

of *Campbell*, another case decided within the last year, based the support awards on the principle that the mother of a pre-school child need not work.¹⁴¹ This is true, despite the difficulty of maintaining two households on a single salary. The cases just cited—*Tjaden*, *Hutcheson*, *Campbell*—suggest the possibility that future discussions of “fairness” will not turn on the fault issue.

VI. CONCLUSION

At this point it can be stated with a fair amount of confidence that the Iowa legislature and the courts have given their approval to no-fault as it applies to divorce law, although this approval is not unanimous. The *Williams* decision demonstrates the Iowa supreme court's willingness to enlarge somewhat the express legislative confines of the doctrine through a necessary construction of legislative intent. The next few years will demonstrate the workability of the no-fault reform as applied to the area of alimony and child support. There will be several indicators of the acceptance of the Iowa supreme court's ruling: action or inaction by the Iowa legislature, treatment in the lower courts of Iowa, and the response to the *Williams* decision in other states. For the present, the decision can be regarded as a good faith attempt by the court to forward the spirit of no-fault legislation. It is anticipated that the legislature will proceed in the same spirit, revising the Dissolution Act where it is indicated.¹⁴²

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¹⁴¹ 204 N.W.2d 638 (Iowa 1973).

¹⁴² Several areas might be mentioned. The Uniform Act suggests, for instance, that “separation agreements” be used with regard to financial rights in order to facilitate dissolution. This is directly contrary to the old rule (expressed recently in *Gudenkauf*) that antenuptial agreements restricting alimony are void as against public policy because they facilitate dissolution. If the recommendations under the Uniform Act find acceptance, a change of this nature would be statutory. Another statutory provision that should be re-evaluated in light of the no-fault concept is the remarriage provision, which has only minimal effect in its present form. (The one-year waiting period may be waived by the court; the requirement may also be circumvented through marriage in another state.)

REMEDIES FOR CONFLICTS OF INTEREST AMONG PUBLIC OFFICIALS IN IOWA

The concept of conflicts of interest originated in the common law of trusts which dictated that a trustee could not, without authority, be pecuniarily interested in the affairs or interests of the beneficiary. It was further recognized that the public official, being in a position of public trust, has "the obligation of acting solely in the interests of the cestui que trust, the public."¹ This reasoning led to the prohibition of such offenses as bribery, embezzlement, and extortion.² While these prohibitions proved to be an asset to the criminal law of many states, little or no recognition was given, until recent years, to many "minor" abuses, such as those occurring when a public official is in a position to award a public contract to his own firm. Today, the questionable conduct of public officials is not as overt as was the earlier criticized conduct of the trustee. In present day public life such conduct falls within the gray area of subtle and illusive conflict situations encompassing a vast span of activities, such as influence peddling, gift giving, arrangements, promises, friendships and kinships for which there are no precise statutory definitions or remedies.

However, the problem of attacking overt or subtle conflicts of interest is not a simple problem of proper legislation and enforcement. Because the pay scale for most public officials on the state and local levels is inadequate to attract a great many competent full-time employees, many individuals may be unwilling to divest themselves of their private business and professional interests in order to enter public life. A strict rule prohibiting persons from holding public office while retaining these private interests would be unacceptable since it would deter those qualified people from entering public service.³ Thus, somewhere in the gray area between the extremes of total prohibition and no restriction at all lies the optimum level of regulation.⁴

The process of defining "conflict of interest" often follows a circuitous path. One commentator has noted, "much like 'sin', few can define a conflict of interest, yet all are against it."⁵ As a general rule, though, where it appears that the type of conflict sought to be prohibited is capable of being specifically and objectively defined, statutes with criminal sanctions are often found to be most appropriate. Yet where it is unusually difficult to objectively define which conflicts are or should be illegal, criminal sanctions may have an undesirable effect, because the fear of being accused of vaguely defined criminal miscon-

¹ Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034 (1961).

² *Id.*

³ Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450 (1969).

⁴ See note 1, *supra* at 1076.

⁵ See note 3, *supra* at 451.

duct may discourage competent men and women from seeking public office. Consequently, most states have limited the statutory remedies to those conflicts which can readily be seen and fill in the gaps with unenforceable codes of ethics. This procedure makes more difficult the task of combatting the more illusive forms of "white collar crime," but not impossible, given a clear reading of the body of statutory and case law available.

The Iowa statutes dealing with various forms of conflict of interest are numerous although somewhat scattered throughout the *Iowa Code*. In some cases, there is a clear definition of the sort of conflict that is prohibited and the penalty provided for violation of the restrictions. In other instances, either a clear prohibition is entirely lacking, or the penalty for violation is seemingly left to judicial interpretation and discretion.

Although the nature of conflict of interest law has been the subject of an *Iowa Law Review* article in recent years,⁶ there has not been, as yet, any overall discussion of the remedies, both criminal and civil, for such conflicts available to the practicing bar. Because of increasing concern over such abuses and indiscretions among public officials of late, most recently evidenced by the Iowa Attorney General's establishment of a new Special Prosecutions Division to deal specifically with this problem, this Note has been written in an attempt to give the practicing bar in Iowa a more comprehensive knowledge of the remedies available against public officials for conflicts of interest violations. This discussion will concentrate entirely on the laws applying to state and local public officials, as this is an extensive area in and of itself. However, the provisions of the *Iowa Code* and interpreting case law dealing with state banks,⁷ private corporations,⁸ debt management agencies,⁹ jurors,¹⁰ athletes,¹¹ attorneys,¹² and trustees,¹³ should be consulted when confronting a conflicts problem in one of those specific areas. The case law dealing with corporate directors' conflicts of interest is particularly extensive. The federal conflict of interest statute¹⁴ should be consulted with regard to restrictions on the activities and interests of officials and employees of the United States government. This Note is not necessarily intended to be a critique of the conflicts statutes nor to be a call for further legislation, although it should become increasingly clear that some sort of revision and codification is needed in this area.

I. PUBLIC OFFICIALS GENERALLY

It should be noted initially that although many of Iowa's conflict of inter-

⁶ See note 3, *supra*.

⁷ IOWA CODE §§ 524.211, .710, .1601, .1611 (1973).

⁸ *Id.* §§ 496A.34, 553.23, 741.2.

⁹ *Id.* §§ 533A.7, .11.

¹⁰ *Id.* §§ 723.1, 739.6-.8.

¹¹ *Id.* § 739.12.

¹² *Donaldson v. Eaton & Estes*, 136 Iowa 650, 114 N.W. 19 (1907); *Harper v. Perry*, 28 Iowa 57 (1869).

¹³ *Van Gorp v. Van Gorp*, 229 Iowa 1257, 296 N.W. 354 (1941); *Linsley v. Strang*, 149 Iowa 690, 128 N.W. 932 (1910).

¹⁴ 18 U.S.C. § 208 (1970).

est statutes were first enacted as early as 1851,¹⁵ there is a relative paucity of case law interpreting these statutes, thus making it difficult not only for the legal profession in researching this area of the law but for the intended objects of the legislation in determining the position of the "fine line" separating permitted from prohibited conduct in the exercise of their respective public duties. It is also noteworthy that enforcement of the statutes seems to have run in spurts throughout their legal history. The vast majority of the earlier cases were decided in the late 1800's and very early 1900's. Several cases can be found in the late 1930's and early 1940's, but generally there is a large gap in the case law until the late 1960's up through the present. This trend could most probably be closely correlated with the economic and political history of the state and the nation; however, it would serve little purpose to engage in such a discussion in this Note.

A. Iowa Code Chapter 739—Bribery and Corruption of Public Officials

There are three chapters of the *Iowa Code* which deal with the actions of public officials generally: Chapters 739, 740, and 741. The first three sections of chapter 739 concern themselves with "any executive or judicial officer or member of the general assembly."¹⁶ While a clear definition of "executive or judicial officer" is entirely lacking both in the statutory and case law of this state, other courts have interpreted "executive officer" to mean one who executes the laws of a division of government. This has been held to include governors,¹⁷ mayors,¹⁸ heads of departments,¹⁹ sheriffs,²⁰ and police officers.²¹ However, there is judicial opinion *contra* in nearly every one of these areas of application,²² and whether members of school boards and other agencies, as well as city councilmen and members of county boards of supervisors, come within the definition of "executive officers" is a matter of divided opinion.²³ The term "judicial officer" has been interpreted to include judges and justices of all courts,²⁴ arbitrators,²⁵ prosecuting attorneys,²⁶ city attorneys,²⁷ and notaries public.²⁸ Employees of designated executive and judicial officers and employees of the general assembly are apparently excluded unless they qualify as officers themselves.

