STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-02

April 3, 2020[1]

QUESTION PRESENTED

Does the Governmental Conduct Act, NMSA 1978, Section 10-16-8(B) (2011) or Rule of Professional Conduct 16-109(A), New Mexico Rules Annotated, prohibit a former state agency attorney from representing Nuclear Watch New Mexico in federal district court litigation, given the facts that the request presents?

FACTS[2]

In 2005, a staff attorney employed by the New Mexico Environment Department ("NMED") represented the agency in negotiating and executing a consent order between NMED, the United States Department of Energy, and others. The lawyer provided counsel to and represented NMED in the negotiation and implementation of the consent order. The consent order imposed duties on the Department of Energy and the operator of Los Alamos National Laboratory to

[1]This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C).

[2]The State Ethics Commission act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at *1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On February 13, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein.

identify and remedy environmental contamination in the area surrounding the Laboratory. The consent order permitted third parties to file actions in federal district court to enforce violations. After the 2005 consent order, the lawyer represented NMED in two administrative actions against the Department of Energy and others to enforce the order, both of which ended in settlement agreements. In 2013, the lawyer left his employment with NMED.

In May 2016, Nuclear Watch filed suit in United States District Court for the District of New Mexico alleging the United States Department of Energy and the Laboratory's current operator, Los Alamos National Security, LLC ("LANS"), violated the consent order in 2014 and 2016. NMED intervened in the federal district court litigation and moved to dismiss Nuclear Watch's second amended complaint. In June 2016, NMED, the Department of Energy, and LANS executed a new consent order that "superseded the [2005 consent order] and settled any outstanding alleged violations under the 2005 Consent Order." Mem. Op. and Order, *Nuclear Watch New Mexico v. U.S. Dep't of Energy, et al.*, No. 1:16-cv-00433-JCH-SCY, 2018 WL 3405256, at *9 (July 12, 2018).

In July 2018, the federal district court entered an order dismissing Nuclear Watch's claims for prospective relief, concluding that the 2016 consent order mooted those claims. However, the court declined to dismiss Nuclear Watch's claims for civil penalties against LANS and the United States Department of Energy "for their failure to complete 13 corrective tasks under the 2005 [Consent] Order[.]" Mem. Op. and Order, *Nuclear Watch New Mexico v. U.S. Dep't of Energy, et al.*, No. 1:16-cv-00433-JCH-SCY, 2018 WL 3405256, at *31-32 (July 12, 2018).[3]

The former NMED lawyer is now employed by a nonprofit public interest law firm and desires to represent Nuclear Watch in the federal district court litigation. NMED has refused to consent to the representation, and asserts that the Rules of Professional Conduct and the Governmental Conduct Act prohibit the representation.

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[3]The requester attached a copy of this court decision to the written request for an advisory opinion. Like state courts, the Commission may take administrative notice of the details of court decisions, even if they are not attached to the request. *Cf. City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 12, 147 N.M. 693, 228 P.3d 477 (describing courts ability to take judicial notice of law); 1.2.2.35(D)(1) NMAC (providing that the Public Regulation Commission administrative notice of decisions of state and federal courts *inter alia*).

ANSWER

Yes. Under subsection 10-16-8(B), "[a] former public officer or employee shall not represent a person in the person's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee." In view of the facts the request specifies, the lawyer was "personally and substantially" involved in the negotiation, entry, and enforcement of the 2005 consent order. Because the negotiation and litigation surrounding the 2005 consent order is the same matter as the ongoing federal district court litigation, subsection 10-16-8(B) bars the lawyer from representing Nuclear Watch in the ongoing federal litigation.

The Commission declines to opine on whether the facts alleged establish a violation of Rule 16-109(A) NMRA.

ANALYSIS

1. Subsection 10-16-8(B)

The Governmental Conduct Act's revolving-door rule, NMSA 1978, Section 10-16-8 (2011), provides in pertinent part:

> A former public officer or employee shall not represent a person in the person's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.

