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Conflicts of Interest: A New Approach

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CONFLICTS OF INTEREST: A NEW APPROACH

As government at all levels continues to grow and play a more direct role in the economy of the country and the private life of the individual citizen, concern for honesty, efficiency, and fair play in government takes on greater importance. This concern for honesty and efficiency is most evident in the area of conflicts of interest. Although conflicts of interest are not peculiar to government,[1] the conflicting interest of the government official in the proper administration of his office and his interest in his private economic, social, and political affairs presents the most obvious and critical problem in this area. It has been observed that "conflicts of interest have become a modern political obsession in this country" attributable to a "moral escalation" of American politics.[2] In an era of modern fiscal controls, civil service, competitive bidding, increased education, and expanded publicity of governmental activities, blatant raids on the public treasury are more frequently found in the pages of a history book[3] than in the pages of the morning newspaper.[4] Today the questionable conduct of public officials falls within the gray area of subtle and illusive conflict situations encompassing a vast span of activities, such as influence peddling, gift giving, arrangements, promises, friendships, and kinships for which there are no clear statutory definitions or remedies.[5]

Inherent in the problem is whether government can make a frontal assault on these subtle conflicts of interest by means of legislation. Critics of any statutory approach to the problem contend that public morality cannot be legislated. They argue that the problem is one of politics and the only answer is to be found in the attraction of a higher caliber of men into public life.[6] This argument, however, overlooks the essential purpose of conflict of interest legislation.

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1. See generally UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON CONFLICT OF INTEREST No. 17 (1961). Other conflicts of interest discussed at the conference include those involving men in the professions and those involving corporate executives.

2. Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 FED. B.J. 239, 248 (1964). A Gallup Poll in October 1965 showed that 40% of the people interviewed believed that political favoritism and corruption are increasing in their own states. Tampa (Fla.) Tribune, Oct. 31, 1965, p. 1-B, col. 3-6.

3. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 729-33, 932-33 (1965).

4. *But see* St. Petersburg (Fla.) Times, Feb. 13, 1966, p. 2-D, cols. 3-6.

5. Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666 (1958-1959).

6. See Davis in UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON CONFLICT OF INTEREST No. 17, 80 (1961).

Hopefully, comprehensive and well-drafted conflict of interest statutes would discourage dishonest men from entering government employment. Conversely, men of high caliber and integrity should welcome legislation that establishes a set of guidelines by which they can recognize and avoid conflicts of interest.[7]

Recognition of the complexities and inadequacies in this area of the law has prompted Congress and several state legislatures to undertake studies of conflicts of interest and to enact comprehensive legislation. This legislation generally is of two types: additional criminal statutes that specifically include or exclude certain activities previously unregulated, and codes of ethics that set minimum standards of conduct for public officers.

The purpose of this note is to survey some of these legislative enactments and to compare them with the present Florida law. The approach will be to analyze some of the more obvious conflict situations, to point out how other states have dealt with the problem, and finally to recommend that the Florida Legislature give serious consideration to a revision of the state's conflict of interest statutes. In the appendix are proposed statutes that contain some of the best features of the conflict of interest statutes and codes of ethics that have been enacted. The proposed statutes are provided to serve as a possible starting point toward a more effective and realistic solution for Florida.

An Overview of the Florida Law

Traditionally, state legislation in the area of conflicts has sought to foreclose one particular type of activity — commercial transactions in which the public official participates on both sides of the transaction. Florida Statutes, sections 839.07-.11, prohibit any state or county officer from bidding on or having any interest in any contract for the performance of public works,[8] and from purchasing supplies or materials for public use from himself or any firm or corporation in which he has a direct or indirect interest.[9]

The principle underlying these prohibitions is that "no man can serve two masters, and a highly moralistic overtone seems to pervade

7. See Pollock in University of Chicago Law School, Conference on Conflict of Interest No. 17, 86 (1961).

8. Fla. Stat. §839.07 (1965).

9. Fla. Stat. §§839.08-.09 (1965); for other statutes relating to conflicts of interest in specific agencies see Fla. Stat. §155.12 (1965) (county hospitals), Fla. Stat. §233.08 (1965) (state text book committee), Fla. Stat. §283.02 (1965) (public printing), Fla. Stat. §§337.04, .12 (1965) (state road board), Fla. Stat. §340.26 (1965) (turnpike authority), Fla. Stat. §624.0104 (1965) (insurance commissioner), Fla. Stat. §§838.01-.10 (1935) (bribery), Fla. Stat. §§839.04-.06 (1965) (speculation in warrants and script), Fla. Stat. §§944.37-.38 (1965) (correctional system).

