

Transmittal Form

Volume: Issue: Publication date: Number of pages: (ALD Use Only) Sequence No.

Issuing agency name and address: Agency DFA code:

Contact person's name: Phone number: E-mail address:

Type of rule action: (ALD Use Only)
New ☐ Amendment ☐ Repeal ☐ Emergency ☐ Renumber ☐ Most recent filing date:

Title number: Title name:

Chapter number: Chapter name:

Part number: Part name:

Amendment description (If filing an amendment): Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes ☐ No ☐ Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes ☐ No ☐ Public domain ☐

Specific statutory or other authority authorizing rulemaking:

Notice date(s): Hearing date(s): Rule adoption date: Rule effective date:

Concise Explanatory Statement For
Rulemaking Adoption:

Findings required for rulemaking adoption:

Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Check if authority has been delegated

Title:

Signature: (BLACK ink only)

Date signed:

FINAL ADOPTED RULE 12/4/19

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(D), the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, or Section 10-16-14(D) 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]



NEW MEXICO STATE ETHICS COMMISSION

800 Bradbury DR SE, Ste. 217, Albuquerque, New Mexico 87106

Jeremy D. Farris, *Executive Director*, (505) 490-0951

Hon. William F. Lang (*Chair*)
Jeff Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Ron Solimon
Dr. Judy Villanueva
Frances F. Williams

CONCISE EXPLANATORY STATEMENT FOR NMAC 1.8.3 (NMSA 1978, § 14-4-5.5 & 1.24.25.14.F NMAC)

Submitted to New Mexico State Records Center and Archives: December 5, 2019

1. Citation to authority authorizing rule: 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.
2. Effective date of rule: January 1, 2020
3. Date of adoption of rule: December 4, 2019
4. Date of meeting at which agency voted to approve rule: December 4, 2019
5. Reasons for adopting rule: To provide general procedural rules for administrative proceedings before the state ethics commission.
6. Reasons for any change between the published proposed rule and the final rule: *See* Attachment 1.
7. Reasons for not accepting substantive arguments made through public comment: *See* Attachment 2.



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CONCISE EXPLANATORY STATEMENT FOR NMAC 1.8.3

(NMSA 1978, § 14-4-5.5 & 1.24.25.14.F NMAC)

Reasons for any change between the initial published rule and final adopted rule

Submitted to New Mexico State Records Center and Archives: December 5, 2019

Section 1.8.3.1 through 1.8.3.6

No changes.

Section 1.8.3.7

1.8.3.7(E), (K) & (N): Adds definitions of “Claim”; “Person,” which follows the definition of “person” in the Campaign Reporting Act; and “Records,” which follows the definition of “records” in the Inspection of Public Records Act. Changes subsection ordering correspondingly.

Rationale: These terms are used throughout the rules and are not defined by the State Ethics Commission Act.

1.8.3.7(D) & (J): Changes definitions of “Brief” and “Party”. Adds “and Parties”.

Rationale: The definition of “Brief” is changed for accuracy. The definition of “Party” is changed to work in concert with the definition of “Person”.

Section 1.8.3.8

Deletes “addressing general practice protocols and procedures” at end of paragraph.

Rationale: Deletion of redundant language.

Section 1.8.3.9

Title: Deletes “ALLEGING ETHICS VIOLATIONS”.

Rationale: The language “ethics violations” is undefined, not readily susceptible to definition, and creates the misimpression that the commission has jurisdiction for only a subset of claims alleging violations of the laws over which the commission has jurisdiction. The commission has jurisdiction over all claims alleging violations of the statutes and constitutional provision listed in NMSA 1978, Section 10-16G-9(A). The rules should reflect the commission’s plenary jurisdiction.

1.8.3.9.A(1): Replaces “investigations of” with “a proceeding before the commission concerning an”.

Rationale: What the commission initiates are cases, matters, or proceedings, and the general counsel’s investigations are only a part of the procedure relating to the proceedings before the agency. “Proceeding” is a serviceable term. The first definition in Black’s Law Dictionary of “proceeding” is “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.”

1.8.3.9.A(1)(a): Deletes “, business, not for profit entity, or any public agency,”.

