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Federal Honest Services Mail Fraud: The Defining Role of the States

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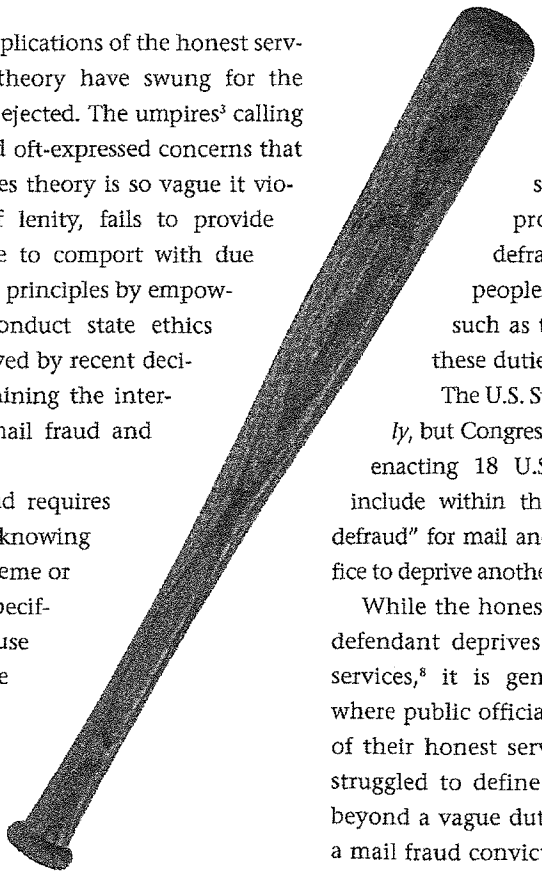
The mail fraud statute has been memorably described as the white-collar federal prosecutor's Louisville Slugger, for its "simplicity, adaptability, and comfortable familiarity."[1] If so, the "intangible right to honest services" theory of mail fraud,[2] as brought into play in some cases, might be thought of as a corked Louisville Slugger, lightening the prosecution's burden and extending its reach—permitting conviction on proof of deprivation of an intangible right (an easier swing than proving deprivation of actual property) and stretching to political or business conduct otherwise inside the ballpark of legality.



But some recent applications of the honest services mail fraud theory have swung for the fences only to be ejected. The umpires[3] calling foul have invoked oft-expressed concerns that the honest services theory is so vague it violates the rule of lenity, fails to provide defendants sufficient fair notice to comport with due process,[4] and traduces federalism principles by empowering federal prosecutors to conduct state ethics reform.[5] These concerns are revived by recent decisions in the Third Circuit examining the interplay between honest services mail fraud and state law.

Traditional mail or wire fraud requires proof of "(1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme.... Identical standards apply to the 'scheme to defraud' under both the mail and the wire fraud statutes."[6] The honest services theory originated as the government attempted to expand the scope of these statutes beyond fraudulent schemes to deprive another of "money or property," to prosecute "schemes to defraud...designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform these duties honestly."[7]

The U.S. Supreme Court rejected this theory in *McNally*, but Congress restored it almost immediately in 1988 by enacting 18 U.S.C. Section 1346, reversing *McNally* to include within the definition of a "scheme or artifice to defraud" for mail and wire fraud purposes any "scheme or artifice to deprive another of the intangible right of honest services."

While the honest services theory can also apply where a defendant deprives a private entity of its right to honest services,[8] it is generally applied to political corruption, where public officials are charged with depriving the public of their honest services. In that context, courts have long struggled to define what fiduciary duty must be violated, beyond a vague duty to provide honest services, to support a mail fraud conviction.

The Third Circuit has held that in honest services cases based not on bribery but on an official taking action to benefit a concealed interest, a state criminal law violation suffices to show breach of the duty of honest services. But it has gone on to state, in unpublished *dicta* in *United States v. Gordon* in 2006,[9] that a state criminal law violation is not *necessary*, that something *less*—state civil law, ethics codes, or other sources—can also suffice to create the requisite fiduciary duty.

> [A]lthough a violation of a state criminal law may be sufficient to lay the foundation for honest services fraud...honest services fraud does not require a violation of criminal law, but rather a violation of a state-created fiduciary duty. At the very least, the government must allege a violation of some law—or a recognized fiduciary duty—to adequately charge honest services fraud.

