

Ethical Considerations for Special Districts

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One of the ways in which the Florida Constitution and legislature attempted to guarantee confidence in our State's government is through the creation of ethical standards for public officials. In 1968, the Florida Constitution was revised to include a code of ethics upon all state employees and non-judicial officers. Those revisions provided that a conflict between public duty and private interests would be prohibited under Florida law. In 1976, an additional constitutional amendment resulted in the adoption of the "Sunshine Amendment". The Sunshine Amendment imposed standards of ethical conduct and created disclosure requirements upon public officers and employees. The Amendment also created an independent commission that investigates complaints relating to breaches of public trust by public officers and employees. The independent commission became the Florida Commission on Ethics.

Florida's ethics laws for public officers and employees are found in Article II, Section 8 of the Florida Constitution and Chapter 112 of the Florida Statutes. Part III of Chapter 112, known as the "Code of Ethics for Public Officers and Employees", was enacted to promote public interest, maintain people's respect for government, and ensure that public officials serve the public interest. One of the fundamental principles of the Code is that public officials shall not use their office for private gain.

The Code of Ethics applies to all "agencies" which includes any State, regional, county, local, or municipal government entity of the State; any department, division, bureau, commission, authority, or political subdivision of the State; or any public school, community college, or State University" to Florida's ethics laws. *See*, Fla. Stat. § 112.312(2). The Code applies to special districts.

The Code of Ethics applies generally **to all public officers and employees at the State, regional, and local levels, including members of an advisory body**. In 2009, the Legislature expanded the applicability of these laws to also include the officers, directors, chief executive officers of a corporation, partnership, or other business entity, and any employee of those entities, that is serving as the chief administrative or executive officer or employee of a political subdivision. *See*, Fla. Stat. § 112.3136. Special district officers and employees are bound by the Code of Ethics.

The Florida Commission on Ethics is responsible for investigating and issuing public reports on complaints of breaches of the public trust by public officers and employees. The Commission is created by Florida Statutes §§ 112.320 and 112.321 which authorizes it to investigate complaints alleging breaches of the public trust by public officers and employees. The Commission meets approximately eight times a year in

Tallahassee and is composed of nine members. Five members are appointed by the Governor, two members are appointed by the Speaker of the House, and two members are appointed by the President of the Senate. No members of the Commission are allowed to hold public employment. All Commission members serve two year terms and may not serve more than two successive terms.

Generally, Florida's Code of Ethics falls into two broad categories: 1) those prohibiting certain actions or conduct by public officers and employees, and 2) those that require that certain disclosures be made to the public by public officers and employees. The following shall serve as a description of the prohibited acts and disclosure requirements under the Ethics Code.

I. PROHIBITED ACTIONS OR CONDUCTS BY PUBLIC EMPLOYEES AND OFFICERS

Unless otherwise noted, each of the following prohibitions applies to special district officials and employees.

a. Solicitation and/or Acceptance of Gifts (Fla. Stat. § 112.313(2)).

Public officers, employees, local government attorneys, and candidates are prohibited from soliciting or accepting anything of value in exchange for an understanding that their vote, official action, or judgment will be influenced by the gift. *See*, Fla. Stat. § 112.313(2). The definition of "gift" in the Code is expansive. "Gifts" include real property; the use of real property; personal property and its use; a preferential rate on a debt, loan, good or service; forgiveness of an indebtedness; transportation other than that provided in relation to officially approved governmental business, lodging, or parking; food or beverage; membership dues; entrance or admission fees; plants, flowers, or floral arrangements; personal services and any service having an attributable value. *See*, Fla. Stat. § 112.312(12)(a). Gifts for votes or for a "quid pro quo" under the Code are prohibited.

b. Unauthorized Compensation (Fla. Stat. § 112.313(4)).

Public officers, employees, local government attorneys, and their respective spouses and minor children are prohibited from accepting any compensation, payment, or things of value when they know, or should know, that the gift is given for the purpose of influencing a vote or other official action. *See*, Fla. Stat. § 112.313(4). The 2009 enactment of Florida Statutes § 112.3136, makes this restriction also applicable to privatized chief administrative officers of political subdivisions. *See*, Fla. Stat. § 112.3136.

c. Misuse of the Official Position (Fla. Stat. § 112.313(6)).

