HONEST SERVICES AND MISUSE OF OFFICE©

Herbert W. A. Thiele, Esq.
County Attorney
Leon County, Florida

I. Background.

The concept of "honest services" is derived from 18 U.S.C. Chapter 63 on Mail Fraud.

Under 18 U.S.C. § 1341 (Frauds and swindles),

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

And, pursuant to 18 U.S.C. § 1343 (Fraud by wire, radio, or television):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The phrase utilized in both §§ 1341 and 1343, "scheme or artifice to defraud," was defined by Congress in 1988 as "a scheme or artifice to deprive another of the intangible right of *honest services*." 18 U.S.C. § 1346. (Emphasis supplied.)

Congress specifically enacted 18 U.S.C. § 1346 (Definition of "scheme or artifice to defraud") in 1988 in reaction to the U.S. Supreme Court decision rendered one year earlier in the case of McNally v. United States, 483 U.S. 350 (1987). In the McNally decision, the U.S. Supreme Court overruled a long line of lower court decisions when it determined that a former public official in the Commonwealth of Kentucky and a private citizen could not be convicted of mail fraud concerning a scheme to require an insurance agent, which provided insurance for the state, to share commissions with certain agencies in which the defendants had an interest, because 18 U.S.C. § 1341 did not prohibit schemes to defraud citizens of their intangible rights to honest and impartial government. However, in enacting 18 U.S.C. § 1346, it was explained by members of Congress that the purpose of the legislation was to overturn the McNally decision and restore the "honest services" mail fraud provision which existed prior to McNally. See Joshua A Kobrin, Note, "Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346," 61 N.Y.U. ANN. SURV. AM. L. 779, 814 (2006**)**. See also United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) ("We have recognized that § 1346 was intended to overturn McNally"); United States v. Walker, 490 F.3d 1282, 1297 n. 16 (11th Cir. 2007) (the honest services amendment was enacted to override McNally).

II. What Constitutes Honest Services Fraud?

Although the term "honest services" is broad and undefined, the federal statute (18 U.S.C. § 1346) has nevertheless withstood numerous challenges for unconstitutional vagueness. In the case of United States v. ReBrook, 837 F. Supp. 162, 171 (S.D.W.Va. 1993), aff'd in part,

rev. in part, 58 F.3d 961 (4th Cir. 1995), cert. den. 516 U.S. 970 (1995), the Court reasoned as follows:

> Concrete parameters outlining the duty of honest service should not be necessary in order for a person to be charged with violating this duty. The concept of the duty of honest service sufficiently conveys warning of the proscribed conduct when measured in terms of common understanding and practice. The Constitution requires no more.

(Citations omitted.)

As stated in United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997), cert. den. 118 S.Ct. 625 (1997):

> "[H]onest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer-or that he consciously contemplated or intended such actions. For example, something close to bribery. If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.

As further stated in United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007) (citations in text):

> The term "honest services" is not defined in the statute, but we have found that "when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest." *United States v. Lopez-Lukis,* 102 F.3d 1164, 1169 (11th Cir.1997). "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. deVegter,* 198 F.3d 1324, 1328 (11th Cir.1999). "If an official instead secretly makes his decision based on his own personal interests-as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest," the official has deprived the public of his honest services. *Lopez-Lukis,* 102 F.3d at 1169.

In the case of United States v. Rybicki, 354 F.3d 124, 139 (2d Cir. 2003), the Second Circuit found that in the private sector, honest services fraud cases fell into the two groups: (a) cases involving bribes or kickbacks, and (b) cases involving self-dealing. Self dealing involves a situation where an employee causes his or her employer to do business with an enterprise in which the employee has a secret interest, which is undisclosed to the employer. 354 F.3d at 140. There are four elements to the crime of honest services fraud:

> (1) a scheme or artifice to defraud; (2) for the purpose of knowingly and intentionally depriving another of the intangible right of honest services as thus defined; (3) where the misrepresentations (or omissions) made by the defendants are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior; and (4) use of the mails or wires in furtherance of the scheme.

354 F.3d at 147. It should be noted that the use of mail or wire communications in the fraudulent scheme can be an "incidental" or "reasonably foreseeable" part of the scheme. See United States v. Sawyer, 85 F.3d 713, 723 n. 6 (1st Cir. 1996).

In the public sector, honest services cases typically involve "serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision-makers to disclose certain conflicts of interest." United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). As set forth in the case of United States v. Mangiardi, 962 F. Supp. 49, 51 (M.D. Penn. 1997), aff'd 202 F.3d 255 (3rd Cir. 1999), cert. den. 529 U.S. 1060 (2000):

> The typical case of honest services fraud is that the public is not getting what it deserves: honest, faithful, disinterested service from a public official. This concept applies whether the official is bribed or fails to disclose a conflict of interest. Finally, the scheme or artifice must lead to actual or intended actual injury. That is, the official must be performing a discretionary function which the scheme or artifice is intended to influence because it is the exercise of a discretionary function (the "service") which must be the target of the scheme.

