



STATE ETHICS COMMISSION

CLE: Filing and Litigating Administrative Complaints

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Commission's Powers as Administrative Agency

Judicial functions: Adjudicate administrative complaints and issue advisory opinions

Adjudicate administrative complaints alleging violations of the laws under the SEC's jurisdiction. *Complainant v. Respondent* (State Ethics Comm'n)

Issue advisory opinions as guidance for public officials regarding ethics issues.

Executive functions: civil enforcement actions, recommendations, trainings

Investigate and initiate civil litigation in state courts to enforce selected provisions of ethics statutes. *State Ethics Comm'n v. Defendant* (1st Jud. Dist. Ct.)

Provide recommendations on amendments to New Mexico's ethics laws. Offer ethics trainings and guides.

Legislative functions: delegated rulemaking powers (NMAC)

Promulgate rules of procedure for administrative adjudication; promulgate proposed code of ethics



The theory and law concerning the Commission's procedure for administrative complaints

Theory

- Efficient gaps and gap-fillers in the Commission's rules of procedure. NMAC 1.8.3.8 ("Standing Orders"); *cf.* 26.600.1 NMAC (AHO rules of procedure); 9.1.1 NMAC (Human Rights Commission rules of procedure).
- "Administrative non-delegation doctrine" as a constraint on efficiency. See, e.g., *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 71; *Kerr-McGee Nuclear Corp. v. N.M. Env't'l Improvement Bd.*, 1981-NMCA-044, ¶ 52.
- "It is an experiment, as all life is an experiment." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also 1.24.25.10 NMAC ("Initiation of the Rulemaking Process by the Public").

Law

- NMSA 1978, §§ 10-16G-9 through 10-16G-12
- 1.8.3 NMAC
- Five separate Joint Powers Agreements between the Commission and the Secretary of State and the Commission and the State Purchasing Division of the General Services Department. See <http://sec.state.nm.us/law>

How to file a complaint with the State Ethics Commission

1. Fill out a complaint form, (available at <https://sec.state.nm.us>), include Respondent's contact information
2. Sign and notarize the complaint form. See § 10-16G-10(B).
3. Attach additional pages or exhibits as needed.
4. Submit the complaint form to ethics.commission@state.nm.us, or to the Commission via U.S. Mail at 800 Bradbury Dr. SE, Suite 215, Albuquerque, NM 87106.

