by Ellie Neiberger

Honest Services Fraud: Federal Prosecution of Public Corruption at the State and Local Levels

Honest services fraud, a form of federal mail and wire fraud, is the crime of defrauding citizens of the "intangible right of honest services."[1] Over the past four decades, the federal government has used the honest services theory of mail and wire fraud to successfully prosecute state and local public officials for a broad range of improper conduct, the most controversial of which is failure to disclose conflicts of interest.[2]

This article provides a general overview of honest services fraud in the public sector.[3] Despite the variety of conduct this theory encompasses, the common premise of public sector honest services cases is that the "the public is not getting what it deserves: honest, faithful, disinterested service from a public official."[4] Although many of these cases involve high-ranking government officials, public sector honest services charges have been brought against all types and levels of governmental and quasi-governmental personnel.[5]

Development of the Honest Services Theory

The federal mail and wire fraud statutes make it a crime to use the mail or wires in furtherance of any "scheme or artifice to defraud."[6] The honest services doctrine developed as a judicially created theory of mail and wire fraud, under which the term "scheme or artifice to defraud" was read to encompass schemes to deprive the public of "intangible rights," including the right to have public officials perform their duties honestly.[7]

Generally, to sustain a conviction of mail or wire fraud, the government must prove 1) a scheme or artifice to defraud, 2) intent to defraud, and 3) use of the wires or mails in furtherance of the scheme.[8] The original theory was that a "scheme or artifice to defraud" referred to fraud intended to deprive another of tangible rights — specifically, money or property.

In the 1970s, federal prosecutors began using the mail and wire fraud statutes to fight public corruption in state and local governments, which is not specifically addressed by any federal statute.[9] However, because proof of identifiable loss of money or property is often difficult to prove in public corruption cases,[10] many of these cases were brought under a new, alternative theory that the public official engaged in a scheme intended to deprive the people of their intangible rights to the official's honest and impartial services.[11]

One of the more well-known early intangible rights cases is *United States v. Mandel*, 591 F.2d 1347, *rev'd on reh'g en banc*, 602 F.2d 653 (4th Cir. 1979) (per curiam). In this case, a state governor received various gifts from a horse racing association and, without disclosing such information, used his public position to influence legislation which benefited the association by increasing the number of days of the horse racing season.[12] Because the governor's conduct affected the citizenry by changing length of the racing season, it would be difficult to prove that he deprived them of property. Thus, rather than attempt to establish that the state's citizens suffered tangible loss, the prosecution charged the governor with federal mail fraud on the basis that he devised a scheme to deprive citizens of "their right to the conscientious, loyal, faithful, disinterested, and unbiased" services of their governor.[13] The Fourth Circuit accepted this theory, recognizing that, "the fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters. . . . A fraud is perpetrated upon the public to whom the official owes fiduciary duties, *e.g.*, honest, faithful and disinterested service."[14]

In *McNally v. United States*, 483 U.S. 350, 355 (1987), the U.S. Supreme Court rejected the honest services doctrine based on the absence of clear statutory language indicating Congress intended to protect intangible rights. The Court explained:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the [f]ederal [g]overnment in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[15]

Congress acted quickly in response to the *McNally* decision. Just a year later, in 1988, Congress enacted the honest services fraud statute, 18 U.S.C. §1346, for the purpose of legislatively overruling *McNally* and restoring prior case law.[16] Section 1346 provides in its entirety: "For the purposes of [Ch. 63 of Title 18, which includes the mail and wire fraud provisions], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Therefore, with the enactment of §1346, federal prosecutors were

granted the express statutory authority to pursue government officials on the basis that dishonest dealing constitutes a theft from the public at large.

The Meaning of "Honest Services"

Because the statute does not define the term "honest services," its meaning has been left to the courts. However, as this broad term has no common law roots or unified meaning under pre-*McNally* case law, the courts have struggled with defining its parameters and have reached conflicting, and sometimes unpredictable, conclusions on the scope of the honest services statute.[17]

The absence of a clear definition of honest services has allowed prosecutors the flexibility to argue that almost any type of abuse of office comes within the statute's reach.[18] Furthermore, the courts have generally been willing to acquiesce in a broad application of the statute.[19]

Due to the lack of coherent guiding principles, the honest services provision has been challenged on grounds that it fails to give adequate notice of what conduct it prohibits and that it fosters abuse of prosecutorial discretion.[20] However, the circuit courts have refused to strike down the statute as unconstitutionally vague.[21] While the courts have offered various reasons for rejecting constitutional challenges, including that §1346 was not vague as applied to the official's clearly illegal conduct,[22] at least one court has held that "concrete parameters" are unnecessary, since the very "concept of the duty of honest services sufficiently conveys warning of the proscribed conduct when measured in terms of common understanding and practice."[23] The Supreme Court has not yet weighed in.