(Citations omitted.)

However, "[t]he broad scope of the mail fraud statute… does not encompass every instance of official misconduct that results in the official's personal gain." United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996). In addition, "the right to honest services is not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing." United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003). Finally, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." Sawyer, 85 F.3d at 725.

III. Examples.

Below is a sampling of honest services fraud cases rendered within the past five years. The listing is illustrative and not exhaustive.

1. United States v. Kemp, 379 F. Supp. 2d 690 (E.D. Penn. 2005), aff'd 500 F.3d 257 (3rd Cir. 2007), cert. den. 128 S.Ct. 1329 (2008). In this case, a jury convicted the former treasurer of the City of Philadelphia, former bank executives, and others for various offenses, including honest services mail/wire fraud. In essence, the then city treasurer received payments and gifts (such as NBA All-Star game tickets, Super Bowl tickets and accommodations, trips, construction of a deck, personal loans, loans for relatives, and a loan to his church) in exchange for City business. The District Court found that the evidence presented proved both prongs of honest services fraud, as follows:

> (1) bribery, in which a benefit is given in exchange for a particular act or series of acts; and (2) failure to disclose, in which a public official accepts benefits which he is required by law to disclose, fails to make the

> disclosure, and then takes discretionary action to favor the giver of the benefit.

The former city treasurer was given a 10-year sentence, and the two bank executives each received 2-year sentences. On appeal, the United States Court of Appeal, Third Circuit, affirmed the convictions.

2. United States v. Sorich, 523 F.3d 702 (7th Cir. 2008). Two of the defendants in this case were high level employees in the Office of Intergovernmental Affairs (an office of the mayor of the City of Chicago), and two others were department officials. Three of the four defendants were convicted by a jury of mail fraud, wherein the defendants were found to have doled out thousands of city civil service jobs based on political patronage and nepotism. The scheme, which had apparently been going on for years, included filling out sham interview forms to assure certain persons would be hired. The defendants were convicted by a jury and sentenced, the longest sentence being 46 months.

The defendants appealed their convictions, contending that their behavior, while dubious, was not criminal, and that the honest services mail fraud statute was unconstitutionally vague. The defendants also argued that they did not make any money from the scheme, nor did they deprive the city or the people of Chicago of any money or property. However, the Seventh Circuit Court of Appeals affirmed the convictions and sentences, concluding that the defendants' actions did constitute mail fraud, that the mail fraud statute was not unconstitutionally vague as applied to the facts of the case, and that the jobs which were doled out by the defendants were indeed a kind of property.

3. United States v. Woodward, 459 F.3d 1078 (11th Cir. 2006). In this case, a 29-year veteran of the Atlanta Police Department and his wife were convicted of mail fraud, conspiracy to commit mail fraud, and deprivation of honest services, and sentenced for three

years and two years, respectively, plus ordered to pay restitution, for operating a business that charged persons a fee to recover money and property held at the police department. The police officer would use confidential information obtained through his position with the police department to locate potential clients, and after locating the clients, the defendants would then lead the clients to believe that the only way the money and property could be reclaimed was through their business operation, which charged a substantial fee (the property can actually be reclaimed directly at the police department for no charge). The defendants also falsified powers of attorney in order to reclaim money and property. On appeal, the Eleventh Circuit Court of Appeals affirmed the convictions and sentences.

4. United States v. Walker, 490 F.3d 1282 (11th Cir. 2007). This case involved a former Georgia state legislator who was convicted of 127 counts of conspiracy, mail fraud, and income tax evasion, and sentenced to over 10 years in prison. Among other things, the defendant, who owned a personnel agency that provided temporary workers for hospitals and other businesses, used his influence to get legislation passed to benefit Grady Hospital in Atlanta, and in return received business favors from Grady Hospital, relating to the utilization of his personnel agency. The defendant's personnel agency also provided personnel services to Medical College of Georgia, which he failed to disclose.

5. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007). In this case, the federal Appeals Court found that a public servant's actions did not constitute mail fraud. The defendant, a section chief in the State of Wisconsin's Bureau of Procurement, presided over the selection of a travel agent for the state. During the bid process, two travel agencies emerged as the top contenders. One agency was based in the state and the other based out of state. The evaluation team selected the out of state agency, and the section chief requested a delay, apparently

believing that her boss would not approve of the selection. It was then agreed by the evaluation team that the matter would be re-bid on a best and final basis, as allowed by state law. Ultimately, the in-state travel agency got the bid. Three months later the section chief received a $1,000 raise. The defendant was subsequently convicted in the United States District Court, Eastern District of Wisconsin, of mail fraud with regard to the selection of the state's travel agent. The defendant appealed, and the Seventh Circuit Court of Appeals reversed the conviction, ordered an acquittal, and stated as follows:

> [The subject federal statutes] have an open-ended quality that makes it possible for prosecutors to believe, and public employees to deny, that a crime has occurred, and for both sides to act in good faith with support in the case law. Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

484 F.3d at 884.

6. Alabama Governor. Two years ago, former Alabama governor, Don Siegelman, was convicted of bribery, conspiracy to commit mail fraud, mail fraud and obstruction of justice for receiving a $500,000 donation to his campaign to establish a state lottery, in exchange for appointing the donor of the funds to a board which regulated hospital construction. He was sentenced to a seven-year prison term, which he began immediately upon conviction. Siegelman filed an appeal, and on March 6, 2009, a panel of three judges for the 11th Circuit Court of Appeals in Atlanta upheld five of the seven charges, struck two of the fraud counts, and ordered a new sentencing hearing. See United States v. Siegelman, 561 F. 3d 1215 (11th Cir. 2009). In May 2009

Siegelman requested a delay in the new sentencing hearing, pending his appeal of the ruling before the U.S. Supreme Court. In June 2009 he also filed a motion for new trial. This case has received significant press coverage, including a segment on *60 Minutes*.

7. Illinois Governor. On December 9, 2008, Illinois Governor Rod R. Blagojevich was arrested and charged with conspiracy to commit mail and wire fraud and solicitation of bribery, and was subsequently removed from office. On April 2, 2009, Mr. Blagojevich was indicted on 16 felony counts of racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents. The charges allege that he used his office to seek or obtain money, campaign contributions and employment for himself and others in exchange for official actions, including trying to leverage his authority to fill the U.S. Senate seat vacated by President Obama. His trial is set for June 3, 2010.

8. Detroit. In June of 2009, Detroit City Council President Pro Tem Monica A. Conyers pled guilty to one count of conspiracy to commit bribery, which carries a maximum sentence of five years in federal prison and a fine of up to $250,000. Mrs. Conyers admitted to receiving cash payments from a representative of Synagro Technologies, Inc., a Houston-based waste management company, for her vote in favor of a multi-million dollar sludge hauling contract between the City and Synagro. Mrs. Conyers is the wife of U.S. Representative John Conyers, Jr., who is Chairman of the House Judiciary Committee. Her chief of staff, Samuel L. Riddle, Jr., was also recently indicted on charges for extortion, conspiracy to commit extortion, attempted extortion, mail fraud, bribery, and for making false statements to the FBI, in relation to the Synagro contract as well as for other deals.

9. New Jersey Mayors. Three New Jersey mayors, a deputy mayor, plus numerous other public officials and political figures were arrested on July 23, 2009, as part of a major FBI sting that netted the arrest of 44 people in New Jersey and New York. Peter Cammarano III, newly elected mayor of Hoboken and an attorney, was charged with conspiracy to commit extortion for accepting $25,000 in cash bribes from an undercover cooperating witness; Dennis Elwell, mayor of Secaucus, was charged with conspiracy to commit extortion for accepting a $10,000 cash bribe; Anthony R. Suarez, mayor of Ridgefield and an attorney, was charged with conspiracy to commit extortion for agreeing to accept $10,000 in cash; and Leona Beldini, deputy mayor of Jersey City, was charged with conspiracy to commit extortion for taking $20,000 in conduit campaign contributions and other dealings. If convicted, the mayors would face a maximum of 20 years in federal prison and a maximum fine of $250,000.

10. Connecticut. Hartford Mayor Eddie A. Perez will go on trial November 2, 2009, on charges of bribery, fabricating evidence, and conspiracy to fabricate evidence, relating to discounted renovations done to his home. He also faces new charges regarding his involvement in a parking lot deal with a former state lawmaker.

In 2004 former Connecticut Governor John G. Rowland pleaded guilty to one count of conspiracy to commit honest services fraud relating to discounted renovations done on his weekend cottage, and was subsequently sentenced to one year and one day in federal prison. He served approximately eleven months of the sentence and was under house arrest for four months.

In 2003 former Bridgeport Mayor Joseph P. Ganim was convicted of racketeering, racketeering conspiracy, extortion, mail fraud, bribery, conspiracy, and

filing false tax returns, relating to bribes and kickbacks received in promoting city contracts with various companies. He was sentenced to nine years in federal prison, fined $150,000, ordered to pay $148,617 in restitution, and ordered to forfeit $175,000 in property.