Public officers, employees, and local government attorneys are prohibited from “corruptly” using or attempting to use their official position, property or resource within trust, to obtain a special privilege for themselves or others. “Corruptly” is an act or omission done with wrongful intent for purpose of obtaining an improper benefit inconsistent with public duties. *See*, Fla. Stat. § 112.312(9). In order to have acted “corruptly”, a public official or employee must have acted with reasonable notice that the conduct was inconsistent with the proper performance of his or her public duties and that the action would be a violation of the Code of Ethics. *See*, Blackburn v. Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991). Sexual harassment has been considered “misuse of public position” because it was determined that the person engaging in the harassment was benefiting himself. *See*, Bruner v. Commission on Ethics, 384 So. 2d 1339 (Fla. 1st DCA 1980).

Example: Use of a public agency’s business card by an elected official for private purposes (such as promoting themselves for personal profit or gain) is a misuse of position; however, incidental private benefit flowing to the elected official from use of the business card to identify himself or herself while performing official duties or attending government related functions would not violate the statute. *See*, CEO 02-13.

d. Disclosure or Use of Information (Fla. Stat. § 112.313(8)).

Public officers, employees, and local government attorneys are prohibited from disclosing or using information that is not available to members of the general public and that was obtained as a result of their official position for personal gain or benefit, or for the benefit of others. *See*, Fla. Stat. § 112.313(8). This prohibition also now applies to privatized chief administrative officers of political subdivisions. *See*, Fla. Stat. § 112.3136.

e. Nepotism (Fla. Stat. § 112.3135(2)).

Public officials within special districts are generally prohibited from appointing, promoting, or advancing “relatives” within the agency. *See*, Fla. Stat. § 112.3135(2)(a). “Relatives” include an individual related to a public officer as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister. *See*, Fla. Stat. § 112.3135(1)(d). Supervising or assigning work to a relative is not addressed or prohibited under the statute. *See*, CEO 2000-17. This statute does not prohibit two relatives from

being employed by the same agency. Additionally, this statute does not apply to relatives serving in a volunteer capacity that provide emergency medical, fire fighting or police services. Volunteers can seek reimbursement for costs or training, and payment for incidental expenses. *See*, Fla. Stat. § 112.3135(2)(a).

f. Conducting Business with the Special District (Fla. Stat. § 112.313(3)).

Public officials and employees acting in their official capacity or public officials and employees acting as a purchasing agent are prohibited from doing business with their own agency. *See*, Fla. Stat. § 112.313(3). “Doing business” under the statute occurs when the parties have entered into a lease, contract, or other type of arrangement and one party would have a cause of action against the other in the event of a breach or default. *See*, CEO 07-11. A public officer, employee or purchasing agent cannot directly or indirectly purchase, rent, or lease any realty, goods or services from a business entity in which the officer, employer, spouse, or child has a material interest. *See*, Fla. Stat. § 112.313(3). A “material interest” is defined as the direct or indirect ownership of more than 5% of the total assets or capital stock of a business entity. *See*, Fla. Stat. § 112.312(15). The prohibition includes acting as an “agent” for the purchase, rental, or lease of any realty, goods, or services for the agency from a business entity in which the employee or public officer, or their spouse, or their child has a material interest. *See*, Fla. Stat. § 112.313(3). Special taxing districts are not exempt from this provision. The statute does allow for certain limited exemptions including a “grandfathering” provision for existing contracts that were entered into prior to elective or appointive office, or beginning employment. *See*, Fla. Stat. § 112.313(3). The statute also provides special districts with a limited exemption when the official’s business or official’s relative’s business are awarded the contract through a sealed, competitive bidding process. *See*, Fla. Stat. 112.313(12)(b). However, if a sealed bidding process is utilized by the special district, prior to or at the time of submission of the bids, the official is obligated to file a written disclosure form (Form 3A) and is prohibited from participating in the selection process. *See*, Fla. Stat. 112.313(12)(b).

g. Conflicting Employment and Contractual Relationships (Fla. Stat. § 112.313(7)).