Rationale: As defined in the amended definitions section, “Person” is inclusive of the deleted, redundant material.

1.8.3.9.A(1)(b): Deletes “ethics violations” and added in its place “a violation of any statute or constitutional provision over which the commission has jurisdiction”.

Rationale: See above rationale for changes to 1.8.3.9 Title.

1.8.3.9.A(2)(b): Adds “mailing” and “email address”.

Rationale: The State Ethics Commission Act places the burden of notifying the respondent of a complaint filed against them. This burden is in contrast to civil practice, where the plaintiff has the burden of serving the defendant. To ease this significant administrative burden on the commission, the complainant should inform the commission of the respondent’s full contact information, to the extent known, including the respondent’s mailing address and email address.

1.8.3.9.A(2)(c): Deletes “constitutional provision” as unnecessary; “law” is inclusive of constitutional provisions.

1.8.3.9.A(3): Adds a new paragraph, providing “Any complaint filed pursuant to Subsection (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.”

Rationale: First, this rule enforces the State Ethics Commission Act’s requirement that complaints filed with the commission be signed and sworn under penalty of false statement. Second, this rule enforces the administrative necessity that the commission be informed as to the respondent’s contact information in order to notify the respondent of the complaint.

1.8.3.9.A(4): Changes opening sentence to read: “Any party may represent themselves or may be represented by a licensed attorney.” Adds final sentence, providing “Corporations and other non-natural persons must be represented by counsel.”

Rationale: The change makes clear that any party may appear *pro se* before the commission or be represented before the commission, but, if represented by another person, then only by a licensed attorney. Representation by an attorney is important because (i) commission proceedings involve motion practice, (ii) parties might need to preserve matters for appeal, (iii) the rules of evidence apply at evidentiary hearings, and (iv) commission decisions can have preclusive effect in subsequent litigation. The addition that corporations must be represented by counsel follows the Second Judicial District’s corresponding local rule, LR2-113(C), and corresponding rationale.

1.8.3.9(A)(4)(a): Creates a new paragraph; changed “complainant” to “represented party”; and add final sentence: “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.”

Rationale: The creation of two new paragraphs under 1.8.3.9(A)(4) groups all rule provisions that concern representation. “Complainant” is broadened to “represented party” because respondent’s attorneys, after entering their appearance, may also receive materials on behalf of the respondent. The addition of a permissive leave requirement for an attorney’s withdrawal, governed by the same permissive leave standard appearing in the Rules of Professional Conduct, ensures that parties appearing before the commission will not be left high and dry by reason of their attorney’s sudden withdrawal.

1.8.3.9(A)(4)(b): Transfers the language in Subsection 1.8.3.11.E to this new paragraph. Deletes first sentence of Subsection 1.8.3.11.E. Adds the sentence “‘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.”

Rationale: This transfer of language from Subsection 1.8.3.11.E to Subsection 1.8.3.9(A)(4)(b) groups together the provisions that concern attorney representation. The first sentence of the former Subsection 1.8.3.11.E is deleted as unnecessary. The addition of the last sentence provides an interpretation of “respondent’s duties” under both rule and NMSA 1978, Section 10-16G-10(K). The interpretation of Section 10-16G-10(K) is that “respondent’s duties” excludes conduct undertaken by elected public officials in furtherance of his or her campaign for reelection; therefore, the State Ethics Commission Act does not create a right to Risk Management Division provided counsel to defend against claims predicated on such conduct. By this recommended rule, the commission announces the position that the public should not be made to indemnify elected public officials from legal expenses incurred in defending conduct undertaken in the furtherance of their reelection campaigns.

