



Rules, Calendar & Ethics Committee

November 17, 2015

3:30 PM

404 HOB

Meeting Packet

**Steve Crisafulli
Speaker**

**Ritch Workman
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rules, Calendar & Ethics Committee

Start Date and Time: Tuesday, November 17, 2015 03:30 pm
End Date and Time: Tuesday, November 17, 2015 05:00 pm
Location: Sumner Hall (404 HOB)
Duration: 1.50 hrs

Workshop of PCB RCEC 16-05 -- Public Corruption

NOTICE FINALIZED on 11/10/2015 2:32PM by Jones.Missy

1 A bill to be entitled
2 An act relating to public corruption; amending s.
3 838.014, F.S.; deleting the definition of the term
4 "corruptly" or "with corrupt intent"; defining the
5 term "governmental entity"; expanding the definition
6 of the term "public servant" to include certain
7 persons who are acting on behalf of a governmental
8 entity; amending s. 838.015, F.S.; redefining the term
9 "bribery" to include knowing and intentional, rather
10 than corrupt, acts; amending s. 838.016, F.S.;
11 revising the prohibition against unlawful compensation
12 or reward for official behavior to conform to changes
13 made by the act; amending s. 838.022, F.S.; revising
14 the prohibition against official misconduct to conform
15 to changes made by the act; amending s. 838.22, F.S.;
16 revising the prohibition against bid tampering to
17 conform to changes made by the act; reenacting s.
18 817.568(11), F.S., relating to criminal use of
19 personal identification information, to incorporate
20 the amendment made by the act to s. 838.014, F.S., in
21 a reference thereto; providing an effective date.

22
23 Be It Enacted by the Legislature of the State of Florida:

24
25 Section 1. Section 838.014, Florida Statutes, is amended
26 to read:

27 838.014 Definitions.—As used in this chapter, the term:

28 (1) "Benefit" means gain or advantage, or anything
 29 regarded by the person to be benefited as a gain or advantage,
 30 including the doing of an act beneficial to any person in whose
 31 welfare he or she is interested, including any commission, gift,
 32 gratuity, property, commercial interest, or any other thing of
 33 economic value not authorized by law.

34 (2) "Bid" includes a response to an "invitation to bid,"
 35 "invitation to negotiate," "request for a quote," or "request
 36 for proposals" as those terms are defined in s. 287.012.

37 (3) "Commodity" means any goods, merchandise, wares,
 38 produce, chose in action, land, article of commerce, or other
 39 tangible or intangible property, real, personal, or mixed, for
 40 use, consumption, production, enjoyment, or resale.

41 (4) "Governmental entity" means the state, including any
 42 unit of the executive, legislative, and judicial branches of
 43 government, political subdivisions and any agency or office
 44 thereof, or any other public entity that independently exercises
 45 any type of governmental function ~~"Corruptly" or "with corrupt~~
 46 ~~intent" means acting knowingly and dishonestly for a wrongful~~
 47 ~~purpose.~~

48 (5) "Harm" means pecuniary or other loss, disadvantage, or
 49 injury to the person affected.

50 (6) "Public servant" means:

51 (a) Any officer or employee of a governmental state,
 52 ~~county, municipal, or special district agency or entity;~~

53 (b) Any legislative or judicial officer or employee;
 54 (c) Any person, except a witness, who acts as a general or
 55 special magistrate, receiver, auditor, arbitrator, umpire,
 56 referee, consultant, or hearing officer while performing a
 57 governmental function; ~~or~~

58 (d) A candidate for election or appointment to any of the
 59 positions listed in this subsection, or an individual who has
 60 been elected to, but has yet to officially assume the
 61 responsibilities of, public office; or

62 (e) To the extent that the individual's conduct relates to
 63 the performance of a public duty of a governmental entity, any
 64 officer, director, partner, manager, representative, or employee
 65 of a nongovernmental entity, private corporation, quasi-public
 66 corporation, or quasi-public entity, or any person subject to
 67 chapter 119 who is acting on behalf of a governmental entity.
 68 For purposes of this paragraph, the term "nongovernmental
 69 entity" means a person, association, cooperative, corporation,
 70 partnership, organization, or other entity, whether operating
 71 for profit or not for profit, which is not a governmental
 72 entity.

73 (7) "Service" means any kind of activity performed in
 74 whole or in part for economic benefit.

75 Section 2. Subsection (1) of section 838.015, Florida
 76 Statutes, is amended to read:

77 838.015 Bribery.—

78 (1) For purposes of this section, the term "bribery" means

79 ~~corruptly~~ to knowingly and intentionally give, offer, or promise
 80 to any public servant, or, if a public servant, ~~corruptly~~ to
 81 knowingly and intentionally request, solicit, accept, or agree
 82 to accept for himself or herself or another, any pecuniary or
 83 other benefit not authorized by law with an intent or purpose to
 84 influence the performance of any act or omission which the
 85 person believes to be, or the public servant represents as
 86 being, within the official discretion of a public servant, in
 87 violation of a public duty, or in performance of a public duty.