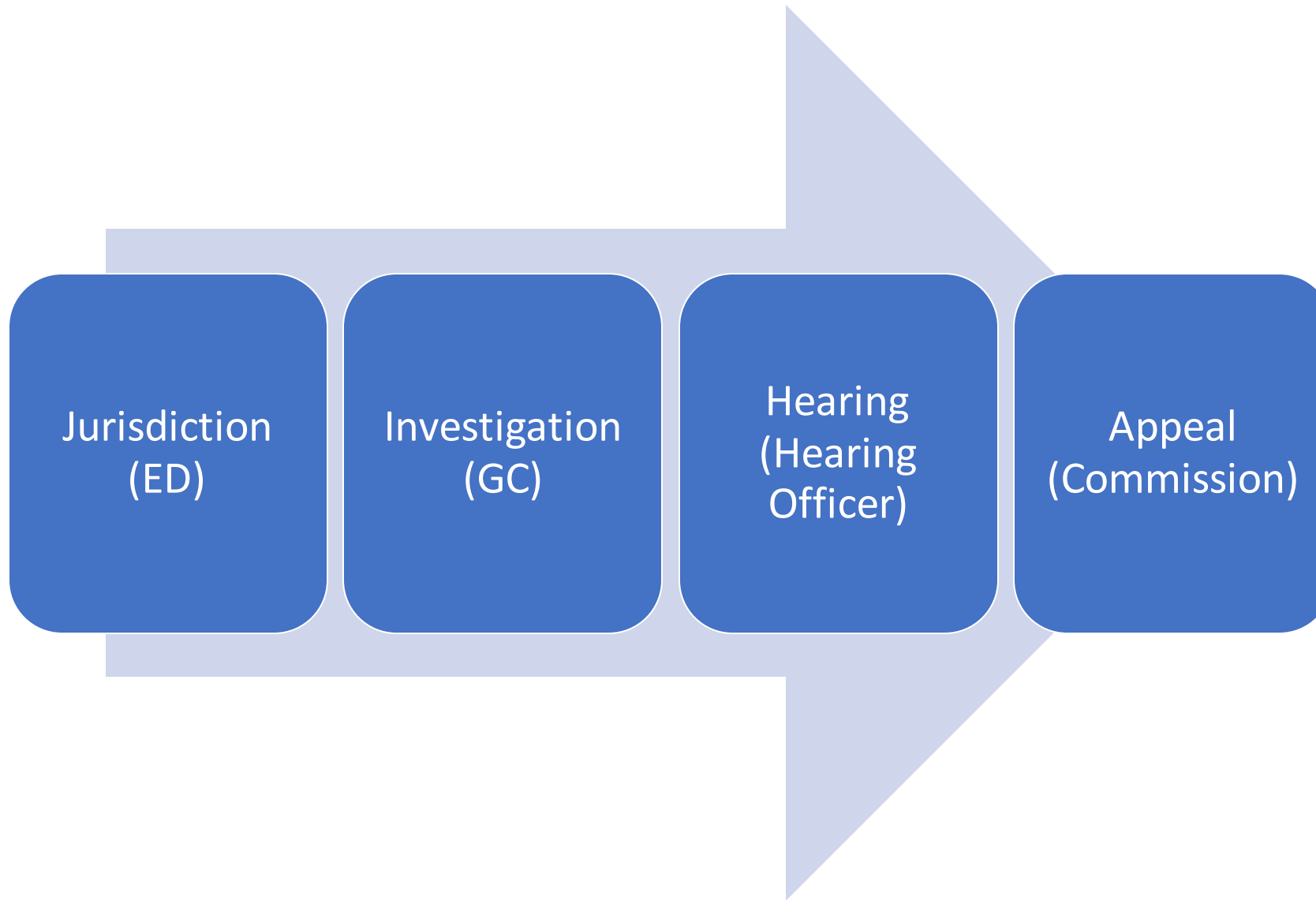
Commission staff are testing a web-based case filing and docketing system that will automate complaint filing, docketing of filings, and notifications to parties. Our goal is a simplified, user-friendly version of Odyssey.



Adjudication of administrative complaints in five acts

- I. Executive Director determines jurisdiction.
- II. General Counsel conducts investigation.
- III. Hearing officers conduct evidentiary hearings issues final rulings.
- IV. Hearing officer Decisions can be appealed to the full Commission.
- V. District court can review Commission final decisions by petition under Rule 1-075 NMRA.





Commission's Jurisdiction for Administrative Cases

Personal Jurisdiction

- All Executive Officials and Legislators
- All Executive and Legislative Employees
(17,000 in filled positions)
- Lobbyists and lobbyists' employers
(725)
- Candidates and entities subject to Campaign Reporting Act
(700)
- State government contractors and seekers of state government contracts
(40,000 active outside suppliers)

Subject-Matter Jurisdiction

- Campaign Reporting Act
- Financial Disclosure Act
- Gift Act
- Lobbyist Regulation Act
- Voter Action Act
- Governmental Conduct Act
- Procurement Code
- State Ethics Commission Act
- Article 9, Section 14 of the Constitution (Anti-Donation Clause)



Commission Jurisdiction - Process

1. Commission staff receive complaint (email or U.S. Mail)
2. Executive Director provides Respondent with notice, a copy of the complaint, and, in some cases, a letter from the Risk Management Division; also provides Complainant with notice (7 days) – 1.8.3.10(A)
3. Respondent may move to dismiss (~12(b)(1), (b)(2), (b)(6)) (+15 days) – 1.8.3.10(A)(1)
4. Complainant may respond to the motion to dismiss (+15 days) – 1.8.3.10(A)(2)
5. Executive Director determines jurisdiction in letter ruling (+10 days) – 1.8.3.10(B)
6. If dismissed, Commission meets in closed session, votes to dismiss complaint, ratifies vote in open session. See 1.8.3.10(F).



