

A Review of the Florida Elections Commission

December 1999



Prepared for
The Florida House of Representatives

by
The Committee on Election Reform

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Revisor's Note:

The following technical revisions were made:

- C On page 5, Footnotes 8 and 9 were corrected to reflect the correct references.
- C On page 7, Footnote 19: Page number referencing the *Sundown Report of the Elections Commission* was added.
- C Page 10, paragraph 5: Corrected from 1995 to 1990 the year in which new positions were created for the Elections Commission.
- C Page 40, paragraph 2: Corrected acronym FED to FEC.
- C Appendix D, Table 1. Corrected deficient formula in spreadsheet program to reflect projected Elections Commission Trust Fund revenues. Projected Trust Fund remainders for fiscal years 2001 through 2005 were corrected.

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I. INTRODUCTION

Florida was the first state to pass stringent campaign finance laws when in 1951 the “Who Gave It, Who Got It” law was adopted.¹ This act required the filing of campaign treasurer reports; imposed contribution limits; and required that all campaign expenditures be made from a candidate’s campaign account.² Unfortunately, the law contained ineffective enforcement provisions which, coupled with the Watergate scandal of the early 1970’s, compelled Florida to act toward an improved mechanism for campaign finance law enforcement.

Through a major revision of the Florida Election Code (Code), the 1973 Legislature created the Florida Elections Commission (FEC) to enforce the state’s campaign finance laws (codified in Chapter 106, Florida Statutes). Innovative approaches to electioneering and campaigning necessitated continuous refinement to the Code which, in turn, has complicated its enforcement.

Since its creation in 1973, the FEC has been given additional responsibilities and grants of authority or jurisdiction. Through the years, numerous reviews and studies were conducted in an effort to improve enforcement of the Code. One recommendation in particular was frequently expressed, that the FEC be structured as an independent enforcement body, thereby severing ties to the politics of state government. Several state newspaper editorials echoed this point by declaring the need for a bipartisan commission, independent of the Department of States’ Division of Elections (the Division), and unhindered in the enforcement of violations on the politically powerful.³ It wasn’t until 1997 that the Legislature acted upon this particular recommendation and transferred the FEC from the Department of State to the Department of Legal Affairs.⁴

¹ Robert J. Huckshorn, “Who Gave It? Who Got It? The Enforcement of Campaign Finance Laws in the States,” *Journal of Politics* 47 (August 1985): 773-789.

² Chapter 26870-391, Laws of Florida.

³ Editorial, *Election Reform Vital to Correct Flaws, Restore Public Integrity*, Sun-Sentinel, Feb. 3, 1997, at 8A; and Editorial, *Regulation Gone Awry*, St. Petersburg Times, Oct. 10, 1998, at 14A.

⁴ Chapter 97-13, Laws of Florida. This transfer re-created the Commission as an independent agency responsible for all aspects thereto including budget, staffing, and operation.

Due to the recent reorganization of the FEC, staff was asked to conduct an initial review to examine the short-term effects of the transfer including, but not limited to, staff composition, jurisdiction, caseload efficiency, and budgetary constraints, and to identify potential long-term problems not previously addressed. This review also attempts to ascertain whether further statutory changes are needed to assist the FEC in the performance of their statutory duties.

As a final note, the historical connection between the FEC and the Division is so intertwined that any discussion regarding jurisdictional responsibilities would be incomplete without incorporating the Division's role and focus as it relates to the broader scope of enforcement of the Code.

II. METHODOLOGY

Staff employed several methods in compiling data for this report. First, a review of existing materials relating to the FEC was performed. These included the examination of applicable Florida Statutes, Chapter Laws, and Administrative Rules to ascertain the historical structure, duties, and limitations placed on the FEC. An examination of previously published reports on the FEC was conducted to gain historical insight into the perspectives, issues, challenges, and recommendations offered at the time of their publication.

Second, a compilation of empirical data and interviews with current and former staff of the Division and the FEC were conducted. The Division and FEC furnished staff with information relating to caseload, staffing, budget, and organizational structure. While compiling data for this report, staff uncovered discrepancies between the various sources called upon to provide statistical data on the FEC. Acknowledging that these inconsistencies may have an impact on the issues presented in this review, staff made every attempt to assimilate all pertinent information independently, objectively and consistently by utilizing data obtained from the FEC, the Division and previous institutional reviews of the FEC.

Third, a random sampling of recent FEC cases from 1996 through 1998 was conducted to evaluate the average time expended at the various levels of an investigation prior to final adjudication of the case.

Fourth, a comparison with the Florida Ethics Commission (Ethics Commission) was conducted to evaluate the effects that certain resources, organizational structure and procedures may have on agencies with similar functions.

Finally, questionnaires were submitted to various states with similar election enforcement practices to compare and evaluate possible recommendations to enhance Florida's system of election law enforcement (see Appendix A for copy of the questionnaire).

III. FINDINGS

A. The Florida Elections Commission: Pre-1997

The Watergate scandal of the early 1970's not only forced the resignation of a sitting President, but single-handedly thrust the issue of election reform and enforcement into the forefront of the political climate across the country. Congress enacted the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455, in 1971 in direct response to revelations made during the congressional investigation of the campaign-related activities of senior officials in President Nixon's Administration. The FECA was enacted to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

The FECA, as substantially amended in 1974 and 1976, was the most comprehensive regulation of the federal electoral process in history. The 1974 amendments to the FECA created the Federal Election Commission to regulate the federal electoral process and to enforce the FECA's limitations.

Following the federal government's lead, many states enacted or strengthened existing campaign finance reform laws.⁵ Florida was one such state in recognizing that the "Who Gave It-Who Got It" law fell short of providing any plausible enforcement action to the requirements and prohibitions affected by the legislation. The Code was overhauled in 1973 to provide for more detailed reporting requirements; regulation of political committees and committees of continuous existence; and an elections commission for enforcement. As stated previously, the FEC was originally housed within the Department of State and dependent on the Division for all support and staffing. Authority to investigate complaints was vested with the Division, with reports brought to the FEC for action.⁶

The basic structure of the FEC remained unchanged until 1977, when the Legislature expanded the jurisdiction of the FEC to hear cases and impose civil fines, in addition to changing the manner in which appointments to the FEC were made.⁷ Further jurisdictional-related changes followed in subsequent years culminating in the creation of the FEC as an

⁵ *Supra* note 1.

⁶ Chapter 73-128, Laws of Florida.

⁷ Chapter 77-175, Laws of Florida.

independent agency in 1997.⁸

Membership

When the FEC was formed in 1973, it was composed of seven members appointed by the Governor and approved by three members of the Cabinet. The first six members were chosen from a list submitted to the Governor by the chairs of the state executive committees of the two major political parties. The seventh was chosen from a list submitted by the first six FEC members. All members served four-year staggered terms and were subject to confirmation by the Senate.⁹

In an effort to provide political independence, two restrictions were imposed. First, an appointee could not serve if he or she had held an elected public office, or office in a political party, the year immediately preceding the appointment. Second, commissioners were prohibited from being members of any county, state, or national executive committee of a political party, or an officer of a partisan political club or organization and could not hold, or be a candidate for, another public office during their tenure on the FEC.¹⁰

Further restrictions to membership followed in 1977 and 1990, limiting the number of commissioners who could be from the same political party to four, and limiting service on the FEC to no more than two full terms.¹¹ Thereafter, the qualifications for membership to the FEC remained unchanged until 1997.

Jurisdiction

The FEC was given jurisdiction over the campaign finance provisions set forth in Chapter 106, Florida Statutes. These provisions provided for more detailed reporting requirements, the regulation of political committees and committees of continuous existence, and limitations on campaign contributions and expenditures.¹²

Although authority over these provisions was given to the FEC, its function was limited to that of making determinations as to whether probable cause existed for a violation of Chapter 106, Florida Statutes. The FEC had no staff of its own and could only be convened at the call of the Chair, or the Secretary of State. All administrative and investigative functions were vested with the Division.

⁸ *Supra* note 4.

⁹ *Supra* note 6.

¹⁰ *Id.*

¹¹ Chapters 77-175 and 90-338, Laws of Florida, respectively.

¹² *Supra* note 6.

An investigation could be initiated through a public complaint filed with the Division or on the Division's own initiative. This self-initiative placed almost unbridled discretion with the Secretary of State in deciding which cases would be investigated and referred to the FEC - an issue that would later give rise to a formal grievance before the Ethics Commission.¹³ Public complaints filed with the Division were proper only if they alleged a violation for an office voted on a statewide basis. Complaints filed by the public which were directed at offices voted on less than a statewide basis were required to be forwarded to the appropriate state attorney for disposition.

Investigations conducted by the Division were reported directly to the Secretary of State, who would convene the FEC to determine probable cause. If probable cause was found, the FEC submitted its findings to the Attorney General, or to the state attorney in the circuit where the violation occurred.¹⁴

Unfortunately, most state attorneys were reluctant to file charges. Of the sixty-two cases that were forwarded to state attorneys between 1973 and 1977, only 21 percent were acted upon. Of those, eight cases were sent to grand juries, four had criminal charges filed, and civil charges were filed in one case. More telling, however, are the thirty-one cases in which state attorneys reversed the FEC's finding of probable cause, and the five cases in which they concurred but refused to file charges.¹⁵

Discouraged by the low priority given to election law violations by state attorneys, the 1977 Legislature expanded the enforcement responsibilities of the FEC and the Division. The FEC

was now authorized to impose civil fines of up to \$1,000 per count for violations of Chapter 106, Florida Statutes, while the Division was empowered to make determinations of election law violations for all levels of public office. Further, the legislation required state attorneys to promptly and thoroughly investigate and undertake any civil or criminal action for

¹³ In 1985, the Ethics Commission investigated a complaint filed against the Deputy Secretary of State for misuse of a public position. The complaint alleged and the facts found that between 1980 and 1985, all complaints filed by the Division were against non-incumbent candidates. Although the Ethics Commission found that the Deputy Secretary was the sole person who determined whether the Division would file a complaint, they returned a no probable cause finding since the actions of the Deputy were not taken with corrupt motives. The report however, underscored one of the operational challenges that faced the Division and Commission with respect to the independence of case referrals. [See, House Committee on Ethics and Elections, *An Overview of Elections Enforcement - The role of the Division of Elections and the Elections Commission*, 1987, at 1.].

¹⁴ *Supra* note 6.

¹⁵ *Supra* note 1.

complaints referred to them by the FEC. In turn, the FEC was authorized to bring enforcement actions in circuit court for civil fines assessed. Fines collected were required to be deposited into the state's General Revenue Fund.¹⁶

By 1978, the Legislature introduced a willful standard for violations under the FEC's jurisdiction. Section 106.25(3), Florida Statutes, was amended to read:

For the purposes of Elections Commission jurisdiction, a violation shall mean the **willful** performance of an act prohibited by this chapter or the **willful** failure to perform an act required by this chapter. (emphasis added).¹⁷

This standard made conviction more difficult because the FEC was required to prove that a violator knew what the law was, that he or she intentionally performed a prohibited act or, he or she failed to perform a required act. Compounding this problem was the lack of resources available to properly investigate a willful claim.¹⁸

Up until 1985, the FEC had been given increasing responsibility without compensation for any changes to personnel or financial resources.¹⁹ In both an effort to add a funding mechanism and remove the need for review of all late filed reports, the FEC was authorized to impose automatic fines for campaign finance reports filed late. Effective January 1986, filing officers were required to notify campaign treasurers if campaign finance reports were

¹⁶ *Supra* note 7.

¹⁷ Chapter 78-403, Laws of Florida. A willful act may be described as one done intentionally, knowingly, and purposely without justifiable excuse. This is distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently whereby the former act is willful and the latter negligent. BLACK'S LAW DICTIONARY (Sixth Edition, 1990).

¹⁸ Senate Committee on Ethics and Elections, *A Review of the Elections Commission and Selected Campaign Financing Provisions Scheduled for Repeal on October 1, 1990*, at 39 (1990). Investigations were conducted by mail or phone and the cost of subpoenas for records was prohibitive.

¹⁹ House Committee on Ethics and Elections, *An Overview of Elections Enforcement: The Role of the Division of Elections and the Elections Commission*, at 16 (1987), citing lack of money for not conducting field investigations as required by s. 106.22, Florida Statutes; House Committee on Regulatory Reform, *Sundown Report of the Elections Commission*, at 25 (1990), citing inadequate funding and staffing for the ineffectiveness of the Commission to fulfil its primary duties and functions; [see also, *supra* note 18, at 31, citing the need for Division assistance in providing travel money to continue holding meetings through FY 1988].

late and were authorized to assess a \$50 fine for each day the report remained overdue.²⁰ Although this new policy was to relieve the FEC of largely academic reviews, the doctrine of due process required an appeal process, which fell back to the FEC. Upon appeal, the FEC could waive a fine in whole or in part however, the burden was on the respondent to prove that unusual circumstances existed for the failure to timely file the report.

Fines that were collected were deposited into the state's General Revenue Fund and were unavailable for use by either the FEC or the Division, unless directly appropriated by the Legislature.²¹ In 1989, the Legislature established a process by which a first-time offender could be granted an automatic waiver for a late filed report, if no activity existed during the covered reporting period.²²

The next seven years would prove to be the most progressive for the FEC. During a routine sundown review of the FEC in 1990, several recommendations were made to further the FEC's ability to perform its statutorily mandated functions.²³ The recommendations included requiring that the Division employ the necessary staff for the FEC to fulfill its responsibilities; that the Division assist the FEC in developing a biennial budget request; that the Division perform random audits of campaign reports, make preliminary investigations of complaints and dismiss those where no probable cause was found; and that the FEC not be subject to the control or direction of the Division.²⁴ The Legislature acted upon these and other recommendations during the following legislative session.²⁵

In the seven years following the passage of the recommendations outlined in the Sundown Report, the FEC's duties and functions remained unchanged. It was not until 1997 when a pivotal move was made to give the FEC the autonomy it had long sought.

These changes are discussed in more detail in the *Florida Elections Commission-Post 1997* section of this report.

²⁰ Chapter 85-226, Laws of Florida.

²¹ *Id.* Enforcement by the FEC for automatic fines covered 390 municipalities, 67 counties, and all political organizations filing with the Division.

²² Chapter 89-256, Laws of Florida.

²³ Florida's Sundown Act was established in 1978 to periodically review statutorily created bodies to determine a continued need for that body. [See s. 11.611, Florida Statutes].

²⁴ House Committee on Regulatory Reform, *Sundown Report of the Elections Commission*, at 26 (1990).

²⁵ Chapter 90-338, Laws of Florida.

Staffing

During the twenty-four year span between its inception in 1973, to the establishment of the FEC as an independent body in 1997, the Division provided all staffing. For most years, this consisted of full-time Division employees allocating a portion of their time for duties required of the FEC.

In the early years (1974-1977), the Division employed four field agents, who were located throughout the state, to assist in investigating FEC matters. By 1978, the Division had assigned one full-time investigator to FEC related investigations, in addition to three part-time investigators. However, a reorganization of the Department of State in 1979 led to a consolidation of all investigators into a single investigative unit. This new unit was placed under the Division of Licensing and transferred to Tallahassee. Although the Division was able to keep one full-time investigator for FEC related complaints, assistance by other investigators within the Division of Licensing proved futile. The complexity of the Code, coupled with lack of specific knowledge in the field, hampered the other investigators in their ability to properly investigate election related matters. Compounding matters, the Division had a shortage of funds allocated for investigation related expenses.²⁶

Both lack of resources and staffing impeded the FEC as they attempted to perform the functions required of them by law. To illustrate, during a public meeting in 1979 the FEC criticized its own structure stating that they were “. . . being denied effective support services because they are not an independent agency and have to borrow staff and office facilities (from the Division of Elections) . . .”²⁷ This issue was moderately addressed by the 1990 Legislature when legislation was passed to clarify the Division’s responsibility to “. . . employ such staff as is necessary to adequately perform the functions of the commission, within budgetary limitations.” (emphasis added).²⁸

²⁶ House Committee on Ethics and Elections, *A Review of the Florida Commission on Ethics and the Election Commission*, at 54 (1989); and Division of Elections, *1980 Annual Report*.

²⁷ House Committee on Ethics and Elections, *An Overview of Elections Enforcement: The Role of the Division of Elections and the Election Commission*, at 18 (1987), citing the *Sentinel Star*, July 7, 1979, at 3C.

²⁸ *Supra* note 25.

Unfortunately, without the allocation of additional dollars, the Division was unable to create positions that were needed, but not legislatively approved.

From 1984 through 1986, four employees were assigned to the FEC. Although the titles varied, the allocated staff consisted of an administrative assistant, staff assistant, investigator, and an attorney. In 1987, the Division requested that the Legislature either provide funding for twelve full-time employees to staff the FEC, abolish the FEC, or transfer staffing responsibilities to another agency such as the Ethics Commission.²⁹ This request was not acted upon.

The lack of support did not prevent the Division from attempting to provide some continuity to the investigative process. In 1988, one full-time Special Investigator position was assigned to the FEC. Additionally, the Division apportioned an assistant general counsel, an attorney, a staff assistant, and an administrative secretary for FEC related matters. During peak times, as many as thirteen Division employees were assigned to assist in preparing for FEC meetings and reports thereto. Responsibility for prosecuting cases on behalf of the FEC, as well as coordinating all administrative functions, fell on the Division's Assistant General Counsel. This position was also responsible for providing legal counsel to the Division, writing advisory opinions, and promulgating Division rules.³⁰

The 1990's found the FEC with a better foundation with respect to staffing. Between 1990 and 1991, the Division began organizing the functions of the FEC into a single group which was better organized, although staff was still primarily shared with the Division. Beginning in 1993, the Division was able to dedicate specific personnel to the FEC. Although a step toward independence, this change did not overcome the imbedded difficulties that had long faced the FEC and the Division resulting from sharing staff. Many conflicts arose between the FEC and the Division attorneys with respect to election law interpretation, findings of law, and other legal issues. Division attorneys often found themselves in the uncomfortable position of being required to defend a position (e.g., that of the FEC's interpretation of the law) in their role as FEC attorney that was in contradiction with an interpretation of the Division's attorney.

The advent of additional funding and the creation of nine positions in 1990 furnished the Division with the ability to begin the task of structuring their organization to perform its FEC related functions. This new structure was organized into three distinct sections - the Legal, Investigative, and Fines Sections. The Legal Section was responsible for reviewing the legal sufficiency of complaints, drafting of complaints, providing legal advice to investigators

²⁹ Division of Elections, *1987 Annual Report*.

³⁰ *Supra* note 26 at 52.

during the course of an investigation, drafting and reviewing subpoenas, reviewing investigative reports, preparing findings of probable cause, presenting cases before the FEC, arguing appeals, representing the Division and/or FEC before the Division of Administrative Hearings or circuit court, and preparing final orders.

The Investigative Section was responsible for all areas of investigations including coordinating and conducting investigations, preparing reports on findings, assisting the legal section in the review of cases, preparing FEC meeting agendas, and any other support functions that were assigned. The Fines Section was responsible for all functions relating to the imposition of automatic fines, recording and maintaining files, validating payments, and preparing default final orders.

Unfortunately, the FEC would experience frequent staff turnover, a problem that until recently, had plagued the FEC in years past. According to the Executive Director for the FEC, it takes approximately one to two years to train an attorney for election law work, and a minimum of two years training an investigator.³¹ With the exception of three key people who remained with the FEC throughout most of the 1990's, any significant staff longevity was virtually nonexistent.

Complaint Process

Although the creation of the FEC was a step in establishing an enforcement arm for election law violations, the reality in the earlier years of its existence was one of screening transgressions for the Attorney General and state attorneys. It would be many years before the FEC would begin to be an effective enforcement authority. The complaint process established in 1973 went virtually unchanged until 1997. From 1973 to 1977, authority to investigate an alleged violation could only be initiated after a sworn complaint was filed with the Division, or the Division initiated an investigation on its own. Upon a complaint being filed with the Division, or upon the Division launching an investigation, the Division would report its findings to the FEC for a determination of probable cause. Determination of probable cause was the only function with respect to enforcement that was vested with the FEC. Actual prosecution of a case was conducted by either the Attorney General or the appropriate state attorney.

In conjunction with the increased responsibilities accorded the FEC in 1977, a more organized process was instituted to handle complaints and investigations. Upon receiving a complaint, the case was assigned to the Division attorney and a letter of receipt transmitted to the complainant. The Division's attorney was responsible for verifying whether a violation

³¹ Interview with Barbara Linthicum, Executive Director, Florida Elections Commission.

of Chapter 106, Florida Statutes, had been alleged. If the complaint was proper, it was assigned to an investigator for fact gathering. The investigator was responsible for ensuring the accuracy of the complainant's allegations, collecting all necessary evidence and, upon consultation with the Division attorney and satisfaction that the file was complete, preparing a final investigative report. The file and report was then forwarded to the FEC for disposition. The Division's responsibility with respect to the case ended. The attorney assigned to the FEC was responsible for reviewing the report for completeness. If further investigation was warranted, an investigator was assigned by the Division. Upon completeness of the file, the FEC's counsel presented the case to the FEC. The FEC then determined whether to hear the case. If the FEC did not hear the case, it was considered a closed matter with no violation found and the case made public. If the FEC decided to hear the case, it was scheduled for a future meeting and the respondent was so notified. A case was considered confidential up until final disposition.

Budget

In 1977, the FEC was given authority to impose civil penalties for election law violations. However, these dollars flowed directly into the state's General Revenue Fund and did not directly revert to either the Division or the FEC for financial support. Penalties assessed in 1978 amounted to \$8,700, but dropped almost threefold in 1980 to \$2,300. By comparison, the Division spent \$7,500 on travel, per diem, and investigative related expenses in 1976, and approximately \$4,000 in 1977.

By 1984, the Division began receiving a level appropriation of \$11,000, although they requested \$15,000 to maintain previous levels of service. Two years later, automatic fines were instituted for the late filing of campaign treasurer's reports by candidates and committees.³² Monies collected from these fines were deposited into the general revenue fund for the jurisdiction to which the committee or candidate reported. These jurisdictions included state, county, and municipal governments. Fines collected for the eighteen-month period from commencement of automatic fines to the end of the 1987 fiscal year amounted to \$306,435.

In 1989, the Legislature created two trust funds for election purposes: (1) the Election Commission Trust Fund (ECTF), which was funded by an election assessment of 1 percent added to a candidate's qualifying fee; and (2) the Election Campaign Financing Trust Fund (ECFTF), to be used for public financing of certain campaigns. Revenues from fines levied for the late filing of campaign treasurer reports that were previously deposited into the state's

³² *Supra* note 20.

General Revenue Fund were transferred to the ECFTF.³³

In 1990, the Division received both staff and fiscal relief when nine new positions were approved and \$324,146 was appropriated by the Legislature for FEC related functions. Five years later, the Division was employing eleven full-time employees to perform functions required of the FEC. However, the lack of separate accounting procedures for Division and FEC related budget categories makes a fiscal evaluation over the life of the FEC unfeasible.

Caseload

In the 26 years since its creation, Chapter 106, Florida Statutes, has been amended considerably not only in the form of increased requirements related to campaign financing, but also with respect to responsibilities assigned to the Division and the FEC. Accompanying this escalation in jurisdictional responsibility was a corresponding increase in cases for which the Division and the FEC were responsible for handling.

The discussion outlined below attempts to highlight some of the affects that the consistent increase in caseload has had on the FEC. It is important to note however, that during the compilation and review of the data contained in this report, staff discovered some discrepancies in the data provided by the sources cited. Staff has concluded that the inconsistencies are caused primarily by staff turnover and inconsistent methods used to compile FEC data since its creation.³⁴ Irrespective of these variances, staff made every attempt to assimilate information independently; utilizing data obtained from the Division's Annual Reports, the FEC, and previous institutional reviews of the FEC. Where significant inconsistencies exist, staff defers to those records kept by the FEC.

The 1970's

Between 1973 and 1977, the FEC reviewed approximately 40 cases per year, for a total of 161 cases. Of these, 62 were referred to the appropriate state attorney's office and the remainder disposed of by either a finding of no probable cause, that no violation occurred or simply directed to another jurisdiction. Of the cases referred to state attorneys, no violations were found in 31 cases, 8 cases went to grand jury, criminal charges were filed in 4 cases, a criminal injunction was obtained in 1 case, and 1 case resulted in a criminal conviction.³⁵ By 1978, the Legislature had given the FEC the authority to levy civil fines of \$1,000 per count

³³ Chapter 89-338, Laws of Florida and Chapter 89-256, Laws of Florida, respectively.

³⁴ Interviews with Ethel Baxter and Paula Reams, Division of Elections, and Barbara Linthicum, Florida Elections Commission.