88 Section 3. Subsections (1) and (2) of section 838.016,
 89 Florida Statutes, are amended to read:

90 838.016 Unlawful compensation or reward for official
 91 behavior.—

92 (1) It is unlawful for any person ~~corruptly~~ to knowingly
 93 and intentionally give, offer, or promise to any public servant,
 94 or, if a public servant, ~~corruptly~~ to knowingly and
 95 intentionally request, solicit, accept, or agree to accept, any
 96 pecuniary or other benefit not authorized by law, for the past,
 97 present, or future performance, nonperformance, or violation of
 98 any act or omission which the person believes to have been, or
 99 the public servant represents as having been, either within the
 100 official discretion of the public servant, in violation of a
 101 public duty, or in performance of a public duty. This section
 102 does not ~~Nothing herein shall be construed to~~ preclude a public
 103 servant from accepting rewards for services performed in
 104 apprehending any criminal.

105 (2) It is unlawful for any person ~~corruptly~~ to knowingly
 106 and intentionally give, offer, or promise to any public servant,
 107 or, if a public servant, ~~corruptly~~ to knowingly and
 108 intentionally request, solicit, accept, or agree to accept, any
 109 pecuniary or other benefit not authorized by law for the past,
 110 present, or future exertion of any influence upon or with any
 111 other public servant regarding any act or omission which the
 112 person believes to have been, or which is represented to him or
 113 her as having been, either within the official discretion of the
 114 other public servant, in violation of a public duty, or in
 115 performance of a public duty.

116 Section 4. Subsection (1) of section 838.022, Florida
 117 Statutes, is amended, and subsection (2) of that section is
 118 republished, to read:

119 838.022 Official misconduct.—

120 (1) It is unlawful for a public servant, ~~with corrupt~~
 121 ~~intent~~ to knowingly and intentionally obtain an improper a
 122 benefit for any person or to cause unlawful harm to another by
 123 ~~to~~:

124 (a) Falsifying ~~Falsify~~, or causing ~~cause~~ another person to
 125 falsify, any official record or official document;

126 (b) Concealing, covering up, destroying, mutilating, or
 127 altering ~~Conceal, cover up, destroy, mutilate, or alter~~ any
 128 official record or official document or causing ~~cause~~ another
 129 person to perform such an act; or

130 (c) Obstructing, delaying, or preventing ~~Obstruct, delay,~~

131 ~~or prevent~~ the communication of information relating to the
 132 commission of a felony that directly involves or affects the
 133 governmental ~~public agency or public~~ entity served by the public
 134 servant.

135 (2) For the purposes of this section:

136 (a) The term "public servant" does not include a candidate
 137 who does not otherwise qualify as a public servant.

138 (b) An official record or official document includes only
 139 public records.

140 Section 5. Subsections (1) and (2) of section 838.22,
 141 Florida Statutes, are amended to read:

142 838.22 Bid tampering.—

143 (1) It is unlawful for a public servant, ~~with corrupt~~
 144 ~~intent~~ to knowingly and intentionally influence or attempt to
 145 influence, in an improper manner, the competitive bidding
 146 process undertaken by any governmental ~~state, county, municipal,~~
 147 ~~or special district agency, or any other public entity~~, for the
 148 procurement of commodities or services, by ~~to~~:

149 (a) Disclosing ~~Disclose~~ material information concerning a
 150 bid or other aspects of the competitive bidding process when
 151 such information is not publicly disclosed.

152 (b) Altering or amending ~~Alter or amend~~ a submitted bid,
 153 documents or other materials supporting a submitted bid, or bid
 154 results for the purpose of intentionally providing a competitive
 155 advantage to any person who submits a bid.

156 (2) It is unlawful for a public servant, ~~with corrupt~~

157 | ~~intent~~ to knowingly and intentionally obtain an improper a
158 | benefit for any person or to cause unlawful harm to another by
159 | circumventing, ~~to circumvent~~ a competitive bidding process
160 | required by law or rule by using a sole-source contract for
161 | commodities or services.

162 | Section 6. For the purpose of incorporating the amendment
163 | made by this act to section 838.014, Florida Statutes, in a
164 | reference thereto, subsection (11) of section 817.568, Florida
165 | Statutes, is reenacted to read:

166 | 817.568 Criminal use of personal identification
167 | information.—

168 | (11) A person who willfully and without authorization
169 | fraudulently uses personal identification information concerning
170 | an individual who is 60 years of age or older; a disabled adult
171 | as defined in s. 825.101; a public servant as defined in s.
172 | 838.014; a veteran as defined in s. 1.01; a first responder as
173 | defined in s. 125.01045; an individual who is employed by the
174 | State of Florida; or an individual who is employed by the
175 | Federal Government without first obtaining the consent of that
176 | individual commits a felony of the second degree, punishable as
177 | provided in s. 775.082, s. 775.083, or s. 775.084.

178 | Section 7. This act shall take effect October 1, 2016.