§ 10-16-8(B). Subsection 10-16-8(B)'s restriction on a former public officer's or employee's representation is stringent because it does not expire: a former public officer or employee is forever barred from representing a person in the person's dealings with the government relating to the same matter in which the former officer or employee participated personally and substantially while in public service.[4]

[4]*See* Office of the New Mexico Attorney General, Governmental Conduct Act Compliance Guide at 37 (2015) ("Subsection B creates an absolute restriction on certain former public officers or employees. It prevents them from representing a person in the person's dealings with the government on a matter in which the public

Subsection 10-16-8(B) contains three elements. First, the former public officer or employee must represent a person in "the person's dealings with the government." § 10-16-8(B). Second, the person's dealings with the government must be the same "matter" as one in which the former public officer or employee participated in while in public service. *Id.* Third, the former public officer's or employee's participation in that matter must have been personal and substantial. *Id.*

The facts that the request posits establish the first and third elements. As to the first element: NMED is a party to the ongoing federal litigation. Participation in a court action in which a state agency is a party is a classic example of "dealing[] with the government." § 10-16-8(B). If the former NMED lawyer enters an appearance as Nuclear Watch's attorney in the ongoing federal district court litigation, he will necessarily represent Nuclear Watch in its "dealings with the government." § 10-16-8(B). As to the third element: the former NMED lawyer's participation in the formation and enforcement of the 2005 consent order was personal and substantial, because, as the request articulates, he represented NMED in the negotiation and execution of the 2005 consent order, and provided counsel to and representation of NMED in the implementation and enforcement of the 2005 order.

The second element is a closer question: are the current federal district court litigation and the negotiation, implementation, and litigation surrounding the 2005 consent order the same "matter" such that the former NMED attorney is barred from representing Nuclear Watch in the federal district court litigation? As explained below, the Commission concludes that the answer to this question is "yes."

The Governmental Conduct Act does not define "matter," *see* NMSA 1978, § 10-16-2 (2011), and New Mexico courts have not addressed whether one or more matters are the same in the context of subsection 10-16-8(B). Subsection 10-16-8(B), however, is modeled on Rule 16-111(A)(2) NMRA and ABA Model Rule of

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officer or employee participated "personally and substantially" while working for either the state agency or local government involved. The amount of the contract or the length of time that the employee has been gone from public service is immaterial.").

Professional Conduct 1.11(a)(2).[5] Because the request involves a former state employee who is also an attorney, the comparison to Rule 16-111 NMRA is particularly apt. The rule

> represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the

[5]Rule 16-111(A)(2) NMRA and ABA Model Rule 1.11(A)(2) provide:

> [A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Like the Governmental Conduct Act, these rules are "intended to deal with what [is] conventionally referred to as the "revolving door" situation of lawyer transfer between government and private employment." *See* Discussion Appendix to Proposed Model Rule of Professional Conduct 1.11 at the February 1983 ABA Midyear Meeting, in ABA Ctr. for Prof'l Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* 279 (Art Garwin ed., 2013); *see also* Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 533 (Summer 1996) (collecting state statutes, including subsection 10-16-8(B), which "are the same or similar to the standard imposed by . . . ABA Model Rule 1.11").

> government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.

Rule 16-111 NMRA, comment [4]; *accord* ABA Model Rule of Professional Conduct 1.11 cmt.

The Governmental Ethics Task Force, created by Laws 1992, Chapter 109 and signed into law by Governor Bruce King, drafted the Governmental Conduct Act's revolving door provisions. The task force described subsection 10-16-8(B)'s purpose in similar terms:

> The amendments proposed by the task force preclude public officers and employees, after leaving government service, from representing any person before or against the government on specific matters in which the former officer or employee participated personally and substantially while in government. . . . This provision is designed to balance the competing interests involved—ensuring that the government officer or employee acts only in the public interest and not in a way that might "feather his or her nest" for post-government employment, while at the same time not barring the officer or employee from representation before his or her agency for such a long period that it would deter government recruitment of the best talent available.

Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations*, at 19 (N.M. Legislative Council Service Info. Memo. No. 202.90785, Jan. 27, 1993).

Given subsection 10-16-8(B) and Rule 16-111(A)(2)'s shared phrasing and purpose, the definition and interpretation of the word "matter" in the latter context

guides the Commission's analysis.[6] Rule 16-111 NMRA and ABA Model Rule of Professional Conduct 1.11 define the term "matter" as follows:

> "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 16-111(E) NMRA; *accord* ABA Model Rule of Prof. Conduct 1.11(e).

In determining whether two or more matters are the same for purposes of subsection 10-16-8(B), the Commission will consider whether the matters' underlying facts, parties, and temporal relationship are the same or overlap substantially. *See Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 26, 292 P.3d 466 (concluding that Rule 16-111 "indicate[s] a fact-specific, transactional approach to determining the scope of '[the] matter'") (second alteration original); *see also* Rule 16-111 cmt. [10] ("In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties and the time elapsed.").