³⁵ *Supra* note 1.

for violations, but had also instituted a “willful” standard for Code violations. As previously discussed, this standard made conviction more difficult. Twenty nine cases were received by the FEC in 1978 and were disposed of in 6 meetings. The FEC found probable cause in 10 of the cases, no probable cause in 16, and 3 cases were referred to the appropriate state attorney.³⁶

The 1980's

By the 1980's, the FEC began to experience a significant increase in their caseload. **Between 1980 and 1985 inclusive, caseloads almost doubled to an average of 71 cases per year, as compared to an average of 40 cases per year during the 1970's.** In 1980, the FEC met 8 times and found violations in 19 cases, no violations in 47 cases, and technical violations in 3 cases.³⁷

From 1983 to 1985, the FEC held 6 meetings per year and considered 214 cases, or approximately 72 cases per year. Violations were found in 65 of the cases, with a total of \$30,745 in civil fines levied. Collection of fines proved challenging however, as \$8,794 went uncollected.³⁸

The implementation of an automatic fine structure for late-filed campaign treasurer reports in 1986 coincided with a 64 percent increase in the FEC's caseload. It should be noted that this figure is exclusive of appeals of automatic fines that were filed which totaled another 420 cases in 1986 alone. Although the level of cases remained constant during 1987 and 1988, the initial surge of new cases in 1986, coupled with the appeals of automatic fines that were filed, began to take its toll on the FEC's overall caseload, with more cases left pending at years end.

Between 1986 and 1989, the FEC met on average 6 times per year and heard a total of 466 cases, or 116 cases per year. Violations were found in 10 percent of the cases, 53 percent of the cases were closed either for lack of legal sufficiency or no violation being found, and the remaining 37 percent of cases were held over to following years. This data is exclusive of automatic fine appeals which, due to incomplete figures, could not be calculated

³⁶ Division of Elections, *1979 Annual Report*.

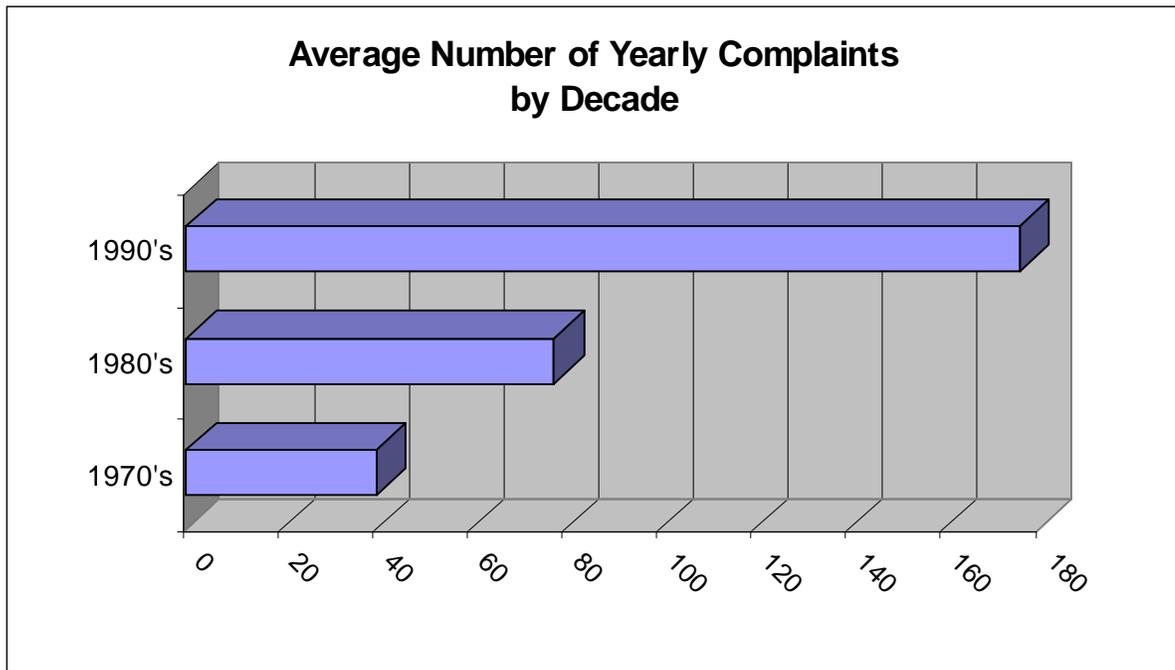
³⁷ Division of Elections, *1980 Annual Report*.

³⁸ Data derived from the following sources: Division of Elections, *1984 Annual Report*; 1985 Questionnaire by the Division of Elections submitted to the Florida Legislature; and Division of Elections *1985 Annual Report*.

for this period.³⁹

The 1990's

The 1990's saw a significant increase in complaints filed as compared to the two previous decades. (see Chart 1) Complaints filed in the 1990's were twice that of the 1980's, and more than three times that of the 1970's. It is uncertain to what extent this occurrence is a result of citizen involvement with respect to policing of election violations, or the increase of jurisdictional responsibilities for the FEC. In either case, it does indicate the trend of filed complaints for the three decades covering the life of the FEC.



Source: The Florida Elections Commission and *Annual Reports*, Division of Elections.

Chart 1.

During 1990, the FEC received 80 complaints and carried over 43 cases from the previous year, for a total of 123 cases to be considered. Sixty-one percent of these cases, or 111 cases,

³⁹ Data derived from Division of Elections, *Annual Reports* for 1986, 1987, 1988, and 1989 and the Florida Elections Commission.

were left pending at the end of 1990. Of the remaining cases, 50 were dismissed for either no violation or no probable cause, 3 cases were referred to the appropriate state attorney, in 3 cases a willful violation was found, and hearings were pending at years end in 3 of the cases.

The large influx of automatic fine cases that were appealed to the FEC during the latter part of the 1980's compelled the Legislature to pass an amnesty provision in 1989 for first time offenders.⁴⁰ This helped to reduce the number of automatic fine cases that were appealed to the FEC. For example, only 99 automatic fine cases were appealed in 1990, significantly less than the 466 automatic fine appeals that were filed in 1986.⁴¹

In 1991, 208 complaints were filed which represented a 106 percent increase from the previous year. In addition, 111 cases were carried forward from 1990. With only 4 cases found to be legally insufficient, the FEC had a total of 315 willful cases to consider in 1991. Probable cause was found in 21 of the cases, 22 were dismissed due to lack of probable cause, 6 cases were referred to the appropriate state attorneys, actual violations were found in 2 cases, and over 250 cases were pending investigation. Additionally, 169 automatic fine appeals were closed during the year.⁴²

By 1992, the FEC had a substantial backlog of cases. Although complaints filed for the year fell 26 percent to 154 cases, the FEC had a backlog of 276 cases carried over from 1991. Of the 428 willful cases before the FEC in 1992, less than 25 percent were closed by years end. Probable cause was found in 20 cases, 60 cases were dismissed for no probable cause, 2 cases were found to lack legal sufficiency, 11 cases were found to have no violation, violations were found in 5 cases, and 1 case was referred to the appropriate state attorney. Appeals of automatic fines totaled 107, with all monies collected going to the ECFTF.⁴³

One of the goals of the FEC in 1993, and one in which they found great success, was to address their backlog of cases. By 1993, the FEC had accumulated a backlog of 324 cases. An additional 143 cases were filed during the year, which brought the total caseload for 1993 to 467 cases. (see Table 1).

⁴⁰ Chapter 89-256, Laws of Florida.

⁴¹ House Committee on Ethics and Elections, *Florida Elections Commission*, October (1995); and Division of Elections, *1990 Annual Report*.

⁴² *Supra* note 41; Division of Elections, *1991 Annual Report*; and the Florida Elections Commission.

⁴³ Data provided by the Florida Elections Commission and a review of the Division of Elections, *1992 Annual Report*.

To assist the FEC in this endeavor, an additional attorney was hired and dedicated to the case overload. Of the 143 complaints filed in 1993, about half (70 complaints) were found to be legally sufficient, alleging a violation for which the FEC had jurisdiction. The FEC was able to dispose of 236 cases during the year, translating into a 66 percent rate of case closure for 1993. This was a substantial increase in case closure from previous years. Additionally, the FEC disposed of 226 automatic fine appeals.

YEAR	Pending from Previous Year	Complaints Filed	Total Caseload	Complaints Found Legally Sufficient	Complaints Found Legally Insufficient	Total Cases Closed *	Percent of Closed Cases to Total Cases
1999	163						
1998	148	216	364	119	97	201	55%
1997	159	135	294	60	75	146	50%
1996	83	274	357	136	138	198	55%
1995	120	123	243	88	35	160	66%
1994	158	251	409	133	118	289	71%
1993	324	143	467	70	73	309	66%
1992	276	154	430	152	2	106	25%
1991	111	208	319	204	4	43	13%
1990	43	80	123	80	0	12	10%

Note: * "Total Cases Closed" include legally insufficient cases.

Source: Florida Elections Commission.

Table 1.

During 1994, a total of 251 complaints were filed with the FEC. Of these, 133 were opened as willful cases, with an additional 158 cases carried forward from 1993. For the year, the FEC disposed of 171 willful cases. Automatic fine appeals filed in 1994 totaled 140. In addition, the FEC sent out 270 enforcement letters, entered 21 default orders, and held 8 hearings.⁴⁴

The number of complaints filed with the FEC in 1995 fell by approximately 50 percent, which is not uncommon for an off-election year. Complaints filed numbered 123, with 88 complaints found to be legally sufficient. Cases carried over from 1994 numbered 120, for a total of 208 willful cases pending before the FEC in 1995. During the year, the FEC completed 117 investigations, held 22 formal and informal hearings, and closed 125 willful cases. Open cases held over to 1996 totaled 83. Automatic fine appeals totaled 59, with 158

⁴⁴ Data provided by the Florida Elections Commission and a review of the Division of Elections, *1994 Annual Report*.

enforcement letters sent, 23 default orders were issued, and 3 hearings held.⁴⁵

In keeping with election year trends, complaints filed during the 1996 election year were high, numbering 274. Although only half (136) of the complaints were found to be legally sufficient, total caseload under the FEC’s review was again reaching very high levels, with 357 cases. Automatic fine appeals totaled 119, with 162 enforcement letters sent, 30 default orders issued, and 7 hearings held. Up until this year, the FEC had kept pace with the number of appeals opened, however, an exception to this trend was developing as appeal cases for automatic fines held over from previous years totaled 64. (see Table 2)

AUTOMATIC FINE CASES				
			Elections Commission Action	
	APPEAL CASES	APPEAL CASES	FINES UPHELD OR PARTIALLY WAIVED	FINES FULLY WAIVED
	OPENED	CLOSED		
1998	240	154	102	80
1997	86	94	80	35
1996	119	55	76	33
1995	59	59	N.A.	N.A.
1994	140	140	N.A.	N.A.
1993	226	226	N.A.	N.A.
1992	107	107	N.A.	N.A.
1991	169	169	N.A.	N.A.
1990	99	99	N.A.	N.A.

Source: Florida Elections Commission
Table 2.

During 1997, the FEC’s last year with the Division, 159 willful cases were carried over from previous years and an additional 135 complaints were filed. Less than half of the complaints (60) were found to be legally sufficient, for a total of 219 working cases. Of these, 27 cases were found to have no probable cause, probable cause was found in 30 cases, violations were found in 14 cases and 1 case was found to have no violation. Complaints closed for the year totaled 71. As for automatic fine cases, the FEC slightly caught up from the previous year with 8 more appeals closed than were opened: 86 filed appeals, 94 closed, 35 fines waived,

⁴⁵ Data provided by the Florida Elections Commission and a review of the Division of Elections, *1995 Annual Report*.

and 80 fines upheld.⁴⁶

One of the major factors causing the backlog of cases was the overall low rate at which cases were ultimately disposed of by the FEC, especially during the early 1990's. In reviewing the trends with respect to case closure, in both terms of actual number of cases closed per year and the percentage of closed cases to total caseload under the FEC's jurisdiction, one can quickly see the inability of the FEC to keep pace. (see Table 1 and Chart 2) More specifically, the figures reveal that from 1990 through 1992 the average number of cases closed to cases filed was 16 percent. Meaning, of course, that 84 percent more cases were being carried forward, on average, than were being disposed of during those years. Chart 2 depicts the percentage of closed cases to total cases, including legally insufficient cases, which the FEC has closed each year since 1990.

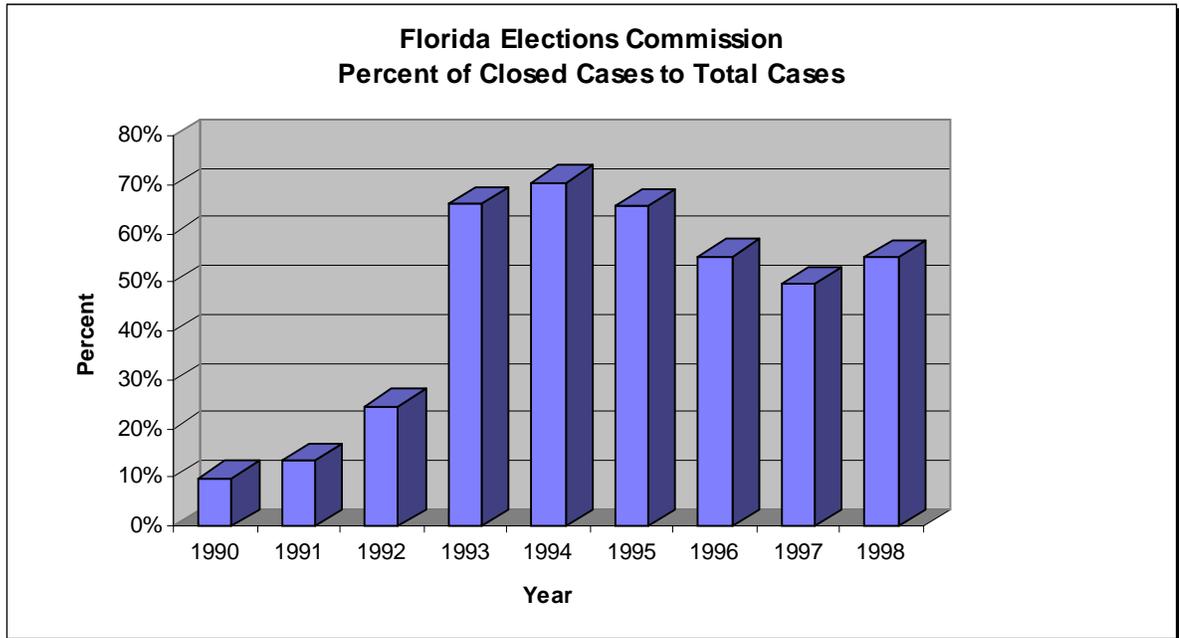


Chart 2.

The problem was caused, in part, to the lack of legal staff available to handle the investigations that were being conducted. Recognizing this, the Division hired an attorney whose sole function was to work on the backlog, which until 1996 was a very successful

⁴⁶ Data provided by the Florida Elections Commission and a review of the Division of Elections, *1997 Annual Report*.

endeavor. Case disposition rate for 1993 through 1995 was high, with rates of 66, 71, and 66 percent, respectively. (see Chart 2) This is more clearly reflected in the “Pending from Previous Year” column in Table 1, which shows the decrease in cases carried forward during 1994, 1995, and 1996. In fact, this number, which was at its all time high of 324 in 1993, fell almost fourfold to just 83 cases by 1996.

Though the FEC was effective in responding to the caseload backlog, this success was short-lived, as the presidential elections of 1996 encumbered the FEC with the largest number of complaints filed to date. In 1996, 274 complaints were filed with the FEC which started another era of case backlog. The hiring of an additional attorney in 1993 had, at least, armed the FEC with additional ammunition to combat the new influx. This is reflected by the higher rate of closed cases to total cases between 1996 and 1998, as compared to 1990, 1991 and 1992. While not optimal, the figures do suggest that the FEC has been able to find some efficiency in process and procedure as compared to earlier in the decade.

B. The Florida Elections Commission: Post-1997

The FEC was granted autonomy in 1997. Pursuant to Chapter 97-13, Laws of Florida, the Legislature transferred the FEC from the Department of State to the Department of Legal Affairs. This transfer established the FEC as a separate budget entity and provided that it was not to be subject to the control, supervision, or direction of the Department of Legal Affairs or the Attorney General, according the FEC authority over all aspects of its duties including personnel, purchasing, and budgetary matters.⁴⁷

In creating the new FEC it is important to note that all administrative matters with respect to elections, such as filing of campaign treasurer reports, distribution of election forms and publications, and providing advisory opinions, were kept within the jurisdiction of the Division. The FEC remains the central election law enforcement agency but now a separate body from the Division. FEC staff is no longer relegated to investigative and reporting duties alone, as they are now responsible for performing all functions necessary of an independent body, including but not limited to, administrative, computer maintenance, and other necessary functions previously performed by the Division. This apparent panacea however, has brought forth new challenges.

⁴⁷ Section 106.24, Florida Statutes.

Membership

Chapter 97-13, Laws of Florida, made changes to both member composition and manner of appointment. The composition of the FEC was increased from seven to nine members each serving four-year staggered terms, but serving no more than two full terms. Initial appointments for the first eight members was made by the Governor from a list provided by the President of the Senate, Speaker of the House of Representatives, and the Majority and Minority leaders of each house. The Governor directly appointed the ninth member who also serves as Chair. As vacancies occur, the new appointment is made from a list provided by the ranking officer of the political party of the respective house originally making that appointment. All appointments continue to require Senate confirmation, but Cabinet approval is no longer required. No more than five members may be from one political party.⁴⁸ Current composition of the FEC is as follows:

Susan MacManus, Chair
2506 Collier Parkway
Land-O-Lakes, Florida 34639
Term Expires: January 4, 2002

Norman M. Ostrau
115 South Andrews Ave., Suite 423
Fort Lauderdale, Florida 33301
Term Expires: December 31, 2000

David W. Dunbar
Post Office Box 10
Palm Harbor, Florida 34682
Term Expires: December 31, 2000

Julie McClure, Vice Chair
202 North 35 Street, West
Bradenton, Florida 34205
Term Expires: December 31, 2000

Anne Jolley Byrd
168 Sugar Plum Drive
Tallahassee, Florida
Term Expires: December 31, 2000

Thomas B. Drage, Jr.
332 North Magnolia Avenue
Orlando, Florida 32801
Term Expires: December 31, 1999

Kenneth L. Epps
4560 Bohemia Drive
Pensacola, Florida 32503
Term Expires: December 31, 1999

J. Courtney Cunningham
235 Catalonia Avenue
Coral Gables, Florida 33134
Term Expires: December 31, 1999

Jimmy T. Patronis, Jr.
5551 North Lagoon Drive
Panama City, Florida 32408
Term Expires: December 31, 1999

⁴⁸ *Supra* note 4.

Members of the FEC do not receive a salary, or other compensation, other than per diem and travel expenses associated with official FEC business.

Jurisdiction

Accompanying the organizational freedom granted the FEC in 1997 was a corresponding expansion of jurisdictional responsibilities over violations of Chapters 104 and 106, Florida Statutes.⁴⁹ There are approximately 60 and 100 violations of Chapters 104 and 106, Florida Statutes, respectively, for which the FEC now has responsibility for enforcing. Violations of Chapter 104, Florida Statutes, are commonly related to the administration of elections, while violations of Chapter 106, Florida Statutes, are commonly related to campaign finance issues. Chapter 104 violations include, but are not limited to: (1) the false swearing of oaths; (2) neglect of an elections official in the performance of his or her duties; (3) vote buying; (4) voting by a non-qualified elector; (5) signing a petition more than once; and (6) the making of false statements against one candidate by another. Violations of Chapter 106 include, but are not limited to: (1) violation of limitations on contributions and expenditures to candidates and committees; (2) improper disclaimers on campaign advertisements; (3) acceptance of contributions from national, state, or county executive committees in excess of limitations; and (4) various violations with respect to the reporting of contributions.

In addition to the above, the FEC has jurisdiction over appeals for automatic fines for late filed campaign treasurer reports, appeals for dissolution or decertification of political committees pursuant to sections 106.03(7) and 106.04(7), Florida Statutes, appeals of fines on members of county canvassing boards pursuant to section 102.112, Florida Statutes, and appeals of adverse decisions with respect to the distribution of public campaign financing dollars in accordance with section 106.35(1), Florida Statutes.⁵⁰

The FEC was also given the latitude to offer pleas of *nolo contendere* and the payment of a fine for offenses that are minor in nature.⁵¹ These consent orders are offered to respondents in an effort to reduce the need to spend unnecessary man-hours investigating offenses the

⁴⁹ Chapter 97-13, Laws of Florida, transferred jurisdiction of Chapter 106 and s. 104.27, Florida Statutes, from the Division of Elections to the FEC. The Legislature added jurisdiction of all violations found in Chapter 104, Florida Statutes, to the FEC in Chapter 98-129, Laws of Florida. The various state attorneys handled previous violations of Chapter 104, Florida Statutes.

⁵⁰ Corresponding Florida Administrative Code rules include 2B-1.0025, 2B-1.0027, 2B-1.003, 2B-1.004, 2B-1.005, 2B-1.0052, 2B-1.0055, 2B-1.006, 2B-1.007, 1S-2.020, and 1S-2.021.

⁵¹ *Nolo Contendere*: Type of plea which may be entered ... by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it. BLACK'S LAW DICTIONARY (Sixth Edition, 1990).

resolution of which could easily be disposed of through a more direct and expeditious process. Minor violations are designated by rule and include, but are not limited to: (1) the failure to designate a separate interest bearing account; (2) placing political ads in roadway right-of-ways; and (3) failure of a non-incumbent to use the word “for” in a political advertisement.⁵²

Additionally, the Legislature codified the standard for “willful violations” in section 106.37, Florida Statutes. This section reads:

Willful violations.--A person willfully violates a provision of this chapter if the person commits an act while knowing that, or showing **reckless disregard** for whether, the act is prohibited under this chapter, or does not commit an act while knowing that, or showing **reckless disregard** for whether, the act is required under this chapter. A person knows that an act is prohibited or required if the person is aware of the provision of this chapter which prohibits or requires the act, understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required. A person shows **reckless disregard** for whether an act is prohibited or required under this chapter if the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation of this chapter. (emphasis added)

By placing this standard in statute, the FEC was now able to focus on the legal requirements necessary, in this case “reckless disregard,” to prove a violation.

From an organizational and administrative perspective, the FEC has been given complete authority to perform all necessary investigations, subpoena witnesses, determine probable cause, hear appeals, and dispose of any matters that come before them. However, the authority to provide advisory opinions pertaining to the Code was not transferred to the FEC and remains under the jurisdiction of the Division. Accordingly, the FEC is required by statute to adhere to the opinions issued by the Division in its deliberations and decisions. Nevertheless, in a recent complaint filed with the FEC and subsequently appealed to the First District Court of Appeals, the FEC implies that they have authority to issue declaratory statements consistent with Chapter 120, Florida Statutes. Section 120.565, Florida Statutes, provides that each agency shall provide for the prompt disposition of requests for declaratory statements. Should it be determined that the FEC is an “agency” for this purpose, the prohibition against the FEC issuing advisory opinions pertaining to the Code is probably moot and could prove legally problematic with two

⁵² Rule 2B-1.003, Florida Administrative Code.

separate agencies issuing opinions that may be inconsistent.⁵³

Staffing

Presently, the FEC employs a staff of 13:

- 1 Executive Director
- 2 Senior Attorneys
- 1 Investigation Manager
- 6 Investigation Specialists
- 1 Business Manager
- 2 Administrative Assistants

The Executive Director works at the pleasure of the FEC and is responsible for supervising and directing all functions of the FEC. It is the responsibility of the Executive Director and Investigation Manager to review all complaints for legal sufficiency prior to being assigned to an investigator. Investigation Specialists perform all investigations that have been accepted for review by the FEC. Once an investigation is complete, it is compiled in report form and submitted to the Investigation Manager, who reviews the report for accuracy and completeness. A Report of Investigation is then forwarded to an attorney, who then composes a Statement of Findings setting out the alleged violations based on the investigation and the Code with recommendations to the FEC. The Executive Director also performs this function. The administrative assistants perform all of the clerking functions for the FEC and staff. The Business Manager acts as the office manager and is responsible for all administrative tasks assigned by the Executive Director. (see Appendix B for organizational chart and selected resumes)

Complaint Process

There are two primary case types handled by the FEC: (1) willful violations of the Code; and (2) automatic fine appeals. Willful cases include all violations of Chapters 104 and 106, Florida Statutes, under the FEC's jurisdiction (e.g., exceeding contribution limits, or failing to supply required disclaimers on campaign signs, etc.), as well as "failure to file" cases (campaign treasurer reports not filed in accordance with Chapter 106, Florida Statutes). It is important to distinguish between a "failure to file" case and a "late-filed report" case, as the

⁵³ Section 106.26(13), Florida Statutes. See also, MCEA, et al. v. Election Commission, Case No. 1999-2221.

former is a “willful violation” case for which a civil penalty can be assessed and the latter is a case in which an automatic administrative fine is imposed. (see Appendix C for complaint process flow charts)

(1) Willful Case

To initiate an investigation, the FEC must either: (1) receive a sworn complaint alleging a violation of Chapters 104 or 106, Florida Statutes; or (2) receive information from the Division which would warrant an investigation. Any complaint received is date stamped for recording purposes and submitted to the Executive Director to determine legal sufficiency (i.e., does in fact allege a violation of Chapters 104 or 106, Florida Statutes). This process takes approximately five days to complete. If a complaint is found legally insufficient it is returned to the complainant to amend and resubmit. Cases found to be legally sufficient are opened for investigation and assigned to an investigator. Both the complainant and the respondent are notified when an investigation has commenced.

