

**Presentation by Richard Herring to the Florida Senate  
Senate Chamber -- December 6, 2010**

Thank you, Mr. Secretary.

And thank you Senators for giving me the opportunity to spend a few minutes with you today to talk about the ethics landscape.

In all honesty, this is the first time in my 80 sessions (regular and special) with the Legislature that I have had to think comprehensively about all the laws, rules, constitutional provisions, court opinions, DOAH orders, Attorney General opinions, Ethics Commission opinions, and Senate and House general counsel opinions that are relevant to this broad 'ethics' topic.

I have discovered that this is truly a fascinating and rich area of law and public policy.

Researching the history, we can see how we got to where we are today. But we will also see that Florida's ethics standards are tentacular. Each standard reaches out to touch and interact with many of the others - often in complex and non-intuitive ways.

These issues are broad - affecting all Floridians and their attitudes, confidence and respect for their government.

Before I get into the bowels of the beast, I do want to thank the many people who are the real experts in this area. I will do my best today to channel the brilliance of:

- Phil, Virlindia, Julia, Dan, and Chris at the Ethics Commission
- Barbara and Jim at the First Amendment Foundation
- Pat in the Governor's Office
- And a bunch of people in the AG's office and at the Department of State

MENTION FLORIDA BAR CLE - 8 HOURS, 5 ETHICS

Remind everyone to call the Senate General Counsel's Office as issues arise.

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## History of FLORIDA'S ETHICS LAWS

Excerpted from "Guide to Sunshine Amendment and Code of Ethics"  
Florida Commission on Ethics, 2010.

Florida has long been a leader among the states in establishing ethics standards for public officials and in recognizing the right of the people to protect the public trust against abuse. Our State Constitution was revised in 1968 to require that a code of ethics be prescribed by law for all state employees and non-judicial officers prohibiting conflict between public duty and private interests.

The "Sunshine Amendment," adopted in 1976, provides additional constitutional guarantees concerning ethics in government. For enforcement, the Sunshine Amendment requires that there be an independent commission (the Commission on Ethics) to investigate complaints concerning breaches of public trust by public officers and employees.

The "**Code of Ethics for Public Officers and Employees**" adopted by the Legislature is found in Chapter 112 of the Florida Statutes. **The main goal of the Code is to promote the public interest and maintain the respect of the people for their government.** The Code also ensures that **public officials conduct themselves independently and impartially**, not using their offices for private gain other than compensation provided by law. As a balance though, the **Code also seeks to avoid the creation of unnecessary barriers to public service.**

In 1974, the Legislature created the Commission on Ethics "to serve as guardian of the standards of conduct" for state and local public officials. Five of the Commission's nine members are appointed by the Governor, and two each are appointed by the President of the Senate and Speaker of the House of Representatives. No more than five Commission members may be members of the same political party, and none may hold any public employment during their two-year terms of office.

Florida's ethics laws contain two types of provisions:

- those prohibiting certain actions or conduct
- those requiring that certain disclosures be made to the public.

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MISUSE OF PUBLIC POSITION

112.313(6) **No public officer ... shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others...**

**Obvious examples:**

- Supervisor of elections sent a campaign solicitation on the absentee ballots.
- Mayor who used non-public information about future city land purchases for the financial benefit of family members. (May also violate the "insider information" law 112.323(8))
- County commissioner who got the county to surplus some land, which was purchased by an associate with the understanding that the land would be deeded to the commissioner.
- State legislator who tried to get an agency employee to do business with the legislator's firm.
- Chief of police who used city asphalt to fill holes in the parking lot of the motel he owned.
- City commissioner who agreed to vote for a motel height variance in exchange for a meeting with the Speaker of the U. S. House. (Didn't vote for it after pressure from constituents, the motel managed railed against this and was overheard, and an ethics complaint followed)

**Less obvious examples:**

- City commissioner who used his public position to try to get a complainant to withdraw an ethics complaint against the commissioner.
- Mayor who retaliated against the city little league for not hiring her son as the umpire.

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One Saturday morning, Mr. X and his wife were driving their red pickup truck. Although there was no stop sign or traffic light at the intersection, he slowed down or stopped at the intersection because the view was partially obscured by foliage and because he was concerned about young drivers in the neighborhood.