Generally, public officers and employees are prohibited from holding any employment or contract with any business entity or agency, regulated by or doing business with his/her public agency. “Employment” has been defined to require that a public officer or employee be compensated or receive some consideration. *See*, CEO 80-29. Additionally, public officers or employees are prohibited from holding any employment or having a contractual relationship which poses a frequently recurring conflict between private interest and public

duties or impedes full and faithful discharge of public duties. *See*, Fla. Stat. § 112.313(7). Special taxing districts created for the purpose of financing, constructing, and maintaining improvements within the district, and water control districts, have been partially exempted from this provision as long as the conflict does not frustrate the “intent” of the provision. *See*, Fla. Stat. § 112.313(7)(a)(1).

h. Employees Holding Office (Fla. Stat. § 112.313(10)).

Public employees are prohibited from being a member of the governing body that serves as his/her employer. *See*, Fla. Stat. § 112.313(10). However, this prohibition does not prevent public employees from holding office within a different political subdivision. *See*, CEO 02-4.

i. Board Membership on a Professional and/or Occupational Licensing Board. Fla. Stat. § 112.313(11).

Officers, directors or administrators with state, county or regional professional or occupational organization or associations are prohibited from serving as a member of a state examining or licensing board for the profession or occupation. *See*, Fla. Stat. § 112.313(11).

j. Local Government Attorneys (Fla. Stat. § 112.313(16)).

Local government attorneys that routinely represent special districts are prohibited from representing individuals and/or entities before the same special district that they represent. *See*, Fla. Stat. § 112.313(16). The prohibition on representation of individuals and/or entities before the special district extends to attorneys within the same law firm. *See*, Fla. Stat. § 112.313(16).

k. Voting Conflicts (Fla. Stat. § 112.3143).

Special district public officials are prohibited from voting or participating in any matter which would benefit their private interests. *See*, Fla. Stat. § 112.3143(2). They are prohibited from voting on any measure that would:

- i. inure to his/her special private gain or loss;
- ii. which the officer knows would inure to the special private gain or loss of a principal by whom he/she is retained;
- iii. which would inure to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which he/she is employed; or

- iv. which would inure to the special private gain or loss of a relative, or of a business associate of the public officer. *See*, Fla. Stat. § 112.3143.

In the event one of the above listed conflicts occur, the public official holding an elective position must: publicly announce before the vote is taken the nature of his/her interest in the matter, abstain from voting on the matter, and then file a Memorandum of Voting Conflict form after the vote. *See*, Fla. Stat. § 112.3143. Alternatively, if a conflict becomes known after the vote has been cast, the public official must: orally announce the conflict at the next meeting after the conflict is discovered and file the written Memorandum of Voting Conflict form within fifteen days of the oral disclosure. *See*, Fla. Stat. § 112.3143(4)(b). The Memorandum of Voting Conflict form is available on the Florida Commission on Ethics website at www.ethics.state.fl.us. *See*, Fla. Stat. § 112.3143.

II. DISCLOSURE REQUIREMENTS

a. Filing of Financial Disclosures (Fla. Stat. § 112.3145)

In order to avoid conflicts that may occur when circumstances require public officials to make decisions affecting their own personal financial interests, certain public officers and employees and candidates for public office are required to publicly disclose their financial interests. Not all public officials and candidates are required to file the same disclosure forms. Accordingly, special district officials and candidates running for positions in special district need to be mindful of which forms they are responsible for submitting and the appropriate location for filing such forms. All financial disclosure forms are available on the Florida Commission on Ethics website at: <http://www.ethics.state.fl.us/> .

Elected and appointed special district officials are included in the definition of “local officers” that are obligated under Florida Statutes § 112.3145(1) to file a Statement of Financial Interest form (Form 1) with either the Commission on Ethics or the Supervisor of Elections. Chief administrative officers of political subdivisions (including privatized chief administrative officers under Fla. Stat. § 112.3136), fire chiefs, and purchasing agents with authority to make purchases exceeding \$15,000 for a political subdivision are also required to file this financial disclosure form. This form requires disclosure of primary and secondary sources of income, real and intangible personal property, liabilities and interests in specified businesses. A separate financial disclosure form is required to be executed and submitted to the Commission on Ethics within sixty days after leaving office or employment.

