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Control of Conflicts of Interest in Highway Construction Contract Administration

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Ross D. Netherton. Larry W. Thomas, TRB Counsel for Legal Research is principal investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving contracts, as well as highway law in general. This report deals with the legal questions surrounding conflicts of interest involving public officials.

This paper is included in a three-volume text entitled, "Selected Studies in Highway Law." Volumes 1 and 2 were published by the Transportation Research Board in 1976 and Volume 3 in 1978. Together they include 45 papers and more than 2,000 pages. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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THE MORALITY ISSUE IN GOVERNMENT

Nineteenth Century Standards of Official Conduct

Contemporary efforts to assure faithful, impartial, and honest administration of public business rely on a system of law and practice that reflects the changing style of American government over almost two centuries. This system has grown chiefly by accretion. Old concepts of official morality were never really discarded as styles changed; and the system grew by adding new features to cope with the expanding range of official conduct that could seriously injure the public interest if it was mismanaged or deliberately corrupted.

The earliest American efforts to institutionalize morality in governmental business often were merely codifications of common law doctrine regarding bribery, extortion, embezzlement, and similar forms of public corruption. Blackstone was considered the authoritative statement of this body of law for the English colonists and the courts of the new State governments after independence; and, in Blackstone's law, bribery and its related crimes were offenses against public justice.[1] Throughout most of the nineteenth century the judicial process remained the focus of concern. As long as the executive branch of American State governments remained small and performed relatively few regulatory functions affecting the community's economic interests, and State legislatures modeled their image and action after the principles of Jacksonian politics, there was neither opportunity nor incentive to substantially expand the protection provided by common law.

At the national level, the larger size and greater visibility of the government's business led Congress to extend the federal statute law to reach two specific practices that offended the public conscience. These were measures to keep federal governmental officials from acting as advocates or agents of others who sought to prosecute claims against the United States Government, and to prevent federal officials from awarding contracts to themselves, or accepting outside rewards for helping others get such contracts. Along with anti-bribery laws, these measures remained the main bases for prosecuting and punishing conduct which most blatantly offended the American public's sense of justice and fair play.[2]

[1] BLACKSTONE, COMMENTARIES, Bk. IV 139.

These laws did not prevent the growth of graft and favoritism in government contracting to scandal proportions during the wars of the nineteenth century; but they provided precedents for Congressional intervention in the event the executive branch failed to raise its standards following each such incident. General legislation to prevent situations in which public officers might be tempted to establish adverse interest came in 1917, when Congress enacted a general prohibition against acceptance of outside compensation for performing governmental duties.[3]

Evolution of the Conflict of Interest Concept in Federal Law

The impetus for establishing enforceable standards of morality for the conduct of public officials appears to have come from legislative conviction that the executive branch could not be checked solely by laws that provided punishment after the fact. It was not that the legislators felt they lacked legal authority to find out what the executive agencies were doing. From the beginning, State courts acknowledged the investigatory powers of their legislatures;[4] and in 1927 the United States Supreme Court, in a case arising out of the Teapot Dome scandal, gave full recognition to the authority of Congress to investigate generally the conduct of the Federal Government and the expenditure of public money.[5] It was, rather, that the styles of winning favorable response from public officials for private partisan interests in the conduct of government business had changed. The old laws could not reach the practices which in the 1940's and 1950's were regarded as threatening the public interest.

The new style was a response to the striking growth that occurred in the functions of government itself during the economic depression of the 1930's and the war years of the 1940's. From these crisis experiences came the concept of "big government." At both the Federal and

[2] The earliest instance of federal legislation appears to have been a law in 1795 prohibiting the Secretary of the Treasury from personally trading in the securities market. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67. This was an exceptional restraint, even for its time, and Congress did not enact any general legislation on conflicts of interest until the 1850's. During the nineteenth century, Congress enacted four statutes relating to conflict of interest situations, namely: Act of Feb. 26, 1853, ch. 81, 10 Stat. 170 (now 18 U.S.C. § 205 (1970)); Act of July 16, 1862, ch. 180, 12 Stat. 577 (now 18 U.S.C. § 203 (1970)); Act of Mar. 2, 1863, ch. 67, 12 Stat. 696; Act of June 1, 1872, ch. 256, 17 Stat. 202 (now 18 U.S.C. § 207 (1970)).

[3] Act of Mar. 3, 1917, ch. 163, 39 Stat. 1106 (now 18 U.S.C. § 209 (1970)).

[4] See discussion in J. HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS, at 35 (Boston: Little, Brown & Co., 1950).

[5] McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927).

State levels, public bodies became responsible for so wide a range of regulatory activities and assistance programs that detailed legislative oversight of the executive branch became impossible; and within the executive branch the Governor and his principal department heads found that often it was not possible even for them to know the details of how the bureaucracy performed its duties. For the most part, the Federal and State bureaucracies were left to regulate themselves in the day-to-day decisions that had to be made.

As these regulatory and service functions brought public agencies into more direct and continuous contact with the community's economic and social life, a demand arose for professionals who could represent or promote private interests in dealings with the Federal Government. Persons who had (or could acquire) specialized knowledge of the workings of government agencies, and develop effective contacts among the officers or employees of these agencies, could assist private groups or individuals whose interests were affected by the action of government agencies. The more influence they developed, the more effective they were in obtaining protection or preference for the interests of their clients. For all concerned, therefore, the critical question was: When do the actions of these specialists go beyond the point of providing legitimate constructive influence and become threats to the integrity and credibility of the governmental process?

Inevitably the results of this system became partisan political issues. In 1952, the Republican national election campaign theme called for "cleaning up the mess in Washington," and denounced the Truman Administration for its apparent tolerance of "influence peddlers." Throughout the 1950's, the Democrats, then out of the White House, condemned Republicans for the apparent ease with which the "Five Percenters" moved in and out of the high echelons of the executive branch with the aid of the Presidential staff. In the end, President Eisenhower's "Chief of Staff" resigned because of disclosures concerning gifts and other influence-related activities. In the 1960's, the administrations of both Presidents Kennedy and Johnson suffered the anguish of investigations that resulted in resignation of executive agency heads or Congressional staff members. And, in the 1970's, investigations of conflicts of interest within the Nixon Administration revealed acts of official misconduct which resulted in both resignations and prosecutions.

The beginnings of a new definition of morality in government may be seen in the legislative history of these years.[6] Senate hearings on

[6] *See, generally,* Manning, *The Purity Potlatch: An Essay on Conflict of Interest, American Government, and Moral Escalation,* 24 Fed. B.J. 239 (1964) [hereinafter cited as Manning]; Holifield, *Conflicts of Interest in Government-Contractor Relationships,* 24 Fed. B.J. 297 (1964) [hereinafter cited as Holifield]; Note, *The Federal Conflict of Interests Statute and the Fiduciary Principle,* 14 Vand. L. Rev. 1485 (1961); Philos, *The Conflict in Conflicts of Interest: The Rule of Law—The Role of Ethics,* 27 Fed. B.J. 7 (1967) [hereinafter cited as Philos]; *A Conflict-of-Interests Act,* 1 Harv. J. Legis. 68 (1964).

the nomination of Charles ("Engine Charlie") Wilson, a former high official of General Motors Corporation, to be Secretary of Defense, and the United States Supreme Court's decision in the so-called "Dixon-Yates Affair," illustrate this new standard. In the case of the Wilson nomination, the standard was satisfied when he divested himself of the securities he held in corporations having a substantial amount of defense business. In the Dixon-Yates affair, the standard was violated when one of the government officials who helped plan and negotiate a contract to build a power plant for the government was disclosed to have business connections with a financial institution that stood to benefit by marketing some of the securities issued to finance the work. The standard was satisfied by a court decision that the power plant contract was unenforcible.

In neither of these instances had anyone actually done anything illegal or demonstrably injurious to the public interest. In the Dixon-Yates case, the United States Supreme Court explained that

> It is . . . significant . . . that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. The omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, . . . This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.[7]

Thus, the worst that could be said in these cases was that the principals had economic interests, or stood to receive special rewards, that might, upon a certain set of assumptions about the conduct of their offices and about human nature generally, tempt them to act contrary to the public interest at some time in the future.

Dissenting opinions in the Dixon-Yates case argued that such a loosely delineated standard introduced needless and undesirable uncertainty into the statute.[8] Notwithstanding this objection, the present

[7] United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961), referring to the federal conflict of interest legislation in Act of June 25, 1948, ch. 645, § 434, 62 Stat. 703 (repealed 1962). A similar provision is now found at 18 U.S.C. § 208 (1970).

[8] *Id.* at 571 (dissenting opinion), stating: The Court's interpretation of § 434 introduces unnecessary and undesirable uncertainties into the statute. Instead of presenting the individual concerned or the trier of fact with a definite stan-

pattern of conflict of interest laws reflects a basic notion that public officers and employees stand in a special relationship to their work; and this demands that, in addition to avoiding actual corruption, the circumstances of their position must maintain the appearance of honesty and integrity.

Accordingly, modern State conflict of interest laws typically prohibit public officers and employees from having any direct or indirect personal pecuniary interest in the public business they transact, or from engaging in certain activities considered as creating circumstances that may lead to development of adverse interests. Such activities include:

1. Acceptance of gratuities or outside compensation of any kind in return for performance of official duties.
2. Acceptance of outside employment with any contractor or consultant that does work for the employee's agency.
3. Holding any interest in real property which his agency proposes to acquire for public use.
4. Acceptance of any loans, discounts, or services of any kind on account of business transacted with the officer or employee's agency.

In a few instances certain of these activities are not prohibited but are made subject to public disclosure of the officer's or employee's financial interest. Public disclosure of financial interests, as an alternative to statutory prohibition, has been used more frequently by federal agencies than by State governments, probably because of the Federal Government's greater use of short-term services of professionals from the private sector as advisors or consultants. However, statutory prohibition of retention of previous connections with private business interests or compulsory disclosure of the extent of these connections proved to be a major deterrent in recruiting such professionals. Therefore, in Pub. L. No. 87-849,[9] Congress established a new category of federal employees, called "Special Government Employees," covering consultants, advisors, and others having intermittent or occasional service

dard for determining whether a disqualifying interest of this kind is presented—the existence vel non of a commitment or undertaking between the primary and secondary contractors—the question is left at large. The opinion in this case indeed highlights the matter. For after apparently agreeing that a "mere hope" that First Boston might share in the financing of the power contract would not be enough, the Court goes on to describe that eventuality in a variety of ways—that there was "a substantial probability" of it; that it was "probable"; that it "seemed likely"; that it "stood a good chance" of coming to pass; and that it might simply follow from "the logic of the circumstances" as a "substantial probability."

Such uncertainties, inherent in the Court's view of the statute, is bound to cause future confusion in an area where the line of demarcation should be clear cut.

[9] 76 Stat. 1119, Oct. 23, 1962.

with a federal agency, and providing that when performing their services these employees must file general statements concerning their other employments and financial interests.

Financial disclosure is regularly required for full-time employees and officials of certain federal agencies that have a need for scrupulous elimination of all outside influences that might create adverse interests.[10] The Securities and Exchange Commission requires all new employees to list all securities held by them or their families, or trustees for their benefit. Also, all Commission employees must agree not to acquire or hold the securities of corporations (mainly utilities and holding companies) whose activities are regulated by the Commission. Internal Revenue Service employees involved in collection, assessment or investigation of taxes or determination of tax liability are required to file statements of personal net worth. And the Department of Agriculture requires submission of outside employment and financial interest statements for all senior officials, all consultants and advisors, and all employees of any grade having contractual or enforcement responsibilities.

Finally, reference should be made to codes of ethics and standards of official conduct for government officials and employees. State government has made more use of this device than has the Federal Government. Where they have been adopted, such statutory standards have been useful in dealing with functions involving high degrees of discretion for which there is little prospect of defining unacceptable activity in sufficiently precise terms to serve as criminal statutes. Also, they often have been the only device for extending modern concepts of controlling conflicts of interest into the legislative branch of State government, which has been conspicuously slow in applying to itself the principles it has prescribed for officers and employees of the executive branch.

Conflict-of-Interest Pressures in the Federal-Aid Highway Program

In its own way, the Federal-Aid Highway Program offers examples of the full spectrum of problems encountered in maintaining honesty and integrity in public service in the atmosphere of pressure created when large public works programs are carried forward at accelerated rates. An extensive body of Federal and State statute and administrative law dealing directly with the formation and performance of highway construction and procurement contracts is an outgrowth of this experience.

The background of this body of law is documented by the work of a special subcommittee of the House of Representatives' Committee on Public Works, established in 1959 to investigate and oversee the poli-

[10] HOLIFIELD, *supra* note 6, at 298.

cies, procedures, and practices involved in administration of highway construction contracts.[11] During the years that followed, the subcommittee's work continued, and it issued reports on various other phases of this program. These reports revealed many instances in which the States appeared unable to prevent conflicts of interest or misconduct on the part of contractors and public officials and employees. Reference to the subcommittee's findings is instructive for the purpose of indicating both the types of conflicts of interest involved in modern highway construction and contract administration, and the range of situations in which such conflicts may occur.

In a report issued after two years of investigations and hearings, the subcommittee summed up its findings concerning the principal conflict of interest problems in one State studied:

> The record before us has established as incontrovertible fact that State personnel accepted tens of thousands of dollars in money and other things of value from contractors performing work under prime and subcontracts involving more than $60 million worth of highway projects in which Federal-aid participated.
>
> . . . . The practices exposed are reprehensible. Their tenure extends over a period of years and the testimony pointedly shows that . . . [numerous States] have been infected by the same moral fungus. One contractor . . . stated that the evil has "snowballed" in recent years and that the increase in intensity may well be associated with the acceleration of highway construction ordained by the Federal-Aid Highway Act of 1956 and subsequent legislation.
>
> . . . . Admittedly the sharp and sustained increase in the number of highway projects and attendant huge expenditures for them afforded wider ranging opportunities for this cancerous activity, but the testimony . . . is conclusive evidence that these were, indeed, longstanding practices which could never be condoned.
>
> . . . . Under no circumstances can they be considered as the exercise of social amenities. In the acceptance of money and/or other things of value the State employees became obligated to the contractors thereby materially raising the level of their susceptibility to suggestions that would influence the performance of their official duties.
>
> Conversely, when State employees sought money, either as a gift or loan, or favors involving anything of value, the contractor had the alternative of either acquiescing or running the risk of complications during the progress of a project.
>
> The State road department employees who testified . . . insisted that the tender by the contractors, and the acceptance by them, of money and other things of value never influenced their judgment in any way in the conduct of their official duties.
>
> The contractors . . . were equally adamant that the disbursements were not for the purpose of inducing State personnel to approve substandard construction, but were intended to "expedite" the progress of the work and reward the State employees for performance of their official duties above and beyond normal expectations.
>
> Digesting the implications . . . of all the testimony, the subcommittee must conclude that the record before it effectively dissipates the probity of the positions advanced by the respective parties.[12]

[11] 76 Stat. 1119, Oct. 23, 1962.

Citing specific parts of the testimony it had received, the subcommittee noted incidents amounting to "a calculated campaign to use money and other things of value to promote subservience among State personnel."[13] Weekly cash payments delivered secretly in unmarked envelopes, fleet discounts on the purchase of automobiles and boats, interest-free loans, payment of moving expenses of State engineers transferred to jobs of supervising a company's contract, and installation of radios in State cars typified such campaigns.[14] Assessing these tactics, the subcommittee felt the evidence "most certainly lends support to the conclusion that some of the contractors, at least, were mighty close to inviting a charge of bribery or attempted bribery. An equally important corollary is a conclusion that some of the State personnel involved came perilously close to the possibility of extortion."[15]

Technically distinguishable from giving and accepting gifts, gratuities, and favors is the contractors' practice of hiring State employees as part-time employees or special consultants during off-duty hours. The subcommittee's 1961 report noted this.

> A few States, by statute, and many States, by administrative orders, either prohibit outright or severely limit acceptance of outside employment. . . . [In those States] that had neither statute nor administrative order . . . the contractors obviously took full advantage of it as the record so clearly demonstrates.
>
> Nearly all of the contractors used the device of hiring State employees to perform a variety of tasks productive of a steady trickle of side money.
>
> Although the testimony reveals that the requests for these extra jobs were initiated for the most part by the State employees themselves, there is also evidence that some of the contractors importuned the employees to engage in this extracurricular activity.
>
> . . . [C]onsiderable significance attaches to the fact that in practically every instance the extra work was being farmed out to those

[12] HOUSE COMM. ON PUBLIC WORKS, RELATIONSHIP BETWEEN ROAD CONTRACTORS AND STATE PERSONNEL IN FLORIDA, 3D INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON THE FEDERAL-AID HIGHWAY PROGRAM, H.R. DOC. NO. 1246, 87th Cong., 1st Sess. 81 (1961) [hereinafter cited as 3D INTERIM REPORT].

[13] *Id.* at 82.

[14] *Id.* at 81–82.

[15] *Id.* at 83.

State employees who exercised supervisory authority over projects being performed by the contractors.

The subcommittee finds no merit whatsoever in the pretensions of the contractors that they were actuated by consciousness of, and compassion for, purported financial distress of the State employees.[16]

Surveying the entire testimony on gifts and outside employment, the subcommittee summed up its conclusions as follows:

> The undesirable consequences of tolerating any longer the practices complained of here are most obvious. They unquestionably give the unscrupulous an unfair competitive advantage over any conscientious contractor who endeavors to live up to the terms of his contract and who tries to comply fully with the specifications. Secondly, the situation is created where contractors find themselves forced to compete against each other for the favor of the State engineers.
>
> The nonexistence of statutes and/or administrative directives against acceptance of gratuities or loans or the acceptance of outside employment led inevitably to such abuses . . . No reminder seems necessary that the Congress can and will enact legislation as a protection for the Federal investment in highways whenever State response to the need for corrective action is deemed to be not adequate.[17]

Criticism of the "demonstrated impotency" of the States' laws as they existed in 1960 applied with equal force to the procedures of the United States Bureau of Public Roads, which, the subcommittee pointed out, was charged with assuring that States participating in the Federal-Aid Highway Program had adequate powers, and were suitably equipped and organized to discharge the duties required under that program.[18]

Corrective action came promptly, and from several sources. Following the initial disclosures of the subcommittee regarding deficiencies in performance of contracts according to their terms and specifications, the American Association of State Highway Officials (AASHO) issued a guide for State officials regarding project procedures.[19] The guide specifically condemned the acceptance of gifts, gratuities, favors, loans, and performance of unauthorized outside employment or any compensated work for a contractor. Discovery of dishonesty or serious conflict of interest should be followed promptly by dismissal and notification of appropriate law enforcement offices of the State. Where a State did not have sufficient law to properly cope with the manner in which conflicts of interest occurred, the AASHO guide suggested that

[16] *Id.* at 85.

[17] *Id.* at 85–86.

[18] HOUSE COMM. ON PUBLIC WORKS, HIGHWAY CONSTRUCTION PRACTICES IN OKLAHOMA, 2D INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON THE FEDERAL-AID HIGHWAY PROGRAM, H.R. DOC. No. 364, 87th Cong., 1st Sess. 93 (1961) [hereinafter cited as 2D INTERIM REPORT].

[19] 3D INTERIM REPORT, *supra* note 12, at 1–2.

the State highway department, as a policy, require each employee to sign a statement that "any proof of conflict of interest that could be interpreted as adversely influencing the ethical and proper discharge of his duties, will be cause for immediate dismissal."[20]

Reaction to the subcommittee's findings also came from the Bureau of Public Roads. In May 1960, federal regulations relating to federal-aid highways were amended to prohibit government officers or employees from having financial interests in contracts being negotiated for highway projects or in the performance of such contracts, or from having any undisclosed interests in real property being acquired for highways.[21] The regulation specified that the States must enforce these requirements.

In most States these responsibilities were carried out by issuance of administrative orders; in a few cases the new prohibitions were enacted in legislation.

By mid-1961, therefore, the subcommittee reported that during 1960 and early 1961 some 26 States had issued administrative orders expressly forbidding acceptance of gratuities by highway officials or employees; 9 States had issued similar orders against acceptance of loans; and 12 States had imposed restrictions on acceptance of outside employment.[22] In most instances, the new State orders copied or followed closely the language of the federal regulation.

Mismanagement and Misconduct Problems in the Federal-Aid Highway Program

Although action to eliminate the most blatant forms of conflict of interest associated with personal adverse and pecuniary gain was prompt and generally effective in providing the legal authority needed by State officials, continuation of the subcommittee's investigations revealed other forms of mismanagement. Serious deficiencies were found in the materials and methods used by contractors, and in the system of inspections and supervision carried out by State and Federal engineers and administrators. Records of the daily construction progress—that is, weight tickets from hauling operations, payroll records, test sample results, and engineers' diaries—frequently were maintained in extremely slipshod fashion which defied proper management or auditing.[23] Laxity in supervision at jobsites extended from failure

[20] *Id.*

[21] 23 C.F.R. § 1.33 (1976).

[22] 3D INTERIM REPORT, *supra* note 12, at 86.

[23] HOUSE, COMM. ON PUBLIC WORKS, HIGHWAY CONSTRUCTION PRACTICES IN ARIZONA, 8TH INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON THE FEDERAL-AID HIGHWAY PROGRAM, H.R. DOC. No. 1494, 88th Cong., 2d Sess., 114 (1964). See also 2D INTERIM REPORT, *supra* note 18, at 85, where the occasional difficulties of even obtaining project records were described:

> The record before the subcommittee does show that discerningly selective termites ate their way through certain of the

to assign competent personnel and insist on diligent performance of work details to an apparent indifference to discoveries of major miscalculations or changed conditions.[24]

The effect was to build cost overruns into highway projects in their early stages. In many instances, however, these overruns were not brought to the attention of higher echelon State and Federal offices until the contractor's final voucher was submitted.[25] By such time, it was often extremely difficult for audits to reconstruct what actually had happened, since extra work devoted to re-doing faulty construction or unanticipated expense had been disguised in other categories of the project's costs.

How and why these practices were allowed to persist by State and Federal officials were equally difficult to understand. Investigations revealed some cases where contracts were awarded to businesses in which members of the contract-awarding body had financial interests. Other situations were found in which contractors engaged in collusion to restrain free competitive bidding by a system of rigged proposals which spread available contracts among the participating contractors.[26] The persistence of these practices by contractors was traced to a long-standing attitude of the Bureau of Public Roads inspectors and engineering staff, who regarded daily supervision of jobsite activities as the responsibility of the States. Bureau policy was based on an assumption that honesty and competence were not to be questioned; and a State's certification that a project had been built in substantial conformity to the approved specifications would not be challenged unless cause was received from a responsible outside source. As this policy became generally known, these sources frequently seemed to disappear, as might be expected.[27]

contractor's weight tickets that staff members wanted to examine, and that State records disappeared after being stuffed in an empty dynamite box at a time when the . . . resident engineer's office was being shifted from one location to another.

[24] Examples included failure to take corrective action after discovery of underground water, or, in another instance, discovery that the original specifications erroneously made no allowance for shrinkage of the subgrade of a project.

[25] 2D INTERIM REPORT, *supra* note 18, at 86–87.

[26] *Id.* at 91.

[27] The Subcommittee's blunt evaluation of this situation was as follows:

> No more eloquent testimony of the inadequacy of the Bureau's procedures is needed than the statement . . . that they would not uncover wrongdoing "unless there was information to lead us to go back of the (State's) certification." Much stress was laid throughout the hearings on the failure of anyone connected with the projects to seek out representatives of the Bureau and report what was going on.
>
> If this is intended as a defense of the Bureau policy then the premise is faulty indeed. . . . When wanton disregard for contractual obligations is as flagrant as that shown in the instant case, it most assuredly is not going to be uncovered by occasional 1–3 hour excursions or cursory shuffling of papers, and conversations with people . . . [involved] can hardly be expected to end with abject confessions of sins of both omission and commission. 2D INTERIM REPORT, *supra* note 18, at 96. See also HOUSE COMM. ON PUBLIC WORKS, HIGHWAY CONSTRUCTION PRACTICES IN THE STATE OF LOUISIANA AND RELATED MATTERS, 9TH INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON THE FEDERAL-AID HIGHWAY PROGRAM, H.R. DOC. No. 2184, 89th Cong., 2d Sess., 137 (1966) [hereinafter cited as 9TH INTERIM REPORT].

[28] *Id.* at 138.

[29] *Id.* at 139.

A few State highway departments had their own audit and investigation teams when the accelerated Federal-Aid Highway Program commenced in 1956. This number increased as the House Special Subcommittee's findings were released in 1960-61, and as the American Association of State Highway Officials continued its efforts to strengthen procedures for contract administration and project supervision. In 1964, however, the subcommittee still was compelled to report that certain serious forms of mismanagement and misconduct continued to exist on a wide scale:

> At best highway departments are unwieldly organizations and structured along lines where elements in the chain of command frequently are endowed with varying degrees of autonomy. Thus there is an ever-present danger that management-level directives may suffer during the process of diffusion to the operating level and laudable objectives may ultimately go unrealized. Conversely, the incidence of adverse happenings on the lower levels may never become known because of intervention or interception, deliberate or otherwise, at intermediary steps on the way to the top.
>
> Exposition of the manner in which quantities for all classes of materials were estimated, when coupled with evidence of what transpired during actual construction, conjures up some extraordinary connotations. Inaccuracies brought forth a variety of evils and substantial error leaned usually in the direction of overestimation. . . . [E]stimating frequently was being done by a person . . . who later would be chargeable with the responsibility for supervising the construction. There is an abundance of testimony that ways and means were found for a contractor to dispose of excess material during performance of the work. . . .
>
> The possibilities inherent in such a system opened wide the door to the type of "advantageous arrangements" between contractors and State personnel of the nature described earlier in this report.[28]

To the extent that lax audits and inspections encouraged the impression that the Federal Government was a benevolent and tolerant financier, rarely concerning itself with how project funds were actually spent, these practices encouraged conditions in which official mismanagement and misconduct could easily occur and go unpunished. Comparable practices on the part of contractors frequently went undetected or, in cases where they caused jobs to exceed the contract periods, were not penalized by assessment of liquidated damages.[29]

Coordination of Corruption Controls in the Federal-Aid Highway Program

As the work of the special subcommittee on the Federal-Aid Highway Program continued, its findings regarding *what* forms of misconduct and conflict of interest were prevalent in the program became less important than its conclusions as to *why* they occurred and persisted. Interim reports early in the subcommittee's investigations strongly criticized the Bureau of Public Roads' engineering and administrative personnel for not asserting and protecting the Federal Government's interests more aggressively.[30] Later reports, acknowledging that both the States and the Bureau had responded to their problems by stronger measures, offered observations concerning the root causes of the program's problems.