A city commissioner and her 16-year-old daughter were behind him ~~returning home to prepare to attend a funeral of Respondent's close friend~~. The commissioner became impatient and blew her horn.

He responded by directing an obscene hand gesture, colloquially known as "shooting the bird." He then slowly drove his truck east through the intersection toward an alley behind his home just down the street.

The Commissioner drove her car through the intersection past him and pulled around at an angle on the road in front of the red truck, requiring it to stop.

The Commissioner exited her vehicle and walked toward the truck. Mr. X also exited his vehicle. When they got close, she waived her middle finger at him, imitating his gesture, and asked, "What's this, what's this?" She also commented that "this is road rage," and asked why he had stopped at the intersection.

He advised her that he was going to call the police. She responded with "go ahead and call the police." She told him she was a city commissioner, that she "owned" or controlled the police, and that the police worked for her. She also told him to follow her because she was going to give him a ticket.

Three neighbors saw the confrontation. One went down to the scene and attempted to calm the situation. The neighbor told the Commissioner, "You have road rage. Road rage will kill you." But she noticed that her words had little effect at the time.

Eventually they both went on their way. He decided not to call the police and drove down the alley behind his home to unload a shower door that he had in the back of his truck.

Later that day, ~~the Commissioner attended the funeral of a close friend. On her way home from the funeral~~, the Commissioner decided to apologize for her behavior and role in the verbal altercation. She stopped by the house and apologized and shook hands. He warned her that he was still felt that his rights had

been interfered with and that she had purposely intimidated him by using her position.

At the hearing, the commissioner said she knew that it was wrong to use her position for her personal benefit, she admitted that she invoked her position as a city commissioner to "one-up" him during the confrontation and she regretted her conduct - as evidenced by her apology on the day of the confrontation.

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Now what I left out was that the Commissioner was on her way to the funeral of a good friend at the time of the incident and returned to apologize on her way home from the funeral. Her daughter had every right to be proud of her mom. After admittedly losing control, she did the hard thing and did what she could to correct her own behavior. This is where the lives of public officials and private citizens diverge. Had these both been private citizens, there would have been no ethics complaint, no fine.

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A SEGUE

Misuse of official position can also take the form of harassment. The Ethics Commission has numerous opinions involving public officials who used their official position in ways that effectively harassed employees.

These include a clerk of the court, a police chief, a community college president, a DOC employee, and numerous others. At least 2 cases involved officials chasing female employees around a conference table.

**Senate Policy clearly prohibits any workplace harassment.**

**1.48 Workplace Harassment Prohibited--It is the policy of the Senate that harassment toward any employee based on race, color, religion, sex, national origin, age, disability, or marital status will not be tolerated. Because of the Senate's strong disapproval of unlawful harassment related to their employment, all Senators and employees must avoid conduct that could be seen as prohibited harassment.**

*[THIS IS LARGELY BASED ON THE OTHER PERSON'S PERCEPTIONS]*

**Examples in the policy:**

**Unwanted - Unwelcome - Unwanted - Unwanted**

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PUBLIC RECORDS

Anything, in any format, that is intended to PERPETUATE, COMMUNICATE, or FORMALIZE knowledge.

Even if it is not in "final form"

Grapsky v. City of Alachua 35 FLW D205 1/22/10 1st DCA  
Asked for minutes of the canvassing board after it met to certify election results. Clerk refused as the minutes had not been approved by the city commission. Once prepared (AG opinion from 1991) they became a public record.

Associated Press v. NCAA

Makes no difference that records are in the hands of private counsel retained by a government agency (this case private counsel for FSU had had to sign a confidentiality agreement with the NCAA)

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The definition of "public record" (119.011(12)) was amended in the mid 90's to insert the phrase "regardless of the physical form, characteristics, or means of transmission," in order to capture those records made, sent or received by technology that was then unknown. Amending the definition this way ensures that the Legislature doesn't have to amend the definition of public record every time there is another technological advance.

To clarify this, the Attorney General sent the Department of State, Division of Archives, Bureau of Records Management a letter asking them to help clarify the issue of text messages, PINS, and other new electronic types of records, as he considered them to be potentially public records (depending upon content). The Bureau recently amended the General Records Schedule in response to this letter.