1.8.3.9(A)(5): Adds language so that the first sentence reads: “The commission may proceed with any complaint, irrespective of whether the complaint is notarized, that is forwarded to the commission by another state agency”

Rationale: Complaints received by the Secretary of State’s Office or the State Purchasing Division of the General Services Department do not need to be notarized for those agencies to resolve such complaints. If those or other agencies refer complaints to the commission

for the commission's *adjudication* (as opposed to the commission's separate investigation and pursuit of civil court action), then this rule makes clear that the commission can begin the proceeding without the notarization requirement—that is, without either the referring agency or the commission having to contact the complainant to request notarization and refiling of the complaint. (That extra procedural step would create a large, administrative burden on the commission staff.) This rule interprets the requirements of NMSA 1978, Section 10-16G-10(B) to apply only to complaints “*filed with the commission* by a person who has actual knowledge of the alleged ethics violation.” Section 10-16G-10(A) (emphasis added). Furthermore, in support of this interpretation, NMSA 1978, Section 10-16G-9(D) signals that the Legislature understood that the commission would receive non-notarized complaints referred by other agencies, providing that “If the commission decides not to act on a complaint, whether the complaint was filed with the commission or forwarded from another public agency” Section 10-16G-9(D) indicates that the commission has power to act on complaints forwarded from other agencies, even though those forwarded complaints are not required to be notarized. Furthermore, NMSA 1978, Section 10-16G-5(C)(1), expressly allows the commission to initiate complaints in the commission's own administrative hearings procedure—ostensibly without the commission having to swear to or notarize the complaint.

Nota bene, however, that the definition of “complaint” at NMSA 1978, Section 10-16G-2(D) is “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.” Again, despite this definition and because of Sections 10-16G-5(C)(1), 10-16G-9(D), 10-16G-10(A), the recommended rule change interprets the notarization requirement to apply only to complaints that a person files with the commission in the first instance.

1.8.3.9(A)(7): Replaces “a joint powers agreement or other” with “an”

Rationale: Concision and deletion of unnecessary detail.

1.8.3.9(B): Replaces “less” with “fewer”.

Rationale: For style.

1.8.3.9(B)(3): Replaces “promptly” with “within five days”

Rationale: Specificity.

1.8.3.9(C): Adds new subsection to read: “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.”

Rationale: Enforces Laws 2019, Ch. 86, § 40, which imposes this limitation on the commission's jurisdiction.

Section 1.8.3.10

1.8.3.10(A): Replaces “ten” with “seven” and deletes “The respondent’s opportunity to respond is set forth as follows:”

Rationale: NMSA 1978, Section 10-16G-10(C) provides, “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.” § 10-16G-10(C) (emphasis added). Originally, the rules reflected “seven” but were changed to “ten” to make the time periods more consistent. The statute requires seven. The final clause is deleted because it is both underinclusive (the subsequent provisions also provide for the *complainant’s* ability to respond to a respondent’s motion to dismiss) and unnecessary.

1.8.3.10(A)(1). Adds “with the commission” in two places.

Rationale: Makes clear that responsive pleadings and motions are filed with the commission.

1.8.3.10(A)(3). Adds a new subsection providing, “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.”

Rationale: Makes explicit what happens if a respondent does not respond to a complaint.

1.8.3.10(B): Corrects reference to correctly read 1.8.3.9 NMAC.

1.8.3.10(D): Changes “but” to “or”. Changes “any interagency” to “an”. Adds “Subsection D of Section 10-16G-9(D)” and, at and of the subsection, “or Section 10-16-14(D) NMSA 1978.”

Rationale: The first change gives greater effect to the commission’s power under NMSA 1978, Section 10-16G-9(C) to “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.” The second change removes unnecessary material. The third change, the addition of Section 10-16-14(D) NMSA 1978, reflects the provision of the Governmental Conduct Act allowing the commission to forward Governmental Conduct Act claims filed with the commission “to the appropriate state agency or investigate the complaint on its own.” § 10-16-14(D).

1.8.3.10(E): Changes “any interagency” to “an”.

Rationale: Removes unnecessary material.

1.8.3.10(F): Deletes this subsection. Reorders subsequent subsection numbering.

