



STATE ETHICS COMMISSION

CLE Webinar: Filing and litigating complaints with the State Ethics Commission Wednesday, June 3, 2020, 12:00 pm – 1:30 pm

12:00 pm Introduction of speakers (5 minutes)

Jeremy Farris and Walker Boyd

General – 1 hour:

12:05 am How to file a complaint with the State Ethics Commission (5 minutes)

How do I file a complaint with the State Ethics Commission? Is the complaint confidential? When is a complaint made public?

12:10 am Referrals of complaints (10 minutes)

How and under what circumstances is a complaint referred to another agency, or from another agency to the Commission?

12:20 am Commission jurisdiction (10 minutes)

What laws can the Commission enforce? Who does the Commission have jurisdiction over?

12:30 am General counsel investigation for probable cause (20 minutes)

What is “probable cause”? What investigative tools does the general counsel have? Can the parties participate in the investigation?

12:50 am Hearings and appeals (10 minutes)

Who decides a complaint? Who gets to participate in a hearing? Are hearings public? Do the rules of evidence apply at hearings? Who can appeal the decision dismissing or sustaining a complaint? Who hears an appeal? What is the standard of review? Can a district court review the Commission’s decision?

Ethics – 30 minutes

1:05 pm Ethical issues relating to the representation of complainants (15 minutes)

Advising a client who wants to file an ethics complaint, preclusion issues, and remedies

1:20 pm Ethical issues relating to the representation of respondents (15 minutes)

What if an ethics complaint is filed against a current client or an employee of a current client?

Information on CLE credits

The State Ethics Commission has received approval from the Minimum Continuing Legal Education (MCLE) program for 1 hour of general and .5 hours of ethics/professionalism MCLE credits. Attendees who sign in and indicate that they wish to receive CLE credits will have their names submitted to the State Bar's MCLE office for approval.

CLE Faculty:

Jeremy Farris is the State Ethics Commission's Executive Director. He previously served as General Counsel to New Mexico's Department of Finance and Administration and practiced law at litigation firms both in Atlanta, Georgia and Albuquerque, New Mexico. Jeremy clerked for the Honorable Julia S. Gibbons on the United States Court of Appeals for the Sixth Circuit; the Honorable Judith K. Nakamura on the New Mexico Supreme Court; and the Honorable James O. Browning on the United States District Court for the District of New Mexico. He holds a law degree from Harvard Law School, a doctorate and masters degree from the University of Oxford, where he was a Rhodes Scholar, and a Bachelors of Science from the Georgia Institute of Technology.

Walker Boyd is the State Ethics Commission's General Counsel. He previously practiced law at Peifer, Hanson and Mullins, P.A., and clerked for the Honorable James A. Parker on the United States District Court for the District of New Mexico and the Honorable J. Miles Hanisee on the New Mexico Court of Appeals. He holds a law degree from the University of New Mexico, where he served as Editor in Chief of the New Mexico Law Review, and a Bachelor's of Arts from Vassar College.

ARTICLE 16G

State Ethics Commission

Sec.

- 10-16G-1. Short title.
- 10-16G-2. Definitions.
- 10-16G-3. State ethics commission created; membership; terms; removal.
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- 10-16G-5. Commission; duties and powers.
- 10-16G-6. Executive director; appointment; duties and powers.
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- 10-16G-9. Commission jurisdiction; compliance provisions. (Effective January 1, 2020.)
- 10-16G-10. Complaints; investigations; subpoenas. (Effective January 1, 2020.)
- 10-16G-11. Status of investigation; reports to commission. (Effective January 1, 2020.)
- 10-16G-12. Investigation report; commission hearings; decisions and reasons given; disclosure of an ethics violation. (Effective January 1, 2020.)
- 10-16G-13. Confidentiality of records; penalty. (Effective January 1, 2020.)
- 10-16G-14. Criminal violations; referral. (Effective January 1, 2020.)
- 10-16G-15. Time limitations on jurisdiction. (Effective January 1, 2020.)
- 10-16G-16. Prohibited actions. (Effective January 1, 2020.)

10-16G-1. Short title.

Sections 1 through 16 [10-16G-1 through 10-16G-16 NMSA 1978] of this act may be cited as the "State Ethics Commission Act".

History: Laws 2019, ch. 86, § 1.

10-16G-2. Definitions.

As used in the State Ethics Commission Act:

- A. "commission" means the state ethics commission;
- B. "commissioner" means a member of the commission;
- C. "complainant" means a person who files a verified complaint with the commission;
- D. "complaint" means a complaint that has been signed by the complainant and the complainant attests under oath and subject to penalty of perjury before a notary public that the information in the complaint, and any attachments provided with the complaint, are true and accurate;
- E. "director" means the executive director of the commission;
- F. "government contractor" means a person who has a contract with a public agency or who has submitted a competitive sealed proposal or competitive sealed bid for a contract with a public agency;
- G. "legislative body" means the house of representatives or the senate;
- H. "lobbyist" means a person who is required to register as a lobbyist pursuant to the provisions of the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978];
- I. "political party" means a political party that has been qualified in accordance with the provisions of the Election Code [Chapter 1 NMSA 1978];
- J. "public agency" means any department, commission, council, board, committee, agency or institution of the executive or legislative branch of government of the state or any instrumentality of the state, including the New Mexico mortgage finance authority, the New Mexico finance authority, the New Mexico exposition center authority, the New Mexico hospital equipment loan council and the New Mexico renewable energy transmission authority;
- K. "public employee" means an employee of a public agency;
- L. "public official" means a person elected to an office of the executive or legislative branch of the state or a person appointed to a public agency; and
- M. "respondent" means a person against whom a complaint has been filed with or by the commission.

History: Laws 2019, ch. 86, § 2.

10-16G-3. State ethics commission created; membership; terms; removal.

A. The "state ethics commission", as created in Article 5, Section 17 of the constitution of New Mexico, is composed of seven commissioners, appointed as follows:

- (1) one commissioner appointed by the speaker of the house of representatives;
- (2) one commissioner appointed by the minority floor leader of the house of representatives;

- (3) one commissioner appointed by the president pro tempore of the senate;
- (4) one commissioner appointed by the minority floor leader of the senate;
- (5) two commissioners appointed by the four legislatively appointed commissioners; and
- (6) one commissioner appointed by the governor, who shall be a retired judge and who shall chair the commission.

B. No more than three members of the commission may be members of the same political party.

C. The appointing authorities shall give due regard to the cultural diversity of the state and to achieving geographical representation from across the state. Each appointing authority shall file letters of appointment with the secretary of state.

D. Commissioners shall be appointed for staggered terms of four years beginning July 1, 2019. The initial commissioners appointed by the speaker of the house of representatives and senate minority floor leader shall serve an initial term of four years; members appointed by the president pro tempore of the senate and house minority floor leader shall serve an initial term of two years; members appointed by the legislatively appointed members shall serve an initial term of one year; and the member appointed by the governor shall serve an initial term of three years. Members shall serve until their successors are appointed and qualified.

E. A person shall not serve as a commissioner for more than two consecutive four-year terms.

F. When any member of the commission dies, resigns or no longer has the qualifications required for the commissioner's original selection, the commissioner's position on the commission becomes vacant. The director shall notify the original appointing authority of the vacant position. The original appointing authority shall select a successor in the same manner as the original selection was made. A vacancy shall be filled by appointment by the original appointing authority no later than sixty days following notification of a vacancy for the remainder of the unexpired term. A vacancy on the commission shall be filled by appointment by the original appointing authority for the remainder of the unexpired term.