V. ELECTRONIC RECORDS (p. vi)

**e-mail, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device) ... provided that the printed version contains all date/time stamps and routing information.**

Talk about METADATA

[Also see AGO 09-15 that addresses social networking such as Facebook

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Prepared in preparation of litigation  
MAY have to have been prepared exclusively for that purpose.

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The state constitutional RIGHT OF PRIVACY specifically does not apply to public records. Art. I, Sec. 3

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Courts will award attorney fees in public records cases.

One case (Aviation Authority v. Najumi) did NOT award attorney fees, finding the Authority in good faith. This case is an outlier and relies on old cases that may not be good law.

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Legislative exemptions

WE KNOW

Drafts of bills and analyses until provided to someone other than the Senator, a supervisor or other officer or employee of the Senate.

BUT ALSO

Any records which would be exempt from inspection and copying if held by an agency.

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#### Post-Employment Restrictions

No fewer than 7 constitutional and statutory provisions exist that limit the ability of public officials and high-level staff from representing entities after they leave public office or employment.

For Senators, the Constitution - Art. II, Sec. 8(e) - and the statute - 112.313(9)(a) - are virtually identical.

**(e) No member of the legislature ... shall personally represent another person or entity for compensation before the government body ... of which the individual was an officer or member for a period of two years following vacation of office...**

Once you leave office, you may not personally represent clients for compensation before the Legislature for 2 years.

- COMPENSATION - travel reimbursement is okay.
- Ministerial acts (filing papers for a client) are okay.
  
- 90-4 legislator - Governor's GC could not appear .
- 2000, if interactions with the Legislature are incidental to subsequent public employment (agency head), former legislator MAY be able to represent the agency before the Legislature.
- 09-4 community college president told he COULD NOT represent the college for 2 years

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### Open Meetings

Florida Constitution, Art. III, Sec. 4(e) **The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house... shall be open and noticed to the public... All prearranged gatherings, between more than two members of the legislature, ... the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. ... Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.**

Senate Rule 1.43 Open meetings

(1) All meetings at which **legislative business** is discussed between **more than two (2) members** of the Legislature shall be open to the public **except:**

(b) **Discussions on the floor while the Senate is in session and discussions among Senators in a committee room during committee meetings ...**

Senate Rule 1.44-**Notice required** for certain meetings

(b) **Meetings of a majority of the Senators who constitute the membership of any Senate committee or subcommittee...**

Senate Rule 1.441 reiterates the **Constitutional requirements** concerning open meetings and adds:

(3) In cases of conflict between this Rule and any other Senate Rule, **the Rule providing greater notice or public access shall prevail.**

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- The Senate Rule definition of "legislative business" is arguably more inclusive than the constitutional requirement.
- Note the differences between "open" and "noticed." A gathering of more than 2 legislators (including a Senator and House members) must be "open." A gathering of a quorum of the Senators on a committee must be "noticed."
- The House does not have the same notice requirements as the Senate.
- Conference rules are addressed separately.

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### Voting conflicts

"A Senator is not disqualified from voting when, in the Senator's judgment, a conflict of interest is present." [Rule 1.39]

"No state public officer is prohibited from voting in an official capacity on any matter." [F.S. 112.3143(2)]

If you think you have a personal direct conflict, you may refrain from voting.

You may tell the secretary to lock your button for the vote on the particular bill.

#### FILE A STATEMENT

Pursuant to Senate Rules (1.20, 1.39) you are required to file a statement of disclosure whenever you have a conflict of interest involving the vote on a measure.

A conflict exists when "any personal, private, or professional interest in a bill [inures] to that Senator's special private gain or to the special gain of any principal to whom the Senator is obligated." There should be a separate disclosure statement for each vote on each relevant bill.

Questions on the content of or need for such disclosures should be directed to the Senate General Counsel's Office.

Disclosures regarding votes in committee should be delivered to the committee staff director or administrative assistant and will be included in the permanent bill files.

Disclosures involving votes on the Senate floor should be delivered to the Senate Secretary for publication in the Senate Journal.

Senators have fifteen days to disclose a conflict for a vote taken in committee, but conflicts must be immediately reported following floor votes. (See s. 112.3143(2), Fla. Stat.; Senate Rule 1.39.)