Since the government did allege a state criminal violation in *Gordon*, the Court said it was "here not required to delineate the parameters of the standard beyond this holding." Because the Third Circuit has not yet confronted all the possible sources of the "state-created fiduciary duty" of honest services, state officials remain subject to federal prosecution under vague standards without advance notice of what is illegal.

The Federalism Rationale for Basing Honest Services Prosecutions on State Law

The First Circuit recently noted: "The relationship between state law and the federal honest services statute is unsettled."[10] Eleven years ago, the Fifth Circuit,[11] in a case whose reasoning the Third Circuit endorsed in 2003,[12] explained the federalist rationale for requiring the Section 1346 honest services duty to be rooted in state law:

> We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees [or that] Congress was attempting in §1346 to garner to the federal government the right to impose on states a federal vision of appropriate services-to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure.

However, one commentator has argued requiring a state law violation could perversely result in federalization of state laws,[13] at a cost to uniformity.[14]

The Concealed Conflict Scenario

Honest services prosecutions have generally been aimed at "two scenarios: (1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain."[15]Regarding the first scenario—bribery—while courts have wrestled with the question, it appears decided, in this circuit at least, that no state law violation, criminal or otherwise, is required once the government proves a *quid pro quo*, *i.e.*, the provision of something of value to a public official in exchange for official action.[16] This rationale as explained by Judge Freda Wolfson in the *Bryant* case on June 5, 2008, was that in the *quid pro quo* case, the relevant duty "is derived from §§ 1341, 1343 and 1346 as a matter of statutory interpretation, not state law."[17] And proof of a *quid pro quo* does ameliorate vagueness, fair notice/due process, and federalism concerns, since an official proven knowingly to have accepted a bribe was fairly on notice that doing so deprived the public of honest services, making him subject to federal prosecution.[18]

Since the bribery theory eliminates the need to prove a state law violation, where a public official acts to benefit a personal interest, the government is likely to take the safer course, trying to characterize the personal interest as the thing of value (the *quid)* exchanged for official action (the *quo*), relying on the concealed conflict as a fallback theory in case its proofs fall short. State law may, however, be relevant to *immunize* from federal prosecution some conduct the federal government seeks to classify as a *quid pro quo*.

New Jersey's part-time Legislature perforce entails legislators with other employment or investments having an interest in entities *potentially* affected by any legislative action.[19] New Jersey's conflict of interest law permits a legislator to support legislation that benefits an entity in which he or she has an interest, so long as the legislation benefits all other similarly situated entities.[20] A jury instruction on a nearly identical Rhode Island law recently resulted in acquittal in an honest services case.[21] Thus, discretionary action that benefits a constituent in which an official has an interest equally with others in its class cannot be classified as an honest services *quid pro quo*. It may, however, fall under the concealed conflict honest services theory if the interest is not disclosed. When the government does allege the concealed conflict scenario, the role of state law comes into play.

The *sine qua non* of the concealed conflicts honest services theory is some fiduciary duty to disclose an interest that creates an actual or potential conflict, coupled with a public official's breach of that duty (or a private citizen's abetting such a breach by, *e.g.*, helping to conceal the official's conflicting interest[22]). No prosecution can lie where the official acts to benefit a personal interest he or she is entitled to keep secret—if, say, his or her legislative action would benefit one company held in a mutual

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fund whose shares he or she owned, and disclosure of such attenuated ownership was not required by any law or rule.

The breadth of the disclosure duty will depend on whether it arises from:

1. a state or local criminal law, *e.g.* New Jersey's state official misconduct, conflicts of interest, or financial disclosure laws carrying criminal penalties for failure to comply;[23]
2. some *non*-criminal state or local law codifying a conflict of interest or establishing a fiduciary duty;[24]
3. some "recognized fiduciary duty"[25] not codified or established in any law; or (the most broad and vague)
4. a general "duty of honest services" that every public official is deemed to owe simply by virtue of his or her position.[26]