enforcement of this law.[10] Two types of sanctions are available when a conflict is found to exist. For violation of a statute, a fine or imprisonment may be imposed on the official without regard to criminal intent, willfulness, corruption, or bad faith.[11] In addition, the contract giving rise to the conflict may be invalidated either on the ground of a direct violation of a statute or, if there is no statute prohibiting the contract, as a violation of public policy. Even when it can be demonstrated that the contract is beneficial to the government or that greater injury will accrue to the public if the contract is declared void, the courts will not uphold the contract and thereby subvert the law.[12] When a contract contravenes a statute, the governmental agency is allowed to retain the benefits of the contract without making any payment for what it has received.[13] Because of the severity of this result, the Florida Supreme Court has tended to construe the express prohibitions of the penal statutes narrowly and is more likely to declare the contract void as against public policy.[14] In this situation, absent a fraudulent intent, the party supplying the goods or services may recover their value, forfeiting only the profit he otherwise would have made.[15]

The major difficulty in interpreting these laws has been the question of what constitutes an "interest." The statutes appear all inclusive, making it unlawful to be "in any way interested in a contract . . ."[16] or in "any manner share in the proceeds"[17] whether such interest is direct or indirect.[18] The statutes are limited to the extent that the interested party must be a "party to the letting"[19] and spe-

10. City of Leesburg v. Ware, 113 Fla. 760, 765, 153 So. 87, 89 (1934). The Florida Supreme Court has declared that to approve a conflict of interest "would be to open the way to a saturnalia of fiscal debaucheries and invite the venal corruptionist into the home of decent business." *Ibid.*

11. Kirkland v. State, 86 Fla. 130, 97 So. 510 (1923); Smith v. State, 71 Fla. 639, 71 So. 915 (1916).

12. City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953).

13. Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933).

14. *Compare* Lainhart v. Burr, 49 Fla. 315, 38 So. 711 (1905), *with* Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933).

15. Lainhart v. Burr, 49 Fla. 315, 38 So. 711 (1905).

16. FLA. STAT. §§839.07, .10 (1965).

17. FLA. STAT. §839.08 (1965).

18. FLA. STAT. §839.091 (1965) limits the general application of the statutes in counties of fewer than 100,000 by providing that "no person shall be subject to prosecution . . . when such purchases are: (a) made from the lowest bidder under sealed bids, or (b) where such purchases are . . . rotated among the different suppliers; or (c) where purchases are made at current market prices and are for an aggregate amount in any calendar year of not more than one thousand dollars. (d) For utility services, newspaper advertising, telephone or telegraph service, insurance premiums or similar services."

19. FLA. STAT. §§839.07, .10 (1965); Stubbs v. Florida State Fin. Co., 118 Fla.

cifically exclude officials who vote against the illegal purchase of contract or who are absent at the taking of the vote.[20] If an officer abstains from voting, however, he is still considered a party to the letting since he has acquiesced in the acceptance of the transaction.[21]

The questions that arise are primarily concerned with "indirect" interest. The court will look through a fabricated arrangement to determine whether an official has an indirect interest in a contract,[22] but when a question involving a bona fide relationship is presented, the answers have been neither predictable nor consistent. For example, in 1951 the Florida Attorney General said that a member of a school board had no direct or indirect interest in a contract between the board and a corporation of which her husband was president.[23] In 1961, however, the attorney general stated that a school board member would be indirectly interested in a contract for the purchase of land by the board when her husband acted as real estate agent for the seller.[24] Other apparently inconsistent rulings have involved stock ownership. It has been considered permissible for a school board to borrow money from a bank even though one of the members of the board was a stockholder in the bank.[25] On another occasion, when a board member was a stockholder and also an officer of the bank, the board was not permitted to transact any business with the bank.[26]

In one situation the attorney general has applied the statutory prohibitions across the board without attempting to make any fine distinctions. An employer who has in his employment a person who is also a member of a governmental board or commission may not contract with or sell to that board or commission,[27] even when the employee is employed in another business of the employer and the employee has no direct connection or duties in relation to the contract.[28] This result is reached on the ground that the employer might exert undue influence on the employee. Under this rationale, it would seem that the same considerations would operate to bar a board from contracting with a corporation whose president is the husband of

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450, 159 So. 527 (1935); City of Coral Gables v. Weksler, 164 So. 2d 260 (3d D.C.A. Fla.), *cert. denied*, 170 So. 2d 844 (1964).

20. FLA. STAT. §§839.09, .10 (1965).

21. [1963-1964] FLA. ATT'Y GEN. BIENNIAL REP. 83.

22. See Watson v. City of New Smyrna Beach, 85 So. 2d 548 (Fla. 1956).

23. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 728.

24. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 18.

25. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 385.

26. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 132.

27. [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 99; [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 730; [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 575.

28. [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 99.

a board member since the husband may likewise exert undue influence on his wife.