Chapter 739 prohibits both the giving to and receipt by these designated

¹⁵ IOWA CODE §§ 2647-56 (1851) (now IOWA CODE §§ 739.1-9 (1973)).

¹⁶ *Id.* § 739.1 (1973).

¹⁷ Commonwealth v. Dowe, 315 Mass. 217, 52 N.E.2d 406 (1943).

¹⁸ People v. Hallner, 43 Cal. App. 2d 715, 277 P.2d 393 (1954).

¹⁹ People *ex rel.* Barber v. Hargreaves, 303 Ill. App. 387, 25 N.E.2d 416 (1940).

²⁰ State v. La Flame, 30 N.D. 489, 152 N.W. 810 (1915).

²¹ State v. Gardiner, 88 Minn. 130, 92 N.W. 529 (1902).

²² See State *ex rel.* Williams v. Coleman, 180 So. 357 (Fla. 1938); People v. Swift, 59 Mich. 529, 26 N.W. 694 (1886).

²³ *Id.*

²⁴ Settle v. Van Evrea, 49 N.Y. 280 (1872).

²⁵ Babylon Milk & Cream Co. v. Horvitz, 151 N.Y.S.2d 221 (1956).

²⁶ State *ex rel.* Williams v. Ellis, 184 Ind. 307, 112 N.E. 98 (1916).

²⁷ People v. Salsbury, 134 Mich. 537, 96 N.W. 936 (1903).

²⁸ *Ex parte* Noell, 220 Mo. App. 702, 293 S.W. 488 (1927).

public officials of any valuable consideration, gratuity, service, or other benefit with *intent to influence* the official to act in a certain manner.²⁹ The criminal penalty provided for violation of these sections is considerably more harsh on the public official who receives such a bribe—up to ten years in the penitentiary, or a fine of up to \$2,000 and up to one year in the county jail—than it is on the person who gives, offers, or promises the bribe—up to five years in the penitentiary, or a fine of up to \$1,000 and up to one year in the county jail.³⁰ Both types of offenders are, however, barred from holding any public office in Iowa forever afterwards.³¹

Iowa Code sections 739.4 and 739.5 provide criminal penalties for the further possibility of a person bribing another individual who is not a public official to use his influence to obtain some sort of "place of trust" for the former. The wording of these sections seems to include private "places of trust" as well as public. The maximum penalty for giving or offering, as well as receiving, such a bribe, *even indirectly*, is a fine of up to \$300 and up to one year in the county jail. It might be speculated that this statute would cover a situation where a businessman, desirous of obtaining a position on the city zoning commission, channelled a great majority of his legal business to the law firm of an attorney who sits on the city council. The attorney who knowingly accepts this business and in turn attempts to arrange such an appointment is equally guilty under *Iowa Code* section 739.5.

If there was ever any doubt as to whether "lesser" public officials such as city councilmen and county supervisors were meant to be included in *Code* sections 739.1-.3, the prohibitions of sections 739.10-.11 serve as a catch-all for all of these other public officials. The broad language of the statute is worthy of note:

If any state, county, township, city, school, or other municipal officer, not mentioned in this chapter, directly or indirectly accept any valuable consideration, gratuity, service, or benefit whatever, or the promise thereof, other than the compensation allowed him by law, conditioned upon said officer's doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority to give or procure for any person public employment, or conditioned upon said officer's refraining from doing or performing any of the foregoing acts or things, he shall be imprisoned in the penitentiary not exceeding one year, or fined in any sum not less than twenty nor more than three hundred dollars.³²

Section 739.11 prohibits the giving, offering, or promising any of the benefits indicated in the previous section and provides for the same penalty. The range of possible examples of prohibited conduct contemplated by these two sections would seem to be endless, and the term "catch-all" would apparently be an

²⁹ IOWA CODE §§ 739.1-.2 (1973).

³⁰ *Id.*

³¹ *Id.* § 739.3.

³² *Id.* § 739.10.

understatement. Strangely enough, although officials falling within the categories set out in *Code* sections 739.1 and 739.2 are barred from ever holding public office again after conviction, no such bar is applied to those caught up in sections 739.10 and 739.11.

Code section 739.12 deals with bribery in athletic contests, and as noted above, this topic will not be considered in this discussion.

B. Chapter 740—Misconduct or Neglect in Office

Early in the development of the common law of conflict of interest it was recognized that while every citizen is said to hold the right to become an officeholder, one must at times subordinate this right to the public good. An officer whose private interests would prevent him from exercising impartial judgment in matters of public concern should not be allowed to serve. By expanding on this idea, lawmakers in this state attempted to prevent situations where there existed even a *possibility* of divided loyalty.³³ These offenses were categorized under the heading "misconduct or neglect in office" now known as *Iowa Code* chapter 740 (1973).

Sections 740.1 and 740.10 prohibit a public official from taking more than his lawful fee for performing an official act. Here we see the prohibition of conduct which holds only the possibility of a motive of conflicting interest. Section 740.1, however, has overtones of extortion attached to it. In order to be convicted under this statute a public official must *corruptly* and *willfully demand* and *receive* the extra compensation. In other words, a mere gratuitous gift of valuable consideration to a public official (here, *any* public official), absent his demand for it, will fail to come within the provisions of this statute, regardless of the corrupt act which may have been performed by the official to merit the gift. Corrupt motive in the demanding and receiving is also imperative with this statute. It is clear, however, that this sort of situation could quite possibly fall within the prohibitions of chapters 739 and 741. But section 740.1 itself is written extremely narrowly. The penalty for this act is a maximum fine of \$100 or imprisonment in the county jail for up to six months.³⁴ If the public official involved is an appointed state officer, he may also be removed from office.³⁵

Section 740.10 merely requires that the official *willfully take* the extra compensation and no demand or corrupt motive appears to be necessary for conviction. Interestingly enough, the statute provides that a violation of this provision shall constitute a misdemeanor, without providing a specific penalty.

³³ *Id.* § 2658 *et seq.* (1851).

³⁴ *Id.* § 740.1 (1973).

³⁵ Under *IOWA CODE* § 66.26 (1973), actual conviction of a violation of *IOWA CODE* § 740.1 may not even be necessary for removal. The statute reads:
Any appointive state officer may also be removed from office by a majority vote of the executive council for any of the following causes:

5. Extortion.

Iowa Code section 687.7 provides that the general penalty for a misdemeanor is up to one year in the county jail and/or a maximum \$500 fine.⁸⁶ Read together, *Code* sections 740.1 and 740.10 may be seen as inconsistent because although corrupt motive and actual demand for illegal compensation are necessary for conviction under section 740.1, it carries a lighter penalty than does a conviction under section 740.10 where a mere taking is all that is necessary.

Section 740.3 is a prohibition against willful and malicious "oppression" by a public official under the pretense of acting in his official capacity. In this statute we see again the legislative policy of prohibiting certain conduct because of the *possibility* that it may be motivated by a conflict of interest on the part of the public official. The penalty for such an act of misconduct is a maximum fine of \$1,000 and imprisonment in the county jail for up to one year.⁸⁷ This particular statute, unlike the others relating to conflict of interest, also provides for civil damages to be paid to the injured party for any injury sustained as a consequence thereof. Presumably, the injured party would have to institute a separate suit for damages in order to recover.⁸⁸ Further, under section 66.26, noted above in relation to extortion, oppression of this sort is grounds for removal from office.⁸⁹

Chapter 740 does not cover, in any way, the individual who offers or gives the extra compensation. For prosecution of such a person reference must be made to chapters 739 and 741.

C. Chapter 741—Gratuities and Tips

Gift-giving in relation to public contracts constitutes the predominant area of legislation and judicial interpretation in the area of conflicts of interest. These abuses are more readily observed and more commonly regarded as objectionable, although a great many transactions of this sort are becoming increasingly clandestine. *Iowa Code* chapter 741 was designed to deal with such conflicts, and section 741.1 is the touchstone of much of Iowa's law governing the conduct of public officials in their fiduciary capacities. This section prohibits the giving to or receipt by a public official of gifts, commissions, bonuses, and gratuities connected with, relating to, or growing out of a business transaction between the parties. It is extremely important to note that this statute requires *no intent to influence or corrupt intent on the part of the public official* in receiving the

⁸⁶ IOWA CODE § 687.7 (1973) provides:

Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

⁸⁷ IOWA CODE § 740.3 (1973).