G. The commission shall meet as necessary to carry out its duties pursuant to the State Ethics Commission Act. Commissioners are entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

H. Four commissioners consisting of two members of the largest political party in the state and two members of the second largest political party in the state constitute a quorum for the transaction of business. No action shall be taken by the commission unless at least four members, including at least two members of the largest political party in the state and two members of the second largest political party in the state, concur.

I. A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office. A proceeding for the removal of a commissioner may be commenced by the commission or by the attorney general upon the request of the commission. A commissioner shall be given notice of hearing and an opportunity to be heard before the commissioner is removed. The supreme court has original jurisdiction over proceedings to remove commissioners, and its decision shall be final. A commissioner is also liable to impeachment pursuant to Article 4, Section 36 of the constitution of New Mexico.

10-16G-4. Commissioners; qualifications; limitations.

A. To qualify for appointment to the commission, a person shall:

- (1) be a qualified elector of New Mexico;
- (2) not have changed party registration in the five years next preceding the member's appointment in such a manner that the member's prior party registration would make the member ineligible to serve on the commission;
- (3) not continue to serve as a commissioner if the member changes party registration after the date of appointment in such a manner as to make the member ineligible to serve on the commission; and
- (4) not be, or within the two years prior to appointment shall not have been, in New Mexico, any of the following:
 - (a) a public official;
 - (b) a public employee;
 - (c) a candidate;
 - (d) a lobbyist;
 - (e) a government contractor; or
 - (f) an office holder in a political party at the state or federal level.

B. Before entering upon the duties of the office of commissioner, each commissioner shall review the State Ethics Commission Act and other laws and rules pertaining to the commission's responsibilities and to ethics and governmental conduct in New Mexico. Each commissioner shall take the oath of office as provided in Article 20, Section 1 of the constitution of New Mexico.

C. For a period of one calendar year following a commissioner's tenure or following the resignation or removal of a commissioner, the commissioner shall not:

- (1) represent a respondent, unless appearing on the commissioner's own behalf; or
 - (2) accept employment or otherwise provide services to a respondent unless the commissioner accepted employment or provided services prior to the filing of a complaint against the respondent.
- D. During a commissioner's tenure, a commissioner shall not hold another public office or be:
- (1) a public employee;
 - (2) a candidate;
 - (3) a lobbyist;
 - (4) a government contractor; or
 - (5) an office holder in a political party at the state or federal level.
- E. A commissioner who changes political party affiliation in violation of the provisions of Subsection A of this section or who chooses to seek or hold an office in violation of Subsection D of this section shall resign from the commission or be deemed to have resigned.

History: Laws 2019, ch. 86, § 4.

10-16G-5. Commission; duties and powers.

- A. The commission shall:
- (1) employ an executive director, who shall be an attorney, upon approval of at least five commissioners;
 - (2) develop, adopt and promulgate the rules necessary for it to implement and administer the provisions of the State Ethics Commission Act; and
 - (3) establish qualifications for hearing officers and rules for hearing procedures and appeals.
- B. Beginning January 1, 2020, the commission shall:
- (1) receive and investigate complaints alleging ethics violations against public officials, public employees, candidates, persons subject to the Campaign Reporting Act [1-19-25 through 1-19-36 NMSA 1978], government contractors, lobbyists and lobbyists' employers;
 - (2) hold hearings in appropriate cases to determine whether there has been an ethics violation;
 - (3) compile, index, maintain and provide public access to all advisory opinions and reports required to be made public pursuant to the State Ethics Commission Act;
 - (4) draft a proposed code of ethics for public officials and public employees and submit the proposed code to each elected public official and public agency for adoption; and
 - (5) submit an annual report of its activities, including any recommendations regarding state ethics laws or the scope of its powers and duties, in December of each year to the legislature and the governor.
- C. Beginning January 1, 2020, the commission may:
- (1) by approval of at least five commissioners, initiate complaints alleging ethics violations against a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist's employer;
 - (2) petition a district court to issue subpoenas under seal requiring the attendance of witnesses and the production of books, records, documents or other evidence relevant or material to an investigation;
 - (3) issue advisory opinions in accordance with the provisions of the State Ethics Commission Act;
 - (4) compile, adopt, publish and make available to all public officials, public employees, government contractors and lobbyists an ethics guide that clearly and plainly explains the ethics requirements set forth in state law, including those that relate to conducting business with the state and public agencies; and
 - (5) offer annual ethics training to public officials, public employees, government contractors, lobbyists and other interested persons.

History: Laws 2019, ch. 86, § 5.

10-16G-6. Executive director; appointment; duties and powers.

- A. The commission shall appoint an executive director who shall be knowledgeable about state ethics laws and who shall be appointed without reference to party affiliation and solely on the grounds of fitness to perform the duties of the office. The director shall hold office from the date of appointment until such time as the director is removed by the commission.
- B. The director shall:
- (1) take the oath of office required by Article 20, Section 1 of the constitution of New Mexico;
 - (2) hire a general counsel who may serve for no more than five years, unless rehired for up to an additional five years;
 - (3) hire additional personnel as may be necessary to carry out the duties of the commission;

- (4) prepare an annual budget for the commission and submit it to the commission for approval;
- (5) make recommendations to the commission of proposed rules or legislative changes needed to provide better administration of the State Ethics Commission Act;
- (6) perform other duties as assigned by the commission; and
- (7) be required to reapply for the position after six years of service and may serve as director for no more than twelve years.

C. The director may:

- (1) enter into contracts and agreements on behalf of the commission; and
- (2) have the general counsel administer oaths and take depositions subject to the Rules of Civil Procedure for the District Courts.

D. For a period of one calendar year immediately following termination of the director's employment with the commission, the director shall not:

- (1) represent a respondent, unless appearing on the director's own behalf; or
- (2) accept employment or otherwise provide services to a respondent, unless the director accepted employment or provided services prior to the filing of a complaint against the respondent.

History: Laws 2019, ch. 86, § 6.

10-16G-7. Recusal and disqualification of a commissioner.

A. A commissioner may recuse from a particular matter.

B. A commissioner shall recuse from any matter in which the commissioner is unable to make a fair and impartial decision or in which there is a reasonable doubt about whether the commissioner can make a fair and impartial decision, including:

- (1) when the commissioner has a personal bias or prejudice concerning a party to the proceeding or has prejudged a disputed evidentiary fact involved in a proceeding prior to a hearing. For the purposes of this paragraph, "personal bias or prejudice" means a predisposition toward a person based on a previous or ongoing relationship that renders the commissioner unable to exercise the commissioner's functions impartially;
- (2) when the commissioner has a pecuniary interest in the outcome of the matter; or
- (3) when in previous employment the commissioner served as an attorney, adviser, consultant or witness in the matter in controversy.

C. A party to the proceeding may request the recusal of a commissioner and shall provide the commission with the grounds for the request. If the commissioner declines to recuse upon request of a party to the proceeding, the commissioner shall provide a full explanation in support of the refusal to recuse.