Applying this test, the negotiation, implementation and enforcement of the 2005 consent order and the current federal district court litigation are the same matter. They involve the same basic facts, the same parties, and the same duties.

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[6]*Cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Marquez v. Larrabee et al.*, 2016-NMCA-087, ¶ 12, 382 P.3d 968 (stating that New Mexico courts may look to the Federal Rules of Civil Procedure and caselaw interpreting those rules for guidance in interpreting substantially similar provisions in New Mexico court rules); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (West 2012) (discussing "prior-construction" cannon of statutory interpretation).

- **Same basic facts.** The 2005 consent order imposed remedial duties on the Department of Energy and LANS arising from environmental contamination at LANL from the date of its execution to its revocation in 2016. In the current federal district court litigation Nuclear Watch claims the Department of Energy and LANS failed to remediate the environmental contamination that was the subject of the 2005 consent order and failed to follow processes mandated by the same order.

- **Same parties.** The Environment Department, the Department of Energy, and the operator of Los Alamos National Laboratory were parties to the 2005 consent agreement. The same parties are also involved in the current federal district court litigation.[7]

- **Same duties.** In the ongoing federal litigation, Nuclear Watch seeks to enforce the Department of Energy's and the laboratory operator's duties under the 2005 consent order.

If the former NMED attorney enters an appearance as Nuclear Watch's lawyer in the ongoing district court litigation, he would be prosecuting claims arising from a consent order that he negotiated, implemented, and enforced while a NMED employee. The potential representation is thus part of the same "matter" as the 2005 consent order, and therefore violates subsection 10-16-8(B).

The Commission is aware of facts that might suggest an otherwise tenuous relationship between litigation concerning the 2005 consent order and the ongoing federal district court litigation. First, the 2005 consent order is almost fifteen years old, and was superseded by the 2016 consent order. Second, in the current litigation, Nuclear Watch also asserts violations of the 2005 consent order occurring after the former NMED attorney left his state agency employment. Hence, the attorney is unlikely to have confidential information from his NMED employment that might benefit Nuclear Watch or prejudice NMED as to those claims.

[7]The 2005 consent order expressly contemplates enforcement by third parties. LANS is the successor-in-interest to the operator of Los Alamos National Laboratory that was a party to the 2005 consent order.

The mere lapse of time and absence of concrete prejudice are not dispositive.[8] Court cases applying the analogous rule of professional conduct to similar facts support this conclusion. For example, in *Monument Builders of Pennsylvania, Inc. v. Catholic Cemeteries Ass'n, Inc.*, 190 F.R.D. 164 (E.D. Pa. 1999), the plaintiff alleged violations of a 1984 agreement resolving antitrust claims that had previously been brought in a separate lawsuit fifteen years prior. The court excluded the plaintiff's attorney when it was disclosed that she was the law clerk for the judge who presided over the 1984 lawsuit. The court held that the 1984 and 1999 actions were the same matter, even though they were many years apart: "they involve the same parties and largely the same facts and conduct and, more importantly, this new action seeks to recover for the violation of a consent decree that [the lawyer] had a hand in construing while she served as [a] law clerk." *Id.* at 167-168.[9]

The former NMED attorney's involvement in the 2005 consent order and potential involvement in the ongoing federal district court litigation is like the former law clerk in *Monument Builders*. The former NMED attorney's representation of

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[8]Some courts have held that a mere appearance of impropriety "is too slender a reed on which to rest a disqualification order except in the rarest cases." *Bd. of Educ. of the City of N.Y. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). New Mexico courts appear to have rejected this approach, at least when applying the Governmental Conduct Act's revolving-door rules. *See Ortiz v. Tax. & Rev. Dep't, Motor Vehicle Div.*, 1998-NMCA-027, ¶ 9, 124 N.M. 677, 954 P.2d 109 (stating that NMSA 1978, § 10-16-8(C) (now Section 10-16-8(D)) prohibits "conduct which may permit *or appear to permit* undue influence or a conflict of interest.") (emphasis added). In either case, the factual basis of litigation concerning the 2005 consent order and the ongoing federal district court litigation so overlap that the Commission need not determine whether a mere appearance of impropriety is sufficient to establish a subsection 10-16-8(B) violation.