Grand Jury Report

RECEIVED
THOMAS D. HALL

DEC 29 2010

CLERK, SUPREME COURT
BY _____

STATE OF FLORIDA
Case No. SC 09-1910

NINETEENTH STATEWIDE GRAND JURY

First Interim Report

A STUDY OF PUBLIC CORRUPTION IN FLORIDA
AND RECOMMENDED SOLUTIONS



December 17, 2010

Ft. Lauderdale, Florida



We, the members of the Nineteenth Statewide Grand Jury, find that public corruption continues to be an issue of great importance in all aspects of government, politics, and business throughout the State. We have been asked to address an enormous issue which is broad in scope and long in history. We take on this challenge with sincere appreciation for the gravity of the undertaking. We hope our words are heard and our recommendations are followed. Better efforts to prevent and penalize corruption are necessary in order to stop fraud, waste, and abuse of our State resources. Given the serious fiscal limitations at all levels of government, anti-corruption efforts must stop the theft and mismanagement of vital public funds. This mismanagement and theft penalizes taxpayers by driving up the cost of all government services. Therefore, we call for an immediate repeal of what can only be referred to as *Florida's Corruption Tax*.

The cadets at our nation's military academies swear an oath to neither lie, cheat, steal, nor tolerate those who do. There is no reason we should hold our public officials to a lesser standard.



Introduction

Public corruption is a vast topic that can be expounded upon in tomes or taught to children in the form of the Golden Rule. The work of government becomes more complex as society grows and needs become greater, but fundamentally government must be based on a shared trust and integrity.

After receiving testimony from witnesses over the last ten months, we find that these recommendations are still as valid today as they were a decade ago. We recommend these ideas be considered in the upcoming legislative session, and continuing sessions, until they are passed.

In seeking to reduce public corruption, we must determine on behalf of the citizens of the State of Florida how to define and punish public officials who transcend the bounds of what is considered to be ethical conduct. What is considered to be ethical may depend on the person asked. There are those who feel transparency should prevail regardless of the impact on the elected official's individual privacy, others acknowledge that some private life must be allowed to exist in order to attract outstanding and willing candidates. A balance must be struck between the citizens' right to honest government and the right of public officials to serve those they are elected to represent without fear of prosecution for unintentional hyper-technical violations.

We first sought to understand what corruption is - what it looks like and what behaviors and activities we hope to deter. We considered the type of individual we expect in public service: an honorable and ethical person. "Honor" is an elusive term. "Honor is the good opinion of the people who matter to us, and who matter because we regard them as a society of equals who have the power to judge our behavior."¹ "A willingness to subordinate one's



individual inclinations to the greater good, will naturally be regarded as honorable; disloyalty and selfishness will be correspondingly dishonorable.”ⁱⁱ Honor is seen as a “virtue” because it connotes this ideal.ⁱⁱⁱ

It is important to distinguish between honor and ethics. For example, honoring one’s duty to an employer may dictate remaining mute about unscrupulous behavior; however, good ethics dictates becoming a whistleblower.

Traditionally the virtue of honor was seen as a fusion of honor and ethics. A person needed to recognize and strive towards a universal standard of virtue, rather than just a local or temporal standard.^{iv} While the use of the term “honor” has faded in our culture, the term “ethics” has risen in prominence. It has been said that “ethics” involves thinking systematically about conduct; whereas, making “moral” choices is about determining right and wrong. Ethics draws on standards that have evolved over time but persist and therefore help identify what is right and proper in the current environment or society. Ethics can refer to principles of action that implement or promote more timeless moral values. “Moral character” is an internal mechanism developed to make decisions with honesty and fidelity. In the end, a person’s character is what allows him to act (or not) on the determinations he makes between right and wrong.^v

The Convening of the Nineteenth Statewide Grand Jury

This Grand Jury was impaneled in February of 2010 upon the petition of Governor Charlie Crist to the Supreme Court of Florida. Specifically, Governor Crist stated in his petition that the following should be addressed statewide:

1. Examine criminal activity of public officials who have abused their powers via their public office;



2. Consider whether Florida's prosecutors have sufficient resources to effectively combat corruption;
3. Address the effectiveness of Florida's current statutes in fighting public corruption;
4. Identify any deficiencies in current laws, punishments or enforcement efforts and make detailed recommendations to improve our anti-corruption initiatives;
5. Investigate crimes, return indictments, and make presentments; and
6. Examine public policy issues regarding public corruption and develop specific recommendations regarding improving current laws.

Politics and History

It has been said that the history of corruption is really the history of reform following corrupt actions. This can be seen in the motives of the Revolutionary generation in establishing our country. One of their greatest tasks was creating a nation unlike the British system which they viewed as corrupt and full of patronage, bribery, and graft. Thus, the 1787 Constitution of the United States created a government with a strong system of checks and balances. Despite the checks and balances, our system has not fully prevented corruption, and our history is riddled with examples of public service immoralities.

The present Florida Constitution was last revised and adopted in 1968 and has subsequently been amended. Under the Florida Constitution, Florida's State government is divided into Legislative, Executive, and Judicial branches. Following the idea of separation of powers, Florida's Constitution states that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."^{vi} While the Governor is vested with the supreme executive power, Florida has a uniquely collegial form



of State government in which the Governor shares responsibility with the Cabinet for administration through various boards.^{vii}

Florida ranks as the fourth largest state in the union with over eighteen and a half million residents and may soon overtake the third largest state - New York.^{viii} This massive population and significant growth means the Governor and Cabinet are unable to directly manage the executive branch due to Florida's increasingly larger and more complex government which has blurred the lines of executive responsibilities. During a four-year term, the Governor will make approximately 6,000 appointments of special officers to boards, commissions, water management districts, and various other agencies and organizations. Some of the Governor's board appointments include the professional and occupational boards which have statewide responsibilities, while others include local and regional boards.^{ix}

Florida's governmental structure is anything but clear or easy to understand. It is no wonder why the citizens of Florida are often confused as to who is responsible when it comes to holding our government officials accountable.

