



The Florida Senate

Interim Project Report 2000-35

September 1999

Committee on Ethics and Elections

Senator Burt L. Saunders, Chairman

A REVIEW OF SELECTED PROVISIONS OF FLORIDA'S ETHICS LAWS

SUMMARY

This report recommends that the Legislature consider several changes to Florida's Code of Ethics (Part III, Chapter 112, Florida Statutes) and related provisions of law, particularly in the area of full and limited financial disclosure and gifts law. The report also recommends specific changes in a number of other areas, including: witness tampering prohibitions and immunity for certain witnesses in Ethics Commission proceedings and investigations; penalties for ethics violations; and, prohibitions against the use of confidential "inside public information" for profit by former officials. Finally, the report addresses a statutory ambiguity in connection with ethics violations by current state legislators.

BACKGROUND

Last year, the Committee on Ethics and Elections drafted an extensive interim report entitled, "A Review of Selected Provisions of the Ethics Code" (October 1998). The report recommended changes to Florida's ethics laws in a number of different areas, with an emphasis on financial disclosure. As a result of that report, the Committee voted to introduce Senate Bill 304. The bill was heavily amended on behalf of the Commission on Ethics in both the Ethics and Elections and Fiscal Policy Committees. The resulting bill differed significantly from its original form. When the bill reached the Senate floor on special order, a number of Senators voiced concerns. The bill was temporarily passed and ultimately died on the Senate calendar.

METHODOLOGY

Committee staff has modified Senate Bill 304 as originally filed and added the Commission on Ethics' proposals which do not appear problematic or controversial in an attempt to address the concerns raised in debate on the Senate floor.

FINDINGS

Financial Disclosure

Number/Scope of Persons Required to File

In 1998, 41,996 persons were required to file either full or limited financial disclosure (full: 2,203; limited: 39,793). In Florida, all elected constitutional officers and candidates for such offices are required to file full financial disclosure. In addition, "local officers," "specified state employees," and "state officers," as defined by statute, are required to file limited disclosure. These categories embrace a vast number of positions, ranging from mayors and local pollution control directors to members of the Board of Regents and upper level employees in the Office of the Governor or other cabinet member.

The category of "local officers" includes appointed members of boards and commissions, *except those having solely advisory powers*. This has led to situations where appointees of fairly minor boards with *limited non-advisory powers* (i.e. municipal and county library boards, Winter Park Sidewalk Art Festival Commission, Town of Belleair Tennis Board) have been required to file financial disclosure. In order to address this problem, the Ethics Commission recommends delineating in statute specific types of boards and commissions (planning or zoning boards, boards having the power to enforce local code provisions, etc.) whose appointed members must file.

One group *not required to file* under current law is former officers and employees --- persons whose office or employment ends prior to December 31 of a given calendar year. Critics have charged that this is a "major loophole" in the financial disclosure law. Staff recommends that these former officers and employees be required to file a final statement of financial interests within 60 days after separation from public office or employment.

Information Which Must Be Disclosed

Form 6, the full financial disclosure, requires a detailed description of each asset, liability, or source of income over \$1,000, and its value. Also, Form 6 requires the filer to state his or her net worth.

Form 1, the limited disclosure, generally requires the disclosure of the reporting individual's primary and secondary sources of income, location or description of real property owned, description of certain intangible property, and name of each creditor to whom the individual owed an amount which exceeded his or her net worth. However, Form 1 differs from Form 6 in that it does not require the disclosure of any specific dollar amounts.

Method of Calculating Information

Full disclosure on Form 6 requires the official or candidate to report his or her net worth, assets and liabilities (exceeding \$1,000), and primary and secondary sources of income (if the reporting individual elects not to file a copy of his or her federal tax return) with *specific dollar values*. Reporting specific dollar values can be problematic because there can be as much as a six-month gap between the date of valuation and the actual filing. Officials and candidates filing Form 6 must sign an oath at the end of the form stating that the information provided is accurate. Thus, if an official reports his or her net worth on Form 6 as \$1 million dollars and it can be shown that the official's actual net worth on December 31 of the reporting period was \$1,000,750, the official will technically be in violation of the oath and could be the target of an ethics complaint.

The problem with Form 6 can be remedied by requiring reporting by specific dollar *category* instead of specific dollar *amounts*.

Although Form 1 *does not require the reporting of any specific dollar amounts*, Form 1 has its own set of problems. The law requires the reporting of certain items based on percentage calculations which can be confusing to the average filer. Staff recommends replacing the percentage calculations with *specific dollar amount thresholds*, as appropriate. This should result in more reliable data.