D. A party may appeal a commissioner's refusal to recuse, or if the propriety of a commissioner's participation in a particular matter is otherwise questioned, the issue shall be decided by a majority of the other commissioners present and voting.

E. A disqualified commissioner shall not participate in any proceedings with reference to the matter from which the commissioner is disqualified or recused, and the commissioner shall be excused from that portion of any meeting at which the matter is discussed.

F. Minutes of commission meetings shall record the name of any commissioner not voting on a matter by reason of disqualification or recusal.

G. If two or more commissioners have recused themselves or are disqualified from participating in a proceeding, the remaining commissioners shall appoint temporary commissioners to participate in that proceeding. Appointments of temporary commissioners shall be made by a majority vote of the remaining commissioners in accordance with the political affiliation and geographical representation requirements and the qualifications set forth in the State Ethics Commission Act.

H. The commission shall promulgate rules for the recusal and disqualification of commissioners, for an appeal of a recusal decision and for the appointment of temporary commissioners.

History: Laws 2019, ch. 86, § 7.

10-16G-8. Advisory opinions.

A. The commission may issue advisory opinions on matters related to ethics. Advisory opinions shall:

- (1) be requested in writing by a public official, public employee, candidate, person subject to the Campaign Reporting Act [1-19-25 through 1-19-36 NMSA 1978], government contractor, lobbyist or lobbyist's employer;
- (2) identify a specific set of circumstances involving an ethics issue;

- (3) be issued within sixty days of receipt of the request unless the commission notifies the requester of a delay in issuance and continues to notify the requester every thirty days until the advisory opinion is issued; and
- (4) be published after omitting the requester's name and identifying information.

B. A request for an advisory opinion shall be confidential and not subject to the provisions of the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978].

C. Unless amended or revoked, an advisory opinion shall be binding on the commission in any subsequent commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

History: Laws 2019, ch. 86, § 8.

10-16G-9. Commission jurisdiction; compliance provisions. (Effective January 1, 2020.)

A. The commission has jurisdiction to enforce the applicable civil compliance provisions for public officials, public employees, candidates, persons subject to the Campaign Reporting Act [1-19-25 through 1-19-36 NMSA 1978], government contractors, lobbyists and lobbyists' employers of:

- (1) the Campaign Reporting Act;*
- (2) the Financial Disclosure Act [Chapter 10, Article 16A NMSA 1978];*
- (3) the Gift Act [Chapter 10, Article 16B NMSA 1978];*
- (4) the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978];*
- (5) the Voter Action Act [1-19A-1 to 1-19A-17 NMSA 1978];*
- (6) the Governmental Conduct Act [Chapter 10, Article 16 NMSA 1978];*
- (7) the Procurement Code [13-1-28 through 13-1-199 NMSA 1978];*
- (8) the State Ethics Commission Act; and*
- (9) Article 9, Section 14 of the constitution of New Mexico.*

B. All complaints filed with a public agency regarding the statutes listed in Subsection A of this section shall be forwarded to the commission.

C. The commission may choose to act on some or all aspects of a complaint and forward other aspects of a complaint to another state or federal agency with jurisdiction over the matter in accordance with Subsection E of this section.

D. If the commission decides not to act on a complaint, whether the complaint was filed with the commission or forwarded from another public agency, or decides only to act on part of a complaint, the commission shall promptly forward the complaint, or any part of a complaint on which it does not wish to act, to the public agency that has appropriate jurisdiction within ten days of the decision. The complainant and respondent shall be notified in writing when the complainant's request has been forwarded to another agency unless otherwise provided pursuant to Subsection H of Section 10 [10-16G-10 NMSA 1978] of the State Ethics Commission Act.

E. The commission may share jurisdiction with other public agencies having authority to act on a complaint or any aspect of a complaint. Such shared jurisdiction shall be formalized through an agreement entered into by all participating agencies involved with the complaint and the director. The commission may also investigate a complaint referred to the commission by the legislature, or a legislative committee, in accordance with an agreement entered into pursuant to policies of the New Mexico legislative council or rules of the house of representatives or senate.

F. The commission may file a court action to enforce the civil compliance provisions of an act listed in Subsection A of this section. The court action shall be filed in the district court in the county where the respondent resides.

History: Laws 2019, ch. 86, § 9.

10-16G-10. Complaints; investigations; subpoenas. (Effective January 1, 2020.)

A. A complaint of an alleged ethics violation committed by a public official, public employee, candidate, person subject to the Campaign Reporting Act [1-19-25 through 1-19-36 NMSA 1978], government contractor, lobbyist, lobbyist's employer or a restricted donor subject to the Gift Act [Chapter 10, Article 16B NMSA 1978] may be filed with the commission by a person who has actual knowledge of the alleged ethics violation.

B. The complainant shall set forth in detail the specific charges against the respondent and the factual allegations that support the charges and shall sign the complaint under penalty of false statement. The complainant shall submit any evidence the complainant has that supports the complaint. Evidence may include documents, records and names of witnesses. The commission shall prescribe the forms on which complaints are to be filed. The complaint form shall be signed and sworn by the complainant and notarized.

C. Except as provided in Subsection H of this section, the respondent shall be notified within seven days of the filing of the complaint and offered an opportunity to file a response on the merits of the complaint.

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.

E. The general counsel shall conduct an investigation to determine whether the complaint is frivolous or unsubstantiated. If the general counsel determines that the complaint is frivolous or unsubstantiated, the complaint shall be dismissed, and the complainant and respondent shall be notified in writing of the decision and reasons for the dismissal. The commission shall not make public a complaint that has been dismissed pursuant to this subsection or the reasons for the dismissal.

F. If the general counsel and the respondent reach a settlement on the matters of the complaint, the settlement shall be submitted to the commission for its approval, and if the matter has been resolved to the satisfaction of the commission, the complaint and terms of the settlement shall be subject to public disclosure.

G. If the general counsel determines that there is probable cause, the director shall promptly notify the respondent of the finding of probable cause and of the specific allegations in the complaint that are being investigated and that a public hearing will be set. If the finding of probable cause involves a discriminatory practice or actions by the respondent against the complainant, no settlement agreement shall be reached without prior consultation with the complainant. In any case, the notification, complaint, specific allegations being investigated and any response to the complaint shall be made public thirty days following notice to the respondent.

H. Notwithstanding the provisions of Subsections C and G of this section, the director may delay notifying a respondent and complainant and releasing to the public the complaint and related information required by Subsection G of this section if it is deemed necessary to protect the integrity of a criminal investigation. A decision whether to delay notifying a respondent shall be taken by a majority vote of the commission and shall be documented in writing with reasonable specificity.

I. As part of an investigation, the general counsel may administer oaths, interview witnesses and examine books, records, documents and other evidence reasonably related to the complaint. All testimony in an investigation shall be under oath, and the respondent may be represented by legal counsel. If the general counsel determines that a subpoena is necessary to obtain the testimony of a person or the production of books, records, documents or other evidence, the director shall request that the commission petition a district court to issue a subpoena.

J. The commission may petition the court for a subpoena for the attendance and examination of witnesses or for the production of books, records, documents or other evidence reasonably related to an investigation. If a person neglects or refuses to comply with a subpoena, the commission may apply to a district court for an order enforcing the subpoena and compelling compliance. All proceedings in the district court prior to the complaint being made public pursuant to Subsection G of this section, or upon entry of a settlement agreement, shall be sealed. A case is automatically unsealed upon notice by the commission to the court that the commission has made the complaint public. No later than July 1 of each even-numbered year, the chief justice of the supreme court shall appoint an active or pro tempore district judge to consider the issuance and enforcement of subpoenas provided for in this section. The appointment shall end on June 30 of the next even-numbered year after appointment.