[9]*See also Archuleta v. Turley*, 904 F.Supp.2d 1185, 1192 (D. Utah 2012) (disqualifying state attorney general from defending state against habeas petition where evidence showed the attorney had previously served as law clerk to the judge who had imposed the custodial sentence being challenged); *State ex rel. Jefferson Cnty. Bd. of Zoning Appeals v. Wilkes*, 655 S.E.2d 178, 185 (W.Va. 2007) ("neither common sense nor applicable legal authority support the contention that each stage in the consideration of a conditional use permit application is a separate and discrete "matter." Nor do they support the contention that the [Board of Zoning Appeals] may not bar its former lawyer from aiding an applicant in connection with an application about which the lawyer once advised the [Board].").

Nuclear Watch in the current litigation would entail prosecuting claims that the Department of Energy and LANS breached a consent order that he had a personal and substantial role in negotiating, drafting, executing, and enforcing. As with *Monument Builders*, the lapse of 15 years between the attorney's participation in the 2005 consent order and the current federal court litigation is not controlling. Rather, the close factual nexus between the 2005 consent order and the current federal district court litigation—particularly Nuclear Watch's claims for civil penalties for failure to complete 13 corrective tasks under the 2005 order—outweighs the amount of time that has lapsed. As a result, the attorney's proposed representation involves the same "matter" as his earlier representation of NMED in connection with the 2005 consent order. Accordingly, subsection 10-16-8(B) prohibits the representation.

As the United States District Court for the District of Minnesota said when it disqualified a former special assistant United States Attorney from representing a plaintiff in a civil action related to previous criminal proceedings:

> Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrant [*sic*] to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay.

Allied Realty of St. Paul, Inc. v. Exch. Nat'l Bank, 283 F. Supp. 464, 467 (D. Minn. 1968).

Except for the one-year cooling-off period in NMSA 1978, Section 10-16-8(D) (2011), the Governmental Conduct Act does not prohibit former state agency attorneys from representing clients in matters involving the agency. But the Act does prohibit a public employee from transferring the benefit of skills and

knowledge acquired from a particular matter to benefit a private client involved in the same transaction or controversy. This prohibition is directly implicated by an attorney appearing and representing a party seeking to enforce the same consent order that he had a personal and substantial role in negotiating, drafting, executing, and enforcing while in public service.

2. Rule 16-109(A)

While the Commission "may issue advisory opinions on matters related to ethics," NMSA 1978, § 10-16G-8(A), the Commission will not issue advisory opinions regarding the application of the Rules of Professional Conduct for attorneys, Rule Set 16 NMRA.

The New Mexico Supreme Court has the power to prescribe standards of conduct for lawyers. *See, e.g.*, *In re Treinen*, 2006-NMSC-013, 139 N.M. 318, 131 P.3d 1282. The Supreme Court prescribes such standards through the Rules of Professional Conduct and disciplinary proceedings. In respect of the separation of powers, N.M. Const, Art. III, § 1, and in view of the Commission's reluctance to issue inconsistent or *ultra vires* opinions, the Commission will not interpret "matters relating to ethics" in subsection 10-16G-8(A) to include potential violations of the Rules of Professional Conduct.

The separation of powers presents no obstacle to Commission opining on or enforcing those provisions of the Governmental Conduct Act, even when a current or former public official or employee is also a licensed member of the bar. *See generally Ortiz*, 1998-NMCA-027, ¶¶ 6-14; *see also id.* ¶ 14 ("Section 10-16-8(C) does not violate separation of powers."). The Commission has Constitutional and statutory authority to issue advisory opinions regarding those same statutes. *See* N.M. Const., Art. V, § 17(B) ("The state ethics commission may . . . issue advisory opinions concerning . . . standards of ethical conduct and other standards of conduct and reporting requirements, as may be provided by law. . . ."); §§ 10-16-13.1 ("The state ethics commission shall advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties."); 10-16G-8(A) (granting the power to issue advisory opinions); 10-16G-9(A)(6) (granting jurisdiction for the Governmental Conduct Act). Accordingly, the Commission will issue advisory opinions upon request regarding the application of Section 10-16-8.

CONCLUSION

Section 10-16-8(B) of the Governmental Conduct Act prohibits the attorney from representing Nuclear Watch New Mexico in the federal district court litigation, *Nuclear Watch New Mexico v. United States Department of Energy, et al.*, No. 1:16-cv-00433-JCH-SCY. The Commission declines to opine whether one or more Rules of Professional Conduct also prohibit the representation.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner

***STUART M. BLUESTONE, Commissioner,** recused from the consideration and issuance of this advisory opinion, pursuant to 1.8.2.8 NMAC. His notice of recusal is on file with the State Ethics Commission.