Third Circuit Honest Services Law: *Antico, Panarella, Murphy, Gordon, Bryant*

In *United States v. Panarella*,[27] a Pennsylvania state senator omitted from financial disclosure statements consulting payments from a tax collection business operated by defendant Panarella, and voted against proposed legislation that would have harmed Panarella's business. Panarella, charged as an accessory to the senator's honest services fraud, claimed on appeal that the indictment failed to allege his payments were bribes or affected the senator's official decision-making. The Third Circuit in *Panarella* appeared to *require* a violation of state *criminal* law, limiting the concealed conflict theory of honest services fraud to: 1) discretionary legislative action that 2) directly benefits 3) a financial interest 4) concealed 5) in violation of state *criminal* law.[28]

The court of appeals reiterated in 2007 that "honest services fraud encompasses a situation where a public official conceals a financial interest *in violation of state criminal law* while taking discretionary action that the official knows will directly benefit the individual or organization behind that financial interest."[29] Like a *quid pro quo*, proof of a state *criminal* law violation arguably ameliorates the vagueness, fair notice/due process, intent, and federalism problems inherent in the honest services theory.[30]

Because *Panarella* appeared to *require* honest services cases to rest on a state criminal violation, it seemed to bar honest services prosecutions aimed at conduct state law expressly and specifically permitted. But *Panarella* was, in fact, more limited, holding only that a state criminal violation was sufficient.[31] And following *Panarella*, the Third Circuit, in its unpublished 2006 decision in *Gordon*, suggested in *dicta* that something less than a state criminal law violation can suffice.

Gordon noted that while *Antico* "suggest[ed] that honest services fraud does not require a violation of underlying 'state or local law codifying a conflict of interest,' Antico was charged with violations of law and this portion of our discussion was therefore *dicta*."[32] The court in *Gordon* explained that "[w]ithout the anchor of a fiduciary relationship established by state or federal law, it was improper for the District Court to allow the jury to create one....principles of federalism...are preserved when federal honest services fraud is tied to a violation of a fiduciary relationship arising under state or local law."[33]

It noted that in *Murphy*,[34] it endorsed the Fifth Circuit's reasoning in *Brumley*, which interpreted Section 1346 as requiring a state law limiting principle

for honest services fraud, stating that an official who does all that is required under state law but who is alleged to have not discharged his or her duties "honestly" cannot be convicted of honest services fraud.[35] Rather, the *Gordon* court stated, Section 1346:

> contemplates that there must first be a breach of a state-owed duty....Thus, although a violation of a state criminal law may be sufficient to lay the foundation for honest services fraud, it is clear from our analysis of the requisite fiduciary duty that honest services fraud does not require a violation of *criminal* law, but rather a violation of a state-created fiduciary duty. At the very least, the government must allege a violation of some law—or a recognized fiduciary duty—to adequately charge honest services fraud. Once again, we are here not required to delineate the parameters of the standard beyond this holding because here the government has alleged that [the defendants] violated Delaware laws.[36]

Limiting the Concealed Conflict Honest Services Theory

A potential limitation on the duty to disclose is suggested in a recent First Circuit case.[37] Rhode Island Senator John Celona was charged *inter alia* with facilitating meetings at his government office between a medical center's CEO (Urciuoli) and representatives of two major insurance companies, pressing the parties to resolve longstanding disputes about reimbursements owed to the medical center, without disclosing that he was acting on behalf of the medical center or its hospital. The court stated:

> On the government's version of what happened, Celona's action could be viewed as receipt of payment for misusing his powers as a legislator at Urciuoli's behest.... Conceptually, the government's allegations may add up to bribery but the central wrong is not the usual problem of buying votes. The core misconduct, if it occurred, was paying Celona to use his legislative powers as a threat to extract favorable treatment for [the medical center] from the insurers....this is not a common subject of the honest services case law... The government adds that Celona did not disclose to the insurers that he was being paid by [the medical center], but while non?disclosure can *sometimes* constitute an independent violation of the statute, here the nondisclosure was in some sense a sideshow to the real harm—the use of legislative threats for private ends. Celona did not recommend specific terms of settlement under a pretense of neutrality, nor is it obvious why disclosure of Celona's relationship with [the medical center] would have resulted in less pressure on the insurance companies to settle.[38]

The First Circuit's analysis, like the court's in *Bryan*, demonstrates the superfluousness of the concealed conflict theory. Where there is a *quid pro quo*, the harm is in that exchange, not in the failure to disclose the breach of duty worked by the exchange.[39]

More significant is the court's statement "nor is it obvious why disclosure of Celona's relationship with [the medical center] would have resulted in less pressure on the insurance companies to settle." This suggests a potential honest services defense in response to the government's materiality allegation—*i.e.* that a reasonable employer would have wanted to know the concealed information (which the jury must decide).[40] A defendant might argue at trial that disclosure would not have changed the outcome, that the target of the official's lobbying would have made the same decision even if it had known about the official's concealed interest in the outcome, to support a defense theme that no duty owed to the public was breached.