Next, the investigator begins the fact gathering process. This is performed almost exclusively by telephone and mail correspondence. This portion of the process is the most variable with respect to the amount of time necessary to complete. Moreover, many instances arise in which further violations are found while investigating the original complaint, which can extend the completion time. Once the investigation is complete, a Report of Investigation is drafted and submitted to the Investigation Manager for review.

Following completion of an investigation and subsequent report, the case is forwarded to a staff attorney, who compiles a Statement of Findings which must be reviewed by the Executive Director prior to being scheduled for review before the FEC for determination of probable cause. If the FEC finds no probable cause, a final order is drafted and the case is dismissed. Complainants have the right to appeal a finding of no probable cause or legal insufficiency with the FEC.

Should the FEC find probable cause, an Order of Probable Cause is drafted formally charging the respondent with a violation of the Code. If the violations are minor, the respondent may enter into a consent order whereby he or she pays the assessed fine(s), but neither admits nor denies the allegations set forth.⁵⁴ A respondent also has the right to request an informal hearing before the FEC to argue his or her case. The respondent may present any testimony or evidence he or she believes may mitigate the penalty or argue against the validity of the charges against them however, this option is only available after probable cause has been determined.

⁵⁴ Rule 2B-1.003, Florida Administrative Code.

On the other hand, should a respondent dispute an issue of material fact upon which the determination of probable cause is based, he or she may request a formal hearing before the FEC or an Administrative Law Judge assigned by the Division of Administrative Hearing (DOAH). This provision was enacted in 1997 to give respondents an avenue for addressing the material facts upon which a finding of probable cause would be based, should a dispute between the respondent and the FEC exist.⁵⁵ The FEC cannot modify findings of facts determined by an Administrative Law Judge unless the agency proves that either the findings were not based upon competent substantial evidence, or they did not comply with essential requirements of law.⁵⁶ Once material facts are determined, the case is reviewed before the FEC and a determination is made.

Final determination with respect to violations and penalties rests with the FEC. All Final Orders of the FEC may be appealed to the District Court of Appeals. If a respondent does not request a hearing, the FEC will enter a Final Order disposing of the case. With few exceptions, all proceedings are confidential until the question of probable cause has been determined.

With respect to time frames, staff processes a filed complaint, determines legal sufficiency, and sends notifications to the complainant and respondent within 7 days of receipt of the complaint. Investigations take approximately 4 to 6 months to complete, with the Statement of Findings completed within 4 weeks. Actual time-frames are contingent upon complexity of the case.

In a review of 18 random cases filed with the FEC between 1996 and 1998, the average time-frame for an investigation was slightly more than 6 months (6.67), and the average time between the completion of a Statement of Findings and final disposition was slightly less than 3 months (2.67). When compensating for the average time-lapse between the completion of a Statement of Findings and the next scheduled meeting of the FEC, the actual time-frame until final disposition would be less. The FEC meets on average once every 2 to 3 months.

(2) Automatic Fine Appeals

Florida Statutes provide that candidates, committees, and political party executive committees file campaign treasurer reports identifying contribution and expenditure activities during predetermined time periods.⁵⁷ The respective filing officer will automatically fine those treasurers who fail to timely file a report. Fines accrue daily until receipt of the report.

⁵⁵ *Supra* note 4.

⁵⁶ Section 120.57, Florida Statutes.

⁵⁷ Sections 106.04(8), 106.07(8)(a), and 106.29(3), Florida Statutes.

In cases where circumstances existed which prevented the timely filing of a report, appeals may be taken before the FEC. Unusual circumstances, which may have contributed to the failure to timely file, are set out in the Florida Administrative Code.⁵⁸

Budget

Recognizing the need to provide adequate funding in light of the changes effectuated by Chapter 97-13, Laws of Florida, the Legislature appropriated an additional \$271,413, which translated into a 45 percent increase in funds from fiscal year 97-98 to fiscal year 98-99. The FEC also received one additional staff person. For fiscal year 98-99 to fiscal year 99-00, the FEC's budget increased 1.23 percent, slightly less than the consumer price index (CPI) for the same time period, which stood at approximately 1.5 percent.⁵⁹

As previously discussed, funding for the FEC is primarily derived from dollars deposited into the ECTF. The ECTF is currently funded by the following elements:

- Election assessment of 1 percent of the annual salary of the office sought for candidates qualifying for non-judicial elective office;
- Filing fee of 3 percent and elections assessment of 1 percent from candidates qualifying for judicial or school board office;
- Fines for failure-to-file or late filed reports by candidates, committees, and political parties;
- Disposition of surplus campaign funds by candidates.

However, these revenues do not appear to adequately fund continued operations of the Commission in upcoming years. This is more apparent now than in past years since previous revenue shortfalls were borne by the Department of State prior to 1997. However, now that the FEC is an independent agency, there exists no safety net for future revenue deficits. With the lions share of revenues occurring in cycles, it is projected that the FEC will experience its first revenue shortfall in fiscal year 99/00 (please refer to Appendix D which displays projected revenues and shortfalls to the Elections Commission Trust Fund for fiscal years 97/98 through 04/05):⁶⁰ As Appendix D indicates, the FEC will experience revenue shortfall in fiscal years 99/00, 01/02, and 03/04. This is predicated however, on the budgets presented by the FEC.

⁵⁸ Rule 2B-1.0055, Florida Administrative Code.

⁵⁹ CPI provided by the Bureau of Labor Statistics.

⁶⁰ Data provided by the Florida Elections Commission.

It is possible to mitigate the revenue shortfalls by either decreasing the annual percentage increase of the FEC budgets or simply by maintaining the FEC budget at FY 99/00 levels. This should postpone the shortfall for a few more fiscal years. (Appendix D). Since agencies are prohibited from deficit spending, the only option available to the FEC would be to cut operations in order to fall within appropriated funding levels.

Caseload

In the short-term, the FEC has had some success in case closures. While the percent of case closures to total cases fell 5 percent in 1997 to 50 percent, the number of cases closed in 1998 increased. (see Table 1) Pending cases carried forward to 1997 increased as a result of the 274 complaints filed in 1996 - as is customary during election years. This trend held true for the 1998 election year as the FEC received 216 filed complaints. In fact, the historical difference between filed complaints during election years and those filed in off-year elections has been two to one.

If one compares only closed cases to those cases filed per year (excluding cases carried forward from previous years) for the latter 1990's, the data suggests that the FEC has been relatively successful in keeping pace since 1996 (see Table 3).⁶¹

YEAR	Complaints Filed	Complaints Found Legally Sufficient	Complaints Found Legally Insufficient	Total Cases Closed *	Percent of Closed Cases to Cases Filed
1999	163				
1998	216	119	97	201	93%
1997	135	60	75	146	108%
1996	274	136	138	198	72%
1995	123	88	35	160	130%
1994	251	133	118	289	115%
1993	143	70	73	309	216%
1992	154	152	2	106	69%
1991	208	204	4	43	21%
1990	80	80	0	12	15%

Note: * "Total Cases Closed" is the sum of legally insufficient cases and cases closed in a given year.

Source: The Florida Elections Commission.

Table 3.

⁶¹ The over 100 percent rates of 1993 to 1995 as previously discussed was the result of the hiring of an additional attorney to focus on pending case backlog.

This rate has been 91 percent on average from 1996 through 1998, suggesting that the FEC has been just shy of being 100 percent effective in closing as many cases as are filed on an annual basis.

Unfortunately, cases from previous years and automatic fine appeals, which have begun to accumulate slightly, continue to place the FEC in the precarious position of reverting to the case backlogs of the early 1990's.

IV. COMPARISON OF THE FLORIDA ETHICS COMMISSION AND THE FLORIDA ELECTIONS COMMISSION

Another tool available in evaluating the FEC is to compare similar procedures, responsibilities and structure of the Ethics Commission. Although they oversee different areas of law, both commissions follow many of the same processes in determining if a violation with respect to public office or election law has occurred. With few exceptions, both bodies have similar staff functions, receive complaints from the public, conduct investigations, determine probable cause, and adjudicate or recommend penalties. While the two commissions were created within a year of one another, one body has historically benefited from reliable and adequate resources and consistencies in organizational structure and staffing, while the other has been systematically plagued by these two critical elements.

Background

The Ethics Commission was statutorily created in 1974, “to serve as guardian of the standards of conduct.” Two years later, the “Sunshine Amendment” was adopted to Florida’s Constitution. This citizen’s initiative provided more stringent requirements of office holders and required an independent commission to conduct investigations and report findings concerning the breach of public trust associated with public office. The Ethics Commission became that “independent” body.⁶²

Complaint Process

Under current law, the Ethics Commission may only initiate an investigation upon the receipt of a sworn complaint by a citizen. Once received, the Executive Director has authority to make a determination of legal sufficiency and if found, order an investigation. If the case is found to be legally insufficient, it must reviewed by the Commission prior to final determination. Complaints, all proceedings, and records are exempt from public records laws

⁶² Chapter 112 (Part III), Florida Statutes and Section 8, Article II, Florida Constitution.

until probable cause has been found, or the respondent (the alleged violator) waives his or her rights to confidentiality. If a case is found to be legally sufficient an investigator is assigned and an investigation is conducted.

Investigations

The Executive Director assigns the case to an investigator, who gathers facts and reports the findings in an Investigative Report. Thus far, this process virtually mirrors that of the FEC. However, an important distinction exists between the two bodies with respect to the investigative stage. Investigators for the Ethics Commission are required to adhere to the material facts related in the complaint. Should an investigation reveal possible violations not identified in the initial complaint, the investigator is prohibited from investigating these ancillary issues. Such discoveries must be reported to the Ethics Commission in a separate report and forwarded to the appropriate legal authority. In contrast, the FEC imposes no restrictions with respect to how far ancillary issues not materially related to the initial complaint may be investigated. Yet, unlike the Ethics Commission, the FEC is the authority that adjudicates complaints and issues administrative penalties whereas, the Ethics Commission is limited to making penalty recommendations to the official having authority over the particular officer or employee.

Another important distinction is that the Ethics Commission has the resources to perform site visits with respect to investigations. As this study previously outlined, the FEC performs its investigations via telephone interviews and mail. The Ethics Commission is able to make site visits at an approximate annualized cost of \$22,000. This distinction is notable in that the ability to make site visits arguably quickens the time frame needed to bring an investigation to a close.

Probable Cause Determination

Another important distinction between the two bodies is the manner in which probable cause is determined. But before this can be discussed, one must first understand how each body utilizes its legal staff. The legal staff of the Ethics Commission, among other responsibilities, is charged with advising the Ethics Commission on legal matters, but does not actually litigate cases before the Ethics Commission. This function is performed by an Assistant Attorney General, referred to as the “Commission Advocate.”⁶³ One advantage of this system is that there exists a clear division between those responsible for prosecuting a case, and those responsible for investigating (staff) and passing judgment (Commissioners), thereby removing any real or perceived conflict between the two. Additionally, this model removes any confusion between staff and Commissioners when staff must take a contrary position.

Probable cause, under the Ethics Commission’s model, provides that once an investigation is

⁶³ Rule 34-5.0045, Florida Administrative Code.

completed, the Investigative Report and complaint are forwarded to the Commission Advocate. The Advocate reviews the documents, prepares recommendations, and forwards these to the Ethics Commission. During a closed session, the Ethics Commission makes a determination of probable cause or no probable cause. The respondent, complainant, and their respective attorneys may attend this closed session and the respondent is given the opportunity to address the Ethics Commission prior to a vote on probable cause.

By contrast, while the FEC follows roughly the same process the respondent does not have the opportunity to be heard prior to a determination of probable cause. For purposes of review, under the FEC model upon conclusion of an investigation a report is prepared and forwarded to a staff attorney, whose responsibility it is to review and prepare the findings of law. This report pairs the evidence with the law for determination of probable cause. Once approved by the Executive Director, the case is scheduled for the next FEC meeting. The staff attorney makes recommendations to the FEC, who in turn finds or rejects probable cause. It is only during the post-probable cause stage that the respondent may challenge the FEC's findings, which may be before the FEC or an Administrative Law Judge.

These two models are matter of choice, and both are allowable under current statutory schemes. Rules governing the Administrative Procedures Act (APA) provide that administrative determinations, which affect the substantial interest of a party, must provide a course of due process where issues of material fact and/or agency actions are challenged. The APA also provides exceptions to hearings governed by the APA if the agency investigation or determination of probable cause occurs prior to agency action.⁶⁴ In either case, both the Ethics Commission and FEC provide hearings before each respective Commission and DOAH.

Should the Ethics Commission find probable cause, it must next decide whether the law was, in fact, violated. If so, the Ethics Commission decides if a penalty should be recommended. At this stage an evidentiary hearing (trial) before a DOAH administrative law judge can be requested by the respondent or the Ethics Commission. The respondent may, in lieu of a hearing, resolve the complaint through a stipulated settlement or consent order (this also holds true for the FEC). Upon conclusion of a hearing, the DOAH administrative law judge will forward a recommended order to the Ethics Commission for final agency action. The Ethics Commission's final action is only a recommendation to the appropriate body, as the Ethics Commission has no authority to impose administrative or other penalties.⁶⁵

⁶⁴ Rule 28-106.101, Florida Administrative Code. [See also, Chapter 28-106, Florida Administrative Code; and section 120.569, Florida Statutes.

⁶⁵ Dependent on the public officer or employee, the bodies in pertinent part are as follows: Senate President or Speaker of the House of Representatives if a legislator or employee of the legislature; Attorney General if complaint against the Governor; and the Supreme Court if against a judicial officer or employee. All others are referred to the Governor.

Staffing

Personnel for the Ethics Commission (with corresponding number of staff in parenthesis) include:

- Executive Director oversees daily operations of staff (1).
- Deputy Executive Director also acts as General Counsel (1).
- Staff attorneys who draft legal opinions, orders, rules, and proposed legislation for consideration by the Ethics Commission. Responds to inquiries about the ethics laws and represents the Ethics Commission in litigation (3 attorneys and 1 secretary).
- A Public Information and Education who provides information regarding Ethics Commission practices and procedures to other states, the press, and the public. Responds to inquiries about the Ethics Commission and ethics laws (1).
- Investigators who are responsible for investigating filed complaints of violations of the ethics laws and writing narrative investigative reports. (6 investigators and 1 coordinator).
- Financial Disclosure Coordinator who compiles a list of persons statewide who are required to file financial disclosure. Provides lists of such persons and mailing labels to elections' officials for notification purposes. (1).
- Staff Assistants/Office Manager: Provides administrative and clerical support to Ethics Commissioners and staff. (3 full-time and 3 part-time positions).

Appendix E contains a list of staff salaries for both the Ethics and Elections Commissions.

Personnel, Budget, and Caseload Comparison

With respect to budget, personnel, and caseload, the Ethics Commission had a fiscal year 97-98 budget of \$1.5 million, staff equaling 19.5 full time equivalents (FTE's), and 210 filed complaints. By comparison, the FEC's budget was 52 percent of the Ethics Commission's budget at \$774,927; staff was 67 percent that of the Ethics Commission at 13 FTE's; and complaints filed during 1998 was 106 percent of the Ethics Commission at 216 (see Table 4).⁶⁶

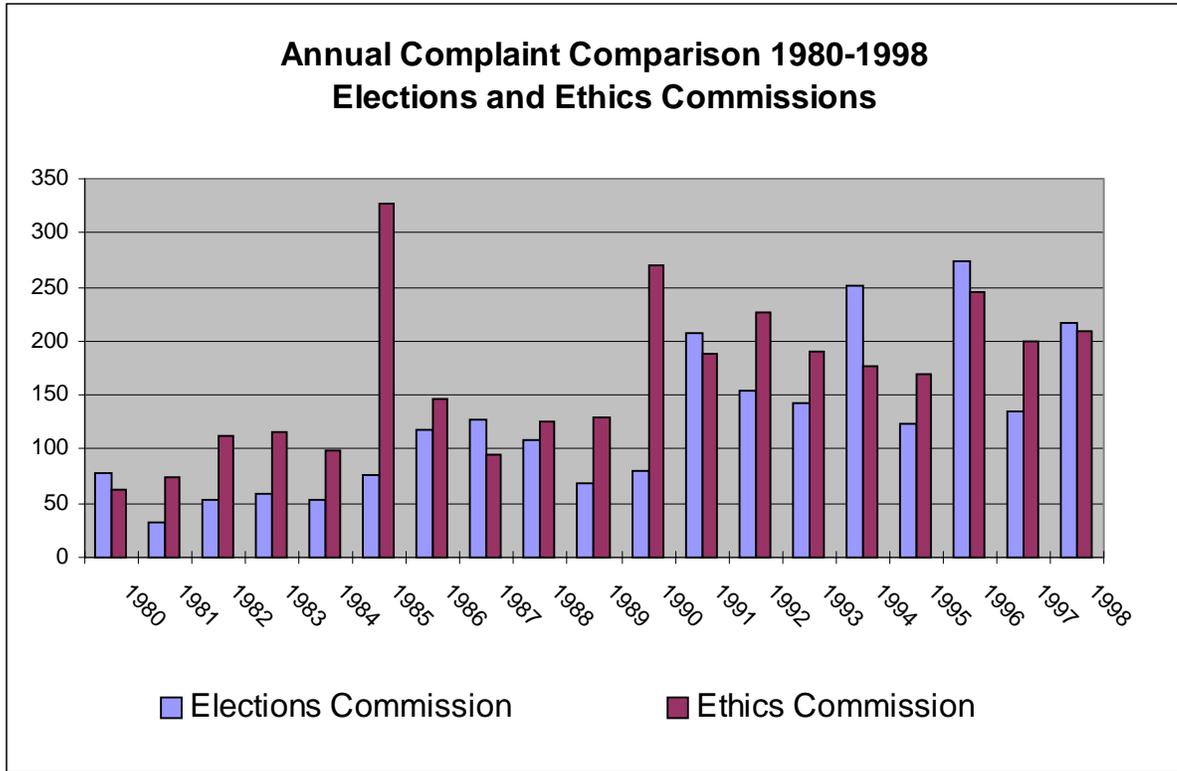
1998 Staff, Budget, and Case Comparison		
	Ethics Commission	Elections Commission
Budget	\$1,553,221	\$774,927
FTE's	19.5	13
Cases Filed	210	216
Cases Closed	200	201
% of Cases Closed	95	93

Source: The Florida Elections Commission and Florida Ethics Commission 1998 Annual Report.

Table 4

⁶⁶ Two points should be noted: 1) The Ethics Commission has some responsibilities over (continued...)

This comparison shows the FEC is as effective as the Ethics Commission in terms of the percentage of cases closed to cases filed during fiscal year 97-98. If we exclude the FEC’s case backlog, the data established in Tables 3 and 4 suggests the FEC is finding efficiencies with respect to disposition of cases filed per year.



Source: The Florida Elections Commission and *Annual Reports* of the Florida Ethics Commission.

Chart 3.

The number of cases filed per year with each commission between 1980 and 1998 has been slightly higher on average for the Ethics Commission than the FEC (see Chart 3). The Ethics Commission has had an average of 166 complaints filed per year to the 124 complaints filed per year with the FEC since 1980 - a 42 case disparity. This tightened to just a 32 case disparity during the 1990's but still in the Ethics Commission’s favor.

(...continued)

and above that of the FEC, however this accounts for only two to three FTE’s; and 2) The Ethics Commission resolved six more cases in 1998 than it accepted.

Time frames with respect to case processing are comparable. The Ethics Commission takes approximately 5.37 months from receipt of a complaint to issuance an investigation report known as a Report of Investigations. The FEC takes slightly more time with 6.67 months to accomplish the same task. With respect to staff, the Ethics Commission has a few more responsibilities that the FEC does not, however this accounts for approximately two to three FTE's. When making the above comparison, the percent of FEC staff (13) to that of the Ethics Commission (16.5) for comparable duties, equals 78 percent. In other words, for the same or similar functions and responsibilities, the Ethics Commission has 22 percent more employees than does the FEC. This further reflects the success the Ethics Commission has had with respect to efficiency and workload management. For 1998, the Ethics Commission disposed of six more cases than complaints filed.

Finally, the Ethics Commission in a 1986 Supreme Court case was determined to be an agency of the legislative branch and as such is afforded the necessary accouterments needed to operate. These include such services as personnel, administrative, and computer equipment support. The value of these costs is not a component of the Ethics Commission budget.⁶⁷ By comparison, the cost to the FEC for these services equals approximately \$88,000 annually.⁶⁸ Additionally, the FEC has incurred a \$65,000 charge to purchase equipment over the preceding two years.

V. OTHER STATES

Administration and enforcement of state election laws by state governments take on various forms throughout the United States. Many states perform both functions within the traditional setting of their respective Secretary of State's office. Several states, however, have modified this model by separating enforcement and administration between two governing bodies - usually some form of an elections division and elections commission.

The following states have been identified as having the aforementioned two agency model with a common obligation to enforce their campaign finance or election laws. Duties vary among these commissions however, with some choosing to enforce all of their respective state election laws to enforcing just that portion dealing with campaign finance, to the issuing

⁶⁷ Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla. 1986).

⁶⁸ This is based on an 8.3 percent charge by the Attorney General's office on the Commission's Salary and Benefits budget category and the contracted recurrent computer support of \$34,000.

of advisory opinions for their particular areas of jurisdiction. The state commissions discussed below are all statutorily created and pay commission related expenses on behalf of their members. One state pays its commission members an annual salary.

ALASKA

The State of Alaska has assigned responsibility for administering and enforcing campaign finance, financial disclosure, and lobbying laws to the Alaska Public Offices Commission (APOC). Conversely, responsibility for election law administration with respect to voting and registration is entrusted to the Division of Elections which is a part of the Lieutenant Governors Office. The APOC is composed of 5 nonpartisan members, appointed by the Governor with the concurrence of the Legislature.

Alaska's complaint process may be initiated either by staff (informal complaint), or through a sworn complaint filed by the public (formal complaint). When a formal complaint is initiated, it is verified for technical sufficiency before being acted upon by staff. Both the respondent and complainant are notified when a complaint is accepted and forwarded to the APOC for investigation. Upon conclusion of the investigation, a recommended order is drafted and forwarded to the APOC. The APOC may accept, reject, or amend staff's recommendation. Hearings are held and the APOC considers the case along with presentations and testimony prior to making a decision. An informal complaint follows a similar process as a formal complaint; however, many of these cases are disposed of through admonishment letters. Most informal complaints are minor in nature. Civil penalties may be assessed for any violations found and for late filed campaign finance reports. Alaska's statute of limitations is twice that of Florida's, in that a complaint may not be filed after 4 years from the date of the alleged violation.

Additionally, the APOC is authorized to issue advisory opinions with respect to the state's campaign finance laws for which it has jurisdiction. On average, the APOC issues approximately 15 opinions per year. The APOC receives approximately 10 formal complaints and 50 informal complaints per year. The APOC employs a full-time staff of 12 and has an annual budget of \$783,000.

CALIFORNIA

Through a constitutional amendment in 1974, California voters created the Fair Political Practices Commission (FPPC) whose primary function is to administer, implement, and enforce the campaign finance objectives of California's Political Reform Act (the Act). The Act requires campaign finance disclosure and dissemination, regulation of lobbying activities, financial disclosure for public officers, public information on candidates and state measures, and enforcement measures.

The FPPC has authority to investigate possible violations, conduct hearings and apply sanctions. Additionally, the FPPC provides advisory opinions and letters in the area of campaign finance of which 65 were issued in 1998. Elections administration functions are the responsibility of the Secretary of State.

Composition of the FPPC consist of five appointed commissioners. The Chair and one other member is appointed by the Governor with the remaining commissioners appointed by the Attorney General, Secretary of State, and State Comptroller.

Staff consists of 70 employees with an annual budget of approximately \$2.16 million dollars. The FPPC receives and disposes of roughly 600 to 700 enforcement complaints per year.

CONNECTICUT

Connecticut's enforcement and administration functions are divided between the Connecticut Elections Enforcement Commission (CEEC) and the Secretary of State's office, respectively. The CEEC is composed of 5 appointed members, who may not be affiliated with any political party. Appointment to the CEEC is divided between the Governor and the 4 highest-ranking members of the House and Senate.

Each agency has authority to issue advisory opinions over its particular area of expertise. For example, inquiries involving enforcement of campaign finance laws falls under the jurisdiction of the CEEC. Whereas, the Secretary of States office issues opinions with respect to election law administration. In 1998, 150 opinions were issued by the CEEC.

Like Florida, investigations are not initiated until a sworn complaint is filed alleging a violation of the state's election laws. Upon completion of an investigation and disposition, the CEEC has authority to impose civil penalties for any violations found. Unlike Florida, the CEEC is the agency responsible for auditing campaign finance reports filed with the Secretary of States office.

The CEEC is staffed by 11 full time employees with a budget of \$741,664. Approximately 215 complaints are filed and disposed of per year.