K. A public official or state public employee who is a respondent who is subject to a complaint alleging a violation made in the performance of the respondent's duties shall be entitled to representation by the risk management division of the general services department.

History: Laws 2019, ch. 86, § 10.

10-16G-11. Status of investigation; reports to commission. (Effective January 1, 2020.)

A. If a hearing has not been scheduled concerning the disposition of a complaint within ninety days after the complaint is received, the director shall report to the commission on the status of the investigation. The commission may dismiss the complaint or instruct the director to continue the investigation of the complaint. Unless the commission dismisses the complaint, the director shall report to the commission every ninety days thereafter on the status of the investigation.

B. Upon dismissal of a complaint or a decision to continue an investigation of a complaint, the commission shall notify the complainant and respondent in writing of its action. If the commission has not notified a respondent pursuant to the provisions of Subsection G of Section 10 [10-16G-10 NMSA 1978] of the State Ethics Commission Act, the commission shall vote on whether to notify the respondent. A decision whether to continue to delay notifying the respondent shall be taken by a majority vote of a quorum of the commission and shall be documented in writing with reasonable specificity.

History: Laws 2019, ch. 86, § 11.

10-16G-12. Investigation report; commission hearings; decisions and reasons given; disclosure of an ethics violation. (Effective January 1, 2020.)

- A. Upon receipt of the general counsel's recommendation, the commission or hearing officer shall:
- (1) dismiss a complaint and notify the complainant and the respondent of the dismissal; or
 - (2) set a public hearing, as soon as practicable.
- B. At any time before or during a hearing provided for in Subsection A of this section, the hearing officer may, at a public meeting, approve a disposition of a complaint agreed to by the general counsel and the respondent, as approved by the commission.
- C. The hearing provided for in Subsection A of this section shall be pursuant to the rules of evidence that govern proceedings in the state's courts and procedures established by the commission. An audio recording shall be made of the hearing. The respondent may be represented by counsel. The parties may present evidence and testimony, request the director to compel the presence of witnesses and examine and cross-examine witnesses.
- D. The hearing officer shall issue a written decision that shall include the reasons for the decision. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct constituted a violation, the decision may include recommendations for disciplinary action against the respondent, and the hearing officer may impose any fines provided for by law. A finding of fraudulent or willful misconduct shall require clear and convincing evidence.
- E. The complainant or respondent may appeal a decision of the hearing officer within thirty days of the decision to the full commission, which shall hear the matter within sixty days of notice of the appeal and issue its decision within 180 days.
- F. The commission shall publicly disclose a decision, including a dismissal following a finding of probable cause or the terms of a settlement, issued pursuant to this section. The commission shall provide the decision to the complainant, the respondent and the:
- (1) house of representatives if the respondent is a public official who is subject to impeachment;
 - (2) appropriate legislative body if the respondent is a member of the legislature;
 - (3) respondent's appointing authority if the respondent is an appointed public official;
 - (4) appropriate public agency if the respondent is a public employee;
 - (5) public agency with which the respondent has a government contract if the respondent is a government contractor; and
 - (6) secretary of state and the respondent's employer, if any, if the respondent is a lobbyist.
- G. The commission shall produce a quarterly report subject to public inspection containing the following information:
- (1) the number of complaints filed with and referred to the commission;
 - (2) the disposition of the complaints; and
 - (3) the type of violation alleged in the complaints.

History: Laws 2019, ch. 86, § 12.

10-16G-13. Confidentiality of records; penalty. (Effective January 1, 2020.)

- A. A decision that a respondent's conduct constituted a violation, and the terms of a settlement approved by the commission, are public records. Pleadings, motions, briefs and other documents or information related to the decision are public records, except for information that is confidential or protected pursuant to attorney-client privilege, provider-patient privilege or state or federal law.
- B. If a complaint is determined to be frivolous, unsubstantiated or outside the jurisdiction of the commission, the complaint shall not be made public by the commission; provided that the commission shall not prohibit the complainant or respondent from releasing the commission's decision or other information concerning the complaint.
- C. Except as otherwise provided in the acts listed in Section 9 of the State Ethics Commission Act, all complaints, reports, files, records and communications collected or generated by the commission, hearing officer, general counsel or director that pertain to alleged violations shall not be disclosed by the commission or any commissioner, agent or employee of the commission, unless:
- (1) disclosure is necessary to pursue an investigation by the commission;
 - (2) disclosure is required pursuant to the provisions of the State Ethics Commission Act; or
 - (3) they are offered into evidence by the commission, respondent or another party at a judicial, legislative or administrative proceeding, including a hearing before a hearing officer.
- D. Information and reports containing information made confidential by law shall not be disclosed by the commission or its director, staff or contractors.
- E. A commissioner, director, staff or contractor who knowingly discloses any confidential complaint, report, file, record or communication in violation of the State Ethics Commission Act is guilty of a petty misdemeanor.

History: Laws 2019, ch. 86, § 13.

10-16G-14. Criminal violations; referral. (Effective January 1, 2020.)

If the commission finds at any time that a respondent's conduct amounts to a criminal violation, the director shall consult with the attorney general or an appropriate district attorney, and the commission may refer the matter to the attorney general or an appropriate district attorney. The commission may provide the attorney general or district attorney with all evidence collected during the commission's investigation. Nothing in this section prevents the commission from taking any action authorized by the State Ethics Commission Act or deciding to suspend an investigation pending resolution of any criminal charges.

History: Laws 2019, ch. 86, § 14.

10-16G-15. Time limitations on jurisdiction. (Effective January 1, 2020.)

A. The commission shall not accept or consider a complaint unless the complaint is filed with the commission within the later of two years from the date:

- (1) on which the alleged conduct occurred; or*
- (2) the alleged conduct could reasonably have been discovered.*

B. The commission shall not adjudicate a complaint filed against a candidate, except pursuant to the Campaign Reporting Act [1-19-25 through 1-19-36 NMSA 1978] or Voter Action Act [1-19A-1 to 1-19A-17 NMSA 1978], less than sixty days before a primary or general election. During that time period, the commission may dismiss complaints that are frivolous or unsubstantiated or refer complaints that are outside the jurisdiction of the commission.

C. A complainant shall be notified in writing of the provisions of this section and shall also be notified in writing that the complainant may refer allegations of criminal conduct to the attorney general or the appropriate district attorney.

D. When commission action on a complaint is suspended pursuant to the provisions of this section, the respondent shall promptly be notified that a complaint has been filed and of the specific allegations in the complaint and the specific violations charged in the complaint.

History: Laws 2019, ch. 86, § 15.

10-16G-16. Prohibited actions. (Effective January 1, 2020.)

A. A person shall not take or threaten to take any retaliatory, disciplinary or other adverse action against another person who in good faith:

- (1) files a verified complaint with the commission that alleges a violation; or*
- (2) provides testimony, records, documents or other information to the commission during an investigation or at a hearing.*

B. A complainant and a respondent shall not communicate ex parte with any hearing officer, commissioner or other person involved in a determination of the complaint.