Filing Locations

Individuals required to file full or limited financial disclosure must do so either with the Secretary of State's office, the local supervisor of elections, or both.

Committee staff believes that the filing administration should be transferred from the Secretary of State's office to the Commission on Ethics. Filings with local supervisors of elections would be unaffected. Transferring the filings will better enable Commission staff to respond to problems and questions which arise in connection with the filings.

For the sake of consistency, administrative duties with respect to filings for gift and honoraria disclosures should also be transferred from the Secretary of State to the Commission.

Compliance/Penalties for Late Filers and Non-Filers

Currently, the Commission on Ethics may only proceed against an individual who files after the grace period (September 1) or fails to file altogether *if it receives a complaint*. It cannot initiate an investigation on its own authority.

In 1998, over seven percent (7%) of those required to file full or limited disclosure (3,116 out of 41,996) filed after September 1 or did not file at all. Of the 104 complaints found by the Commission to be legally sufficient, only 3 related to full financial disclosure and no more than 22 related to limited financial disclosure. That means that over 3,000 persons violated the Code in 1998 and incurred no penalty. The compliance problem has historically been most pervasive with local officers required to file limited disclosure on Form 1, and the 1998 figures continue this historical trend.

To remedy this situation, staff recommends that the Legislature establish an automatic fine system for those who fail to file by September 1. The fine system could include a cap on the maximum penalty which may be assessed.

Amended Filings

Florida law does not contain any specific mechanism authorizing the filing of an amended financial disclosure form. However, there is little incentive to do so since the chance of having a complaint filed for a public disclosure violation is very remote.

The Commission has suggested that the Legislature authorize it to adopt rules and forms to provide for the filing of amended full and limited financial disclosure. Staff adopts the Commission's recommendation insofar as it provides for greater disclosure.

Notice to the DCA

By November 1 of each year, the Commission must provide the Department of Community Affairs (“DCA”) with a list of the names of special district local officers delinquent in their financial disclosure filing. s. 112.322(9), F.S.. Unfortunately, DCA does not take any action with regard to the list, making its preparation and transmission a ministerial task which serves no practical purpose.

Staff agrees with the Commission’s recommendation to delete this statutory requirement.

Quarterly Disclosures

All elected constitutional officers, state officers, local officers, and specified state employees must file a quarterly report of the names of clients represented for a fee or commission before agencies at their level of government. s. 112.3145(4), F.S. The report is due 15 days after the last day of the calendar quarter.

The reporting deadline should be moved from 15 days after the last day of the calendar quarter to the last day of the following quarter, to simplify reporting dates.

Gifts*Reimbursement Period*

Florida law prohibits a reporting individual from accepting a gift from a lobbyist or principal valued at more than \$100. s. 112.3148(4), F.S. In addition, most gifts valued at more than \$100 from someone other than a principal or lobbyist must be reported in the quarter following receipt of the gift. s. 112.3148(8)(a), F.S. In determining the value of a gift, the reporting individual may deduct any compensation reimbursed to the donor. s. 112.3148(7)(b), F.S.; Rule 34-13.500(3), F.A.C. However, there is *no specific deadline* in the law delineating *when* the reimbursement must be made by the reporting individual or received by the donor.

Staff recommends that the Legislature establish a 90-day period during which reimbursement may be made.

Applicability of Gifts Law to Elected Officers Prior to Taking Office

In addition to embracing a variety of state and local employees, the gifts portion of the Code of Ethics for Public Officials applies to candidates for public office as well as to elected state and local officers. The gifts law

does not apply to non-incumbents in the gap period immediately after election but prior to actually taking office. This has been characterized as a major loophole, since the period following a successful election seems precisely the time when public scrutiny should be at its most vigilant. Staff recommends extending the gifts law to cover victorious, non-incumbent ex-candidates during the gap period.

Judges of Compensation Claims

An ambiguity exists under current law concerning whether the Chief Judge and subordinate judges of compensation claims are subject to the gift prohibitions and reporting requirements in the Code of Judicial Conduct or the Code of Ethics (Part III, Chapter 112, Florida Statutes). With the exception of things like commercial loans, gifts from relatives, and ordinary social hospitality, the Code of Judicial Conduct precludes a judge from accepting a gift from a donor who “has come or (is) likely to come or whose interests have come or are likely to come” before the judge. Canon 5D(5), Code of Judicial Conduct. Gifts of over \$100 from donors not meeting this definition must be reported by the judge annually to the Secretary of State, with a copy provided to the Judicial Qualifications Commission.