Conclusion

Concealed conflict honest services prosecutions based on breach of a fiduciary duty arising from something short of a state *criminal* law would renew the vagueness, due process/lack of notice, and federalist objections to the honest services theory. The suggestion that an honest services case could rest on breach of a duty arising from some non-criminal state law is troubling. Given how broadly New Jersey's state official misconduct, conflicts of interest, and financial disclosure laws already criminalize any potential concealed conflict by a state official, it is difficult to conceive of conduct that is not already criminal under these statutes but that nonetheless constitutes a federal offense. That may not, however, stop federal prosecutors from trying conceive of such conduct, or to try to stretch state criminal laws where they perceive a lapse in the state's enforcement of those laws. But federalism dictates permitting state courts, in state prosecutions, to define the contours of state criminal laws.

In 2003, the Third Circuit in *Murphy* warned against bootstrapping onto a state criminal statute a fiduciary duty in addition to the simple duty not to violate that criminal law:

> We cannot endorse this methodology because all criminal activity would breach a duty to the public not to break the law that could then form the basis of a mail fraud conviction. This outcome would, of course, run counter to the federalism concerns... about the potentially limitless application of § 1346.[41]

The *Murphy* court echoed Second Circuit Judge Ralph Winter's caution 26 years ago about honest services mail fraud:

> what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the free-swinging club of mail fraud affords federal prosecutors.[42]

The defense bar should be alert to efforts to juice the government's batting average with honest services prosecutions based on amorphous and ill-defined state fiduciary duties. Such attempts should be tossed out as "illegal action."[43]

Endnotes

1. Jed S. Rakoff, The Federal Mail Fraud Statute (Part 1), 18 *Duq. L. Rev.* 771 (1980) ("To federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love.")
2. 18 U.S.C. § 1346.
3. "Judges are like umpires...They make sure everybody plays by the rules." Judge (now Chief Justice) John Roberts, statement before Senate Judiciary Committee, Sept. 12, 2005, www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm.
4. Regarding lenity and notice/due process concerns, *see United States v. Panarella*, 277 F.3d at 698; *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) ("fair warning should be given...of what the law intends to do if a certain line is passed"); *United States v. Brown*, 459 F.3d 509, 522 (5th Cir. 2006) ("Enron Nigerian Barge case" rejecting honest services prosecution based in part on lack of notice); *United States v. Urciuoli*, 513 F.3d 290, 293 (1st Cir. 2008) (noting need to assure "fair notice to those governed by the statute"). Regarding vagueness, *see United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (reversing honest services conviction and criticizing §1346's "open-ended quality"); *United States v. Rybicki*, 354 F.3d 124, 156 (2d Cir. 2003) (*en banc*) (Jacobs, J., dissenting) (honest services statute "flunks the test for facial vagueness"). The U.S. Supreme Court has repeatedly refused to hear vagueness challenges to the honest services statute, § 1346. *See, e.g., cert. petitions in Rybicki v. U.S.*, 2004 WL 715871, *cert. denied*, 543 U.S. 809 (2004); *Loren-Maltese v. United States*, 2005 WL 3157384 (2005), *cert. denied*, 546 U.S. 1095 (2006).
5. Regarding federalist concerns, *see* George D. Brown, New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?, 60 *Washington and Lee Law Review* 417-511 (Spring 2003), available at http://ssrn.com/abstract=401180.
6. *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001) (citations omitted). Mail or wire fraud is punishable by up to 20 years imprisonment (30 years if affecting a financial institution). To be part of the execution of mail fraud, use of the mails need not be essential element of the scheme; it is sufficient for mailing to be incident to essential part of the scheme, or a step in the plot. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989). *See United States v. Cross*, 128 F.3d 145 (3d Cir. 1997) (mailings not in furtherance of mail fraud scheme where deprivation of honest services completed before mailings and mailings were required by law); *United States v. Al-Ame*, 434 F.3d 614, 616-18 (3d. Cir. 2006) (distinguishing *Cross*). In the Third Circuit "it is not necessary for the government to show that defendant herself actually placed documents in the mail, or that she actually intended for the mails or wires to be used....It is sufficient to show that [w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used. Furthermore, evidence of office practice or business custom is sufficient to establish the mailing element." *United States v. Hitchens*, 62 Fed. Appx. 417, 418-419, 2002 WL 31898234, at *1 (3d Cir. 2002) (citations and internal quotations omitted).
7. *McNally v. United States*, 483 U.S. 350, 358 (1987).
8. Tim Donaghy, the ex-National Basketball Association referee recently sentenced by a federal judge in Brooklyn to 15 months in prison for providing gamblers with tips on basketball games based on his insider access to the athletes, was convicted of wire fraud for depriving his employer, the NBA, of the intangible right to his honest services. *United States v. Donaghy*, Case No. 07-cr-587 (E.D.N.Y.). In *United States v. Delle Donna*, 552 F. Supp. 2d 475, 488-94 (D.N.J. March 14, 2008), Judge Ackerman found legally sufficient an honest services indictment of Guttenberg Mayor David Delle Donna and his wife based on fiduciary duties they owed under New Jersey statutes not to the public, but to election campaign committees—private entities—to honestly and truthfully account for the committee's receipts and not to use committee funds for any improper purpose or expenditure; the Court held that the honest services theory cov-