**"Special or private gain"** is generally measured in 3 ways:

- The size of the class. For example, do legislators comprise more than 1% of those affected.
- Whether the benefit or loss is remote or speculative, and
- **Whether the measure being voted on is preliminary or procedural.**

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## RELATIVES

### VOTING CONFLICTS

112.3143 Voting conflicts.-

(1) As used in this section:

(b) "Relative" means any father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

### **TWELVE**

### NEPOTISM

**(appointment, promotion, employment, advancement - NOT working together or supervising each other - CEO 90-62 law does not prevent stationing, evaluating, transferring, or suspending a relative YOU CAN FIRE BUT NOT HIRE)**

112.3135 Restriction on employment of relatives.-

(d) "Relative," for purposes of this section only, with respect to a public official, means an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

### **TWENTY-SEVEN**

### GIFTS

112.312 Definitions.

-As used in this part and for purposes of the provisions of s. 8, Art. II of the State Constitution, unless the context otherwise requires:

(21) "Relative," unless otherwise specified in this part, means an individual who is related to a public officer or employee as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, grandparent, great grandparent, grandchild, great grandchild, step grandparent, step great grandparent, step grandchild, step great grandchild, person who is engaged to be married to the public officer or employee or who otherwise holds himself or herself out as, or is generally known as, the person whom the public officer or employee intends to marry or with whom the public officer or employee intends to form a household, or any other natural person having the same legal residence as the public officer or employee.

#### **THIRTY-SEVEN**

Your spouse's brother is your brother-in-law.  
But is your spouse's brother's wife your sister-in-law? No.  
CEO 96-6

Likewise  
Your mother's sister is your aunt.  
But is your mother's sister's husband your uncle? Again No.  
CEO 99-5

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#### **GIFTS**

**If you didn't pay for it, it may be a gift.**

**1. INFLUENCE. You may not accept anything of value (gift, compensation, offer of work) if you should know it is given to influence an official action (112.313(2), (4). NO EXCEPTIONS**

Full-value, arms-length transactions are fine. The larger the value, the more likely it's intended to influence.

OK where wife of a PSC commissioner had a contract with a private school, when the husband of a member of the school's advisory board represented people before the PSC.

**SOLICIT.** A legislator may not solicit any gift from a lobbyist or the firm or principal of a lobbyist or partners of lobbyist or CCEs and PACs if the gift is for the benefit of the legislator or his/her family member.

**2. 1990 LAW.** A legislator may not accept a gift worth more than \$100 from the partner or firm of a lobbyist (or CCE or PAC). You can "pay down" the value to \$100 or less. Such gifts must be reported.

**3. 2005 EXPENDITURE BAN.** A legislator may not knowingly accept a gift directly or indirectly from a lobbyist or the principal of a lobbyist (excludes partner or firm of lobbyist). Requires "reasonable inquiry."

A gift to a spouse given with intent to influence the Legislator, or intended to benefit the Legislator, is considered an indirect gift to the Legislator. (Travel expenses of spouse.)

Three exceptions:

- Gift accepted on behalf of a government entity or charitable organization (specifically a 501-C3) AND possession quickly transferred.
- Gift (including over \$100) from certain state and local government entities/agencies IF given for a public purpose (yes for office space provided by a county, no for sports tickets)
- Gift (including over \$100) from a DSO that is authorized by law to support a government entity. (University officials traveling to a university sporting event.)

**RELATIVES.** Gifts to Legislators from relatives are ok, even if relative is a lobbyist or principal (may still be prohibited under gift ban - if it is to influence or is quid pro quo).

Not a gift if received in exchange for equal or greater consideration. Consideration must be given within 90 days. A promise to pay is consideration only if it is legally binding, in writing, and enforceable. Services by the Legislator as a Legislator are not consideration.

"Gift" includes use of real property, preferential loan rate (not available to government or to similar persons), transportation/parking, free publicity. (Appearing in a public service announcement paid by lobbyist principal is prohibited if production costs exceed \$100.)

Gifts associated with the Legislators non-legislative business or employment, unrelated to the legislator's public position, are ok. Gift from client of law firm to lawyer legislator when client has no relationship to Legislature.

Value of gift is actual (full) cost to the gift giver.

- Value of a gift of travel services by travel agent includes all agency costs.
- Round-trip transportation is valued as a single gift.
- Transportation in a private vehicle is valued same as comparable public transportation. (Airplane ticket valued at unrestricted coach fare).
- Lodging on consecutive nights is a single gift (valued at \$44, the state per diem rate minus the meal rate).
- Gift by charitable organization of a sports ticket is face value of ticket MINUS charitable contribution portion.