History of the Florida's Code of Ethics

If democracy is sustained by public trust, it is understandable why we need rules addressing ethics, conflicts of interest, and disclosure of personal finances. The increase in laws and regulations in these areas appears to be a result of diminishing public trust in government. We have learned that public confidence began a decline in the early 1960s and continued to decline until the Watergate scandal led to an all time low in public trust of government. Following Watergate, ethics became a major issue in national politics.^x However, attention to



ethics is usually scandal-driven and short-lived.^{xi} In order to increase public trust, public servants must improve their ethical behavior and reputation since public confidence is likely related to the public perception of ethical practice.^{xii}

Ethics is action you can defend publicly and comfortably. The burden of ethics is that there is no checklist or computer program that can teach you every ethical decision; personal judgment and responsibility are necessary. In recognizing this, we turn to Florida's attempt to regulate ethical conduct. Florida has a Constitutional requirement for a code of ethics which was established under Chapter 112, part III, F.S.

Prior to 1967, Florida relied on "common law" cases to address governmental ethics. In 1967 the Legislature enacted the beginning of what eventually would be called the "Code of Ethics for Public Officers and Employees" (hereinafter "the Code"). That same year the Florida Constitution Article III, Section 18 was amended to provide that "A code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interest shall be prescribed by law." In 1998, the voters passed a constitutional amendment proposed by the Constitutional Revision Commission which moved the constitutional requirement for a code of ethics under Article II, section 8(g).

Initially the Code applied only to state officers and employees. In 1969, public officers and employees of all counties, cities, and other political subdivisions were added to the Code. In 1970, the Legislature enacted criminal sanctions into the Code, making violations misdemeanors punishable by a fine not to exceed \$1,000 or imprisonment for up to one year. Following the Watergate crisis in 1974, the Legislature responded by requiring public disclosure of various financial interests, creating tighter restrictions on conflicts of interests, and establishing a Commission on Ethics to provide a means of administrative enforcement of the



Code. Witnesses testified that with administrative penalties in place, the Legislature no longer felt the need for criminal penalties.

In 1975, the Commission on Ethics was prescribed the authority to investigate, and civil fines were enacted for violations. In 1976, Governor Askew organized the first citizen initiative constitutional amendment petition in order to enact into law what he felt the Legislature failed to do. Thus, the "Sunshine Amendment" was passed and is now part of the State Constitution under Article II, section 8. Section 8 titled "Ethics in government" states that "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse." To secure this right, Section 8 requires:

- Full and public disclosure of financial interests be disclosed by any elected constitutional officer or any candidate for such office.
- All public officers and candidates for any public office to file full and public disclosure of their campaign finances.
- Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by actions.
- Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of their retirement benefits and pension.
- A two year prohibition for members of the legislature or statewide elected officers from representing another person or entity for compensation before the same governmental body or agency of which the individual was a member or officer. Members of the legislature have this same prohibition during their term of office and it is expanded to include appearing before judicial tribunals for these reasons.
- An independent commission (Florida Commission on Ethics) to conduct investigations and issue reports on all complaints concerning breach of public trust by public officers and employees.
- A code of ethics be created for all state employees and nonjudicial officers which prohibits conflicts of interest between public duty and private interests.



Since this constitutional revision, the Code of Ethics has undergone additional revisions usually as a response to some form of scandal and public outcry. We will discuss additional reforms to the Code of Ethics as they relate to our recommendations.

Previous Reports Addressing Anti-Corruption Reform in Florida

In determining how to address anti-corruption efforts in the State of Florida, it is important to understand the history and development of Florida's state, county, and local government and previous anti-corruption efforts.

We heard testimony regarding the 1999-2000 Public Corruption Study Commission which was tasked by Governor Jeb Bush to complete a comprehensive review of current laws, policies, and procedures and to make recommendations on how Florida might better prevent and respond to acts of public corruption. We have reviewed the Study Commission's recommendations regarding government corruption laws and learned that many of those recommendations have been adopted by the Legislature, although slowly and many not until years later.

Unfortunately, there were several crucial recommendations of the Public Corruption Study Commission that were not adopted by the Legislature. Some of the proposals that were not accepted are as follows:

- Make it a second degree felony to "refrain from performing a mandatory constitutional or statutory duty or cause another person to refrain from performing such duty," with corrupt intent to obtain a benefit for any person, or to cause harm to another person;
- Make it a second degree felony to criminally misuse one's official position with the following language:



(1) It is unlawful for any public servant to corruptly use, or attempt to use, his or her official position or any public property or public resource which may be within his or her trust, to:

(a) Establish any business relationship between the public servant's own agency and any business entity in which the public servant receives or has an expectation of receiving a benefit; or

(b) Perform his or her official duties to secure for himself or herself a benefit that is not generally available to the public.;

- Expand the jurisdiction of the Statewide Prosecutor to include any violation of Ch. 838, F.S., which concerns the offenses by public servants;
- Require elected officials to be educated in ethics laws, the public records law, the "Sunshine Law," and the criminal laws regarding government corruption;
- Give the Commission the authority to initiate investigations based upon receipt of sufficient evidence, as judged by an extraordinary majority of the Commission;
- Allow the Commission to investigate situations when referred directly to the Commission by the Governor, the Comptroller (now, CFO), the State Attorneys; and others (law enforcement or regulatory agencies such as the Florida Bar, DBPR, Elections Commission, etc.).