ers theft of honest services owed to private entities, rejecting defendants' argument that "no matter how the Government labels this case, it is one involving alleged political corruption and must fall under the analysis of *Panarella* [which] limits the permissible theories of honest services fraud to the two types discussed in *Antico* and *Panarella*—bribery and failure to disclose a conflict of interest—and that neither theory covers the alleged deprivation of honest services factually alleged in the Indictment."

9. *United States v. Gordon*, 183 Fed. Appx. 202, 2006 WL 1558952 at *11 (3d Cir. June 08, 2006) (unpublished decision) (reversing district court dismissal of honest services counts against Delaware county officials charged with assisting developer get approvals for golf course in exchange for undisclosed loans). *See also United States v. Wecht*, 2006 WL 1835818 (W.D.Pa. June 29, 2006) (Third Circuit's "trilogy of honest services/intangible rights cases [*Antico*, *Panarella* and *Murphy*] stands, in part, for the proposition that the government must allege a violation of a 'state-created fiduciary duty' arising from state ethics or criminal laws or from some well recognized common law fiduciary duty.").
10. *United States v. Urciuoli*, 513 F.3d 290, 298-99 & n.6 (1st Cir. 2008) (Boudin, J.) (collecting cases) ("in some circumstances, state law might bear on what 'services' are owed by a state legislator. But just how far state law might be a premise for honest services fraud,...or, alternatively, might 'immunize' conduct that would otherwise be a federal crime, are tricky questions and may depend *inter alia* on precisely what the government has charged.").
11. *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997).
12. *See Murphy*, 323 F.3d at 116 & n. 5; *Gordon*, 2006 WL 1558952 at *10.
13. *See* Daniel W. Hurson, Mail Fraud, The Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts, 38 *Hous. L. Rev.* 297, 329 (Spring 2001).
14. *Id.*, 38 *Hous. L. Rev.* at 320 (*citing United States v. Shotts*, 145 F.3d 1289, 1294-95 (11th Cir. 1998) ("what constitutes mail fraud apparently is susceptible to 50 different interpretations")).
15. *United States v. Antico*, 275 F.3d 245, 262-63 (3d Cir. 2001).
16. *See United States v. Bryant*, __ F. Supp. 2d __, 2008 WL 2315720, at *14 (D.N.J. June 5, 2008) (Wolfson, J.). *See also United States v. Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996) ("In general, proof of a state law violation is not required for conviction of honest services fraud"); *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999), *cert. denied*, 530 U.S. 1263 (2000); *United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); *United States v. Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). Other circuits require a state law violation (not necessarily criminal) for any honest services prosecution. *See United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (en banc), *cert. denied*, 522 U.S. 1028 (1997); *United States v. Kott*, 2007 WL 2572355, *4 - 6 (D.Alaska, Sept. 4. 2007) (collecting cases and deciding to follow *Brumley* to hold "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law" rather than federal law).
17. *Id.*, at *20.
18. Arguably if a bribe is paid in person the mailing element might not be satisfied, but the Government will often be able to allege some mailing thereafter as part of the scheme (see, e.g., *United States v. Mariano*, 2008 WL 2470911 (3d Cir. June 20, 2008) (indictment alleged mailing element satisfied by bribe recipient mailing checks to pay his credit card bill).
19. "State legislators often have careers and businesses beyond their roles as a state official. Such legislators are not guilty of honest services mail fraud just because they engage in business with a company that may be involved in the legislative process." *United States v. Walker*, 490 F.3d 1282, 1298 n.17 (11th Cir. 2007).
20. N.J.S.A. 52:13D-18(b) ("No member of the Legislature shall be deemed to have a personal interest in any legislation within the meaning of this section if, by reason of his participation in the enactment or defeat of any legislation, no benefit or detriment could reasonably be expected to accrue to him, or a member of his immediate family, as a member of a business, profession, occupation or group, to any greater extent than any such benefit or detriment could reasonably be expected to accrue to any other member of such business, profession, occupation or group.").
21. The honest services prosecution in Rhode Island, which has a part-time legislature and permits its senators to work privately, resulted in a May 2008 acquittal after the jury was instructed it needed to consider the state law "class exception," Rhode Island General Laws § 36-14-7(b), expressly permitting a legislator to take action on legislation that would affect a private entity for whom the legislator works, as long as the legislation would affect that entity to no greater extent than any other similarly situated entities. *See United States v. Kramer et al.*, U.S.