Gift exchange may not be equal consideration. Each gift is freely given and is not "payment" for the other gift. It MAY be if contemporaneous and equal value.

A member of the Legislature may request an advisory opinion from the general counsel of the house of which he or she is a member as to the application of this section to a specific situation. The general counsel shall issue the opinion within 10 days after receiving the request. The member of the Legislature may reasonably rely on such opinion.

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Beginning on page 26 of the handout on your desks are summaries of some of the reporting forms you will need to file quarterly or annually, including financial disclosures, public disclosures and gift disclosures.

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**Trade Secrets**

Senate Policy 1.56 Documents Marked as Trade Secrets

Each document submitted directly to the Senate by governmental or private sector entities asserting that the document is a trade secret must be marked "Trade Secret." The failure to mark trade secret documents waives any presumption of confidentiality. If large numbers of documents are submitted, the documents marked "Trade Secret" must be segregated...

Documents claimed to contain trade secrets or their contents will not be released to the public except as provided in this policy.

If the Senate receives a public-records request for a document marked as a trade secret, the Senate will promptly notify the party asserting that the document is a trade secret. That party will have 30 days ... to file an action in circuit court seeking a determination whether the document in question contains trade secrets and an order barring the document's public disclosure. ... the Senate will not release the documents pending the outcome of the action...

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812.081 (2) Any person who... without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree...

815.045 Trade secret information.— The Legislature finds that it is a public necessity that trade secret information ... be expressly made confidential and exempt from the public records law because it is a felony to disclose such records...

#### Trade Secret Case Law

"It is clear that a private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential. Neither the desire for nor the expectation of non-disclosure is determinative." Sepro Corp. v. Florida Dept. of Environmental Protection, (Fla. Dist. Ct. App. 2003).

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### DUAL OFFICEHOLDING

- Art. II, sec. 5(a): **No person shall hold at the same time more than one office ...**

- This applies to both elected and appointed offices.

- In 1970 the Supreme Court set out the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first." Holley v. Adams, 238 So. 2d 401, 407 (Fla. 1970). Under the rationale of that decision, the action of an officer accepting another office in violation of the dual officeholding prohibition may create a vacancy in the first office.

- If you are about to be appointed to a public board, council, or commission, call the Senate General Counsel's office.
- The Constitution does not define the terms "office" or "officer" for purposes of the dual officeholding prohibition.

#### I. OFFICEHOLDING v. EMPLOYMENT

- The Supreme Court has helped to define "office" and to distinguish it from "employment":  
The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an "employment" does not comprehend a delegation of any part of the sovereign authority...
- Employment in a position that does not exercise the powers of an "office" does not constitute officeholding for purpose of the prohibition.

AGO 71-263 and 71-296 (assistant state attorney is an employee, not an officeholder and may serve as a state legislator)

AGO 77-31 (community college district comptroller is an employee, not an officeholder and may serve as a state legislator)

#### II. MEMBERSHIP AS OFFICEHOLDING OR NOT BASED ON THE EXERCISE OF THE SOVEREIGN POWER OF THE STATE

- Membership on the governing body of a governmental entity is officeholding.

Advisory Opinion to Governor, 1 So. 2d 636 (Fla. 1941), State Planning Board - expend public funds

AGO 76-241 Florida Human Relations Commission accepts money to help finance its activities; passes upon complaints; and makes rules.

AGO 91-79 State Board of Community Colleges establishes rules and approves budgets

AGO 93-28 Southeast Interstate Compact Commission for the Management of Low Level Radioactive Waste, enter into contracts, and hire staff

- Membership on a purely advisory body which exercises no sovereign powers of the state does not trigger the dual officeholding prohibition.

AGO 72-179 ad hoc charter revision commission  
purely advisory capacity

AGO 71-43 members of a state park advisory council  
Served without compensation at the pleasure of the Division of  
Recreation and Parks in purely an advisory capacity and who had  
no authority to expend public funds

### III. EXCEPTIONS

A notary public or military officer may hold another office. Any  
officer may be a member of a constitutional revision commission  
or constitutional convention.

AGO 75-115 the Lieutenant Governor may also serve as an agency  
head.