Constraints on Commission's Jurisdiction

Inherent constraints of the limits of the delegated power

- *See, e.g., In re Application of PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10 (“[A]gencies are limited to the power and authority expressly granted and necessarily applied by statute.”).
 - no subject matter jurisdiction for IPRA claims
 - no personal jurisdiction over state governmental entities (officials and employees only)
 - no personal jurisdiction over local public bodies, or their officials or employees

External constraints on jurisdiction

- First Statute of Limitations (No jurisdiction for conduct before July 1, 2019)
- Second Statute of Limitations (2 years from time of conduct/reasonably discovered)
- Substantiality doctrine. *Cf., e.g., Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (We have long distinguished between failing to raise a substantial federal question for jurisdictional purposes . . . and failing to state a claim for relief on the merits; only ‘wholly insubstantial and frivolous’ claims implicate the former.”) (citing *Bell v. Hood*, 327 U.S. 678 (1946)); *see also Hagans v. Lavine*, 415 U.S. 528 (1974) (providing various formulations of this doctrine).



When is a complaint referred?

- Referrals under Joint Powers Agreements with the Secretary of State or GSD State Purchasing Division
- Referrals of criminal matters to Office of Attorney General, appropriate District Attorney, or the U.S. Attorney's Office. *See* 1.8.3.10(G) NMAC.
- Referrals of matters beyond SEC jurisdiction but within another agency's jurisdiction. 1.8.3.10(D) NMAC; NMSA 1978, § 10-16G-9(D).
- In any case of referral, the parties are given notice.



General counsel investigation

NMSA 1978, § 10-16G-10(D):

The director shall determine if the complaint is subject to referral to another state agency pursuant to an agreement or outside the jurisdiction of the commission, and if so, promptly refer the complaint to the appropriate agency. If the director determines that the complaint is within the commission's jurisdiction, the director shall have the general counsel initiate an investigation.



General counsel investigation (Cont'd)

Q: What is the general counsel investigating?

A: Whether the complaint is frivolous or unsubstantiated, or supported by probable cause. *See* NMSA 1978, § 10-16G-10(E); 1.8.3.11(A) NMAC.

Q: How will the general counsel investigate?

A: Will likely seek additional information from Complainant/Respondent; may seek to subpoena documents that Respondent refuses to produce.



Motion to dismiss for failure to state a claim

Commission rules permit a respondent to move to dismiss a complaint for failure to state a claim.

- GC has taken the position that the standard for dismissal is as low, and possibly lower, than the standard applied by New Mexico state courts. *See Madrid v. Village of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871 (“[New Mexico] appellate courts have never required trial courts to consider the merits of a plaintiff’s allegations when deciding a motion to dismiss[.]”).
 - NMSA 1978, § 10-16G-10(E): “The general counsel **shall** conduct an investigation to determine whether the complaint is frivolous or unsubstantiated.”
- Not the same as federal courts’ “plausibility” standard, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (requiring that a complaint in federal court be “plausible on its face” to survive a motion to dismiss).
- Because State Ethics Commission Act places onus on GC to investigate, Complainants should either allege facts or set out matters to be investigated.
- GC recommends a disposition, hearing officer issues final decision. *See* 1.8.3.11(B).



General counsel's investigation

GC may:

- administer oaths
- interview witnesses
- examine books, records, documents and other evidence

See NMSA 1978, § 10-16G-10(I).

1.8.3.11 NMAC provides details on GC investigation and discovery



What are the consequences of refusing to participate in GC's investigation?

1. Adverse inference, *see* 1.8.3.11(C)(2)(e);
2. Barred from presenting evidence at hearing, *see id.*; or
3. Subpoena, *see* NMSA 1978, § 10-16G-1.8.3.11(C)(3)



Subpoenas

“If the general counsel determines that a subpoena is the testimony of a person or the production of books, records, documents or other evidence, the necessary to obtain director shall request that the commission petition a district court to issue a subpoena.” § 10-16G-10(I).

Process:

1. GC asks ED for subpoena
2. ED asks Commission for leave to seek subpoena
3. Commission approves request
4. ED/GC file petition with district court judge appointed by Chief Justice of NMSC
5. District court judge approves petition, subpoena is served

Standard of relevancy: “reasonably related to an investigation.” § 10-16G-10(J).