The Public Corruption Study Commission is not the only body who has studied public corruption in recent years. As recently as this past year, Palm Beach County convened a Grand Jury to investigate matters of public corruption. While a majority of the Palm Beach County Grand Jury's work focused on local issues specific to Palm Beach County, they also addressed issues that can be applied to the State or local governments outside of Palm Beach County.

One of the strongest recommendations the Palm Beach Grand Jury proposed was for the Legislature to create a sentencing enhancement for crimes committed "under the color of law". This is a solid recommendation and will be discussed in much greater detail later in this report.



Present Day Corruption in Florida

In order for government to function, the people must have faith in their elected officials. Unfortunately, one only needs to read the newspaper headlines across the State of Florida to realize that public corruption is pervasive at all levels of government. Recent public opinion polls show that a record number of Americans believe public officials are untrustworthy. Anti-corruption reform is critical to restoring that trust. Reform is essential to remedy the perception that those in leadership roles fail to set a noble example of service and are instead assumed to be egotistical and corrupt. When the legislature fails to act after its own members flagrantly abuse their positions, the citizens lose respect, faith, and interest in the government. Vigorously attacking public corruption will begin to repair this breach of trust. The best and brightest will not be discouraged from government or civil service, and more ethical and moral citizens will be interested in running for office. We believe the citizens of Florida deserve public servants who will take action for the good of the whole even if it does not benefit them individually. While there are many good officials in Florida, our government buildings and elected bodies should be overflowing with leaders who are not afraid to set a higher standard for their conduct and serve as role models for the public.

In order to reduce corruption and increase ethical behavior in the public sphere, we must also define "public service." Public service is more than just government service alone and includes quasi-governmental agencies and many non-profit organizations funded in part by public dollars. Therefore, any organization and its employees or agents can be defined as public servants when the mission leans towards the public rather than private side of service.



Those in public service must understand the power they hold is for the benefit of the people. This raises the question of whether or not ethics laws and legislation go far enough to encompass public service performed by entities beyond strictly official governmental agencies.

Broadly defined, "Public Corruption" is the "abuse of public roles or resources or the use of illegitimate forms of political influence by public or private parties."^{xiii} Others have stated that political corruption is the betrayal of an office or duty for some consideration.^{xiv} Public corruption is a catchall for many abuses including bribery, graft, extortion, nepotism, kickbacks and outright theft. The definitions in use vary among local, state and federal authorities, further complicating matters. The federal government has defined public corruption crimes as those which involve abuses of the public trust by government officials.^{xv}

Much of the way our federal and state government is structured today is in response to massive public corruption scandals and accompanying public outrage in the past. For example, the civil service system was created so that public jobs would be filled based on merit and not on a system of patronage. Codes of ethics for Congress were created in 1964 after a probe into the dealings of the Secretary of State. Limitations on campaign contributions by individuals and corporations were established in 1971 and were further tightened following the revelation that President Nixon received massive amounts of illegal corporate and personal contributions during his presidential campaign. The Foreign Corrupt Practices Act was passed in 1977 to prohibit gifts or payments to foreign officials by American companies after it was discovered U.S. multinational companies hid vast sums of their balance sheet to have available to bribe foreign governments. In 1978, the Ethics in Government Act required financial disclosure requirements on federal officeholders and allowed independent counsel to investigate allegations of corruption against them. Since the 1970's federal laws have been used to prosecute state as well as local



officials. The same checks and balances that are the hallmark of our system of government have resulted to some degree in the frustration of prosecution of public corruption as the U.S. Supreme Court has ruled certain campaign finance laws and federal mail-fraud statutes to be unconstitutional.^{xvi}

The timing of this Report is intentional. We recommend the 2011 Legislative Session address our concerns with urgency, so this report focuses primarily on recommendations to changes in laws of the State of Florida. Certainly, there are many factors to be considered in developing new legislation. We cannot ignore the reality that it is often hard to impose more severe restrictions on one's own interests. We believe that the time for action is now, and we urge the Florida Legislature and other governmental bodies to address anti-corruption efforts using our findings and recommendations as a starting point.

We are not the first state, country, or society to address public corruption, and it is unrealistic to believe we will be able to eliminate the problem. However, we have determined that there are certain measures which would reduce the capacity of those who would use a Florida public office for malfeasance. The best anti-corruption approach involves not only deterrence through oversight and punishment, but also prevention through education. With this in mind, we turn to our recommendations which are followed by supporting facts and findings from testimony and evidence we received.