Recently, the honest services statute has received significant criticism for its application in the campaign contribution context, where First Amendment rights are implicated. In 2006, former Alabama Governor Don Siegelman was convicted of various federal crimes, including honest services fraud, in connection with a $500,000 contribution his state education lottery campaign received from Richard Scrushy of HealthSouth Corporation, a private donor he later appointed to a state healthcare board.[24]

Two honest services counts were brought on the basis that Siegelman agreed to appoint Scrushy to the board in exchange for the $500,000 contribution.[25] Siegelman argued that because raising funds to support an education lottery implicated his First Amendment rights, the government was required to prove an "explicit quid pro quo."[26] On appeal, he asserted that the prosecution failed to make such a showing because there was no evidence of actual conversations between himself and Scrushy. The 11th Circuit rejected Siegelman's argument that "only *express* words of promise" will do and upheld his convictions on the basis that the record contained evidence from which the jury could infer the existence of an agreement to exchange money for specific official action.[27]

Circuit Splits

Rather than invalidate the honest services provision, the circuit courts

have developed various principles in an attempt to limit its scope. However, the circuits differ as to which limiting principles they apply and how they are applied.[28]

It is generally accepted that public employees who engage in "core corrupt conduct," such as bribery and kickbacks, violate a duty to act for the public good.[29] Therefore, the limiting principles generally come into play in cases involving "lesser wrongs," such as failures to disclose conflicts of interest.[30]

One disputed issue is whether the public official's conduct must have violated a duty created by some source external to §1436, such as state or local law. In *United States v. Brumley*, 116 F. 3d 728, 735 (5th Cir. 1997) (en banc), the Fifth Circuit expressly held that a deprivation of honest services requires a violation of state law, which arguably gives adequate notice of what conduct is prohibited. Similarly, the Third Circuit requires the government to show that the official breached a "clearly established fiduciary relationship or legal duty in either federal or state law."[31]

A majority of circuits, including the 11th Circuit, hold that proof of an independent federal, state, or local law violation is not required to support a conviction of honest services fraud.[32] These courts generally agree that the honest services duty is "governed by a uniform federal standard inherent in §1346," however, "they have not uniformly defined the contours of that standard."[33] The 11th Circuit's position is that "[p]ublic officials *inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest*. 'If the official instead secretly makes his decision based on his own personal interests . . . the official has defrauded the public of his honest services.'"[34]

Another major issue on which the circuits are divided is whether §1346 applies only to schemes for "private gain." The Sixth and Seventh circuits require that the public official misuse or intend to misuse his or her office for private gain;[35] however, other circuits reject this principle as an unsupported and unnecessary limitation on the statute.[36]

Although the Sixth and Seventh circuits agree that private gain is an element of the offense, they disagree as to the nature of the private gain required. The Sixth Circuit holds that "honest services fraud is 'anchored upon the defendant's misuse of his public office for *personal profit*.'"[37] However, the Seventh Circuit, in *United States v. Turner*, 551 F.3d 657, 665 (7th Cir. 2008), concluded that the requisite "private gain" need not be a personal gain to the public official.[38] The defendant in *Turner*, the director of a state division of physical services, was convicted under §1346 for assisting three state-employed janitors engage in a scheme in which they worked only a few of their required hours per week, falsified their attendance logs, and collected salaries for full-time work. Although the director-defendant did not receive a personal gain, the private gain to the janitors was sufficient to support his conviction of honest services fraud.

Convictions of Public Officials in Florida

Federal prosecutors have aggressively pursued cases involving honest services fraud in Florida. According to a Department of Justice report, there were 794 federal public corruption convictions in Florida from 1999 to 2008.[39] The following are examples of recent honest services convictions of Florida state and local officials for failure to disclose conflicts of interest.

In *United States v. McCarty*, No. 09-80004 (S.D. Fla. Jan. 9, 2009), Mary McCarty pleaded guilty to honest services fraud for using her position as a Palm Beach County commissioner to vote on multiple bond awards to underwriting firms where her husband was employed without disclosing such information to the public. McCarty also admitted to failing to disclose that she and her husband received gifts, such as free and discounted stays at hotels, from parties who had matters before the commission.