All gifts received by special district officials which the official believes to be in excess of \$100 must be disclosed by submitting a Quarterly Gift Disclosure form

(Form 9) to the Florida Commission on Ethics. The Quarterly Gift Disclosure form should be filed on the last date of any calendar quarter following the calendar quarter in which the gift was received. The definition of “gift” under the Ethics Code is comprehensive and should be referred to if in doubt of its applicability. *See*, Fla. Stat. § 112.312(12)(a). Special district officials also are obligated to complete a separate form (Form 10) relating to any gifts valued over \$100 that they receive from the special district in which they are an officer or other government agencies, from direct-support organizations, or for payments or gifts they receive in exchange for appearances at events or as a honorarium. *See*, Fla. Stat. §§ 112.3148, 112.3149. If no gifts valued over \$100 were received during the year, then no gift disclosure forms need to be submitted to the Commission on Ethics.

b. Disclosure Submissions to Ethics Commission are Public Records

It is important for special district elected officials and officers appreciate that once the disclosure forms are submitted to the Supervisor of Elections or Commission on Ethics, the forms are a public record of the special districts and are subject to Chapter 119, Florida Statutes. Special district officials should provide a copy of their submitted disclosure forms to the special district’s records custodian as a matter of course to avoid any unnecessary violations of the Sunshine Law. A special district cannot refuse to allow access to the financial disclosure forms on the basis that the records are also maintained by the Supervisor of Elections or Commission on Ethics. *See*, AGO 86-69; *Wallace v. Guzman*, 687 So. 1351 (Fla. 3d DCA 1997); *Warden v. Bennett*, 340 So. 2d 977, 979 (Fla. 2d DCA 1976). For example, if a public records request is received by a special district requesting disclosure forms submitted by special district officials, the special district is obligated under Chapter 119, Florida Statutes, to produce this documentation. If an action is initiated against a special district to enforce a district’s obligation to permit the inspection or copying of a record under Chapter 119, Florida Statutes, and the district’s withholding of the record is deemed “unlawful,” the special district may be forced to pay the requesting party’s costs and attorneys fees for enforcement of the public records law. *See*, Fla. Stat. § 119.12.

c. Conflict of Interest Disclosure

As mentioned above, if an officer of the special district is aware or becomes aware of a conflict of interest that he/she will be taking on a matter, a Memorandum of Voting Conflict must be submitted to the person in the special district responsible for recording the minutes of all public meetings. If the conflict is known to the office before a vote is taken, the officer is required to publicly announce before the vote the nature of his/her interest in the matter,

must abstain from voting and must submit a Memorandum of Voting Conflict form after the vote. *See*, Fla. Stat. § 112.3143. A copy of the memorandum should be submitted to the person responsible for recording the minutes of the meeting for incorporation into the minutes of the meeting. The form does not need to be submitted to the Florida Commission on Ethics. Alternatively, if the conflict becomes known after a vote was cast, the officer must disclose the conflict orally at the next meeting after the conflict is discovered and file a written memorandum within fifteen days of the oral disclosure. *See*, Fla. Stat. § 112.3143(4)(b). The Memorandum of Voting Conflict form can be found on the Florida Commission on Ethics' website at www.ethics.state.fl.us.

III. CONSEQUENCES OF VIOLATION

a. Ethics Complaints

Public officers and employees, including those of special districts, may be the subject of an ethics complaint for violations of the Chapter 112, Florida Statutes and Section 8, Article II of the Florida Constitution. The Commission on Ethics is charged with receiving, investigating, and conducting hearings on violations set forth in complaints. *See*, Fla. Stat. § 112.322. An ethics complaint can be brought against any elected official by an individual who submits a sworn complaint. It cannot be brought by an association or group. The filing of an Ethics Complaint is governed by Fla. Stat. §§ 112.322, 112.3231, 112.324 and Rule 28-106.104, Florida Administrative Code ("F.A.C."). Complaints alleging ethics code violations must be brought against public officials within 5 years of the alleged violation or breach of the public trust. *See*, Fla. Stat. 112.3231(1).