There are only a few reported cases in which a public officer has been prosecuted for his misconduct.[29] More often the statutes and the public policy prohibitions have been invoked to avoid undesirable contracts.[30] Such a suit is subject to abuse for there may be a political rather than an economic motive behind the suit or the law might be used by a county or municipality as a means of escaping a burdensome contract.[31]

In addition to the specific statutory prohibitions, section 839.11 of the Florida Statutes establishes the crime of "malpractice in office not otherwise specifically provided for . . . ." Only limited use has been made of this statutory provision in Florida. On three occasions a state comptroller was indicted for malpractice. In the first instance the specific charge was that the comptroller neglected to perform his duty by failing to take possesion of the property and business of a bank that he knew to be in an unsound condition. The Florida Supreme Court in a habeas corpus proceeding exonerated the comptroller on the grounds that his duties were discretionary and his nonaction involved neither bad faith nor a breach of a fiduciary duty.[32] The following year the comptroller was again indicted for failing to forfeit the franchise and "wind up" the affairs of a bank that was failing. The Florida Supreme Court on this occasion held that under Florida law the comptroller had no "specific duty" to take charge of the bank and therefore the indictment charged no crime.[33] Two years later the same comptroller was charged with malpractice for employing the officers and employees of a bank to examine the affairs of that bank despite a statutory prohibition "that no person connected with the banking business, either as an officer, director, agent, or employee shall be so employed." The statute seemed clearly applicable but the Florida Supreme Court released the comptroller on the ground that the persons employed were only clerical and ad-

29. Kirkland v. State, 86 Fla. 130, 97 So. 510 (1923); Smith v. State, 71 Fla. 639, 71 So. 915 (1916).

30. Watson v. City of New Smyrna Beach, 85 So. 2d 548 (Fla. 1956); Fruchtl v. Foley, 84 So. 2d 906 (Fla. 1956); City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953); City of Stuart v. Green, 156 Fla. 551, 23 So. 2d 831 (1945); City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87 (1934); Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933).

31. Note, *Conflicts of Interest in Government Contracts*, 24 U. CHI. L. REV. 361, 369 n.54 (1956-1957); see City of Stuart v. Green, note 30 *supra* in which after many attempts by the city to rescind a purchase of land, the deed to which was defective, the city was successful in having the transaction declared void on the grounds of a conflict of the vendor's interests.

32. *Ex parte* Amos, 93 Fla. 5, 112 So. 289 (1927).

33. *Ex parte* Amos, 94 Fla. 1023, 114 So. 760 (1927).

ministrative assistants and that the bank had ceased to do business.[34] These three cases demonstrate the difficulty of attempting to govern official conduct by criminal statutes, particularly in the case of high ranking officials imbued with extensive discretionary authority.

NEW LAWS FOR OLD PROBLEMS

Any attempt to cope with the problem of conflicts of interest must follow a three step analysis: first, identifying what constitutes a conflict of interest; second, determining the best method of preventing the conflict from arising; and third, selecting the appropriate sanctions once a conflict is found to exist. As noted previously, there are two general types of legislation to be considered. One involves an expansion of the scope of the criminal statutes by making them applicable to situations presently unregulated and by more closely defining what constitutes an interest. The other approach is to adopt a code of ethics setting out certain standards by which public officials can gauge their conduct. A code of ethics, as distinguished from the criminal law, generally provides for removal from office or discharge as the penalty for its violation, and its enforcement can be carried out through an administrative proceeding rather than resorting to the courts. The following is an analysis of some of these criminal and code provisions and how they might be utilized in Florida.

Personal Interest in Government Transactions

The present Florida law broadly covers the problem of public officials having a private interest in government business, but the attempts by the courts and the attorney general's office to determine what constitutes an "interest," particularly an "indirect interest," have been less than satisfactory.

There is an infinite variety of factual situations that might present a question of "interest," and no statute can be drawn to cover all these situations. On the other hand, the legislatures of several states have recognized that it is possible to identify and designate some very common interests as being remote or insignificant. This approach recognizes a *de minimis* concept that as a practical matter some interests are not sufficient to create a real conflict of interest.

Generally such a statute prohibits a governmental board or commission from contracting with a business entity in which a public official has a "substantial" or "controlling" interest. The question is frequently that of stock ownership, and a "substantial" interest has

34. *Ex parte* Amos, 100 Fla. 687, 129 So. 855 (1930).

been designated in California as more than five per cent[35] and in New York as more than ten per cent[36] of the shares of stock in the contracting corporation. This type of statute usually requires that the interest of the officer or employee be disclosed and that he abstain from voting. The California statute,[37] which is the most comprehensive enactment dealing with remote interest, also contains an important provision concerning the employer-employee relationship. The statute defines as "remote" the interest of a public official who is an employee of a contracting party if the employer has ten or more employees and the official has been employed for more than three years prior to assuming public office.[38] The effect of the remote interest statute is to raise a presumption that, in the situations classified as constituting remote interest,[39] there is no motive for corruptness on the part of the official. This presumption, however, is subject to being rebutted, and the California statute provides that its provisions shall not be applicable to any officer who uses his office to influence or attempt to influence another member of the board or commission to enter into a contract.[40]

Remote interests statutes are limited to conflicts involving boards and commissions but a broader approach, applicable to the conflicting interest of all officers and employees, may be found in the codes of ethics. One common provision is that no officer or employee should accept other employment which will impair his independence of judgment.[41] Another common provision requires that the public officer or employee abstain from making personal investments that he has reason to believe will create substantial conflicts between his public and private interest.[42] A third such provision adopted in several states requires any public official who has a direct or indirect interest in a business entity regulated by the state to disclose his interest by filing a sworn statement with the secretary of state.[43] This

35. CAL. GOV'T CODE §1091 (b) (1). *But see* CAL. GOV'T CODE §1091 (b) (Supp. 1965) for deletion of this provision.

36. N.Y. PUB. OFFICERS LAW §73 (4).

37. CAL. GOV'T CODE §1091; see also LA. REV. STAT. §42.1112 (Supp. 1964); MINN. STAT. ANN. §471.88 (1961).

38. CAL. GOV'T CODE §1091 (b) (4).

39. Other situations classified by the California statute as constituting remote interest include the interest of a parent in the earnings of his minor child for personal services and the interest of a landlord or tenant of the contracting party.