District Court, District of Rhode Island, Case No. 07-cr-009, discussed at http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/06/court-instructi.html. *See also United States v. Urciuoli*, 513 F.3d 290, 298 (1st Cir. 2008) (Boudin, J.) (upholding refusal to charge concerning the Rhode Island "class exception" because court "doubt[ed] that the jury convicted based solely on the conflict of interest and without finding bribery for official acts").

22. *See United States v. Carbo*, 2007 WL 2323126 at *15-29 (E.D.Pa. Aug. 10, 2007) (examining level of knowledge private citizen must have of official's reporting requirements to fulfill specific intent requirement of honest services failure to disclose mail fraud); *questioned by United States v. Chartock*, 2008 WL 2569343 n.5 (3d Cir. June 30, 2008) (not precedential) ("this Court questions the correctness of the holding in *Carbo*"; "to convict a private citizen ... of the failure to disclose a conflict of interest theory of honest services fraud, the government must introduce sufficient evidence to prove that the private citizen was aware that the public official was required to disclose their relationship and that the private citizen knowingly assisted the public official in the failure to disclose").
23. *See* N.J.SA. 2C:27-1 *et. seq.* (Bribery and Corrupt Influence); 2C:30-2 (Official Misconduct); N.J.S.A. 2C:28-7 (Tampering with Public Records or Information, applied in *State v. Gregorio*, 186 N.J. Super. 138, 144-50 (Law Div. 1982), to the filing of a false financial disclosure statement by a legislator, although no case law indicates this section has been invoked in the 26 years since 1982 to punish false financial forms). *See also State v. Thompson et al.*, __ A.2d __, 2008 WL 2938070, at *9-15 (N.J. Super. Aug. 1, 2008) (conflict-of-interest violation alone, without additional element of purpose to benefit self or injure or deprive another of a benefit, does not suffice to prove criminal official misconduct violation). Regarding Pennsylvania law, *see, e.g.. U.S. v. Wecht*, 2008 WL 2223869, at *7 (W.D.Pa. May 23, 2008) ("Both at common law and under Pennsylvania criminal law, [a public official has] a duty to disclose to the public material information....This common law duty to disclose is codified by Pennsylvania statute, which requires public officials to file annual Statements of Financial Interest and criminalizes intentional misrepresentations in these statements. *See* 65 Pa. C.S.A. §§ 1104(a), 1105 & 1109(b)."); *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002) (Pennsylvania State Senator's false disclosure forms violated Pennsylvania criminal statutes).
24. *See Bryant*, at *21 (finding State Senator Wayne R. Bryant had the requisite fiduciary relationship with the public of New Jersey based on facts that "Third Circuit case law has 'assumed ... that public officials have a duty to provide honest services to the public'" [*citing Murphy*, 323 F.3d at 116], and "in *Murphy* the court recognized that 'the anchor of a fiduciary relationship' could be 'established by *state or federal law*'" [*citing Murphy*, 323 F.3d at 105 (emphasis added)] ; on statement of legislative findings preceding New Jersey Conflicts of Interest Laws (N.J.S.A. 52:13D-12) declaring that public office in New Jersey is a public trust; and on New Jersey common law, *i.e., Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474 (1952), holding "The members of the board of chosen freeholders and of the bridge commission are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve.").
25. *Gordon*, 2006 WL 1558952 at *8.
26. *See* Joshua A. Kobrin, 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, 802 (2006) ("Even more than average citizens, public servants, by the very nature of their employment, have committed to the 'social contract.'"); John Coffee, Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 *Am. Crim. L. Rev.* 427, 463-64 (1998) (public fiduciaries know the expectations the public has for them, and can thus be prosecuted under the federal common law as long as alleged nondisclosure involves economic gain); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996); *Brumley*, 116 F.3d at 734-35. *But see United States v. Bloom*, 149 F.3d 649, 654-57 (7th Cir. 1998) ("violations of state-law fiduciary duties do not turn into mail fraud just because the mails are used in the process"; rather, "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain"); *Panarella*, 277 F.3d at 692 (Third Circuit distinguishing *Bloom* and rejecting its reasoning).
27. 277 F.3d 678 (3d Cir. 2002).
28. *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002).
29. *United States v. Kemp*, 500 F.3d 257, 283 (3d Cir. 2007) (emphasis added).
30. *See Panarella*, 277 F.3d at 698-99 (requiring such a violation "resolves federalism and vagueness concerns that might otherwise arise in cases such as this").