The filing of an ethics complaint subjects the public official to an administrative review by the Ethics Commission. The process for the Ethic Commissions' review, investigation and hearings on the complaints is governed by Fla. Stat. § 112.322 and Rule 34-15.001, *et seq*, F.A.C. If a complaint is deemed legally sufficient by the Ethics Commission then, a preliminary investigation will be undertaken by the investigative staff of the Commission. If the Commission staff finds there is probable cause for the complaint, then the complaint becomes a public record and the Commission decides whether the law was actually violated and, if so, whether a penalty should be recommended. The accused public official can request a public hearing, where evidence is presented. Public hearings may be conducted by the full Ethics Commission, by a single Commission member, or by the Division of Administrative Hearings. *See*, Rule 34-15.010, F.A.C. At the completion of the public hearing, the presiding hearing officer issues a recommended order to the Ethics Commission. *See*, Rule 34-15.024, F.A.C. The Chair of the Ethics Commission considers the recommended order and is limited to evidence presented at the public hearing before entering a

final order. *See*, Rule 34-15.025, F.A.C. The Commission's final order is then made available to all the parties involved in the proceeding and the public. In any proceeding in which the Commission finds a violation of Chapter 112, Florida Statutes or section 8, Article II of the Florida Constitution and recommends a civil penalty or restitution penalty, the Attorney General is obligated to bring a civil action against that individual to recover such penalty. *See*, Fla. Stat. § 112.317(2).

There is a limited exemption from Florida's public records laws (Florida Statutes § 119.07 and s. 24(a), Art. I, of the Florida Constitution) for ethics complaints and investigation records maintained by the Ethics Commission. *See*, Fla. Stat. § 112.324(2)(a). The limited exemption from the public records laws applies until the complaint is dismissed for insufficiency, until the accused violator requests that the records be made public, or until the Commission on Ethics determines whether probable cause exists to believe that a violation occurred. *See*, Fla. Stat. § 112.324(2)(a).

b. Penalties

There are no criminal penalties for violations of the Code of Ethics. Nevertheless, civil penalties can be imposed and may include impeachment, removal or suspension from office or employment, public censure, reprimand, demotion, reduction in salary level, forfeiture of up to one third of the official's salary for twelve months, restitution of any financial benefit received, or a civil penalty up to \$10,000. *See*, Fla. Stat. § 112.317(1)(a).

Additionally, felonies and other specified offenses can subject public officers and employees to forfeiture of all rights and benefits under the retirement system to which they belong if they are convicted of the offenses prior to their retirement. *See*, Fla. Stat. § 112.3173(3). Offenses that can subject a public officer or employee to this extreme penalty include embezzlement or theft of public funds; bribery; felonies specified in Chapter 838, Florida Statutes; impeachable offenses; and felonies committed with the intent to defraud the public or their public agency. *See*, Fla. Stat. § 112.3173.

IV. AVOIDING CODE OF ETHICS VIOLATIONS

a. Online Training

The Florida Commission on Ethics provides an online workshop covering the Code of Ethics, Sunshine Law, and Public Records Act, that is available free of charge to all elected officials and to those appointed to hold elective office.

Information regarding these online workshops can be obtained from the Ethic Commission's website at: www.ethics.state.fl.us.

Additionally, the Commission on Ethics also has available for purchase a "Guide Booklet" that compiles the Sunshine Amendment and Code of Ethics for Public Officers and Employees into one hand-held manual. Order forms for these "Guide Booklets" are also available on the Ethic Commission's website.

b. Advisory Opinions

Any public officer, candidate, or public employee in Florida who is in doubt about the applicability of the standards of conduct or disclosure laws to himself or herself may request an advisory opinion from the Commission on Ethics. *See*, Fla. Stat. § 112.322(3)(a). The opinions from the Commission are binding upon the party seeking the opinion. *See*, Fla. Stat. § 112.322(3)(b). To the extent advisory opinions are sought from the Commission, public officers and employees can request the Commission withhold disclosure of their name.

c. Recent Advisory Opinions of Interest

The Commission on Ethics has published only a few opinions from 2009 to the present relating specifically to special district officials or employees. The majority of the opinions from the Commission on Ethics were issued to other local governments and agency officials. These opinions should be reviewed as guidance on what the Commission on Ethics considers a "conflict". It should be noted that each opinion is fact specific.