40. CAL. GOV'T CODE §1091 (c), (d).

41. MASS. ANN. LAWS ch. 268A, §23 (a) (Supp. 1964); MINN. STAT. ANN. §3.88 (1) (a) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (a) (Supp. 1965); TEXAS REV. CIV. STAT. ANN. art. 6252-9 (d) (j) (1962).

42. N.Y. PUB. OFFICERS LAW §74 (3) (g); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (h) (1962).

43. N.Y. PUB. OFFICERS LAW §74 (3) (j); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (b) (1962).

does not prevent an official from owning such an interest; it merely reduces the possibility that the official could use his influence or position to gain an unfair advantage over other state regulated competitors. The New York statute provides that this statement shall be open to public inspection.[44] The Texas statute is silent on the subject, and a proposed statute in Minnesota would make the statement available only to administrative authorities concerned with investigation of breaches of the code.[45] The Minnesota proposal seems more reasonable because it would permit enforcement of the code without unduly infringing upon the right of privacy of the individual.

As noted above[46] certain types of transactions, which would otherwise be prohibited, are presently allowed under the Florida Statutes in counties of less than 100,000 population. This indicates that the legislature has not been unmindful of the need for tempering the statutes. Much of the difficulty relating to what constitutes an interest could be eliminated in Florida if the legislature were to define and exclude remote interest from the operation of the statutes. (See Appendix, section 3). The legislature could also broaden the entire scope of the statutes by enacting a code of ethics. This would not result in any substantial changes in the present law, because the relatively broad language of a code would encompass most situations that have previously been prohibited as a violation of public policy. The advantage of the code over judicially determined public policy is that it provides a more definite guideline by which the public official can gauge his own conduct. (See Appendix, Section 5 (b) (1), (2), (6), (7)).

Postemployment

The problem of the use by a former government officer or employee of the knowledge or influence gained as a public official for later personal profit has recently been called to the attention of the public. The incident that presented a possible conflict of interest question involved the organization by three former members of the state cabinet of a state licensed and regulated insurance company to sell annuities to public school teachers through county school boards.[47] This problem is not new, however, as there have been a number of instances in which important state employees retired and were immediately hired by private industry to use their knowledge and con-

44. N.Y. PUB. OFFICERS LAW §74 (3) (j).
45. Eisenberg, *supra* note 5, at 694.
46. See statute cited note 18 *supra*.
47. St. Petersburg (Fla.) Times, Oct. 17, 1965, p. 3-D, cols. 4-5.

tacts to obtain state business.[48] Presently nothing in the Florida statutes makes this type of activity illegal, and no one would deny the right of a man to quit public employment and engage in the legitimate business of his choice. The question of abuse of public office arises only when a former officer exploits the friendships and special knowledge for personal gain or is lured from public employment specifically to utilize his special talents for obtaining government business.

To prevent this type of abuse Congress[49] and four state legislatures[50] have made it unlawful for a former government officer or employee to appear before or to contract with a governmental agency with which he was directly connected within the previous two years. The federal, Louisiana and Massachusetts statutes apply the prohibition not only to former officials but also to partners of former officials.[51] New York and Washington have no similar provision. These statutes contemplate that the two-year moratorium on doing business with the government is sufficient to prevent the former officer from taking unfair advantage of his special knowledge or influence. The proposed statute is actually rather narrow in its application, because it prohibits transactions only with the governmental agency with which the former official was directly related. Nevertheless, the statute eliminates the most obvious possibilities for misusing influence or knowledge without completely denying him the right to do business with a large number of other governmental agencies.

As has been demonstrated, postemployment conflicts of interest have arisen frequently enough that the legislature should take steps to prevent further abuses. A one or two-year prohibition against transacting business with the governmental agency with which the official was related should be imposed on former officials, if not on the partners of the former officials. (See Appendix, section 2).

Representation

One of the more pressing and controversial conflict problems arises when a public official represents private interests before a

48. Waldron, *Florida Needs a Law Outlining Standards of Ethical Conduct for Public Officials*, St. Petersburg (Fla.) Times, Feb. 11, 1965, p. 1-B, cols. 3-8. See also Waldron, *Many Apparent Conflicts of Interest Involve Persons in Florida Government*, St. Petersburg (Fla.) Times, Feb. 13, 1965, p. 8-C, cols. 1-4.

49. 18 U.S.C. §207 (1964) (2 years).

