

### Common Law Criminal Offense

Misconduct in office by a public officer is a common law offense subject to the provisions of MCLA 750.505, MSA 28.773:

Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five years or by a fine of not more than \$10,000.00, or both in the discretion of the court.

### Misconduct in Office Applies Only to Public Officers

Misconduct in office applies only to public officers as distinguished from public employees. See *People v Coutu*, 450 Mich 348 (1999). In the *Coutu* decision, the Michigan Supreme Court held that deputy sheriffs are "public officers" for the purposes of the common law offense of misconduct in office. In order to be considered a public officer, five elements are required:

1. The position must have been created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature.
2. The position must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public.
3. The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority.
4. The duties of the position must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body.
5. The position must have some permanency and continuity, and not be only temporary or occasional.

### Malfeasance, Misfeasance, and Nonfeasance

The offense of misconduct in office includes **malfeasance**, which is the doing of a wrongful act;

**misfeasance**, which is the doing of a lawful act in a wrongful manner; and

**nonfeasance**, which is the failure to perform an act required by the duties of the office.

It does not include acts done by officers in good faith or honest mistakes. The crime requires evidence of corrupt intent which does not necessarily mean, however, an intent to profit.