C. Nothing in the State Ethics Commission Act precludes civil or criminal actions for libel or slander or other civil or criminal actions against a person who files a false claim.

History: Laws 2019, ch. 86, § 16.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 8 STATE ETHICS COMMISSION
PART 3 ADMINISTRATIVE HEARINGS

1.8.3.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 217, Albuquerque, New Mexico 87106.
[1.8.3.1 NMAC-N, 1/1/2020]

1.8.3.2 SCOPE: This part applies to all proceedings, cases, and hearings before the commission and all parties that appear before the commission.
[1.8.3.2 NMAC-N, 1/1/2020]

1.8.3.3 STATUTORY AUTHORITY: Paragraphs 2 and 3 of Subsection A of Section 10-16G-5 NMSA 1978; Paragraph 5 of Subsection B of Section 10-16G-6 NMSA 1978; Subsection H of Section 10-16G-7 NMSA 1978; Subsection C of Section 10-16G-12 NMSA 1978; Section 1-19-34.8 of the Campaign Reporting Act, Section 1-19-1 NMSA 1978; Section 2-11-8.3 of the Lobbyist Regulation Act, Section 2-11-1 NMSA 1978; Section 2-15-8 NMSA 1978 ; Sections 10-16-11, 10-16-13, 10-16-14 and 10-16-18 of the Governmental Conduct Act, 10-16-1 NMSA 1978; Sections 10-16A-5, 10-16A-6, and 10-16A-8 of the Financial Disclosure Act, 10-16A-1 NMSA 1978; Section 10-16B-5 of the Gift Act, Section 10-16B-1 NMSA 1978; and Section 13-1-196.1 of the Procurement Code, Section 13-1-28 NMSA 1978.
[1.8.3.3 NMAC-N, 1/1/2020]

1.8.3.4 DURATION: Permanent.
[1.8.3.4 NMAC-N, 1/1/2020]

1.8.3.5 EFFECTIVE DATE: January 1, 2020, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[1.8.3.5 NMAC-N, 1/1/2020]

1.8.3.6 OBJECTIVE: The objective of this part is to provide general procedural rules for proceedings before the state ethics commission.
[1.8.3.6 NMAC-N, 1/1/2020]

1.8.3.7 DEFINITIONS: The following terms apply to these rules unless their context clearly indicates otherwise:

- A. “Appellant”** is a party who requests that the commission review and change the decision of the hearing officer.
- B. “Appellee”** is a party to an appeal arguing that the hearing officer’s decision is correct and should stand.
- C. “Blackout period”** means the period beginning 60 days before a primary or general election in which a person against whom a complaint is filed is a candidate, and ending on the day after that election.
- D. “Brief”** is a document summarizing the facts and points of law of a party’s case. It may be offered to or requested by a hearing officer or filed in an appeal to the commission. For example, a “brief in chief” is filed with the commission by the appellant. An “answer brief” is filed by the appellee in response to the brief-in-chief.
- E. “Claim”** is a complainant’s allegation that a respondent violated a particular provision of law.
- F. “Designated district court judge”** is an active or pro tempore district judge who has been appointed by the chief justice of the supreme court to consider the issuance and enforcement of subpoenas applied for by the commission.
- G. “Discriminatory practice,”** as used in this part, has the same meaning as it does in Subsection L of Section 28-1-2 of the Human Rights Act, Section 28-1-1 NMSA 1978.
- H. “Lobbyist’s employer”** as used in this part, has the same meaning as it does in Subsection F of Section 2-11-2 of the Lobbyist Regulation Act, Section 2-11-1 NMSA 1978.
- I. “Meeting”** means a meeting of the commission duly noticed and conducted in compliance with the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978.
- J. “Party” and “Parties”** means the named persons in a proceeding before the commission or a hearing officer.

K. “Person” means any individual or entity.

L. “Pleading” means any written request, motion, or proposed action filed by a party with the hearing officer or commission.

M. “Qualified hearing officer” means an official appointed by the director in accordance with these rules to conduct an administrative hearing to enable the commission to exercise its statutory powers.

N. “Records” means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, whether or not the records are required by law to be created or maintained.

[1.8.3.7 NMAC-N, 1/1/2020]

1.8.3.8 STANDING ORDERS: The director may issue, or withdraw, standing orders addressing general practice issues and filing protocols for the handling of cases before the commission or its hearing officers. Such standing orders will be displayed publicly at commission facilities, any commission website, and in any applicable information provided with a notice of hearing. The parties appearing before the commission or its hearing officers are expected to comply with standing orders.

[1.8.3.8 NMAC-N, 1/1/2020]

1.8.3.9 COMPLAINTS: FILING REQUIREMENTS, TIME LIMITATIONS, NOTICE:

A. The commission shall investigate allegations of violations of any statutes or constitutional provisions over which the legislature gives it jurisdiction. Such complaints may be filed against any public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist’s employer.

(1) The commission may initiate a proceeding before the commission concerning an alleged violation:

(a) through the filing of a complaint with the commission by any person which alleges that the complainant has actual knowledge of the alleged violation of such statutes or constitutional provisions;

(b) by initiating its own complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a person subject to the jurisdiction of the commission, pursuant to Paragraph 1 of Subpart C of Section 10-16G-5 NMSA (1978); or

(c) by accepting a complaint filed with another public agency and forwarded by that agency to the commission pursuant to Subsection B or E of Section 10-16G-9 NMSA 1978.

(2) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, shall:

(a) be filed on a form prescribed by the commission and provided at no cost to the complainant, or in a substantially equivalent form;

(b) state the name and, to the extent known to the complainant, the mailing address, email address, telephone number, and public office or other position of the person against whom the complaint is filed;

(c) set forth in detail the specific claims against the respondent and the supporting factual allegations, including, if known to the complainant, any law that the respondent has allegedly violated;

(d) include any evidence that the complainant has that supports the complaint, which may include documents, records and names of witnesses; and

(e) be signed, notarized and sworn to by the complainant, under penalty of false statement.

(3) Any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC that fails to state either the mailing address or email address of the person against whom the complaint is filed, or is not signed, notarized and sworn to by the complainant, under penalty of false statement, shall be dismissed without prejudice, and the complainant will have the opportunity to refile the complaint.

(4) Any party may represent themselves or may be represented by a licensed attorney. Corporations and other non-natural persons must be represented by counsel.

(a) Any legal counsel representing any party shall enter an appearance with the commission. Upon receipt of the appearance, the commission shall direct all official notices and correspondence to the attorney named in the written appearance, at the address or location stated therein, and any official notice received by any named attorney shall be deemed to have been received by the represented party. An attorney may

withdraw from representing a party before the commission only with leave of the director and for a reason provided for by Section B of Rule 16-116 NMRA.

(b) If the respondent is a public official or state public employee subject to a complaint alleging a violation made in the performance of the respondent's duties, the respondent shall be entitled to representation by the risk management division of the general services department. "Respondent's duties," within the meaning of Subsection K of Section 10-16G-10 NMSA and this rule, excludes conduct undertaken by an elected public official in furtherance of his or her campaign for reelection.