50. LA. REV. STAT. §42:1116 (Supp. 1964) (2 years); MASS. ANN. LAWS ch. 268A, §§5, 12, 18 (Supp. 1964) (1 year); N.Y. PUB. OFFICERS LAW §73 (7) (2 years); WASH. REV. CODE ANN. §42.22.040 (4) (1959) (2 years).

51. 18 U.S.C. §207 (c) (1964); LA. REV. STAT. §42:1116 (c) (Supp. 1964); MASS. ANN. LAWS ch. 268A, §§5, 12, 18 (Supp. 1964).

government agency. The danger is that the official will be in a position to influence unduly or to bring pressure upon the agency in order to gain a favorable ruling or decision as, for example, when a member of the state road board goes before a county commission to obtain an exclusive right to community antenna service for one of two competing corporations.[52] A correlative to this situation is the public official who represents a state agency in a private capacity while having some supervisory responsibilities over that agency in his official capacity. The danger here is that the official will not be able to exercise an independent, objective judgment in his official supervisory role. The import of the conflict is indicated by the number of members of the Florida Legislature who represent, practice law before, and are otherwise employed by state agencies.[53] Again, there is presently nothing illegal in this conduct, but it does raise the question of the propriety of attempting to "serve two masters."

Indirectly, the 1965 Florida Legislature foreclosed this type of conflict by an amendment to Florida Statutes, chapter 282, entitled "Spending Philosophy Act."[54] As interpreted by the attorney general[55] this act prevents a legislator, or any other state employee whose salary is specifically fixed by law, from receiving compensation from more than one state agency. According to the attorney general the statute also applies to prohibit compensation of partners of state employees but does not apply when federal or county funds are involved. To emphasize the indirect approach of this legislation,[56] the attorney general noted that the act was not a "conflict of interest" or "code of ethics" bill and it was not the legislative intention that it be construed as such.[57]

As a practical matter, it must be recognized that legislators and nonsalaried members of boards and commissions are part-time public servants who must depend on other employment, such as private law practice, for their livelihood. This is an instance in which a balance must be struck to protect the interest of the public in fair and equal treatment, without discouraging capable men from entering public office.

There have been two approaches to this problem. One is a statutory prohibition against a legislator or other public officer

52. Tampa (Fla.) Tribune, Oct. 28, 1965, p. 12-B, cols. 1-2.

53. Waldron, *Question: Should Members of Legislature be Permitted To Work for State Agencies?*, St. Petersburg (Fla.) Times, Feb. 12, 1965, p. 1-B, cols. 4-8.

54. FLA. STAT. §282.051 (6) (1965).

55. OPS. ATT'Y GEN. FLA. 066-8 (1966).

56. It has been suggested that the bill "slipped through" the legislature because its effect was not understood by members of the legislature. St. Petersburg (Fla.) Times, Feb. 13, 1966, p. 2-D, cols. 3-6.

57. OPS. ATT'Y GEN. FLA. 066-8 (1966).

representing a private interest before a state agency or prosecuting a claim against the state.[58] New York has introduced a refinement into this law by prohibiting representation by a state official only when the compensation for an appearance is contingent or dependent upon any action by the state agency.[59] Such a provision accomplishes the desired result of protecting the state's direct interest, yet is sufficiently limited to allow the lawyer-legislator to serve in public office without giving up his private practice.

The second approach to the problem is found in the provisions of the codes of ethics, which require that no officer, employee, or legislator should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others,[60] and admonishes the officer not to accept other employment that will impair his independent judgment.[61]

The contingency fee statute and the code of ethics complement each other. The statute specifically makes illegal the most direct violations of the public trust. The code, on the other hand, establishes a standard of conduct that would deter the less obvious conflicts of interest. Adoption in Florida of one or both of these approaches should effectively curtail the common but questionable practice of a public officer who represents public or private interests in the dual capacity of private advocate and public servant. (See Appendix, sections 1, 5 (b) (1), (2), (5)).

Confidential Information

A fourth problem area in which public office is particularly subject to abuse is the use of confidential information for personal gain. The most common example of this is the purchase of land by a person with advance undisclosed knowledge of the route of new highways that, when completed, will substantially increase the value of the land.[62] Another abuse of confidential information was suggested by a Florida state senator when he said he was satisfied someone had "inside" information with which bond speculators made a "financial killing" in the refinancing of $67 million worth of Florida Turnpike bonds in 1961.[63]

58. See 18 U.S.C. §205 (1964); MASS. ANN. LAWS ch. 268A, §§4, 11, 17 (Supp. 1964); MINN. STAT. ANN. §3.88 (1) (a) (Supp. 1965).

59. N.Y. PUB. OFFICERS LAW §73 (2).

60. MASS. ANN. LAWS ch. 268A, §23 (d) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (d); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (c) (1962); WASH. REV. CODE ANN. §42.22.040 (1959).

61. See statutes cited note 41 *supra*.

62. Note, *Conflict of Interest: State Government Employees*, 47 VA. L. REV. 1034, 1068 (1961).

63. Waldron, *Louisiana's Code of Ethics for Men in Government Worth Study by Florida*, St. Petersburg (Fla.) Times, Feb. 14, 1965, p. 8-B, cols. 1-5.