In *United States v. Newell*, No. 07-80121 (S.D. Fla. Aug. 9, 2007), Warren Newell pleaded guilty to honest services fraud for using his position as a Palm Beach County commissioner to secure the success of various transactions in which he held undisclosed financial interests. According to the indictment, he voted to extend development rights that increased the value of properties in which he held a secret interest. One day before he voted on these matters, he withdrew his equity interest in the entity that owned the properties. However, he continued to advise the entity regarding the sale of the properties and received a share of the profits therefrom.

In *United States v. Masilotti*, No. 06-80158 (S.D. Fla. Oct. 30, 2006), Anthony Masilotti was convicted of honest services fraud based on misuse of his position as a Palm Beach County commissioner to advocate and vote for real estate transactions benefiting his secret financial interests in the subject realty.

The Future of Honest Services Fraud

Given the increasing confusion and controversy surrounding the honest services fraud statute over the past 20 years, and in light of several recent high-profile prosecutions, it is unsurprising that honest services fraud is currently an issue before various state and federal branches of government.

This term, the U.S. Supreme Court has heard oral arguments in three high-profile honest services cases: *Skilling v. United States*, No. 08-876 (petition for certiorari granted May 18, 2009); *Black v. United States*, No. 08-1196 (petition for certiorari granted June 29, 2009); and *Weyhrauch v. United States*, No. 08-1394 (petition for certiorari granted Oct. 13, 2009). The Court granted certiorari in these cases just months after Justice Scalia vigorously dissented to the Court's refusal to hear *United States v. Sorich*, in which the Seventh Circuit upheld honest services convictions of Chicago city officials for their participation in a patronage hiring scheme.[40] In his widely read dissenting opinion, Justice Scalia criticized the Court for declining to review a law that allows the federal government to "prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail."[41]

Skilling and *Black* are private sector honest services cases. *Skilling* involves

former Enron CEO Jeffrey Skilling's various federal fraud convictions, including honest services fraud. Depending on whether the Court limits its ruling to private actors, this case may affect the law as it applies to public officials, because it raises issues as to whether §1346 requires proof of private gain and whether it is unconstitutionally vague. *Black* involves the honest services conviction of former newspaper head, Conrad Black. While this case presents the narrower issue of whether proof of economic harm is required, it raises the constitutional issue as well.

Weyhrauch is a public sector honest services case involving former Alaska legislator, Bruce Weyhrauch. The issue presented for Supreme Court consideration is whether proof of a state law violation is necessary for an honest services conviction.

Weyhrauch was charged with defrauding his constituents by failing to disclose a conflict of interest — that he was negotiating future employment with a company affected by pending legislation.[42] It is undisputed that he did not violate any federal statute, state statute, ethics rule applicable to members of the Alaska Legislature, or any duty existing under Alaska's common law.[43] However, the government asserted that a legislator's knowing concealment of a conflict of interest may be used to support an honest services conviction, regardless of whether state law requires disclosure.[44] The Fifth Circuit agreed, and expressly held that state law is irrelevant in determining whether a public official is guilty of honest services fraud.[45]

In addition to these cases, honest services fraud is the subject of legislation currently pending before Congress and the Florida Legislature. Federal S.B. 49, the Public Corruption Prosecution Improvements Act, proposes to increase the statute of limitations from five to six years and expand the statute to include schemes to obtain "any other thing of value."

In Florida, Senator Dan Gelber has introduced three bills targeting public corruption this legislative session. The first, the Honest Services Bill, S.B. 444, proposed a state crime of honest services fraud which would be "construed, to the extent possible, in accordance with the standards and intent set forth under [§1346]."[46] However, this bill was withdrawn from consideration in first committee and is, therefore, unlikely to become law. Even if enacted, it would probably be invalidated if the Supreme Court strikes down §1346 as unconstitutionally vague since its interpretation is expressly tied to §1346.

The other two bills sponsored by Senator Gelber were designed to avoid the uncertainties regarding the status of §1346. S.B. 1076 proposed to expand the scope of Florida's official misconduct statute[47] to make it a third-degree felony for "a public servant, with corrupt intent, in a matter falling within the public servant's duties, to willfully fail to disclose" a direct or indirect, future or current, financial interest of, or benefit inuring to the benefit to, either the public servant or a member of his or her immediate family. To establish "corrupt intent," the government would need to establish that the official acted "knowingly and dishonestly for a wrongful purpose." Finally, S.B. 734 proposed increased penalties for all crimes committed by public officials. While these bills were ultimately not passes this session, they evidence an increased emphasis on public corruption issues at the state level.

Furthermore, last December the Florida Supreme Court granted Governor Charlie Crist's petition to impanel a statewide grand jury for a 12-month period to investigate "criminal activity among local and state officials acting in their official capacity."[48] The grand jury will investigate public corruption affecting multiple judicial circuits and, at the end of its investigation, issue a report, which may recommend legislative changes to address these crimes.