(5) The commission may proceed with any complaint, irrespective of whether the complaint is notarized, that is forwarded to the commission by another state agency, or by the legislature or a legislative committee pursuant to Subparagraph (c) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, according to the terms of any agreement for shared jurisdiction between the commission and the referring agency or the legislative body, pursuant to Subsection E of Section 10-16G-9 NMSA 1978.

(6) No complaint may be accepted or considered by the commission unless the date on which the complaint is received by the commission, or the date on which the commission votes to initiate a complaint, falls within the later of two years from the date:

(a) on which the alleged conduct occurred; or

(b) the alleged conduct could reasonably have been discovered.

(7) For the purpose of applying the two-year statute of limitations established in Subsection A of Section 10-16G-15 NMSA 1978, the date on which a complaint is filed with a public agency that refers the complaint to the commission under the law, or under an agreement for shared jurisdiction, shall be deemed the date of filing with the commission.

B. The commission shall not adjudicate a complaint filed against a candidate, except under the Campaign Reporting Act or Voter Action Act, fewer than 60 days before a primary or general election.

(1) This paragraph does not preclude during the blackout period:

(a) the dismissal of frivolous or unsubstantiated complaints, or dismissal or referral of complaints outside the jurisdiction of the commission, as provided by these rules; or

(b) an investigation related to the commission's discretion to file a court action to enforce the civil compliance provisions of any statute or constitutional provision over which the commission has jurisdiction.

(2) For complaints filed during and subject to the blackout period, the director, or the director's designee, shall notify the complainant:

(a) of the provisions of this section regarding the blackout period;

(b) that the complainant may refer allegations of criminal conduct to the attorney general or appropriate district attorney at any time; and

(c) of the deferral of commission action on the complaint for the duration of the blackout period.

(3) The director, or the director's designee, shall within five days notify a person named as a respondent in a complaint filed during the 60-day pre-election blackout period of:

(a) the filing of the complaint;

(b) the specific allegations and violations charged in the complaint; and

(c) the deferral of commission action on the complaint for the duration of the blackout period.

C. The commission shall not adjudicate a complaint that alleges conduct occurring only before July 1, 2019. Any complaint filed with the commission or referred to the commission that alleges conduct occurring only before July 1, 2019 shall be either dismissed or returned to the referring entity.

[1.8.3.9 NMAC-N, 1/1/2020]

1.8.3.10 DIRECTOR'S RESPONSIBILITIES UPON RECEIVING A COMPLAINT; RESPONDENT'S OPPORTUNITY TO RESPOND; JURISDICTIONAL REVIEW; REFERRALS; NOTIFICATION TO PARTIES:

A. Within seven days of receiving the complaint, the director shall notify the respondent of the filing of the complaint.

(1) The respondent may file with the commission a responsive pleading within 15 days from the date of receiving the director's notification and serve the same upon the complainant. Also, within 15 days from the date of receiving the director's notification, the respondent may file with the commission, and serve upon the complainant, a motion to dismiss the complaint for:

- (a) lack of subject matter jurisdiction;
- (b) lack of personal jurisdiction; or
- (c) failure to state a claim upon which relief may be granted.

(2) The complainant may file a response to the respondent's motion. A response to a motion is due 15 calendar days from the date of the filing of the motion.

(3) If the respondent fails to submit a responsive pleading or motion within 15 days from the date of receiving the director's notification, then the director shall review the complaint for jurisdiction, and if jurisdiction lies, shall refer the complaint to the general counsel.

B. Upon receiving a complaint pursuant to Subparagraph (a) or (c) of Paragraph 1 of Subsection A of 1.8.3.9 NMAC, and any responsive pleading, or motion and corresponding response, the director shall, within 10 days, review the submissions to determine whether the complaint is within the commission's jurisdiction.

C. If the director determines that a complaint lies wholly or in part within the jurisdiction of the commission, the director shall forward the complaint to the general counsel to initiate an investigation.

D. If the director determines that the complaint is not wholly within the commission's jurisdiction, or is within the jurisdiction of another state or federal agency, either in whole or in part, the director shall within ten days refer some or all claims within the complaint to the appropriate agency, in accordance with Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, or Subsection D of Section 10-16-14 NMSA 1978.

E. If the director determines that the complaint is neither within the jurisdiction of the commission nor subject to referral to another agency under the terms of an agreement entered into pursuant to Subsection E of Section 10-16G-9 NMSA 1978, the commission shall dismiss the complaint.

F. Subject to Subsection E of Section 1.8.3.15 NMAC, the director shall notify the complainant and respondent in writing of any action taken under Subsections C through E of 1.8.3.10 NMAC, unless notification has been delayed by the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978 and Subsection E of 1.8.3.15 NMAC. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

G. The director shall consult with the attorney general, an appropriate district attorney or the United States attorney if:

(1) when reviewing a complaint for jurisdiction, the director determines that the complaint alleges conduct on the part of the respondent or another that appears reasonably likely to amount to a criminal violation; or

(2) the commission, any commission staff member, or any commission hearing officer finds at any time that a respondent's conduct appears reasonably likely to amount to a criminal violation.

(3) Nothing in Section 10-16G-14 NMSA 1978 or in this section prevents the commission from taking any action authorized by the State Ethics Commission Act or deciding to suspend an investigation pending resolution of any criminal charges.

[1.8.3.10 NMAC-N, 1/1/2020]

1.8.3.11 GENERAL COUNSEL'S RESPONSIBILITY TO INVESTIGATE COMPLAINTS; DISCOVERY AND SUBPOENAS; PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; SETTLEMENT AUTHORITY:

A. Upon receiving notice of the director's determination that the commission has full or partial jurisdiction over the complaint, the general counsel shall determine whether the complaint is frivolous or unsubstantiated, or supported by probable cause.

B. If the respondent moves to dismiss a complaint, either in whole or in part, for failure to state a claim for which relief can be granted, and if the director determines that the commission has jurisdiction over the claim that is the subject of the respondent's motion to dismiss, the general counsel shall review the motion and any corresponding response. After reviewing the motion and any corresponding response, the general counsel shall make a recommendation on the disposition of the motion. Based on the general counsel's recommendation, the hearing officer may either:

(1) grant the motion, either in whole or in part, dismiss the complaint or part of the complaint that fails to state a claim upon which relief can be granted, and notify the complainant and respondent in writing of the decision and the reasons for dismissal; or

(2) deny the motion and notify the parties in writing of the denial. In that event, the general counsel shall initiate an investigation into whether the complaint is supported by probable cause.

C. To perform the investigation into whether probable cause supports the complaint, the general counsel, or the general counsel's designee, may administer oaths, interview witnesses under oath, and examine books, records, documents and other evidence reasonably related to the complaint.

(1) The general counsel, or the general counsel's designee, may send to any party requests for production of books, records, documents and other evidence reasonably related to a complaint; requests for admission; and interrogatories, to be responded to at a time therein specified.

(a) The general counsel shall serve a copy of the request for production of books, records, documents and other evidence and interrogatories on the respondent.

(b) If a claim is made that documents responsive to a request made under this subparagraph are privileged, the party asserting the claim of privilege must, within 14 days after making the claim of privilege, provide the general counsel with a written description of each document withheld that is sufficient to permit the general counsel to assess the applicability of the asserted privilege.

(2) The general counsel, or the general counsel's designee, may notice and take the deposition of any person, including any party, subject to the following provisions:

(a) The general counsel, or the general counsel's designee, may put the witness on oath or affirmation and shall personally, or by someone acting at the general counsel's direction, record the testimony of the witness.