Numerous officers and employees have access to advance knowledge of changing governmental policies and regulations or of proposals for new construction. Such knowledge is entrusted to them by virtue of their public office, but it also offers a temptation to turn their special advantage into personal profit. The potential evil is twofold: a direct use of the confidential information by the public official and the disclosure of the confidential information to friends, relatives, or business associates.

The states that have attempted to deal with this problem have made appropriate provisions in their codes of ethics. Uniformly, the codes provide that "no officer or employee or legislator should accept employment or engage in any business or professional activity which will require him to disclose confidential information . . ."[64] or "use such information to further his personal interest."[65] This conflict of interest is so obvious that any specific legislation would seem almost unnecessary. There is evidence, however, that such abuses have occurred in Florida and the legislature should clearly establish as the policy of the state that the use of confidential information for private gain is a violation of the public trust. (See Appendix, section 5 (b) (3), (4)).

Special Employees

As modern government continues to expand and take on responsibilities in highly technical and specialized fields, it becomes increasingly necessary to rely upon the knowledge and talents of experts, advisors, consultants, and other temporary employees whose government service comprises only a limited part of their professional activity. Many such "consultants" or "advisors" would be surprised to learn that they are generally considered "employees" within the meaning of the conflict of interest statutes.[66]

Government must be able to attract these highly qualified people, but broad or all-encompassing conflict of interest laws are generally regarded as a deterrent to employing essential people.[67] On the other

64. MASS. ANN. LAWS ch. 268A, §23 (b) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (b); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (e) (1962); WASH. REV. CODE ANN. §42.22.040 (5) (1959).

65. MASS. ANN. LAWS ch. 268A, §23 (c) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (c); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (f) (1962); WASH. REV. CODE ANN. §42.22.040 (6) (1959).

66. See City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953). One academician has pointed out that the general feeling of the college community is that conflict of interest statutes are not intended for them. Wallis in UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON CONFLICT OF INTEREST No. 17, 89, 90 (1961).

67. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 152-64 (1960).

hand, there is the possibility that the special employee will take advantage of his government employment for his personal benefit. Here, as in the area of representation, there is a need for a balancing of interest. Congress[68] and Massachusetts[69] have attempted to do this by enacting legislation relating specifically to special employees. The statutes do two things: define who is a special employee and limit the operation of conflict of interest statutes in regard to such persons.

A special employee has been defined as a person, not an elected official, who serves with or without compensation, who has other personal or private employment, and whose government service is limited to 800 hours[70] or 130 days[71] during any one 365-day period. One other qualification might be to exclude from the definition of special employee not only elected officials but also persons appointed by the Governor to statewide boards and commissions. Such a provision seems warranted since members of such boards as the Florida Board of Regents, the Florida State Road Board, or the Florida State Turnpike Authority frequently have more responsibility and influence than most elected officials. Under these limitations, the definition would encompass only actual employees and not politicians or those who hold major political appointments.[72]

Once an individual has qualified as a special employee, he is exempted from the general operation of the conflict of interest laws, and the law is made applicable to him only in relation to those transactions in which he has or will participate personally and substantially as a government employee.[73]

The special employee category has its drawbacks in that it introduces additional complexity into the law. Nevertheless, if the legislature were to undertake a thorough study of the area of conflicts of interest and to propose a revision of the statutes, the problem of the special employee should be given consideration. With this in mind, the appendix contains a proposed statute that would adequately cover the problem. (See Appendix, section 4).

Enforcement of the Codes

The criminal statutes, which for the most part were enacted in the nineteenth century, have frequently been criticized as being ineffective

68. 18 U.S.C. §202 (a) (1964).
69. MASS. ANN. LAWS ch. 268A, §1 (o) (1), (2) (a), (b) (Supp. 1964).
70. *Ibid.*
71. 18 U.S.C. §202 (a) (1964).
72. *But see* LA. REV. STAT. §42.1117 (Supp. 1964).
73. 18 U.S.C. §205 (1964); MASS. ANN. LAWS ch. 268A, §§4, 5, 11, 12, 14 (e), 17, 20 (c) (Supp. 1964).

because of the inability or unwillingness of public officials to enforce them.[74] Although such statutes do have a certain deterrent effect and the suggestion that their use be expanded to other conflicts of interest is not without merit, criminal sanctions are a crude method of dealing with the problem. The trend today is toward the adoption of codes of ethics setting out standards of conduct, which when violated bring into play an administrative proceeding that can result in a reprimand, removal from office, or discharge.[75]

The responsibility for investigating and enforcing the codes presents a problem for consideration. Minnesota has established a standing committee in each house of the legislature to enforce its legislative code of ethics and to approve executive codes of ethics submitted by each state agency.[76] This procedure is an appropriate means of enforcing the code in the legislative branch of government.[77] However, within the traditional concept of separation of powers a different procedure should be utilized to enforce an executive code of ethics.