31. "Although we hold that the existence of a violation of state law, coupled with the other facts discussed above, is *sufficient* to establish honest services wire fraud in this case, we need not decide whether a violation of state law is *necessary* for nondisclosure of a conflict of interest to amount to honest services fraud." *Panarella* at 699 n. 9 (emphasis in original); *Bryant*, 2008 WL 2315720 at * 23 (noting this limitation of *Panarella* holding).
32. 2006 WL 1558952 at *6 n.5.
33. 2006 WL 1558952 at *7.
34. 323 F.3d at 116 & n. 5.
35. *Brumley*, 116 F.3d at 734.
36. Third Circuit Model Criminal Jury Instruction 6.18.1341-3, "Mail or Wire Fraud—Protected Interests: Honest Services," directs courts "[i]n a prosecution of a state official" to instruct that the official "owes a duty to (specify duty or duties owed under state law)" and states: "Some explanation of that duty may also be appropriate; *e.g.*, in Pennsylvania, where a person is a government official, and has a financial relationship with someone who will benefit from the public employee's official actions, that official has an affirmative duty to disclose information about the relationship. If he intentionally hides this information, then he has violated his duty to the public that he serves." The Comment to this instruction, while citing *Murphy* for the proposition that "[t]he prosecution must establish that the defendant owed the public a duty of honest services," fails to specify the potential sources of that duty aside from state criminal law – understandably, since the Third Circuit has yet to do so, as it stated in *Gordon* ("we are here not required to delineate the parameters of the standard").
37. *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008) (Boudin, J.).
38. *Id.* at 297-98 (emphasis in original).
39. *Bryant*, at *38 ("the Government conceded that a finding of *quid pro quo* bribery is a logical prerequisite to a finding that Bryant failed to disclose a conflict of interest, *i.e.*, the one posed by the *quid pro quo* arrangement. Indeed, the Government stated, with respect to the failure to disclose theory, it need not prove anything in addition to the *quid pro quo* arrangement.").
40. As the First Circuit stated in *Urciuoli*, "The case law does establish that concealment of a *material* conflict of interest can under some circumstances constitute honest services fraud." *Id.* at 298 n.5 (emphasis added) (citing *inter alia Panarella*, 277 F.3d at 691).
41. *Murphy*, 323 F.3d at 117.
42. *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting).
43. *See* Major League Baseball Official Rule 6.06(d) ("A batter is out for illegal action when...[h]e uses or attempts to use a bat that, in the umpire's judgment, has been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction.").

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