(b) Any objection during a deposition shall be stated concisely in a non-argumentative and non-suggestive manner. Objections to form or foundation may only be made by stating "objection—form" or "objection—foundation". It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. When a question is pending, or a document has been presented to the witness, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege.

(c) All objections shall be noted by the general counsel or the general counsel's designee upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections, except where the objection is based on an assertion of privilege made in good faith.

(d) The general counsel, or the general counsel's designee, shall certify on the deposition that the witness was duly sworn by the general counsel or the general counsel's designee and that the deposition is a true record of the testimony given by the witness.

(e) If a party refuses to respond to discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party's refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify. If a party fails to provide information or identify a witness in response to a request by the general counsel, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or on appeal, unless the failure was substantially justified or is harmless.

(3) If the general counsel determines it is necessary, the director shall request the commission's authority to petition a district court:

(a) to issue a subpoena to obtain testimony of a person or the production of books, records, documents or other evidence reasonably related to an investigation;

(b) to order enforcement if the person subpoenaed neglects or refuses to comply; or

(c) to resolve any assertion of privilege.

D. Upon the commission's approval, the director, or the director's designee, may petition the designated district court judge, or another district court judge if the designated judge is not available, for a subpoena pursuant to the previous subsection. If a person neglects or refuses to comply with a subpoena, the director or the director's designee, upon the commission's approval, may apply to a district court for an order enforcing the subpoena and compelling compliance.

E. If the general counsel finds probable cause to support the allegations of the complaint, the director shall promptly notify both the complainant and the respondent:

(1) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;

(2) of the finding of probable cause as to specific claims; and

(3) that a public hearing before a hearing officer will be set, *provided* that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978.

F. If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the

respondent shall be notified in writing of the decision and the reasons for the dismissal. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

G. The general counsel may at any time enter into a proposed settlement agreement of the complaint with the respondent. The proposed settlement agreement shall be presented to the commission for approval. If the complaint alleges, or the general counsel has found probable cause to support, a discriminatory practice or action by the respondent against the complainant, no settlement agreement may be reached without prior consultation with the complainant. If approved by the commission, the settlement agreement shall be subject to public disclosure.

H. At any time, the complainant may voluntarily dismiss the complaint, either in whole or in part, by filing a notice of voluntary dismissal with the commission; however, any notice of voluntary dismissal does not diminish the power of the commission to initiate a complaint under Paragraph 1 of Subsection C of Section 10-16G-5 NMSA 1978. If the general counsel has determined the complaint is supported by probable cause, the complainant may dismiss the complaint only on motion and on such terms and conditions as the hearing officer deems proper.

[1.8.3.11 NMAC-N, 1/1/2020]

1.8.3.12 GENERAL COUNSEL'S INVESTIGATION REPORTS AND RECOMMENDATIONS TO COMMISSION; DISPOSITION BY AGREEMENT; NOTICE TO PARTIES:

A. Upon completion of the investigation of a complaint found to be supported by probable cause, the general counsel shall report promptly the general counsel's findings and recommendations to the director.

(1) Upon the receipt of the general counsel's findings and recommendations, the director will designate a qualified hearing officer to conduct a hearing on the complaint if so recommended by the general counsel. Based on the report of the general counsel, the hearing officer will set a public hearing as soon as practicable.

(2) In referring a complaint to the hearing officer, the director may consolidate the complaint with any other pending complaint involving related questions of law or fact; *provided* that consolidation will not unduly delay resolution of an earlier-filed complaint, unduly prejudice any complaint, or compromise the right of any complainant or respondent to confidentiality under these rules.

B. If a hearing has not been scheduled concerning the disposition of a complaint within 90 days after the complaint has been received from the complainant or after referral from another agency, whichever is later, the director shall report to the commission at a duly convened meeting on the status of the investigation. The commission and the director shall thereafter proceed in accordance with Section 10-16G-11 NMSA 1978.

C. At any time before or during a hearing, the hearing officer may, at a duly convened public meeting, approve a disposition of a complaint agreed to by the general counsel and the respondent, provided that:

(1) the complainant shall be consulted on the proposed agreement prior to its execution, and

(2) the agreement shall be effective upon approval by the commission at a public meeting.

[1.8.3.12 NMAC-N, 1/1/2020]

1.8.3.13 HEARING OFFICERS; HEARINGS; INTERPRETERS; EVIDENCE:

A. The commission shall authorize the director to contract, for reasonable hourly compensation, with qualified persons to act as hearing officers. Hearing officers shall be assigned to act on or preside over hearings on complaints. Hearing officers must be currently licensed attorneys, or retired judges of the appellate, district, or metropolitan courts of New Mexico or any federal court, who are familiar with the ethics and election laws enforced by the commission.

B. All hearings before the hearing officer will occur in Santa Fe or Albuquerque, or at such other location within the state as may be determined by the hearing officer. In selecting the location of a hearing other than in Santa Fe or Albuquerque, the hearing officer shall consider and give weight to the location and reasonable concerns of the respective parties, witnesses, and representatives in the proceeding. Upon a showing by any party of an undue burden, the hearing officer may move the hearing to a more appropriate venue.

C. If a hearing officer has not already notified the parties of a hearing through the issuance of a scheduling order, the director will notify the parties to the hearing by mail, directed to the address provided by the parties, of the date, time, and place scheduled for the hearing, at least 15 days before the scheduled hearing.

D. The hearing shall be conducted pursuant to the rules of evidence governing proceedings in the state courts, Rule 11-101 NMRA, and these procedural rules. All hearings shall be open to the public in accordance

with the Open Meetings Act, Section 10-15-1 NMSA 1978, except for hearings or portions thereof exempted from the requirements of that Act.

E. Audio recordings shall be made of all hearings conducted pursuant to this section.

F. The parties may be represented by counsel, who shall enter an appearance at the earliest opportunity, pursuant to Paragraph (3) of Subsection A of 1.8.3.9 NMAC.

G. The hearing officer shall permit the general counsel to intervene upon request.

H. The hearing officer shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the proceedings and to maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

- (1) to administer or have administered oaths and affirmations;
- (2) to cause depositions to be taken;
- (3) to require the production or inspection of documents and other items;
- (4) to require the answering of interrogatories and requests for admissions;
- (5) to rule upon offers of proof and receive evidence;
- (6) to regulate the course of the hearings and the conduct of the parties and their

representatives therein;

(7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;

(8) to schedule, continue and reschedule hearings;

(9) to consider and rule upon all procedural and other motions appropriate in the proceeding;

(10) to require the filing of briefs on specific legal issues prior to or after the hearing;

(11) to cause a complete audio record of hearings to be made;

(12) to make and issue decisions and orders; and

(13) to reprimand, or with warning in extreme instances exclude from the hearing, any person

for engaging in a continuing pattern of disruptive or other improper conduct that interferes with the conduct of a fair and orderly hearing or development of a complete record.

I. In the performance of these adjudicative functions, the hearing officer is prohibited from engaging in any improper *ex parte* communications about the substantive issues with any party on any matter, but may communicate with parties separately solely on scheduling issues if all parties are notified of such communications and do not object to them. An improper *ex parte* communication occurs when the hearing officer discusses the substance of a case without the opposing party being present, except that it is not an improper *ex parte* communication for the hearing officer to go on the record with only one party when the other party has failed to appear at a scheduled hearing despite having received timely notice thereof.