Louisiana[78] and New York[79] have developed a detailed procedure for enforcing an executive code of ethics. Each state has created a permanent body that is charged with the responsibility of investigating alleged violations of its code. In New York a committee acts primarily in an advisory capacity to the attorney general, and its findings and recommendations are turned over to the attorney general for appropriate action.[80] In Louisiana a commission appointed by the Governor conducts investigations and after a public hearing can order that an employee be dismissed or suspended.[81] The commission also sits as an appeal board on all disciplinary actions taken by agency heads.[82] Although there are no cases that have considered the question, contracts made in violation of a code should be declared void on the same basis as contracts that violate public policy. To hold otherwise would be to allow the official to profit by his wrong.

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74. See Note, *A Conflict of Interest Act,* 1 HARV. J. ON LEGISLATION 68 (1964).

75. LA. REV. STAT. §42:1119 (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (4); TEX. REV. CIV. STAT. ANN. art. 6242-9 (4) (1962). Louisiana, New York, and Washington also provide criminal penalties as an alternative method of enforcement. LA. REV. STAT. §42:1123 (Supp. 1964); N.Y. PUB. OFFICERS LAW §79; WASH. REV. CODE ANN. §42.22.070 (1959).

76. MINN. STAT. ANN. §§3.89-.92 (Supp. 1965); N.Y. LEGIS. LAW §80.

77. See MINN. STAT. ANN. §3.88 (Supp. 1965); N.Y. Sess. Laws 1964, ch. 914, §86. New York repealed its separate Legislative Code of Ethics and now specifically includes legislators and legislative employees in that state's general code of ethics.

78. LA. REV. STAT. §§42:1119-23 (Supp. 1964).

79. N.Y. EXECUTIVE LAW §74.

80. N.Y. EXECUTIVE LAW §63 (11).

81. LA. REV. STAT. §42:1119 (Supp. 1964).

82. LA. REV. STAT. §42:1119 (E) (2) (Supp. 1964).

If the legislature were to adopt a code of ethics and then fail to provide a system of enforcement, most of the effectiveness of the code would be lost. Enforcement would then be in the hands of department and agency heads, which could lead to inequities and lack of uniform application. For the purpose of uniformity and fairness an enforcement procedure patterned after that used in New York is set out in the appendix. (See Appendix, sections 5 (c), (d), 6, 7).

The conflict of interest statutes currently in force in Florida are subject to two criticisms. First, the statutes are not entirely suited to the subtle types of conflicts that arise today. Second, the statutes are directed at only one of the many documented conflict of interest situations that have arisen in the state.

The proposed statutes in the appendix are offered as a starting point for a complete revision of the Florida conflict of interest statutes. They build upon and supplement, rather than replace the present Florida law. Additional flexibility and clarity could be added to the criminal statutes by defining remote or insignificant interests and by giving special consideration to the unique problems of the special employee. The scope of the statutes could also be broadened to include some well-defined conflicts of interest that are presently unregulated. More importantly, a comprehensive code of ethics would provide guidelines for all officers and employees confronted with almost any conceivable conflict of interest. This code, coupled with a practical enforcement procedure, is more likely to be enforced, because the objective of the code can be achieved without resorting to the courts and the criminal law.

The public has a paramount interest in the maintenance of moral and ethical standards by the officials who are entrusted with its welfare, prosperity, and security. In return for this trust, public officials should endeavor to establish for themselves realistic and enforceable standards of conduct.

CHARLES P. PILLANS

APPENDIX

CONFLICT OF INTEREST PROPOSED STATUTES

Section 1. *Representation.*

No state, county, or municipal officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any case, proceeding, application, or other matter before any governmental agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit.[1]

Section 2. Postemployment.

(a) No person who has served as an officer or employee of the state or a county or municipal government shall, within a period of two years after termination of such service or employment, appear before such governmental agency or receive compensation for any services rendered on behalf of any person, firm, corporation, or association in relation to any case, proceeding, or application with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment.

(b) No state or county board or commission or municipal board or council shall enter into a contract with any firm or corporation in which a person, who within the preceding two years, was a member or employee of such board, commission, or council has a substantial interest.[2]

Section 3. Remote Interest.

(a) An officer or employee shall not be deemed to be interested in a contract entered into by a state or county board or commission or a municipal board or council of which he is a member or employee if he has only a remote interest in the contract and if the fact of such interest is disclosed to the board, commission, or council, and noted in the official records, and thereafter the board, commission, or council authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote of the member with the remote interest.

(b) As used in this chapter, remote interest means:

(1) the ownership of less than ten per cent of the shares of a corporation for profit;

(2) that of a nonsalaried officer of a nonprofit corporation;

(3) that of an employee of the contracting party having ten or more other employees, provided that the officer was an employee of said contracting party for at least three years prior to his initially accepting such office.

(c) The provisions of this section shall not be applicable to any officer or employee interested in a contract who influences or attempts to influence a member of the board, commission, or council of which he is a member or employee to enter into the contract.[3]

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1. See N.Y. PUB. OFFICERS LAW §73 (2).