⁸⁸ IOWA CODE § 740.3 (1973) provides only that the official convicted thereunder shall be "liable" to the injured party for such damages.

⁸⁹ Under IOWA CODE § 66.26 (1973), actual conviction may not be necessary for removal. The statute reads:

Any appointive state officer may also be removed from office by a majority vote of the executive council for any of the following causes:

4. Oppression [740.3].

commission, bonus, or gratuity. This provision should be contrasted with the equally broad wording of sections 739.1, 739.2, 739.10, and 739.11, where some "evil intent" was specifically required. However, when dealing with a possible conflict of interest situation, the provisions of chapters 739 and 741 should always be read together as they provide for a great deal of flexibility and are rather all-inclusive in this area.

Section 741.1 also has more extensive coverage than any of the statutes discussed previously. The statute covers "any agent, representative, or employee"⁴⁰ in addition to the public official per se, as long as either was acting in behalf of a principal in any business transaction. The commission, bonus, or gratuity may be received because it is connected with, relates to, or grows out of such a transaction, thus leaving the door open for prosecution of public officials with merely a good memory for past favors!

The person giving, offering, or promising the gratuity need not be acting for himself in order to incur liability either. He also may be acting on behalf of a copartnership, association, or corporation when making the offers.

While the reasoning of the Iowa Legislature sitting in 1967 remains undisclosed in the statutes or case law, we have in *Iowa Code* section 741.1 a very broad statute designed to deal with conflicts of interest among public officials, yet limited by an amendment which reads:

The provisions of this section shall not be construed to apply to officials or employees of the state of Iowa nor to legislators or legislative employees.⁴¹

Without venturing a guess as to any personal interest which might have prompted the amendment, it might be speculated that the intent was to avoid duplication of the prohibitions of *Code* sections 739.1 and 739.2. However, chapter 739 still holds some duplication in coverage of county, township, city, school and other municipal officers⁴² also covered under chapter 741. Perhaps the rationale for such a limitation need not be discussed here, but the fact of its existence is quite important when determining the applicability of the provisions of these three basic chapters.

The penalty provided for either receiving, giving, offering, or promising such benefits under section 741.1 is a fine of not less than \$25 nor more than \$500 and/or up to one year in the county jail.⁴³ There appears to be no bar to holding office nor any provision for removal from office encompassed in these statutes, provided the prosecution is brought only under chapter 741 and not in conjunction with chapters 739 or 740.⁴⁴

It is difficult to imagine a situation where only one of the statutes discussed above is clearly and unequivocally applicable to the facts. As has been fre-

⁴⁰ IOWA CODE § 741.1 (1973).

⁴¹ *Id.*, amending IOWA CODE § 741.1 (1966).

⁴² *Id.* § 739.10-11 (1973).

⁴³ *Id.* § 741.2.

⁴⁴ *Id.* §§ 66.26, 739.3.

quently mentioned herein, it is necessary to read all three chapters together in order to be assured that all the areas where the statutes interlock have been duly noted. It is entirely possible, for instance, that although the public official in question may not be removed from office under one section, another section of a different chapter covers his conduct equally as effectively and provides for his removal, as well. Because these basic conflict of interest statutes have not been enacted in any uniform manner, and their provisions appear haphazard at times, care should be taken not to omit any vital consideration when analyzing the conduct in question.

D. *Interpretive Case Law*

In spite of the fact that chapters 739, 740, and 741 of the *Iowa Code* are basic to the prosecution of conflict of interest violations in this state, prosecutions under these statutes have been few. Interpretations of these laws by the Iowa supreme court have been few. A number of opinions written by various Attorneys General in Iowa help to fill out our understanding of these statutes, but in many cases, legislative intent and probable judicial interpretation remain a mystery.

As was noted above, the broad language of *Iowa Code* section 739.10 serves to create a statutory catch-all to cover any public official not included in sections 739.1 and 739.2. There has been some question raised, however, as to who is included in the category of "public official." Certainly not every public employee may be classified an "official," but the line of distinction has not always been clear either. In 1906, the Attorney General declared that in his opinion, the county attorney was a public official within the meaning of what is now *Iowa Code* section 739.10.⁴⁵ In 1930, an Attorney General's opinion took school janitors off the list of public officials, but surprisingly, school superintendents were also found to be "mere employees" within the statute.⁴⁶ Finally in 1966, the Iowa supreme court sought to clear up this problem of coverage of the statute and found that:

... five essential elements are required by most courts to make a public employment a public office. They are: (1) The position must be created by the Constitution or legislature or through the authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The position must have some permanency and continuity, and not be only temporary and occasional.⁴⁷

There it was found that a city zoning inspector met all these requirements and was, in fact, a public official, within the meaning of the statute.

⁴⁵ 1906 OP. ATT'Y GEN. 385.

⁴⁶ 1930 OP. ATT'Y GEN. 165.

⁴⁷ *State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289 (1966).

In certain instances where there is no real question about whether or not the individual in question is a public official, there have been questions raised about the applicability of the statute⁴⁸ to various fact situations. In 1928, an opinion of the Attorney General⁴⁹ found that it was against public policy for a school board to contract with the wife of a member of the board for transportation of pupils when the board member is to receive consideration from his wife for the use of his transportation equipment. The opinion stated that:

The school board member in the case presented . . . would be receiving indirectly, if it could not be said directly, a valuable consideration or benefit by reason of the contract made by the board of which he is a member with his wife.⁵⁰

An opinion written in 1967, however, clarified the problem of application of the statute⁵¹ to public contracting. There it was found that the mere fact that a member of a school board is related to a possible contracting party does not prohibit him from entering into discussions of the prospective contract.⁵² Thus it appears that the significant factor in such situations is the consideration or gratuity to be paid to the public official as a result of the contract, and not a mere relationship in and of itself.

A somewhat more obscure problem of applicability arose in *Maggi v. Cassidy*⁵³ in 1921. There the state supreme court held that a sheriff may properly receive a reward for an arrest and conviction of a felon where the offense was committed outside the sheriff's own jurisdiction. The court reasoned that since the warrant for arrest was issued in another county, the sheriff in question had no official duty to make the arrest and consequently the reward was not illegal in the contemplation of *Iowa Code* section 739.10.

Code section 740.3 dealing with oppression in office by a public official was scrutinized by the Iowa supreme court quite recently in the case of *Osbeck v. Mallory*.⁵⁴ In that opinion the court held that when a minor magistrate, such as a mayor presiding over the "mayor's court," acts wholly without jurisdiction, civil liability attaches for his malicious and corrupt abuse of process and his willful and malicious oppression of any person under the pretense of acting in his official capacity.⁵⁵ Judicial immunity was a defense raised in this action at law; however, the court found that because the statute specifically provides for such an action and because the conduct in question was willful and malicious, immunity is an invalid defense.

A corollary issue was raised with regard to prosecutions under section 740.3 in an Attorney General's opinion in 1926.⁵⁶ The question there was

⁴⁸ IOWA CODE § 739.10 (1973).

⁴⁹ 1928 OP. ATT'Y GEN. 75.

⁵⁰ *Id.*

⁵¹ IOWA CODE § 739.10 (1973).

⁵² 1967 OP. ATT'Y GEN. 201.

⁵³ 190 Iowa 933, 181 N.W. 27 (1921).

⁵⁴ 188 N.W.2d 294 (Iowa 1971).

⁵⁵ *Accord*, *State v. Bevans*, 37 Iowa 178 (1873).