We have reviewed the current anti-corruption laws in the State of Florida, and according to testimony and statistics, we find that they are not being utilized to their full potential. We have determined that public officials are often not being punished under the public corruption laws in Florida for four main reasons:

1. The act is not criminalized;



2. The cases are too difficult to prove due to their definitions and extra elements of proof;
3. The punishments imposed too lenient and do not fit the crime; or
4. The prosecutor decides to charge another crime or accept a plea in order to allow a defendant to avoid the negative publicity of public corruption charges.



RECOMMENDATIONS

"Where a man assumes a public trust, he should consider himself a public property."^{xvii}

Thomas Jefferson

We have heard testimony and received evidence about Florida and federal anti-corruption criminal laws. Our Report will look at the more significant anti-corruption crimes in Florida^{xviii} and what steps the Florida Legislature should take to improve these laws and punish those public officials and servants who willfully violate them.

1. "Public servant"
2. "Corruptly" or "with corrupt intent"

I. CRIMINAL REVISIONS

Our first group of recommendations addresses Chapter 838 which is titled "Bribery; Misuse of Public Office."

A. Amendments to Chapter 838 Terminology

1. We recommend the Legislature redefine the term "public servant" under F.S. 838.014(6).
 - a. Amend F.S. 838.014(6)(a) to read:
"Any officer or employee of a governmental entity."
 - b. Create F.S. 838.014(6)(e) to state:
"Any officer, director, partner, manager, representative, or employee of a nongovernmental entity, private corporation, quasi-public corporation, quasi-public entity or anyone



covered under chapter 119 that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of the state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service."

" 'Governmental function' or 'governmental service' for purposes of Chapter 838 means performing a function or serving a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds."

" 'Governmental entity' as defined under F.S. 11.45(1)(d)

We have heard testimony that the impediments to prosecuting criminal violations under Chapter 838 are due in large part to the current definition of "public servant" provided for under F.S. 838.014(6):

- (6) "Public servant" means:
- (a) Any officer or employee of a state, county, municipal, or special district agency or entity;
 - (b) Any legislative or judicial officer or employee;
 - (c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
 - (d) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

After hearing testimony of witnesses, we conclude that this definition presents a major obstacle to charging and prosecuting crimes under Chapter 838. This narrow definition of "public servant" prevents numerous prosecutions of corrupt individuals who are serving a governmental function or service but are not within reach of the law as written. This Grand Jury was convened to address our criminal anti-corruption laws among other concerns. Our first and most critical recommendation is to amend the definition of "public servant." Many of our



governmental duties have been shifted to private or semi-private entities and actors who do not fall within the existing narrow definition and thus escape prosecution under anti-corruption laws.

It is important to understand how the present definition of "public servant" came to be defined. In 2003, the "Paul Mendelson Citizens' Right to Honest Government" bill was passed. This bill was mostly successful at addressing numerous problems with Chapter 838 including increasing the level and severity of bribery and unlawful compensation. According to a witness who prosecutes public corruption offenses, increasing the criminal penalties has helped achieve cooperation from targets of investigations and increased the prosecutor's bargaining power. While the "Paul Mendelson" bill strengthened several provisions of our public corruption laws, it also greatly weakened the definition of "public servant" and thus drastically reduced the overall effectiveness of our public corruption laws.

Prior to this bill, "public servant" was defined as follows:

"Public servant" means any public officer, *agent*, or employee of government, whether elected or appointed, including, but not limited to, any executive, legislative, or judicial officer; any person who holds an office or position in a political party or political party committee, whether elected or appointed; and any person participating as a special master, receiver, auditor, juror, arbitrator, umpire, referee, consultant, administrative law judge, hearing officer, or hearing examiner, or *person acting on behalf of any of these*, in performing a governmental function; but the term does not include witnesses. Such term shall include a candidate for election or appointment to any such office, including any individual who seeks or intends to occupy any such office. It shall include any person appointed to any of the foregoing offices or employments before and after he or she qualifies.

The original bill proposed amending the term "public servant" to state:

- (6) "Public servant" means:
- (a) Any officer or employee of a state, county, municipal, or special district agency or entity;
 - (b) Any legislative or judicial officer or employee;
 - (c) Any officer, director, partner, manager, representative, or employee of a *nongovernmental entity* that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the



governmental function or provision of the governmental service;
(d) Any person, except a witness, who acts as a master, receiver, auditor, juror, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
(e) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

However, due to an amendment, the definition to “public servant” was changed to its present state. The present definition not only omitted within the definition of “public servant” any reference to an agent of government or a person acting on behalf of an agent or employee of government as had previously been included, but this amendment also struck out language which would have included nongovernmental entities who perform a governmental function or service. Thus, it managed to omit anyone who is not directly an “officer or employee of a state, county, municipal, or special district agency or entity.” We find the Legislature must address the definition of “public servant” and we request that consideration be given to the language we have recommended.