2. 18 U.S.C. §207 (1964); MASS. ANN. LAWS ch. 268A, §§5, 12, 18 (Supp. 1964); N.Y. PUB. OFFICERS LAW §73 (7); WASH. REV. CODE ANN. §42.22.040 (4) (1961).

3. See CAL. GOV'T CODE §1091.

Section 4. Special Employees.

(a) A special state, county, or municipal employee is a person:
(1) who is not an elected official;
(2) who has not been appointed to a state-wide board or commission by the governor;
(3) and occupies a position which by its classification or terms of the employment contract permits personal or private employment during normal working hours or
(4) who, in fact, does not earn compensation as a state, county, or municipal employee for an aggregate of more than one hundred and thirty-five days during the preceding three hundred and sixty-five days.

(b) A special employee shall be subject to the provisions of this chapter only in relation to the particular matters in which he has at any time participated personally and substantially as a state, county, or municipal employee or which is pending in the department or agency of the government in which he is serving.[4]

Section 5. Governmental Code of Ethics.

(a) No officer or employee of a state or county board or commission or a municipal board or council should have any interest, financial or otherwise, direct or indirect, in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the discharge of his duties in the public interest.

(b) Standards:
(1) No officer or employee should accept any gift, favor, or service that might reasonably tend to influence him in the discharge of his official duties.[5]
(2) No officer or employee should accept other employment which will impair his independence of judgment in the exercise of his official duties.[6]
(3) No officer or employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position.[7]
(4) No officer or employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interest.[8]
(5) No officer or employee should use or attempt to use his official position

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4. 18 U.S.C. §§202(a), 205 (1964); MASS. ANN. LAWS ch. 268A, §§1(*o*)(1), (2)(a), (b), 4, 5, 11, 12, 14(e), 17, 20(c) (Supp. 1964).

5. See TEX. REV. CIV. STAT. ANN. art. 6252-9(3)(a) (1962); WASH. REV. CODE ANN. §42.22.040(2) (1961).

6. See MASS. ANN. LAWS ch. 268A, §23(a) (Supp. 1964); MINN. STAT. ANN. §3.88(1)(a) (Supp. 1965); N.Y. PUB. OFFICERS LAW §74(3)(a); TEX. REV. CIV. STAT. ANN. art. 6252-9(3)(j) (1962).

7. See MASS. ANN. LAWS ch. 268A, §23(b) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74(3)(b); TEX. REV. CIV. STAT. ANN. art. 6252-9(3)(e) (1962); WASH. REV. CODE ANN. §42.22.040(5) (1961).

8. See MASS. ANN. LAWS ch. 268A, §23(c) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74(3)(c); TEX. REV. CIV. STAT. ANN. art. 6252-9(3)(f) (1962); WASH. REV. CODE ANN. §42.22.040(6) (1961).

to secure unwarranted privileges or exemptions for himself or others.[9]

(6) An officer or employee should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create a substantial conflict between his duty in the public interest and his private interest.[10]

(7) If an officer or employee is an officer, agent, or member of, or owns, directly or indirectly, a substantial interest in any corporation, firm, partnership, or other business entity which is subject to the jurisdiction of a state regulatory agency, he shall file a sworn statement with the secretary of state disclosing such interest.[11]

(8) No officer or employee should by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position, or influence of any party.[12]

(c) The failure of any officer or employee to comply with one or more of the foregoing standards which apply to him shall constitute grounds for expulsion, removal from office, or discharge, whichever is applicable.[13]

(d) This code should be construed liberally to effectuate its purposes and policies and to supplement such existing laws as may be related to the same subject.[14]

Section 6. Advisory Committee on Ethical Standards.

(a) The attorney general, with the approval of the cabinet, is authorized to establish an advisory committee on ethical standards.

(b) The committee shall, at the request of the attorney general:

(1) consider any complaint concerning violations of the code of ethics involving officers or employees of state, county, or municipal agencies; make determinations thereon and report its recommendations to the attorney general;

(2) render to the attorney general an advisory opinion as to whether the facts and circumstances in a particular case involving an officer or employee demonstrate a violation of the code of ethics;

(3) make recommendations for revisions in the code of ethics and other legislation relating to the conduct of state officers and employees in performance of their official duties.

(c) Each member of the committee shall serve without compensation, but shall be reimbursed for expenses actually and necessarily incurred by him in the performance of his official duties.[15]

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9. See MASS. ANN. LAWS ch. 268A, §23 (d) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (d); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (c) (1962); WASH. REV. CODE ANN. §42.22.040 (1961).

10. N.Y. PUB. OFFICERS LAW §74 (2) (g); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (h) (1962).

11. See N.Y. PUB. OFFICERS LAW §74 (3) (j); TEX. REV. CIV. STAT. ANN. art. 6252-9 (3) (i) (1962).

12. See MASS. ANN. LAWS ch. 268A, §23 (e) (Supp. 1964); N.Y. PUB. OFFICERS LAW §74 (3) (f).

13. TEX. REV. CIV. STAT. ANN. art. 6252-9 (4) (1962).

14. See WASH. REV. CODE §42.22.060 (1961).

15. See N.Y. EXECUTIVE LAW §74.