RELEVANT COMMISSION ON ETHICS ADVISORY OPINIONS

June 2009-May 2010

• CEO 09-11 -Post Employment Restrictions (June 17, 2009)

An employee of a state agency (the Department of Children and Families) requested an opinion regarding whether there would be a violation of Sections 112.3185(3) or (4), Florida Statutes, if she accepted employment as Chief Financial Officer ("CFO") of an entity that contracted with the state agency she was employed by. The Commission advised that neither Section 112.3185(3) nor 112.3185(4), Florida Statutes, prohibits a former agency employee from going to work for an entity that has contracted with his or her agency. The Commission advised that the statutes prohibit employment only if it is 'in connection with' the contract. Based upon the facts provided, they found that the position of CFO will entail more responsibilities than the contract between the agency and her new employer, such that it was found that her employment would not be "in connection with" the contract. Additionally, the Commission noted that Section

112.313(9)(a)4, Florida Statutes, prohibits a former agency employee from representing another person or entity for compensation "before the agency with which he or she was employed" for a period of two years following the vacating of her position, and stated that the employee would be prohibited for two years from personally representing another person or entity for compensation before the agency.

- **CEO 09-15 - Anti-Nepotism (July 29, 2009)**

The Ethics Commission was asked to opine on whether a newly-elected City Commission could affirmatively act to nominate for reappointment a relative who was already serving without compensation on a board or committee of the City. The Ethics Commission found that an uncompensated member of an advisory board nominated for appointment by a non-related City Commission member could continue to serve after his or her relative was elected to the Commission, provided that neither the newly elected Commission member nor the Commission took any affirmative action to reappoint the advisory board member or advocate for his or her reappointment. Section 112.3135, Florida Statutes prohibited that City Commission member and the collegial body from appointing a relative of one of its members to an advisory board, even if the nomination for appointment was not made by the related City Commission member.

- **CEO 09-16 - Post-Office Holding (September 16, 2009)**

A former County Commissioner who was also an attorney was appointed by the Governor to fill a vacancy on the County Commission. Following the expiration of the term, the appointed County Commissioner decided not to run for the seat but wanted to represent clients before the Commission. The appointed former Commission member asked the Commission on Ethics whether he was subject to the two year post-office holding representation restriction set forth in Section 112.313(14), Florida Statutes. The Commission determined that the two year post office did not apply to him as the restriction on representation only applies to elected, not appointed positions.

- **CEO 09-20 - Conflict of Interest/Voting Conflict (December 9, 2009)**

A candidate for a seat on a County Commission who was employed by a private engineering firm inquired into whether his candidacy for the Commission would create a prohibited conflict if his employer (the engineering firm) entered into a contract with the County. The Commission stated that if his employer (engineering firm) was awarded a contract by the County while he was running for office there would not be a violation of the Section 112.313(7)(a), Florida Statutes, because the restriction on conflicting employment and contractual relationships only apply to "public officers," "public employees," and certain "local government attorneys." Further, the Ethics Commission stated that if the

candidate won the election and took office, Section 112.316, Florida Statutes, would operate to "grandfather" certain pre-existing agreements between his employer and the County. However, should certain renewals or extensions of the pre-existing agreements occur after the candidate takes office, or should new contracts between his employer and the County be entered into after he takes office, a prohibited conflict will be created, absent applicability of an exemption. The voting conflicts law of Section 112.3143(3)(a), Florida Statutes, would be applicable to the candidate, should he win and take office, regarding votes/measures of the County Commission, that affected his employer and its clients.

- **CEO 09-21 – Gift Acceptance and Disclosure (December 9, 2009)**

A County Commission member's son-in-law suffered a stroke at a very young age and had significant medical bills associated with his illness. The County Commissioner's daughter and friends wanted to establish a fund to collect donations to pay for the son-in-law's medical expenses. The County Commission inquired of the Ethics Commission whether the establishment of this fund would be considered an inappropriate solicitation of gifts on behalf of a relative if the County Commissioner did not participate in any way in the fundraising efforts. The Ethics Commission stated the County Commissioner was prohibited under Section 112.3148(3), Florida Statutes, from soliciting contributions from a political committee or committee of continuous existence, or a lobbyist, their partner, firm, employer, or principal. However, based on the facts provided, the County Commissioner stated she was in no way involved in the fundraising effort so the Ethics Commission found this section inapplicable. The Ethics Commission also determined that the donations to the son-in-law's fundraising efforts would also not be considered unauthorized compensation for the Commissioner and her family members under Section 112.313(4), Florida Statutes, because of the County Commissioner's lack of personal involvement in the fundraising effort.