⁵⁶ 1926 OP. ATT'Y GEN. 270.

whether a county board of supervisors could properly employ counsel to defend the county sheriff who had been charged under section 740.3 of the *Iowa Code*. The Attorney General answered in the affirmative but stipulated that the power was merely discretionary and that no board could be *forced* to make such payments. Unfortunately, this opinion appears to be the result of a hasty conclusion by the Attorney General and a similar result would probably not be reached today. The opinion was based almost entirely on case law concerning counsel provided for officers being prosecuted for *good faith* acts in performance of official duty.⁵⁷ It should have been clear that an act committed willfully and maliciously is *not* a good faith act. In fact, one of the cases cited in this Attorney General's opinion specifically states that the doctrine is not applicable to a case "where the officer knowingly and willfully" violates the statute.⁵⁸

Perhaps the most significant decision in recent years in the area of conflict of interest law in Iowa was *Dukehart-Hughes Tractor and Equipment Co. v. United States*.⁵⁹ In that case, plaintiff, a heavy equipment distributor, as part of its good will and advertising program, entertained potential customers, including public officials of the state of Iowa, by giving fishing trips, convention trips, golf tournaments, dinners, athletic tickets, and Christmas presents. The cost of these programs was deducted from plaintiff's federal income tax as ordinary and necessary business expense.⁶⁰ Declaring that such a deduction would frustrate state public policy, the Commissioner of Internal Revenue denied the deduction and the Equipment Company brought an action for a refund in the United States Court of Claims.

The court held that in order for the expenses to be non-deductible, it must be shown that they were used for a purpose which is contrary to state or federal public policy. *Iowa Code* section 741.1 was raised by the Commissioner on the grounds that this Iowa statute prohibited such gifts to public officials. The court then further held that because the gifts were not connected with any one single business transaction with the state of Iowa, but were for the purpose of general good will, the gift-giving was not contrary to the policy of the statute. A comment on the *Dukehart* case shortly after the decision was handed down⁶¹ indicates that the primary impact of the decision is the failure of the federal court to recognize a public policy in Iowa against general and consistent gift-giving creating a situation where a public official's private interests could quite easily tend to conflict with the performance of his public duties, regardless of malicious intent.

In the present section of this discussion another issue should be briefly dealt with which does not appear to be covered by statutory law but which has

⁵⁷ *Peet v. Leinbaugh*, 180 Iowa 937, 940 (1917); *Gormly v. Town of Mt. Vernon*, 134 Iowa 394 (1906).

⁵⁸ *Gormly v. Town of Mt. Vernon*, 134 Iowa 394 (1906).

⁵⁹ 341 F.2d 613 (Ct. Cl. 1965).

⁶⁰ See INT. REV. CODE of 1954, § 162(a).

⁶¹ Comment, *Taxation—Deductions—Gifts to Public Officials Held Deductible*, 51 IOWA L. REV. 522 (1966).

been raised by two recent opinions of the Iowa Attorney General.⁶² Frequently, questions arise as to whether the holding of two different public positions constitutes a conflict of interest. It has consequently been held that there must first be an inconsistency of functions, inherently repugnant to each other, before such status will be condemned.

Because chapters 739, 740 and 741 are basic to the law regulating conflict of interest in Iowa, these statutes and the case law surrounding them should always be consulted when dealing with a possible conflict situation. However, the *Iowa Code* contains many more specific prohibitions applicable only to state, county, or municipal officials, and others which apply only to particular offices. These are dealt with below.

II. STATE OFFICIALS AND EMPLOYEES

A. *The General Assembly and Its Employees*

In the paragraphs above, the applicability of chapters 739 and 740 of the *Iowa Code* to the Legislature and its employees was established. In addition to these provisions, various sections of the new *Code* chapter 68B, enacted in 1967 deal specifically with the conflicts of interest of state legislators. Problems of interpretation and coverage of these statutes promise to be fewer than with the chapters previously discussed as the General Assembly saw fit to include in this new act an entire section defining terms.⁶³ Section 68B.3 was passed to forbid a legislator or legislative employee from privately entering into a contract to sell goods with a value of over \$500 to the state unless the contract was obtained through public bidding.

Under section 68B.5, a legislator or legislative employee cannot accept, solicit or receive, even indirectly, a gift (no matter what its form) valued at \$25 or more so long as the gift is related to legislative service. The statute also prohibits the offering or giving of such a gift, but campaign contributions are specifically excluded.

Section 68B.6 of this act prohibits only a legislative employee from entering into contracts, express or implied, to render services by himself or by another "against the interest of the state in relation to any case, proceeding, application, or other matter before any state agency, any court of the state of Iowa, any federal court, or any federal bureau, agency, commission or department."⁶⁴ The rationale for omitting legislators from this prohibition remains unclear.

The violation of any of these sections constitutes a misdemeanor by specific provision,⁶⁵ and under *Code* section 687.7 requires a penalty of up to one year in the county jail and/or a maximum \$500 fine. A convicted legislator or

⁶² 1970 OP. ATT'Y GEN. 525; 1968 OP. ATT'Y GEN. 541.

⁶³ IOWA CODE § 68B.2 (1973).

⁶⁴ *Id.* § 68B.6.

⁶⁵ *Id.* § 68B.8.

employee may also be suspended from his position.⁶⁶ Actions to enforce these statutes may be brought by any legal resident over the age of nineteen or by the Attorney General.⁶⁷

Unfortunately the Iowa supreme court has not been called upon to voice an opinion with regard to chapter 68B since its enactment, consequently Attorney General's opinions are all we have for purposes of interpreting these statutes. Two opinions are significant in this light.⁶⁸ While it is prohibited by *Code* section 68B.5 for a legislator to accept travel expenses from an outside interest, speakers honorariums and travel expenses for speaking purposes may be accepted by a lawmaker so long as they are not given as a mere subterfuge to circumvent the purposes of the act.

B. State Agencies—Officials and Employees

1. General Statutory Regulation

As has been noted several times, chapters 739, 740, and 741 are clearly applicable to state officials, and a further discussion of these sections would be superfluous here. There are, however, several additional prohibitions which apply particularly to state officials and employees.

Sections 68B.3, 68B.5, and 68B.6 of the *Code of Iowa*, discussed above in relation to legislators and legislative employees, are equally applicable to state officials and employees. However, the new chapter 68B contains certain other provisions which apply solely to non-legislators in state government. Section 68B.4 states that under penalty of up to one year in the county jail and/or a maximum fine of \$500 and suspension from office,⁶⁹ officials and employees of regulatory agencies⁷⁰ must abstain from selling goods or services, either directly or indirectly, to anyone subject to the authority of that agency. For example, a member of the State Board of Regents would be prohibited from selling any goods or services to any state university, and a member of the Board of Pharmacy Examiners would be likewise barred from selling services or materials to a pharmacist.

Section 68B.7 imposes a two year restriction on former officials and employees of state agencies to effectively ban them from appearing before that

⁶⁶ *Id.*

⁶⁷ *Id.* § 68B.9. The age minimum for bringing an action under this statute is subject to change with the enactment by the 65th General Assembly of the new adult rights law lowering the age of majority to eighteen.

⁶⁸ 1969 OP. ATT'Y GEN. 319; 1968 OP. ATT'Y GEN. 752.

⁶⁹ IOWA CODE §§ 68B.8, 687.7 (1973).

⁷⁰ IOWA CODE § 68B.2(4) (1973) reads:

"Regulatory agency" means department of agriculture, industrial commissioner, bureau of labor, employment security commission, department of banking, insurance department, department of health, department of public safety, department of public instruction, board of regents, department of social services, state department of revenue, department of mines and minerals, commerce commission, liquor control commission, board of pharmacy examiners, state conservation commission, aeronautics commission, state highway commission, civil rights commission, soil conservation committee, public defense, and natural resources council.

agency or receiving any compensation for rendering any kind of service to a person, firm, corporation, etc., in relation to any case, proceeding or application which the official or employee dealt with while in office. Heads of commissions and their deputies are further banned for two years from receiving any compensation from such outside interest if the compensation *depends on* any action by the agency which the official previously headed. Thus, a former commerce commissioner could not, for example, receive compensation from a public utility if that compensation depended upon approval of a rate increase. And so without specifically spelling it out, this statute prohibits even the *possibility* of influence peddling, and again we see that the actual intent of the parties is totally irrelevant. This is a *per se* standard. Violation of this section constitutes a misdemeanor and carries the standard penalty.⁷¹

The prohibitions of chapter 68B do not merely apply to the legislator, official, or employee himself. Whenever those terms are used they are interpreted to include any firm or association of which the official is a member or partner and any corporation in which the official holds a 10% interest, directly or indirectly. Wives (and presumably husbands, although the statute doesn't specify) and unemancipated minor children are also included.⁷²

Under *Code* section 314.2, state officials and employees are also prohibited from directly or indirectly becoming interested in any highway development contract. Such an official may not even furnish materials for a highway project. If such a prohibited contract is made, it is considered void and the contractor-official may not recover for anything furnished by him. Unfortunately, this statute is one of those in the *Iowa Code* which clearly spells out the prohibited conduct and then fails to provide a penalty therefor. *Iowa Code* section 687.6 provides, however:

When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.⁷³

The following section, 687.7, then provides that the penalty for a misdemeanor is up to one year in the county jail and/or a maximum \$500 fine. An interesting interpretation of the prohibitions of *Code* section 314.2 came from the Iowa Attorney General in 1955.⁷⁴ In that opinion it was stated that state officials were not prohibited from subcontracting with highway contractors provided there was no prior understanding that if the contract was awarded, the contractor would subcontract with the official. Although this is within the language of the statute, the distinction appears to be merely a technical one.