One factor was a pervasive overconfidence on the part of the public highway agencies and the construction industry in 1956 regarding their capacity to accelerate the pace and multiply the size of the highway construction program on the scale demanded with adequate protection of the public investment against the dangers of fraud and mismanagement. As matters turned out, when the accelerated program began it proved almost impossible to catch all the errors and deficiencies in the plans, designs, and estimates submitted by the States. The extensive commitment of Bureau engineers to the tasks of correcting and revising these shortcomings cut heavily into the engineering time available for project inspections. Under these conditions, also, inspection techniques tended to become very general.[31]

Coupled with the public highway agencies' overconfidence, and adding to the atmosphere it created in the construction program, was a generally accepted emphasis on quantity of money spent and miles built.

[30] 2D INTERIM REPORT, *supra* note 18, at 96; 3D INTERIM REPORT, *supra* note 12, at 84–5; HOUSE COMM. ON PUBLIC WORKS, HIGHWAY CONSTRUCTION PRACTICES IN THE STATE OF NEW MEXICO, 5TH INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON THE FEDERAL-AID HIGHWAY PROGRAM, H.R. DOC. NO. 1819, 87th Cong., 2d Sess., 86 (1962) [hereinafter cited as 5TH INTERIM REPORT].

[31] 9TH INTERIM REPORT, *supra* note 27, at 136–137, stated:

> The analysis . . . shows clearly that, for more than 4 years after the present massive Federal-Aid Program was set in motion by the Congress in 1956, the State's highway department continued to wallow through a slough of ineptitude and inefficiency.
>
> . . . .
>
> The division engineer strongly implied his "engineering judgment" left him no choice but to concentrate on this "area of greatest weakness." Consequently his entire staff of engineers spent as much as 10 days before lettings to put State plans in a condition permitting Bureau authorization to the State to go ahead with contract awards. Even so, he reported, it was "seemingly impossible" to catch all the errors or deficiencies. . . . The declaration of the Bureau's division engineer . . . finds support in the testimony.

The subcommittee's 1966 interim report noted the implications of this attitude as follows:

> It is not the first time that the subcommittee has encountered the mistaken philosophy that vast importance somehow is attached to statistics stressing impressive mileage of roadway placed in any given year, even though quality of construction gets secondary attention.
>
> This philosophy ignores the point proved over and over by the subcommittee that weakness at any point in the administration of the highway program breeds contemporary weakness in another. . . .[32]

Another contributing factor in some cases was the determined effort of unscrupulous parties to acquire influence over highway officials in order to corrupt their decisions regarding award of contracts and other favors. Where the pressures of rapidly expanding programs and personnel temporarily created instability in a State highway department's channels of control, or in the relationship between the department's chief administrative officer and a politically appointed policy-making commission, the tactics of corrupt practices often succeeded, and in some instances, for considerable periods of time.[33] Fortunately, however, this form of corruption is one of the easiest to eliminate, because it is heavily dependent on the personal influence of a few key personalities, who generally are vulnerable to prosecution and publicity.

More deeply rooted in the history and character of the State and Federal highway agencies, was an attitude of gentlemanly trust in each other. One observer, not associated with the special subcommittee, described it this way:

> It is typical of most state highway departments that their history is relatively brief. . . . For many years they remained small compared to the vast organizations that have developed recently, and, being small, personal friendships developed between supervisor, and subordinates were close; the relationship continued for many years, and each did his own job without extensive written regulations and policies. Regulation of personal behavior from friend to friend is something that rarely occurs because one friend does not expect chicanery of another. . . . Similarly, when opportunities for substantial flim-flams developed, trust that had been growing over many years prevented the supervisor from suspecting his subordinate, and checking closely on him. It was difficult for one friend to investigate another's activities, especially where the investigator's pocketbook is not affected; and, where he is not trained in making investigations, his personal emotions interfere with his performance.[34]

[32] *Id.* at 137.

[33] 5TH INTERIM REPORT, *supra* note 30, at 85.

[34] Jones, "Conflict of Interest," *Amer. Ass'n of State Highway Officials, Proceedings of Committees, 1962,* 29, 34 (1962) [hereinafter cited as JONES].

Finally, the root causes of corruption and mismanagement in the highway program were viewed as including an institutional problem—one of making the working relationship between the Federal and State governments effective and efficient. In a subcommittee report prepared in 1966, after all the investigations of construction practice and contract administration had been completed, this view was discussed as follows:

> With our concern for what is wrong, we must go back to the genesis of the State-Federal relationship, widely referred to as a "partnership." The use of that term, on the one hand, reflects the warm bond that does exist between the two groups and which has been a material factor for over 50 years in making the program work and in producing its great accomplishments. They have done these things by working together, and, in that sense, it truly is a partnership.
>
> On the other hand, the term probably has not lent clarity to the difficulties that do exist in the relationships between the States and the Federal Government. In addition to its partnership aspects the relationship at times is that of two parties on opposite sides of a contract. This distinction is real and should not be overshadowed or distorted in the zeal to accomplish, together, the purpose of the bilateral contract and the relationship.
>
> . . . . [E]ach has certain obligations to fulfill to the other. Each is depending on the other to meet those obligations so the program can be carried out in the manner provided for by the legislation. We have a valuable national asset in the body of law which has been developed during this country's history, and the clear definitions of legal relationships and duties it provides is one of the things which makes for an orderly society.[35]

Relating this concept to some of the complaints heard during its investigations, the subcommittee became more specific:

> It seems that too often the view is held that the States are only satisfying some vague bureaucratic red tape when meeting Federal requirements and that affirmative action taken by the Bureau to secure compliance is unwarranted interference in State affairs.
>
> We are not advocating action which would place a strain on the Federal-State relationship. However, noncompliance, whether brought about by ignorance or design, constitutes a serious breach of the promises given under the contract and should be considered as such if there is ever to be a healthy relationship and any order is to be brought to an accounting dilemma of such serious proportions.[36]

[35] H. Rep Federal-State Highway Management Practices and Procedures, Report of the Special Subcommittee on the Federal-Aid Highway Program, H.R. Doc. No. 1506, 90th Cong., 2d Sess., 108–109 (1968).

[36] *Id.* at 109.

THE EVOLVING DEFINITION OF "CONFLICT OF INTEREST"

A Rationale for Statutory Construction

Reference to nineteenth century American statutes on corrupt practices of government officials has already noted that this body of law was limited to specific acts resulting in unfair private gain at public expense or destruction of public confidence in the government. None of these statutes, however, was concerned with what is now called "conflict of interest" legislation, or used this term in defining a standard of morality in government business. Until the twentieth century, the term "conflict of interest" was used mainly by lawyers, trustees, and other professional fiduciaries for whom it had a special history and meaning.

The process of evolving a definition of "conflict of interest" for governmental officials began in the federal law in 1917, when a general statute prohibiting outside compensation for performance of governmental duties was enacted by Congress.[37] Subsequently, other provisions were added to create a small but highly specialized body of law aimed at limiting the risk that federal officials would become involved in situations having the potential of harm to the public interest.[38] State legislation for similar purposes remained relatively rare until the 1950's; and, insofar as the States' highway programs were concerned, it was not until the 1960's that comprehensive coverage of all the major forms of conflict was achieved.

One formative influence on the development of this coverage was the work of the House of Representatives' Special Subcommittee on the Federal-Aid Highway Program. Another important factor was the work of various governmental and professional groups that addressed the problem of formulating a rationale for dealing with the forms of interest conflict which were considered unacceptable. One of the most widely quoted reports of this series was prepared and published by the New York City Bar Association in 1960.[39]

At its outset, this report distinguishes certain types of activities in which the conflicts between public and private interests have been given definitions in the criminal law. Thus, the employee of a mint who pockets part of the coins he makes is guilty of theft—an obviously unacceptable act regardless of whether it is done by a public employee or a private individual. Also, the government contracting officer who accepts money from a contractor in exchange for the award of a contract is guilty of accepting a bribe, and the contractor is guilty of bribery—

[37] Act of Mar. 3, 1917, ch. 163, 39 Stat. 1106 prohibiting outside compensation for performance of governmental functions or services.

[38] 18 U.S.C. §§ 201–224. Supp. V 1975.

[39] Special Comm. on the Federal Conflict of Interest Laws, Ass'n of the Bar of the City of New York, Conflict of Interest and Federal Service (Cambridge, Mass.: Harvard Univ. Press, 1960).

acts that are unacceptable when they involve public officials and public contracts even though they would not be unlawful if only private individuals or corporations were involved. In both of these cases, specfiic acts were performed with harmful or corrupt intent. In contrast, the situations covered by the new generation of conflict of interest laws in the 1950's and 1960's did not demand overt acts aimed at raiding the public treasury or securing unfair advantage. An unacceptable situation might exist whenever there was in fact a conflict between the public interest in proper administration of government business and a public official's personal economic interest. Looking more closely at this, the Bar Association report went on to say:

> A conflict of interest does not necessarily presuppose that action by the [public] official favoring one of these interests will be prejudicial to the other, nor that the official will in fact resolve the conflict to his own personal advantage rather than the government's. If a man is in a position of conflicting interests, he is subject to temptation however he resolves the issue. Regulation of conflicts of interest seeks to prevent situations of temptation from arising.[40]

Unlike the situations that can be fitted into the definitions of theft and bribery, this rationale does not demand that any acts occur regarding a specific transaction. The wrong arises entirely out of the undesirably inconsistent position of an official, both in his relationship to the outside parties involved, and to his governmental employer.

Summing up, the Bar Association report stated:

> The offense is an offense arising out of special status. The whole is greater than the sum of the parts: a subjectively innocent gift combined with a subjectively innocent official performing an innocent act can combine to constitute an offense against conflict of interest principles.
>
> Regulation of conflicts of interest is regulation of evil before the event; it is regulation against potential harm. These regulations are in essence derived, or secondary—one removed away from the ultimate misconduct feared. The bribe is forbidden because it subverts the official's judgment; the gift is forbidden because it may have this effect, and because it looks to others as though it does have this effect. This potential or projective quality of conflict of interest rules is peculiar and important. We are not accustomed to dealing with law of this kind. It is as though we were to try to prevent people from acting in a manner that may lead them to rob a bank, or in a manner that looks to others like bank robbery.[41]

The growth of restraints which operate in anticipation of wrongdoing might be viewed as a sign that morality in American public service has improved to the point where the most flagrant forms of official corruption have been brought under control, and improprieties of the second-

[40] *Id.* at 3–4.

[41] *Id.* at 19–20.

ary order now can be dealt with. In the long view, however, it should be noted that when such gains are made, they have their own particular costs. In the case of American conflict of interest laws, these costs have been greatest in connection with the recruitment of able professional manpower to serve in governmental positions.

Retention of a legislative approach which holds that the public and private sectors can and should be maintained exclusive of each other has been criticised as being out of touch with contemporary conditions of government and business.[42] Public officials cannot preoccupy themselves with the performance of their offices and employments so completely as to remove all possibility of conflicting interests; nor is it desirable that they lose all concern for and interest in the way the actions of government and the decisions of their offices may affect them personally. Moreover, the rationale of applying anticipatory restrictions in order to avoid the creation of relationships which may be inconsistent with the public interest may fail to heed one of the apparent lessons of the common law in dealing with corruption in government. Common law rules rested on two basic notions: inconsistency with the public's interest and welfare (with emphasis on the actuality of the inconsistency), and a resulting personal pecuniary benefit to those involved in the inconsistent action. Although the two elements counterbalanced each other to some extent, the over-all result produced a standard that could be applied with more definiteness than exclusive reliance on inconsistency.[43]

Various explanations have been offered for the evolution of contemporary legislation aimed at preventing conflicts of interest in government. Some have suggested that the origins of these laws may have been in an adaptation of the fiduciary duties of persons occupying positions of trust in private dealings; others have seen in them a reflection of the American political process and the enduring folklore of that system.[44] All these considerations aside, however, the definition of conflict of interest which emerged in the early 1960's has provided a basis for legislation and administrative regulations addressing a variety of specific activities and relationships. These have included (1) acceptance of gratuities, gifts or other rewards, (2) acceptance of loans, (3) acceptance of outside employment during governmental service, (4) post-employment activities which may involve representation of contractors in dealing with certain government agencies, and (5) acquisition or retention of undisclosed personal interests in real property which is being acquired by public agencies, or ownership of interests in businesses which have contracts with public agencies.

[42] PHILOS, *supra* note 6, at 7.

[43] *Conflict of Interest,* 70 W. VA. L. REV. 400 (1968); Note, *Conflict of Interest: State Government Employees,* 47 VA. L. REV. 1034 (1961).

[44] MANNING, *supra* note 6, at 239.

Borderline Areas of Contemporary Conflict of Interest Problems

Statutes or administrative regulations dealing with the foregoing list of situations presently exist in the federal law and in most States. Yet this extensive body of law sometimes is criticized as not reaching some practices which currently present serious threats to maintaining honest and impartial public administration. One which may easily be visualized in connection with highway programs has been called "organizational conflict of interest." [45] These occur where shortages of time, personnel, or technical skill lead a government agency to turn over to an outside contractor some of the tasks of management, planning, or research and development for which the agency is ultimately responsible. When the agency selects one contractor from among a group of competitors and awards it a contract to perform a particular task, the award may carry with it the right (indeed, the necessity) to have access to information of an official nature concerning future governmental plans or intentions, or of a proprietary character regarding other competitors. Knowledge obtained during a government assignment may be used directly to the contractor's advantage following termination of the assignment, or in a variety of indirect ways. It may also be used to the disadvantage of a competitor either by disclosure to a third party or by directly attacking a weakness revealed by the information.

These undesirable uses of information originally compiled for the public purposes of a governmental agency may be prevented, during the period of the employment or contract, by legislation or administrative regulations against the contractor's inconsistent use or unauthorized disclosure of what he learns.[46] After termination of the employment or contract, a certain amount of protection may also be achieved on the theory that the information was "public property" when acquired, and it retains this status until and unless officially made public. However, detection and proof of the violation of this restriction, or proof of use to the detriment of a competitor is extremely difficult, and enforcement might well prove to be impractical.[47]

Other abuses of governmental position can result in injury to third parties when an official uses his title, stationery, or other symbols of position to influence others in transactions in which the government is not directly involved. With the same subtlety, an official's innocent efforts to assist a friend or former business associate while that official is temporarily in public service may constitute a form of conflict of interest.

[45] *See, e.g.,* Yarmolinsky, *Organizational Conflicts of Interest,* 24 FED. B.J. 309 (1964), describing issues raised by Department of Defense practices.

[46] Specific legislative and administrative restrictions on unauthorized disclosure of information obtained through governmental service are noted in Summary of State Laws and Administrative Regulations in the Appendix of this paper.

[47] PHILOS, *supra* note 6, at 12-14.

None of the present conflict of interest statutes cover such activities. Nor do they reach another level of abuses which involve neglect of duty, deferral of public duty in favor of personal convenience, and diversion of government work time and public resources to personal outside activities.[48] In these instances, the complaint cannot be that an official or employee is attempting to serve two masters, but rather that he is serving no master except himself. His unacceptable conduct is his exploitation of the public for his personal benefit or satisfaction. Additionally, it may well turn out that some third party, rather than the government, is the one who suffers most from this conduct.

Can these borderline areas of contemporary conflict of interest problems be reached by legislation dealing with so-called "misconduct of public officials" and governmental codes of ethics? To date, the chief examples of such measures have not advanced the technique of assuring honesty and diligence in public service beyond the level reached in 1960. Statutes enacted to punish or prevent official misconduct approach their objective by enumerations of acts that are regulated or prohibited very much as conventional conflict of interest laws do. Although called "standards" of ethical conduct, these enumerations in most cases merely add to the list of activities that are *malum prohibitum,* and leave it to the initiative of courts and administrative boards to go beyond these limits and denounce as *malum in se* those additional situations which constitute unacceptable abuse of official position or power.[49]

The evolution of a rationale for controlling conflicts of interest in governmental affairs, and particularly in public works programs, is incomplete. It continues to be carried on, as it has been throughout its history, as a fragmented process, in need of an integrating over-all concept. There is evident need to enlarge the rationale of current Federal and State law so that it defines the roles of all the pertinent statutes dealing with the total problem of assuring integrity and honesty in public service. What is needed is a rationale that correlates these functions and techniques with recognition that modern State governments, like the Federal Government, have now become so large and complex that the possibility of conflicts of interest exist in almost every facet of the public's business, and call for an equally wide approach to their control.[50]

[48] JONES, *supra* note 34, at 29.

[49] *E.g.,* UTAH CODE ANN. § 67-16-1 to 14 (1975 Supp.); MICH. STAT. ANN. § 4.1701(121), (123), (124), (127), (Supp. 1976), Public Officers' and Employees' Ethics Act.

[50] PHILOS, *supra* note 6, at 23. The need for a rationale is no less urgent for local government, as discussed in Freilich & Larson, *Conflicts of Interest: A Model Statutory Proposal for the Regulation of Municipal Transactions,* 38 U.M.K.C. L. REV. 373 (1970); *Conflict of Interest,* 70 W.VA. L. REV. 400 (1968); Note, *Conflicts of Interest of State and Local Legislators,* 55 IOWA L. REV. 450 (1969); Comment, *Conflict of Interests and the Municipal Employee,* 20 BUFFALO L. REV. 487 (1971);

BRIBERY AND RELATED CRIMES

Bribery of Public Officials and Employees

Laws against bribery, attempted bribery, and conspiracy to commit bribery express the uniform condemnation of acts which blatantly subvert justice, destroy confidence in governmental officials, and turn over public resources to private groups or individuals for their personal profit. All States have enacted anti-bribery laws applicable to both givers and receivers, and the *United States Code* covers bribery of federal officials. In a substantial number of States, the application of general bribery statutes to highway construction programs has been extended and strengthened by legislation and administrative orders referring to officials responsible for these programs.

Although the language of these bribery statutes varies in detail, the gist of the law is clear and uniformly accepted. At common law, and, later, by statute, bribery was understood to be the giving of anything of value to the holder of a public office or other person officially performing public duties, with the corrupt intention of thereby influencing him to perform his public duties in accordance with the desires or interests of the giver.[51] At common law, bribery was a misdemeanor, and initially was associated with subversion of the judicial process. Later it was applied to legislative and executive processes. Modern statutes have broadened the application of the law to include all categories of public officials and employees and increased the punishment for bribery to felony status.

Rules of statutory interpretation require that criminal laws be construed strictly; but the broad scope of the language used in typical State bribery laws has resulted in bringing a wide range of acts within reach of the prosecutor. Moreover, common law bribery has not been abrogated by enactment of legislation, and remains as a supplementary basis for prosecution.[52]

Most of the litigation over interpretation of bribery statutes is centered in determination of the scope of four key features: the class of persons subject to the law; the action called for by the bribe; the intent of the parties; and the consideration given or offered as the bribe.

Note, *Remedies For Conflicts of Interest Among Public Officials in Iowa,* 22 DRAKE L. REV. 600 (1973).

[51] R. PERKINS, CRIMINAL LAW, at 469 (2d ed., New York: Foundation Press, 1969) 469 [hereinafter cited as PERKINS]. *See, also,* State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

[52] State v. Womack, 4 Wash. 19, 29 P. 939 (1892). *But see,* State v. Quinn, 35 N.M. 62, 290 P. 786 (1930), holding that an equipment engineer was not a "State officer" under the statute; therefore inability to prosecute under the statute did exclude prosecution for a common law offense.

Persons Subject to Bribery

Cases delineating the class of persons subject to being bribed originally had difficulty with the distinction between "public officers"—which was the usual phrase used by legislative draftsmen in these cases—and other types of governmental employees.[53] Eventually it became customary for legislation to specify both "officers" and "employees," or use an all-inclusive term, such as "public servant," and indicate its scope in a statutory definition.[54] With these devices, current anti-bribery legislation can readily be construed to include all who serve as de jure or de facto "officers," or who serve government agencies in other capacities as employees, consultants or agents.[55]

The crime of bribery may be committed even though the recipient of the bribe is actually not a public officer or employee. If the offeror believes he is dealing with a duly authorized public official or employee who can exercise the influence that the offeror desires, and all other elements of the crime are present, the offense may be completed by making an offer to him.[56]

The Object of Bribe

Parallel to expansion of the classes of public employees that may be subject to bribery, State and Federal statutes have gradually expanded the list of actions or omissions that may be the objects of bribery. Thus, it is customary to see legislation specify that the official action which is the object of bribery may include votes, decisions, judgments, opinions, appointments, awards, and "other proceedings" which are pending, or may become pending before the public servant in his official capacity. The circumstances under which such duties are imposed upon a public official need not be specified by statute, but may arise through the instructions of a supervisor to an employee or agent,[57] or through custom associated with the exercise of a particular public office or function.[58] It is essential, however, that the bribe be given for the perform-

[53] Brusnighan v. State, 86 Ga. App. 340, 71 S.E.2d 698 (1952), holding that clerical personnel of State office were not "holders of an office of government" under bribery statute. *See, also,* State v. Duncan, 153 Ind. 318, 54 N.E. 1066 (1899), gravel road engineer appointed by county commissioners; State v. Aldridge, 25 Conn. Super. 257, 202 A.2d 508 (1964), independent appraiser retained by State; People v. Drish, 24 Ill. App. 3d 225, 321 N.E.2d 179 (1974), member of city planning commission.

[54] State *ex rel.* Davis v. Oakley, 191 S.E.2d 610 (W.Va., 1972) "public servant."

[55] Commonwealth v. Funk, 314 Ky. 282, 234 S.W.2d 957 (1950), extending statute to all whose official conduct in any way is connected with government, or are "charged with a public duty."

[56] State v. London, 194 Wash. 458, 78 P.2d 548, 115 A.L.R. 1255 (1938), where de facto road supervisor actually lacked legal authority to purchase road materials. *See, also,* Wells v. State, 174 Tenn. 552, 129 S.W.2d 203, 122 A.L.R. 948 (1939).

[57] State v. Emmanuel, 42 Wash. 2d 799, 259 P.2d 845 (1953).

[58] Kable v. State, 17 Md. App. 16, 299 A.2d 493 (1973).

ance or omission of an act that is part of an official duty associated with the office involved, rather than one which is purely private or personal in nature.[59]

The requirement that bribery must be for the purpose of corruptly influencing action on "a pending matter" has sometimes presented difficulty in applying it to policy-making officials or high level executive officers. So, in connection with a charge of offering to pay the Governor of a State a kickback on the State's purchase of certain roadbuilding materials from the offeror, it was held that, although it was not the Governor's function or practice to purchase such materials, he was nevertheless charged by law with the duty of seeing that the State's laws were faithfully executed. Therefore, an offer to the Governor on this matter involved a matter "pending before him" within the meaning of the statute.[60] A similar result has been reached in situations where solicitation of a bribe involved a governmental employee whose advice and recommendation would be influential, even though he had no authority to make a final decision on the matter in question.[61]

Intent of the Parties

The intent to exert a corrupting influence on official action is essential to constitute the crime of bribery. The specific intent required to sustain a charge of bribery must call for inducing a particular government official or employee to corruptly perform or omit the performance of some official duty.[62]

A complete understanding and agreement among all parties to the transaction need not be proved under most State statutes. These laws customarily prohibit the offering, giving, soliciting and accepting of bribes as separate offenses. Thus, one party may be prosecuted, whereas the other quite properly may never be charged.[63] Proof of intent to give a bribe may be shown by any means indicating the giver's understanding that the payment is tendered in order to corrupt or wrongfully influence a public officer or employee to act in his official capacity. Proof of intent to solicit or accept a bribe may be shown by evidence that official action which is to follow will be wrongfully influenced by receipt of the bribe. In either case, the intent must be directed to a specific action or matter pending, or due to be acted upon in the future by the recipient.

[59] People v. Gokey, 57 Ill. 2d 433, 312 N.E.2d 637 (1974); State v. Smith, 252 La. 636, 212 So. 2d 410 (1968); State v. Papalos, 150 Me. 370, 113 A.2d 624 (1955); State v. Cooney, 23 Wash.2d 53, 161 P.2d 442 (1945).

[60] State v. Simon, 149 Me. 256, 99 A.2d 922 (1953).

[61] United States v. Heffler, 402 F.2d 924 (3d Cir. 1968), *cert. den. sub. nom.* Cecchini v. United States, 394 U.S. 946, 89 S.Ct. 1280, 22 L.Ed.2d 480 (1969).

[62] United States v. Miller, 340 F.2d 421 (4th Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.Me., 1958).

[63] People v. Wallace, 57 Ill. 2d 285, 312 N.E.2d 263 (1974); People v. Incerto, 180 Colo. 366, 505 P.2d 1309 (1973); Williams v. State, 178 Wis. 78, 189 N.W. 268 (1922); State v. Dudoussat, 47 La. Ann. 977, 17 So. 685 (1895).

This intention to secure a benefit directly from the corrupting influence of a payment to a public official is a distinguishing element of bribery. This benefit may be anything reasonably regarded as an economic gain or advantage; and may include such subtle benefits as extensions of a line of credit, or information of an advantageous investment opportunity. It includes benefits to family members and others in whose welfare the recipient of the bribe is interested. But, whatever its form, the bribe must be the influencing factor in the corrupt action that is to follow. It is not bribery, for example, if an interested citizen offers to buy lunch for a public servant, unless he intends that this favor will influence the public servant's act. Intentional acts to get a public servant's ear to persuade or influence him to act in a particular manner do not constitute bribery, although they may be subject to prosecution for improper influence or an unlawful gift under other statutes.[64]

Gifts not associated with specific matters pending for action or potentially referrable to the recipient may be considered as threats to the integrity of governmental processes, but they cannot be prosecuted under common law or statutes which limit the subjects of corruption to particular types of official action. In the history of the Federal-Aid Highway Program, the inability to prosecute for such gift-giving under bribery laws led to development of new forms of control. These controls, to be discussed more fully later, were aimed at the conduct of outsiders who sought to systematically bestow on key government officers and employees a series of favors and benefits, none of which was decisive regarding any action, but all of which together had the effect of creating an unarticulated general bias in favor of the giver. The dangers associated with offers or actions of this type prompted the development of the body of special law regulating conflict of interest and official misconduct which occurred in the 1960's.