KANSAS

Like Connecticut, Kansas divides the responsibility of election law administration and enforcement between the Secretary of State and the Kansas Commission on Governmental Standards and Conduct (KCGSC). The KCGSC is responsible for administering and enforcing the campaign finance laws, lobbying and ethics laws for the state of Kansas. Campaign finance reports are also filed with the KCGSC. Election law administration is the responsibility of the Secretary of States office. The KCGSC has 9 members appointed by the

Governor (2), Secretary of State (1), Attorney General (1), Chief Justice of the Supreme Court (1), Majority and Minority leaders (1 each) of the House and Senate. Not more than 5 members may be from the same political party. Members receive \$35 per meeting plus travel expenses.

The complaint process begins with a complaint either filed by the public or the KCGSC staff. All complaints are confidential until probable cause is found, at which time it becomes public record. Once the complaint is investigated and probable cause determined, a findings of fact is issued by the KCGSC. Civil penalties can be imposed by the KCGSC. Criminal prosecution cases are forwarded to the Attorney General, District Attorney or County Attorney.

The KCGSC is staffed by 9 full-time employees and 3 part-time employees, with a budget of \$537,000. The average number of complaints filed and disposed of per year is between 15 and 20.

NEW JERSEY

The New Jersey Election Law Enforcement Commission (NJELEC) both administers and enforces the campaign finance laws of the state. This differs from Florida's system in that New Jersey has combined the administration and enforcement functions over specified areas of election law between the NJELEC, whose area of responsibility includes campaign finance, and the Division of Elections within the Department of Law & Public Safety, which is responsible for voting administration laws.

The NJELEC consists of 4 members who are appointed by the Governor and confirmed by the Senate, and a 40 member staff. Members of the NJELEC receive per diem and travel expenses. The NJELEC's budget is \$2.5 million.

A complaint must be filed in order for an inquiry to be initiated. A preliminary inquiry is conducted, followed by the staff's recommendation to the NJELEC. The NJELEC then determines if a complaint should be issued. If so, the respondent is charged and may request a hearing. Should a violation be found, the NJELEC may impose civil penalties. The NJELEC meets once a month.

The NJELEC is also charged with issuing advisory opinions over campaign finance issues and acting as the repository for campaign finance reports. The NJELEC issued 7 opinions in 1998. Approximately 104 complaints are received per year, and 81 actually presented to the NJELEC.

OHIO

The Ohio Election Commission (OEC) oversees political party spending, campaign finance, and corporate political contributions. It is also responsible for investigating cases of unlawful campaign practices. The OEC is comprised of 7 members appointed by the Governor upon the recommendation of the Democratic and Republican caucuses of the Ohio Legislature. Each member is paid \$25,000 a year and is reimbursed for travel expenses. OEC acts on campaign finance-related complaints filed by individuals, local boards of election, or the Secretary of State, and holds regular meetings to decide whether a violation has occurred. The OEC may impose fines or refer the complaint to authorities for prosecution. Staff is composed of 3 people with an annual budget of \$570,000.

Administration of election laws is the responsibility of the Secretary of State. Campaign finance reports are filed with the Secretary of States office.

The OEC is authorized to issue advisory opinions on subjects under its jurisdiction. Opinions are issued on average at a rate of 8 per year.

OEC's complaint process takes several paths. An individual may file a complaint via an affidavit or, the Secretary of State or a county board of elections may file a complaint. Complaints filed by the Secretary of State or a county election board are usually over late filed reports or other campaign finance reporting issues. Due to the minor nature of these violations, a preliminary hearing is held to determine if a violation has in fact occurred; if cause is found, a fine is imposed. Should the violation be egregious, the OEC can decide that a full hearing is necessary. The OEC estimates that 99 percent of all cases are filed in this manner.

When individuals file complaints, they may take two tracks. Should the allegations require expedited review, a probable cause panel made up of 3 to 4 members of the 7-member commission will hear the case. This panel can meet as little as 3 days after the complaint is filed. Should probable cause be found the case would be heard by the entire OEC in a full hearing. By statute, this hearing must be held within 10 days of the probable cause panel's meeting, but can be delayed if good cause is shown.

The OEC receives 900 to 1000 complaints of all types per year. Between 800 to 900 are minor filing complaints received from the Secretary of State or county election boards for late filed reports or failure to file a report. Individuals file approximately 100 complaints per year. Roughly 70 allege false statements in campaign materials, about 20 allege improper or no disclaimers on campaign materials, and about 10 involve campaign finance violations.

VI. CONCLUSIONS

In many respects, Florida has an election commission that is of model form when compared to the design fashioned by the Council on Governmental Ethics Laws (COGEL) in a three-year study published in 1991.⁶⁹ (See Appendix F for COGEL Model) The COGEL model calls for an independent agency with an executive director who works at the pleasure of the commission members and is responsible for all aspects of the day-to-day operations of the model agency including personnel. The model agency is given authority to issue advisory opinions, conduct investigations, adopt rules, administer oaths and subpoenas, act on complaints initiated by either the agency or the public, hold hearings, find probable cause, provide orders and recommendations, impose fines, hear appeals, and enter into settlement agreements. Except for the specific authority to issue advisory opinions and the few nuances typical of individual state concerns and situations, the FEC parallels this framework.

Given this, it appears that Florida has taken appropriate steps to provide a solid foundation to enforce the State's election laws. Nonetheless, there have been shortcomings in efficiency especially with respect to case management. Admittedly, a certain degree of inefficiency may be linked to a lack of appropriate support over time. As with most ventures, support is an inherent component of success realized. Such is the case with the FEC and yet, there exists no reliable measure of stated funding deficiencies. Given the paradox between the FEC and the Division that for budget purposes the former was a component of the Division for years but with respect to operation was considered separate, there exists no segregated accounting procedures before 1997 to adequately evaluate this dilemma.

The inability of the FEC to keep pace with their caseload, at least in the early years, can be linked to the degree to which staff members were dedicated to FEC business. This is not to suggest that either the FEC, or the Division, have not performed well under the circumstances, but rather that some of the shortcomings are a matter of lack of adequate support, not inability. This may best be evaluated in the aggregate by comparing the manner in which the Ethics Commission has been structured over the years and their ability to be relatively successful and efficient in carrying out their jurisdictional duties recognizing that the Ethics Commission has been completely independent since its creation and has experienced low staff turnover. Certainly not all of the ills which have fallen on the FEC may be explained by comparing the two commissions, but given the piecemeal fashion in which the FEC has been organized and operated when compared to the Ethics Commission, one can only wonder what effect it has had over time.

⁶⁹ *A Model Law for Campaign Finance, Ethics, and Lobbying Regulation*, Council on Governmental Ethics Laws, 1991.

When viewed in the short-term, it is difficult to assess tangible long-range solutions given the short time period in which the FEC has been independent (less than 2 years). Therefore, it may be advisable to allow the FEC some time to establish itself before substantial changes are recommended. This does not suggest however, that the FEC is without current challenges that require more immediate consideration. Therefore, the following conclusions are drawn in two parts: (1) immediate considerations to assist the FEC in correcting current deficiencies and (2) proposals for future considerations.

Short-term Considerations

There has been an ongoing discussion between the FEC and the Attorney General's office with respect to services the Attorney General's office was to provide for the FEC at no cost. According to the Executive Director of the FEC, when the FEC was transferred to the Department of Legal Affairs in 1997, the Attorney General's Office represented that the Department would provide certain administrative services which included many administrative and computer support services to the FEC. However, one year later the Department reversed this position and has asked the FEC to transfer funds to cover the cost of providing such services. The amount requested was \$54,478, or 10 percent of the FEC's 1997-98 budget. Additionally, the Department has disconnected the FEC from its computer network forcing the FEC to contract for these services at further cost. The FEC and the Department of Legal Affairs have not resolved this matter. The FEC is currently expending funds and may be required to spend more for services that originally were to be borne by the Department.

A second issue affecting the FEC is their backlog of cases. The FEC is requesting funding for one additional attorney. Based on the random cases reviewed and time-frames thereto, the issues affecting the FEC with respect to case backlog in the aggregate appear to involve the quantity of cases filed as opposed to the ability to timely process a case. With twice as many investigators as attorneys, the backlog has historically been created at the attorney level.

Another issue affecting the FEC is that of providing advisory opinions. Like any regulatory agency, the FEC's charge is not only one of enforcement, but also of compliance. Current statutory scheme provides governmental agencies with the ability to advise anyone affected by any rule or law that agency has jurisdiction through what is known as a "declaratory statement." Individuals may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.⁷⁰ The Division performs this function by issuing "advisory opinions." Created by the same law which created the FEC in 1973, the

⁷⁰ Section 120.565, Florida Statutes.

Division was authorized to give directives on matters regarding election law in Florida, otherwise known as an “advisory opinion.” Opinions may be requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws. Anyone acting in good faith upon the opinion given is shielded from any criminal penalty provided for in the Code.⁷¹

Given that the Department of State was the agency charged with all aspects of election law administration and enforcement prior to 1997, it stood to reason that this agency would be given the authority to administer advisory opinions. However, now that these duties have been split, it may be prudent to review the FEC’s ability to provide a portion of this service.

Historically, the opinions issued by the Division have fallen into two distinct categories: 1) that of election law administration; and 2) matters regarding campaign finance. Issues under the caption of election law administration include resign to run issues, the canvassing of votes, polling place issues, elector registration, residency issues, and other areas of election law administration found in Chapters 97 through 103, and 105, Florida Statutes. Those under the category of campaign financing deal with questions regarding campaign contributions and expenditures, political disclaimers, fundraisers, and other campaign activities regulated by Chapter 106, Florida Statutes. Of the 1238 advisory opinions issued between 1976 and 1998, approximately 34 percent were Chapter 106, Florida Statutes, inquiries.⁷² Moreover, those interested parties requesting advisory opinions themselves fall into two categories. Issues relating to election law administration are primarily requested by county supervisor of elections or municipal clerks charged with election administration for their respective jurisdictions. Conversely, candidates, parties, and committees seek answers regarding campaign finance issues.

Given the Legislature’s preference to split the functions of election law administration and enforcement between two separate and distinct agencies, it may be more efficient for those who seek advisory opinions to receive them from the agency that enforces that particular area of law.

And finally, on November 3, 1998, the electorate of the State of Florida voted to reorganize Florida’s Cabinet by removing the Secretary of State from this constitutionally created structure. Although these changes are not effective until 2003, the Secretary has established a task force to evaluate the effect this revision will have on the functions of the Department. Even though the Legislature should be cognizant of this event, it is uncertain when any

⁷¹ Section 106.23(2), Florida Statutes.

⁷² Derived from Division of Election’s *Statutory Index to Formal Opinions (1976-1998)*.

recommendations will be unveiled with respect to the Department and what effect they may have on the FEC, if any.

Long-term Considerations

The following are issues that were identified during the course of this review or which involve specific organizational changes that may warrant further review:

- ▶ Limiting investigation to facts and parties materially related to the complaint at issue (see s. 112.322(1), Florida Statutes). This would statutorily provide the FEC with a road map to focus on when investigating allegations with respect to the Code.
- ▶ Divesting the FEC of some responsibilities.
- ▶ Evaluate the model currently in use by the FEC with respect to who should provide prosecutorial functions. One of the factors which may cause inefficiency in the FEC currently may be found in the many roles staff must play to perform their respective functions. Should the FEC continue to have systemic problems with caseloads, the Ethics Commission model may be considered as a possible alternative.
- ▶ Provide respondents the opportunity to respond to the Report of Investigations and, if requested, to the FEC directly prior to the determination of probable cause. Also an identical provision to that of the Ethics Commission model. This system would provide the respondent with at least one opportunity to address the FEC and possibly avert a finding of probable cause, thereby reducing caseload in the long run.

APPENDICES

Appendix A	State Questionnaire - Study of the Florida Elections Commission
Appendix B	Florida Elections Commission Organization Chart and Staff Information
Appendix C	Florida Elections Commission Complaint Process Chart Florida Elections Commission Automatic Fines Process Chart
Appendix D	Elections Commission Trust Fund Projected Revenues Elections Commission Trust Fund Budget Options Staff Positions and Budget of the Florida Elections Commission
Appendix E	Staff Salaries for the Florida Ethics Commission and Florida Elections Commission
Appendix F	<i>A Model Law for Campaign Finance, Ethics, and Lobbying Regulation, Council on Governmental Ethics Laws, 1991., Agency Organization and Responsibilities.</i>

APPENDIX A

Study of the Florida Elections Commission by the Florida House of Representatives

State Questionnaire

1. Does your Commission/Agency both administer and enforce the election laws of your state? _____

If so, please describe this process including any organizational charts which illustrate the nature of this process. _____

If not, please describe who has authority over enforcement action and a description of that process. _____

2. Is your Commission/Agency established by Constitution, Statute, or both? (Please enclose a copy of those provisions which establish your authority, duties, and responsibilities. _____

3. Does your Commission/Agency issue advisory opinions relating to voting administration and/or campaign finance? _____

If so, how many were issued for each category in 1998? _____

If not, who has responsibility for each? _____

4. Please explain the complaint process for your Commission/Agency?

5. Does your Commission/Agency file campaign finance or other election related reports for candidates, parties, and/or committees?

6. Are members of your Commission/Agency elected or appointed?
If appointed, by whom?

7. Do members receive a salary and/or expenses? (Please explain).

8. Does your Commission/Agency have the authority to impose civil penalties against violators?

9. What is the total number of employees and current budget for your Commission/Agency? (Please enclose your organizational chart and budget).

10. On average how many complaints are filed and disposed of in a year?

APPENDIX B





STAFF OF THE FLORIDA ELECTIONS COMMISSION

Barbara Linthicum, Executive Director and General Counsel -- Barbara served the FEC as Senior Attorney Supervisor for five years and has served as the Executive Director/General Counsel since 1997. She has a Juris Doctorate with Honors from Florida State University where she also received a Bachelor in Political Science degree and was a doctoral candidate in political science. Barbara was appointed Public Defender for the Second Judicial Circuit by Governor Martinez in 1990 and has held a several legal positions in government including Deputy General Counsel for both Governors Graham and Martinez, Assistant General Counsel for the Department of Business and Professional Regulation, and Legislative Analyst for the Senate Judiciary Committee. She also taught political science at Hillsborough Community College.

Michael McGuckin, Assistant General Counsel -- Mike has been with the FEC since June 1998. He has a Juris Doctorate from Loyola University School of Law, a Master of Science Degree in Elementary and Special Education from Hofstra University, and a Bachelor of Art in History and Social Sciences from Spring Hill College. Mike has a variety of work experiences including being an instructor at the Leon County Boot Camp, a prosecutor in Leon County and in New Orleans, a teacher for exceptional students in several settings, and has served as an advocate for the indigent, elderly, and disabled. In addition to being a member of the Florida and Louisiana Bar Associations, he is certified to teach in New York and Florida. His first work experience was as a child care and case social worker in New York City where he worked with abused, neglected, and abandoned children.

Phyllis Hampton, Assistant General Counsel -- Phyllis has been with the FEC since April 1999. She has a Juris Doctorate from Florida State University where she also was in the masters program in rehabilitation counseling. She received a Bachelor of Arts in Education with a major in English, speech, and journalism from the University of Florida. Phyllis served as an assistant general counsel for Governors Chiles and Bush and General Counsel for Secretary of State Jim Smith. Prior to becoming General Counsel for the Department of State, she was counsel for the Division of Elections and an analyst for the Senate Judiciary Civil Committee. Prior to attending law school, Phyllis worked as a vocational rehabilitation counselor for the blind and was a social worker providing counseling to indigent families.

David Flagg, Investigator Supervisor -- David served the FEC as an investigator for approximately five and a half years, and he has been serving as the investigator supervisor for the past eighteen months. He has a Bachelor of Science degree in Sociology and Liberal Arts from Bridgewater State College. Prior to making his home in Tallahassee, David served the Commonwealth of Massachusetts as an Ombudsman and the City of Brockton as a mediator for consumer related problems.

Travis Wade, Investigation Specialist -- Travis has served the FEC for approximately two and a half years. He has a bachelor's degree from Florida State University in Criminology/Criminal Justice. He has experience as a private investigator and was most

recently employed as a Senior Criminal Justice Information Technician with the Florida Department of Law Enforcement.

Keith Smith, Investigation Specialist -- Keith has served the FEC for approximately two and a half years. In the ten years prior to his arrival at the FEC he was employed as a Publications Specialist at the Department of State, Bureau of Administrative Code.

Margie Wade, Investigation Specialist -- Margie has served the FEC for approximately one year. Margie came to the FEC from the Department of Children and Families where she worked for thirteen years as a Protective Investigator. She received her Masters of Science in Psychology from Florida A&M University.

Douglas Sisson, Investigation Specialist -- Douglas has served the FEC for approximately six months. He has a Bachelor of Science degree in Marketing from Florida State University. During the five years prior to his arrival at the FEC, Douglas served as a counterintelligence agent with the United States Army.

Mark O'Brien, Investigation Specialist -- Mark began his service with the FEC on June 7, 1999. He has a Bachelor of Arts degree in Sociology from Florida State University. Mark was employed with the Florida Department of Corrections for over eleven years. While with the department, Mark served in a number of positions including Correctional Probation Officer and Correctional Probation Supervisor.

Malcolm Chellman, Business Manager -- Malcolm has served the FEC for approximately three years. He has a bachelor's degree from Florida State University in Communications. He has extensive experience working as a paralegal at various state agencies and was most recently employed as a Document Specialist with the Division of Elections, Department of State. Malcolm also serves as the FEC's Network Administrator.

Carol Davis, Administrative Assistant -- Carol has served as the receptionist for the FEC for the past eight years. Prior to coming to the FEC, she worked as a Senior Clerk for the Florida Department of Education. She presently attends Florida A&M University as an English major.

Steven Christensen, Commission Clerk -- Steve joined the FEC staff as FEC Clerk in October 1997. Steve came to the FEC from the Attorney General's Office where he oversaw the criminal appeals case management system for the Tallahassee Bureau of Criminal Appeals. He has an Associate of Science degree in Management and has an extensive legal background on both the state and federal levels. Steve relocated to Tallahassee from San Diego, where he spent eight years as a deputy clerk for the United States District Court, Southern District of California.

BARBARA M. LINTHICUM

2002 The Capitol
Tallahassee, Florida
(850) 922-4539

510 Beard Street
Tallahassee, Florida
(850) 561-8439

EDUCATION

Florida State University College of Law
J.D. with Honors, 1979
Law Review Articles Editor

University of South Florida
M.A. Political Science and Education
1970

Florida State University
Doctoral Candidate in Political Science
1975 - 1976

Florida State University
B.A. in Political Science, 1969

EMPLOYMENT

EXECUTIVE DIRECTOR 1997 - PRESENT **SENIOR ATTORNEY SUPERVISOR 1992 - 1997** **FLORIDA ELECTIONS COMMISSION**

I currently serve as the executive director and general counsel of the Florida Elections Commission. I supervise an eleven member staff that investigates and prosecutes alleged violations of the Florida's election laws. My duties include directing administrative work for the Commission, including hiring and training staff, preparing the Commission's legislative budget requests, administering appropriated funds, and assuring efficient operation of the office. I also research and analyze legal issues affecting the Commission and assure consistent application of Commission policy and statutory interpretation. I identify and implement strategies to carry out the Commission's directives and its legislative mandate.

ASSISTANT GENERAL COUNSEL **DEPARTMENT OF BUSINESS REGULATION** **1990 - 1992**

I litigated complex cases relating to the regulation of the rapidly evolving and expanding vacation club, time share and condominium industry and served as an Arbitrator in the Department's newly created mandatory arbitration program. I also represented the Department in a wide range of cases before the Division of Administrative Hearings, the Public Employee Relations Commission, the Unemployment Appeals Commission, and Circuit Court, handling the cases from inception to conclusion at the appellate level.

**PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
1990**

As the Public Defender for the Second Judicial Circuit, I supervised a staff of 85 lawyers and extensive support staff to provide legal representation to indigent defendants in criminal cases. I directed the administration of the office, recruited and hired staff, drafted and presented the budget, lobbied extensively for the needs of the office in meeting its statutory responsibilities and for criminal justice issues, including community intervention and prevention programs.

**DEPUTY GENERAL COUNSEL 1985 - 1990
ASSISTANT GENERAL COUNSEL 1980 - 1985
EXECUTIVE OFFICE OF THE GOVERNOR**

Under Governors Graham and Martinez, I served as the chief legal officer under the general counsel and helped supervise the Governor's legal staff. I served as counsel for the Governor's Office of Planning and Budgeting, reviewing the appropriations and implementing bill and defending legal challenges to the budget and the Governor's exercise of his veto. I was responsible for directing and coordinating Governor Graham's program of assuring prompt inquiry, investigation and prosecution of misconduct of public officials. I initiated and coordinated inquiries by the Florida Department of Law Enforcement into allegations of official misconduct and recommended initiation of official investigations to the Governor. I drafted and reviewed legislation on behalf of the Governor and represented the Governor before various legislative committees. I provided legal advice in many other areas and issues, including recall of public officials, vacancies in office, appointments, elections, financial emergencies, suspensions, and special districts.

**EXECUTIVE DIRECTOR
OFFICE OF PROSECUTION COORDINATION
EXECUTIVE OFFICE OF THE GOVERNOR
1983 - 1988**

I was appointed Executive Director by Governor Graham and was charged with supervising a staff that provided support for the Governor's Council on Organized Crime. I was the Governor's liaison to the state attorneys and state and local law enforcement. I recommended candidates to the Governor for appointment to law enforcement positions and recommended the assignment of special prosecutors in conflict cases. I also supervised the Statewide Grand Jury Legal Unit that investigated and prosecuted multi-jurisdictional organized crime cases. I staffed the Governor's Commission on the Statewide Prosecution Function, drafted the legislation that created the Office of Statewide Prosecution and assisted in lobbying for adoption of the legislation.

**LEGISLATIVE ANALYST
THE FLORIDA SENATE
1979 - 1980**

I conducted research studies to determine the feasibility of legislation, drafted legislation, and reviewed and analyzed proposed legislation for the Senate Judiciary Committee.

**TENURED ASSOCIATE PROFESSOR
HILLSBOROUGH COMMUNITY COLLEGE
1971 - 1975**

I taught political science and worked with and advised students. I also chaired or actively participated in college committees, including the Student Affairs Committee and the Curriculum Committee. I also served on the Board of Directors of Florida Political Science Association and was an active member of the Southern Political Science Association.

ORGANIZATIONS

The Florida Bar - Admitted 1980
Tallahassee Bar Association
Government Bar Association
Tallahassee Women Lawyers

Martindale-Hubbell - Rated BV
U.S. Service Academy Parent's Club
Florida State University Alumni Association
Lafayette Park Neighborhood Association

PUBLICATIONS

- R. Palmer and B. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla.St.U.L.Rev. 653 (1985).
B. [Linthicum] Berry, *Ineffective Assistance of Counsel*, 54 Fla.B.J. 707 (1980).
B. [Linthicum] Berry and T. Dye, *The Discriminatory Effect of At-Large Elections*, 7 Fla.St.U.L.Rev. 85 (1979) [cited by the United States Supreme Court in *City of Mobile v. Bolden*, 100 S.Ct. 1490 (1979)]

MICHAEL T. McGUCKIN
804 OLD SHELL POINT ROAD
CRAWFORDVILLE, FL 32327
(850) 421-1735

EDUCATION: Loyola University School of Law, New Orleans, Louisiana
J.D.-May 1979
Hofstra University, Hempstead, New York
M.S.-June 1975-Elementary and Special Education
Spring Hill College, Mobile, Alabama
B.A.-May 1969-History and Social Sciences

EXPERIENCE: Florida Elections Commission, Assistant General Counsel
Prosecute alleged civil violators of Florida election law
June 1998-Present

As Assistant General Counsel with the Florida Elections Commission, I prosecute cases throughout the state involving allegations of Florida election law violations before the Commission, and the Division of Administrative Hearings. I am responsible for analyzing and researching the legal issues presented by the facts and circumstances of individual cases. I also prepare recommendations for the Commission, and present them in a Statement of Findings consistent with statutory interpretation and Commission precedent and policy.

Leon County School Board, Instructor
Teach special education and regular diploma high school students
September 1994-June 1998

As most senior instructor at the Leon County Boot Camp, I determined entry and exit level knowledge and skills of students for given instructional objectives using diagnostic tests, observations and records. With student input, I established appropriate goals for academic and behavioral standards and develop instruments to assess individual performance. While serving as the Boot Camp's representative to Second Chance School's Site-Based Decision Making Council, I was elected Chairperson. I was responsible for development of School Improvement Plans that met the individual needs of adjudicated and delinquent youth in ten unique treatment programs. I also served on the Second Chance School Advisory Council which reviewed and/or approved their plans. I coordinated with other service delivery personnel throughout Florida to ensure that students had the opportunity to develop a healthy, positive outlook on education. I worked with students on a daily basis to increase their analytical skills so they might achieve appropriate academic or career goals compatible with their individual ability, initiative and willingness to commit to personal progress.