As a footnote to the statutory material here presented with regard to state officials and employees, it might be noted that *appointive* state officers may also be removed from office by the state executive council. Cause for such

⁷¹ IOWA CODE §§ 68B.8, 687.7 (1973).

⁷² *Id.* § 68B.2(7).

⁷³ *Id.* § 687.6.

⁷⁴ 1955 OP. ATT'Y GEN. 57.

action would be oppression,⁷⁵ extortion,⁷⁶ or corruption.⁷⁷

In addition to the statutory provisions in the Iowa law dealing with state agency officials generally, there are a number of statutes which deal specifically with particular state offices and their employees. Very individualized prohibitions have been designed for the types of conflict situations members of these boards and commissions are likely to become involved in. It should be kept in mind, nonetheless, that these officials who are singled out for statutory treatment are also subject to the same laws which govern all public officials, as well as all state officials generally.

2. *Industrial Commissioner*

It is considered grounds for removal from office when the Industrial Commissioner becomes financially interested in any business affected by the workman's compensation laws during his term of office.⁷⁸ Although this provision is not directly applicable to deputy commissioners, section 86.2 of the same chapter of the *Code* provides that the Industrial Commissioner is himself responsible for the acts of the deputies he appoints. Thus it would appear that the Commissioner could be held liable for the conflicts of interest of his deputies. Although no criminal penalty is included in this statute,⁷⁹ presumably *Code* sections 68B.4 and 68B.8 would apply here as well.

3. *Beer and Liquor Control Department*

Persons responsible for the enforcement and administration of the beer and liquor control laws⁸⁰ are prohibited from soliciting or accepting donations, gratuities, political advertising, gifts, or other favors, directly or indirectly, from any liquor licensee or beer permittee.⁸¹ In addition to the officers and employees of the Beer and Liquor Control Department, apparently police officers are included in the coverage of this statute.⁸² A fine of up to \$1,000 and/or imprisonment in the county jail for up to one year is the penalty provided for violation of this restriction.⁸³ It should be noted that unlike most of the conflict of interest statutes we have discussed previously, this is a *per se* rule and no evil intent or conditional business transaction need be proved.

Members of the Iowa Beer and Liquor Control Council and employees of the Control Department are also prohibited from directly or indirectly having any interest in the sale or manufacture of liquor or beer,⁸⁴ and the same jail

⁷⁵ IOWA CODE § 740.3 (1973).

⁷⁶ *Id.* § 740.1.

⁷⁷ See generally IOWA CODE § 66.26 (1973).

⁷⁸ *Id.* § 86.7.

⁷⁹ *Id.*

⁸⁰ Under IOWA CODE § 123.4 (1973), the Iowa Beer and Liquor Control Department was created to administer and enforce the liquor laws.

⁸¹ IOWA CODE § 123.18 (1973).

⁸² 1963 OP. ATT'Y GEN. 250.

⁸³ IOWA CODE §§ 123.18, .90 (1973).

⁸⁴ *Id.* § 123.45.

sentence and fine as were noted above are applicable.⁸⁵

4. *State Board of Regents*

When a purchase or sale of real estate is made by the Board of Regents, no Board member, member of a committee, nor any officer of a state institution under the Board may be interested, either directly or indirectly, in the contract.⁸⁶ This would prevent a Board member from quickly investing in a piece of property which he knows is being considered as the site of a new university building, for instance. Although no penalty for entering into such a contract is provided, presumably a fact situation consistent with the prohibitions against acceptance of commissions and gratuities⁸⁷ could be created and a penalty consistent therewith⁸⁸ would be in order.

5. *Director of Revenue*

The Director of Revenue is restricted from holding any other state, federal, or local office while serving his term as Director;⁸⁹ nor may he hold any "position of profit" or engage in any type of activity which is inconsistent with his official duties.⁹⁰ He is further prohibited from serving on a committee of a political party or contributing to anyone's campaign fund.⁹¹

This seems to be the type of statute discussed earlier which absolutely prohibits a public official from retaining his private profession or interest while in office. It is likely that this law could prohibit some qualified persons from accepting such an office, but it is probable that the statute was enacted with a view toward the extreme sensitivity of a position which deals with the taxpayer's money.

There appears to be no penalty for the violation of this section, but if the conflict of position was extreme enough to constitute oppression, the Director could be held liable under section 740.3 of the *Code*. Otherwise, the standard penalty would, no doubt, be applicable.⁹²

6. *Superintendent of Banking*

Iowa Code section 524.211 prohibits the Superintendent of Banking, his deputy, assistants, and examiners from accepting either a gift or a loan, directly or indirectly, from a state bank or any of its directors, officers, or employees. Consequently, when any of these individuals is in need of a personal loan, they are limited to the resources of a private bank or a loan company. The deputy

⁸⁵ *Id.* § 123.90.

⁸⁶ *Id.* § 262.10.

⁸⁷ *Id.* § 741.1.

⁸⁸ *Id.* § 741.2.

⁸⁹ *Id.* § 421.3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* §§ 687.6-7.

superintendent, assistants and examiners are also restricted from performing services or being an officer or employee of a state or private bank.⁹³ The deputies, assistants and examiners may be discharged, suspended or demoted for such outside employment.⁹⁴ The Superintendent himself appears to be exempt from this last prohibition, but under *Iowa Code* section 68B.4, he could be prohibited from selling any services to such a state or private bank, under penalty of one year in the county jail and/or a \$500 fine.

The acceptance of a gift or loan by the banking officials may constitute bribery under chapter 739, if intent to influence can be proved, but regardless of donative intent, section 524.1611 provides for a penalty of up to one year in the county jail and/or a fine of up to \$1,000. A further fine equal to the value of the property received by the official convicted may also be imposed, and the officer is discharged from his state employment and forever barred from holding a position with the Department of Banking.⁹⁵ The harshness of these penalties might also be linked to the financial character of the position, much like that of the Director of Revenue.

III. COUNTY OFFICIALS AND EMPLOYEES

A. General Statutory Regulation

Initially, this Note set out the various prohibitions under *Iowa Code* chapters 739, 740, and 741, dealing with the interests and activities of *all* public officials. It should be reiterated at this point that those chapters apply to county officials as well, and they should not be overlooked when analyzing the questionable activities of county personnel.

Within chapter 741 of the *Code*, section 741.11 specifically provides that members of county boards of supervisors, in their individual capacity, may not, in any way, become parties, directly or indirectly, to a contract for supplies or labor with the county. Because there is no specific penalty provided in the statute for this prohibited act, we may assume it is a misdemeanor and carries the standard penalty for such offenses.⁹⁶

An even further particularization of these basic conflict provisions was embodied in *Iowa Code* section 252.29 which specifically prohibits a county board member or employee from being directly or indirectly interested in any supplies furnished the poor. Presumably, this constitutes a misdemeanor.⁹⁷ It is unclear whether this prohibition would be interpreted to encompass *services* furnished the poor as well as supplies, but these would probably be significantly more relevant to welfare practices in present day context.

County officials and employees are also prohibited from becoming even indirectly interested in highway development contracts, and such a tainted

⁹³ *Id.* § 524.211(2).

⁹⁴ *Id.*

⁹⁵ *Id.* § 524.1611(1).

⁹⁶ *Id.* §§ 687.6-7.

⁹⁷ *Id.*

contract will be held void and recovery under it barred.⁹⁸ As with state officials, it is assumed that violation of this law constitutes a misdemeanor.⁹⁹

Case law in this area of county conflict situations indicates that implied, as well as express, contracts between a board of supervisors and one of its members are within the prohibition,¹⁰⁰ and will be held void¹⁰¹ under the statute.¹⁰² The prohibitions of section 741.11 of the *Code* have been held to extend even as far as claims for labor performed for the county which claims were subsequently purchased by a supervisor.¹⁰³ Even if sealed bids are called for by the board of supervisors, and the bid of the interested supervisor turns out to be advantageously low, the county board will be prohibited from accepting it.¹⁰⁴

B. *Specific County Offices*

As with state agencies, the legislature has from time to time singled out several county officials and applied specific restrictions to their activities. Of course, the statutes relating to public officials generally and county offices are all applicable to these individual officers as well.