The Form of the Bribe

The form and amount of the consideration offered or accepted as a bribe are not essential elements of the crime.[65] Money, property, services, discounts, and all types of personal favors have been held sufficient to constitute bribes.[66] Statutory language which speaks of "any-

[64] Searcy and Patterson, *Practice Commentary*, following 4 TEX. PENAL CODE § 36.02 (Vernon 1974).

[65] Commonwealth v. Funk, 314 Ky. 282, 234 S.W.2d 957 (1950); State v. Emmanuel, 49 Wash. 2d 109, 298 P.2d 510 (1956); Zalla v. State, 61 So. 2d 649 (Fla. 1952); Commonwealth v. Hayes, 311 Mass. 21, 40 N.E.2d 27 (1942).

[66] Smith v. State, 241 Ind. 1, 168 N.E.2d

thing of value" has been construed by a subjective test of whether the consideration offered was actually accepted by the offeree as being sufficient for the purpose. The bribe may not have any actual present value, but only an apparent value, or a future value. It need not be direct; but it may be hidden under the guise of a sale, wager, payment of debt, or any other manner designed to cover the true purpose of the parties.[67]

Penalties for Violation of Bribery Statutes

In prescribing penalties for bribery, Federal and State statutes have raised this offense from a misdemeanor at common law to felony status. Additionally, many States provide that persons convicted of bribery shall be removed from office and/or disqualified from holding public office.[68] Forfeiture of bribe money or property which may come into the hands of the State in connection with the prosecution of a bribery charge generally has been upheld by courts in the absence of statutory provision for its return.[69]

More complex questions arise, however, in connection with efforts to recover funds paid by public agencies under contracts made under the influence of bribes. Such contracts are void as against public policy, whether or not they are so declared by statute; and only in the most unusual situations are the terms of these contracts enforceable against a public agency. At the same time, where a public agency has paid out funds for performance of a contract later found to be void because of bribery, it is customarily possible for public agencies to obtain the return of funds paid to the contractor, or recover the profits made on the contract.[70]

199 (1960), sharing sales commissions; State v. Webb, 74 Ohio L. Abs. 414, 140 N.E.2d 802 (Ct. App. 1956), exchange of automobiles not a bribe if fair according to market value of cars; Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923), sex; Hoeppel v. United States, 66 App. D.C. 71, 85 F.2d 237 (D.C. Cir. 1936), *cert. den.* 299 U.S. 557, 57 S.Ct. 19, 81 L.Ed. 410 (1936) promissory note; State v. McDonald, 106 Ind. 233, 6 N.E. 607 (1886), price discount; People *ex rel.* Dickinson v. Van De Carr, 87 App. Div. 386, 84 N.Y.S. 461 (1903), political advantage; People v. Vincilione, 17 Cal. App. 513, 120 P. 438 (1911), sharing future legal fees.

[67] PERKINS, *supra* note 51, at 469. Also, LA. REV. STAT. § 14:118 (Supp. 1976).

[68] *E.g.*, KAN. STAT. ANN. § 21-3901 (1974), "forever disqualified from holding public office or public employment in this State"; W.Va. CODE § 61-5A-9 (Supp. 1976), "forever disqualified from holding any office or position of honor, trust or profit of government in this State."

[69] Womack v. Maner, 227 Ark. 789, 301 S.W.2d 438; 60 A.L.R.2d 1271 (1957); United States v. Sprinkles, 138 F.Supp. 28 (E.D. Ky. 1956), deals with disposition of bribe money, property, or assets pursuant to direction of court under 18 U.S.C. § 3612 (1970). See, also, OKLA. STATS. ANN. ch. 21 § 402 (Supp. 1975), calling for forfeiture of money, property, or assets used in violation of anti-bribery laws. WIS. OP. ATT'Y GEN. 731 (1932), advising that money used in attempted bribe of public official was forfeited to State.

[70] RHYNE, MUNICIPAL LAW, 260-261.

Related Offenses

At common law, an unsuccessful offer of a bribe, or a series of acts intended to constitute a bribe, but falling short of an offer and acceptance, was subject to prosecution as attempted bribery. The distinction was relatively easy to maintain when the scope of these crimes was limited to common law definitions.[71] As legislation redefined bribery, and listed separately the acts offering, agreeing, giving, soliciting, accepting and receiving, the common law distinction became less important. Prosecutions under such statutes have been able to secure the objectives of anti-bribery laws without disturbing the historic and theoretical relationship between attempts and completed crimes.[72]

Closely related to situations which constitute attempts are those which involve conspiracies to violate anti-bribery laws. A typical situation amounting to a bribery conspiracy is cited where consummation of the crime is frustrated because of the incapacity of the principal actor to perform the necessary acts.[73] Conspiracy situations also may occur where the parties negotiate and agree on a plan to offer or solicit a bribe but do not actually attempt to tender or solicit payment. Where conspiracy is defined by statute as a separate crime, the gist of such laws is to prohibit the act of "agreeing to give or receive" a bribe.[74]

The requirement that public officials report violations of anti-bribery laws is customarily found in rules and regulations promulgated for public employees by agency heads; and relatively rarely is it enacted as legislation. Illinois' statute illustrates the typical treatment of this requirement by the legislature.[75]

CONFLICT OF INTEREST IN PUBLIC CONTRACTS

Scope of Regulatory Legislation

As the function of the public sector has expanded, the needs of governmental agencies for goods and services have created a multibillion dollar market for contractors in the private sector. Common law rules designed to prevent conflicts of interest among public officials in a

[71] Rudolph v. State, 128 Wis. 222, 107 N.W. 466 (1906); State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933).

[72] Commonwealth v. Baker, 146 Pa. Super. 559; 22 A.2d 602 (1941); Ford v. Commonwealth, 177 Va. 889, 15 S.E.2d 50 (1941); State v. Soward, 262 Minn. 265, 114 N.W.2d 276 (1962); Craig v. State, 244 So. 2d 151 (Fla. Dist. Ct. App. 1971).

[73] Wilson v. United States, 230 F.2d 521, (4th Cir. 1956), *cert. den.*, 351 U.S. 931, 76 S.Ct. 789, 100 L.Ed. 1460 (1956); People v. Jacoboni, 34 Mich. App. 84, 190 N.W.2d 720 (1971). See also, Annot., 74 A.L.R. 1110 (1931); Annot., 131 A.L.R. 1322 (1941).

[74] People v .Wettengel, 98 Colo. 193, 58 P.2d 279, 104 A.L.R. 1423 (1935); People v. Phillips, 76 Cal. App. 2d 515, 173 P.2d 392 (1946).

[75] "Any public officer, public employee or juror who fails to report forthwith to the local State's Attorney any offer made to him in violation of Section 33-1 com-

simpler setting proved unequal to the task of dealing with such conflicts in the many forms they took in this market. Accordingly, there has developed an extensive body of legislation designed to eliminate or minimize situations where public officials have personal interests in the contracts they negotiate and administer for their governmental agencies.

Current Federal, State, and local laws to control personal interest in public contracts have accepted the common law premise that public officials should not be permitted to have any private interests or activities which may conflict or appear to conflict with their performance of official duties honestly and without bias. The difficulty with strict application of this rule is that modern governments cannot function entirely isolated from the business and professional community around them. The impact of this is particularly clear in local government, where many officers and employees have personal financial interests in enterprises which do business with their agencies. For them, the common law demand for total absence of interest would threaten with cancellation a great many contracts made by local governments or their special purpose units and boards. The membership of these units consists of local business and professional people, for whom public service often is a part-time commitment; and complete divestiture of their outside economic interests is completely impractical. Thus, a secondary effect of strict application of the common law concept would be to drive away from government many who must be relied on to make essential contributions to public service.

Practical considerations therefore have led legislators to draft conflict of interest laws with care to see that day-to-day problems of governmental business can be accommodated without denying the common law view of a public office as a public trust. In this respect, two features of the laws relating to conflicts of interest in public contracts deserve notice: One is the manner in which the prohibited areas of conflict are described; and the other is the provision for exceptions to the prohibition.

With allowance for substantial differences in style, draftsmen of State laws controlling conflicts of interest have sought to prohibit State officers or employees from being directly or indirectly interested financially in any contract made by them in their official capacity on behalf of the State. Most of such laws apply to all State officers and employees generally, and many apply to local levels of government and special units or categories of employees.[76]

In a few States, legislation speaking directly to the officers and em-

mits a Class A misdemeanor." ILL. ANN. STAT. ch. 38 § 33-2 (Supp. 1976).

[76] CAL. GOV'T CODE, § 1090 (Deering 1973), applies to members of the legislature, State, county, district, judicial district, and city officers and employees.

ployees of State highway agencies supplements these general laws.[77] Missouri's law illustrates a specific approach, as follows:

> No member of the commission, engineer, or other person appointed or employed by the commission shall, directly or indirectly, have any pecuniary interest in, or act as agent for, the sale of road or bridge building material, equipment, tools, machinery or supplies, or in any contract for the construction or maintenance of state highways or bridges, or the financing thereof, or in any performance bond or workman's compensation or any other insurance furnished to the commission, or insurance furnished to any person . . . contracting with the commission.[78]

In contrast, the comparable provisions of Wyoming's highway law are much more general, and provide that it is unlawful:

> [T]o become in any manner interested, either directly or indirectly, in his own name or in the name of any other person or corporation, in any contract, or the performance of any work in the making or letting of which such officer may be called upon to act or vote.[79]

In those States which do not have specific legislation for highway contracts, most accomplish the same regulatory objective through administrative orders; and in most of these cases, the States have used as their model the language of the Federal Highway Administration regulation which states:

> No official or employee of a State or any other governmental instrumentality who is authorized in his official capacity to negotiate, make, accept or approve, or to take part in negotiating, making, accepting or approving any contract or subcontract in connection with a project, shall have, directly or indirectly, any financial or other personal interest in any such contract or subcontract. No engineer, attorney, appraiser, inspector or other person performing services for a State or a governmental instrumentality in connection with a project shall have, directly or indirectly, a financial or other personal interest, other than his employment or retention by a State or other governmental instrumentality, in any contract or subcontract in connection with such project.[80]

Direct and Indirect Interests

Reference to both "direct" and "indirect" interests, and other choices of terms describing the scope of these laws, indicate that the prohibition against personal interests in public contracts is intended to be sufficiently comprehensive to penetrate the substance of the transactions

[77] Alabama, Arkansas, Florida; Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.

[78] MO. ANN. STAT. § 226.090 (Supp. 1976).

[79] WYO. STAT. § 9-680 (Supp. 1975).

[80] 23 C.F.R. § 1.33 (1976).

in question, even where they may be disguised. In this respect, little difficulty has been experienced in applying conflict of interest rules to situations in which the offending official, as an owner, partner or other participant, shared directly in the profits of a government contract.[81] Designation of the contract as an adjunct to a public official's regular authorized compensation does not change the nature of an unlawful interest.[82]

Where a public officer or employee's connection with a government contractor is in the form of stock ownership, however, the broad range of possible fact situations makes application of the law more difficult. On principle, a public officer's interest as a stockholder is a prohibited interest under the statutes;[83] but in the application, courts have not agreed on criteria for these indirect interests, and factual differences often influence results. Thus, where the director of a State agency was charged with having contracted to obtain automotive supplies and services for the agency's motor vehicles, conviction was supported by the fact that defendant was not only a substantial stockholder, but also served as secretary of the company providing the supplies.[84]

From the early cases involving corporate stockholding, it was recognized that, realistically, the owner of only a small portion of the stock of a large corporation has very little, if any, individual or personal interest

[81] *See:* Trainer v. City of Covington, 183 Ga. 759, 189 S.E. 842 (1937); Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933); FLA. OP. ATT'Y GEN. (1950) 384, small abstract company owned by employee of State road department.

[82] *See,* Nampa Highway Dist. No. 1 v. Graves, 77 Ida. 381, 293 P.2d 269 (1956), where taxpayers prevented payment of claims submitted by highway district commissioner for additional compensation for services performed by them as superintendents of bridge construction, and superintendent of noxious weed control, stating, at 293 P.2d 271–2:

> The contract of employment in question interferes with the unbiased discharge of respondents' duties to the public as commissioners and places them in a dual position inconsistent with their duties as trustees for the public and all such contracts are invalid even if there be no specific statute prohibiting them. The law invalidating such a contract is based on public policy and the contention that there was no loss to the Highway District is no defense.
>
> It is the relationship that the law condemns, and not the result. . . . A public official cannot exercise the dual position of buyer and seller and the commissioners in question cannot sell their services to the District and receive or collect moneys from the District not authorized by law for the work or services so performed.

[83] 63 AM. JUR. 2d *Public Officers and Employees,* § 316 (1922).

[84] State v. Robinson, 71 N.D. 463, 2 N.W.2d 183, 140 A.L.R. 332 (1942). See, also: IOWA OP. ATT'Y GEN., Mar. 5, 1970, advising that a corporation in which a city engineer is a majority stockholder is prohibited from bidding on highway construction and maintenance contracts in any county in the State; Yonkers Bus, Inc. v. Maltbie, 23 N.Y.S.2d 87 (Sup. Ct. 1940); People *ex rel.* Schenectady Illuminating Co. v. Board of Sup'rs, 166 App. Div. 758, 151 N.Y.S. 1012 (1915).

in contracts made by corporate management.[85] Nor does he have any discernible influence on or benefit attributable to particular contracts. Yet, the attitude of the courts in applying conflict of interest statutes to these situations generally has been that the amount of a public official's stockholding did not determine whether it came within the statute. Upon examination, apparent exceptions to this rule generally are explainable by considerations other than the smallness of the stockholding involved.[86]

Other relationships between public officials and government contractors which have been viewed as constituting prohibited interests in contracts include employment and debtor–creditor status. Employment of a public officer or employee by an enterprise which has a contract with that employee's agency has been held to constitute a prohibited interest.[87] This result is not affected by whether the employee is compensated by salary or commission, or whether he is compensated at all.[88]

Among other business relationships that have been held to constitute prohibited indirect interests are those of surety and creditor of a contractor doing business with the government.[89] The reasoning is similar to that which has sustained findings of interest in employment situations, and has been criticized as illustrating the uncertainty surrounding tests for indirect interest in public contracts.[90]

[85] State v. Kuehnle, 85 N.J.L. 220, 88 A. 1085 (Ct. Err. & App. 1913).

[86] Downs v. Mayor and Common Council, 116 N.J.L. 511, 185 A. 15 (Ct. Err. & App. 1936); Washington County v. Froehlich Mercantile Co., 198 Wis. 56, 223 N.W. 575 (1929); Davidson v. Sewer Improvement Dist., 182 Ark. 741, 32 S.W.2d 1062 (1930); Furlong v. South Park Comm'rs, 340 Ill. 363, 172 N.E. 757 (1930). See also IND. STAT. ANN. § 8-13-1-11 (1973), providing that "Direct or indirect personal interest as used in this section shall not include the ownership of stock of corporations which is traded on a public exchange."

[87] People v. Elliott, 115 Cal. App. 2d 410, 252 P.2d 661 (1953); People *ex rel.* Pearsall v. Sperry, 314 Ill. 205, 145 N.E. 344 (1924); Grady v. City of Livingston, 115 Mont. 47, 141 P.2d 346 (1943); Mumma v. Town of Brewster, 174 Wash. 112, 24 P.2d 438 (1933); Panozzo v. City of Rockford, 306 Ill. App. 443, 28 N.E.2d 748 (1940).

[88] Yonkers Bus, Inc. v. Maltbie, 23 N.Y.S.2d 87, 90 (Sup. Ct. 1940), arguing that since a public servant "devoted his time and energy to the progress of the corporation, and actively participated in its affairs, it could readily be found he had an interest . . . within the prohibition of the statute, although perchance he was not a stockholder and, during his occupation of public office, received no salary or other money."

[89] People v. Watson, 15 Cal. App. 3rd 28, 92 Cal. Rptr. 860 (1971), *cert. den.* 404 U.S. 850, 92 S.Ct. 84, 30 L.Ed.2d 88 (1971); Tuscan v. Smith, 130 Me. 36, 153 A. 289 (1931); Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095 (1928); Commonwealth *ex rel.* Whitehouse v. Harris, 248 Pa. 570, 94 A. 251 (1915); FLA. OP. ATT'Y GEN. (1958) 058–212. *But see,* Collinsworth v. City of Catlettsburg, 236 Ky. 194, 32 S.W.2d 982 (1930). *See also,* 73 A.L.R. 1352 (1931).

[90] Note, *Conflict of Interest: State Government Employees,* 47 VA. L. REV. 1034 (1961); Note, *Conflict-of-Interest of Government Personnel: An Appraisal of the Philadelphia Situation,* 107 U. PA. L. REV. 985 (1959).

Agency and consultant relationships also have been held to give rise to prohibited interests, as in the case where a bond house was retained to prepare the prospectus for a municipal bond issue, act as the issuing city's fiscal agent, and serve as consultant on financial matters. When the bond house sought to invest in the city's bond issue, it was held to be barred because of a prohibited conflict of interest.[91]

Interests in subcontractors or materialmen to government contractors have not been regarded as prohibited by conflict of interest laws,[92] but always are subject to scrutiny for the possibility such second-tier contracts are not genuine.

Public officials may be charged with personal interest in government contracts because of family relationships to the contractor or his organization. A few States have provided legislative standards for these situations. For example, Tennessee law specifies that:

> No contract shall be let to or made with any person in which any officer of the [State highway] department is interested, directly or indirectly, or with whom any officer of the department is knowingly related, either by blood or marriage within the fourth degree, computing by the civil law.[93]

Where legislation does not provide guidance, the courts have determined the significance of family relationship in the context of other factors in the case. In the majority of reported cases, family kinship alone has been treated as not creating a disqualifying interest under conflict of interest statutes.[94] However, husband–wife business relationships have been scrutinized carefully, and where separation of the parties' interests is not genuine, conflicts of interest may be identified in the substance of the transaction.[95]

Special relationships based on friendship, or membership in professional or social organizations may also be the basis for finding a prohibited personal interest in a public contract. As with family kinship, such associations ordinarily do not involve the prospect of pecuniary benefit which is necessary to constitute a prohibited conflict of interest.[96]

[91] City of Miami v. Benson, 63 So.2d 916 (Fla. 1953); United States v. Mississippi Valley Generating Co., 364 U.S. 520 81 S.Ct. 798, 5 L.Ed.2d 268 (1960). *But see* Pawchak v. Long, 91 Ill. App. 2d 218, 234 N.E.2d 85 (1968), holding that corporate consultant which had made surveys, maps and plans, and recommended contractor for supply was an independent contractor, and not an officer within meaning of statute.

[92] IND. OP. ATT'Y GEN. No. 18, (1959).

[93] TENN. CODE ANN. § 54–117 (1968); see also, ARIZ. REV. STATS., § 38–503. Criteria sometimes are provided in administrative regulations. E.g., Ky. Dep't of Highways Order 57805 (Jan. 12, 1959).

[94] 63 AM. JUR. 2d, *Public Officers and Employees*, § 318; Annot., 74 A.L.R. 792 (1931).

[95] *Compare:* Nuckols v. Lyle, 8 Ida. 589, 70 P. 401 (1902); Woodward v. City of Wakefield, 236 Mich. 417, 210 N.W. 322 (1926); Thompson v. District Board of School Dist. No. 1, 252 Mich. 629, 233 N.W. 439 (1930); Githens v. Butler County, 350 Mo. 295, 165 S.W.2d 650 (1942).

The Nature of the Interests Prohibited by Law

Whether accruing directly or indirectly, the benefits which characterize the interests prohibited by State statutes must, as a rule, be of a pecuniary nature, and must be personal to the public official involved. This interpretation has followed from the nature of the circumstances —that is, commercial transactions—and the customary use of such terms as "pecuniary" and "financial" when describing the interest banned by statute. Where statutory definitions are provided, they verify that personal monetary benefits or returns are intended.[97] In 1972 an Arizona court summed up what appears to be the consensus of the courts that have ruled on this matter,

> We do not believe . . . that the legislature intended that the word "interest" for purposes of disqualification was to include a mere abstract interest in the general subject or a mere possible contingent interest. Rather, the term refers to a pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling or bias.[98]

Benefits of a nonpecuniary nature can, of course, be visualized in circumstances associated with the award of public contracts. These may involve friendship, family relationships, business good will, or concern for the welfare of others. Such interests seldom have been regarded as being prohibited for the protection of public contracts.[99] However, where the circumstances indicate that a public official's interest, even though small and indirect, may deprive his agency of his complete fidelity, or place him in a compromising position in the exercise of his official judgment, it is recognized as prohibited.[100]

Conflict of interest statutes customarily speak to interests existing at the time a contract is awarded. Interests held prior to that time, but

[96] Quackenbush v. City of Cheyenne, 52 Wyo. 146, 70 P.2d 577 (1937) (dictum); Furlong v. South Park Comm'rs, 340 Ill. 363, 172 N.E. 757 (1930) (dictum); Stone v. Salt Lake City, 11 Utah 2d 196, 356 P.2d 631 (1960), *cert. den.* 365 U.S. 860, 81 S.Ct. 827, 5 L.Ed.2d 823 (1961).

[97] CONN. GEN. STAT. ANN. § 1–68 (Supp. 1976); MASS. ANN. LAWS ch. 268A, § 7 (1968); MICH. STAT. ANN. § 4 1701 (121) (Supp. 1976); N.J. STAT. ANN. § 52:13D–13(g) (Supp. 1976); MD. EXEC. ORDERS OF THE GOVERNOR, 14A *Code of Ethics*, art. II, 6–7.

[98] Yetman v. Naumann, 16 Ariz. App. 314, 492 P.2d 1252 (1972).

[99] Comment, *Conflict of Interest in Public Contracts in California*, 44 CALIF. L. REV. 355 (1956); Comment, *Conflicts of Interest in Government Contracts*, 24 U. CHI. L. REV. 361 (1957).

[100] Terry v. Bender, 143 Cal. App. 2d 198, 300 P.2d 119 (1956), where a mayor's interest was in securing payment of a warrant for a special attorney.

divested in anticipation of participating in the negotiation and award, are not regarded as affecting official judgment concerning the contract.[101] Interests acquired after the award may be considered equally compatible with the unbiased discharge of the owner's official duties; and usually such interests have taken the form of subcontracts, assignments, investments, or employment as part of the contractor's staff. When these interests are created in good faith, and the official's duties do not involve continuing management or monitoring of the contract, courts have been inclined to allow them without obligation.[102] Subsequently acquired interests always are subject to scrutiny for the possibility that conspiracy may have existed at the time of contract award.

Statutory Exceptions

When the existence of a prohibited interest is shown, courts have tended to apply the conflict of interest penalties rigidly, even where the evidence shows that the contract may be advantageous to the public or that it was awarded after having satisfied the normal procedures of competitive bidding. Over the years, the application of the conflict of interest laws relating to public contracts has acquired a reputation for toughness and strict adherence to the common law precept that it was of primary importance to prevent situations of temptation from occurring in public life.[103] Over the years, also, there developed an evident need for governmental bodies to relax the legal standards within carefully defined spheres of activity where a certain amount of conflict of interest could be accepted. The response to this need has taken several forms, and comprises an important aspect of current statute law.

One technique for relieving the rigor of the statutory prohibitions involves establishing special definitions for key terms. Statutes in which this technique is used create areas of permissible conflict of interest by providing that only those personal interests which are substantial are prohibited, or, alternatively, that the prohibition does not apply to remote interests.

In several instances, States that regulate only substantial interests do not provide statutory definitions of this term, leaving it to administrative judgment to decide case-by-case whether the circumstances threaten the public interest.[104] In others, the key terms are self-explanatory or else understandable in context.[105] Most precise and

[101] Heffernen v. City of Green Bay, 266 Wis. 534, 64 N.W.2d 216 (1954).

[102] *See,* City of Oakland v. California Constr. Co., 15 Cal. App. 2d 573, 104 P.2d 30 (1940).

[103] 24 U. CHI. L. REV. *supra* note 99, at 366.

[104] COM. GEN. STAT. ANN. § 1–68 (Supp. 1976); Wis. Constr. & Materials Manual, § 1.06(9).

[105] COLO. REV. STAT. § 18–8–308 (1973), "potential conflicting interest," existing where public servant is director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest; HAWAII REV. STAT. § 84–15 (Supp. 1975), "controlling interest" or property with value of $1,000 or more; IND. STAT. ANN. § 8-13-1-11 (1973), "personal interest" not to include ownership of stock traded on public exchange; PA. GOVERNOR'S EXEC. ORDER 1974–6, "adverse interest," existing where official is a stockholder, partner, member, agent, representative or employee of contractor; TEX. REV. CIV. STAT., art. 6252.9b, § 2 (Supp. 1976), "substantial interest."

[106] MD. EXEC. ORDER OF GOVERNOR, 14A, art. II; MASS. ANN. LAWS ch. 268A, § 7 (1968); MICH. STAT. ANN. § 4.1701 (132) (Supp. 1976); N.J. STAT. ANN. § 52: 13D-19 (Supp. 1976); N.M. STAT. § 5-12-7 (1974); N.Y. PUBLIC OFFICERS LAW § 73 (4) (McKinney Supp. 1975); UTAH CODE ANN. § 67-16-3(11) (Supp. 1975).

[107] KAN. STAT. ANN. 46–229 (Supp. 1975).

mechanical in their application are the State laws which draw a line between permitted and prohibited interests by reference to dollar or percentage amounts of the contractor's business owned by a public official.[106] These amounts vary from 1 to 10 percent of a business, and often have been stated in the alternative with other measurements of involvement.

For example, Kansas' law describes a "substantial interest" as any of the following:

> (a) The ownership by an individual or spouse, either individually or collectively[,] of a legal or equitable interest exceeding five thousand dollars ($5,000) or five percent of any business, whichever is less.
> (b) The receipt in the preceding calendar year . . . of compensation which is . . . included as taxable income on Kansas income tax returns . . . in an aggregate amount of one thousand dollars ($1,000) from any business or combination of businesses.
> (c) The receipt in the preceding calendar year . . . of gifts or honoraria having an aggregate value of five hundred dollars ($500) or more from any person other than a relative of such individual.
> (d) The holding of the position of officer or director of any business, irrespective of the amount of compensation received. . . .
> (e) If an individual's compensation is a portion or percentage of each separate fee or commission paid to a business . . . such individual has a substantial interest in any client or customer who pays fees or commissions . . . from which . . . such individual received an aggregate of one thousand dollars ($1,000) or more in the preceding calendar year.[107]

Arizona's statute illustrates the use of this same technique to define "remote interest" as any of the following:

> (a) [A] nonsalaried officer of a nonprofit corporation.
> (b) [A] landlord or tenant of the contracting party.
> (c) [A]n attorney of a contracting party.
> (d) [A] member of a nonprofit cooperative marketing association.
> (e) The ownership of less than three percent of the shares of a corporation for profit, provided the total annual income from dividends,

including the value of stock dividends, from the corporation does not exceed five percent of the total annual income of such official or employee, and any other payments made to him by the corporation do not exceed five percent of his total annual income.