State Attorney's Office, Assistant State Attorney
Prosecuted delinquent offenders in Leon County Juvenile Court
August 1993-August 1994

As lead attorney in the Juvenile Division of the Office of the State Attorney for the Second Judicial Circuit of Florida, I was responsible for the intake, adjudication, and disposition of the majority of delinquency cases before the Leon County Juvenile Court. I prepared cases for direct filing in our adult felony and misdemeanor divisions and provided direction and instruction on

juvenile issues to Assistant State Attorneys and law enforcement officers throughout the circuit. I oversaw criminology student investigative interns from Florida State University and collaborated as an externship supervisor with the F.S.U. College of Law. As a component of the SAO criminal offense daily intake and screening process, I reviewed the work product of the juvenile extern attorney and investigative interns for appropriate judgment and interpretation consistent with applicable law. This cooperative supervision allowed students a broad range of progressively more complex assignments in a contemporary legal workplace. I provided critiques, constructive criticism, feedback, and guidance on a daily basis to maximize the educational value of their work experience.

Taylor County School Board, Exceptional Student Educator
Taught S. E. D. students in a tri-county program
August 1991-July 1993

As team teacher in a self-contained classroom for severely emotionally disturbed adolescents, I arranged and managed the physical environment to facilitate instruction and ensure student safety. I was responsible for recognizing signs of severe emotional distress, alcohol/drug abuse, child abuse/neglect, and for demonstrating awareness of appropriate intervention and referral/reporting procedures within Jefferson, Madison, and Taylor counties. I determined entry level knowledge and skills of students for a given set of instructional objectives using diagnostic tests, teacher observations, and student records. I identified appropriate short and long range goals for specific academic and behavior aids and constructed classroom tests and tasks to measure student achievement of objectives. I was responsible for developing, planning, and maintaining students' Individual-Education Plans and for monitoring IEP reviews/reevaluations pursuant to school board policy and applicable federal and state laws.

Brookwood Secure Center, Summer School Teacher
Taught special education and GED preparation classes
July 1991-August 1991

As a summer school teacher at this maximum security facility for males between fourteen and twenty-one years of age, serving indeterminate sentences for conviction of serious felony offenses, I taught special education, resource, enrichment and General Education Diploma (GED) preparation classes in upstate New York.

Florida Legal Services, Policy Analyst
Analyzed impact of state policies on indigent citizens
January 1990-January 1991

As policy analyst for this statewide support office of legal aid and legal services providers in Florida, I was responsible for coordinating the development of judicial and legislative priorities and for directly supervising legislative efforts of the legal services community. At various times I provided technical assistance to and coordinated the efforts of statewide task forces in areas of housing, community economic development, education and family/juvenile law, and prepared initiatives on disabled, homeless and veterans' issues. I was responsible for review and analysis of Interest on Trust Accounts (IOTA) grant applications and made funding recommendations implementing projects that provided millions of dollars worth of benefits to more than ninety thousand Floridians. I also drafted, prepared formal comments, and made substantive recommendations with respect to proposed and anticipated local, state and federal legislation,

regulations, and ordinances. I created the Poverty Lawyers' Legislative Review, which provided a single volume reference source of the statutory changes made during the 1990 session and was distributed to law schools and legal aid and legal services programs throughout Florida.

Florida Supported Employment Project, Associate Director
Supervised state severely disabled employment initiative
March 1989-December 1989

As Associate Director of this statewide severely disabled employment initiative under a "state change" federal grant, I collaborated with state departments to provide training and technical assistance to state agencies, rehabilitation facilities, and the private sector. At various times, I researched and developed project policies pertaining to: sub-grant proposals, reviews and site inspections, state and facility contracts and performance-based results, as well as project personnel training and staff development. As part of the Florida Association of Rehabilitation Facilities, I participated in the development of legislative priorities for the association in conjunction with its members and staff. I was responsible for legislative and administrative advocacy, judicial/legal monitoring and research. I also drafted, prepared formal comments, and made substantive recommendations regarding proposed and anticipated local, state and federal legislation, regulations and ordinances as they impacted on Florida's disabled adults and children. I also drafted, negotiated, and examined contracts, documents, and other materials required by the association's activities.

Advocacy Center for Elderly and Disabled, Staff Attorney
Provided legal counsel statewide to specific groups
March 1987-March 1989

As staff attorney for this federally funded statewide agency for protection and advocacy, I was responsible for providing direct legal representation to developmentally disabled persons, clients of state rehabilitation services, residents of state mental health facilities, and individuals aged sixty and above throughout Louisiana. I was responsible for investigating cases, obtaining evidence, preparing cases for trial, presenting cases before courts, administrative bodies, and persons having quasi-judicial authority, and preparing any appeals from the respective federal or state decision makers. I also drafted, prepared formal comments, and made substantive recommendations with respect to proposed and anticipated local, state and federal legislation, regulations, and ordinances. I was the Advocacy Center's designated lead counsel in a statewide class action voting rights suit. As a "Cooperating Attorney" with Loyola Law School, I provided direct supervision, training and instruction in court and at the center to numerous senior law students placed under my tutelage as part of their clinical skills training program.

New Orleans Legal Assistance Corporation, Staff Attorney
Provided indigent legal services in multi-county area
August 1985-March 1987

As senior attorney in the juvenile section of the family/juvenile unit of this federally funded legal services corporation field office, I was responsible for providing direct legal representation to very low income persons from a multi-county/parish area. This included: responsibility for investigating cases, obtaining evidence, preparing cases for pre-trial hearing, and trial of cases before courts as well as appeals. I prepared orders, rules, and other legal documents giving effect to appropriate governing statutes or law. As a "Cooperating Attorney" with Loyola Law

School, I was also responsible for providing direct training and supervision to numerous senior law students placed by their clinical skills training program at NOLAC. This included trial tactics, professional responsibility, case planning, preparation for administrative, due process, civil service and motion hearings, trials, and any respective appeals. I instructed and supervised these students and several attorneys in memoranda and brief writing as well as trial procedure and practice. In cases involving child and spousal support, I supervised law students in conducting investigations and discovery into the resources of parents (custodial and non-custodial). This involved analyzing numerous facts and allegations to determine their reliability and completeness, and discovering sources of income regarding an individual's net worth and support obligation.

Loyola Law School, Supervising Attorney
Coordinated federally funded civil clinical project
August 1984-August 1985

As supervising attorney under a federally-funded, time-limited Legal Services Corporation (LSC) law school grant, I directly instructed, trained and supervised the field work of more than thirty senior law student practitioners, and was directly responsible to Loyola Law School, LSC, and individual clients for all work done in this supervisory capacity. I was charged with developing the practitioners' performances in client representation, mastery of basic lawyering skills, understanding of professional responsibility, and substantive and procedural law. This included directly representing clients in judicial, administrative, due process, and legislative hearings, as well as performing factual investigations, empirical research, and legal analysis on behalf of clients. My duties encompassed concentrated instruction, training and supervision of each student lawyer in the following: interviewing clients and third parties, fact-gathering and field investigating, identifying and applying law to case facts, diagnosing client problems, developing case strategies, counseling, drafting legal instruments, writing legal briefs, analyzing the operation of legal institutions, negotiating cases, preparing for and conducting trials/hearings, preparing appellate briefs, arguing appeals, researching problems related to substantive and procedural law, judicial, administrative, legislative processes and public policies. Oftentimes, I was required to substitute for the student practitioner when the client's interests were best served.

New Orleans District Attorney's Office, Assistant D. A.
Prosecuted criminal offenders in jury and judge trials
April 1980-August 1984

As Assistant Chief of the Juvenile Division, I directly trained and supervised six attorneys in: pretrial proceedings and motion practice (including investigating cases, interviewing witnesses, admissibility of confessions/statements/evidence, and discovery), trial procedure (including tactics, preparation, and introduction of exhibits and evidence, case planning), and special problems of certain substantive offenses (including elements of proof in complex cases), defenses, arguments, memoranda, briefs, writs, appeals and all other post adjudication remedies and relief. I supervised the division's chief investigator who directed the four section investigators in delivery of services to our rotating staff of attorneys. Generally, I gave newer attorneys greater supervision, providing them with more detailed instruction concerning each phase and aspect of prosecution. I gave individual advice and guidance as needed on problems as they arose during investigation, screening, hearing, or trial. I thoroughly reviewed the completed work of each attorney and investigator for completeness, effectiveness, accuracy,

soundness of judgment, and consistency with statute, precedent and office policy to determine progress and the need for additional training/instruction. I was responsible for the unusually difficult and potentially complex legal, investigative or problematic cases. This often involved research and extensive investigation to resolve controversial matters without clear precedent.

St. Christopher's Home, Childcare and Social Caseworker
Provided preservation social services to at risk families
March 1973-May 1976

As a child care and case social worker for a New York City based social service agency, I provided preservation and other services to abused, neglected, and abandoned children of multicultural backgrounds, their biological parents, and guardians. As the special needs population of the agency increased, I completed a two-year M.S. program to meet the multiple challenges of clients. My newly developed special education skills ensured that the learning techniques and behavioral management systems experienced by our children in the classroom were legally appropriate and consistently and effectively applied in the home environment. I developed and implemented programs involving alcohol/drug awareness, parent effectiveness training and a successful behavioral management program based on a home token economy.

MILITARY: United States Army, Honorable Discharge
December 1969-December 1971

**RECENT
EDUCATION:** University of South Florida Mediation Institute
February 1998 Family Mediation Training

Florida State University
August 1997-Present Educational Leadership Program

**LICENSES/
MEMBERSHIP:** Certification-Teacher (NY 1975-Present)
(FL 1991-Present)
Member-Louisiana State Bar Association (1980-Present)
The Florida Bar (1991-Present)

PHYLLIS HAMPTON

2002 The Capitol
Tallahassee, Florida
(850) 922-4539

5114 Red Fox Run
Tallahassee, Florida
(850) 562-0673

EDUCATION

Florida State University College of Law
J.D. 1984

University of Florida
B.A.E. in English, Speech, and Journalism
1962

Florida State University
Master's Coursework in Vocational
Rehabilitation Counseling
1967-1968

EMPLOYMENT

ASSISTANT GENERAL COUNSEL FLORIDA ELECTIONS COMMISSION APRIL 1999 - PRESENT

I currently serve as an assistant general counsel for the Florida Elections Commission. I handle all aspects of litigation regarding alleged violations of Chapters 104 and 106, of the Florida Election Code

ASSISTANT GENERAL COUNSEL EXECUTIVE OFFICE OF THE GOVERNOR MARCH 1995 - MARCH 1999

Under Governor Chiles' second term of office and for the first three months of Governor Bush's administration, my two main areas of responsibility were serving as the Governor's Clemency Aide and serving as counsel for the Office of Tourism, Trade, and Economic Development (OTTED). OTTED was the successor to the Florida Department of Commerce, which the Legislature abolished in 1996. As the Governor's Clemency Aide, I coordinated clemency activities for the Governor; the six cabinet members who are members of the Executive Clemency Board; the Executive Clemency Board Office, which handles the administrative details for the Board; and, the Florida Parole Commission, which does all of the investigative work for the Board. I also coordinated the Governor's clemency efforts on behalf of the Battered Women's Clemency Project, which was funded by The Florida Bar Foundation for three years and ended in December 1998. Twenty-four women were granted clemency. I supervised the Notary Public Section and gave legal advice on various issues including vacancies in office, appointments, recall and suspension

of public officials, elections, and special districts. I handled capital cases for one year. I drafted all of the Governor's election law legislation and performed other duties as requested.

**GENERAL COUNSEL
DEPARTMENT OF STATE
DECEMBER 1990 – JANUARY 1995**

Under Secretary of State Jim Smith, I served as the chief legal officer for the department and supervised the legal staff of 14 attorneys, including the Florida Elections Commission. I drafted and reviewed legislation on behalf of the Secretary, including all election law legislation and represented the Secretary before various legislative committees. I edited the rulemaking handbook used by state agencies and assisted the supervisors of elections in writing and editing the elections county canvassing handbook used by county canvassing boards. I standardized the rulemaking, grant, and contract procedures for the Department's seven divisions and reviewed all Division of Elections opinions. I coordinated the State of Florida's indexing of all state agencies final orders which was mandated by the Florida Legislature in 1991. I performed other duties as requested by the Secretary and division directors.

**ASSISTANT GENERAL COUNSEL
DIVISION OF ELECTIONS
DEPARTMENT OF STATE
MARCH 1987 – DECEMBER 1990**

I coordinated the legal duties of the Division of Elections and supervised the staff of the Florida Elections Commission. I prepared formal and informal opinions for the division. I also assisted the 67 supervisor of elections and various municipal clerks with legal interpretations of the Florida Election Code. I held election law seminars for supervisors of elections, municipal clerks, and county court judges. I assisted the Secretary in election law matters and drafted election law legislation for the Division and Secretary.

**LEGISLATIVE ANALYST
THE FLORIDA SENATE
OCTOBER 1985 – MARCH 1987**

I conducted research studies to determine the feasibility of legislation, drafted legislation, and reviewed and analyzed proposed legislation for the Senate Judiciary Committee. I specialized in family law and elections.

**LEGAL INTERN
OFFICE OF GENERAL COUNSEL
FLORIDA STATE UNIVERSITY
SUMMER 1983**

I researched various issues for the General Counsel and handled contract negotiations with several vendors.

**ADMINISTRATIVE ASSISTANT
DIVISION OF BLIND SERVICES
JANUARY 1967 – DECEMBER 1970**

I was Administrative Assistant to the State Director of Rehabilitation Services for the Division of Blind Services. I prepared federal and state budgets, supervised counselor training programs, coordinated the agency's purchasing program for rehabilitation services, and was liaison contact with various federal and state agencies.

**VOCATIONAL REHABILITATION COUNSELOR
DIVISION OF BLIND SERVICES
JULY 1965 TO DECEMBER 1966**

As a vocational rehabilitation counselor, I arranged vocational and medical services for legally and totally blind clients in 17 rural counties in North Florida to prepare clients for employment. I found training and employment opportunities for clients and provided counseling to clients, their families, employers, and co-workers. I was the first woman vocational rehabilitation counselor for the blind in Florida.

**SOCIAL WORKER
DEPARTMENT OF PUBLIC WELFARE
JANUARY 1963 TO JUNE 1965**

I provides counseling to indigent families receiving public assistance in Leon County.

ORGANIZATIONS

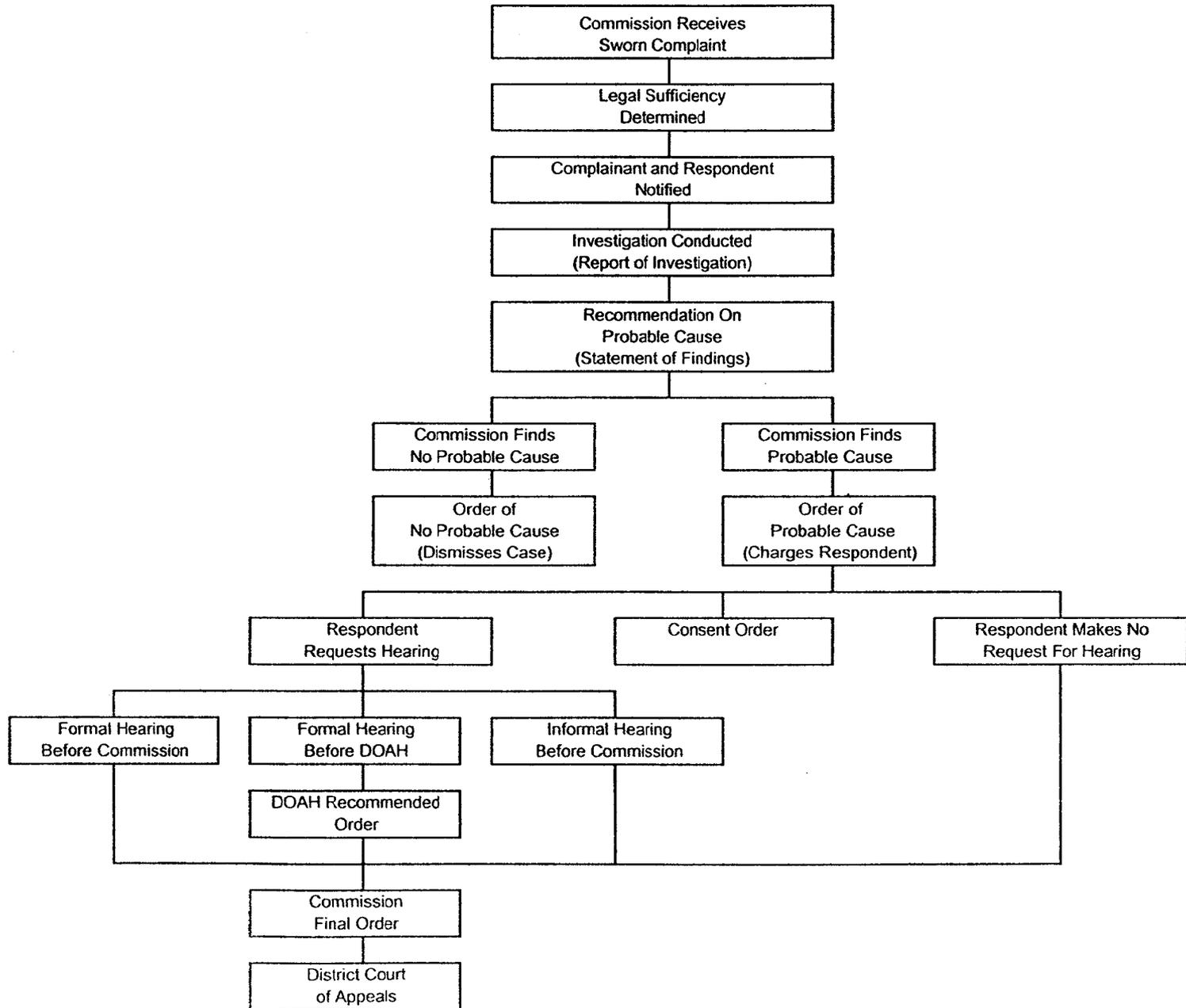
The Florida Bar - Admitted 1984
Member of the Government and
Administrative Law Sections

Florida Government Bar Association
Tallahassee Women Lawyers

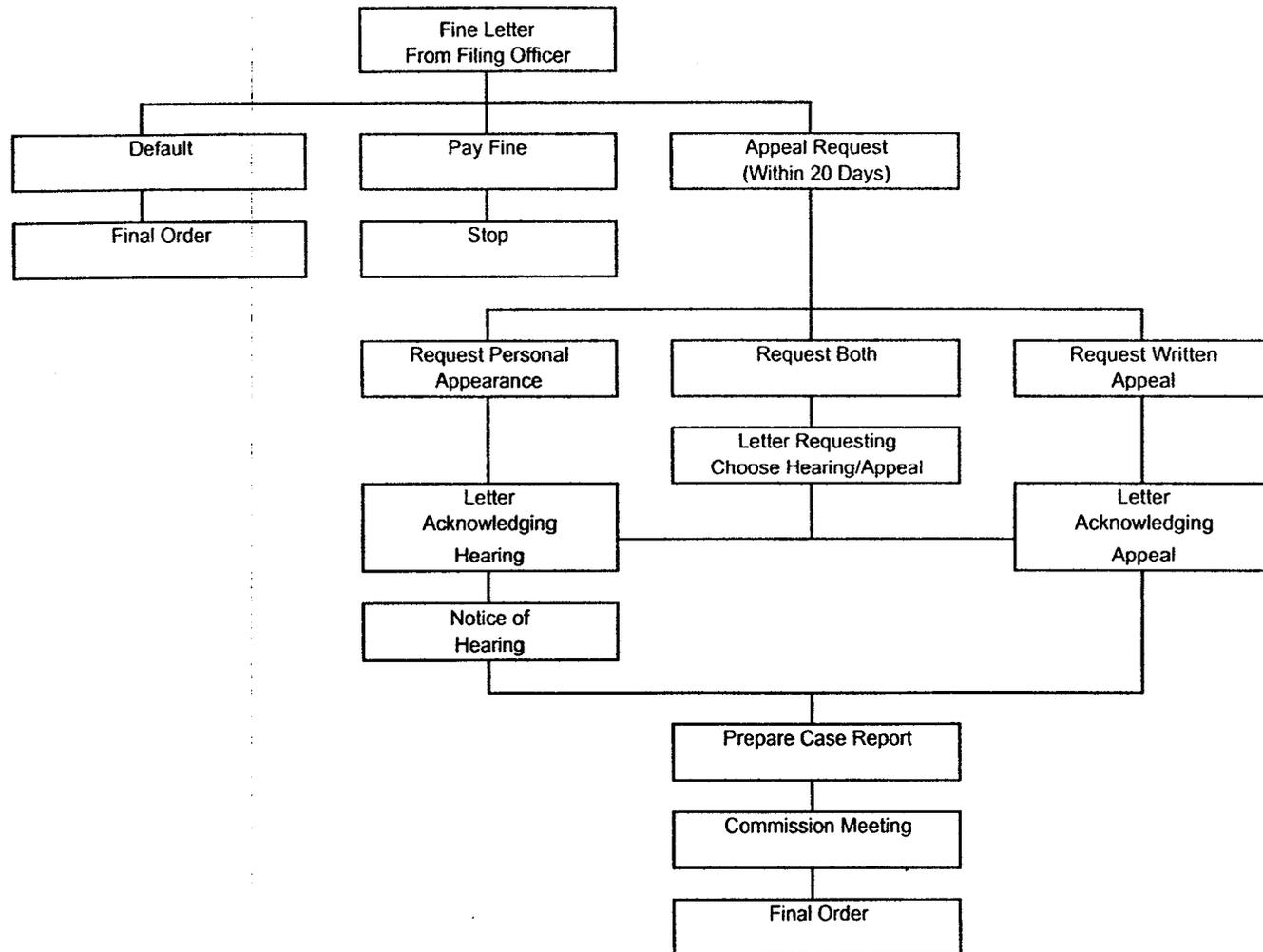
Chairman of the Tallahassee Marine Institute,
an affiliate of the Associated Marine Institutes
(AMI). AMI and its affiliates are not for profit
corporations that provide services to delinquent
teenagers in Florida and six other states.
University of Florida Alumni Association
Florida State University Alumni Association
Farm View Home Owner's Association

APPENDIX C

FLORIDA ELECTIONS COMMISSION COMPLAINT PROCESS



FLORIDA ELECTIONS COMMISSION AUTOMATIC FINES PROCESS



APPENDIX D

ELECTIONS COMMISSION TRUST FUND PROJECTED REVENUES

REVENUE SOURCE	FISCAL YEAR 97/98	FISCAL YEAR 98/99	FISCAL YEAR 99/00	PROJ. FY 00/01	PROJ. FY 01/02	PROJ. FY 02/03	PROJ. FY 03/04	PROJ. FY 04/05
1% ELECTION ASSESSMENT	\$ 134,597	\$ 603,967	\$ 130,886	\$ 801,340	\$ 125,175	\$ 603,967	\$ 130,886	\$ 669,287
3% JUDICIAL FILING FEE				\$ 1,318,907		\$ 745,374		\$ 922,748
3% COUNTY SCHOOL BOARD FILING FEE			\$ -	\$ 147,618	\$ -	\$ 197,322	\$ -	\$ 147,618
TERM LIMITS ELECTIONS ASSESSMENT INCREASE				\$ 52,248		\$ 23,749		\$ 15,041
REFUNDS	\$ 1,310	\$ 165	\$ 165	\$ 165	\$ 165	\$ 165	\$ 165	\$ 165
FEES AND COSTS RETURNED	\$ 11,054	\$ 10,000	\$ 10,000	\$ 10,000	\$ 10,000	\$ 10,000	\$ 10,000	\$ 10,000
AUTOMATIC FINE REVENUE	\$ 30,000	\$ 144,334	\$ 49,500	\$ 54,000	\$ 45,000	\$ 105,000	\$ 49,500	\$ 54,000
TOTAL REVENUE	\$ 176,961	\$ 758,466	\$ 190,551	\$ 2,384,278	\$ 180,340	\$ 1,685,577	\$ 190,551	\$ 1,818,859
Carryover	\$ 1,111,009	\$ 513,043	\$ 404,774	\$ -	\$ 1,120,888	\$ -	\$ 268,842	\$ -
Division of Elections Voter Fraud Rewards			\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)
FEC Budget	\$ 774,927	\$ 866,735	\$ 884,839	\$ 1,163,390	\$ 1,254,033	\$ 1,316,735	\$ 1,382,572	\$ 1,451,701
Remainder	\$ 513,043	\$ 404,774	\$ (389,514)	\$ 1,120,888	\$ (52,805)	\$ 268,842	\$ (1,023,179)	\$ 267,158

NOTE: * Includes revenue projections for 1% election assessment and 3% filing fee for Judges and School Board Candidates.
 * County judicial retention/election option will effect revenues for election assessments and filing fees for 2002 and 2004 and thereafter but is not reflected above.

Source: Florida Elections Commission (projections verified by the Office of Legislative Services, Economic & Demographic Research).
Table 1.