- **CEO 10-1 - Privatized Chief Administrative/Executive Officers of Political Subdivisions (March 3, 2010)**

The Ethics Commission was asked by a private for-profit corporation that manages over eighty five community development districts (CDDs) to provide an opinion on the scope and applicability of Section 112.3135, Florida Statutes, to the corporation and its personnel. Specifically, the corporation wanted to know which corporate personnel were subject to the requirements, including financial disclosure filing requirements, set forth in Section 112.3136, Florida Statutes. The Ethics Commission found that the corporation served as chief administrative or executive officer or employee for various districts. The Ethics Commission then stated that the statute encompassed two classes of persons: (1)the officers,

directors, and chief executive officer of the corporation and (2) the corporation employees who act as the chief administrative or executive officer or employee of given district(s) service as chief administrative or executive officer or employee of a political subdivision. Under the facts presented, the Ethics Commission determined that the following officers, directors, and employees of the corporation were subject to Section 112.3136, Florida Statutes: (1) its CEO/President, its CFO/Secretary, its Vice Presidents, and its Treasurer/Assistant Secretary, because they are officers of the corporation; (2) the corporation's directors, because they were directors of the corporation; and (3) the corporation's employees (district managers) who acted as chief administrative officers for the district(s). The Ethics Commission concluded the opinion stating that the purpose of enacting Section 112.3136, Florida Statutes, was to close an "ethics loophole" previously available to persons of a particular business entity providing management (chief administrative or executive officer or employee) services to a local government entity.

- **CEO 10-3 - Conflict of Interest/Doing Business With Own Agency/Voting Conflict (March 3, 2010).**

The Ethics Commission was asked by a School Board candidate whether there was a prohibited conflict of interest because the candidate's husband owned a material interest in an insurance agency that provided insurance related products and benefits to the school district. The contract between the candidate's husband's agency and the School Board was entered into in 2007 for a three year term, and could be extended by the School District for three additional one-year periods. The Ethics Commission found that the candidate would not be in violation of Section 112.313(3), Florida Statutes, and that a prohibited conflict of interest did not exist with regard to the school board's contract with the husband's insurance agency because the contract was executed prior to her qualification for elective office and would be "grandfathered-in". The Ethics Commission also stated that a prohibited conflict of interest would not be created were the contract to be renewed for three additional one year terms, as long as the provisions in the renewed contract remained the same as those of the original. The Ethics Commission cautioned that the candidate would be required to abstain from voting to renew the contract pursuant to Section 112.3143(3), Florida Statutes, as it would inure to the special private gain or loss of her husband.

- **CEO 10-5 - Conflict of Interest/Voting Conflict (March 3, 2010)**

A governing board member of a water management district sought an opinion from the Ethics Commission on whether the "sealed, competitive bidding" exemption of Section 112.313(12)(b), Florida Statutes, negated a prohibited

conflict of interest under Section 112.313(7)(a), Florida Statutes. Under the facts presented, the governing board member was employed as the chairman, chief executive officer, and president of a nonprofit organization whose mission and goals are to preserve historical records/artifacts and educational initiatives. The water management district owned a one thousand acre piece of property with a historic homestead that it sought to lease to a third party to manage. The water management district issued a request for competitive sealed bids package relating to the lease of the homestead, and that the governing board member had no involvement in preparing. The question was raised whether a prohibited conflict of interest will be created for the governing board member if his employer, non-profit organization was selected as the lessee following a "sealed, competitive bidding" process. The Ethics Commission found that exemption provided for in Section 112.313(12)(b), Florida Statutes, would negate the prohibited conflict of interest if the governing board member's organization was awarded the bid following a sealed, competitive bidding process, to the lowest or best bidder, and if the governing board member filed the required statement of interest (Form 3A). Further, the Ethics Commission noted that based on the facts they were provided there was no indication that the member has, or will, use or attempt to use his influence to persuade the water management district or its personnel to enter into the lease with the organization, other than by the organization's submission of its bid, and the situation presented does not indicate that the member participated in the determination of the bid specifications or that he will participate in the determination of the lowest or best bidder.

