

**MISUSE OF OFFICE UNDER STATE AND FEDERAL LAW
YOU MIGHT NOT KNOW IT WHEN YOU SEE IT***

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I. STATE CODE OF ETHICS—PROHIBITED CONFLICTS AND VOTING CONFLICTS

A. Common Sense Regulations

1. You cannot use information available to you because of your job, but not available to the public, for your personal benefit or for the benefit of others. § 112.313(8), *Fla. Stat.*
2. You cannot corruptly use your public position to obtain a special benefit for yourself or others. § 112.313(6), *Fla. Stat.*
3. Neither you, your spouse, nor your minor children can accept anything of value when you know, or should know, that it is given to influence the way you do your job. §§ 112.313(2) & (4), *Fla. Stat.*

B. Prohibited Business Relationships

1. You are prohibited in your private capacity from doing business with your agency. This prohibition covers all goods and services and businesses in which you, your spouse, or child serve as an officer or own more than a 5% interest. § 112.313(3), *Fla. Stat.*
2. You are prohibited in your private capacity from having a contractual relationship with an entity that is regulated by or doing business with your agency and cannot hold such a relationship that would create a “frequently recurring conflict” between your private interests and public duties. § 112.313(7)(a), *Fla. Stat.*

C. Voting Conflicts

1. Public officials must declare a conflict and abstain from voting when the vote would result in a special private gain or loss to the official, any principal that retains the official, any subsidiary or parent organization of a principal that retains the official, or the official’s business associate or relative. § 112.3143(3)(a), *Fla. Stat.*
2. For the purposes of this law, *relative* is defined as a parent, spouse, child, sibling, or in-law. § 112.3143(1)(b), *Fla. Stat.*

3. The term *special private gain or loss*, in almost all circumstances, refers to a direct financial interest. See, e.g., *George v. City of Cocoa*, 78 F.3d 494 (11th Cir. 1996) (“A ‘special private gain’ described by the voting conflicts statute almost always (if not always) refers to a financial interest of the public official that is directly enhanced by the vote in question.”); *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170, 1173 n. 8 (Fla. 3d DCA 1984).

D. Apparent Voting Conflicts

Section 286.012, Florida Statutes, imposes an affirmative duty on the part of officials to vote on all matters unless there is or appears to be a possible conflict of interest under Florida’s Code of Ethics. In other words, you can abstain, but only to avoid the sort of conflict contemplated by the Code of Ethics. The Commission on Ethics has explained, for example, that a city council member may not abstain on a matter involving the member’s personal foe, explaining that the Code of Ethics is primarily concerned with a public official’s economic interests. *COE* 79-14. In determining what constitutes a possible conflict of interest under this statute, the Attorney General has similarly explained that a public official must have a personal financial interest in a matter in order to abstain from voting. *AGO* 87-17.

- E. For complete information on Florida’s Code of Ethics, including administrative regulations, required reporting forms, and Commission on Ethics opinions, visit the Ethics Commission website at: <http://www.ethics.state.fl.us/>.

II. FEDERAL HONEST SERVICES LAW

A. 18 USC § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

B. 18 USC § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

C. 18 USC § 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

- (1) to defraud a financial institution; or
- (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

D. 18 USC § 1346. Definition of “scheme or artifice to defraud”

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.

III. THE HONEST SERVICES LAW APPLIED IN FLORIDA

A. The Eleventh Circuit Court of Appeals has ruled that proof of violation of state law is not necessary for a conviction under the Honest Services Law. *United States v. Hasner*, 340 F.3d 1261, 1269 (11th Cir. 2003). The court’s reading of the law suggests a broader reach than some other circuits, but public officials in Florida convicted under this law uniformly misused their public office for personal gain, which in one fashion or another could have amounted to violations of Florida’s Code of Ethics. For example:

1. In *Hasner, supra*, the chairman of the Housing Finance Authority concealed commissions paid to him in connection with a real estate transaction where the property was to be developed with bonds issued by the Housing Finance Authority.
2. In *Lomelo v. United States*, 891 F.2d 1512 (11th Cir. 1990), the mayor of the City of Sunrise took part in a scheme in which public dollars were funneled to individuals for services that were never performed.

3. *Castro v. United States*, 248 F.Supp.2d 1170 (S.D. Fla. 2003), was one of several trial court cases emanating from the so-called “Operation Court Broom,” in which judges were convicted of appointing attorneys as special public defenders in exchange for kickbacks.
 4. Finally, in *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997), a Lee County Commissioner took bribes from a lobbyist in exchange for votes and participated with the lobbyist in a blackmail campaign against a county commission candidate to maintain a balance on the Commission that was favorable to the lobbyist.
- B. According to the Eleventh Circuit: “When a government officer decides how to proceed in an official endeavor—as when a legislator decides how to vote on an issue—his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services.” U.S. v. Lopez-Lukis, 102 F.3d 1164 (11th Cir. 1997).
- C. According to the Florida Legislature: “It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain” § 112.311(1), *Fla. Stat.*

IV. WHEN FOLLOWING STATE LAW IS NOT ENOUGH

- A. Practical Advice for Public Officials
1. Getting a handle on voting conflict factors
 - a. Nature of the gain or loss – What’s at issue?
 - b. Relationship to recipient – Who’s in or out of luck?
 - c. Timing – When did it, or when will it happen?
 2. Put it in writing – Enhance disclosure requirements for public officials and entities seeking to do business with the County.
 3. When in doubt, shout it out – Disclose possible perceived conflicts that do not rise to voting conflicts under the State Code of Ethics.

* "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (with apologies to Justice Potter Stewart).