(f) [A]n officer in being reimbursed for his actual and necessary expenses incurred in the performance of official duty.

(g) [A] recipient of public services generally provided by the . . . department, commission, agency, body or board of which he is an officer or employee, on the same terms and conditions as if he were not an officer or employee.[108]

In addition to furnishing indicia by which substantial and remote interests may be identified, State statutes concerned with exceptions to the conflict of interest rule generally provide that disclosure of conflicting interest is essential to giving it legitimacy. They variously provide that interest conflicts which are remote or not substantial under the statutory criteria must be reported to the Secretary of State, Attorney General, the contract agency, or the head of the agency where the officer or employee serves.[109] Most also provide that after disclosing his conflicting interest the officer concerned must abstain from voting on the award to the contractor in question, or on any actions subsequently taken regarding that contract.[110] As an additional safeguard of the public's interest in these cases, competitive bidding procedures are made mandatory.[111]

A further aspect of the provision for exceptions to the application of statutory conflict of interest rules is seen in the allowance of categorical exceptions for certain types of contracts. Recognizing that modern procurement procedures, utilizing prequalification, public notice, and competitive bidding can go far in preventing favoritism and corruption in public contracts, some State laws provide for categorical exception of contracts awarded through this process.[112] A second class of transaction which is widely recognized as an exception, by both courts and legislatures, includes contracts for property or services for which the price or rate is fixed by law.[113] Sometimes called the "public utility exception," it is based on the theory that when dealing with a supplier who is the sole source, and regulated in setting his rates, the effect of personal interest on the part of the contracting agency is minimized. A third category of contracts often excepted from the conflict of interest rules are those executed under emergency conditions.[114] Typically limited in their scope to procuring supplies or services needed for meeting essential public requirements during a limited time period, these contracts represent risks which the government elects to take in order to provide measures which the community needs more urgently. A final category of exceptions seen in State conflict of interest laws is one which reflects an arbitrary minimum dollar amount below which the rules against personal interest are not applied. The range of minimum levels varies from $25 to $3,000.[115]

In some instances, the statutory exceptions also reflect administrative practices of the State for which special safeguards have been developed. In Maryland, Wisconsin, and Wyoming, exceptions are made for contracts made in connection with the selection of banks to act as depositories of State funds. In this instance formulas are set forth in enabling legislation to prescribe the allocation of funds among eligible depositories. New Mexico and Wisconsin list insurance contracts on State facilities and personnel among the excepted categories; and Michigan includes contracts made between political subdivisions of the State, provided the conflicting interest is fully disclosed during the negotiations.

Penalties and Civil Remedies

Violation of statutory rules prohibiting officials from having personal financial interests in public contracts is subject to criminal penalties as a misdemeanor.[116] Frequently these laws also provide for mandatory or discretionary disciplinary action against an offending official by removal or discharge from office.[117] In some instances, statutes specify

[108] ARIZ. REV. STAT. § 38-502 (1974).

[109] Secretary of State: ARIZ. REV. STAT. § 38-542 (1974); KAN. STAT. ANN. § 46-248 (Supp. 1975); UTAH CODE ANN. 67-16-7 (Supp. 1975); Attorney General: COLO. REV. STAT. § 18-8-308 (1973); Contracting Agency: CAL. GOV'T CODE 1091 (Deering Supp. 1976); MASS. ANN. LAWS ch. 268A, § 7 (1968); Ethics Commission: CONN. GEN. STAT. ANN. § 1-76 (1976); N.J. STAT. ANN. § 52:13D-19 (Supp. 1976); MD. EXEC. ORDER OF GOVERNOR, 14A, art. II.

[110] E.g., ARIZ. REV. STAT. § 38-503 (1974).

[111] E.g., N.M. STAT. § 5-12-7 (1974).

[112] E.g., KAN. STAT. ANN. § 46-233; N.J. STAT. ANN. § 52:13D-19 (Supp. 1976); N.M. STAT. § 5-12-7 (1974); OKLA. STAT. ANN. § 74-1405 (1976).

[113] E.g., KAN. STAT. ANN. § 46-233 (Supp. 1975); MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. II. *See also,* Capital Gas Co. v. Young, 109 Cal. 140, 41 P. 869 (1895), gas services; Mayor and Common Council of the City of Kokomo v. State *ex rel.* Adams, 57 Ind. 152 (1877), railroad; Stroud v. Pulaski County Special School Dist., 244 Ark. 161, 424 S.W.2d 141 (1968), truck hauling.

[114] Crass v. Walls, 36 Tenn. App. 546, 259 S.W.2d 670 (1953); Thompson v. Lone Tree Township, 78 N.D. 785, 52 N.W.2d 840 (1952). *See also,* 24 U. CHI. L. REV. *supra* note 100, at 365.

[115] E.g., UTAH CODE ANN. § 67-16-7 (Supp. 1975); N.M. STAT. § 5-12-7 (1974); WIS. STAT. ANN. § 946.13(2) (Supp. 1975).

[116] A few exceptions should be noted: TENN. CODE § 54-118 (1968), declares it a felony for highway department officers to enter into contracts in which they have prohibited interests. MINN. STAT. ANN. § 16.33 (1960), declares violation of interest rules a "gross misdemeanor."

[117] ARIZ. REV. STAT. § 38-506 (1974); Idaho Highway Dep't Regulations, 18-023.040; N.M. STAT. § 5-12-14 (1974); N.Y. PUBLIC OFFICERS LAW § 73(10) (McKinney Supp. 1975). OKLA. STAT. ANN. § 74-1406 (1976); TEX. CIV. STAT., art. 6252-96, § 6 (Supp. 1976); UTAH CODE ANN. § 67-16-12 (1975).

that these penalties apply only where the offense is willfully (or knowingly) and intentionally committed.[118] These modifications of the common law's strict approach to deterring conflicts of interest are concessions to criticism of the unfairness and hardships involved in penalizing public officials who may have acted in good faith without knowledge of their potentially adverse interests. In a similar spirit provisions for dismissal of persons guilty of violating conflict of interest statutes have been put on a discretionary rather than mandatory basis, thus providing opportunities to consider the circumstances of each case individually before disciplinary action is taken.[119]

No consensus exists among the States as to the approach preferred for securing compliance with rules against conflict of interest. The deterrent effect of strict enforcement of these laws has been seriously questioned, and, in California, it was deemed desirable to amend the law to make knowledge and criminal intent necessary elements of the crime.[120]

The contractor and governmental agency also have a keen interest in how the law treats violations of the conflict of interest rule as it bears on civil remedies available to them. Two differing views may be seen in the statutes. One view, consistent with the common law approach to this subject, holds that where a conflict of interest occurs, the contract in question is illegal and absolutely void.[121] Subsequent ratification by the contracting agency or efforts to validate the transaction will not alter the status of the contract in the absence of special statutory provisions.[122] As a consequence, the contractor cannot sue the government on the contract or on the usual bases of equitable relief.[123] The contracting agency, on the other hand, may recover what it may have paid under the contract without giving back the value received.[124]

The toughness of this rule has been influential in persuading some States not only to recognize categorical exceptions to the definition of prohibited interests, but also to declare that violation of rules regarding conflict of interest only results in making contracts voidable. In such cases, the extent of recovery by a contractor or by innocent third parties depends upon the terms and scope of the statutory exception.[125]

[118] CAL. GOV'T CODE § 1091 (Deering Supp. 1976); N.Y. PUBLIC OFFICERS LAW, § 73(10) (McKinney Supp. 1975); UTAH CODE ANN. § 67-16-12 (Supp. 1975).

[119] N.Y. PUBLIC OFFICERS LAW § 74(4) (McKinney Supp. 1975).

[120] *See:* Kaufmann and Widiss, *The California Conflict of Interest Laws,* 36 S. CALIF. L. REV. 186 (1963); 44 CALIF. L. REV. *supra* note 99; 24 U. CHI. L. REV. *supra* note 99.

[121] E.g., IOWA CODE ANN. § 314.2 (Supp. 1976); ME. REV. STAT. ANN. § 17-3104 (Supp. 1976); TENN. CODE § 54-117 (1968); WIS. STAT. ANN. § 946.13(3) (1958).

[122] Trainer v. City of Covington, 183 Ga. 759, 189 S.E. 842 (1937); Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020 (1924).

[123] Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933); Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095 (1928).

[124] Miller v. City of Martinez, 28 Cal. App. 2d 364, 82 P.2d 519 (1938).

[125] E.g., MASS. LAWS ANN. ch. 268A, § 15 (1968), provides that prohibited interests are grounds for avoiding, rescinding or cancelling contracts, and authorizes action "on such terms as the interests of the county and innocent third persons require." MICH. STAT. ANN. § 4.1701 (123) (Supp. 1976), authorizes party entering into a voided contract in good faith without knowledge of prohibited interest to recover the reasonable value of benefits conferred on the government.

CONFLICT OF INTEREST: PROHIBITED PRACTICES

Scope and Purpose

By virtue of their common law origins and subsequent evolution in statutes, there is considerable agreement concerning the rules relating to bribery, together with its related crimes, and restriction of public officials' personal interest in government contracts. Less consensus exists with respect to the series of statutes aimed at preventing the creation of special personal relationships between public servants and government contractors which might result in improperly or unduly influencing these public servants in the performance of their official duties. In the case of these statutes, the wide variety of their language is a reflection of a diversity of scope and approach to the objective of preventing conflicts of interest in public service.

The chief distinguishing characteristic of these laws is their purpose of preventing the occurrence of situations in which conflicts of public and personal interest may arise. In this respect they differ from the anti-bribery laws, which deal with specific acts aimed at exerting corrupt influence on a public official for the purpose of inducing him to perform or omit some action in violation of his lawful duty. In addition, they differ from another category of offenses customarily called "official misconduct," which covers actions in the nature of misfeasance, malfeasance, and nonfeasance, together with other forms of wrongdoing performed in public office. In contrast, the practices prohibited by conflict of interest statutes are not, in themselves, immoral, unethical or dangerous. When occurring outside government, they are not illegal, or even objectionable; but when practiced by public officials and government contractors or persons seeking government contracts, they endanger the public interest because of the pressure, both actual and suspected, that they impose on officers and employees in carrying out their duties.

One practice that is frequently prohibited by law includes the giving and receiving of gifts, gratuities, loans, and other forms of benefits with monetary value. Viewing them as a group, one commentator has

summed up their relation to other forms of conflict of interest law as follows:

> On the more flagrant level [the giving and receiving of private compensation] has been termed bribery and extortion. Short of this, the misconduct in office and other conflict of interest statutes apply. To come within the prohibition the interest must be one incurred by reason of the officer's public position. Normally this requirement would exclude gifts for purely social reasons; however, if the gift would have a tendency to reflect upon the officer in the public image, a conflict of interests will probably arise. Again it is the appearance of corruption, which the public mind is very quick to attribute to a public servant, that is sought to be avoided. It is therefore immaterial whether the gift was tendered before, in conjunction with, or subsequent to a specific act. Nor must there be a specific act. "Buying" the friendship and good will of a public official through gifts is sufficient. (Citations omitted.) [126]

Just as the types of these prohibited practices are diverse, so are the forms which the anticipated conflict of public and private interest may take. Sometimes a gift or gratuity may be given with the hope that it will bring the donor unauthorized benefits through some official act by a public officer or employee. However, it may be equally valuable to the donor merely to receive information about the activities or plans of an official or his agency, or the use by a friendly official of his position and title to help secure preferential treatment or special consideration with other governmental offices. As a result of the cordiality obtained through the giving of gifts and gratuities, public officials may be persuaded to use their influence with subordinates or coordinate officers in behalf of the interests of their friends. Commenting on this, it has been observed that:

> The favors may be small, but favors have the tendency to become reciprocal. This area is one of a real conflict of interest and is difficult to pin down because of the innumerable forms it may take. The jocular standard that "If you can't eat, drink, or smoke it in one day, don't take it," is too lax. . . . The standard is certainly much more stringent for government employees than in private business; and this is rightly so since values are not identical, and the effect of misbehavior in business is not so damaging to society as it is by a government officer.[127]

Acceptance of Gifts, Gratuities, and Loans

The use of gifts, gratuities, and other forms of private compensation to establish bases for preferential treatment of private interests was highlighted as a serious and prevalent problem in the findings of the House Special Subcommittee investigating the Federal-Aid Highway

[126] 47 U. VA. L. REV. *supra* note 43, at 1038.

[127] *Id.* at 1038–1039.

Program in the early 1960's. As a result of these disclosures, most State highway departments promulgated administrative rules for their department personnel, and many State legislatures enacted new or stronger standards for the conduct of public officials and government contractors. The pattern of these measures developed without the unifying influence of a federal law, for, unlike the cases of bribery and conflict of interest in public contracts, neither Congress nor the Federal Highway Administration laid down any standards applying generally to the giving and receiving of gifts and gratuities. A comparative view of this body of State law may, however, be obtained by reference to examples illustrating the various approaches used, and some of the problems encountered in their implementation.

Parties Subject to Regulation

With few exceptions, State statutes establishing prohibited practices are addressed to the public officials who are the actual or intended recipients of gifts, gratuities, and similar rewards. Typically, these statutes adopt one of three approaches in defining the group of officials subject to the law. Most apply to all public officers and employees of the State.[128] Many, however, impose their prohibitions only on certain classes of public officials who, by reason of their functions, are considered to be particular targets of systematic gift-giving by outsiders seeking government business. Such statutes generally focus their restrictions on officials "authorized to procure material, supplies, or other articles by purchase or contract, or to employ service or labor." [129] Finally, about one-third of the States have enacted laws applying exclusively to personnel of the State highway department or local roadbuilding agencies.

In the few instances where this approach is not used, State legislatures have attempted to apply their prohibitions to those who give, or offer to give gifts and gratuities as well as those who receive them.[130] This desire has carried over into the administration of conflict of inter-

[128] Generally the words "officers and employees" are used, although occasionally "ministerial officers" are used to cover those officers whose duties are entirely ministerial rather than discretionary. "Public servants" is the broadest term used in these statutes, and includes all who serve in any capacity on government boards, commissions, or similar groups. See Searcy and Patterson, *Practice Commentary,* following TEX. PENAL CODE § 36.08 (Vernon 1974).

[129] VT. STAT. ANN. tit. 13, § 1106 (1974); VA. CODE § 18.2-444 (1975); W. VA. CODE § 61-5A-6 (Supp. 1976), specific "public servant in any department . . . exercising regulatory functions or conducting inspections or investigations." ARK. STAT. § 76-222 (1957), members of State highway commission, engineers, agents or other employees thereof; MO. ANN. STAT. § 226.180 (Supp. 1976), member of highway commission or any employee thereof.

[130] 4 TEX. PENAL CODE § 36.07-09 (Supp. 1976); N.C. GEN. STAT. § 14-353 (1969); IOWA CODE ANN. § 739.11 (1950); MASS. ANN. LAWS ch. 268A, § 2 (1968); DEL. CODE ANN. tit. 11, § 1205 (1974).

est laws; and State highway departments occasionally have addressed directives to contractors, dealers, and suppliers doing business with the department, seeking their cooperation in discontinuing their practices of sending gifts to departmental personnel.[131]

Form of Gift or Gratuity

Recognizing that the influences that this legislation is designed to control are subtle ones, which are engendered by a variety of situations, the statutes customarily describe the prohibited acts in suitably broad terms. A variety of forms have been used, and are illustrated by the following:

California: "emolument, gratuity, or reward, or any promise thereof." [132]

California: "any gift of value . . . from individuals and firms doing business with the State." [133]

Hawaii: "any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties, or is intended as a reward for any official action on his part." [134]

Illinois: "fee or reward which he knows is not authorized by law. [135]

Kansas: "any economic opportunity, gift, loan, gratuity, special discount, favor, hospitality, or service from any person known to have a special interest." [136]

Maryland: "any gift or benefit of more than insignificant economic value, including money, any service, gratuity, fee, property, loan, promise, or anything else of more than insignificant economic value from or on behalf of any individual or entity who is doing or is seeking to do business of any kind with the State or whose activities are regulated by the State." [137]

Although the variety of style used by the draftsmen of these laws may now seem to present obstacles to the development of a uniform body of doctrine regarding conflict of interest, it must be remembered

[131] E.g., Ky. Dep't of Highways, *Memo* (Dec. 5, 1960); Tenn. Dep't of Highways, *Letter Directive* (Nov. 9, 1960).

[132] CAL. PENAL CODE § 70 (Deering Supp. 1976).

[133] Calif. Dep't of Highways, *Circular Letter*, No. 60-308 (Dec. 13, 1960).

[134] HAWAII REV. STAT. § 84-11 (Supp. 1975).

[135] ILL. ANN. STAT. ch. 38, § 33-3(d) (Supp. 1976).

[136] KAN. STAT. ANN. § 46-236 (Supp. 1975).

[137] MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. III(1), "Standards of Ethical Conduct for State Officers and Employees."

that most of this legislation was written and enacted under pressure to correct or anticipate practices that at the time were active sources of embarrassment and injury to the Federal-Aid Highway Program. Little, if any, history of judicial interpretation of these terms could be found in reported cases; and the administrative experience of States that had had such laws was meager.

In the large sense, however, most people, both in and out of government, knew and agreed with the objective of these laws, and were content to have the specific meanings of the statutory words come through policy directives from agency heads to their personnel stating where the lines were to be drawn between acceptable and unacceptable gifts. Generally, State legislatures left this interpretive role to the administrative and policy-making echelons of the State's executive branch, with two exceptions. Frequently, in listing prohibited activities, provisions are made to exclude soliciting or receiving (1) contributions for political campaigns, collected in accordance with applicable campaign finance laws, and (2) commercially reasonable loans or other commercial transactions in the ordinary course of business.[138]

Acts of "Soliciting" and "Receiving"

Descriptions of the specific acts comprising the prohibited activity customarily use the terms "soliciting," "receiving," "accepting," and "agreeing to receive." The prohibition extends to these acts whether they involve a public official directly or indirectly.[139] Violation of the statute is complete with the performance of the act described, and in this respect these conflict of interest offenses differ from bribery, where the same acts violate the law only when performed with the intent of corruptly influencing some official act.

It has been said that the laws prohibiting gifts and gratuities serve to ensure public acceptance of the integrity of governmental processes, and to penalize transactions where bribery cannot be proved.[140] Yet the problem of proving solicitation or acceptance of gifts and gratuities presents some of the same difficulties that are encountered in enforcement of bribery laws. Since they are criminal laws, the statutory language must be strictly construed;[141] and since the case against an accused official may depend on circumstantial evidence, the burden on the prosecution may be substantial. Conviction of solicitation and receipt of an unlawful gift, however, can be sustained on the uncorrobo-

[138] KAN. STAT. ANN. § 46-236-237 (Supp. 1975); N.M. STAT. § 5-12-3 (1974).

[139] N.J. STAT. ANN. § 52:13D-24 (Supp. 1976); ARK. STAT. § 76-222 (1957); UTAH CODE ANN. § 67-16-5 (Supp. 1975); VT. STAT. ANN. tit. 13, § 1106 (1974).

[140] Searcy and Patterson, *Practice Commentary following* 4 TEX. PENAL CODE § 36.08 (Vernon 1974).

[141] State v. Hazellief, 148 So. 2d 28 (Fla. Dist. Ct. App. 1962).

rated testimony of the giver of the gift, provided it is not otherwise objectionable.[142] Possibly because of these tactical problems, and possibly because administrative agency heads have closer, more direct contact with the public employees who are subject to these laws, most suspected violations of these laws appear to be handled as administrative disciplinary matters rather than as matters for the criminal courts.

For both the administrative and judicial processes, however, a major problem persists in determining how to pursue indirect transactions to the full extent of the public interest without thereby unnecessarily interfering with legitimate personal activities of governmental employees. Efforts have been made to clarify the dividing line between these two areas by being more explicit in statutory descriptions of the prohibited practices. In some instances this has resulted in limiting the prohibited class of gifts to those given by persons doing business with the State.[143] In others, the gift must be linked with an existing intent to influence a public official in the performance of his duties.[144] In still others, the request or acceptance of a gift or gratuity is declared unlawful only when it occurs "knowingly," [145] or if the recipient within a specified previous period has been involved in any official action directly affecting the donor.[146] Another qualification that is used in several States is illustrated by the following excerpt from the New York law:

> No officer or employee of a state agency . . . shall, directly or indirectly, solicit, accept or receive any gift having a value of twenty-five dollars or more . . . under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.[147]

Although intended to clarify the dividing line between permitted and prohibited acts, these statutory qualifications raise other questions. To penalize only those cases in which an unlawful gift was knowingly solicited or received would appear to remove a large category of hardship cases from the scope of the law. Yet, in California, the statutory definition of this term leaves doubt that many cases will be excluded, for it provides that knowingly means

> only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.[148]

Moreover, courts have ruled that the recipient's knowledge of the source of a gratuity or gift need not be contemporaneous with its receipt and acceptance, but, rather, the violation occurs whenever knowledge of the unlawful source is acquired. Thus, an official who accepts a gift, and retains it after subsequently learning that the source was unlawful, is guilty of violating the law.[149]

Equally far-reaching demands for evidence of the parties' intentions arise where statutes limit the prohibited gifts to those intended to influence the recipient in his duties. Such intentions cannot readily be inferred from circumstantial evidence, and so, in the mid-1960's, comparisons were made between the conflict of interest cases and the tax laws, both of which were engaged in proving the intent underlying gifts and gratuities. The Court of Claims' decision in *Dukehart-Hughes Tractor & Equipment Co. v. United States* [150] illustrates both a typical fact setting of such cases, and the prevailing view of the federal courts on the public policy against contractors' gifts to government officials.

Practical considerations of administration may appear to contradict the mandate of enforcement of the statutory language. For example, Pennsylvania's Department of Transportation states

> When it is inappropriate to refuse a gift, it must be reported in writing to the recipient's supervisor, and every effort made to give the gift to an appropriate public or charitable institution.[151]

Does this directive invite public employees to put themselves in technical violation of conflict of interest laws? The question appears not to have been answered squarely, although Florida's court has held that a similar provision in a municipal ordinance did not conflict with the State's statute prohibiting a public official's acceptance of any remuneration not authorized by law.[152]

Acceptance of Outside Employment

Bases for Limitations on Outside Employment

Acceptance of part-time employment by professional and technical personnel of State highway departments was cited by the House Special Subcommittee on the Federal-Aid Highway Program as having become

[142] State v. Morrison, 175 Wash. 656, 27 P.2d 1065 (1933).

[143] VT. STAT. ANN. tit. 13, § 1106 (1974).

[144] ARK. STAT. § 76-222 (1957).

[145] CAL. PENAL CODE § 70 (Deering Supp. 1976).

[146] N.M. STAT. § 5-12-3; UTAH CODE ANN. § 67-16-5.

[147] N.Y. PUBLIC OFFICERS LAW § 73(5) (McKinney Supp. 1975). See also: HAWAII REV. STAT. § 84-11 (Supp. 1975); TEX. CIV. STAT., art. 6252-96 § 8 (Supp. 1976); Wis. State Highway Dep't, *Policy Memo.* 21-35 (Jan. 18, 1961).

[148] CAL. PENAL CODE § 7 (Deering 1971).

[149] Commonwealth v. Welch, 345 Mass. 366, 187 N.E.2d 813 (1963).

[150] 341 F.2d 613 (Ct. Cl. 1965). See also, 51 IOWA L. REV. 522 (1966).

[151] Pa. Dep't of Transp., *Master Policy Manual*, No. 20101.002 (Oct. 10, 1974).

[152] Ducoff v. State, 273 So. 2d 387 (Fla. 1973).

a common practice in many States. Similarly, some appraisers, architects and attorneys sought to continue their professional practice privately, with outside clients, at the same time they served as full-time governmental officers or employees. These practices were criticized as potential contributors to conflicts of interest in the highway program; and, in the early 1960's, they became focal points for the creation of a body of State statutes and administrative rules designed to prevent such situations from occurring.

Although some State legislatures and highway departments recognized the need for regulating outside employment before 1960, the major impetus for this body of law followed the revelations of the subcommittee's hearings, and the prompt response of the American Association of State Highway Officials in preparing guideline standards for its member organizations.[153]

Currently, 16 States control outside employment of State highway agency personnel by statutes; in the remainder, control is in the form of specific and formal administrative regulations, or else implicit in the authority which is part of general administrative responsibility for personnel.[154] Generally, regulations relating to outside employment are merged into longer lists of practices prohibited in the interest of preventing conflicts of interest. Accordingly, a specific rationale for this activity must be drawn from the regulatory language itself; and when this is done, the central theme of both statutes and administrative rules is that they serve to prevent the creation of situations in which public officials may be placed under pressure to favor special private interests in performance of their public duties. This may be implicit in the use of such terms as "inconsistent outside employment," as used in Alaska's personnel regulations,[155] or it may be spelled out at length

[153] In *An Informational Guide On Project Procedures,* published in 1960 by American Association of State Highway Officials, it was emphasized that "absolute integrity on the part of all State highway personnel is absolutely essential if public confidence in the State highway departments is maintained." In listing areas in which this integrity could be jeopardized by conflicts of interest, the Association guide stated: "Highway department personnel paid on an annual or monthly basis should not engage in outside work, unless the matter is previously cleared by the chief administrative officer of the department. Project personnel must be prohibited from doing engineering work for and receiving compensation from the contractor." SUBCOMMITTEE, 3D INTERIM REPORT, *supra* note 12, at 1-2.