1. *County Medical Examiner*

Iowa Code section 339.12 provides:

No medical examiner shall use influence in favor of any particular funeral director.

This prohibits any scheme of kickbacks between funeral homes and the county medical examiner. Removal of the medical examiner can only be effectuated by the county board of supervisors,¹⁰⁵ and although no other remedy is explicit in these statutes, the standard penalty for a misdemeanor would seem to be as appropriate here as in any other conflict situation.¹⁰⁶

2. *County Hospital Trustees*

Trustees of county public hospitals are prohibited from having a direct or indirect pecuniary interest in the purchase or sale of goods used by or disposed of by the hospital.¹⁰⁷ This is true even if bids are taken, and the bid of the interested trustee is advantageously low.¹⁰⁸ Although unstated, we may assume a violation of this act constitutes a misdemeanor.¹⁰⁹

⁹⁸ *Id.* § 314.2.

⁹⁹ *Id.* §§ 687.6-.7.

¹⁰⁰ *Nelson v. Harrison County*, 126 Iowa 436, 102 N.W. 197 (1905).

¹⁰¹ *Id.*

¹⁰² *IOWA CODE* § 741.11 (1973).

¹⁰³ *Harrison County v. Ogden*, 133 Iowa 677, 108 N.W. 451 (1906).

¹⁰⁴ 1967 OP. ATT'Y GEN. 153; 1963 OP. ATT'Y GEN. 78.

¹⁰⁵ *IOWA CODE* § 339.1 (1973).

¹⁰⁶ *Id.* §§ 687.6-.7.

¹⁰⁷ *Id.* § 347.15.

¹⁰⁸ 1967 OP. ATT'Y GEN. 153.

¹⁰⁹ *IOWA CODE* §§ 687.6-.7 (1973).

3. *Compensation Commission*

The broadness of the prohibition which restricts the members of a county compensation commission (the body which assesses damages to be paid by the county for property taken) is extreme. They are warned against possessing *any interest* in a proceeding which would cause them to render a "biased decision."¹¹⁰ If they were to actually possess such a forbidden interest, it might be speculated that a court would hold the commission proceedings invalid, and if the interest was pecuniary it is quite possible that the official could be convicted under *Iowa Code* sections 739.10 and 739.11 (accepting a reward for acting officially in a certain manner) and section 740.1 (extortion), as well as possibly other statutes in this area as discussed above.

4. *Sheriffs, Deputies, Marshalls, and Police Officers*

The list of officials included under *Iowa Code* section 739.9 includes sheriffs, deputy sheriffs, marshalls, deputy marshalls, policemen, and police officers of any city or town. These individuals are prohibited from:

. . . receiv[ing] from a defendant, or other person, any money or other valuable thing as consideration or inducement for omitting or delaying to arrest any defendant or to carry him before a magistrate or to prison, or for postponing, delaying, or neglecting the sale of property on execution, or for omitting or delaying to perform any other duty pertaining to his office¹¹¹

This basic bribery statute obviously requires some degree of wrongful intent in order to constitute a violation. The consideration must be received for the prohibited purpose. Violations of this statute carry a penalty of a maximum \$500 fine and/or up to six months in the county jail.¹¹²

IV. MUNICIPAL OFFICERS AND EMPLOYEES

A. *General Statutory Regulation*

The general prohibitions which apply to public officials as a whole and which have been discussed at length above are obviously equally applicable to municipal officers and employees. These provisions should be noted here. In the specific area of conflicts of interest of municipal officers, however, the basic policy is set out by *Iowa Code* section 368A.22:

No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality.¹¹³

With this basic prohibition in mind, a few very limited exceptions to the rule should be noted.

¹¹⁰ *Id.* § 472.4.

¹¹¹ *Id.* § 739.9.

¹¹² *Id.*

¹¹³ *Id.* § 368A.22(2).

In municipalities with a population of less than three thousand and where such contracts are granted only by open public bidding, the prohibition does not apply.¹¹⁴ Apparently the theory behind this exception was that in Iowa towns of such small size the selection of possible markets is so limited that it would be virtually impossible in some instances to avoid buying certain products or services from a municipal officer or employee.

A second exception to the basic statutory rule¹¹⁵ arises where the municipal officer's interest is simply maintained by virtue of being an employee or stockholder of the contractor.¹¹⁶ The contract must be obtained through public bidding, however, and if the acquisition of the municipal contract will not in any way affect the officer's compensation from the company, this type of contract will be permitted.¹¹⁷ In addition, the officer's duties with the firm must not include the procurement or preparation of such contracts.¹¹⁸ If the officer's stock holdings amount to less than 5% of the outstanding stock in the contracting corporation, the bidding requirement is unnecessary and the contractual relationship will also be permitted.¹¹⁹ Contracts for professional services not normally subject to bidding procedures are also exempt from the basic prohibitions.¹²⁰

If the contract in which a municipal officer has an interest was made before he was elected or appointed, he will not be guilty of a conflict of interest under section 368A.22, but this contract cannot be renewed.¹²¹ Compatible municipal offices are also exempted by this statute.¹²²

Another twist in the law may be illustrated with the following example. If a city ordinance authorizes only the city council to contract for the services of a local building contractor, a contract may be entered into with such a contractor even if he is currently a member of a city commission, such as the planning and zoning commission. In other words, the interested official must be a member of the municipal body authorized to approve the contract in order to fall within the prohibition.¹²³

Several other rather obscure exceptions to the general rule are authorized,¹²⁴ but basically any other contract within the prohibition will be held

¹¹⁴ *Id.* § 368A.22(2)(d).

¹¹⁵ *Id.* § 368A.22(2).

¹¹⁶ *Id.* § 368A.22(2)(e), (j).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 368A.22(2)(i).

¹²⁰ *Id.* § 368A.22(2)(e).

¹²¹ *Id.* § 368A.22(2)(g).

¹²² *Id.* § 368A.22(2)(a).

¹²³ *Id.* § 368A.22(2)(j).

¹²⁴ Other exceptions stated under IOWA CODE § 368A.22(2) (1973) are:

- b. The designation of a bank or trust company as a depository, paying agent, or for investment of funds.
- c. An employee of a bank or trust company, who serves as treasurer of any municipality.

void,¹²⁵ and the interested official will be guilty of a misdemeanor.¹²⁶

In instances where there is no actual contract involved, but where a resolution or ordinance passed by the municipal governing body is in question because of a conflict of interest in one of the members, the ordinance will only be held invalid if the vote of that member was decisive.¹²⁷

Municipal officers are also prohibited from receiving free passes or free service from any business operating under a municipal franchise,¹²⁸ and a violation constitutes a misdemeanor.¹²⁹

Townships are also covered by statutes in the area of conflicts of interest. Township trustees are not allowed to become parties, directly or indirectly, to any contract to furnish supplies or labor to the township.¹³⁰ This, too, would constitute a misdemeanor.¹³¹

For the most part, case law in the area of municipal conflicts of interest indicates that it is irrelevant whether the official actually profited by his private interests in the contract or not. It is the conflicting relationship which the law condemns in these cases, and thus it is no defense to show that the municipality actually profited by the relationship.¹³² Surprisingly, it has been held that even though such contracts are void, and the municipal officer is convicted of a misdemeanor and not allowed to recover for his contracted services, this is not grounds for removal from office.¹³³

B. *Specific Municipal Offices*

1. *Municipal Riverfront Improvement Commission*

Members of these commissions are not allowed to be interested, even indirectly, in any contract entered into by the commission or in any purchase or sale of property.¹³⁴ This would, no doubt, constitute a misdemeanor.¹³⁵

2. *Police Officers*

As was noted above in the discussion of county government, police officers may not receive compensation of any sort for neglect of official duty (*i.e.*, ac-

f. The designation of an official newspaper.

h. Contracts with volunteer firemen or civil defense volunteers.

¹²⁵ IOWA CODE § 368A.22(3) (1973).

¹²⁶ *Id.* § 368A.23; *Leffingwell v. Lake City*, 257 Iowa 1022, 135 N.W.2d 536 (1965).