11. Escambia County, Florida. In 2006, W.D. Childers, former president of the Florida Senate and chairman of the Escambia County Commission, was found guilty of two charges of bribery and unlawful compensation and sentenced to 42 months in prison. The unlawful acts were related to the county's purchase of property for a soccer complex in the amount of $6.2 million from associates of Childers. To push the purchase through the commission, he was found to have bribed a fellow commissioner, who subsequently committed suicide. He was released from prison on June 17, 2009, and will be on probation for 18 months. In 2006 Mr. Childers was also convicted of violating Florida's Government-in-the-Sunshine Law, a misdemeanor, and served 49 days in jail.

12. Palm Beach County, Florida. In June 2007 the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, pled guilty to his involvement in a public corruption conspiracy stemming from the unlawful use of his elected position to promote and conceal significant financial ventures, including land deals which netted him millions of dollars. He also accepted significant travel gratuities, including free air travel valued at approximately $100,000, from a developer in return for voting favorably on measures for the developer. He was convicted of a single count of honest services fraud and sentenced to prison for five years. He was also ordered to forfeit two parcels of real estate worth approximately $9 million, as well as $175,000 in cash. In addition,

his ex-wife had to forfeit $400,000 which she received in a divorce settlement, as the money came from a tainted land deal brokered by Masilotti.

In 2008 another former Palm Beach County commissioner was sentenced to five years in prison, followed by two years of supervised release, for conspiracy to commit honest services fraud. Warren H. Newell concealed his financial interest in a "success fee contract" relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately $366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, Mr. Newell concealed that he docked his boat at the yacht center and owed significant boat dockage fees ($40,000), later receiving forgiveness of his dockage fees as a kickback. Finally, he concealed his financial interest in another land deal which came before the commission. Mr. Newell's sentence was recently reduced by two years for providing evidence against former Palm Beach County Commissioner Mary McCarty.

On January 8, 2009, Palm Beach County Commissioner Mary B. McCarty resigned her post, stating that she had failed to disclose free and discounted hotel rooms provided to her by a company doing business with the county, and also had failed to recuse herself on county bond issues that benefited companies that employed her husband. The benefits to the McCarty's were said to have been in the amount of $300,000. Ms. McCarty pled guilty to depriving the public of her honest services, and was sentenced on June 4, 2009, to serve a prison term of 42 months, to be followed by three years of supervised release, and must pay a fine in the amount of $100,000. The

McCarty's had previously forfeited $272,000 to the U.S. government. Her husband was sentenced to a prison term of eight months.

13. Levy County, Florida. In October 2008, Levy County Commissioner William Samuel Yearty was indicted for one count of conspiracy to commit bribery, one count of bribery, and one count of knowingly making a false or fraudulent statement to federal investigators. In addition, County Commissioner Robert Anthony Parker was charged with one count of conspiracy to commit bribery and one count of bribery. It is alleged that the commissioners offered their approval for real estate developments in exchange for money and other inducements. Their trials are set for November 9, 2009.

14. Dixie County, Florida. In October 2008, former County Commissioners Alton Land and John Lee Driggers, along with retired building and zoning inspector Billy Keen, were indicted for solicitation of bribes, conspiracy to commit that offense, and making false statements during the course of a federal investigation, for allegedly accepting thousands of dollars to approve rezonings and other real estate developments. On August 6, 2009, Messrs. Land, Driggers and Keen were convicted of conspiracy, accepting bribes and lying to FBI agents. Sentencing is scheduled for November 9, and they could face a maximum of 20 years in prison.

Two Cross City officials, Councilman Marcellus Dawson and City Superintendent Johnny Miller Green, were indicted in November 2008 for solicitation of bribes, conspiracy to commit that offense, and making false statements to the FBI. The officials allegedly offered their approval of building projects to an undercover agent in exchange for money and other inducements.

Former Dixie County Attorney Joseph T. Lander was arrested in December 2008 and charged with eight counts of mail fraud. He allegedly required developers to pay him personally for performance bonds for developments, plus he used his position to entice investors to invest in a vitamin business he claimed to have started.

15. St. Johns County, Florida. On July 31, 2009, former St. Johns County Commissioner Thomas G. Manuel pleaded guilty to one count of bribery for taking a $10,000 bribe from a developer to obtain approvals for a development known as Twin Creeks. According to the Factual Basis filed in this case by the U.S. government, Mr. Manuel met with an attorney for the developer and the developer, and pressured the developer to make charitable donations to various organizations. The attorney and developer informed the FBI of this matter and began recording conversations with Mr. Manual. Mr. Manuel continued to tell the developer to make contributions to various charitable organizations, or the developer's future business before the County Commission would be in jeopardy. Mr. Manuel subsequently accepted $10,000 in cash and then $50,000 in cash from the developer for Mr. Manuel's continued support. After accepting the $50,000 cash payment, Mr. Manuel was detained by the FBI and the $50,000 was seized. Mr. Manuel repaid all but $3,400 of the $10,000 payment that he had previously accepted, and will be required to repay the remaining amount. He faces up to 10 years in prison and a $250,000 fine.