The Commission recommends resolving this ambiguity by requiring the Chief Judge and judges of compensation claims to follow the gift prohibitions in Canon 5D(5)(h) of the Code of Judicial Conduct rather than the Code of Ethics. To conform all gift disclosure filings, committee staff further recommends transferring the filing location from the Secretary of State to the Commission on Ethics.

Extensions of Time for Required Filings

Section 112.3151, F.S., currently allows the Commission to grant extensions of time on an individual basis for financial disclosure filings and all other filings required under Chapter 112, Part III (i.e. gift, honoraria). Since most reports are not due until 3 to 6 months after the end of the reporting period, there should be plenty of time to accomplish these filings without the need for an extension. Staff recommends repealing this section in its entirety.

Commission on Ethics*Investigatory Powers & Proceedings*

The Commission on Ethics has a wide array of investigatory powers, including subpoena power over persons and documents and the administration of oaths. The Commission staff has recommended that the state’s witness tampering statutes be extended to include Commission proceedings. The witness tampering

statutes currently apply in: proceedings before a judge or court or grand jury; proceedings before the Legislature; and, proceedings before a federal agency which are authorized by law.

Committee staff believes the expansion of the witness tampering laws to include Ethics Commission proceedings is sound. It is important that both Ethics Commission investigations and proceedings be conducted with integrity, and that administrative investigators and fact-finders have access to all the pertinent facts. Witnesses who are threatened or harassed into withholding information or testimony necessarily hamper these efforts. Therefore, staff endorses the Commission staff's recommendation to extend the state's witness tampering laws to include Commission proceedings and investigations.

Another issue surrounding Commission witnesses is immunity. There is currently no mechanism in statute authorizing the Commission to seek a grant of immunity when a witness refuses to talk because of possible self-incrimination. In some instances, witnesses to a public official's ethics violation are entitled to claim a fifth amendment privilege because of the possibility of prosecution for their actions, which can limit the public's access to the truth of what happened. The Public Service Commission currently has authority to seek a grant of judicial immunity. See s. 350.124, F.S.

Staff agrees with the Commission's suggestion that when a witness refuses to talk because of possible self-incrimination, it should be able to apply to the chief judge of the circuit for a judicial grant of immunity after consulting with the appropriate state attorney.

Penalties for Ethics Violations

The Attorney General must bring suit to collect unpaid civil or restitution penalties assessed for an ethics violation. s. 112.317(2), F.S. However, there is no provision in law allowing the Attorney General to collect the legal fees and costs of bringing the suit.

The Commission recommends that the Attorney General be entitled to collect legal fees and costs for prosecuting suits to collect a civil or restitution penalty resulting from an ethics violation.

There is also no provision in law specifically designating how monies from restitution penalties are to be allocated. They currently are deposited to the General Revenue Fund of the state. The Commission should be able to recommend that any restitution penalty be paid to the

violation's agency *or* the General Revenue Fund of the state.

Florida law provides that any person who discloses his or her intention to file a complaint or discloses the existence or contents of a complaint which has been filed with the Commission commits a misdemeanor of the first degree. s. 112.317(6), F.S. It is also a first-degree misdemeanor to disclose the existence or contents of any document in connection with a confidential preliminary investigation by the Commission until the document becomes a public record. *Id.* However, in 1989, the 11th Circuit held that these provisions of Florida law violated free speech guarantees. *Doe v. Gonzalez*, 723 F.Supp. 690 (S.D.Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989). Staff is not aware of the provision having been enforced since that time.

Staff recommends repealing this section of Florida law prohibiting the disclosure of confidential documents or the contents of a complaint filed, or to be filed, with the Ethics Commission.

Chapter 839, Florida Statutes, entitled "Offenses by Public Officers and Employees," contains several sections criminalizing certain specific conflicts of interest involving public officials in the area of public works contracts. ss. 839.08, 839.09, 839.091, and 839.10, F.S. These sections were adopted prior to the Legislature's enactment of landmark ethics legislation in 1967, which was "intended to deal pervasively with the subject matter of conflict between the official duties and private interests of public officials and employees." *Oldham v. Rooks*, 361 So.2d 140, 142 (Fla. 1978); Chapter 67-469, Laws of Florida. The Florida Supreme Court has held that a similar conflicts provision in Chapter 839 was repealed by implication when the Legislature adopted Part III of the Code of Ethics. *Oldham*, 361 So.2d at 141. The same logic should prevail with regard to sections 839.08, 839.09, 839.091, and 839.10, Florida Statutes.

Staff recommends repealing ss. 839.08, 839.09, 839.091, and 839.10, Florida Statutes, which criminalize specific conflicts of interest with regard to supplies and public works contracts.