[154] ARK. STAT. § 12-3003 (Supp. 1975); CAL. GOV'T CODE § 19251 (Deering 1973); COLO. REV. STAT. § 24-50-117 (1973); CONN. GEN. STAT. ANN. § 1-66 (Supp. 1976); KAN. STAT. ANN. § 46-233 (Supp. 1975); MICH. STAT. ANN. § 4.1701 (121) (Supp. 1976); MO. ANN. STAT. § 226.180 (Supp. 1976); N.H. REV. STAT. § 228.10 (1964); N.J. STAT. ANN. § 52:13D-23 (Supp. 1976); N.Y. PUBLIC OFFICERS LAW § 74(3) (McKinney Supp. 1975); OKLA. STAT. ANN. § 74-1404 (1976); TEX. CIV. STAT. art. 6253-96, § 8 (Supp. 1976); UTAH CODE ANN. § 67-16-4 (Supp. 1975); WASH. REV. CODE ANN. § 42.21.040 (1972).

[155] *Alaska Gen. Personnel Rules,* § 706.0 (Sept. 12, 1960).

to stress that governmental personnel should conduct themselves so that there is neither actual conflict of interest nor anything which could reasonably appear to affect the public employee's independence of judgment.

The need to preserve public confidence in the integrity of public agencies and personnel is, however, not the only consideration that has shaped State policies on outside employment. In several States, outside employment restrictions have been justified in terms of the impact of this activity on the effiiciency of the highway agency and the economy of the private sector. Illustrating these considerations, an Ohio administrative directive stated:

> . . . [S]ome Engineer employees of the Department are indulging in private engineering practice on a part-time basis. These Engineers quite often work late at night as well as on weekends, and as a result may be in a position physically that they cannot give the State their best. Furthermore, the practice deprives private Engineers of that work which would otherwise become available to them, which is not in the best interest of professional ethics.[156]

Thus, the rules against outside employment rest on a rationale which serves both the intangible need for public confidence in government, and the practical needs of administering governmental business.

Scope of Employment Restrictions

Draftsmen preparing legislation for restriction of the outside employment of governmental personnel must solve the difficult problem of defining the extent to which otherwise legitimate personal activity of government employees must be curtailed for the advancement of a public interest which, at best, is measurable only indirectly. The issue involved in this, and other forms of preventive conflict of interest laws, is summed up in the statement of legislative policy and intent with which the Utah Legislature introduced its "Public Officers' and Employees' Ethics Act" in 1969:

> The purpose of this act is to set forth standards of conduct for officers and employees of the state of Utah and its political subdivisions in areas where there are actual or potential conflicts of interest between their public duties and their private interests. In this manner the

[156] Ohio Dep't of Highways, *Memorandum to Bureau Chiefs, Department Heads, and Division Engineers* (Sept. 14, 1949). See also, Pa. Dep't of Transp. *Master Policy Manual,* No. 20101.003 (Oct. 10, 1974); N.M. State Highway Dep't, Letter (Nov. 26, 1958) to all licensed engineers land surveyors, and design personnel. Oregon State Highway Department policy states that outside employment must not interfere with the employee's availability to the department in emergencies. Conn. Dep't of Highways Regulations, § 1.03, prohibits "having any business or . . . holding another job which could be interpreted as tending to influence him in the discharge of his official duties."

> legislature intends to promote the public interest and strengthen the faith and confidence of the people of Utah in the integrity of their government. It does not intend to deny any public officer or employee the opportunities available to all other citizens of the state to acquire private economic or other interests so long as this does not interfere with his full and faithful discharge of his public duties.[157]

Given this problem of protecting two interests, the States have adopted various methods of introducing the necessary discrimination into their laws. Generally this has meant placing qualifications on the prohibition against outside employment, and thereby limiting it to situations in which the potential for creation of conflicting interests is greatest. Review of the statutes and administrative regulations suggests that the strongest case for prohibition of outside employment can be made in those instances where it serves to (1) maintain the public officer's or employee's independence of judgment in the performance of his duties, (2) prevent disclosure of confidential information concerning a governmental agency under circumstances where the recipient has an advantage not enjoyed by the general public, or (3) avoid impairment of the public official's efficiency in his work, or embarrassment of the official or the agency in which he is employed.[158]

Without exception, the restrictions on acceptance of outside employment are directed to the employee rather than the employer. Instances of flagrant use of private employment to influence public officials may, of course, bring the employer within the scope of certain other conflict of interest and corrupt practice laws; but generally, he is not penalized for offering an opportunity to perform outside work. The exception to this is the contractor who has a contract specifying that in the performance of the work called for the contractor will not employ any of the State's engineering or technical personnel.[159]

As to the prohibited acts, it is uniformly customary to use broad terms, such as "engage in" or "accept" employment of the type described. Only in rare instances is the act of soliciting such outside employment also penalized.[160] In a few cases, also, the laws specify that the public employee's unlawful act must be done "knowingly" in order to constitute a violation of the statute.[161]

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[157] UTAH CODE ANN. § 67-16-2 (Supp. 1975).

[158] Texas Highway Dep't, *Admin. Order*, No. 88-60 (Oct. 7, 1960); MINN. CIV. SER. RULES, §§ 4, 8, 11; MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. III(3); CAL. GOV'T CODE § 19251 (Deering 1973); CONN. GEN. STAT. ANN. § 1-66 (Supp. 1976); WIS. State Highway Comm'n, *Memo.* 21-34 (Aug. 23, 1960).

[159] Rhode Island Dep't of Public Works contract form in 1961 obligated the contractor not to engage "on a full or part-time or any other basis during the period of his contract in the employ of the Bureau or the highway organization of any State, county, or city, except regularly retired employees, without the written consent of the public employer of such person.

[160] Wash. Dep't of Highways, *Directive* (Jan. 20, 1961).

[161] OHIO REV. CODE § 2929.42 (1975).

Enforcement of Employment Restrictions

In States where outside employment is prohibited by statute, violation of the law customarily is declared to be a misdemeanor; yet an absence of reported court cases on these laws suggests that in reality they serve mainly as personal standards for individual conduct, and as guides for disciplinary personnel action by administrative agencies. Occasionally guidelines for administrative action are included in the statutes, and, typically, these have authorized such actions as removal from office or discharge from employment,[162] disqualification from holding public office,[163] and turnover to the employee's department of any compensation received by him from his outside employment.[164]

Additional means of surveillance and control of outside employment are provided in requirements that all instances of such employment must be submitted to the employee's full-time employer for approval. In these cases, the full-time employer generally is designated as the authority for determining whether a particular type of outside work meets the criteria of prohibition that are set forth in the State's statute or administrative order.[165]

Representation of Outsiders in Dealing With the Government

Policy Against Representing Adverse Claims

Parallel to the rules against engaging in outside employment is another body of statutes and regulations that prohibit public officers and employees from representing outsiders in connection with claims, applications, or other matters or proceedings before the governmental agency in which such public officials are employed.[166] Sometimes contained in the general law of the State, this prohibition reflects a long-standing policy that, while serving as a public official, an individual must remain loyal to his agency as against any personal activities. In their basic rationale, therefore, these State laws and regulations against representing adverse claimants against the government are similar to the nineteenth century federal law on conflicts of interest. In each case, the public interest was perceived as requiring government officials to refrain from advocating or adopting positions contrary to those of their office or agency, and using their position and influence to work for those positions in proceedings before the agency. In the present

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[162] TEX. CIV. STAT. art. 6252-9b § 6 (Supp. 1976).

[163] OHIO REV. CODE § 2919.13, misdemeanor provision supplemented by requirement that offender is disqualified from holding public office for 7 years. W.VA. CODE § 17-2A-5 (1974), relating to members of the State Road Commission.

[164] S.C. Highway Dep't, *Rules & Regulations*, § 14.4(b), Jan. 1, 1955.

[165] CAL. GOV'T CODE § 19251 (Deering 1973).

[166] E.g., Pennsylvania's "State Adverse Interest Act," enacted in 1957, No. 451 [1957] PA. LAWS 1017 [codified at PA. STAT. ANN. § 71-776.1 to 776.8 (1962)].

federal law, this prohibition is set forth in 18 U.S.C. § 205 (1970), and makes it unlawful for an officer or employee of the United States to act, other than in the discharge of his official duties, as the agent or attorney for prosecuting a claim against the United States, or to receive a gratuity or share of an interest in any such claim in consideration for his assistance in presenting it.[167]

Considerations similar to those that led Congress to prohibit representation of adverse claims before federal agencies have motivated the States. However, relatively few have enacted specific prohibitions for their public officers and employees. Practical aspects of recruiting professional manpower for public service have made most States and local governments cautious about imposing restrictions on private interests and activities which are broader than necessary to cover the State's essential interests.[168] Relying on the fact that flagrant abuses of official position and influence in behalf of the holder of an adverse claim probably will be subject to prosecution under other laws controlling conflict of interest or official misconduct, most States appear to have preferred to leave their laws either silent or vague on the issue of representation.

Within the group of States that deal specifically with the problem of representing adverse claimants, a variety of approaches may be seen. Pennsylvania's law makes it unlawful for State employees to represent "directly or indirectly"any person on any matter pending before or involving any State agency.[169] Although the language of the statute limits its application to matters involving or pending before the executive branch, its prohibition of indirect representation reaches activity on the part of business or professional associates of a public official.

New York's Public Officers Law prohibits State officers or employees from making contingent fee agreements for services to be rendered in a case, proceeding, or other matter before a State agency; and it bars full-time salaried State employees from making agreements for compensated representation of another against the State in transactions or proceedings before a State agency or the Court of Claims.[170]

Statutes in Massachusetts and Utah contain categorical prohibitions against representation of others in proceedings involving the State.[171] However, legislation in Arizona, Hawaii, and New Jersey, and administrative orders in Maryland limit prohibitions to situations in which a public official acts as agent or attorney in a proceeding before the agency with which he is associated, or a transaction in which he has participated or will participate in the future.[172] Regulations of the Wisconsin Division of Highways specify that no employee of the division shall act as agent for prosecution of a claim against the State, assist such prosecution, or support such a claim except in the proper performance of official duties. The regulations emphasize that the intent of the latter provision is to prevent use of public employees as expert witnesses by others pursuing claims against the State.[173]

[167] 18 U.S.C. § 205 (1970) notes an exception for acting without compensation as agent or attorney for another who is subject to disciplinary, loyalty, or other personnel administration proceedings, provided it is not inconsistent with the faithful performance of his regular duties.

[168] 47 VA. L. REV., *supra* note 43, at 1061.

[169] PA. STAT. ANN. § 71-776.7 (1962).

[170] N.Y. PUBLIC OFFICERS LAW § 73 (McKinney Supp. 1975).

[171] MASS. ANN. LAWS ch. 268A, § 4 (1968); UTAH CODE ANN. § 67-16-6 (Supp. 1975).

Restriction of Post-Employment Activities

In certain instances, legislative prohibitions against State officers' appearances as agents or attorneys in matters pending before agencies in which they have been employed also apply beyond the officer's period of public service for a specified time, generally one year.[174] In others, restriction on post-employment activities appear in separate specific sections of the law.[175]

State statutory restrictions on postemployment activities by public officials appear to have not often been interpreted by the courts, but comparable provisions of the federal law have been construed judicially on a number of occasions. The federal law prohibits former employees from acting as agents or attorneys for any party other than the United States in any matter in which the government is party and has a substantial interest, and in which the former employee participated "personally and substantially" while so employed.[176] The federal law also extends to the partners of officers and employees.

Primary concern in the history of the federal law has been on preventing former employees and officers from influencing their former associates or successors in ways that unfairly use the former officer's titles, positions, and friendships to gain advantages not available to the general public. State legislation, however, has added certain other activities to these areas of concern. In addition to prohibiting former employees from representing others in matters with which they were

[172] ARIZ. REV. STAT. § 38-504 (1974); HAWAII REV. STAT. § 84-14; N.J. STAT. ANN. § 52:13D-15 to -17 (Supp. 1976); MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. III(5).

[173] Wis. Div. of Highways, *Constr. & Materials Manual*, § 1.06(4).

[174] ARIZ. REV. STAT., § 38-504, prohibits a State official's appearance before a public agency "by which he is or was employed within the preceding twelve months . . . concerning any matter with which such officer or employee was directly concerned and in which he personally participated during his . . . service by a substantial and material exercise of administrative discretion."

[175] MASS. ANN. LAWS ch. 268A, § 5 (1968); HAWAII REV. STAT. § 84-18 (Supp. 1975).

[176] 18 U.S.C. § 207 (1970).

involved while in public service, statutes enacted in Arizona and Hawaii prohibit disclosure or use of confidential information acquired in the course of official duties following termination of that service.[177] Under Kansas law, for one year after termination of State employment, public officers and employees are barred from accepting employment with any person or firm that within two years previous had a public contract in which the officer or employee participated.[178]

Implementation of these statutes has required recourse to the courts, because good working definitions of key terms and guidelines for interpretation rarely are provided in the legislative language. Most of the judicial interpretation of this body of law has involved the federal statute. Among these cases, *United States v. Nasser*[179] dealt with several basic constitutional issues as it applied the federal post-employment restrictions to the case of an Internal Revenue Service officer charged with agreeing to act as attorney for a client regarding tax matters with which the officer had "substantially participated" while on the IRS staff. The defense argued that the prohibition was unconstitutional because of the vagueness of the term "personal and substantial participation" through decision, approval, disapproval, recommendation, advice, investigation, "or otherwise." The Court saw the matter differently, however, stating that avoidance of conflicts of interest is a traditional ethic of the legal profession, with standards that are commonly understood and practiced by attorneys, and the statute described as precisely as possible an unethical practice that was capable of taking "infinite forms."[180]

The federal disqualification of former officers and employees in matters connected with their former duties was also challenged as being a bill of attainder by imposing punishment upon former public officials as a class without a judicial trial, and as constituting ex post facto legislation.[181] Neither of these objections, however, was sufficient to invalidate the post-employment limitations imposed by the law.

If the constitutional questions concerning regulation of post-employment activities appear to be settled, however, certain other matters of statutory construction are not. One difficult question concerns determination of when "personal and substantial" participation occurs. Although all might agree that an officer who signs a contract on behalf of the government is participating within the terms of the statute, there are lesser degrees of involvement on which there is no consensus. Similarly, is a second contract with the same contractor considered as part of the contractor's earlier contracts so as to be part of the "same transaction?" Under what circumstances should the law be understood to prohibit employment of relatives of public officials' relatives in contractor activities? These and related questions currently must be answered by reference to administrative interpretations of the postemployment regulation laws, with the result that instances of uncertainty and inconsistency may be cited.[182]

[177] ARIZ. REV. STAT. § 38-504 (1974), 2-year period; HAWAII REV. STAT. § 84-18 (Supp. 1975), indefinite period.

[178] KAN. STAT. ANN. § 46-233 (Supp. 1975).

[179] 476 F.2d 1111 (7th Cir. 1973).

[180] *Id.* at 1117.

[181] *Id.* at 1115, holding that the statute provides a classification of general applicability for accomplishment of a legitimate legislative purpose through a rational means. *Id.* at 1116-1117, denying that an unconstitutional ex post facto act had occurred where an absolute prohibition rather than a 2-year bar on post-employment activities was established during the period of an official's service with a public agency. The Court noted that because he was an attorney, obligated to observe legal ethics, he would have been restricted from accepting private employment in a matter in which he had had substantial responsibility as a public employee. Thus, while the amendment of the law during defendant's tenure as a public official created certain criminal penalties not previously in force, defendant was not in a position to avoid the prohibition.

DISCLOSURE OF FINANCIAL INTERESTS

Scope of State Legislation

Reference has been made earlier to the pervasive feeling that general disclosure of actual or potential adverse interests will effectively permit an informed and aroused public opinion to forestall serious injury to the public interest. Carried to its full extent, the logic of this proposition might suggest that disclosure of the private financial interests of all public officers and employees, whether elected or appointed, would be possible, and, indeed, might be preferable to the mandatory divestiture of sensitive financial interests which has become the customary rule for high-level public officers in recent times. Some observers have seen this as a trend in the evolution of federal conflict of interest laws, and cite the need to modify the custom of mandatory divestiture in order to make public service more attractive to top level professional manpower.[183]

This logic has not, however, shaped the pattern of State financial disclosure laws, for both legislatures and courts have been cautious about moving in ways that intrude too far into constitutionally protected rights of privacy. Recognizing that financial disclosure is on its

[182] Under a headline "2 Ex-Interior Aides Probed By Justice," the Washington Post, August 3, 1975, at 6, reported the case of a former Director of the National Park Service and an Associate Solicitor of the Department of the Interior who, after retiring from federal service, represented a concessionnaire seeking to renew a contract to provide certain services in the National Parks. Although neither official had signed any previous contracts with the contractor during their active service, they had been aware through memoranda of the contractor's earlier dealings with the agency. The report also revealed instances of other Park Service employees whose relatives were employed by the contractor in a variety of positions, both permanent and temporary.

[183] MANNING, 24 FED. B.J., *supra* note 6, at 254-256.

strongest ground when linked to some present actual conflict of interest, some States have limited disclosure to circumstances bearing on specific transactions. In addition they have offered public officials the option of abstaining from participation in a prohibited transaction as an alternative to forfeiture of public office. For example, Michigan's statutory prohibition against public servants having personal interests in public contracts does not apply if an official discloses his pecuniary interest in the contract promptly, and if the interested official does not solicit or take part in any way in the contracting process.[184]

A somewhat similar result is achieved by the provisions of Maryland's Executive Orders of the Governor that allow the State's Board of Ethics to suspend the prohibitions against interest where there is prompt disclosure of an adverse interest, and the Board makes a written finding that the public interest in the member's participation in a specific transaction exceeds the interest in the member's disqualification.[185]

Most disclosure statutes seek not only to legitimize a specific public transaction despite the presence of adverse interest, but also to provide a form of preventive protection of public agencies against potential corruptive pressure or bias in their actions. This class of statutes requires disclosure only if the public official's financial interest creates an actual conflict in the performance of his official duties.[186] The test of when an interest creates an actual conflict is seldom covered by legislative language, and selection of what must be disclosed usually is limited to those interests which stand to receive direct pecuniary benefits from a contract award or other official action.

As the scope of this preventive function has expanded from a clear connection with contractors seeking government contracts or businesses regulated by State agencies, it has moved onto ground that is constitutionally questionable. Connecticut and California offer illustrations of contrasting legislative approaches:[187]

> *Connecticut:* Every person subject to this chapter shall file with the Committee [on Ethics] at such times, in such detail and in such manner as the Committee prescribes, written statements of economic interests likely to create conflicts of interest. Such statement shall include: (1) a list of economic interests of the person making the disclosure and of his spouse and minor children, including stocks, bonds, realty, equity or creditor interest in proprietorships or partnerships or other business entity . . . ; (2) a list of every office, directorship and salaried employment of the person making the disclosure and of his spouse or minor children; (3) a list of all those to whom the persons subject to this chapter furnished compensated services valued at more than five thousand dollars during the period covered by the report.[188]
>
> *California:* . . . [E]very public officer shall file, as a public record, a statement describing the nature and extent of his investments, including ownership of shares in any corporation or the ownership of a financial interest in any business entity, which is subject to regulation by any state or local public agency, if such investment is in excess of $10,000 in value. . . .[189]
>
> and
>
> . . . . the term ownership of shares and the term investments, respectively, include shares and investments owned by either spouse or by a minor child thereof. . . .[190]

In California the constitutional issues raised by such sweeping disclosure requirements were examined in *City of Carmel-by-the-Sea v. Young*[191] in 1970, but the State Supreme Court's decision left certain parts of the boundary between public and private interests unsettled.

Public Employees' Right of Privacy

Mandatory disclosure of personal financial interests runs contrary to the feeling that individuals are entitled to have the privacy of their personal affairs preserved. Even when they perform public duties as officers and employees of governmental agencies, and therefore are answerable to the public for adherence to high ethical standards of conduct, this right of privacy is not entirely subordinated to the public's interest in preventing official misconduct and conflict of interest. How much privacy was surrendered by acceptance of public office or employment became the core issue before the California courts in *City of Carmel-by-the-Sea v. Young.*

Following enactment of California's financial disclosure law, quoted previously, the plaintiff city brought suit for declaratory relief, attacking the constitutionality of applying the statute to city officers and employees. The City argued that the disclosure requirements were more

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[184] MICH. STAT. § 4.1701(123) (Supp. 1976). *See also,* COLO. REV. STAT. § 18-8-308 (1973).

[185] MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. III.

[186] ARIZ. REV. STAT. § 38-541 to -545 (1974); ARK. STAT. § 12-3001 to -3008 (Supp. 1975); CONN. GEN. STAT. ANN. § 1-66 to -78 (Supp. 1976). HAWAII REV. STAT. § 84.1 to -33 (Supp. 1975); KAN. STAT. ANN. § 75-4301 to -4306 (Supp. 1975); KY. REV. STAT. § 61.710 to -780 (1975); MO. ANN. STAT. § 105.450 to -495 (1966), amended (Supp. 1976); NEB. REV. STAT. § 49-1106 (1974); N.M. STAT. § 5-12-1 to -15 (1974), N.M. STAT., § 15-43-15.1 to -15.6 (1976); N.Y. PUBLIC OFFICERS LAW § 74 (McKinney Supp. 1975); TEX. CIV. STAT. art. 6252-9b (Supp. 1976); VA. CODE § 2.1-347 to -358 (1973); W.VA. CODE § 6B-1-1 (Supp. 1976); WASH. REV. CODE ANN. § 42.21.010-.090 (1972).

[187] *See also* ILL. ANN. STAT. ch. 127, §§ 604A-101 to -107 (Supp. 1976).

[188] CONN. GEN. STAT. ANN. § 1-76 (Supp. 1976), excluding, however, savings, checking or share accounts in banks and equity interests of less than $3,000.

[189] CAL. GOV'T CODE § 3700.

[190] *Id.* at 3604.

[191] 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

sweeping than necessary to deal with the dangers of official corruption which was the target of the law. The State defended by arguing that the legislature's objective was legitimate and substantial and the means of protecting the public's interest was appropriate.

The Court agreed with the City that the mandatory disclosure requirement was excessively broad, and invaded constitutionally protected rights of privacy, which, in this instance, included "one's feelings and one's own peace of mind." [192]

Explaining its view, the Court said:

> The governmental purpose . . . is to assure the people to the fullest extent possible that the private financial dealings of public officials and of candidates for public office "present no conflict of interest between the public trust and private gain." Obviously the elimination and prevention of conflict of interest is a proper state purpose, but that alone does not justify "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. . . ."
>
> The financial disclosure requirements of the statute . . . encompass indiscriminately persons holding office in a statewide agency regardless of the nature or scope of activity of the agency, as well as those whose offices are local in nature. . . . No effort is made to relate the disclosure to financial dealings or assets which might be expected to give rise to a conflict of interest. . . .[193]

Touching also the possibility that publicity of the disclosures would expose public servants to unwanted solicitations of salesmen, and attentions of criminal elements of the community, the Court noted that the rest of California's 85 statutes dealing with conflicts of interest limit their disclosure requirements to transactions which would create conflicts with official duties. This relationship may be direct or indirect, but the Court felt it must be shown in order to justify impinging on the individual's privacy.

The Court was not unanimous, and dissenting opinions objected to both procedural and substantive aspects of the decision.[194] The most serious question concerned the nature and status of the majority's concept of privacy which was entitled to protection because it involved "values implicit in the concept of ordered liberty." Contrasting the facts of this case with those generally cited to turn back invasions of First Amendment rights, the dissent charged that neither the city nor its officeholders had identified any recognizable damage to their security or welfare. Nor was the legislature insensitive to the complexities of the two sets of values it attempted to balance. Citing the statute's

[192] *Id.* at 268, 466 P.2d at 231, 85 Cal. Rptr. at 7.

[193] *Id.* at 268–69, 466 P.2d at 232, 85 Cal. Rptr. at 8.

[194] Procedurally, it was questioned whether the city was correct in asking for declaratory relief where no controversy was shown, and it was argued that the court was being asked to rule on a political question.

statement of purpose, it noted that the disclosure requirement was based on the premise that the public had both the right to expect integrity and honesty from public officials and the right to be assured of this by measures to prevent conflicts of interest.[195] Turning finally to the status of the right of privacy as it existed for public officers and employees, the dissent cited numerous instances in which mandatory disclosure of economic information had been sustained in connection with licensing or regulation of economic activities.

City of Carmel-by-the-Sea v. Young may be regarded, as the majority suggested, as the case of a badly designed law, leaving the legislature free to pass a "properly drawn" statute providing for "broad disclosure of assets, income and receipts relevant to the duties and functions" of public officials. Considered more fully, however, it opens up a more fundamental and complex set of questions dealing with the status of personal privacy under the law, the nature of this status in the taxonomy of legal rights, and the relationship of these rights to the obligations of public service. How these questions are answered directly affects the working contracts of government with the private sector of the community, an interface which has been steadily expanding since the 1930's.

As to the status of personal property, the majority in *City of Carmel-by-the-Sea* relies heavily on *Griswold v. Connecticut*,[196] where the United States Supreme Court recognized a zone of privacy created implicitly by several fundamental constitutional guarantees which, among other things, had been used to protect the right of privacy relating to marriages. As to the legal status of an individual's interest in his privacy, the majority spoke of it as one of "the protected rights and liberties not specifically mentioned in the Constitution . . . [but] falling within the penumbra or periphery of the Bill of Rights" and other fundamental personal rights retained by the people within the meaning of the Ninth Amendment.[197] Illustrative of the support for this view in earlier decisions, the Court cited *Fairfield v. American Photocopy Equipment Co.*,[198] another California case which 10 years earlier had extended protection to personal privacy against commercial exploitation of a person's name and likeness. And finally, as to the applicability of such rights to situations involving public service, the majority stated that financial disclosure could not be made a requirement of appointment to governmental employment; and it warned

[195] 2 Cal. 3d at 278, 466 P.2d at 239, 85 Cal. Rptr. at 15.

[196] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), declaring unconstitutional a State law prohibiting use of contraceptives or giving information as to methods of contraception. *See: Symposium —the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965).

[197] 2 Cal. 3d at 267, 466 P.2d at 231, 85 Cal.Rptr. at 7.

[198] 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

against the chilling effects such a requirement would have on the seeking or holding of public office or employment.

These views have been criticized for going beyond both the law and the facts.[199] To the Court's critics it seemed wrong to move in one step from the protection of personal behavior which had minimal, if any, tangible impact on his neighbors into the protection of economic privacy where misconduct of an officeholder is a public concern because of its potential impact on governmental integrity. Moreover, the record of accomplishment of narrower disclosure laws was not such as to assure that the legislature in fact had any practical alternative to the law passed earlier.