Advising State and Local Officials

Although the Supreme Court may settle some of the conflicting interpretations of §1346, or invalidate the provision altogether, it is important for state and local government practitioners to educate public officials about honest services fraud and how developments in this area of law affect them.

First, unless and until overturned by the Supreme Court or Congress, §1346, along with the case law interpreting it, is the law. Particularly, state and local officials should be aware that, because the 11th Circuit holds that they may be convicted under §1436 for violating their "inherent duties" as public officials, disclosure duties of public officials in Florida extend beyond what is required under state and local law. Therefore, when in doubt, they should disclose potential and perceived conflicts of interest.

Second, even if the statute is held to be unconstitutional, it is likely that Congress and/or the Florida Legislature will move quickly to fill the gap.

Third, because complex ethical issues arise when a lawyer representing an entity advises the entity's officers or employees, public attorneys should look to their job descriptions and applicable rules of professional conduct before advising particular public officials.[49] To avoid conflicts of interest, it may be necessary for public officials to retain independent counsel.❑

[1] 18 U.S.C. §§1341, 1343, 1346.

[2] *E.g., United States v. Urciuoli*, 513 F.3d 290, 295 n.3 (1st Cir. 2008) ("Typical cases [of honest services fraud] involve votes paid for by bribes or based on private undisclosed financial interests of the legislator . . . or other nondisclosures in relation to official duties."); *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008).

[3] While honest services fraud may be applied to private actors, *see United States v. DeVegter*, 198 F.3d 1324, 1327-28 (11th Cir. 1999) ("Although the paradigm case of honest services fraud is the bribery of a public official, §1346 is not limited to such conduct but extends to the defrauding of some private sector duties of loyalty"), private sector honest services fraud is beyond the scope of this article.

[4] *United States v. Mangiardi*, 962 F. Supp. 49, 51 (M.D. Penn. 1997), *aff'd*, 202 F.3d 255 (3d Cir. 1999).

[5] *See, e.g., United States v. ReBrook III*, 837 F. Supp. 162, 171 (S.D.W.Va. 1993) (holding that all government employees owe a duty of honest services to the public), *aff'd in part, rev'd in part on other grounds*, 58 F.3d 961 (4th Cir. 1995); *United States v. Woodard*, 459 F.3d 1078, 1082 (11th Cir. 2006) (holding that a police officer and his wife deprived the city of the officer's honest services when they used confidential police information to contact persons whose property was held at the department and fraudulently represented that they could reclaim possession of their property only upon payment of a fee); *United States v. Gray*, 790 F.2d 1290, 1296 (6th Cir. 1986) (hold-

ing that the chairman of state democratic party owed a fiduciary duty to the public because he "substantially participated in governmental affairs" and had substantial control over award of state's workers' compensation insurance contract).

[6] 18 U.S.C. §§1341, 1343.

[7] *See, e.g., McNally v. United States*, 483 U.S. 350, 355 (1987) (citing *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979)).

[8] *See, e.g, Neder v. United States*, 527 U.S. 1, 20-25 (1999); *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008), *cert. denied*, 129 Sup. Ct. 1308 (2009); *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001).

[9] Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 460-61 (1995); Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 932 (2009) (stating that the mail and wire fraud statutes were originally used as a way to federally prosecute state and local officials, to whom the federal bribery statute, 18 U.S.C. §201, generally does not apply, for public corruption).

[10] Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U.L. REV. 1099, 1108 (1999) (hereinafter *Valuing Honest Services*) (citing Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 208-09 (1994)).

[11] Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY at 932, 955-57 (2009); *see also United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987) (county judge); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) (city alderman); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (former governor).

[12] *Mandel*, 591 F.2d at 1356-57, 1367.

[13] *See id.* at 1353; *see also* Note, *Valuing Honest Services*, 74 N.Y.U.L. REV. at 1107 (stating that proof of tangible loss to citizens would be difficult in *Mandel* because of the nature of the legislation).

[14] *Id.* at 1362.

[15] *McNally*, 483 U.S. at 360.

[16] *See* 134 CONG. REC. H11108-01 (statement of Sen. Biden) (stating that purpose of legislation was to overrule *McNally*); *see also* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 491 n. 452 (1989) (outlining the legislative history of §1346) (citing 134 CONG. REC. H11, 251 (daily ed. Oct. 21, 1988) (Part II) (statement of Rep. Conyers); 134 CONG. REC. S17, 308 (daily ed. Oct. 21, 1988) (statement of Sen. McConnell); *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997) (observing that every circuit that had considered the issue concluded §1346 overturned *McNally*).