ELECTIONS COMMISSION TRUST FUND BUDGET OPTIONS

FUNDS	FISCAL YEAR 97/98	FISCAL YEAR 98/99	FISCAL YEAR 99/00	PROJ. FY 00/01	PROJ. FY 01/02	PROJ. FY 02/03	PROJ. FY 03/04	PROJ. FY 04/05
TOTAL REVENUE	\$ 176,961	\$ 758,466	\$ 190,551	\$ 2,384,278	\$ 180,340	\$ 1,685,577	\$ 190,551	\$ 1,818,859
Carryover	\$ 1,111,009	\$ 513,043	\$ 404,774	\$ -	\$ 1,120,888	\$ -	\$ 268,842	\$ -
Division of Elections Voter Fraud Rewards			\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)	\$ (100,000)
Budget #1	\$ 774,927	\$ 866,735	\$ 884,839	\$ 1,163,390	\$ 1,254,033	\$ 1,316,735	\$ 1,382,572	\$ 1,451,701
Budget #2	\$ -	\$ -		\$ 929,081	\$ 975,535	\$ 1,024,312	\$ 1,075,527	\$ 1,129,304
Budget #3	\$ -	\$ -		\$ 884,839	\$ 884,839	\$ 884,839	\$ 884,839	\$ 884,839
Remainder #1	\$ 513,043	\$ 404,774	\$ (389,514)	\$ 1,120,888	\$ (52,805)	\$ 268,842	\$ (1,023,179)	\$ 267,158
Remainder #2	\$ -	\$ -	\$ -	\$ 1,355,197	\$ 225,693	\$ 561,265	\$ (716,134)	\$ 589,555
Remainder #3	\$ -	\$ -	\$ -	\$ 1,399,439	\$ 316,389	\$ 700,738	\$ (525,446)	\$ 834,020

Budgets are based as follows:

- # 1: Florida Elections Commission requested budgets.
- # 2: Five percent annual increase beginning FY 00/01.
- # 3: No increases from FY 99/00 budget.

Table 2.

Staff Positions and Budget of the Florida Elections Commission

	1997 - 98	1998 - 99	1999 - 00	2000 - 01 (Req.)
Number of Positions	12	13	13	16
Salaries and Benefits	\$544,779	\$593,102	\$650,385	\$800,901
Other Personal Services	\$16,148	\$16,148	\$16,148	\$80,148
Expenses	\$211,000	\$219,168	\$217,458	\$266,957
Operating Capital Outlay	\$3,000	\$38,317	\$848	\$15,384
TOTAL	\$774,927	\$866,735	\$884,839	\$1,163,390

- Note: 1). Increases in Salaries and Benefits Category from FY 97/98 to 98/99 is due to the addition of one staff person, state pay raises, and increased medical premiums.
- 2). Increases in Salaries and Benefits Category from FY 98/99 to FY 99/00 is due to a budget amendment to rectify a miscalculation which understated the salaries continuation component for FY 98/99.

Source: Florida Elections Commission

APPENDIX E

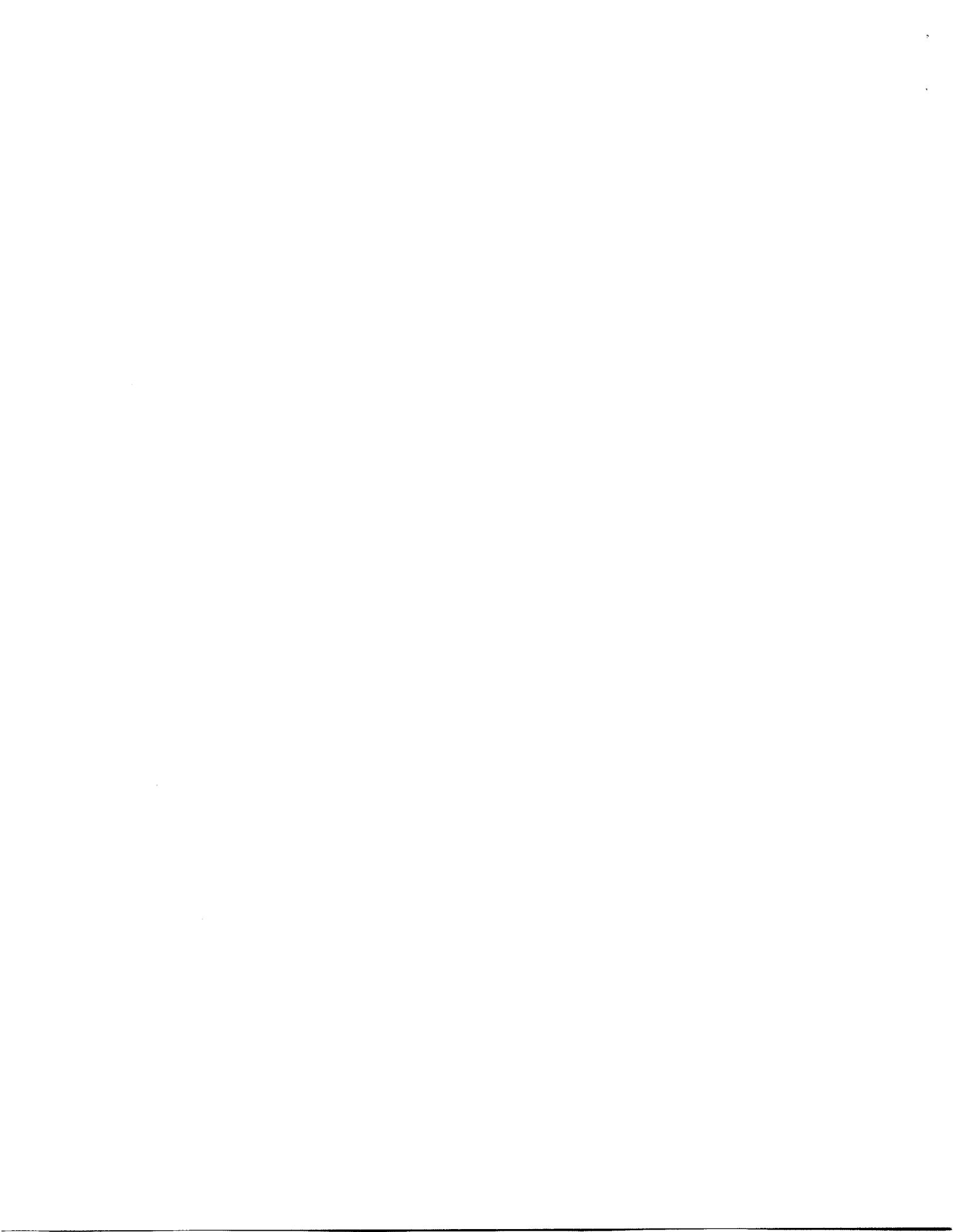


Staff Salaries for the Florida Ethics Commission and Florida Elections Commission

ETHICS COMMISSION		ELECTIONS COMMISSION	
		Average	
\$40,710		Salary	\$37,775
Position	Salary	Salary	Position
Executive Director	\$92,040	\$87,107	Executive Director
Dep.Exe.Dir.	\$84,048	\$45,000	Senior Attorney
Attorney	\$60,636	\$55,123	Senior Attorney
Attorney	\$67,224	\$44,537	Invest. Manager
Attorney	\$70,224	\$27,717	Invest. Spec. II
Public Info. & Ed.	\$46,920	\$30,216	Invest. Spec. II
Senior Investigator	\$49,140	\$30,316	Invest. Spec. II
Investigator	\$38,916	\$30,251	Invest. Spec. II
Investigator	\$45,156	\$29,897	Invest. Spec. II
Investigator	\$43,032	\$27,717	Invest. Spec. II
Investigator	\$45,156	\$31,908	Business Mgr. II
Investigator	\$36,864	\$29,302	Admin. Asst. III
Complaint Coord.	\$27,012	\$21,988	Admin. Asst. I
Financial Coord.	\$39,732		
Asst. to Exe. Dir.	\$24,300		
Office Manager	\$20,004		
Receptionist	\$22,788		
Clerk (half-time)	\$8,028		
Clerk	\$19,512		
Clerk (half-time)	\$7,092		
Clerk (half-time)	\$7,092		

Florida Elections Commission.

Source:



APPENDIX F



1 **§500 Agency Organization and Responsibilities**

2
3 **§500.01 Establishment and Composition of the Agency**

4
5 (1) The Agency is established as an independent authority.

6
7 (2) The Agency consists of five (5) members. The members are appointed by the governor from a panel of ten (10)
8 individuals nominated by the chief justice of the [state court of last resort]. A member of the Agency must be a citizen of
9 the United States and a resident of this state. A member of the Agency shall not be a:

- 10 (A) public official;
11
12 (B) public employee; or
13
14 (C) candidate;
15
16 (D) lobbyist or lobbyist's principal;

17
18 or a member of the immediate family of such an individual while a member of the Agency.

19
20 **Comment:**

21
22 *Consideration might also be given to language that would prohibit certain classes of campaign contributors from being*
23 *members of the Agency. Language might be drafted as follows:*

24
25 (E) contributor within two years of appointment of more than [\$100] to:

- 26
27 (i) the campaign committee of a person seeking election to a public office to which this Act pertains; or
28
29 (ii) a political party.

30
31 (3) A member of the Agency serves a term of four (4) years. However, the initial members of the Agency serve the
32 following terms:

- 33 (A) One (1) member serves a term of one (1) year.
34
35 (B) One (1) member serves a term of two (2) years.
36
37 (C) One (1) member serves a term of three (3) years.
38
39 (D) Two (2) members serve a term of four (4) years.

40
41 (4) An individual may not serve more than two (2) consecutive terms as a member of the Agency. A member of the
42 Agency continues in office until a successor is appointed and has qualified.

43
44 **Comment:**

45
46 *To foster consistency of decisions, predictability of the Agency's treatment of matters, and institutional memory of prior*
47 *actions, terms of at least four years are encouraged. Longer terms may also be appropriate.*

48
49 **§500.02 Election and Duties of the Chair and Vice Chair**

50
51 The chair and vice chair of the Agency are elected by a majority of the members of the Agency. The chair and vice chair
52 serve a term of one (1) year, and may be re-elected. The chair presides at meetings of the Agency. The vice chair presides
53 in the absence or disability of the chair.

54
55 **§500.03 Agency Meetings**

56
57 The Agency meets at the call of the chair or a majority of its members. A quorum consists of three (3) or more members.
58 An affirmative vote of three (3) or more members is necessary for an Agency action.

59
60 **§500.04 Filling of a Vacancy**

61
62 A vacancy is filled for the remainder of an unexpired term in the same manner as an original appointment, except that
63 the chief justice of the [state court of last resort] shall nominate two (2) individuals for gubernatorial appointment to a
64 vacancy.
65
66
67

1 §500.05 Removal of a Member

2
3 The governor may remove or suspend a member of the Agency upon filing with the Agency a written finding of the
4 member's misfeasance or malfeasance, and upon serving a copy of the written finding on the member removed or suspended.
5

6 §500.06 Expenses for Agency Members

7
8 A member of the Agency serves without compensation, but is afforded actual and necessary expenses incurred in the
9 performance of duties.
10

11 §500.07 Agency Staff

12
13 (1) The Agency may employ and remove at its pleasure an executive director to perform its functions. The executive
14 director shall have the responsibility for employing and removing other personnel as may be necessary.
15

16 Comment:

17
18 *Some jurisdictions require agencies to avail themselves of central state legal services rather than permitting the employment*
19 *of attorneys by individual agencies. The commission established by this Act should be permitted to employ attorneys for its*
20 *own purposes, rather than being forced to rely upon the vagaries of the state legal structure to have access to counsel. States*
21 *might wish to expressly provide for hiring of legal help in their statutes.*
22

23 (2) An executive director shall administer the daily business of the Agency, and perform the duties assigned by the
24 Agency.
25

26 (3) The Agency shall fix the compensation of its employees. The staff of the Agency is outside of the [classified state
27 service]. A member of the staff of the Agency shall not be:
28

29 (A) a public official; or

30 (B) a candidate;

31 while a member of the staff of the Agency.
32

33 §500.08 Filing of Statement of Financial Disclosure

34
35 A member and an employee of the Agency shall file a statement of financial disclosure with the Agency which shall be
36 a public record.
37

38 §500.09 Prohibition on Political Activity by Agency Members and Staff

39
40 A member of the Agency and its staff shall not participate in political management or in a political campaign during the
41 member or employee's term of office or employment. A member of the Agency and its staff shall not:
42

43 (1) make a financial contribution to a candidate;

44 (2) make a financial contribution to a political committee; or

45 (3) knowingly attend a fundraiser held for the benefit of a candidate or political committee.
46
47
48
49

50 §500.10 Prohibition on Lobbying Activity by Agency Members and Staff

51
52 (1) A member of the Agency and its staff may not be a registered lobbyist or participate in lobbying activities that would
53 require the individual to register as a lobbyist, unless the lobbying activities are:
54

55 (A) authorized by the Agency;

56 (B) conducted on behalf of the Agency; and

57 (C) permitted under state law.
58
59
60

61 §502 Agency Authority

62 §502.01 General Powers of the Agency
63
64
65

1 Except as expressly provided otherwise, the Agency is responsible for administering the provisions of this chapter. The
2 Agency shall have the power and duties set forth in this Act.

3
4 §502.02 Issuance of Advisory Opinions

5
6 (1) The Agency may render advisory opinions concerning this Act based upon real or hypothetical circumstances, when
7 requested in writing by:

- 8 (A) a public official or public employee;
9
10 (B) a former public official or former public employee; or
11
12 (C) a person who is personally and directly involved in the matter.
13

14
15 (2) An advisory opinion request by a public official or public employee concerning his or her own affairs or the affairs
16 of a subordinate public official or employee or a potential public official or public employee shall be confidential.

17
18 (3) An advisory opinion request by a former public official or former public employee concerning his or her own affairs
19 shall be confidential.

20
21 (4) An advisory opinion request by a person concerning his or her own affairs with regard to potential public service
22 shall be confidential.

23
24 (5) An advisory opinion shall be in writing and must be made available to the public, but in the case of a confidential
25 advisory opinion, the identity of the person requesting the opinion and of a person whose affairs are involved in the
26 circumstances described in the request for the advisory opinion, are confidential.

27
28 (6) An advisory opinion shall be deemed rendered when signed by three or more Agency members subscribing to the
29 advisory opinion.

30
31 (7) An Agency member who agrees with the advisory opinion but for different reasons than as stated may file a written
32 concurring opinion.

33
34 (8) An Agency member who disagrees with the advisory opinion may file a written dissenting opinion, which will be
35 placed at the end of the majority opinion, or at the end of a concurring opinion, if any.

36
37 (9) Agency attorneys may issue advice either orally or in writing concerning this Act based upon real or hypothetical
38 circumstances when requested when such advice is consistent with this Act or previous advisory opinions issued by the
39 Agency, provided that such advice shall be confidential when an advisory opinion on the matter would be confidential.
40 Advice so issued by Agency attorneys need not be made available to the public.

41
42 (10) An advisory opinion requested under this section and any related internal Agency materials requested or prepared
43 as a result of such an advisory opinion request shall be confidential.

44
45 (11) The confidentiality of an advisory opinion may be waived either:

46 (A) in writing, by the person who requested the advisory opinion; or

47
48 (B) by majority vote of the members of the Agency, if a person makes or purports to make public the substance
49 or any portion of an advisory opinion requested by or on behalf of the person. The Agency may, in such an event, also vote
50 to make public the advisory opinion request and related materials.

51
52
53 Comment:

54
55 *This provision authorizes the Agency to issue advisory opinions, but leaves to the Agency's discretion the assessment of the*
56 *appropriateness of issuing an opinion.*

57
58 *There is considerable merit to the idea of having anyone be able to request an advisory opinion, and for having such an*
59 *advisory opinion request and response be a matter of public record. However, allowing anyone to request an advisory opinion*
60 *can tie up the actions of an agency with partisan- or personal-based attacks upon the actions of a public official or employee.*
61 *Public officials or employees should be able to request advisory opinions about themselves and their subordinates, and there*
62 *is significant sentiment for keeping these requests and responses confidential. Many feel, however, that ethics would be greatly*
63 *fostered by giving the Agency the authority to issue a non-confidential advisory opinion to a member of the public who is*
64 *involved in some matter involving a public official or public employee, and a state official or employee should also have the*
65 *ability to request a public advisory opinion about another state official or employee who is not a subordinate. For example,*
66 *a member of a state board might want to know whether another member of the board has a potential conflict of interest.*

1 *Permitting members of the public who might not have a particular interest to request an advisory opinion would serve the*
2 *purpose of having an advisory opinion on record if, for example, a board member refused to request such an opinion with*
3 *respect to a potential conflict that he or she might have. Ethics agencies around the nation are frequently contacted by the*
4 *news media or members of the public regarding something that a state official or employee is doing. Without the ability to*
5 *issue an advisory opinion to a member of the public, the agencies have a difficult time responding to these concerns. Even*
6 *if the Agency contacts the state official or employee involved, their advice would normally be privileged or confidential, and*
7 *thus they would have a problem responding to a member of the public or news media with respect to the particular situation.*

8
9 *The section permitting staff attorneys to issue advice either orally or in writing, when such advice is based upon clear law*
10 *or precedent is set forth to cover those situations in which there is not a need to issue an advisory opinion to answer a*
11 *question.*

12
13 *Jurisdictions should closely examine their open meetings laws to determine whether a specific exemption to such laws that*
14 *would permit the Agency to meet in closed session to consider requests for advisory opinions is necessary.*

15
16 **§502.03 Conduct of Investigations**

17
18 (1) **The Agency may conduct investigations, inquiries, and hearings concerning any matter covered by this Act and**
19 **certify its own acts and records.**

20
21 (2) **The Agency may determine whether to:**

22 (A) **investigate; and**

23 (B) **act upon a complaint.**

24
25
26
27 **When the Agency determines that assistance is needed in conducting investigations, or when required by law, the Agency**
28 **shall request the assistance of other appropriate agencies.**

29
30 **§502.04 Adoption of Rules**

31 **The Agency shall adopt, amend, repeal, and enforce rules to implement this Act.**

32
33 **§502.05 Prescription of Forms and Preservation of Documents**

34
35 **The Agency shall prescribe and provide forms for reports, statements, notices, and other documents required by this Act.**
36 **Documents filed with the Agency as public records must be retained for at least four (4) years from the date of their receipt.**

37
38 **Comment:**

39 *States should check this provision against other provisions of state law which govern retention of records. Most states have*
40 *a general statute which covers the retention and disposition of public records.*

41
42
43
44 **§502.06 Review of Statements**

45 **The Agency shall:**

46 (1) **review each statement filed in accordance with this Act for compliance with its provisions; and**

47 (2) **notify the individual on whose behalf the statement is filed of an omission or deficiency.**

48
49
50
51 **§502.07 Access to Statements**

52
53 **The Agency shall make statements and reports filed with the Agency available upon the written request of an individual**
54 **for public inspection and copying during regular office hours. The Agency shall make copying facilities available free of**
55 **charge or at a cost not to exceed actual cost. A statement may be requested by mail, and the Agency shall mail a copy of**
56 **the requested statement to the individual making the request upon payment of appropriate postage costs.**

57
58
59 **§502.08 Maintenance of Statements**

60
61 **The Agency shall compile and maintain an index of reports and statements filed with the Agency to facilitate public**
62 **access to the reports and statements.**

1 **§502.09 Access to Information for Investigations**

2
3 The Agency may require the cooperation of a state agency, official, employee, and other person whose conduct is
4 regulated by this Act. An individual shall make information reasonably related to an investigation available to the Agency
5 on written request.
6

7 **§502.10 Annual Report of the Agency**

8
9 No later than [December 1] of each year, the Agency shall report to the legislature and the governor on the Agency's
10 activities in the preceding [fiscal] year. The report must contain the names and duties of each individual employed by the
11 Agency, and a summary of Agency determinations and advisory opinions. The Agency shall prevent disclosure of the identity
12 of a person involved in [decisions or] confidential advisory opinions. The report may contain other information on matters
13 within the Agency's jurisdiction and recommendations for legislation as the Agency deems desirable.
14

15 **§502.11 Publication of Information**

16
17 The Agency shall publish and make available to the persons subject to this Act and the public explanatory information
18 concerning this Act, the duties imposed by it, and the means for enforcing it.
19

20 **§502.12 Research and Educational Outreach**

21
22 The Agency may:

- 23
24 (1) conduct research concerning state governmental ethics; and
25
26 (2) implement the educational programs it considers necessary to effectuate this Act.
27

28 **§502.13 Oaths and Subpoenas**

29
30 The Agency may:

- 31
32 (1) administer oaths and affirmations for the testimony of witnesses; and
33
34 (2) issue subpoenas by a vote of three or more members, subject to judicial enforcement, for the procurement of
35 witnesses and materials relevant to the Agency's investigations, including books, papers, records, documents, or other
36 tangible objects.
37

38 **§502.14 Local Rules**

39
40 The Agency shall issue rules governing state government [campaign finance,] conflicts of interest, financial disclosure
41 [, and lobbyist regulation]. The rules may be adopted by a local jurisdiction or imposed upon a local jurisdiction under this
42 Act.
43

44 **§502.15 Other Duties**

45
46 The Agency may perform the other acts, duties, and functions authorized by this Act that it deems appropriate in
47 connection with this Act.
48

49 **§504 Complaints**

50
51 **§504.01 Complaints Initiated by an Individual**

52
53 (1) The Agency shall accept from an individual, either personally or on behalf of an organization or governmental body,
54 a verified complaint in writing that states the name of a person alleged to have committed a violation of this Act, and sets
55 forth the particulars of the violation.
56

57 (2) The Agency shall forward a copy of the complaint and a general statement of the applicable law with respect to the
58 complaint to the respondent.
59

60 (3) If the Agency determines that the complaint does not allege facts sufficient to constitute a violation of the Act, it
61 shall dismiss the complaint and notify the complainant and the respondent. If the Agency determines that the complaint
62 alleges facts sufficient to constitute a violation of the Act, an investigation may be conducted with respect to an alleged
63 violation.
64
65

1 §504.02 Complaints Initiated by the Agency
2

3 (1) If the Agency determines that information the Agency has received:

- 4 (A) provides an adequate basis for the belief that a violation of the Act has been committed; or
5
6 (B) that an investigation of a possible violation is warranted;

7
8 an investigation may be conducted with respect to an alleged violation.
9

10
11 (2) If the Agency, during the course of an investigation, or upon the receipt of information finds probable cause to
12 believe that a violation of the Act has occurred, it may, upon its own motion, make a complaint in writing, stating the name
13 of the person who is alleged to have committed a violation of the Act, and set forth the particulars thereof. A complaint
14 initiated by the Agency must be signed by a majority of the members of Agency.
15

16 (3) The Agency shall forward a copy of the complaint, and a general statement of the applicable laws with respect to
17 the complaint to the respondent.
18

19 §504.03 Amendment of Complaints
20

21 (1) If a verified complaint has been filed, or if the Agency has issued its own complaint, and subsequently the Agency
22 finds probable cause to believe that a violation of the Act has occurred, other than an alleged violation in the complaint, the
23 Agency may amend the complaint upon its own motion to include the violation.
24

25 (2) An amended complaint issued by the Agency must be signed by a majority of the members of Agency. The Agency
26 shall forward a copy of the amended complaint, and a general statement of the applicable laws with respect to the amended
27 complaint to the complainant and respondent.
28

29 §504.04 Right to Appear
30

31 The Agency shall afford a public official or employee who is the subject of a complaint an opportunity to explain the
32 conduct alleged to be in violation of the Act. A public official or employee who is the subject of a complaint has the right
33 to appear and be heard [under oath] and to offer information which may tend to exonerate the public official or employee
34 of probable cause to believe that there has been a violation of the Act.
35

36 §504.05 Right to Request an Investigation of One's Own Conduct
37

38 A public official or employee may request the Agency to make an investigation of the public official or employee's own
39 conduct, or of allegations made by another individual as to the public official or employee's conduct. This request must be
40 in writing and set forth in detail the reasons for requesting an investigation.
41

42 §504.06 Statute of Limitations
43

44 (1) Action may not be taken on a complaint filed more than three (3) years after the violation of the Act is alleged to
45 have occurred.
46

47 (2) Nothing herein shall bar proceedings against a person who by fraud or other device prevents discovery of a violation
48 of the Act.
49

50 §504.06 Referral of Evidence of a Violation of Law
51

52 Notwithstanding [the provisions of a state confidentiality law], the Agency may, in its discretion, turn over to an
53 appropriate government Agency [upon request or as a matter of course], apparent evidence of a violation of law.
54

55 Comment:
56

57 *This section permits the Agency to make available to an appropriate government official or agency information that may be*
58 *used in a criminal proceeding or other breach of the law. The question that the state needs to resolve is whether this*
59 *information should be turned over to such an entity automatically, or only after the material has been requested of the*
60 *Agency. Automatic release of materials may promote more prosecutions, for the appropriate prosecutorial authorities may*
61 *be unaware of certain transgressions without such notice. Release upon request would serve to reduce the burden on*
62 *prosecutorial authorities, for they would then only be required to look into more information on the investigations that they*
63 *had initiated.*
64
65

1 *While a mandatory requirement for Agency action was considered, it was rejected as a being an undue burden on the Agency*
2 *with respect to both action and timing.*

3
4 **§506 Investigations and Hearings**

5
6 **§506.01 Authorization to Conduct an Investigation**

7
8 Before the Agency may subpoena a witnesses, administer oaths, take testimony, or require the production for examination
9 of books or papers with respect to an investigation or hearing, it shall, by resolution adopted by a vote of three or more of
10 its members, define the nature and scope of its inquiry.