At bottom, however, reaction to the majority's decision appeared to rest on a feeling that there was or should be some difference between the obligation of a public officer or employee regarding accountability for his personal affairs, and the obligation of an individual to his neighbors in his private life. Conceding that public service is not a privilege which could be conditioned on the surrender of constitutional rights,[200] it still seemed too much to say that the First Amendment cases fully protected a public official from mandatory disclosure of his personal financial interests whether or not they related to his governmental duties. Who should decide the relevancy of these interests thus became the ultimate question; and on this issue most critics favored leaving it to the legislature, at least until and unless the court showed how a satisfactory objective test could be devised to detect when and where a potential conflict of interest would occur.

Viewing the evolution of the First Amendment cases which have been applied to regulation of public officials' freedom of expression, it is unlikely that courts will offer a test of this sort. Absolute tests are too strict, and balancing of private and public interests are too loose, due to the nature of the interests involved. What will ultimately become the accepted doctrine for this matter remains to be determined. One view, which appears to be similar to the rationale of the majority in *City of Carmel-by-the-Sea,* stated the rule thus:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. (Citations omitted.)[201]

[199] See 45 TUL. L. REV. 167 (1970); 49 TEX L. REV. 346 (1971); 59 CAL. L. REV. 158 (1971); 23 VAND. L. REV. 1359 (1970).

[200] Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

[201] Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 2475 L.Ed.2d 231 (1960). *See also* United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

And commentators who have looked broadly at the entire field of unconstitutional conditions on public employment and officeholding, have noted that the legal notion of a protectable interest, or right, has a prime function of maintaining sufficient security for the individual to enable him to exercise his basic liberties. Unless it is checked, the government's power to distribute such benefits as employment can easily be used to effectively buy up the exercise of First Amendment freedoms.

In the present uncertain condition of the law, therefore, States seeking to strengthen public confidence in government through financial disclosure laws may have only two reliable benchmarks. One is the rationale of *City of Carmel-by-the-Sea* that each additional imposition of conditions on the benefits of public employment and officeholding must be clearly justified in its own set of circumstances.[202] The other is the course followed in Illinois, where a comprehensive financial disclosure law was upheld in light of a constitutional provision that all candidates for or holders of State offices, and all members of State commissions, boards, and similar bodies must file annual statements of their economic interests, which shall be available for public inspection.[203]

OFFICIAL MISCONDUCT

Misconduct in Office: The Common Law View

The searching examination of highway construction practices and contract administration conducted by the Special Subcommittee on the Federal-Aid Highway Program in the 1960's revealed a broad spectrum of unauthorized and undesirable acts. At one end of this spectrum, the practices were closely akin to bribery and its related crimes; at the other end, they merged into the problems of mismanagement, negligence, and excessive waste. Although not demonstrated in violations of the laws dealing with bribery and conflict of interest in construction contracts, they comprised an environment which, as the subcommittee noted, "opened wide the door to the type of 'advantageous arrangements' between contractors and State personnel" that undermined governmental integrity.[204] None of these practices was new to the law, and none was uniquely characteristic of the Federal-Aid Highway

[202] Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures In The Protection Of First Amendment Rights,* 21 HAST. L. REV. 129, 164–165 (1969); Comment, *Financial Disclosure By Public Officials And Public Employees In Light of Carmel-By-The-Sea v. Young,* 18 U.C.L.A. L. REV. 534 (1971).

[203] ILL. CONST., art. 13, § 2. This provision of the Illinois Constitution of 1970 was interpreted in Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), upholding the financial disclosure law, but indicating that indiscriminate disclosure of public officers' economic interests cannot be sustained in the absence of a constitutional provision therefor. *See also,* 22 DE PAUL L. REV. 302 (1972); Comment, *Texas Public Ethics Legislation: A Proposed Statute,* 50 TEX. L. REV. 931 (1972).

[204] SUBCOMMITTEE, 9TH INTERIM REPORT, *supra* note 27, at 138.

Program, although the magnitude and speed with which highway construction projects were fostered by the accelerated roadbuilding of the decade 1955 to 1965 aggravated the problem at the State level.

The practices involved in this spectrum of the law comprise the category that has become known as misconduct in office, and have become focused in the three-part classification of malfeasance, misfeasance, and nonfeasance. The generally accepted description of this classification is offered by Perkins, as follows:

> The prevention of outside influences tending toward corruption is not the only social interest in the official action of public officers. It is socially desirable, so far as reasonably possible, to insure that no public officer shall, in the exercise of the duties of his office or while acting under color of his office, (1) do any act which is wrongful in itself—malfeasance, (2) do any otherwise lawful act in a wrongful manner—misfeasance, or (3) omit to do any act which is required of him by the duties of his office—nonfeasance. And any corrupt violation by an officer in any of these three ways is a common law misdemeanor known . . . as "misconduct in office" or "official misconduct." [205]

For prosecutions under common law, it was necessary to show that the act done or omitted was within the official duties of the officer in question, or under color of his office, and that the action was a means of acquiring unlawful personal benefit for the official or one in whose behalf he acted.[206] Where malfeasance was charged, questions of whether or not these elements were present in a specific situation generally could be determined with reasonable certainty, and prosecutions for this form of misconduct resembled those dealing with bribery, acceptance of gifts or gratuities, and corruption.[207]

Where misfeasance or nonfeasance were charged, however, distinctions were likely to become unclear. Where a contract was awarded to someone other than the lowest responsible bidder, should the contracting officer be charged with nonfeasance, because he failed to award to the lowest responsible bidder, or misfeasance, because he let the contract improperly under the competitive bidding rules? Or, where the contracting officer's purpose in awarding a contract is to enrich a friend, does the choice between malfeasance and misfeasance depend on whether the award was made by circumventing the regular bidding requirements, or by perverting them?

A century ago these questions appeared to concern American courts substantially in the trial of misconduct charges. Modern decisions appear to be less worried about formal tests and distinctions, and willing to treat all three forms of behavior as punishable misconduct.[208] Reduction of the significance of these distinctions and formalities has, in part, resulted from legislation codifying and extending the common law rules on official misconduct.

[205] PERKINS, *supra* note 51, at 482.

[206] State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961); Coffey v. Superior Court, 147 Cal. 525, 82 P. 75 (1905).

[207] Raduszewski v. Superior Court, 232 A.2d 95 (Del. 1967).

Statutory Misconduct in Office: Specific Prohibitions

Overview

State legislation dealing with official misconduct has not developed systematically, and sometimes has been described as a handy catchall to punish public officials where no specific crime of a more serious nature can be proven.[209] Often these statutes have prohibited specific acts without reference to corrupt intent, and the pleading and proof of violations have become simpler than in actions under the common law.[210] Intent to do the prohibited act, which in itself is the complete crime, is sufficient; and proof of corrupt intentions of one or more parties is not needed. Statutory language is the determining factor in this matter.

Except where the control of official misconduct has been provided through the mechanisms of codes of ethics for State officers and employees, the laws dealing with misconduct in office have been scattered throughout the criminal code and statutes relating to public officers, departmental organization, and public contracting procedure. Standards of conduct have been promulgated in the form of administrative regulations as well as statutory requirements. Most of the enforcement actions, however, appear to be handled in the administrative process rather than the courts.

Unauthorized Disclosure of Confidential Information

Control of the disclosure of information obtained by public officers and employees in the course of their official duties is a sensitive matter with public agencies, and is specifically addressed in the statutes and regulations of a substantial number of States. The most frequent form of control employed by the States is a prohibition against unauthorized disclosure by public officials of confidential information, or information obtained by them in their official capacity. In most instances, this prohibition is limited to disclosures or misuses of such information for the purpose of pecuniary gain by the officer or a friend.[211] Colorado's stat-

[208] PERKINS, *supra* note 51, at 487–489.

[209] 47 U. VA. L. REV. *supra* note 43, at 1044.

[210] *See, e.g.*, Layne v. Hayes, 141 W.Va. 289, 90 S.E.2d 270 (1955); People v. Elliott, 115 Cal. App. 2d 410, 252 P.2d 661 (1953).

[211] CONN. GEN. STAT. ANN. § 1-66(c) (Supp. 1976); KAN. STAT. ANN. § 46-241 (Supp. 1975); MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. III, § 2; N.M. STAT. § 5-12-6.

ute is one of the most specific in setting forth the scope of its prohibition of unauthorized disclosure, namely:

> Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he:
>
> (a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or
>
> (b) Speculates or wagers on the basis of such information or official action; or
>
> (c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.[212]

In a variation of this type of law, some States declare a general prohibition against unauthorized disclosure and a specific prohibition of misuse of official information for obtaining personal benefit.[213] Customarily these restrictions apply to information that has been officially designated as confidential by the agency concerned, although wider applications may be suggested by the terms of some statutes.[214]

Generally, restrictions on disclosure or misuse of information obtained in the course of performing public duties apply to public officials only during their tenure of public office. In a few instances, however, statutes specifically extend such restrictions to cover the post-employment activities of public officers and employees, usually for one year following termination of public service.[215]

Acceptance of Rewards for Performance of Official Duties

Frequently seen among laws for the prevention of official misconduct are provisions prohibiting public officers and employees from accepting any reward or special compensation for performance of their official duties.[216] Occasionally, also, these prohibitions extend to acceptance of rewards for official acts that have occurred in the past as well as for current activities.[217]

These laws are related to the commonly seen statutory requirement or administrative policy that public officers and employees shall not receive compensation for official duties from any source except the public agency in which they are employed. The root evil which this legislation is intended to eliminate is typified by the so-called "kickback" practices that are capable of arising in both the award and administration of construction contracts, and the acquisition of right-of-way.[218]

Where these rules have been applied, it is customary for exceptions to be made, either in the terms of the interpretation, to permit public officials to receive awards, prizes, or honoraria tendered in recognition of the professional or technical excellence of their work, and to distinguish such forms of compensation from other types which clearly corrupt public administration or give the appearance of impairing the integrity of governmental agencies.

Misuse of Public Office or Title

A catchall safeguard found in many State laws is the general prohibition against using one's official position "to secure special privileges or exemptions for himself or others, except as may be provided by law."[219] Variations in the specific language of this provision cover a wide range. Some use special terms, such as "graft,"[220] or "profiteering."[221] Others make the statutory language more precise by specifically prohibiting unauthorized use of government equipment or property for private gain,[222] misuse of public funds in speculation for private profit,[223] and "discounting" of public claims (i.e., acting in a private capacity directly or indirectly to purchase for less than full value or discount a claim held by another against the State or a political subdivision).[224]

[212] COLO. REV. STAT. § 18-8-402 (1973). Also, N.H. REV. STAT. ANN. § 643.2 (Supp. 1973).

[213] HAWAII REV. STAT. § 84-12 (1975); MICH. STAT. § 4.1701(121) (Supp. 1976); N.M. STAT., § 5-12-6 (1974); Wis. State Highway Div., *Constr. & Materials Manual,* 1.06(5); ARK. STAT. § 12-3003 (Supp. 1975).

[214] E.g., HAWAII REV. STAT. § 84-18, referring to "information which by law or practice is not available to the public."

[215] ARIZ. REV. STAT. § 38-504(B) (1974); HAWAII REV. STAT. § 84-18 (Supp. 1975).

[216] ARIZ. REV. STAT. § 38-444; ILL. ANN. STAT. ch. 38, § 33-3 (Supp. 1976); KAN. STAT. ANN. § 46-235 (Supp. 1975); NEV. REV. STAT. § 197.110 (1973); N.J. STAT. ANN. § 52:13D-24 (Supp. 1976); IOWA CODE ANN. § 739.10 (1950); OKLA. STAT. ANN. § 74-1404 (1976); TEX. CIV. STAT. art. 6252.9b § 8 (Supp. 1976); UTAH CODE ANN. § 67-16-5 (Supp. 1975); WASH. REV. CODE ANN. § 42.20.010 (1972).

[217] COLO. REV. STAT. § 18-8-303 (1973); KAN. STAT. ANN. § 46-235 (Supp. 1975); N.H. REV. STAT. ANN. § 640.4 (Supp. 1973).

[218] E.g., State v. Kemp, 126 Conn. 60, 9 A.2d 63 (1939), charging that agent of highway commission received a share of sales commissions paid to sellers' agents in sale of land to State for highway purposes.

[219] OKLA. STAT. ANN. § 74-1404 (1976). Also, N.J. STAT. ANN. § 52:13D-23 (Supp. 1976), ". . . to secure unwarranted privileges or advantages for himself or others."

[220] Ch. 249, § 81, [1909] WASH. LAWS 915 (repealed 1975); see, WASH. REV. CODE ANN. § 9A68.050 (Special Supp. 1976), trading in special influence.

[221] DEL. CODE ANN. § 11-1212.

[222] COLO. REV. STAT. § 18-8-407 (1973).

[223] KAN. STAT. ANN. § 21-3910 (1974); NEV. REV. STAT. § 197.110 (1973). *See also,* People v. Schneider, 133 Colo. 173, 292 P.2d 982 (1956), stating that use of public money for official's personal gain is within scope of predecessor COLO. REV. STAT. § 18-8-407.

[224] KAN. STAT. ANN. § 21-3906 (1974); WIS. STAT. § 946.14 (1973).

Customarily, violation of such prohibitions is classed as a misdemeanor, with some statutes going further to provide for removal from office and disqualification from future officeholding. Enforcement of these laws through the courts, however, has been relatively rare. More often these statutes and similarly general directives contained in administrative regulations and policy statements have been enforced through personnel disciplinary actions carried out administratively within State highway agencies.[225]

Falsification of Records and Reports

Specific prohibitions have been enacted in several States regarding the filing of false reports or certifications. Washington's State law illustrates one of the most comprehensive forms of such laws, and deals with knowingly making false or misleading reports, issuing false certificates, falsely auditing and paying fraudulent claims, and falsification of accounts.[226] Where prohibitions against falsification of documents and records are set forth in this way, they constitute separate bases for prosecution, even though the transaction alleged to have been falsely reported is itself unlawful or part of another instance of misconduct in office.[227]

The availability of specific statutory bases to punish such practices as making false reports to public agencies; falsifying or presenting misleading information concerning the results of sample testing, surveys, mapping, specifications and other forms of physical evidence and documentation; and in the issuance of false reports and certificates, would appear to facilitate the law's enforcement. Specifically, it would appear that these laws would make it easier to reach those who may have connived with a public officer in his fraud. Rules of thumb hold, however, that the test of whether a person is an accomplice in a crime is whether he could be indicted for the offense. The application of this rule is illustrated in *State v. Elsberg*,[228] where a former highway commissioner was prosecuted for allegedly filing false audits and paying false claims.

[225] MD. EXEC. ORDER OF THE GOVERNOR, 14A,.art. I, III, 4; Okla. State Highway Dep't Regulations § 1625, "Conduct of Classified Employees"; Pa. Dep't of Transp., *Master Policy Manual*, No. 20101.-001 (Oct. 10, 1974); Wis. Highway Div., *Construction & Materials Manual*, 1.06(3).

[226] WASH. REV. CODE ANN. §§ 42.20.040 to .070 (1972). See also, N.H. REV. STAT. ANN. §§ 641.3, .6, .7 (Supp. 1973) (including "tampering with public records"); IOWA CODE ANN. § 740.12 (1950).

[227] State v. Mundy, 7 Wash. App. 798, 502 P.2d 1226 (1972), holding that seeking compensation for services not actually rendered and certifying a false claim were separate crimes, despite the fact they arose from the same circumstances.

[228] State v. Elsberg, 209 Minn. 167, 295 N.W. 913 (1941).

Intentional Failure to Perform Official Duties

Statutory provisions for punishment of public officers or employees for failure to perform official duties have been enacted in about one-fourth of the States. Generally, problems of interpretation of these statutes have centered in two areas: delineation of the scope of the official duties to which the statutory obligation applies, and definition of the standard of performance demanded by the law.

Although these laws are related to others which prohibit acceptance of gifts, gratuities, or other compensation in return for agreeing to omit performance of an official duty for the advantage of the donor, the two types of law are distinguishable and separate, one constituting a form of actual or possible corruption in making an unlawful agreement, the other representing a form of nonfeasance which the law punishes in certain limited circumstances set forth in part by the legislature and in part by the courts.

In delineating the scope of these statutes, legislative language varies substantially, but an illustrative selection of States reveals common agreement on basic elements. In particular, it is agreed that failure to perform must be deliberate and intentional, and so distinguishable from ordinary negligence or incompetence.[229] In this context, "willful neglect" has been held to mean omission that is intentional or by design.[230] Occasionally phrases have been used that suggest specific additional elements of intent, such as "knowingly, arbitrarily and capriciously" (Colorado), "intentionally or recklessly" (Illinois), "palpable omission" (Nebraska), and "knowingly . . . with intent to obtain a benefit or to harm another" (Oregon).[231]

Although failure to perform official duties may be connected with conflicts of interest and corrupt plans to obtain personal benefits at public expense, these elements need not always be shown in order to establish the intent required by the statute.[232] Statutory language generally is decisive on such questions.

The omission or refusal to perform must be with regard to a duty that is required by law,[233] or "clearly inherent in the nature of his

[229] DEL. CODE ANN. § 11-1211 (1974), "knowingly refrain"; MINN. STAT. ANN. § 609.43 (1964), "intentionally"; ORE. REV. STAT. § 162.415 (1975), "knowingly"; WASH. REV. CODE ANN. § 42.20.100 (1972), "wilfull."

[230] State v. Williams, 94 Vt. 423, 111 A. 701 (1920).

[231] COLO. REV. STAT. § 18-8-405 (1973); ILL. ANN. STAT. ch. 38, § 33-3 (Supp. 1976); NEB. REV. STAT. § 28-724 (1975); ORE. REV. STAT. § 162.415 (1975).

[232] State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929); State *ex rel.* Dineen v. Larson, 231 Wis. 207, 284 N.W. 21 *reh. den.*, 231 Wis. 207, 286 N.W. 41 (1939). *But see*, State v. Boyd, 196 Mo. 52, 94 S.W. 536 (1905), holding that proof of corrupt intent was necessary where statute authorized removal of official for corrupt, fraudulent, and willfull failure to perform duties.

[233] ILL. ANN. STAT. ch. 38, § 33-3 (Supp. 1976); IOWA CODE ANN. § 740.19 (1950); WASH. REV. CODE ANN. § 42.20.100 (1972).

office." [234] In a few instances, the phrase "mandatory duty" has been used.[235]

Except in Minnesota and Nebraska, the statutes do not address the question of whether ministerial and discretionary functions are subject to the same standard.[236] To the extent that this matter has been clarified, it has been by judicial interpretation, illustrated in *State v. Brattrud*.[237] Here defendant was charged with willfully refusing to sign a warrant to pay a bill for purchase of road oil, and defended by arguing that he questioned the legality of the proceedings leading up to approval of the bill for payment. In questioning the validity of the claim, defendant thus questioned the existence of the duty. In holding that the facts did not constitute a violation of the State's law punishing willful neglect, the Court expressed the view that the law was intended to apply to cases in which the duty to be performed was purely ministerial. Commenting on the situation faced by the defendant, the Court said:

> Necessarily, there is involved in the imposition of such duty a responsibility on [the officer's] part to determine for himself whether or not the proceedings up to that point have pursued a legal course. We do not mean by this that he has a discretion as to determining policy in connection with such matters as are here involved unless the law . . . vests him with such discretionary or veto power; but, if the duty imposed upon him is of such character that as a matter of public interest he must, in the faithful discharge of his duties, scrutinize the preceding proceedings in order to determine whether in fact his duty has arisen, then we think that there was no intent upon the part of the legislature to subject the public officer to a criminal proceeding in case he concludes, perhaps erroneously, that the proceedings are illegal or that the signing of the documents, as here presented, would lead to the payment of an illegal claim against the city or the making of an illegal contract.
>
> . . . It is our belief that the sections here construed could only be invoked where the duties of the public officer are so purely ministerial that there can be no question about his obligation to perform them, as, for instance, in the filing or registration of instruments where adequate fees are tendered.[238]

Expressing somewhat similar views, the Illinois Court has held that mandatory requirements for public contracts to be let only to the lowest responsible bidder except in emergencies, was not violated by failure to award contracts by this means when offcials erroneously concluded that emergency conditions existed.[239]

When it has been determined that certain official duties are subject to a State's nonfeasance–misconduct law, there remains the question of what standard should be used in deciding whether performance is satisfactory. The ministerial character of these duties suggests that usually strict compliance with all details of the required action must be performed. However, circumstances may render it impossible for an official to perform his duty fully and exactly as set forth in the law. Early decisions laid down a rule of reason to such situations. So, for example, where a road overseer was charged with criminal failure to make road repairs, and it was shown that this was not possible to fully accomplish with the means available to him, the court required only that the overseer show reasonable diligence and effort in performing his duty.[240]

Clearly, however, any rule which accepts reasonable diligence and effort invites the possibility that negligence, mismanagement, and avoidable failures will be brought within the scope of the statute, and punished as misconduct in office. Use of such terms as "neglect" and "omission" in legislative language has encouraged confusion. Where qualified by such terms as "willful" or "knowingly," the standard takes clearer shape, and unintended application of the law may be avoided by reference to the necessity for intentional and deliberate refusal to act. Where statutes are worded in ways that leave doubt, courts appear to rely on a twofold rule: For duties that are mandatory, any intentional and deliberate refusal to perform them is punishable misconduct. Because he is not permitted discretion, there is no need to show more. However, where the law permits discretion, so that an intentional refusal to act might be considered the result of an exercise of judgment as to what would serve the public interest best, prosecution for misconduct can be sustained only by showing that the refusal was due to either corrupt intentions or else such gross negligence as to be the equivalent of fraud.[241]

[234] COLO. REV. STAT. § 18-8-404-405 (1973); DEL. CODE ANN. § 11-1211 (1974); ORE REV. STAT. § 162.415 (1975).

[235] ILL. ANN. STAT. ch. 38, § 33-3 (Supp. 1976); MINN. STAT. ANN. § 609.43 (1964).

[236] NEB. REV. STAT. § 28-724 (1975), "palpable omission of duty" by ministerial officer; MINN. STAT. ANN. § 609.43 (1964), "Intentionally fails or refuses to perform a known mandatory nondiscretionary ministerial duty of his office or employment within the time or in the manner required by law."

[237] 210 Minn. 214, 297 N.W. 713 (1941). The statute under which the case was brought read: [2 Mason Minn. St. 1927 § 9970] "Whenever any duty is enjoined by law upon any public officer or person holding public . . . employment, every wilfull neglect to perform such duty . . . shall be a gross misdemeanor . . ."

[238] *Id.*, 2d 297 N.W. at 714–15.

[239] People v. Campbell, 3 Ill. App. 3d 984, 279 N.E.2d 123 (1972).

[240] Parker v. State, 29 Tex. App. 372, 16 S.W. 186 (1891); State v. Demerritt, 64 N.H. 313, 9 A. 99 (1887). See also, Annot., 134 A.L.R. 1250 (1941).

[241] PERKINS, *supra* note 51 at 489.

Miscellaneous Forms of Misconduct

State legislation contains numerous provisions prohibiting and punishing other specific forms of misconduct in office. Some of these laws originated in response to particular incidents in their State's history, whereas others appear to codify the results of court decisions or anticipate all conceivable situations, potential as well as probable. A catalog of these statutory prohibitions adds no significant scope or substance to the general body of law addressed to conflicts of interest in the award and administration of public contracts. However, mention of some may be of interest to indicate the full range of matters the State laws cover.

In States that punish willfull failure to perform an official duty required by law, there sometimes is a complementary provision for punishment of public officers or employees who intentionally exceed their legal authority,[242] or who are guilty of malfeasance or partiality in performance of their duties.[243]

Reference has been made earlier to statutory provisions which, either explicitly or implicitly, seek to prevent the appearance of corruption as well as its actual occurrence. In a few instances these statutes are supported by administrative regulations which prohibit highway department officers and employees from engaging in any activity that embarrasses or discredits the department.[244]

Catchall provisions appear in various forms. For example, Oregon law considers it misconduct for a public officer or employee to violate any statute relating to his office or duties.[245] Utah law declares it misconduct to violate any part of the State's public ethics act.[246] In certain States it is declared unlawful for public officers or employees to engage in or become associated with any business enterprise that is subject to regulation by the governmental agency in which they are employed.[247]

Conspiracy to restrain trade or competition is the subject of an extensive body of law at both Federal and State levels. However, in certain instances these general safeguards are supplemented by specific prohibitions against restricting competition among bidders on highway contracts.[248] Colorado law, apparently responding to a particular undesirable past practice, makes it a crime for a public officer to designate a supplier of goods or services to the State where the State's rules require competitive bidding.[249]

Finally, reference should be made to the substantial number of States that have codes of ethics or standards of conduct for public officers and employees. Sometimes enacted in statutory form,[250] and sometimes promulgated as administrative regulations,[251] they represent an attempt to occupy the middle ground between law and morality on realistic terms. Although these codes often include many of the prohibitions that are closely related to bribery and conflicts of interest, the standards they contain speak to a level of personal responsibility in public service that can best be enforced by voluntary efforts or by disciplinary personnel action through administrative procedures.

In this respect they deal with the fringe areas of law and management where the main result of rigorously applying criminal penalties may be to drive public officials out of governmental service. In general, the public has a similar reaction to such criminal laws, not because it condones wrong-doing in government, but because it is suspicious of

[242] COLO. REV. STAT. § 18-8-404 (1973); ILL. ANN. STAT. ch. 38, § 33-3 (Supp. 1976); MINN. STAT. ANN. § 609.43 (1964); WIS. STAT. § 946.12 (1973).

[243] NEB. REV. STAT. § 28-724 (1975).

[244] D.C. Dep't of Highways & Traffic, *Circular No. 6* (May 24, 1960); Pa. Dep't of Transp., *Master Policy Manual*, No. 20101.001, (Oct. 10, 1974).

[245] ORE. REV. STAT. § 162.405 (1975).

[246] UTAH CODE ANN. § 67-16-12 (Supp. 1975).

[247] N.J. STAT. ANN. § 52:13D-23 (Supp. 1976); N.Y. PUBLIC OFFICERS LAW § 73 (7) (McKinney Supp. 1975).

[248] GA. CODE ANN. § 26-2308 (1972); KY. REV. STAT. § 57.081 (1975); WASH. REV. CODE ANN. § 9.18.130 (1961); WIS. STAT. § 133.01 (1973).