Note: subpoena proceedings in district court are sealed. *See* § 10-16G-10(J)

1.8.3.11(C)(3) sets out additional details for subpoenas, including use of subpoena to resolve assertions of privilege



Hybrid adversarial / inquisitorial system

- Complainant bears the ultimate burden of proving a violation before a hearing officer. *See* § 10-16G-12(C).
- GC determines probable cause, and this process is confidential and potentially *ex parte*: parties not entitled to receive all info provided to GC unless GC determines a complaint is supported by probable cause. *See* § 10-16G-10(G).
- Investigation is not controlled by the parties: at most, parties may ask GC to seek discovery or to ask ED for Commission's leave to seek a subpoena.
- GC's finding that a complaint lacks probable cause is final and unreviewable. *See* NMSA 1978, § 10-16G-10(E); 1.8.3.11(F) NMAC.



Hearings

- If GC finds that a complaint is supported by probable cause, report is sent to hearing officer, who must set a public hearing. *See* § 10-16G-12(A).
- Parties may request that ED compel attendance of witnesses; parties permitted to examine and cross-examine witnesses. *See* § 10-16G-12(C).
- Rules of evidence apply. *See* § 10-16G-12(C).
- Standard of proof: preponderance of the evidence. *See* § 10-16G-12(D). Fraudulent or willful misconduct requires clear and convincing proof. *Id.*
- 1.8.3.13 sets out details of hearing procedure.



Appeals

- Parties may appeal a hearing officer's decision to the full Commission. *See* § 10-16G-12(E).
- 1.8.3.14 NMAC sets out procedure for appeals.
- Commission rules permit certiorari review by district courts. *See* 1.8.3.14(H) NMAC.



Advising a client who wants to file an ethics complaint

- Pros:
 - Speedy (90 days from complaint to GC determination of probable cause)
 - Complaint may allege violations of laws that do not otherwise create a cause of action (E.g., Campaign Reporting Act, Financial Disclosure Act, Governmental Conduct Act)
 - Economics are more attractive than a lawsuit (Commission takes on the burden of service to Respondent; GC performs time-consuming discovery activities like interviewing witnesses, serving subpoenas, etc.)
- Cons:
 - Remedies are limited (chiefly civil penalties) and no fee-shifting
- How SEC administrative cases might interact with courts
 - Commission decisions may have preclusive effect on a subsequent district court action. See *Shovelin v. Central New Mexico Elec. Co-op, Inc.*, 1993-NMSC-015, ¶ 12; Restatement (Second) of Judgments § 83.
 - Doctrine of exhaustion of administrative remedies is unlikely to apply, see *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 27, except in case where complainant first files in SEC and then, while SEC proceedings are pending, files same claim or Declaratory Judgment action in district court. See, e.g., *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, ¶ 22.



Ethical concerns for lawyers representing complainants

Complaints must be sworn, *see* NMSA 1978, § 10-16G-2(D). By filing a complaint, the complainant is affirming under penalty of perjury “that the information in the complaint, and any attachments provided with the complaint, are **true and accurate.**” *Id.*

Compare Rule 1-011 NMRA: “The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief **there is good ground to support it**; and that it is not interposed for delay.”

Compare also Rule 16-307(A) NMRA (lawyer as necessary witness).



Ethical issues concerning representation of respondents

- Individual respondents may be entitled to RMD-appointed counsel, see NMSA 1978, § 10-16G-10(K). RMD counsel is advisable in an intra-agency case, where both the complainant and respondent are employees of the same agency.
- RMD counsel is also advisable in a GCA or Procurement Code case. Potential conflict problem where lawyer represents institutional client and complaint is filed against an institution's officer or employee.

Rule 16-113(B): If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

- Application of Rules of Professional Conduct may turn on whether a claim is individual- or official-capacity. See generally *Flores v. Herrera*, 2016-NMSC-033 (holding that WPA does not create an individual-capacity claim); see also *Kentucky v. Graham*, 473 U.S. 159, 165-66, 166 n.11 (1985) (explaining difference between personal-capacity and official-capacity suits).



Q&A



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