¹²⁷ IOWA CODE § 368A.25 (1973); *see Krueger v. Ramsey*, 188 Iowa 861, 175 N.W. 1 (1919).

¹²⁸ IOWA CODE § 368A.23 (1973).

¹²⁹ *Id.*

¹³⁰ *Id.* § 741.11.

¹³¹ *Id.* §§ 687.6-.7; *see State v. York*, 131 Iowa 635, 109 N.W. 122 (1906).

¹³² *Peet v. Leinbaugh*, 180 Iowa 937, 164 N.W. 127 (1917); *Bay v. Davidson*, 133 Iowa 688, 111 N.W. 25 (1907).

¹³³ *State ex rel. Cochran v. Zeigler*, 199 Iowa 392, 202 N.W. 94 (1925).

¹³⁴ IOWA CODE § 372.16 (1973).

¹³⁵ *Id.* §§ 678.6-.7.

cepting a bribe to refrain from arrest).¹⁸⁶ The penalty imposed on a guilty officer is a maximum \$500 fine and/or six months in the county jail.¹⁸⁷

3. *Urban Renewal and Low-Rent Housing Agencies*

Public officials involved with an urban renewal project or a low-rent housing project may not voluntarily acquire a personal interest, even indirectly, in the project or in any property included or planned to be included therein.¹⁸⁸ Neither may such an official become interested in a contract related to an urban renewal or low-rent housing project.¹⁸⁹ If the acquisition was involuntary, such as by devise or bequest, the interest must be immediately disclosed to the local governing body.¹⁴⁰ If the interest of the official only amounts to 5% of the outstanding stock of the contracting corporation, the interest is not condemned.¹⁴¹

The two statutes covering conflicts of interest in this area contain a provision unique in the law of conflicts of interest. It not only must be disclosed to the local governing body when a participating official already holds an interest in property included in a housing or urban renewal project, but it also must be disclosed when such an official has *owned or controlled within the preceding two years* any property included or planned to be included in the project.¹⁴² The broad coverage of this statute was obviously a product of the expectations and fears of our lawmakers about the fortunes that were to be made in the expansive urban renewal projects of the 1950's and 1960's. As it was stated by the Iowa court in *Wilson v. Iowa City*:¹⁴³

... the legislature intended every public official and employee described in the statute to be prevented not only from gaining personal advantage after he actually knew what was included in a project, but to prevent him also from trading upon advance information as to what was planned to be included therein.¹⁴⁴

It is the *potential* for conflict of interest which the law desires to avoid.¹⁴⁵

Under the present law, the vote of the interested member must have been decisive, in order to invalidate the resolution entirely, although at the time *Wilson* was decided this provision was not a part of the urban renewal statute.¹⁴⁶ These statutes¹⁴⁷ state, however, that such a violation constitutes "mis-

¹⁸⁶ *Id.* § 739.9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* §§ 403.16, 403A.22.

¹⁸⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 165 N.W.2d 813 (Iowa 1969).

¹⁴⁴ *Id.* at 820.

¹⁴⁵ *Id.* at 822.

¹⁴⁶ IOWA CODE § 403.16 (1973).

¹⁴⁷ *Id.* §§ 403.16, 403A.22.

conduct in office," presumably a misdemeanor.¹⁴⁸

Numerous definitions are included in both statutes¹⁴⁹ thus making judicial interpretation somewhat less burdensome than with some of the earlier-enacted statutes. The case law surrounding these statutes has substantially consisted of a single case—the *Wilson*¹⁵⁰ case quoted above. There it was held that both ownership interests and leasehold interests in property within an urban renewal project area would disqualify the interested city councilman from voting on any resolution dealing with such property.¹⁵¹

V. JUDGES

The judiciary in Iowa is subject to *Iowa Code* section 740.3, as are other public officials, and under this statute they are prohibited from "willfully and maliciously" oppressing any person under pretense of acting in one's official capacity. Although the term "oppression" has never been judicially defined, we may assume it would apply to cases of extreme pressure and influence or cases where extreme hardship is invoked upon an individual before the court under color of the judge's office. The penalty for a violation of *Code* section 740.3 is a maximum \$1,000 fine and imprisonment in the county jail for up to one year. The judge could also be held liable in civil damages for any damage sustained as a result of the oppression.¹⁵² Judicial immunity is not a defense to such actions in any case.¹⁵³

Where oppression is not present in a judicial act, but it becomes clear to a party before any court in the state of Iowa that the judge is personally interested in the action in some way, the judge is, by statute, disqualified from presiding, except from disposing of a preliminary matter not affecting the merits of the case.¹⁵⁴ The particular statutory prohibition reads as follows:

A judge or justice is disqualified from acting as such, except by mutual consent of the parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding. This section shall not prevent him from disposing of any preliminary matter not affecting the merits of the case.¹⁵⁵

The same rule applies specifically to probate matters.¹⁵⁶

Case law in this area of disqualification of a judge for personal interest is voluminous, but the purpose of this Note is to merely note the remedy—disqualification—and assess its basic application. Thus, other than noting that the

¹⁴⁸ *Id.* §§ 687.6-7.

¹⁴⁹ *Id.* §§ 403.16(1)-(7), 403A.22(1)-(7).

¹⁵⁰ *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969).

¹⁵¹ *Id.* at 820.

¹⁵² *IOWA CODE* § 740.3 (1973).

¹⁵³ *Osbekoff v. Mallory*, 188 N.W.2d 294 (Iowa 1971).

¹⁵⁴ *IOWA CODE* § 605.17 (1973).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 633.17.

statutes governing disqualification have been construed narrowly to assure litigants a right to a judgment of a court above reasonable ground of suspicion,¹⁵⁷ any extensive discussion of this case law will be omitted here. Iowa Rule of Civil Procedure 167 provides that one of the grounds for a change of venue is the interest of the judge in the action,¹⁵⁸ and on motion of one of the parties, such change will be granted.

VI. OTHER REMEDIES—REMOVAL AND IMPEACHMENT

Throughout this Note the discussion has centered on certain specific statutes relating to the conduct of designated officials or types of officials. The remedies for their misconduct have been both civil and criminal; however, two remedies which are always open and sometimes extremely useful are removal of the errant official from his office and, in some cases, impeachment.

A. Removal

Chapter 66 of the *Iowa Code* provides the grounds and procedure for removing a public official from office. Essentially, any appointive or elected public official, except those who may be removed only by impeachment,¹⁵⁹ may be removed by a district court for: (1) willful misconduct or maladministration in office; (2) corruption; or (3) extortion, among other grounds.¹⁶⁰ Appointive state officers may also be removed from office by a majority vote of the executive council for: (1) any disability preventing a proper discharge of his duties; (2) gross partiality; or (3) oppression, in addition to the other grounds noted above.¹⁶¹ A petition for removal may be filed by: (1) the Attorney General; (2) at least twenty-five electors of the state for removal of a state official; (3) at least five electors of the district, county, or municipality where the official functions; or (4) the county attorney for district, municipal, and county officials.¹⁶² The accused may, after filing, be suspended from his office by the district court.¹⁶³ City councils may also remove, by a two-thirds vote, an elected municipal officer against whom charges have been preferred, for any of the above causes.¹⁶⁴

B. Impeachment

An impeachment is a written accusation against the governor, a judge of the supreme or district court, or any other state official, by the state house of

¹⁵⁷ *M. R. Harris' Estate v. West Grove Sav. Bank*, 207 Iowa 41, 217 N.W. 477 (1928).

¹⁵⁸ IOWA R. CIV. P. 167(b).

¹⁵⁹ The governor, a judge of the supreme or district court, and state officials are all subject to impeachment under IOWA CODE § 68.1 (1973).

¹⁶⁰ IOWA CODE § 66.1 (1973).

¹⁶¹ *Id.* § 66.26.

¹⁶² *Id.* § 66.3.

¹⁶³ *Id.* § 66.7.