An instructive illustration of the problems of enforcing State laws against restraint of competition occurred in 1974 when 12 paving contractors were prosecuted for conspiracy to violate WIS. STAT. § 133.01 in regard to highway paving contracts over the previous 6 years. Injunctions were issued against future collusive activity, and statutory damages were compromised in a financial settlement with the State. Disqualification from future bidding was not ordered, however, mainly in consideration of the fact that defendants had done 85% of the State's bituminous concrete paving during the past 6 years, and their disqualification would leave the State highway division with very few competent in-state bidders on future paving contracts. Also, loss of status to bid on State contracts might well drive these companies out of business altogether, and so reduce competition generally as well as in the highway paving area. Letter from Attorney General Robert Warren to Robert Huber, Chairman, Wisconsin State Highway Commission (Sept. 13, 1974).

Restraint of competition may also be charged by taxpayers and unsuccessful bidders. See, Regan v. Babcock, 188 Minn. 192, 247 N.W. 12 (1933); Foley Bros. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963).

[249] COLO. REV. STAT. 18-8-307 (1973).

[250] ARIZ. REV. STAT. § 38-541 to -563 (1974); ARK. STAT. §§ 12-3001 to -3008 (Supp. 1975); CONN. GEN. STAT. ANN. §§ 1-66 to -78 (Supp. 1976); HAWAII REV. STAT., §§ 34 to 37 (Supp. 1975); KAN. STAT. ANN. §§ 46-215 to -278 (Supp. 1975); MASS. ANN. LAWS ch. 268A, §§ 1 to 25 (1968), as amended (Supp. 1975); MICH. STAT. Ann. §§ 4.1701 (121) to (137) (Supp. 1976); N.J. STAT. ANN. §§ 52:13D-11 to -27 (Supp. 1976); N.M. STAT. §§ 5-12-1 to -15 (1974); N.Y. PUBLIC OFFICERS LAW § 74(1) (McKinney Supp. 1975); OKLA. STAT. ANN. §§ 74-1401 to -1416 (1976); TEX. CIV. STAT. art. 6252-9b (Supp. 1976); UTAH CODE ANN. §§ 67-16-1 to -14 (Supp. 1975); WASH. REV. CODE ANN. §§ 42-21.010 to .090 (1972).

[251] MD. EXEC. ORDER OF THE GOVERNOR, 14A, art. I-VI (Sept. 4, 1969); N.D. State Highway Dep't, *Personnel Policy No. 3* (Dec. 1, 1974); PA. GOVERNOR EXEC. ORDER 1974-6 and Dep't of Transp., *Master Policy Manual*, No. 20101.001 to .003 (Oct. 10, 1974); Wis. State Highway Div., *Policy Memo 21-34*, "Conduct and Ethics" (Sept. 2, 1964).

the application of technical rules of criminal law to a field of activity where it has become practically impossible to maintain public and private interests in unmixed isolation. The most valuable contribution that can be made by codes of ethics and standards of conduct for public officers and employees, therefore, may not be the recognition of the need for minimum standards, but in providing a means of enforcement that is more flexible and realistic than the criminal law provides.[252]

CONCLUSION

An extensive body of law has been developed to control or prevent conflicts of interest in public transactions. From common law origins dealing chiefly with bribery of judicial officers, State legislation has extended the scope of these laws to reach all types of governmental functions and classes of public officers and employees, and has enlarged their purpose to include prevention as well as punishment of unlawful conflicts.

Contemporary conflict of interest law is an outgrowth of the increasing trend to bring governmental and private sector activities closer together—a trend which yields very real benefits in the management of national growth, but, at the same time, creates a working environment for public officials which makes it difficult to maintain independence of judgment and action. Numerous investigations of this problem by executive and legislative bodies, including a thorough inquiry by the House Special Subcommittee into the Federal-Aid Highway Program, documented these conflicts, and indicated the direction in which corrective and preventive measures should be sought.

Much of the present body of conflict of interest law applicable to the award and administration of highway contracts is in response to these investigations. Commencing in the 1960's, the growth of administrative regulations paralleling and expanding the statute law has had twofold importance: first, in 1960-61, it demonstrated how quickly administrative officers could take corrective action when serious shortcomings were revealed; and second, it presented an administrative process which offered an alternative to formal criminal proceedings in the enforcement of public contract policy.

Use of administrative power and procedures added flexibility to the enforcement of conflict of interest rules, and paved the way to the most recent developments in this body of law, namely: enactment of codes of ethics for public officials, and establishment of financial disclosure laws. Although these laws have created requirements which, in some instances, merely codify prohibitions or practices that have judicial acceptance, they have gone further to set forth requirements that must

[252] *See, generally,* PHILOS, *supra* note 6; Note, 47 U. VA. L. REV. 1034, *supra* note 43.

rely more on voluntary compliance and the disciplinary processes of personal administration than on enforcement in the criminal courts. Acceptance of these conditions as part of the terms of public employment has not so far impaired constitutionally protected rights, but financial disclosure laws have raised more serious constitutional issues. The limit to which State and Federal law may go in discovering and preventing potential conflicts of interest in public contracting will, in great measure, be delineated by the boundary that ultimately is laid down by the courts between the area of legitimate restriction of personal economic interests of public servants and the area of constitutionally protected rights of privacy which may be diminished by reason of public service, but never are completely waived.

APPENDIX

SUMMARY OF STATE LAWS RELATING TO CONTROL OF CONFLICT OF INTEREST IN HIGHWAY CONTRACT ADMINISTRATION

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Ala.	CODE, tit. 14, § 63 and 64 (1958). Covers giving and receiving bribes; applies to any State executive officer, deputy clerk, agent or servant of such executive clerk.	CODE, tit. 23, § 18, 126 (1958). Prohibits highway department personnel from having direct or indirect interest in State contracts for construction or maintenance of roads or bridges.			
Alaska	STAT. §§ 11.30.040, 11.30.-050, 11.30.070 (1970). Covers giving and receiving bribes; applies to any executive officer.	General Personnel Rules, § 706.0. Applies to all State employees; requires departmental approval to engage in outside employment, and prohibits inconsistent outside employment.			
Ariz.	REV. STAT. §§ 13–281 to –282 (Supp. 1973). Covers giving and receiving bribes; applies to any public officer or employee.	REV. STAT. §§ 38–501 to –505 (1974). Applies to all public officers and employees; requires disclosure of interests and abstention from participation in any matter in which party has "substantial interest." Restricts post employment dealings with public agency where previously employed; restricts unauthorized post-employment disclosure of confidential information acquired in course of official duties during previous employment.	REV. STAT. §§ 38–541 to –545 (1974). Applies to all public officers; requires filing of names under which they or their families conduct business; identification of sources of income; property owned directly or in trust; creditors; accounts receivable, gifts over $500, and professional or business licenses. Merit System Regs. Require written notice to State highway commission of interests in land held for investment purposes.	REV. STAT. §§ 38–443, to –444, 38–447 (1974). Misdemeanor for public officer or person holding position of public trust or employment to wilfully omit to perform duty which is required by law, or seek gratuity or reward other than authorized by law for performing official duty. REV. STAT. §§ 13–281.01, 13–281.02 (Supp. 1973). Prohibits obtaining money upon claim that he will improperly influence public officer or employee; pro-	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		Prohibits use of official position to secure personal benefit not ordinarily accruing from performance of duty where such benefit shows "substantial and improper influence" on performance of duties. Prohibits additional compensation for performing official duty.		hibits receiving or agreeing to compensation for improper influence or improper action regarding license, contract, payment, etc.	
Ark.	STAT. ANN. §§ 41–2702 to –2704 (Special Supp. 1976). Applies to any "public servant"; covers giving or receiving of bribes.	STAT. ANN. § 76–221 (1957). Prohibits State highway department employees from having pecuniary interest in any highway commission contract. STAT. ANN. §§ 76–222 (1957). Prohibits members of State highway commission, engineers, agents or employees from seeking or accepting gratuities intended to influence official action. STAT. ANN. §§ 12–3001 to –3005 (Supp. 1975). Prohibits public officials or State employees from engaging in outside employment which might require disclosure of confidential information obtained due to official position, or disclo-	STAT. ANN. §§ 12–3006 to –3008 (Supp. 1975). Requires annual report of direct financial interests in corporations subject to jurisdiction of State regulatory agency, official positions or directorships in organizations subject to State regulatory agencies, businesses from which compensation is received. Highway Dep't Memorandum (1960). Prohibits departmental employees from having financial interest in real estate to be acquired for federal-aid highway project unless interest is publicly disclosed.	STAT. ANN. § 12–3002 (Supp. 1975). Prohibits public official or State employee from using position to secure special privileges for self or family or others with whom he has substantial financial relationship. STAT. ANN. § 41-2707 (Special Supp. 1976). Prohibits public servant from committing unauthorized act or omitting to perform duty required by law or clearly inherent in the nature of his office.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		sure for personal profit. Prohibits acceptance of compensation in addition to State salary. Highway Dep't Memorandum (1960). Prohibits highway department employee from accepting outside employment.			
Calif.	PENAL CODE §§ 67, 67.5, 68 (Deering 1971). Applies to any executive or ministerial officer, employee or appointee; covers giving and receiving bribes.	PENAL CODE § 70 (Deering Supp. 1976). Prohibits knowingly asking, receiving, or agreeing to receive gratuities, rewards or promises thereof for an official act, except as authorized by law. GOV'T CODE § 1090 (Deering 1973). Prohibits State officers or employees from having financial interests in contracts made by them in official capacity or by body or board of which they are members. Does not prohibit "remote interests" as defined by law [§§ 1091, 1091.5 (Deering Supp. 1970)] if interests are publicly disclosed. GOV'T CODE § 19251 (Deering 1973). Prohibits State officers or employees engaging in outside employment inconsistent, incompatible,			
		or in conflict with duties. (Applied to local agency personnel in GOV'T CODE §§ 1126, 1127) (Deering 1973) as amended (Deering Supp. 1976). Dep't of Public Works Memorandum (Jan. 24, 1951). Prohibits departmental officers or employees accepting loans, profit sharing, or other business arrangements with parties doing business with department.			
Colo.	REV. STAT. §§ 18-8-301, 18-8-302 (1973). Applies to "public servants"; covers offering, giving, soliciting, accepting bribes.	REV. STATS. § 24-50-117 (1973). Prohibits State employees from engaging in "any employment or activity" which creates conflict of interest. REV. STATS. § 18-8-303 (1973). Prohibits soliciting, offering or accepting compensation for actions favoring another or exercising discretion in performing duty as public servant. § 18-8-304. Prohibits soliciting unlawful compensation for official acts. §18-8-306. Makes it a felony to attempt to influence public servants or affect their actions by deceit, threats, or economic reprisals.	REV. STATS. § 18-8-308 (1973). Requires disclosure of actual or potential conflict of interest where public servant exercises any substantial discretionary function regarding public contract or transaction.	REV. STATS. § 18-8-307 (1973). Prohibits "designating" suppliers of goods or services to State where bidding is required by law § 18-8-402. Prohibits misuse of information obtained in public service by (1) acquiring pecuniary interest in property or business affected by government action, (2) speculating on basis of official position, or (3) advising others for special financial benefit on basis of such information. §§ 18-8-404, 18-8-405. Prohibits intentional misconduct by unauthorized use of official position, or refraining from performing duty imposed by law.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Conn.	GEN. STAT. ANN. §§ 53a-147, 53a-148 (1972). Applies to all public servants; covers giving and accepting bribes.	GEN. STAT. ANN. §§ 1-66, 1-68 (Supp. 1976). Prohibits members of executive department and employees from (1) having any interests, or engaging in transactions, or incurring any obligations in substantial conflict of interest with proper discharge of duties, (2) engaging in outside employment which impairs independent judgment or requires disclosure of confidential information obtained in official duties, (3) disclosing for financial gain confidential information acquired in official duty, or using such information for financial gain, or (4) accepting employment involving representation of others before certain State agencies or boards.	GEN. STAT. ANN. § 1-76 (Supp. 1976). Requires filing statements of economic interests likely to create conflicts of interests. Dep't of Transp. Reg. § 1.03. Prohibits State employees from (1) having interests which could reasonably be considered as resulting in conflict of interest, (2) accepting gifts or favors, or doing business, or engaging in outside employment "which could be interpreted as tending to influence" discharge of duties, and (3) using State equipment, materials or information for personal gain.		
Del.	CODE, tit. 11, §§ 1201, 1202, 1203, 1209 (1974). Applies to all public servants; covers giving, receiving, offering, or soliciting bribes.	CODE ANN. tit. 11, §§ 1205, 1206, 1207, 1208, 1209 (1974). Prohibits giving or receiving gratuities or personal benefits for engaging in official conduct for which additional compensation is not authorized. Declares misdemeanor to exert improper influence on public servant through threat of unlawful harm.		CODE ANN. tit. 11, § 1211 (1974). Declares misdemeanor through official misconduct for personal gain or to cause harm to another by committing unauthorized exercise of official function, knowingly refraining from performing duty required by law or nature of office, knowingly performing official function in a way intended to benefit one's own property or financial interests "under circumstances in which his actions would not have been reasonably justified in consideration of the factors which he ought to have taken into account in performing his functions." CODE ANN. tit. 11, § 1212 (1974). Declares misdemeanor to engage in profiteering as defined in statute. State Highway Dep't Reg. Prohibits outside employment without official permission.	
Fla.	STAT. ANN. §§ 838.014, 838.015 (1976). Applies to any public officer, agent, or employee; covers giving and receiving bribes.	STAT. ANN. § 838.016 (1976). Prohibits any public servant from exacting or accepting pecuniary or other benefit other than authorized by law for performance, nonperformance or violation of official duty. STAT. ANN. § 838.016 (1976). Prohibits offering public officer compensation or reward not authorized by law. STAT. ANN. § 337.04, 337.12 (1968) as amended (Supp.			

		1976). Prohibits State road board members or employees of department of transportation, or company in which member of State Road Board is financially interested from contracting with Board to purchase materials or perform construction for performance of work. § 337.045 (Supp. 1976). Prohibits State officers or employees of department of transportation from soliciting or accepting funds from anyone who has or seeks business relations with department. Dep't of Transp. Regs. Prohibits members or employees from accepting gratuities or loans.			
Ga.	CODE ANN. § 26-2301 (1972). Applies to any State officer; covers giving and receiving bribes.	CODE ANN. § 26-2301 (1972). Prohibits State officers, agents or employees from accepting money or anything of value in addition to authorized compensation as inducement to perform official act. CODE ANN. § 26-2306 (Supp. 1976). Prohibits State officers, agents or employees from selling goods or chattels to State for his own financial interest, or for any business entity, while he is financially interested in such organization.			CODE ANN. § 26-2307(a) (1972). Prohibits conspiracy to defraud State by theft of property belonging to State; and § 26-2308 (1972), transactions or conspiracies in restraint of free and open competition in any transaction with State.

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		Dep't of Transp. Rules. Prohibits departmental engineers from "working in competition with outside engineers," accepting payments on car or services or gifts.			
Hawaii	PENAL CODE, act 9 § 1040, [1972] Hawaii Laws 116 (likely to appear at HAWAII REV. STAT. § 710-40). Applies to any public servant; covers giving and receiving bribes.	REV. STAT. § 76-106 (1968). Prohibits State or county employees from having outside employment inconsistent, incompatible or in conflict with proper discharge of duties. §78-6 (1968). Prohibits full-time officers from engaging in other gainful occupation, employment, or professional practice during term of office. REV. STAT. § 103-58 (1968). Prohibits State officers from making contracts with themselves or organizations in which they are members or stockholders, or acquiring financial interest in subcontractors. REV. STAT. § 84-14 (Supp. 1975). Prohibits State employees from (1) taking any official action directly affecting a business in which he has substantial interest; (2) acquiring financial in-	REV. STAT. § 84-17 (Supp. 1975). Requires public employees to file statement of financial interests likely to be affected by actions of their agency.		REV. STAT. § 84-18 (Supp. 1975). Prohibits postemployment disclosure of information which by law or practice is not publicly available and was acquired in official duty, or use of such information for personal gain or benefit of others; prohibits postemployment representation of others in dealing with agency in which employee served.

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		terest in any business with which he may be officially involved; (3) representing others before State or county agency for contingent fee; (4) representing others for compensation in a matter in which he officially participated; (5) representing others in any transaction before an agency over which he has authority, unless interest has been disclosed. REV. STAT. § 84-15 (Supp. 1975). Prohibits State from making contracts over $1,000 with State employee or business in which he has controlling interest, or which is represented or personally assisted by one who has been a State employee within 2 years and participated in such matter while employed. REV. STAT. § 84.12 (Supp. 1975). Prohibits disclosure for personal gain or benefit of others any information acquired in official duty and not available to public.			
Idaho	CODE §§ 18-2701, 18-2702 (1947) as reenacted (Supp. 1976). Applies to all executive officers; covers giving and receiving bribes.	CODE § 18-2704 (1947) as reenacted (Supp. 1976). Prohibits executive officials from accepting any gratuities or rewards for doing official acts, except as provided by law. CODE § 59-201, 59-202 (1947). Prohibits State officials from having interest in contracts made by themselves or bodies of which they are members; or purchase or sell interests in anything he dealt with in official capacity. Dep't of Highways Regs. § 18-023.030. Prohibits soliciting or accepting gratuities, favors, services, loans, entertainment which might reasonably be interpreted as tending to influence performance of official duties. Dep't of Highway Reg. § 18-023.040. Prohibits State employees from acquiring equipment or material, or accepting outside employment from organizations likely to have official dealings with agency.			
Ill.	ANN. STAT. Ch. 38, § 33-1 (Supp. 1976). Applies to public officers, public employees and jurors; covers giving and receiving bribes.	ANN. STAT. Ch. 102, § 3 (Supp. 1976). Prohibits acting as agent for another in application or bid on contract with own agency; prohibits receiving gratuity or other valuable benefit		ANN. STAT. Ch. 38, § 33-3. Prohibits (1) intentionally or recklessly failing to perform mandatory duty, (2) knowingly performing acts forbidden by law, (3) intentionally acting in excess	