Former Officials

Use of Public Inside Information

Florida law prohibits a public officer, agency employee or local government attorney from using confidential

information obtained during the course of his or her public service for personal gain. s. 112.313(8), F.S. However, the prohibition does not appear to apply to former public officers or employees.

Staff recommends that the prohibition be extended to explicitly include former public officers, agency employees, and local government attorneys. The distinction is strictly one of timing, and it shouldn’t matter whether or not someone who uses “public inside information” for personal gain is still a state employee at the time of realizing the gain.

Statutory Ambiguity Regarding Jurisdiction Over Sanctioning Legislators

There is a statutory ambiguity involving the sanctioning of state legislators who violate the Code of Ethics. Specifically, the situation involves a current legislator who committed the alleged breach of ethics while a public officer or employee prior to joining the Legislature.

The Legislature should clarify the statutes to clearly provide that the proper sanctioning authority in a case involving a current legislator who commits a violation prior to joining the Legislature is vested with the house in which the legislator serves. Designating any other sanctioning authority would likely violate Article III, section 2, of the Florida Constitution, which provides that each house of the Legislature shall be the “sole judge” of the qualifications of its members.

RECOMMENDATIONS

Based on last year’s report and the matters highlighted by the Florida Commission on Ethics, committee staff recommends that the Legislature consider the following statutory changes:

Financial Disclosure

- Identify specific types of boards and commissions whose appointed members must file limited financial disclosure, irrespective of whether the board or commission is solely advisory. [Form 1]
- Require former officers and employees who leave government service to file a final statement of financial interests no later than 60 days following their departure date. [Form 1 and Form 6]

- Modify full disclosure to require reporting by *dollar category* as opposed to specific dollar amount. [Form 6]
- Replace the percentage calculations with regard to limited disclosure with statutory dollar amount thresholds, as appropriate, to reduce filer confusion. [Form 1]
- Transfer the filing administration from the Secretary of State’s Office to the Commission on Ethics. [Form 1 and Form 6] (Filing administration for gift disclosures and honoraria disclosures should also be transferred from the Secretary of State to the Commission.)
- Adopt an automatic fine system for delinquent filers and non-filers, similar to the system used in connection with campaign finance reports. [Form 1 and Form 6]
- Authorize the Commission to adopt rules and forms to provide for the filing of amended full and limited financial disclosure. [Form 1 and Form 6]
- Delete the requirement that the Commission provide the DCA with a list of special district local officers delinquent in filing financial disclosure.

Quarterly Disclosures

- Extend the deadline for officers and specified state employees to report the names of clients represented for a fee or commission before agencies at their level of government from 15 days after the last day of the calendar quarter to the last day of the following quarter, to simplify reporting dates.

Gifts

- Establish a 90-day period during which a reporting individual may reimburse a donor for purposes of gift valuation and reporting requirements.
- Extend the provisions of the gifts law to cover non-incumbents elected to office for the period immediately following election but prior to taking office.
- Clarify that judges of compensation claims must follow the gift prohibitions in Canon 5D(5)(h) of the Code of Judicial Conduct rather than the Code of Ethics. Also, require filing with the Commission on Ethics instead of the Secretary of State.

Extensions of Time for Required Filings

- Repeal s. 112.3151, F.S., authorizing the Commission to grant extensions of time for filings --- financial disclosure, gift, honoraria, quarterly disclosure of clients, etc.

Commission on Ethics/Witness Tampering

- Extend the state’s witness tampering laws, ss. 914.21-914.24, F.S., to include Ethics Commission proceedings and investigations.
- Authorize the Commission to seek immunity for certain witnesses.

Penalties for Ethics Violations

- Allow the Attorney General to collect legal fees and costs for prosecuting cases involving ethics violations.
- Authorize the Commission on Ethics to recommend that a restitution penalty be paid to the violator’s agency instead of the General Revenue Fund of the State.

- Repeal s. 112.317(6), F.S., prohibiting the disclosure of confidential documents or the contents of a complaint filed with the ethics commission.
- Repeal ss. 839.08, 839.09, 839.091, and 839.10, F.S., which criminalize specific conflicts of interest encompassing supplies and public works contracts.

Inside Public Information/Former Officials

- Clarify that the current prohibition against a public officer’s, employee’s, or local government attorney’s use of ‘public inside information’ for personal gain, s. 112.313(8), F.S., also applies to *former* public officers, employees, and local government attorneys.

Jurisdictional Ambiguity Concerning Legislators

- Clarify that the proper sanctioning authority in the case of a current state legislator who commits a violative act prior to joining the Legislature is vested with the house in which the legislator serves.

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

Senator Kirkpatrick
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