Specific Examples of a Failed Definition

To underscore the problem with the definition of “public servant,” we will provide some examples. We heard from witnesses and FDLE investigators who provided us with background of a complaint concerning the mismanagement of funds by a for-profit corporation (hereafter “Company”) who was contracted to perform services for a non-profit organization (hereafter “Agency”). The Agency was formerly a department of state government which received funds from the federal government to perform the governmental function of aiding citizens. Due to privatization, the divisions within the department were allowed to operate with almost no agency oversight. The Company was paid with government funds, performed a government service, but their excesses were immune to prosecution because they are not public servants. This



investigation started after an anonymous letter was provided to law enforcement detailing numerous specific complaints involving allegations of bid rigging, kickbacks, and bribery. After a lengthy investigation, it was determined that contracts awarded had appearances of impropriety due to personal relationships, nepotism, and the way in which they were awarded. The Company then spent money on what appeared to be excessive program costs including clothes, laptops, field trips, and elaborate graduation ceremonies with champagne toasts. Even if probable cause could be established for criminal charges in this instance for bribery, kickback, or bid tampering, the employees or recipients of this government funded contract could not have been charged under Chapter 838 as they are not "public servants." They are, in fact, a non-profit organization receiving funding of federal money which flowed through the State and County. All of this is frustrating and absurd. It is clear that any entity which contracts to perform services for the state must be held accountable for any violation of criminal laws just as any governmental employee.

Another example showed criminal investigations into payoffs of community service hours which were never performed but were signed for completion. Community service hours are frequently ordered to be completed while a defendant is placed on probation. Community service hours can be completed at pre-approved locations as determined by the Department of Corrections. When a probationer completes community service hours, he or she is required to have the completed hours signed as verification prior to submitting the form to his or her probation officer for credit. During one investigation, it was revealed that a suspect who was signing for completed hours was being paid cash to falsify the hours completed. The State Attorney's Office considered charges including bribery and unlawful compensation, both under Chapter 838. Ultimately, the State Attorney's Office determined it could not file charges in part due to the definition of "public servant" because the suspect was employed by a private non-



profit corporation and not an agency or governmental unit. It is clear that this suspect was receiving a bribe to falsify a potential public record and should fall under some prosecution for bribery. If it was determined that this person does not fall under the definition of "public servant," then the State should have the option of considering another viable charge such as commercial bribery which is presently unconstitutional as we will discuss later. Ultimately, no one was criminally prosecuted.

In a third investigation, a non-governmental organization contracted with the county to provide alternatives to incarceration and social services. Part of the services the organization provided were pre-trial release services to arrested criminal adult defendants. During an undercover investigation, law enforcement paid cash to two individuals who supervised defendants in the pre-trial release program. In exchange for the cash payments, the pre-trial release employees allowed the undercover officers to avoid reporting and other requirements of the pre-trial release program. The State Attorney's Office concluded the two employees failed to meet the definition of "public servant" and thus any charges under Chapter 838 for bribery, official misconduct, or unlawful compensation could not be charged. The pre-trial release program was determined to receive funding from the county to perform what would otherwise be a governmental function or service; however, because the program was being contracted to a private non-governmental organization, the employees did not fall under the definition of "public servant."^{xix} Commercial bribery was not an option here either as it has been held unconstitutional. Ultimately, no one was criminally prosecuted.

Privatization of home inspections by private social service providers is another topic we investigated. This revealed home inspectors, paid by taxpayer dollars, were falsifying records about conducting home visits. These individuals are paid for travel and they must submit a



voucher stating that they traveled to a certain home and conducted a visit. This travel is approved by a supervisor. In addition, when a home inspector arrives at the home he or she is visiting, a visitation log and affidavit are also signed by the home owner. The investigation revealed travel vouchers submitted for travel which never occurred and forged homeowners' signatures. In one instance an agency client was not even placed at the home the inspector alleged visiting. The State Attorney's Office declined prosecuting any violation of Chapter 838 as the definition of "public servant" did not cover a home inspector who was contracted by a state agency to perform these visits. The only applicable law that could be charged was falsifying official documents which is a second degree misdemeanor offense. The crime for falsifying official documents has since been increased to a third degree felony. However, this does not address why someone receiving public funds to perform a governmental function is not treated the same as a governmental employee whose position has not been privatized.

Privatization is not only occurring with probation and pre-trial release services; our prisons have been and will likely continue to be privatized. Witnesses have testified that they are concerned with private prison guards who accept bribes, but cannot be prosecuted in the same way as a prison guard who works in a state run prison.

These are just a few examples of situations in which the term "public servant" has prohibited criminal prosecution of individuals receiving public funds to perform governmental services or functions. The time has come for the Legislature to close this appalling loophole. If policymakers are inclined to increase privatization, they must make sure this corruption issue is addressed so that hidden unpunished corruption costs are not added on top of the state's bill.



2. **We recommend removing the definition and the element of “corruptly” or “with corrupt intent” from Chapter 838 and all criminal violations therein and be replaced with “knowingly” or “intentionally.”**

Before proceeding into our justification for this recommendation, we must provide a little background. Chapter 838 and the Code of Ethics (Chapter 112, Part III) frequently overlap in the actions they seek to prohibit. A major difference between Chapter 838 and the Code of Ethics is that Chapter 838 is criminal, while the Code of Ethics usually provides for only civil penalties.^{xx} Criminal penalties typically require an intentional act while civil may not. We have heard that Chapter 838 punishes both the public servant as well as the person who participated in the criminal offense; whereas, the Code of Ethics typically only punishes public officials or employees. Civil violations under the Code of Ethics require a lesser standard of proof than any criminal violations under Chapter 838. In addition, because of different procedural rules, evidence which is admissible in a civil case may not be admissible in a criminal case.