11 **Comment:**

12
13 *This section requires the Agency to define the scope of a proceeding at its outset. The question that the state needs to resolve*
14 *is whether this definition of the nature and scope of the inquiry is to be limiting or advisory. If the former, the resolution*
15 *should be drawn as broadly as possible, or made subject to later amendment. If the latter, there should be some specificity*
16 *to guard against the proverbial government witchhunt.*

17
18
19 **§506.02 Agency Investigatory Powers**

20
21 In an investigation or hearing conducted under this section, the Agency may do the following:

22
23 (1) Require an individual to submit in writing verified reports and answers to questions relevant to the proceedings
24 conducted under this section.

25
26 (2) Administer oaths and require by subpoena the attendance and testimony of witnesses and the production of
27 documentary evidence relating to the investigation or hearing being conducted.

28
29 (3) Order testimony taken by deposition before an individual designated by the Agency who has the power to administer
30 oaths, and, to compel such testimony and the production of evidence by subpoena.

31
32 (4) Pay witnesses the same fees and mileage reimbursement paid in similar circumstances by the courts of the state.

33
34 (5) Request and obtain from the [state department of taxation or revenue] copies of state income tax returns and access
35 to other appropriate information regarding a person who is the subject of an investigation.

36
37 (6) Request the respondent's attendance at a meeting [or hearing] of the Agency conducted to obtain further information
38 from the respondent.

39
40 **§506.03 Enforcement of Subpoenas**

41
42 Enforcement of subpoenas issued by the Agency may be effected by written application of the Agency to a [local court]
43 judge.

44
45 **§506.04 Probable Cause of Violation**

46
47 (1) At the conclusion of its investigation, the Agency shall, in preliminary written decision with findings of fact and
48 conclusions of law, make a determination of whether probable cause exists to believe that a violation of the Act has occurred.
49 If the Agency determines that probable cause does not exist, it shall send written notice of the determination to the respondent
50 and the complainant. The written notice of no probable cause must be in the form of a written decision with findings of fact
51 and conclusions of law.

52
53 (2) If the Agency determines that there is probable cause to believe that a violation of the Act has been committed, its
54 preliminary decision with findings of fact and conclusions of law may contain an order setting forth a date for hearing before
55 the Agency to determine whether a violation of the Act has occurred. The order shall be served upon the respondent. The
56 respondent is entitled to full discovery rights before a hearing is ordered, including adverse examination of witnesses who
57 will testify at the hearing at a reasonable time before the date of the hearing.

58
59 (3) If the Agency finds probable cause to believe that a violation of the Act has occurred, the Agency may waive further
60 proceedings because of action the respondent takes to remedy or correct the alleged violation. The Agency shall make the
61 remedial or corrective action taken by the respondent, the Agency's decision in light of the action to waive further
62 proceedings, and the Agency's justification for its decision, a part of the public record.
63
64
65

1 §506.05 Hearing Procedures
2

3 (1) The Agency may appoint a qualified individual as a hearing examiner. The hearing examiner must:

- 4 (A) be a member of the bar of the state;
5
6 (B) not be an elective official or a full-time employee of the executive or legislative branch; and
7
8 (C) not be a member or employee of the Agency.
9

10 (2) The hearing examiner shall conduct a hearing or rehearing under this section in accordance with the [requirements
11 of the state administrative procedure act], except as otherwise expressly provided.
12

13 (3) During an investigation or hearing to determine whether a violation of the Act has occurred, the respondent may
14 be represented by counsel of the respondent's choice.
15

16 (4) The respondent has the following rights:

- 17 (A) To be afforded an opportunity to challenge the veracity and sufficiency of a complaint filed against the
18 respondent.
19
20 (B) To present witnesses, who shall be subpoenaed by the Agency to compel attendance upon the respondent's
21 request.
22
23 (C) To establish pertinent facts and circumstances;
24
25 (D) To rebut or offer countervailing evidence;
26
27 (E) To question or refute testimony or evidence, including the opportunity to confront and cross-examine an adverse
28 witness.
29
30 (F) To exercise fully any pretrial discovery procedure usually available in a civil action.
31
32

33 (5) During an Agency hearing conducted to determine whether a violation of the Act has occurred, all evidence,
34 including records the Agency considers, shall be fully offered and made a part of the record in the proceedings.
35

36 (6) A person whose name is mentioned or who is otherwise identified during an Agency hearing, and who, in the
37 opinion of the Agency, may be adversely affected as a result, may, upon the request of the person or the person's
38 representative:
39

- 40 (A) appear personally before the Agency and testify on the person's own behalf;
41
42 (B) have a representative appear to testify; or
43
44 (C) rebut or offer countervailing evidence.
45
46

47 The Agency may permit any other person to appear and testify at a hearing.
48

49 (7) The Agency shall not be bound by the strict rules of evidence when conducting a hearing to determine whether a
50 violation of this Act has occurred, and the degree or quantum of proof required shall be a preponderance of the evidence.
51

52 (8) After the conclusion of its hearing, the Agency shall, as soon as practicable:

- 53 (A) begin deliberations on the evidence presented at the hearing; and
54
55 (B) determine whether the respondent has violated the Act.
56

57 (9) If a hearing officer is appointed and a majority of the members of the Agency are not present at the hearing, the
58 Agency shall not begin deliberations until after:
59

- 60 (A) the proposed decision is served upon the Agency and the parties; and
61
62 (B) an opportunity is provided for oral arguments.
63
64
65

1 (10) A hearing to determine whether there has been a violation of the Act must be public, unless the Agency votes to
2 hear the evidence in executive session.

3
4 (11) A member of the Agency may administer oaths. A member of the Agency may hear testimony or receive other
5 evidence in a proceeding before the Agency.

6
7 **§506.06 Orders and Recommendations**

8
9 (1) No later than [a reasonable time] after the conclusion of a hearing to determine whether a violation of the Act has
10 occurred, the Agency shall set forth its determination in a written decision with findings of fact and conclusions of law. The
11 Agency shall send its written decision with findings of fact and conclusions of law to the respondent and complainant.

12
13 (2) If the Agency determines that a violation of the Act has occurred, its written decision with findings of fact and
14 conclusions of law must contain one (1) or more of the following orders or recommendations:

15
16 (A) In the case of a state official liable to impeachment, a recommendation to the presiding officer of each chamber
17 of the legislature that the official be removed from office.

18
19 (B) In the case of a public official or public employee in the [classified or unclassified] service, a recommendation
20 to the appropriate appointing authority that the public official or public employee be censured, suspended, or removed from
21 office or employment.

22
23 (C) In the case of a member of the state legislature, a recommendation to the presiding officer of the appropriate
24 chamber of the legislature that the legislator be censured, suspended, or removed from office.

25
26 (D) In the case of a judge, a recommendation to the [state court of last resort] and to the presiding officer of each
27 chamber of the legislature that the judge be censured, suspended, or removed from office.

28
29 (E) An order requiring the public official or public employee to conform the official's or employee's conduct to
30 the requirements of the Act.

31
32 (F) An order requiring the public official or public employee to pay a civil penalty of not more than [\$2,000] for
33 each violation of the Act. The attorney general, when requested by the Agency, shall institute proceedings to recover a fine
34 or forfeiture incurred under this section not paid by, or on behalf of, the person against whom it is assessed.

35
36 (G) Other recommendations or orders, including:

37
38 (i) forfeiture of gifts, receipts or profits obtained through a violation of the Act;

39
40 (ii) voiding of a state action obtained through a violation of the Act; or

41
42 (iii) or a combination of the above, as necessary and appropriate, consistent with the Act.

43
44 (3) A fine imposed by the Agency, disciplinary action taken by an appropriate authority, or a determination not to take
45 disciplinary action made by an appropriate authority is public record.

46
47 (4) This section does not limit the power of:

48
49 (A) either chamber of the legislature to discipline its own members or to impeach a public official; or

50
51 (B) of a department to discipline its officials or employees.

52
53 **§506.07 Rehearings**

54
55 (1) After the service upon the alleged violator by the Agency of a decision under section 506.06 containing an order
56 or recommendation, the respondent may apply to the Agency for a rehearing with respect to a matter determined in the
57 decision.

58
59 (2) An application for a rehearing is governed by rules established by the Agency. The Agency may grant one (1)
60 rehearing to a particular respondent.

61
62 (3) An Agency order may not become effective:

63
64 (A) before twenty (20) days after it is issued;

1 (B) while an application for rehearing or a rehearing is pending; or

2
3 (C) before ten (10) days after the application for rehearing is either denied, or the Agency has announced its final
4 determination on rehearing.

5
6 **§506.08 Action by the Attorney General**

7
8 (1) The attorney general may recover a fee, compensation, gift, or profit received by a person as a result of a violation
9 of the Act.

10
11 (2) Action taken by the attorney general under this subsection must be brought no later than one (1) year after a
12 determination of a violation of the Act.

13
14 **§506.09 Appeal**

15
16 A final action by the Agency under this Act is subject to review in accordance with the [state administrative procedure
17 act].

18
19 **§506.10 Settlement Agreements**

20
21 A public official or employee under investigation by the Agency for a possible violation of the Act may enter into a
22 settlement agreement with the Agency to resolve the matter to preclude further proceedings or hearings. A settlement
23 agreement is a matter of public record.

24
25 **§506.11 Authentication of Agency Actions**

26
27 A decision or advisory opinion of the Agency must be in writing and signed by three or more members of the Agency.

28
29 **§506.12 Public Inspection of Records**

30
31 (1) Except as provided in subsection (2) below, all Agency records are open for public inspection during normal business
32 hours.

33
34 (2) The following Agency records are not open for public inspection:

35
36 (A) Records obtained in connection with a request for an advisory opinion. The Agency may make records
37 described by this subdivision public with the consent of the individual to whom the records pertain.

38
39 (B) Records obtained or prepared by the Agency in connection with an investigation or complaint. However, the
40 Agency shall permit inspection of the following:

41 (i) Records made public in the course of a hearing.

42 (ii) Verified complaints filed with the Agency.

43 (iii) Complaints issued by the Agency.

44 (iv) Probable cause decisions with findings of fact and conclusions of law.

45 (v) Decisions with findings of fact and conclusions of law issued after a hearing.

46 (vi) A determination made by the Agency regarding a rehearing.

47 (vii) A settlement agreement entered into by the Agency and a respondent.

48
49 (3) A person who makes or purports to make public the substance or a portion of a confidential advisory opinion
50 requested by or on behalf of the person has waived the confidentiality of the request for an advisory opinion, and of a record
51 obtained by the Agency in connection with the request for an advisory opinion.

52
53 (4) The Agency may publicly respond to a statement or interpretation made concerning the contents of an advisory
54 opinion or decision it has issued or is purported to have issued.

1 §506.13 Freedom from Reprisal for Disclosure of Improper Acts
2

3 (1) A public official or public employee who reports or attempts to report to the Agency or the official's or employee's
4 department, division, board, bureau, commission, chamber of the legislature, or other agency of the state, information
5 concerning an action that the public official or public employee reasonably believes to involve:
6

- 7 (A) corruption;
8
9 (B) unethical practices;
10
11 (C) violation of federal, state, or local laws or regulations;
12
13 (D) mismanagement;
14
15 (E) gross waste of public funds or resources;
16
17 (F) abuse of authority;
18
19 (G) danger to the public safety; or
20
21 (H) other alleged acts of impropriety;
22

23 within a state department, division, board, bureau, commission, chamber of the legislature, or other agency of the state, may
24 not be subject to discipline or reprisal for reporting the acts of alleged impropriety to the extent that the public official or
25 employee is not directly responsible for the acts complained of.
26

27 (2) A public official or employee shall not subject a person who reports to a government entity or the Agency
28 information concerning an action the person reasonably believes is a violation of the Act, or of any order, or rule, issued
29 by the Agency to reprisal or retaliation.
30

31 (3) A public official or employee who is discharged, disciplined, or otherwise penalized by a government employer in
32 violation of this section may, after exhausting all available administrative remedies, bring a civil action, no later than ninety
33 (90) days after the date of the final administrative determination or not later than ninety (90) days after the violation,
34 whichever is later, in [district-level] court for:
35

- 36 (A) reinstatement to the position held at the time of the disclosure;
37
38 (B) payment of back wages and benefits; and
39
40 (C) other relief as the public official or employee may deem appropriate or necessary.
41

42 (4) An employee found to have knowingly made a false report shall be subject to disciplinary action which may include
43 dismissal.
44

45 **Comment:**
46

47 *An individual, particularly a public employee, should be free to speak out on issues relating to fraud, waste, and abuse in*
48 *government without fear of retaliation through demotion, transfer, cut in pay, or an unsatisfactory performance review. This*
49 *provision permits a public employee or any person to disclose alleged improprieties without reprisal by the government.*
50 *Safeguards for reinstating an employee and deterring willful misconduct through making false accusations are also included.*
51

52 §506.16 Copy of the Act to be Furnished to Public Officials and Employees
53

54 (1) Each public official and employee shall receive a copy of this Act [notice of amendments,] and a brochure describing
55 the general application of the Act before January 15 of each year, from the public official or employee's department, division,
56 board, bureau, commission, chamber of the legislature, or other agency of the state, upon assuming the duties of office or
57 position within state government.
58

59 (2) The [jurisdiction] may choose to assume the responsibility for the distribution of the Act for appropriate public
60 officials and employees under subsection (1) above if it annually includes a copy of the Act with each official or employee's
61 paycheck or statement of electronic funds transfer.
62

1 **§508 Miscellaneous Penalty Provisions**

2
3 **§508.01 Forfeiture of Pension and Retirement Benefits**

4
5 (1) A public official or public employee, or a survivor, heir, successor, or estate of a public official or public employee
6 who is convicted of a felony:

7
8 (A) relating to; or

9
10 (B) arising out of;

11
12 the public official or public employee's public service may not receive the portion of pension or retirement benefits paid by
13 a public entity and interest accrued on that portion.

14
15 (2) A public official or public employee entering public service subsequent to the passage of this Act is deemed to have
16 consented to this section as a condition of coverage.

17
18 **Comment:**

19
20 *Principles of fairness are at stake in the distribution of the government share of retirement or pension benefits to a public*
21 *official or employee who has abused the public trust. Situations in Pennsylvania and Illinois have highlighted the problem*
22 *in recent years. This section denies the government's payments (and accrued interest on the payments) to a public official or*
23 *employee's pension or retirement plan if the official or employee's felony conviction is related to the individual's government*
24 *service. The public official or employee is still entitled to redeem the employee's share of the contribution to the pension or*
25 *retirement plan. A similar statute in Illinois has survived constitutional challenge.*

26
27 **§508.02 Tax Treatment of Fines and Repayments**

28
29 (1) A fine, penalty, reimbursement, or other payment ordered by the Agency or court in connection with making the
30 government whole for a transaction improperly entered into by a public official, employee, or consultant, or a member of
31 the immediate household of a public official, employee, or consultant does not qualify for a state or local tax credit or
32 deduction.

33
34 (2) The guilt or innocence of a party making a payment under subsection (1) has no effect upon the state or local tax
35 consequences, nor does an admission or failure to admit guilt or complicity in a transaction.

36
37 **Comment:**

38
39 *A corrupt public official or employee should not be able to profit from his or her action in any manner, direct or indirect.*
40 *Much of the language of this statute has been oriented to proscribing the direct benefits. This section and section 248 are*
41 *devoted to keeping the wrongdoer from deriving some good from the wrongdoing. The scenario is not hypothetical; former*
42 *Vice President Spiro T. Agnew tried to do just this.*

43
44 **§508.03 Administrative Debarment**

45
46 If the head of a department or agency of the executive branch in which a former officer or employee served finds, after
47 notice and opportunity for a hearing, that the former officer or employee violated subsection (1), (2), or (3) of this section,
48 the department or agency head may prohibit that person from making, on behalf of any other person (except the state), an
49 appearance before, or with the intent to influence, an oral or written communication to the department or agency on a matter
50 for not more than five (5) years. The disciplinary action is subject to review in an appropriate state [district level] court. A
51 department or agency shall, in consultation with [the attorney general or the Agency], adopt rules to implement this
52 subsection.

53
54 **§508.04 Suspension or Revocation of Lobbying Privilege**

55
56 The Agency may by a majority vote, as a result of a violation of the Lobbying Regulation Act, after a public hearing,
57 suspend or revoke the registration privileges of a lobbyist.

58
59 **§510 Agency Duties**

60
61 **Comment:**

62
63 *This section sets forth the required powers and duties of the Agency which are considered essential to the effective*
64 *investigation of suspected or alleged violations, and enforcement of the provisions of this Act. The authority prescribed in*
65 *this section was drafted after consideration of detailed survey responses from 30 officials charged with enforcement of*
66 *campaign finance laws in their respective jurisdictions in the United States and Canada, and the drafter's own experience*

1 of ten years practice in this area. In broad terms, this section addresses the critical investigative and auditing functions of
2 the Agency, and the authority necessary to enforce compliance with the registration and reporting provisions of this Act.
3

4 §510.01 Responsibility of the Agency
5

6 The Agency shall do the following:
7

8 (1) Investigate a suspected violation of this Act on its own initiative or upon receipt of a written complaint under
9 oath by an individual with respect to an alleged violation of this Act.

10 (A) No later than seven (7) days after the Agency has received a sworn complaint, or decides to investigate on
11 its own initiative, the Agency must acknowledge receipt of the complaint to the complainant by certified mail, where
12 appropriate.
13

14 (B) A complaint must be filed, or an investigation must be begun by the Agency on its own initiative, no later
15 than four (4) years from the date that the violation is suspected or alleged to have been committed.
16
17

18 Comment:
19

20 *These provisions require the Agency to investigate a suspected or alleged violation of the Act on its own volition or upon the*
21 *receipt of a properly verified complaint from an individual. This process is consistent with the authority granted to the vast*
22 *majority of independent boards and commissions in the United States that have been established to administer and enforce*
23 *such laws.*
24

25 *Even in the absence of a complaint, it is essential for the Agency to begin an investigation when it possesses information that*
26 *bears upon a possible violation of the laws. The failure to act in such circumstances may erode the public's confidence in*
27 *the electoral process, and will surely tarnish the credibility of the Agency.*
28

29 *The language does not specify whether a majority or extraordinary majority vote of the Agency members should be required*
30 *to initiate an investigation in the absence of a complaint. The intent is to reserve these procedural issues for a decision by*
31 *the Agency in the resolution of the formal regulation-making process governed by the Administrative Procedure Act of the*
32 *particular jurisdiction. However, we recommend that a simple majority vote of the Agency members be required, rather than*
33 *an extraordinary majority, in order to facilitate such action. The language is certainly broad enough to ensure, for example,*
34 *that the results of staff audits may serve as the basis for a full investigation. However, the necessity for the Agency to review*
35 *these results and adopt a motion to initiate an investigation is an important check on the discretion of its staff.*
36

37 *By contrast, no vote by Agency members is required as a prerequisite to the investigation of a verified complaint. The oath*
38 *requirement, coupled with penalties for false oaths that will undoubtedly exist elsewhere in the law of the jurisdiction, greatly*
39 *deters the opportunity for fabrication of patently fraudulent charges. A sworn complaint should carry sufficient legitimacy*
40 *to justify an investigation of the charges without requiring formal Agency approval.*
41

42 *No further conditions are prescribed for the complaint filing process to encourage its use to address questions of propriety.*
43 *While there was some support for a requirement that the complainant have personal knowledge of the facts recited, it was*
44 *rejected as burdensome and because it places an unnecessary impediment to the initiation of an investigation.*
45

46 *Written notice of receipt of a complaint must be sent to the complainant by the Agency. To prevent stale claims, a four year*
47 *statute of limitations is placed upon the filing of complaints and commencement of investigations.*
48

49 (2) Receive and examine each statement and report filed under the Act and determine whether it is complete and is
50 in compliance with the provisions of the Act.
51

52 Comment:
53

54 *The Agency is required to both receive and examine the registration and financial disclosure reports filed in accordance with*
55 *the provisions of the Act. Although a few jurisdictions assign the repository function to an official or agency that does not*
56 *possess the audit, investigative, and enforcement functions (typically the Secretary of State or county clerks), the preferred*
57 *approach is to combine all functions in a single independent agency that is not comprised of elected officials subject to the*
58 *requirements of the Act.*
59

60 *In addition to the elimination of conflicts of interests and a reduction in partisanship, both real and potential, the delegation*
61 *of all functions to an independent entity promotes efficiency, facilitates dissemination of information to the public, and ensures*
62 *greater compliance with the laws.*
63

64 *Among other adverse consequences, the separation of the repository function from the audit and enforcement functions will*
65 *increase the likelihood that those subject to the requirements of the Act will receive inconsistent advice, and diminish the*
66 *ability of the audit and enforcement agency to review the statements and reports for compliance.*

1 *Under ideal circumstances, a more complete and detailed review (audit) should be undertaken with respect to each report*
2 *filed. However, the practical fiscal limitations on resources available to the Agency preclude such detailed reviews in each*
3 *instance without some overt showing of need or random desk or field audit requirement.*

4
5 (3) Review and audit a statement or report filed under the Act:

6
7 (A) to determine if an applicant for public funds is eligible to receive such funds and has otherwise complied
8 with the requirements of [the public financing section of the Act];

9
10 (B) as may be necessary to conduct a fair and complete investigation of a suspected or alleged violation of the
11 Act commenced pursuant to subsection (1) of this section; and

12
13 (C) in any other circumstances deemed necessary to effectuate the purposes of the Act in accordance with the
14 regulations adopted by the Agency under the Act.

15
16 **Comment:**

17
18 *The public interest in comprehensive auditing of campaign disclosure reports is considered most significant when taxpayer*
19 *funds are sought or used to finance a political campaign, and when the guilt or innocence of an individual or other person*
20 *suspected of a violation is determined by the enforcement agency. Consequently, an audit is required by law only in those*
21 *instances.*

22
23 *The Agency's ability to conduct audits under other circumstances should not be constrained if it possesses sufficient resources*
24 *if the circumstances are set forth in regulations promulgated by the Agency in accordance with the Administrative Procedure*
25 *Act of the particular jurisdiction.*

26
27 (4) (A) Impose a late filing fee, payable to the Agency, against a person who fails to file a statement or report with
28 the Agency by a deadline set forth under the Act.

29
30 (B) Imposition of a late filing fee shall not be an appealable matter, either to the Agency or to a court.

31
32 (C) The Agency may, for good cause, and in accordance with procedural rules it shall adopt, waive a late filing
33 fee required to be imposed under this subsection.

34
35 (D) A late filing fee shall be assessed on the following basis:

36
37 (i) A late filing fee of fifty dollars (\$50) shall be assessed against a person for failure to file a required
38 statement or report in a timely manner.

39
40 (ii) An additional late filing fee of ten dollars (\$10) shall be imposed for each day after the first day that a
41 required statement or report is not filed.

42
43 (iii) A late filing fee of one hundred dollars (\$100) shall be assessed against a person for failure to timely file
44 a required statement or report that must be filed within thirty (30) days before a primary or general election.

45
46 (iv) An additional late filing fee of fifty dollars (\$50) shall be imposed for each day after the first day that
47 a required statement or report that must be filed within thirty (30) days before a primary or general election is not filed.

48
49 (E) The total amount of late filing fees imposed and due under this subsection with respect to a single required
50 statement or report for any one person may not exceed one thousand dollars (\$1,000).