[17] *See United States v. Sorich*, 129 S.Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) ("How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?") (internal quotations omitted)).

[18] Matthew N. Brown, *Prosecutorial Discretion and Federal Mail Fraud Prosecutions for Honest Services Fraud*, 21 GEO. J. LEGAL ETHICS 667, 673 (2008).

[19] *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (college basketball coaches who schemed to obtain scholarships for ineligible players deprived the university of its right to honest services within the meaning of the mail and wire fraud statutes); *see also United States v. Piggie*, 303 F.3d 923, 926 (8th Cir. 2002) (involving honest services conviction of university basketball coach).

[20] A criminal statute is "void for vagueness" if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

[21] *See e.g., United States v. Hasner*, 340 F.3d 1261, 1269 (11th Cir. 2003) (§1346 not vague as applied to defendant); *United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) ("We conclude that 18 U.S.C. §1346, together with §1341 or §1343, provides explicit standards for those who seek to apply the statute"); *United States v. ReBrook*, 837 F. Supp. 162, 171 (S.D. W.Va. 1993).

[22] *See Hasner*, 340 F.3d at 1269 (rejecting vagueness challenge where defendant specifically intended to deprive the public of his honest services); *United States v. Hausmann*, 345 F.3d 952, 958-59 (7th Cir. 2003) (§1346 not unconstitutionally vague as applied to a kickback scheme enabled by the defendant's abuse of office).

[23] *ReBrook*, 837 F. Supp. at 171.

[24] *United States v. Siegelman*, 561 F.3d 1215, 1219, 1227, 1229 (11th Cir. 2009) (per curiam).

[25] *Id.* at 1227.

[26] The Supreme Court has held that a Hobbs Act conviction for demanding a campaign contribution in exchange for official action could not stand without a showing that "payments [were] made in return for an *explicit* promise or undertaking by the official to perform." *McCormick v. United States*, 500 U.S. 257, 273 (1991).

[27] *See Siegelman*, 561 F.3d at 1226.

[28] *See Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari) ("Courts have expressed frustration at the lack of any 'simple formula specific enough to give clear cut answers to borderline problems.'") (quoting *Urciuoli*, 513 F.3d at 300).

[29] Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY at 999.

[30] *See id.*

[31] *United States v. Murphy*, 323 F.3d 102, 117 (3d Cir. 2003).

[32] *Weyhrauch*, 548 F.3d 1237; *Sorich v. United States*, 523 F.3d 702, 712 (7th Cir. 2008); *Hasner*, 340 F. 3d 1261, 1269; *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997); *United States v. Sawyer*, 85 F. 3d 713 (1st Cir. 1996); *United States v. Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995).

[33] *Weyhrauch*, 548 F.3d, at 1244.

[34] *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (quoting *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (emphasis added) (internal citation omitted).

[35] *See United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) ("[C]ourts have felt the need to find limiting principles, and ours has been that the '[m]isuse of office ...for private gain is the line that separates run-of-the-mill violations of state-law fiduciary duty ... from federal crime.'") (citing *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)); *United States v. Turner*, 465 F.3d 667, 676 (6th Cir. 2006).

[36] *See United States v. Inzunza*, 580 F.3d 894, 904-05 (9th Cir. 2009); *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (rejecting misuse of office for private gain requirement as unsupported by the statutory language); *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002); *see also* Note, *The Evolution of the Harm Requirement in Honest Services Fraud*, 36 AM. J. CRIM. L. 71, 83-84 (2008) (standard for misuse of office for private gain).

[37] *Turner*, 465 F.3d at 676 (quoting *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986)) (emphasis added).

[38] *See also Sorich*, 523 F.3d at 709 ("By 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not.").

[39] Public Integrity Section Criminal Div., *U.S. Dep't of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 2008* 58-59 (2008).

[40] *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1308 (2009).

[41] *Id.* at 1310.

[42] *Weyhrauch*, 548 F.3d at 1239-40.

[43] *See id.* at 1240 & n.2.

[44] *Id.* at 1240.

[45] *See id.* at 1244-46.

[46] Fla. S.B. 444 (2009) (withdrawn from consideration on Mar. 3, 2010).

[47] FLA. STAT. §838.022.

[48] *In re Statewide Grand Jury #19*, No. SC09-1910 (Second Amended Petition (Nov. 30, 2009)) (Order Directing Implementation of Statewide Grand Jury (Dec. 2, 2009)).

[49] *See* FLORIDA RULES OF PROF'L CONDUCT 4-1.13 & cmt.

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