- **CEO 10-6 - Voting Conflict (April 21, 2010)**

A Mosquito Control District Commissioner requested an opinion from the Ethics Commission regarding whether she was prohibited under Section 112.3143(3)(a), Florida Statutes, from voting on the District's acquisition of a parcel of real property which was owned by business entities created and owned by the Commissioner's brother-in-law. The Ethics Commission found that Section 112.3143(3)(a) prohibits a Mosquito Control District Commissioner from voting on a matter which would inure to the special private gain or loss of herself, a relative, a business associate, or a principal by whom she is retained or to the parent organization or subsidiary of a corporate principal by whom she is retained, other than an agency as defined in Section 112.312(2). The Ethics Commission stated that the fictitious legal entities involved were vehicles for family ownership of land and the transaction would inure to the special private gain or loss of the Commissioner's brother-in-law. Because the Commissioner's vote would inure to the special private gain or loss of one of the enumerated relatives, the Ethics Commission stated that the District Commissioner was required to abstain from the vote, publicly state to the assembly the nature of the

voting conflict, and file a Form 8B, Memorandum of Voting Conflict with the person responsible for recording the minutes for the District within fifteen days after the vote on the District's acquisition of the property.

- **CEO 10-07 - Conflict of Interest (April 21, 2010)**

The Ethics Commission was asked whether it was a prohibited conflict of interest under Section 112.313(3), Florida Statutes, for a Hospital District Commission member to be employed by an equipment vendor that was selling goods to the District. The District Commission member had no ownership interest in the equipment vending company, other than insignificant stock options. Accordingly, the Ethics Commission found that the material interest hurdle in Section 112.312(15), Florida Statutes, defined as "direct or indirect ownership of more than five percent of the total assets or capital stock of any business entity," was not applicable in this instance. The Ethics Commission also noted that the equipment company had been selling equipment to the District since 2001 and the equipment purchases were below the spending threshold which would require approval by the Board. Given the District Commission member's lack of involvement in the vendor's domestic operations and the Board's lack of involvement in the decisions to purchase the equipment, the Commission on Ethics determined that Section 112.316, Florida Statutes, would operate to negate any conflict created under Section 112.313(7)(a), Florida Statutes.

V. HONEST SERVICES FRAUD

While this material is primarily focused on educating special district public officials on Florida's Ethics Code, special district public officials must also be aware that federal law may also apply to decisions by a public officials that are based on personal interests, bribery or personal benefit from an undisclosed conflict of interest. Further, the consequences for violations of the federal laws may subject public officials to federal prosecution and incarceration.

In the past few years, several Florida public officials have been the subject of federal prosecution for honest services fraud. "Honest services fraud" refers to an addendum to the federal Mail Fraud statute (18 U.S.C. § 1341) that states:

For the purposes of this chapter, the term, *scheme or artifice to defraud* includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

Honest services cases typically involve “serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision makers to disclose certain conflicts of interest.” *United States v. Czubinski*, 106 F. 3d 1069, 1076 (1st Cir. 1997). The typical case relates to situations when the public is not getting honest, faithful, disinterested services from a public official. *United States v. Mangiardi*, 962 F. Supp. 49 (M.D. Penn. 1997). The honest services fraud applies when the public official is bribed or fails to disclose a conflict of interest, and when the scheme or artifice leads to actual or intended injury. *See id.* However, the statute only applies when the public official is performing a discretionary function which the scheme or artifice is intended to influence because the discretionary function is the target of the scheme. *See id.*

The honest service fraud statute is being used to fight public corruption because it is easier to prove than bribery or extortion. Honest services fraud applies to cases in which private individuals breached a fiduciary duty to another. While there are numerous examples of prosecution under these federal statutes, especially in South Florida, this statute is currently being challenged as being unconstitutionally vague before the U.S. Supreme Court in three unrelated high profile cases alleging honest services fraud. Accordingly, special district officials and employees need to be aware of the potential implications and consequences under federal law as well.

VI. CONCLUSION

It is important for special district officials and employees to understand that once you become elected or appointed to a position within a special district you assume all the obligations and responsibilities under Florida’s Code of Ethics to protect the public trust. Ignorance of the Ethics Code will not be a useful or successful defense in an investigation by the Ethics Commission. It behooves all officials and officers to avoid the potential for Ethics Code violations by carefully considering and differentiating individual interests from public duty. If in doubt as to whether you have a conflict, you should consult the special district’s legal counsel, contact the Florida Ethics Commission for advice, or seek an advisory opinion from the Ethics Commission before taking any questionable action.