51
52 **Comment:**

53
54 *This subsection requires the Agency to impose a late filing fee against a person who is required to file a statement or*
55 *disclosure report, and who fails to do so by the time required by the Act.*

56
57 *The imposition of a late filing fee is automatic, and is not appealable. The lack of an appeal ensures timely disclosure and*
58 *prevents dilatory tactics. Automatic increases of the fee for continued delinquency are also prescribed, with the total amount*
59 *of fees that may be assessed against any one person for the nonfiling or late filing of a single statement or report may not*
60 *exceed \$1,000.*

61
62 *As the statements and reports required to be filed immediately preceding an election are likely to be the most important to*
63 *the public, the late filing fee for noncompliance is set at a higher threshold.*

1 *The Agency is authorized to waive any late filing fee imposed under terms of the Act, but only if the circumstances satisfy the*
2 *criteria set forth in regulations adopted by the Agency in accordance with the Administrative Procedure Act of the jurisdiction.*
3 *Standardized requirements for the granting of such waivers will help to ensure that the Agency is not subjected to unjustified*
4 *criticism, or subject to claims of selective enforcement.*
5

6 (5) Issue a finding of probable cause or no probable cause to believe that a violation of the Act has been committed.
7

8 (A) If a finding is not issued by the Agency within one hundred and twenty (120) days after the Agency receives
9 a complaint, an individual who resides within the jurisdiction of the office for which the candidate complained against seeks
10 may file a civil action to enforce the provisions of the Act in the [trial] court for the jurisdiction in which the violation is
11 alleged to have occurred. An action brought under this subsection shall have precedence for purposes of trial in the order
12 of time filed, and over all other civil actions for any cause.
13

14 (B) In addition to the service required for the commencement of a civil action, an individual who brings a civil
15 action under this subsection shall, within seven (7) days after filing the action, serve a copy of the complaint on the Agency.
16

17 The Agency shall file a motion to dismiss the civil action commenced under this section within three (3) days after its receipt
18 of a copy of the complaint if it has issued a probable cause or no probable cause finding, and shall serve notice of its motion
19 on all parties. The court shall hear the motion not less than three (3) nor more than seven (7) days after its filing by the
20 Agency, and shall render a judgment on the motion at the conclusion of the hearing.
21

22 (C) A civil action may not be filed under subsection (A) if:
23

24 (i) the action alleges a violation against a person for failure to timely file a required statement or report;
25

26 (ii) the Agency has:
27

28 (a) issued a finding of probable cause or no probable cause to believe that a violation has been
29 committed in connection with the original complaint; or
30

31 (b) has referred evidence compiled in its investigation to the [appropriate prosecutorial authority]; or
32

33 (iii) the violation occurred more than four years before the date the civil action is filed.
34

35 (D) The court shall have the same powers as reserved to the Agency if the court determines that a civil violation
36 of the Act has occurred.
37

38 (E) A plaintiff or defendant who prevails in a civil action shall be entitled to recover attorneys fees and court
39 costs from an opposing party, other than the Agency, if the court so decides. A successful plaintiff shall also be entitled to
40 receive one-third (1/3) of the amount of a civil penalty and forfeiture of a contribution or expenditure ordered by the court
41 to be paid by the defendant under subsection (A).
42

43 (F) The Agency retains jurisdiction over the original complaint unless:
44

45 (i) a civil action has been commenced under subsection (A) within the time required; and
46

47 (ii) the Agency has not issued a finding of probable cause or no probable cause to believe that a violation
48 has occurred, or has referred evidence compiled in its investigation to the [appropriate prosecutorial authority].
49

50 **Comment:**
51

52 *The Agency must act upon a complaint it receives. If the Agency does not act within 120 days after its receipt, an individual*
53 *within the jurisdiction may file a complaint with the trial level court to ensure the civil enforcement of the campaign finance*
54 *laws. While only a few jurisdictions have such a "citizen suit" provision, this check on the Agency's actions is considered*
55 *to be an important and necessary safeguard in the enforcement process.*
56

57 *The 120-day period provides the Agency a reasonable opportunity to act fairly upon the substantial majority of complaints*
58 *that it receives even if its appropriated funds and dedicated resources are modest—as is the reality with respect to most entities*
59 *which investigate and enforce campaign finance laws. The fair and expeditious resolution of these complaints is a worthy*
60 *objective, and legislatures should adequately fund the enforcement agency to achieve this goal. If such funding is not*
61 *provided, this time constraint will only serve to diminish the Agency's effectiveness and adversely impact upon the public's*
62 *perception of its operations.*
63

64 *The "citizen suit" provision is not available if the Agency has, at a minimum, issued a finding of probable cause, or the*
65 *absence of such cause. Unless a civil action is commenced, the primary jurisdiction of the Agency is not lost if the Agency*
66 *fails to issue a finding or make a referral to another prosecutorial authority within the 120-day period.*

1 **§511 Agency Discretionary Authority**

2
3 **Comment:**

4
5 *This section sets forth the Agency's discretionary authority. To ensure that the Agency can fully and effectively investigate*
6 *alleged violations, it must have the power to issue subpoenas to compel testimony and the production of any relevant*
7 *documents during any given stage of an investigation. Once an violation is discovered, the Agency must be able to*
8 *expeditiously correct it, and, if appropriate, punish offenders through employment of effective sanctions to deter future*
9 *transgressions. Various enforcement tools and options are provided to enable the Agency to effectively deal with the range*
10 *of violations it will discover, and the particular circumstances unique to each case.*

11
12 **§511.01** In the performance of its required duties, the Agency has the authority to do the following:

13
14 (1) Subpoena persons in connection with an investigation or hearing under procedural regulations it may adopt. A
15 subpoena may be issued to compel attendance and testimony, and to require the production for examination of books, records,
16 papers, computer software, or other documents or materials the Agency deems relevant to a matter under investigation or
17 in question.

18
19 (A) In the event of a refusal to comply with a subpoena issued pursuant to this subsection or to testify with
20 respect to a matter upon which the person may be properly interrogated, the [trial level court of the county in which the
21 Agency maintains its principal office], on application of the Agency, may issue an order requiring the person to comply and
22 to testify.

23
24 (B) Failure to obey an order of the court compelling compliance or testimony may be punished by the court as
25 contempt.

26
27 **Comment:**

28
29 *This subsection authorizes the Agency to issue subpoenas in connection with an investigation or hearing, require the*
30 *production of records, documents, or materials relevant to the matter in question, and compel the testimony of any person.*

31
32 *Adequate subpoena power is considered essential to ascertain the facts and veracity of a particular complaint or investigation.*
33 *Such authority is typically delegated to most agencies that investigate election complaints.*

34
35 *The text requires the Agency to adopt procedural regulations concerning the issuance of subpoenas to ensure uniformity and*
36 *compliance with the constitutional guarantees of due process. The Agency is also authorized to enforce compliance with its*
37 *subpoena by direct action to a trial court which, in turn, is empowered to issue a contempt order in the event of*
38 *noncompliance with the subpoena. Again, this is an essential component of the subpoena power, without which the power*
39 *would be rendered impotent.*

40
41 *To preclude the possibility of political interference—or even the raising of a valid claim to that effect—the Agency is permitted*
42 *to enforce its subpoena directly in the court without the prior approval of the attorney general or similar prosecutorial*
43 *authority.*

44
45 (2) Issue an order requiring the custodian of financial records necessary for the Agency to complete and audit
46 conducted under Section 170(3) to produce such records for examination.

47
48 (A) If a person refuses to comply with such an order, the [trial level court] situated in the same [judicial district
49 or county] where the Agency maintains its principal office may, on application of the Agency, issue an order requiring the
50 person to comply with the Agency order; and

51
52 (B) The failure to obey such an order may be punished by the court as contempt.

53
54 **Comment:**

55
56 *This subsection is intended to ensure that the Agency is afforded access to all financial records necessary to conduct an audit*
57 *when required by the law and circumstances, and in the absence of a pending complaint or investigation. If the Commission*
58 *is involved in an investigation, it can use its subpoena power to compel production of such records, which may include such*
59 *items as bank statements, checkbook ledgers, canceled checks, deposit tickets, invoices, receipts, and the like.*

60 *Because the enabling subpoena authority applies exclusively to investigations and hearings, it does not cover audits*
61 *undertaken which do not result in full investigations. This provision complements the subpoena authority by permitting the*
62 *Agency to issue an enforceable order to produce such records under the circumstances described above. This authority is both*
63 *a logical and necessary component of the audit authority.*

1 (3) Secure voluntary compliance with the provisions of the Act through informal means of persuasion and
2 conciliation.
3

4 **Comment:**
5

6 *The Agency should act expeditiously to correct minor discrepancies or omissions which it may discover. Formal procedural*
7 *requirements, such as a hearing, should be viewed as a last resort, and must not interfere with the Agency's mandate to*
8 *ensure compliance with the registration and reporting requirements of the Act. The collective experience in administration*
9 *of these laws suggests that there are many inadvertent errors and omissions in registration and reporting that may easily be*
10 *rectified and should not be subject to penalty. In these common and frequent circumstances, the public policy underlying these*
11 *laws is best achieved by securing timely and complete disclosure of campaign finances.*
12

13 (4) Consult with and request additional investigatory or audit personnel from the:

- 14 (A) office of the attorney general;
15
16 (B) [local prosecutorial authority];
17
18 (C) [commissioner or head of the state police or state law enforcement investigatory authority];
19
20 (D) chief of a local police department;
21
22 (E) state or county auditors; or
23
24 (F) local [election authorities];
25
26

27 when necessary to determine compliance with the provisions of the Act. Such assistance shall be provided to the Agency upon
28 request.
29

30 **Comment:**
31

32 *Many of the existing agencies with the jurisdiction to administer and enforce campaign finance laws are not adequately funded*
33 *to employ a sufficient number of auditors or investigators to properly attempt or conduct necessary audits or investigations.*
34 *The integrity of the entire process is, however, dependent upon the proper allocation of these resources to monitor activities.*
35

36 *Even in those jurisdictions which have provided their respective enforcement agencies with ample resources to handle*
37 *day-to-day operations, there will be investigations or audits that require the infusion of significantly more resources than a*
38 *typical case to complete them quickly, thoroughly, and fairly. In addition, the issues involved in a particular investigation*
39 *or audit may have legal or financial ramifications beyond the Agency's internal expertise. The Agency must, at a minimum,*
40 *possess the ability to marshal the resources of other law enforcement and prosecutorial entities in an effort to complete these*
41 *investigations and audits.*
42

43 (5) Conduct a hearing when it is deemed necessary to determine if a violation of the Act has occurred in accordance
44 with the requirements of the [administrative procedure act] and with the regulations that the Agency shall adopt.
45

46 (A) An opportunity for a hearing shall be provided to a respondent prior to the issuance of an order by the
47 Agency requiring:

- 48 (i) payment of a civil penalty;
49
50 (ii) return of a contribution to a contributor; or
51
52 (iii) the escheat of a contribution to the state;
53
54

55 however, a hearing is not required prior to the imposition of a late filing fee imposed under Section 170 (4).
56

57 (B) A hearing shall be preceded by written notice to the respondent of not less than ten (10) days, and must
58 include the charges and references to the provisions of the Act that are alleged to have been committed. A respondent may
59 waive the right to a hearing by written stipulation.
60

61 (C) A hearing conducted pursuant to paragraph (A) of this subsection is open to the public.
62

63 (D) A respondent at a hearing conducted pursuant to paragraph (A) of this subsection shall have all of the
64 protections granted by the [administrative procedure act], including:
65

- (i) the right to be represented by counsel;
- (ii) the ability to call, examine, and cross-examine witnesses; and
- (iii) the opportunity to require production of evidence by subpoena.

(E) A member of the Agency [or a senior judge or referee] shall act as the hearing officer for purposes of conducting the hearing. The hearing officer may be assisted by counsel to the Agency in the conduct of the hearing.

(F) In lieu of a hearing officer, the Agency may, acting en banc, conduct the hearing.

(G) Upon the conclusion of the hearing, the hearing officer or designee of the Agency, shall prepare a report consisting of:

- (i) findings of fact;
- (ii) conclusions of law; and
- (iii) a recommended order.

The hearing officer may be assisted by counsel to the Agency in the preparation of this report. The report must be issued to the respondent no later than thirty (30) days after the conclusion of the hearing and submission of briefs, if any. A requirement of this paragraph may be waived by written stipulation of the complainant and the respondent.

(H) The Agency shall, by a majority vote of a quorum of those members present:

- (i) adopt;
- (ii) modify; or
- (iii) reject

the report of the hearing officer within thirty (30) days after its issuance to the respondent.

(I) A decision of the Agency to

- (i) adopt;
- (ii) modify; or
- (iii) reject

a report under this section may be appealed by the respondent to the [trial court] of the jurisdiction where the Agency maintains its principal office within the time required by the [administrative procedure act].

Comment:

This subsection prescribes the Agency's general discretionary authority to conduct a hearing when necessary to determine whether a violation of the law has been committed.

The hearing must be conducted in accordance with the jurisdiction's administrative procedure act to ensure compliance with the constitutional requirements of due process. However, an opportunity for a hearing is not required unless the Agency orders that a civil penalty be paid or improper contributions be forfeited to the state or refunded to donors.

In instances where property is sought to be taken by the Agency, constitutional due process requires notice to the person whose property is subject to such an action, and an opportunity for the person to be heard at a hearing. Mandatory administrative hearings in other cases are not only not legally necessary, but are also generally too cumbersome and time-consuming to justify when the essential purpose of the law is to ensure the expeditious resolution of disputes. Due process requirements are satisfied by the court in circumstances when the Agency refers evidence of criminal violations to the appropriate criminal prosecutorial authorities, or when the Agency refers evidence requiring an injunction, quo warranto, or equitable relief to civil prosecutorial authorities. Consequently, an Agency hearing on such issues would be redundant.

Consideration might be given to allowing a judicial appeal to be taken by a losing civil complainant after an Agency hearing, or to specifically permit an appeal to be taken by a respondent who merely wishes to have an issue or finding fully resolved after an Agency hearing.

1 (6) Issue an order against a person found to have committed a violation of the Act to cease and desist the violation.
2

3 **Comment:**
4

5 *This subsection authorizes the Agency to take direct enforcement action in the event a violation has been committed. The*
6 *ability to order a cease and desist action is important to prevent the continuation of the offense. The enforcement Agency must*
7 *be able to accomplish this directly without resort to another forum.*
8

9 (7) Issue an order against a person found to have committed a violation of the Act to pay a civil penalty:

10 (A) not to exceed five thousand dollars (\$5,000); or

11 (B) an amount equivalent to three (3) times the amount of an unlawful contribution or expenditure;

12 whichever is greater.
13

14
15
16
17 *Such an order may not be issued against a person without providing the person written notice and an opportunity to be heard*
18 *at a hearing as required by this statute. A person may waive these rights by written stipulation. If a civil penalty is imposed*
19 *upon a candidate, the Agency may order that the penalty, or any portion of the penalty, be paid from the candidate's personal*
20 *funds.*
21

22 **Comment:**
23

24 *The Agency must be provided with the authority to enforce its orders. The ability to directly impose significant monetary*
25 *penalties against violators is the most potent tool for the effective enforcement of the campaign finance laws. Most existing*
26 *enforcement agencies possess such authority, and each Agency considers this to be absolutely essential to maintain the*
27 *integrity of the process. The threat of monetary sanctions is a deterrent to potential violators—but only if the amount of the*
28 *penalty that may be assessed for a given violation is significant.*
29

30 *An enforcement agency should be consistent and fair in its treatment of violations. However, in practice, a law cannot be*
31 *drafted that addresses each circumstance—mitigating or aggravating—that may be present in the context of a particular*
32 *violation. Consequently, the Agency should be afforded discretion to determine the amount of the penalty to be assessed in*
33 *a particular case.*
34

35 *Reasonable limitations on this discretion should be—and are—carefully drawn in the statute. The maximum penalty that may*
36 *be imposed must reflect the actual amount that was given, loaned, transferred, received, or spent in violation of the law to*
37 *provide the deterrent effect that is so critical to any penal system. In addition, no penalty should be extracted from a person*
38 *without due process of law. Accordingly, notice and an opportunity to be heard at a hearing is required.*
39

40 *Although many states permit fines to be paid from committee funds, this is not an effective deterrent to the commission of*
41 *violations. Consequently, the Agency is given discretion to assess the fine against the candidate personally.*
42

43 (8) Issue an order against a person found to have received a contribution that is prohibited, or is in excess of the
44 limitations prescribed by this Act. Such an order may require:

45 (A) forfeiture of the prohibited contribution or the excessive portion of a contribution to the state General Fund;

46 or
47

48 (B) return of the prohibited contribution or the excessive portion of a contribution to the original contributor.
49

50
51 *The Agency may not issue such an order without providing the person making the contribution and the person receiving the*
52 *contribution written notice and an opportunity to be heard at a hearing as required by subsection (4) of this section. A person*
53 *may waive his or her rights by consent or written stipulation.*
54

55 **Comment:**
56

57 *In addition to the imposition of monetary civil penalties against a violator, the Agency must possess the authority to "make*
58 *the campaign finance process whole." To ensure that this objective is accomplished, the Agency is provided with the authority*
59 *to issue an enforceable order directing the recipient of a contribution that is in excess of the limitations or otherwise in*
60 *violation of the substantive provisions of the law to forfeit the illegal sums to the Agency or to return them to the original*
61 *contributor, at the Agency's discretion. Any sums collected, as in the case of civil penalties or late filing fees, must be*
62 *deposited in the state General Fund.*
63

64 *Both the recipient and contributor are to be afforded notice and opportunity to be heard, because both the making and the*
65 *receipt of an improper contribution may be prosecuted under the Act.*

1 (9) (A) If an order issued by the Agency is not complied with by the person to whom it is directed, the [trial level
2 court] where the Agency maintains its principal office shall, upon application of the Agency, issue an order requiring the
3 person to comply with the Agency's order.
4

5 (B) Failure to obey such a court order may be punished as contempt.
6

7 **Comment:**
8

9 *The authority of the Agency to enforce its orders by judicial intervention is essential. The ability of the court to punish by
10 contempt a person who refuses to comply with an Agency order provides assurance that the enforcement process is effective,
11 and serves as a further deterrence to potential wrongdoers.*
12

13 (10) Refer evidence that a violation of the Act has been knowingly and wilfully committed to the [local or state
14 prosecutorial authority] to determine whether criminal prosecution should be commenced against any such person.
15

16 **Comment:**
17

18 *Each jurisdiction provides for the possible criminal enforcement of violations of the campaign finance laws. Undoubtedly,
19 there will be some cases where the violation is intentional and extremely serious, and where civil enforcement will not be
20 adequate to punish the offender or provide suitable deterrence. Criminal enforcement is, therefore, essential.*
21

22 *Most jurisdictions require the offender to act intentionally or with some degree of greater awareness of his or her unlawful
23 conduct before criminal sanctions may be applied. The standard most often used to determine the presence of criminal conduct
24 is that the person "knowingly and wilfully" violated the Act, which is incorporated in this text.*
25

26 *The Agency, as the primary investigatory authority, must therefore be authorized to refer evidence of these criminal violations
27 to the jurisdiction's prosecutorial authorities. Due to its experience in handling all campaign finance violations, the Agency
28 is best equipped to initially adjudge whether the case deserves consideration for prosecution. None of the boards and
29 commissions that have existing jurisdiction to investigate these violations also possess the authority to prosecute criminally.*
30

31 *The needs for checks and balances, and the complexity of criminal prosecution clearly suggests that the Agency should not
32 have the authority to maintain criminal prosecution. The same kinds of considerations strongly mitigate against removal of
33 prosecutorial jurisdiction upon an Agency referral. Mandatory criminal prosecution, although an appealing concept, does
34 not seem justified when measured against a variety of other compelling reasons for maintaining discretion in this area.*
35

36 (11) (A) Refer evidence of a violation of the Act to the [local or state civil prosecutorial authority] to determine whether
37 proceedings for:
38

39 (i) quo warranto;

40 (ii) injunctive relief; or

41 (iii) equitable relief
42

43 should be sought.
44

45 (B) The [local or state prosecutorial authority] is authorized to commence such a proceeding by application to the
46 [local trial level court] in the [county or district] where the Agency maintains its principal office.
47

48 **Comment:**
49

50 *Many jurisdictions permit injunctive or equitable relief to be sought from the courts to enforce compliance with campaign
51 finance laws. These actions are ordinarily instituted by the Attorney General or similar civil prosecutorial authority after an
52 Agency investigation. As these actions are both complex and extraordinary, the civil prosecutor should have the responsibility
53 for them.*
54

55 *Quo warranto proceedings are generally not applicable to violations of the campaign finance laws, however, in the most
56 egregious circumstances where a candidate's election to office was the result of significant wilful violations of the law, quo
57 warranto should be available to challenge the ostensible victor's right to the office.*
58

59 **§512 Civil Penalties**
60

61 **§512.01 Amounts of Civil Penalties**
62

63 A person who violates a provision of this Act, except as provided in §170(4), shall be liable for a civil penalty:
64
65

1 (1) not to exceed five thousand dollars (\$5,000) per violation; or

2
3 (2) an amount equivalent to three (3) times the amount of the total amount of an unlawful contribution or expenditure;

4 whichever is greater.

5
6
7 A penalty or fee collected by the Agency shall be deposited in the state General Fund.

8
9 **§512.02 Joint and Several Liability**

10 If two (2) or more persons are responsible for a violation, they shall be jointly and severally liable.

11
12 **§513 Criminal Sanctions**

13 (1) A person who knowingly and wilfully violates a provision of the Act may be punished by:

14
15 (A) a fine not to exceed ten thousand dollars (\$10,000); or

16
17 (B) imprisonment not to exceed five (5) years;

18
19 or both.

20
21 (2) A person who is convicted under this section shall be disqualified from holding elective public office for a period of four years from the date of conviction.

22
23 **Comment:**

24
25 *Criminal sanctions for knowing and wilful violations of the campaign finance laws exist in most jurisdictions and are essential to the effective enforcement of these laws. The range of existing criminal sanctions varies.*

26
27
28 *To provide an effective deterrent to pernicious conduct, the offender ought to be subject to severe treatment. The sanctions incorporated in this section are consistent with those applicable to non-capital felonies. Soem jurisdictions treat these violations as misdemeanors. The loss of voting rights which, in most jurisdictions, also results in disqualification from seeking or holding public office upon conviction of a felony is an appropriate remedy for a serious election-related offense.*

29
30
31 **§514 Venue**

32
33 Venue for a prosecution commenced under §513 shall be in the county or district where the campaign statement was filed, or where the offense has been alleged to have been committed.

34
35
36 **§515 Statute of Limitations**

37
38 A prosecution under §173 shall be commenced no later than five (5) years after the date that the violation is alleged to have been committed.

39
40
41 **§516 Disclosure of Complaints, Records of Agency Investigations or Audits, or Hearings**

42
43 (1) A complaint filed with the Agency is open to public inspection, and a copy of an Agency report shall be provided to any person upon request.

44
45 (2) A record compiled or made by the Agency in an investigation pursuant to section 170(1) is confidential, and shall not be disclosed by a member or staff of the Agency until:

46
47 (A) the investigation is completed; and

48
49 (B) the Agency has issued its findings.

50
51 (3) Notwithstanding paragraph (2) above, a record may be disclosed:

52
53 (A) to a respondent or subject of an investigation, or the attorney for a respondent or subject of an investigation, in an attempt to conciliate or otherwise settle the matter;

54
55 (B) to a respondent in a hearing conducted by the Agency to determine whether the respondent has violated a provision of the Act, if authorized by the rules of discovery pertaining to such hearings that the Agency shall adopt;

1 (C) when necessary to conduct a full and fair hearing to determine whether a violation of the provision of the Act
2 has been committed; or

3
4 (D) to a law enforcement Agency or officer to fulfill the purposes of section 171(4).

5
6 (4) If the Agency decides to refer evidence of a violation of the Act to the [appropriate prosecutorial authority] pursuant
7 to §171(10), no record compiled or made by the Agency in an investigation of the violation shall be disclosed by the
8 members or staff of the Agency to any other person until:

9
10 (A) the [appropriate prosecutorial authority] has determined not to prosecute the matter; or

11
12 (B) the case has been finally adjudicated in the courts;

13
14 whichever is applicable.

15
16 (5) A record compiled or made by the Agency in an inspection or audit of a report or statement filed in accordance with
17 provisions of the Act is open to public inspection and shall be provided to any person upon request.

18
19 (6) Notwithstanding paragraph (5) above, a record used by the Agency in an investigation that it has initiated is
20 confidential, and shall not be disclosed by a member or staff of the Agency until:

21
22 (A) the investigation is completed; and

23
24 (B) the Agency has issued its findings.

25
26 (7) Except in the case of a hearing conducted under §171(5)(B), a hearing conducted by the Agency is confidential
27 unless each respondent in the hearing requests otherwise.

28
29 (8) A final decision or findings issued by the Agency after a completed investigation is open to public inspection. The
30 Agency shall mail a copy to the complainant and respondent within five (5) days of such a decision or findings, and provide
31 such a decision or findings to any person upon request.

32
33 Comment:

34
35 *This section addresses the sensitive issues concerning disclosure of complaints, Agency investigatory and auditing records,*
36 *hearings, and final decisions issued by the Agency.*

37
38 *While there is a consensus for "sunshine" to reign to the greatest extent possible, there are legitimate concerns—such as the*
39 *protection of reputations against baseless complaints—that require confidentiality of certain records and proceedings, at least*
40 *until the Agency has made a determination of the accused's guilt or innocence. Confidentiality of investigative records is*
41 *essential while an investigation is in progress to encourage witnesses to speak freely and truthfully, protect them against*
42 *possible threats or coercion, and diminish the ability of the respondent to construct or fabricate defenses. Such compelling*
43 *considerations do not exist once an investigation is completed. At that point, the public's right to know supersedes other*
44 *possible interests.*

45
46 *Practical concerns mitigate against confidentiality of the actual complaint. The public's perception of the Agency could be*
47 *severely tarnished if it could not, at least, publicly acknowledge that a complaint has been filed. While a statutory gag order*
48 *could be imposed on the Agency, it cannot silence the complainant. There is no effective means to preclude release of the*
49 *complaint. This section attempts to strike the appropriate balance between the public's right to know and the need for secrecy*
50 *in the investigatory process.*