		for influencing official action; prohibits elective or appointive official from having interest in any contract or work regarding which he must take action.		of authority for personal gain or advantage of others, and (4) soliciting or accepting rewards or fees not authorized by law for performance of official duties.	
Ind.	STAT. ANN. § 35-1-90-4 (1975) repealed effective 7-1-77 and replaced by § 35-44-1 (Supp. 1976). Applies to State officers or other agents, employees, or persons holding office of trust or profit under State law; covers giving and receiving bribes.	STAT. ANN. § 35-1-101-7 (1975). Prohibits State officer, agent, appointee, or person holding appointing power from being directly or indirectly interested in any State contract for construction of bridges, public buildings or works.			
Iowa	CODE ANN. §§ 739.1, 739.2 (1950). Applies to any executive officer of State; covers giving and receiving bribes. CODE ANN. § 739.11 (1950). Prohibits giving, offering, or promising gratuity or other consideration for purpose of "corruptly influencing" official act.	CODE ANN. § 739.10 (1950). Prohibits any State officer from accepting gratuity or other compensation not authorized by law for performance of official actions. § 741.1 (Supp. 1976). Prohibits accepting gift, bonus, gratuity, or commission in connection with any business transaction, or offering or giving such gifts or rewards. CODE ANN. § 741.11 (1950). Prohibits supervisors and township trustees from having any interest in public contracts. § 314.2 (Supp. 1976). Prohibits State officials and employees from having interest in contracts for construction, reconstruction or improvement of highways, bridges or culverts, or furnishing materials therefor.		CODE ANN. §§ 740.12, 740.19, 740.20 (1950). Prohibits (1) fraudulently making false entries, receipts or certificates on public records, (2) willfully neglecting to perform duty connected with public office, and (3) using publicly owned equipment, materials or machinery for private purposes, or permitting such use.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Kans.	GEN. STAT. ANN. § 21-3901 (1974). Applies to any officer or employee of State; covers giving and receiving bribes.	STAT. ANN. §§ 46-233, 46-235, 46-237, 46-238 (Supp. 1975). Prohibits State officer or employee from (1) taking part in contract with a business in which he has a substantial interest, (2) taking employment with business having contracts with officer's agency; (3) accepting additional compensation for performance of official duties; (4) accepting gifts, loans, special discounts, economic opportunities, or services valued at over $100 in a year under circumstances where it should be known that donor seeks to influence performance of official acts, or (5) accepting sale or lease of property from anyone known to have a special interest at a special rate or price. STAT. ANN. §§ 46-239, 46-240, 46-242 (Supp. 1975). Prohibits State officers or employees from representing others in claims against State, unless a disclosure statement is filed.	STAT. ANN. §§ 46-247 to 46-252 (Supp. 1975). Requires filing of statement of substantial interest by certain State officers and employees.	GEN. STAT. ANN. §§ 21-3902, 21-3903, 21-3905, 21-3906, 21-3910 (1970). Prohibits State officer or employee from (1) willfully and maliciously committing acts of oppression, partiality, misconduct, or abuse of authority, (2) willfully asking or accepting unauthorized fee or reward for performance of official duty, (3) giving or offering additional compensation for past official acts, (4) permitting false claims upon the State to be audited or paid, (5) discounting public claims, (6) misuse of public funds. STAT. ANN. § 21-3907 (1974). Prohibits public officers from having unlawful interest in insurance contracts, or engaging in unlawful procurement of insurance contracts. STAT. ANN. § 46-241 (Supp. 1975). Prohibits disclosure or use of confidential information by State officer or employee.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Ky.	REV. STAT. § 432.350. Applies to any executive or ministerial officer of State; covers giving and receiving bribes.	REV. STAT. § 61.190 (1975). Prohibits public officials from receiving any interest, profit or perquisite arising from use or loan of public funds in his hands or through his agency. REV. STAT. § 180.050 (1976). Prohibits highway department officers and employees from having interests in companies involved in building bridges for the State. REV. STAT. § 45.990 (1975). Prohibits offering, paying, taking or receiving rebates, percentages of contracts, or other payments as inducement for procurement of business. Dep't of Highways Order 57805. Prohibits professional or technical employees from engaging in part-time work with businesses qualified to do work for State; prohibits giving gifts, presents or gratuities to highway department employees for performing official duties. Dep't of Highways Memoranda direct staff and fee appraisers not to work on property acquisitions for State where they or their families have interests; and direct departmental employees to avoid conflicts of interest in contracts made by department.			REV. STAT. § 45.460 (1975). Prohibits agreements or collusion among prospective bidders which restrain or are "reasonably calculated" to restrain competition by agreeing to bid at fixed price or refrain from bidding.
La.	REV. STAT. § 14-118 (1976). Applies to all public officers and employees; covers giving and receiving bribes.	REV. STAT. § 14-120 (1974). Prohibits giving or accepting gratuities or other benefits with intention that the recipient will corruptly influence official action by public officials. REV. STAT. § 48-421 (1965). Prohibits directors, officers, and employees of highway department, and companies in which they are financially interested, from bidding on, entering into or being interested in contracts for building highways or furnishing materials or supplies therefor. Dep't of Highways Memoranda. Prohibits departmental employees from accepting any gifts, loans, gratuities or favors from contractors, vendors or consultants doing business with the department.			
Maine	REV. STAT. ANN. tit. 17A, § 602 (Special Supp. 1976). Applies to executive officers; covers giving and receiving bribes.	REV. STAT. ANN. tit. §§ 604 to 606 (Special Supp. 1976). Forbids public servant from accepting or soliciting pecuniary benefit for past, present, or future matters over which he may exercise his discretion. REV. STAT. ANN. tit. 17A, § 609 (Special Supp. 1976). Forbids public servant from misusing information for pecuniary gain for himself or another.			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Md.	ANN. CODE art. 27, § 23 (1976). Applies to any executive officer or employee of State; covers giving and receiving bribes.	ANN. CODE art. 89B, § 3 (Supp. 1976). Prohibits member of State Roads Commission from having pecuniary interest in any contract for work done or material provided for Commission. Governor's Exec. Order Art. 41 § 14A (Sept. 4, 1969, as amended Oct. 9, 1970). Declares it unethical to (1) accept gift, gratuity, fee, loan, service, or other thing of value from party doing business with State, or who is regulated by State, under circumstances indicating intent to influence performance of official duties; (2) disclose for personal gain or advantage of others any confidential information concerning State business; (3) engage in outside employment which may result in conflict of interest; (4) intentionally use prestige of State office for personal gain; (5) assist in representing another in any transaction involving State which results in conflict of interest; (6) participate in transaction involving State in which officer or employee has direct interest, or where he knows that other parties to transaction include: (a) company in which he has direct or indirect interest, or is an officer or director; or with which he is negotiating for employment; (b) company which is his creditor; (c) company having officer or employee with which he has conflict of interest.			
Mass.	ANN. LAWS ch. 268A, § 2 (1968). Prohibits giving or receiving corrupt gifts or offers made to influence official acts of State or local employees to aid in collusion for fraud, or induce action or omission of unlawful nature.	ANN. LAWS ch. 268A, §§ 3, 4, 11, 12 (1968). Prohibits present or former State employee from accepting anything of substantial value for or because of an official act, or from giving or accepting any compensation other than authorized by law. ANN. LAWS ch. 268A, § 5 (1968). Prohibits former State employee from acting as agent or attorney for another than the State in conjunction with any matter in which State has a sub-	ANN. LAWS ch. 268A, §§ 6, 24 (1968). Prohibits State employee from participating in any matter in which he or his family has financial interest, unless he first discloses interest, and obtains determination that interest is not so substantial as to affect integrity of his duties.	ANN. LAWS ch. 268A, § 23 (1968) as amended (Supp. 1975). Establishes standards of conduct for State employees. Prohibits State or local officers or employees from: 1. Outside employment which impairs independence of judgment. 2. Activity requiring disclosure of confidential information obtained in official position. 3. Disclosing confidential information for personal gain.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		stantial interest and in which employee participated during his employment; prohibits former employee from acting as agent or attorney in any case involving State for one year following end of his employment. ANN. LAWS ch. 268A, § 7 (1968) as amended (Supp. 1975). Prohibits State employee from having a financial interest in any contract made by State agency. Ch. 268A, § 8 (1968). Prohibits employee from directing bidder on State construction contract to obtain insurance or surety bond from any particular source.		4. Using official position to secure personal privilege or gain. 5. Conduct indicating that he can be improperly influenced in official action by others. 6. Conduct raising suspicion that he is likely to violate law.	
Mich.	STAT. ANN. §§ 28.312, -313 (1962). Applies to any public officer, agent, servant or employee; covers giving and receiving bribe.	STAT. ANN. § 5.353 (1973) as amended (Supp. 1976). Prohibits members of Board of County Road Commissioners from having pecuniary interest in the contractor or employee in any contract for the board, or property purchased or sold by the board. §§ 4.1701(123), 4.1701(124) (Supp. 1976). Prohibits State officer or government employee from having financial or other interest in contract with State, or from incurring any obligation which is in	STAT. ANN. §§ 4.1701(131), 4.1701(132) (Supp. 1976). State officials must file information of business, sources of income, real property, creditors, and gifts.		
		substantial conflict with proper discharge of official duties. STAT. ANN. §§ 4.1701(121), 4.1701(126) (Supp. 1976). Establishes standards of conduct for public employees. Public officer or employee shall not: 1. Divulge to unauthorized parties confidential information acquired in course of duties. 2. Present his personal opinion as that of his agency. 3. Accept any gift, loan, goods, services, or other thing of value which tends to influence manner in which official duties are performed. 4. Engage in business from which he may profit from official position or authority, or benefit financially from confidential information obtained by reason of official position. 5. Accept employment or render services which are incompatible or in conflict with independence of judgment or action in performing official duties. 6. Public officer or employee shall use personnel, resources, property or funds under his official care solely in accordance with law, and not for personal gain or benefit.			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Minn.	STAT. ANN. § 609.42 (1964). Applies to all public officers and employees; covers giving and receiving bribes.	STAT. ANN. § 161.33 (1960). Prohibits members or employees of highway department from having interest in any contract for construction or improvement of roads or bridges, or purchase or repair of road machinery, equipment, materials or supplies. Rules of Conduct, State Civil Service Board. Prohibits employee from accepting gratuities; representing the State in any dealings with businesses in which he has a substantial pecuniary interest; engaging in outside employment which may reasonably be expected to impair independence of judgment in exercise of official duties, or disclose confidential information acquired through official position, or which is incompatible, inconsistent, and in conflict with official duties.		STAT. ANN. § 609.43 (1964). Prohibits public official or employee from (1) intentionally failing or refusing to perform known, mandatory, nondiscretionary ministerial duty; (2) knowingly performing act in excess of authority or forbidden by law; (3) intentionally injuring another through pretense of official authority; (4) knowingly making false returns, certificates, reports or similar documents. STAT. ANN. § 609-45 (Supp. 1976). Prohibits public officials or employees from asking for or receiving compensation not authorized by law for performance of official duties. STAT. ANN. § 609.455 (1964). Prohibits public officials or employees from auditing, allowing or paying claim on State known to be false.	
Miss.	CODE § 97-15-3 (1972). Applies to members of highway commission and employees; covers giving and accepting bribes. CODE § 97-15-5 (1972). Applies to members of highway commission and employees and covers conspiracy with others to permit violation of law or contract with intent to defraud State.	CONST., art 4, § 109. Prohibits public officers or members of the legislature from having interests in any contract with State during term of service and one year after expiration of term. CODE §§ 97-15-7, 97-15-9 (1972). Prohibits candidates for highway commission from accepting campaign contributions from roadbuilders; prohibits contractors and materialmen from contributing to campaigns of highway commission members. CODE § 97-15-11 (1972). Prohibits collusion among contractors to raise prices of construction, work, equipment or supplies.			
Mo.	ANN. STAT. §§ 558.010, 558.020, 558.080, 558.090 (1953) as amended (Supp. 1976). Apply to all public officials; cover giving, receiving, and solicitation of bribes, and attempts at bribery.	ANN. STAT. § 226.180 (Supp. 1976). Prohibits member of State highway commission or engineer, agent, or other employee from soliciting, receiving or accepting bribe, gratuity, gift or reward from company furnishing materials for roadbuilding, or bonding company; or from soliciting employment from any business furnishing materials on State roadbuilding or performing construction work.			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Mont.	CONST. art. XIII, § 4. Directs that legislature shall provide code of ethics prohibiting conflicts of public duty and private interest for members of legislature and all State and local officers and employees. REV. CODE § 94-7-102 (Criminal Code Supp. 1976). Applies to all State officers and employees and covers offering and accepting bribes.	REV. CODE § 94-7-104 (Criminal Code Supp. 1976). Prohibits accepting compensation for past performance of official duty. § 94-7-105. Prohibits accepting gifts, gratuities or other rewards from parties regulated by agency, or known to have or be seeking contracts or claims on State. Exception: "trivial benefits" incidental to personal, professional or business contacts involving no substantial risk of undermining official impartiality.		REV. CODE 94-7-208, 94-7-209 (Criminal Code Supp. 1976). Prohibits tampering with physical evidence involved in official business or tampering with official records. REV. CODE § 94-7-401 (Criminal Code Supp. 1976). Prohibits purposely or negligently failing to perform duty, or performing acts forbidden by law, or accepting rewards or compensation not authorized by law.	
Nebr.	REV. STAT. §§ 28-706, 28-708 (1975). Applies to State officers; covers giving and accepting bribes, attempted bribery, and solicitation of bribe by public officer.	CONST. art. III, § 16. Prohibits State officer from having interest in any contract with State during term of public service and for one year after end of term. Dep't of Roads Admin. Order. Prohibits department employees from engaging in part-time employment with contractor doing business with the State, without obtaining written authority from department.		REV. STAT. § 28-724 (1975). Declares misdemeanor for any ministerial official to make any "palpable omission" of duty, willfully and corruptly engage in malfeasance or partiality in discharge of duties.	
Nev.	REV. STAT. §§ 197.010, 197.020, 197.030, 197.040 (1973). Applies to executive and administrative officers and others; covers giving and receiving bribes.	REV. STAT. § 408.890 (1975). Prohibits employees of department of highways from having interests in contracts for construction, reconstruction, improvement or maintenance of highways.		REV. STAT. § 197.110 (1973). Prohibits public officer from asking for or receiving gratuity or compensation for omitting or deferring performance of an official duty or service, except as allowed by law; prohibits public officer from using personnel, money or property under his official control for his private gain or benefit of another; prohibits public official from being interested in any contract, sale or lease made through or supervised by him.	
N.H.	REV. STAT. ANN. § 640.2 (Supp. 1973). Applies to any officer or employee of State; covers giving and accepting bribes, requires public officials to report offers of bribes.		REV. STAT. ANN. § 640.3 (Supp. 1973). Prohibits acts for purpose of influencing discretion of public official on "basis of considerations other than those authorized by law." Requires public servants to report attempts at improper influence. REV. STAT. ANN. §§ 640.4, 640.5, 640.6 (Supp. 1976). Prohibits accepting additional outside compensation for performing official duty or past acts, gifts from donors interested in State business, or compensation for assisting others in preparing contracts, claims, and other transactions with State. § 95.1 (Supp. 1973). Prohibits State officers from having interests in contracts with State agencies.	REV. STAT. ANN. § 643.2 (Supp. 1973). Prohibits use of information acquired by virtue of public office for (1) acquiring interest in property, business or transaction which may be affected by State action; (2) speculating or wagering; (3) knowingly aiding another to do such things. REV. STAT. ANN. §§ 641.3, 641.6, 641.7 (Supp. 1973). Prohibits tampering with public records or information, falsifying physical evidence, making false or misleading statements (including samples, maps, specimens).	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
N.J.	STAT. ANN. § 2A:93-6 (1969). Applies to bribes to secure work, service, license, permission, approval, "or other act or thing connected with . . . any office . . . of the government"; covers giving and receiving bribes.	STAT. ANN. §§ 52:13D-12 to 52:13D-20 (Supp. 1976). Prohibits State officers or employees from: (1) representing any business in which he has an interest in negotiations for acquisition of land for State, any proceeding before State agency in which he has served; (2) after terminating State service, representing in a proceeding on which he previously had been involved; (3) acting on a State contract awarded to a party in which he has a substantial interest. STAT. ANN. § 52:13D-24 (Supp. 1976). Prohibits soliciting or accepting gratuity, gift, employment, or reward for services related to official duties.		STAT. ANN. § 52:13D-23 (Supp. 1976). Establishes code of ethics for State officers and employees. Prohibits officers or employees from: 1. Having interests or engaging in business transactions which are in substantial conflict with proper discharge of duties. 2. Engaging in any business which is subject to State licensing or regulation unless notice given to State. 3. Using official position to secure unwarranted privilege or advantage. 4. Acting in any matter in which he has personal financial interest which might impair his independence of judgment. 5. Engaging in outside employment which might impair independence in judgment. 6. Accepting gift, favor or service under circumstances which might indicate it was intended to influence official action; or 7. Knowingly acting in any way giving the impression to the public that he may be engaged in unethical conduct.	
				STAT. ANN. § 52:13D-25 (Supp. 1976). Prohibits disclosure of information obtained through official position and not generally available to the public.	
N. Mex.	STAT. §§ 40A-24-1, 40A-24-2 (1972). Applies to public officers or employees; covers giving and accepting bribes.	STAT. §§ 5-12-1 to 5-12-15 (1974). Prohibits State employees from (1) receiving any fee or reward, other than authorized by law; (2) acquiring or holding conflicting financial interest; (3) using confidential information for his or another's private gain; or (4) contracting with agency employing him. Also requires financial disclosure. State Highway Dep't Admin. Order. Prohibits departmental employees from accepting gratuities of any kind from persons doing business with State. Prohibits engineering and surveying staff from engaging in outside employment with companies doing business with State.			
N.Y.	PENAL LAW §§ 200.00, 200.10 (McKinney 1975). Applies to all public servants; covers giving and accepting bribes.	Public Officers Law § 73 (McKinney Supp. 1975). Prohibits State officers and employees from: 1. Agreeing to contingent fees for services connected with matters before State agencies.		Public Officers Law § 74 (McKinney Supp. 1975). Establishes Code of Ethics for State officers and employees. Prohibits: 1. Accepting other employment which will impair independence of judg-	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		2. Bringing claim or representing another in a claim against State. 3. Having financial interest in contract with the State. 4. Accepting favors, gifts, services, loans, travel, entertainment, hospitality or other benefits under circumstances suggesting that they might influence him in official actions. 5. For 2 years following termination of employment, representing another in a proceeding before the State regarding which he was involved during his employment. PENAL LAW, §§ 200.25, 200.35 (McKinney 1975). Prohibits public servants from accepting any gratuity or reward not authorized by law for performance of official duties.		ment, or compel disclosure of confidential information obtained by reason of official position, or use of confidential information for personal gain. 2. Using official position to secure unwarranted privileges or benefits. 3. Conducting himself so as to give impression that his official actions are affected by favors or other personal considerations, or engaging in acts which violate the law. 4. Acquiring personal investments in businesses which may be expected to be involved with State agencies.	
N.C.	GEN. STAT. §§ 14–217, 14–218 (1969). Applies to any person holding office under State law; covers giving and accepting bribes.	GEN. STAT. § 14–353 (1969). Prohibits giving or accepting gratuities or gifts with intent of influencing State agents or employees in their official actions. State Highway Comm'n Admin. Order. Prohibits employees of department, and contractors and suppliers dealing with department, from giving or receiving gifts or loans to State employees. Prohibits departmental employees from accepting outside employment which would result in conflict of interest, or compromise position of employee or commission with companies doing business with them. GEN. STAT. § 136–13 (Supp. 1975). Prohibits gifts or favors intended to influence official action, or engage in fraud upon State, or violation of law. Applies to officers and employees of State highway commission, members of Secondary Roads Council and Board of Transportation. GEN. STAT. § 136–14 (Supp. 1975). Prohibits member of highway commission from being employed by a business furnishing supplies, materials or work to State.			
N. Dak.	CENT. CODE § 12.1–12–01 (1976). Applies to all public servants; covers giving and receiving bribes.	CENT. CODE § 12.1–12–03 (1976). Prohibits public servants from asking for or receiving gratuities or			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		rewards for doing official acts, or compensation for any official service. CENT. CODE § 48-02-12 (1960). Prohibits members of special boards from becoming financially concerned with contracts made by their agency. State Highway Dep't Personnel Policy, 1974. Establishes standards to avoid conflicts of interest. Provides: 1. No department personnel may take part in award of contract in which he has financial or personal interest. 2. Any direct or indirect interest in real property acquired for highway projects must be disclosed, and interested employee may not participate as agent of State in negotiations. 3. Department personnel may not accept any gifts valued over $25 from anyone having dealings with department. 4. Department personnel and families may bid on equipment purchases or land only where competitive bidding is used.			
Ohio	REV. CODE § 2921.02 (1975). Applies to public servants; covers giving and receiving bribes.	REV. CODE §§ 2921.42, 2921.43 (1975). Prohibits being interested in contract for purchase of supplies, property, or insurance for use of governmental agency, State or local. Prohibits acceptance of gratuities or special rewards for performing official duties, or outside employment or business which is inconsistent with officer's public office.			
Okla.	STAT. ANN. §§ 21-381, 21-382 (Supp. 1975). Applies to executive and other public officers; covers giving and receiving bribes.	STAT. ANN. § 74-1404 (1976). Prohibits State employee from accepting gratuities, loans, gifts, entertainment, favors or services intended to influence performance of official duties, or of having substantial financial interest in any sale to a State agency, or accepting outside employment which would impair his efficiency or independence of judgment or using confidential information for own benefit. State Personnel Board Reg., "Conduct of Classified Employees": Prohibits engaging in employment or activity which is inconsistent, incompatible, or in conflict with duties, or involves use of State facilities, equipment, supplies or time.		STAT. ANN. § 74-1404 (1976). Prohibits use of official position to secure special privileges for himself.	

Oreg.	REV. STAT. §§ 162.015, 162.-025 (1975). Applies to any public servant of State; covers giving and receiving bribes.	REV. STAT. § 244.040 (1975). Public official prohibited from receiving gifts or other rewards; seeking or receiving promise of future employment; or using confidential information for personal gain. State Highway Dep't Admin. Order. Prohibits outside engineering employment for engineering personnel and outside appraisal employment for right-of-way personnel.	REV. STAT. §§ 244.050 to 244.110 (1975). Executive officers required to file statements of financial interests. § 244.120 (1975). Public officials required to disclose conflicts arising in course of duties.	REV. STAT. § 162.405 (1975). Declares misdemeanor for violating any statute relating to employee's office or duties; § 162.415 (1975). Prohibits failure to perform official duty with intent to gain personal benefit or harm another person thereby. § 162.425 (1975). Prohibits using confidential information gained through official duties to obtain personal gain for himself or others.	
Pa.	CONSOL. STAT. ANN. § 18–4701 (1973). Applies to any officer; covers giving and receiving bribe.	CONSOL. STAT. ANN. § 18–4108 (1973). Prohibits giving or receiving additional rewards or compensation for performance of official duty. CONSOL. STAT. ANN. § 18–7503 (1973). Prohibits State engineers and architects from having interests in contracts they award. CONSOL. STAT. ANN. §§ 71–776 to 71–776.8 (1962). Prohibits State employee from attempting to influence the making or performance of a public contract in which		CONSOL. STAT. ANN. § 18–5302 (1973). Prohibits abuse of official position by using confidential information acquired officially to obtain personal pecuniary interest in property being acquired by State, or to wager on basis of such information.	

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		he has an adverse interest; prohibits representing another in any claim or proceeding against the State. Governor's Executive Order No. 1974–6. Establishes Code of Ethics for State employees, and prohibits: 1. Acceptance of loans, gifts or services for personal benefit intended to influence performance of official duties. 2. Unauthorized disclosure of confidential information, or advance release of official information for personal gain. 3. Part-time outside employment resulting in conflict of interest. 4. Activity which violates law or reflects unfavorably on department or State.			
R.I.	GEN. LAWS §§ 11–7–3 to 11–7–6 (1969). Applies to public agents, employees and servants; covers giving and receiving bribes.	State Bureau of Public Works. Standard contract form for employing highway engineers and architects prohibits employee from having outside employment while working for department.			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
S.C.	CODE §§ 16–211, 16–212 (1962). Applies to State executive officers; covers giving and receiving bribes. § 33–6 (1962). Applies to members of State Highway Commission or engineers, agents, or other employees.	CODE § 16–213 (1962). Prohibits acceptance of gratuities, rebates or extra compensation for performance of official duties. State Highway Dep't Admin. Reg., § 14.4(b). Prohibits outside employment that is in any way inconsistent with duty to highway department; and requires all outside employment to have written approval.			
S. Dak.	CONST. art. III, § 28; COMP. LAWS §§ 3–15–4, 3–15–5, 3–15–10 (1974). Applies to all public officers and public employees; covers giving, receiving, and soliciting bribes.	COMP. LAWS § 31–2–26 (1976). Prohibits State Highway Commission members or employees from accepting gratuities or anything of value on account of any contract or proceeding related to construction, improvement, repair or maintenance of roads or bridges; also prohibits member or employee from having financial interest in a Commission contract for purchase of right-of-way, equipment, material, supplies for construction, etc., of roads or bridges.			
Tenn.	CODE §§ 39–801, 39–802 (1956). Applies to executive officers of the State; covers giving and accepting bribes.	CODE §§ 54–117, 54–118 (1968). Prohibits public officer from making any contract for a governmental agency with anyone who is (1) a relative by blood or marriage within the fourth degree, (2) a stockholder in the contractor company, (3) one who, as an engineer in a public agency, has an interest in the contract. CODE § 54–121 (1968). Prohibits highway department employees from encouraging purchase of particular materials or products, or assists in initiation of requisition of materials or supplies.		CODE § 54–119 (1968). Prohibits "any fraudulent act whatever in respect to the expenditure of" State funds connected with roads or bridges.	
Tex.	PENAL CODE § 36.02 (Supp. 1976). Applies to executive officers and State employees; covers giving and accepting bribes. § 36.04 (1974). Prohibits privately addressed representations, entreaties, arguments, or other communications to any public servant who exercises official discretion in adjudicatory proceedings intending to influence the outcome on account of those considerations.	PENAL CODE §§ 36.07, 36.08, 36.09, 36.10 (1974) as amended (Supp. 1976). Prohibits giving or accepting additional compensation for past official acts, or gifts from anyone subject to public officer or his agency. CIV. CODE art. 6252–9b. Prohibits (1) accepting gifts or services which might influence discharge of official duty, (2) engaging in employment or business which might cause disclosure of confidential information acquired officially, (3) making personal investments which would create a substantial conflict of interest, (4) accepting outside employment which would impair independence of judgment, or lead to disclosure of confidential information gained officially, and (5)	CIV. CODE art. 6252.9. Requires disclosure to Secretary of State by State officers of his financial activity.		

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
		accepting compensation from outside source for duties performed for a State agency.			
Utah	CODE ANN. Applies to public servants; covers giving and accepting bribes.	CODE ANN. §§ 76-8-103 (Supp. 1975) (Public Officers and Employees Ethics Act). Prohibits engaging in business or employment which might induce disclosure of confidential information gained through official position, or might impair independence of judgment in performance of official duties; accepting gifts or loans which might influence discharge of official duties, or which involve parties doing business with the employee's agency; accepting outside compensation for assisting in transactions involving State or local government; having substantial interest in a transaction involving a State agency, or a business regulated by a State or local agency; having personal investments in a business which creates a substantial conflict between private interest and public duty.		CODE ANN. § 67-16-10 (Supp. 1975). Prohibits inducing any public officer or employee to violate the ethics act.	
Vt.	STAT. ANN. tit. 13, §§ 1101, 1102 (1974). Applies to executive officers of State; covers giving and accepting bribes.	STAT. ANN. tit. 13, § 1106 (1974). Prohibits public officer or employee authorized to purchase supplies or materials or employ labor from receiving any commission, bonus, discount, present, or reward from a contractor dealing with State. Tit. 13, § 1105 (1974). Prohibits members and clerks of State Highway Board from receiving any compensation except from the State.			
		State Highway Dep't Admin. Order. Prohibits employees from engaging in conflicting outside employment, or accepting gratuities.			
Va.	CODE § 18.2-447 (1975). Applies to public servants of the State; covers giving, accepting, and soliciting bribes.	CODE § 18.2-444 (1975). Prohibits accepting gift or gratuity intended to influence official action regarding giver's business; prohibits accepting commission, discount or bonus from one who furnishes materials, supplies or labor to a State agency.	CODE §§ 33.1-336 to 33.1-343 (1976). Establishes reporting requirements for "Highway Contractors' Associations."		
		State Highway Dep't Admin. Order prohibits employee placing himself under obligation to a contractor in any manner, or borrowing or obtaining gasoline or supplies from a contractor. Personnel regulations prohibit engaging in outside employment or private business during working hours, or at any time if it affects usefulness of employee. All outside employment must be reported to employee's agency.			

STATE	BRIBERY	CONFLICT OF INTEREST	FINANCIAL DISCLOSURE	OFFICIAL MISCONDUCT	MISCELLANEOUS
Wash.	REV. CODE § 9A.68.010 (Special Supp. 1976). Applies to public servants; covers giving and receivin_ bribes.	REV. CODE § 42.20.010 (1972). Prohibits acceptance of gratuities, commissions, discounts, bonuses, or services for failing or omitting to perform an official duty. Prohibits employee from representing State or local agencies in transactions with businesses in which he has an interest; or being personally interested in any transaction carried on under his supervision. REV. CODE § 49.44.070 (1962). Prohibits employee from seeking additional outside compensation for performance of his official duties.		REV. CODE § 42.20.020 (1972). Prohibits delegation of authority to another for personal profit. §§ 42.20.040 to 42.20.070 (1972). Prohibits intentional filing of false or misleading reports or certificates, or paying false claims, or falsification of accounts. § 42.20.100 (1972). Prohibits wilfull neglect of duties imposed by law. REV. CODE §§ 9.18.120, 9.18.-130 (1961). Prohibits suppression of competitive bidding, or collusion to prevent competitive bidding on State contracts. REV. CODE § 9A.68.50 (Special Supp. 1976). Prohibits engaging in graft to influence a public officer's performance of his official duties.	
W. Va.	CODE § 61-5A-3 (Supp. 1976). Applies to public servants or public officials; covers giving and accepting or soliciting bribes.	CODE § 61-5A-4 (Supp. 1976). Prohibits acceptance of pecuniary benefit for performance of official duties, violation of a legal duty, or conferral of unlawful pecuniary benefit on another person. CODE § 61-5A-6 (Supp. 1976). Prohibits giving or accepting gifts or gratuities relating to (1) exercise of regulatory or investigative functions, (2) bids, claims, contracts or transactions involving the State, or (3) enforcement of administrative or judicial decisions. CODE § 17-2-6 (1974). Prohibits members of State Road Commission from having "any official relation" to any business selling materials to State, or having any pecuniary interest in such businesses.			
Wis.	STAT. § 946.10 (1973). Applies to public officers and public employees; covers giving, offering, accepting, and soliciting bribes.	STAT. § 946.13 (1973). Lists types of situations in which private interest in State contracts is prohibited. State Constr. and Materials Manual, § 106. Lists standards of conduct for employees of Division of Highways. Prohibits (1) using official position to secure special privileges; (2) acting as agent for outsider in claim against the State, or receiving gratuities or shares of such claims; (3) disclosing confidential information gained through		STAT. § 946.12 (1973). Prohibits (1) intentional refusal or failure to perform mandatory official duty; (2) intentional action which exceeds legal authority; (3) exercising discretionary powers so as to secure dishonest personal advantage; (4) making false reports or statements; and (5) soliciting or accepting greater compensation than allowed by law.	STAT. §133.01 (1973). Prohibits contracts in the nature of conspiracies in restraint of trade or in the nature of a trust to control prices or production or prevent competition.

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		official position, or accepting employment requiring disclosure of such information; (4) engaging in outside employment or activities which impair independence of judgment; (5) receiving gifts or gratuities from outside sources; (6) using State property for securing private or personal benefit; and (7) engaging in activities that create conflicts of interest.			
Wyo.	STAT. § 6-156 (1957). Applies to officers, agents or employees of State; covers giving, accepting or soliciting bribes.	STAT. § 6-178 (Supp. 1975). Prohibits State officer from having any interest in contracts for construction of State public works, or receiving a percentage, drawback, premium, or profit from the letting of such contracts. (However, contract is not unlawful if officer discloses his intent, and does not participate in negotiations for award or administration of such contract.) STAT. § 9-680 (Supp. 1975). Prohibits State officers from having interests in any contract or work regarding which they have official responsibility. Prohibits State officer from representing any outsider in any application or bid for contract or work regarding			

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		which he has a right to vote. Also prohibits accepting gratuities or gifts intended to influence his vote in his official capacity. STAT. 15.1-176, 15.1-210 (Supp. 1975). Prohibits municipal officers from having any personal interest in any public works contract, or receiving any pay or privilege other than regularly provided by the public agency. § 15.1-234 (Supp. 1975). Declares a person having a personal interest in a public works contract ineligible for holding city office or employment.			
D.C.	CODE § 22-701, 22-702. Applies to all executive or other officer or employee; covers giving and accepting bribes.	CODE, §§ 1-245, 1-802. Declares void any public contract by the District in which any member of the government or the contracting officer has a personal interest. Dep't of Highways and Traffic Admin. Order. Prohibits acceptance of (1) gifts, gratuities, social courtesies or discounts from contractors, suppliers, or		District Personnel Manual (1960 ed.). Prohibits District government employee from engaging in any outside employment or private business transaction which (1) tends to interfere with performance of governmental duty, (2) may reflect discredit on the District government or become a source of criticism or embarrassment to it, or	

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		business organizations with whom recipient has dealings on behalf of the District; (2) loans from business with whom recipient has dealings on behalf of the District; (3) outside employment which adversely affects impartial and proper discharge of duties, or gives him an unfair advantage over competitors because of information available because of official position, or has direct or indirect connection with work related to his duties or government position; (4) salary from outside source for performance of official duties.		(3) involves using title or position or information of official nature to secure personal advantages.	
P.R.	LAWS tit. 33 §§ 4360, 4361, 4363 (Supp. 1975). Applies to public officers and employees; covers giving and receiving bribes.	LAWS tit. 33 §§ 4351, 4353 (Supp. 1975). Prohibits profiting from confidential information; executing a contract in which officer or employee has patrimonial interest. LAWS tit. 3 § 570 (1965). Prohibits officer or employee from engaging in negotiations in which he has a financial interest.			

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and engineers responsible for the administration of highway construction contracts. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful as an easy and concise reference document.