J. Parties who appear at the hearing may:

(1) request the director to request the commission's authority to petition a district court to compel the presence of witnesses. Subpoenas may be requested by the commission from a district court in the same manner as provided for in Subsection J of Section 10-16G-10 NMSA 1978 and Subsections C and D of 1.8.3.11 NMAC;

(2) present evidence and testimony;

(3) examine and cross-examine witnesses; and

(4) introduce evidentiary material developed by the general counsel. Before the hearing, the general counsel shall timely disclose to the parties all evidence in the possession or within the control of the general counsel, other than privileged information.

K. Any person may timely file an amicus brief, not to exceed ten pages, with the director, for consideration by the hearing officer.

L. Upon reasonable notice by the party to the director, a party needing language interpreter services for translation of one language into another, and any interpreter required to be provided under the American with Disabilities Act, shall be provided for by the commission. While the person serving as an interpreter need not be a court-certified interpreter in order to provide interpretation at a hearing, any person serving as an interpreter in a hearing before the commission must affirm the interpreter's oath applicable in courts across this state.

M. After the termination of the hearing, if the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint constituted a violation of any law within the jurisdiction of the commission, the hearing officer, in a written decision:

(1) may

(a) impose any fines provided for by law; and

(b) recommend to the appropriate authority commensurate disciplinary action against the respondent;

(2) and must

(a) state the reasons for the hearing officer's decision; and

(b) provide the parties with notice of the right of appeal to the commission.

N. Clear and convincing evidence is required to support a finding by a hearing officer that a respondent's conduct was fraudulent or willful.

O. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint constituted a violation of the Governmental Conduct Act and was either unintentional or for good cause, then the hearing officer shall give the respondent 10 days to correct the violation, pursuant to Subsection (B) of Section 10-16-13.1, before taking any action under Subsection M of Section 1.8.3.13 NMAC.

P. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint does not constitute a violation of any law within the jurisdiction of the commission, the hearing officer, in a written decision, shall dismiss the complaint and inform the complainant of their right to appeal to the commission.

Q. Either party may request copies of exhibits, documents, records in the administrative file, or a copy of the audio recording of the proceeding by submitting a written request to the director. The director may charge a reasonable fee for copies made, consistent with its fee schedule under the Inspection of Public Records Act. The director may also require the requesting party to submit a new, sealed computer storage device, such as a compact disc, dvd disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record. Every party is responsible for paying the cost of any transcription of the audio recording.

[1.8.3.13 NMAC-N, 1/1/2020]

1.8.3.14 APPEALS:

A. Except as provided by Subsections E and F of 1.8.3.14 NMAC, the complainant or respondent may appeal the final decision of the hearing officer within 30 days of the issuance of the decision to the full commission by filing a notice stating:

(1) each party taking the appeal and each party against whom the appeal is taken;

(2) the name, address, telephone number and email address of counsel for the appellant;

(3) the decision or part of a decision from which the party appeals; and

(4) the specific grounds for the appeal, including specific references to any evidence or law interpreted by the hearing officer.

B. For the purpose of this rule, briefing time shall commence from the date the appellant files a notice of appeal to the full commission. Unless otherwise provided for by the commission,

(1) The appellant shall file and serve a brief in chief within 15 days;

(2) The appellee shall file and serve an answer brief within 15 days after service of the brief of the appellant; and

(3) Neither the brief in chief nor the answer brief shall exceed 10 pages.

C. The commission shall schedule oral arguments, if requested by either party or ordered by the commission within sixty days of the notice of appeal.

D. Any person may timely file an amicus brief, not to exceed ten pages, with the director for consideration by the commission.

E. The commission shall review the whole record of the proceeding and shall, within 180 days of receiving the notice of appeal, issue its decision upholding or reversing the decision of the hearing officer. The commission may reverse all or part of the hearing officer's decision and remand the matter to the hearing officer for further proceedings.

F. If a hearing officer issues a decision granting a respondent's motion to dismiss for failure to state a claim and dismisses a complaint or part of a complaint pursuant to Paragraph (1) of Subsection B of 1.8.3.11 NMAC, then the complainant may appeal the hearing officer's decision to the commission as provided in these rules. If, however, a hearing officer issues a decision denying a respondent's motion to dismiss for failure to state a claim, then the respondent has no right to an interlocutory appeal of that decision to the commission, but may appeal any final decision of the hearing officer to the commission.

G. If a hearing officer dismisses a complaint, pursuant to Subsection G of 1.8.3.11, following the general counsel's determination that the complaint is not supported by probable cause, then the complainant has no right to an appeal of that dismissal to the commission.

H. A party may seek review of the commission's final decision by filing for a petition of writ of certiorari pursuant to Rule 1-075 NMRA.
[1.8.3.14 NMAC-N, 1/1/2020]

1.8.3.15 OPEN RECORDS AND CONFIDENTIALITY:

A. Thirty days after the director provides notice pursuant to Subsection F of 1.8.3.11 NMAC to the respondent of the allegations of a complaint, the general counsel's finding of probable cause, and the setting of the public hearing:

(1) the director shall make public the specific allegations of the complaint, the notification to the respondent, and any response filed by the respondent, and any related records, *provided* that:

(2) prior to the publication of any commission records pursuant to the preceding subparagraph, any proceedings in district court initiated by the commission to obtain subpoenas shall be sealed, and shall remain so until such time as the commission notifies the court that the commission has made the complaint public or the parties enter into an approved settlement agreement.

B. If a complaint is dismissed because the general counsel has found it to be frivolous or unsubstantiated, as provided in Subsection E of Section 10-16G-10 NMSA 1978, the commission shall not release to the public the complaint, the reason for its dismissal, or any related records. Nothing in this subsection shall prevent the making public of any document by a complainant or respondent to the proceeding.

C. Notwithstanding any other requirement in these rules or the law requiring notification to the complainant or respondent of commission actions on a complaint, the director may delay notifying parties or releasing to the public the complaint and related information if the director deems it necessary to protect the integrity of a criminal investigation.

(1) The director shall, within 10 days of making the decision to delay release of a complaint pursuant to this subsection, present to the commission the records and information to be withheld and the reasons for delaying their release.

(2) The commission may, by a majority vote pursuant to Subsection H of Section 10-16G-10 NMSA 1978, confirm the director's decision in a meeting closed pursuant to the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978, and the commission's open meetings resolution.

(3) The commission shall document in writing with reasonable specificity its decision on whether to confirm the director's decision, the reasons for its decision, and the time after which the release of documents must occur.

D. Except as otherwise provided by Section 10-16G-13 NMSA 1978, or these rules, all complaints, pleadings, evidence, findings of ethical violations, terms of settlements approved by the commission and other documents within the custody and control of the commission shall be public records subject to public inspection pursuant to the Inspection of Public Records Act, Section 14-2-1 NMSA 1978.

E. Notwithstanding the previous subsection, the commission, its staff and contractors shall not reveal any information that is:

(1) protected pursuant to any privilege in law or judicial rule, or

(2) otherwise made confidential by law.

[1.8.3.15 NMAC-N, 1/1/2020]

History of 1.8.3 NMAC: [RESERVED]