¹⁶⁴ *Id.* § 66.29.

representatives before the senate charging a misdemeanor or malfeasance in office.¹⁶⁵ It appears therefore that many of the offenses discussed throughout this Note when committed by one of the named officials would also subject him to the possibility of impeachment in the state legislature. The procedure for impeachment is set out in *Iowa Code* chapter 68, but it does not appear to have ever been subjected to judicial interpretation since its original enactment in 1860.¹⁶⁶

VII. CONTRACTUAL OBLIGATIONS AND CONFLICTS OF INTEREST

Many of the statutes dealing with conflict of interest in Iowa prohibit the making of contracts by a public official wherein he is directly or indirectly interested, or they require competitive bidding to prevent the possibility of conflict of interest. Assuming that a public official is convicted under a state statute prohibiting such a contractual relationship, what happens to the contract? It is basic to the law of contracts in this state that a contract made in violation of a statute and against the policy of the state, whether *malum prohibitum* or *malum in se*, is void, and cannot be enforced.¹⁶⁷ Several Iowa cases have held that a vote of a governing body contrary to a conflict of interest statute is void,¹⁶⁸ especially where the vote was approving entrance into a contract violating conflict of interest rules. Thus, the contract itself would be held void. In *Wilson v. Iowa City*,¹⁶⁹ the Iowa court held that such a vote would be held void even where the vote of the interested member was not crucial to the outcome. However, seemingly in reaction to this case and its predecessors, the Iowa Legislature, in 1969, amended the statute under which the *Wilson* case was decided¹⁷⁰ to read as follows:

Any violation of the provisions of this section shall constitute misconduct in office, but no ordinance or resolution of a municipality or agency shall be invalid by reason of a vote or votes cast in violation of the standards of this section unless such vote or votes were decisive in the passage of such ordinance or resolution.¹⁷¹

Nonetheless, this statute and the rule dealing with low-rent housing,¹⁷² are the only conflict of interest laws which encompass such an exception. Some explicitly take the opposite position and hold that any contract entered into in violation of the statute is void.¹⁷³ Consequently, for the present, it is probably safe

¹⁶⁵ *Id.* § 68.1.

¹⁶⁶ *Id.* § 4937 (1860).

¹⁶⁷ *Madrid Lumber Co. v. Boone County*, 255 Iowa 380, 121 N.W.2d 523 (1963); *Pike v. King*, 16 Iowa 49 (1864).

¹⁶⁸ *Krueger v. Ramsey*, 188 Iowa 861, 175 N.W. 1 (1919); *Town of Hartley v. Floete Lumber Co.*, 185 Iowa 861, 171 N.W. 183 (1919); *James v. City of Hamburg*, 174 Iowa 301, 156 N.W. 394 (1916); *Bay v. Davidson*, 133 Iowa 688, 111 N.W. 25 (1907); *Buffington Wheel Company v. Burnham*, 60 Iowa 493, 15 N.W. 282 (1883).

¹⁶⁹ 165 N.W.2d 813, 820 (Iowa 1969).

¹⁷⁰ IOWA CODE § 403.16 (1966).

¹⁷¹ *Id.* § 403.16 (1973), amending IOWA CODE § 403.16 (1966).

¹⁷² *Id.* § 403A.22 (1973).

¹⁷³ *Id.* §§ 314.2, 368A.22(3).

to assume that the rule in the *Wilson* case¹⁷⁴ and its predecessors will continue to be followed and that the use of the "crucial vote" rule in the two statutes noted¹⁷⁵ will be limited to cases arising under those statutes.

Normally, there can be no action brought in *quantum meruit* or otherwise for services rendered or compensation due under a contract voided by virtue of violation of the conflict of interest statutes;¹⁷⁶ however, in the drafting of Iowa's anti-trust laws, an interesting provision was included which applies directly to bribery of public officials as discussed above. The full text of this statute reads:

The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm, or private corporation with the state, or with any county, city, town, city acting under special charter, city acting under commission form of government, school corporation, or with any municipal corporation, now or hereafter created, whether said provision be inserted in such contract or not, to wit:

"The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has any other person, for or in his behalf, directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation, or association which tends to or does lessen or destroy free competition in the letting of this contract, and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than five percent of the contract price but in no event less than three hundred dollars, as liquidated damages to the other contracting party."¹⁷⁷

No other conflict of interest statute contains such a provision for liquidated damages, so we must assume that upon avoidance of contracts not involving bribery, damages will not be recoverable.¹⁷⁸

VIII. CONCLUSION

This Note was meant to be an analysis of the conflict of interest laws in Iowa and their application to persons of varying status within the realm of public life. However, no conflicts situation will be so clear-cut that it will fit neatly into any one of these categories. In analyzing the criminal and civil lia-

¹⁷⁴ *Wilson v. Iowa City*, 165 N.W.2d 813, 820 (Iowa 1969).

¹⁷⁵ IOWA CODE §§ 403.16, 403A.22 (1973).

¹⁷⁶ *Cole v. Brown-Hurley Hardware Co.*, 139 Iowa 487, 117 N.W. 746 (1908); *Peters v. City of Davenport*, 104 Iowa 625, 74 N.W. 6 (1898).

¹⁷⁷ IOWA CODE § 553.23 (1973).

¹⁷⁸ See also *Des Moines City Ry. Co. v. Amalgamated Ass'n of Street & Electric Ry. Employees of America*, 204 Iowa 1195, 213 N.W. 264 (1927); *Marienthal, Lehman & Co. v. Shafer*, 6 Iowa 233 (1858).

bility of an individual officer or employee, it is necessary to observe the status of both parties to the transaction and determine which statutes are then applicable. In most cases, the discussion under two or more topics within this Note will be relevant to any single conflicts situation.

Finally, as was noted in the introduction to this commentary, statutory law deals only with the more or less overt types of conflict of interest. In most cases, the more subtle forms elude prosecutors, and sometimes even the party injured by the conflict. Unless courts can begin to deal with these illusive situations under a general common law theory of public trust, or some other relevant doctrine yet to be espoused, many acts of official misconduct will go unchecked and perhaps even unnoticed.

MARY ANN OTTINGER HEGE

EQUITABLE CONVERSION AND ITS EFFECT ON RISK OF LOSS IN EXECUTORY CONTRACTS FOR THE SALE OF REAL PROPERTY

I. INTRODUCTION

The doctrine of equitable conversion is a fiction which effects a constructive transmutation in the nature of property. An early English case, *Fletcher v. Ashburner*,¹ defined equitable conversion as a change in the nature of property whereby, in specified instances, real estate is considered to be personal property, and personal property to be realty, and transmissible and descendible in that converted form. A contemporary commentator on the doctrine has explained it as the application of a fiction whereby "a magic conversion . . . [occurs]; and that which to the eye of 'outward seeming' appears to be *terra firma* is not *terra firma* at all; it is personalty."² The origin of the doctrine is unclear,³ but cases utilizing it have been found in English law as early as 1678.⁴ The doctrine of equitable conversion is designed to give effect to the maxim that equity regards as done that which ought to be done,⁵ in the absence of an intervening act which ought to prevent performance.⁶ Equitable conversion is not a fixed rule of law, but proceeds on a case-by-case basis seeking to accomplish that which was intended.⁷

The impact of the doctrine of equitable conversion on the contract and property law of Iowa has been great, and often the results of its implementation have been surprising. Because the doctrine is employed in a myriad of factual sets arising in the areas of wills, trusts, inheritance taxes and contracts for the conveyance of real property, this Note will examine one limited aspect of the application of equitable conversion: the risk of loss in a contract for the sale of real property.

II. GENERAL ASPECTS OF EQUITABLE CONVERSION

An analysis of the effect of equitable conversion on the risk of loss in an executory contract for the sale of realty must begin with a review of the general ramifications of the doctrine in the area of executory land contracts. This doctrine is a principle in equity and is guided by the rules of equity, not by the

¹ 28 Eng. Rep. 1259 (1779).

² Herman, *The Doctrine of Equitable Conversion: I, Conversion by Contract*, 12 DE PAUL L. REV. 1, 7 (1962).

³ Davis, *The Origin of the Doctrine of Equitable Conversion by Contract*, 25 KY. L.J. 58 (1936).

⁴ Bubb's Case, 22 Eng. Rep. 32 (1678).

⁵ *Brickson v. Schwebach*, 219 Iowa 1368, 261 N.W. 518 (1935); *In re Estate of Jackson*, 217 Iowa 1046, 252 N.W. 775 (1934); *In re Estate of Dodge*, 207 Iowa 374, 223 N.W. 106 (1929).

⁶ *In re Estate of Dodge*, 207 Iowa 374, 223 N.W. 106 (1929); *Inghram v. Chandler*, 179 Iowa 304, 161 N.W. 434 (1917).

⁷ *Id.*