From testimony we have heard and in reviewing the statutes, we have learned that F.S. 112.313(2) (soliciting or accepting gifts) and 112.313(4) (unauthorized compensation) align closely with F.S. 838.015 (bribery) and 838.016 (unlawful compensation for official behavior). Therefore, the Legislature has shown the ability to criminalize portions of the Code of Ethics under Chapter 838.

While the prohibited conduct may overlap between Chapter 838 and the Code of Ethics, there are distinctions where the two Chapters seek to punish similar action. We have heard testimony that the Legislature used the words “corruptly” or “with corrupt intent” throughout Chapter 838 in order to differentiate criminal and civil penalties for the similar action. The Legislature wanted to provide an additional hurdle for prosecuting conduct which might also be a



violation under the Code of Ethics. We find this distinction unnecessary as the criminal statutes already requires criminal intent and a higher burden of proof; therefore, we recommend the additional language of "corruptly" or "with corrupt intent" be removed from Chapter 838.

We have repeatedly heard from law enforcement and prosecutors that the use of the word "corruptly" or "with corrupt intent" makes charging violations under Chapters 838 more difficult than other criminal statutes and may require additional evidence such as testimony from one of the actors involved. Under F.S. 838.014(4), "corruptly" or "with corrupt intent" means "acting knowingly and dishonestly for a wrongful purpose." We find the additional element of "corruptly" or "with corrupt intent" should be removed from bribery, unlawful compensation, official misconduct, and bid tampering.

Bribery is criminalized under F.S. 838.015 and states:

- (1) "Bribery" means *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit not authorized by law with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.
- (2) Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that the public servant had assumed office, that the matter was properly pending before him or her or might by law properly be brought before him or her, that the public servant possessed jurisdiction over the matter, or that his or her official action was necessary to achieve the person's purpose.
- (3) Any person who commits bribery commits a felony of the second degree...

Unlawful compensation or reward for official behavior under F.S. 838.016 states:

- (1) It is unlawful for any person *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.
- (2) It is unlawful for any person *corruptly* to give, offer, or promise to any public servant, or, if a public servant, *corruptly* to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law for the past, present, or future exertion of any influence upon or with



any other public servant regarding any act or omission which the person believes to have been, or which is represented to him or her as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty.

(3) Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

(4) Whoever violates the provisions of this section commits a felony of the second degree...

Official misconduct is criminalized under F.S. 838.022 which presently states:

(1) It is unlawful for a public servant, *with corrupt intent* to obtain a benefit for any person or to cause harm to another, to:

(a) Falsify, or cause another person to falsify, any official record or official document;

(b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or

(c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

(2) For the purposes of this section:

(a) The term "public servant" does not include a candidate who does not otherwise qualify as a public servant.

(b) An official record or official document includes only public records.

(3) Any person who violates this section commits a felony of the third degree...

We have heard testimony that the language and definition of "corruptly" or "with corrupt intent" has limited the effectiveness of Florida's criminal anti-corruption laws by placing an extra burden beyond the requirement of criminal intent that is standard in criminal offenses. We acknowledge there are cases in which corrupt intent has been found; however, this additional burden requiring a public servant's intent to be "corrupt" is not necessary.^{xxi} We find that the standard criminal burden of "intentionally" or "knowingly" is sufficient to establish a public servant has acted with scienter (guilty knowledge) as to separate these offenses from an unintentional violation which may be civil.

We also find that in certain circumstances it is entirely appropriate to punish similar actions both civilly and criminally. Under F.S. 112.311 the Legislature has determined that the law should protect against any conflict of interest and establish standards for the conduct of



elected officials and government employees as a declaration that the integrity of government is essential. Public officials and those bound by the Code of Ethics are rightfully held to a higher standard. In accordance with testimony, we are only aware of two similar violations between the two Chapters, but as we will discuss later under section II, we are recommending more. We find that due to the extra burden of proof, public officers and those subject to Chapter 112, Part III, need not worry about criminal prosecution unless their action was intentional and can be proven beyond a reasonable doubt, in which case they should be punished criminally and civilly for certain violations.

Bid tampering, F.S. 838.22, also requires "with corrupt intent" as referred to in the preceding recommendation. We heard one reason bid tampering is hard to prove is because procurement laws, in some instances quite properly, do not necessarily require that the lowest bid be accepted, allowing the selection of a most qualified bid. The awarding of contracts involves subjective decisions which make it difficult to prove criminal intent without some form of illicit payment or insider knowledge. The additional burden of "corrupt intent" seems an unnecessary hurdle in bid tampering or bid rigging schemes.

Numerous states specify that violations of the state's ethics law are also violations of criminal law.^{xxii} Other states, like Florida, have criminal statutes in addition to ethics laws. We find if the Legislature does not want to criminalize the Code of Ethics, then it must make stronger criminal statutes to prohibit certain intentional unethical acts by public officers and employees. We find the Legislature should remove the words "corruptly" or "with corrupt intent" throughout Chapter 838.