996).

<sup>xxx</sup> See Roque, 664 So.2d at 929-930.

<sup>xxxi</sup> *Id.* at 135.

<sup>xxxii</sup> We note that under grand theft statute, F.S. 812.014, the thresholds are \$300 for a third degree felony, \$20,000 for a second degree felony, and \$100,000 for a first degree felony.

<sup>xxxiii</sup> The Florida Public Corruption Study Commission, 8 (2000), available at [http://www.fdle.state.fl.us/publications/corruption\\_study/corruption\\_report.htm](http://www.fdle.state.fl.us/publications/corruption_study/corruption_report.htm)

<sup>xxxiv</sup> Skilling v. U.S., 130 S.Ct. 2896 (2010).

<sup>xxxv</sup> See *The Florida Senate Bill Analysis and Fiscal Impact Statement CS/SB 734*, April 19, 2010.

<sup>xxxvi</sup> *Our Private Legislatures*, The Center for Public Integrity, *In Your State - Florida*, Center Identifies Potential for Conflict in State Legislature (2004), available at <http://www.publicintegrity.org>

<sup>xxxvii</sup> See National Conference of State Legislatures, *Voting Recusal Provisions* (Oct. 2009), available at <http://www.ncsl.org/?TabId=15357>; National Conference of State Legislatures, *To Vote or Not to Vote: State Provisions on Conflicts of Interest and Voting* (Nov. 2009), available at <http://www.ncsl.org/default.aspx?tabid=15269>; National Conference of State Legislatures, *Conflict of Interest Definitions* (Nov. 2009), available at <http://www.ncsl.org/?tabid=19024>.

<sup>xxxviii</sup> Florida Public Study Commission, *supra* note xlv, at 8.

<sup>xxxix</sup> See National Conference of State Legislatures, *supra*, note xxxiv.

<sup>xl</sup> See National Conference of State Legislatures, *supra*, note xxxiv.

<sup>xli</sup> Other states appear to have criminalized similar provisions. See National Conference of State Legislatures, *supra*, note xxxiv.

<sup>xlii</sup> Association of Inspectors General, *Principles and Standards for Offices of Inspector’s General*, 1 (May 2004), available at <http://data.memberclicks.com/site/aig/IGStandards.pdf>.

<sup>xliii</sup> *Id.* at 3.

<sup>xliv</sup> See *The Ethics Challenge in Public Service*, at 43, citing John F. Kennedy’s message to Congress on April 27, 1961.

<sup>xlv</sup> See Florida Senate Rules 1.20 and 1.39; Florida House Rule 3.1.

<sup>xlvi</sup> 50 States Project, The Center for Public Integrity, *Our Private Legislatures Public Service, Personal Gain*, Appendix: Nationwide Financial Disclosure Rankings 102 (2000), citing The Center for Public Integrity, *Hidden Agendas: An Analysis of Conflicts of Interest in State Legislatures* (1999); See also The Center for Public Integrity, *States of Disclosure - Rankings* (2006), available at <http://www.publicintegrity.org>.

<sup>xlvii</sup> See *House of Representatives Staff Analysis CS/HB 551*, April 7, 2010.

<sup>xlviii</sup> Florida Constitution, Article II, Section 3, and Article III, Section 2.

<sup>xlix</sup> See *The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 252*, Prepared by The Professional Staff of the Ethics and Elections Commission, March 5, 2009.

<sup>1</sup> *CS/HB 551*, Approved by Governor May 27, 2010.

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<sup>li</sup> The Federal Elections Commission, Thirty Year Reoprt 12 (Sept. 2005), available at <http://www.fec.gov/info/publications/30year.pdf>

<sup>lii</sup> *Id.*

<sup>liii</sup> *Id.*

<sup>liv</sup> *Congress Staffers Gain From Trading Stocks*, Wall Street Journal, October 12, 2010, pg. 1.

<sup>lv</sup> *Report to Congress on the Activities and Operations of the Public Integrity Section for 2009*, supra. The information about the Public Integrity Section in this Report was taken from this *Report to Congress*.

<sup>lvi</sup> *Id.* at i.

<sup>lvii</sup> *Id.* at 38.

<sup>lviii</sup> *Id.* Table I at 51.

<sup>lix</sup> *Id.* Table III at 54-58.

<sup>lx</sup> We are unable to cite where this information was obtained by the witness.

<sup>lxi</sup> According to testimony, Florida ranked first with 824 convicted public officials and New York ranked second with 704. We point out that according to this testimony, Nebraska ranked last in this survey. We find this interesting in that Nebraska has a unicameral legislature, but have not received any testimony that these two things are related.

<sup>lxii</sup> We find the Legislature should address the need for reporting the disposition of criminal charges to a central database such as FCIC.

<sup>lxiii</sup> Information presented by Data prepared by the Florida Statistical Analysis Center as of July 26, 2010.