Rationale: This subsection previously routed claims alleging violations of the Anti-Donation Clause of Article IX, Section 14 away from the commission's administrative hearings process and, rather, directed the commission either (i) to investigate and allege the claim in state district court or (ii) to refer the matter to the Attorney General. Originally, I was worried that the Legislature could not confer jurisdiction to decide a *constitutional* claim against a state employee or state public official to an administrative tribunal, where the administrative tribunal's decision could have a preclusive effect in subsequent civil court litigation. The Legislature's grant of jurisdiction to an administrative agency for constitutional claims struck me as a violation of Article III, Section 1 (the separation of powers constitutional provision) and an unlawful divestiture of the judicial power to decide constitutional claims, which the Constitution accords to the courts in Article VI, Section 1. The previous subsection had avoided any potential constitutional deficiency by ensuring, as a matter of procedure, that the commission would not adjudicate Anti-Donation Clause claims and, therefore, handle Anti-Donation Clause claims differently from other statutory claims within its jurisdiction. (There is no doubt that the Legislature can grant jurisdiction for statutory claims to the commission). Commissioner Bluestone asked for additional research into this issue.

After subsequent research, I believe the commission may exercise the jurisdiction the Legislature conferred for Anti-Donation Clause claims; hence, the commission may handle anti-donation claims in the same manner as the commission handles statutory claims. While there is no case directly on point, I think the law orients to this conclusion. But I emphasize that the case is close, and the case law on point is not clear. This is my reasoning:

In this area of public law, New Mexico case law has mainly focused on whether, as a matter of statutory interpretation of agency enabling statutes, the Legislature delegated to various administrative agencies the power to adjudicate constitutional claims. In those cases, the state appellate courts have almost uniformly concluded that, as a matter of statutory interpretation, the Legislature had not conferred such power to the administrative agencies in their respective enabling statutes and, therefore, that the agencies lack jurisdiction to determine issues beyond the scope of their respective legislatively-delegated powers.¹

¹*E.g., Schuster v. State Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶¶ 20–21, 283 P.3d 288 (“[A]ny constitutional challenge beyond MVD's scope of statutory review is brought for the first time in district court under its original jurisdiction.”); *Victor v. New Mexico Dep't of Health*, 2014-NMCA-012, ¶ 24, 316 P.3d 213, 219 (“Constitutional challenges that exceed the scope of the hearing officer's review are subject to the original jurisdiction of the district court.”); *Maso v. State of New Mexico Taxation & Revenue Dep't, Motor Vehicle Div.*, 2004-NMCA-025, ¶ 12, 135 N.M. 152, 155, 85 P.3d 276, 279 (“MVD lacks subject matter jurisdiction to consider matters beyond the scope of the statute and could not resolve a due process issue even with a driver's consent.”); *Martinez v. N.M. State Eng'r Office*, 2000-NMCA-074, ¶ 22, 129 N.M. 413, 9 P.3d 657 (stating that because the State Personnel Board is a statutorily created administrative body, it is limited to authority expressed or implied by statute).

Those cases are not insightful, because the State Ethics Commission Act expressly purports to delegate to the Commission the power to decide Anti-Donation Clause claims.

New Mexico case law has focused to a lesser extent on whether, under Article III, Section 1 and Article VI, Section 1, the Legislature *can* confer on an administrative tribunal the jurisdiction to adjudicate *constitutional* claims (as opposed to whether the Legislature has so conferred such jurisdiction).

While it is doubtful that the Legislature may confer on an administrative agency the jurisdiction to consider the constitutionality of statutes, including the agency's own enabling legislation,² the state appellate courts have recognized that the Legislature may confer on an administrative agency the jurisdiction to apply a constitutional provision to particular facts.³ Accordingly, the state appellate courts seem to have implicitly acknowledged the Legislature's ability to grant the commission the power to determine, at least as a tribunal of first review, whether a state public official or state employee violated the Anti-Donation Clause in particular circumstances.

Furthermore, because Rule 1-075 NMRA allows parties to seek judicial review of a final commission decision on an Anti-Donation Clause claim through a petition for a writ of certiorari, the State Ethics Commission Act likely does not divest the judiciary of its authority to be the final arbiter of constitutional claims.⁴ So, I am now less concerned

²See, e.g., *Sandia Sav. & Loan Ass'n v. Kleinheim*, 1964-NMSC-067, ¶ 14, 74 N.M. 95, 99, 391 P.2d 324, 327 (“*We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body.*” (emphasis original) (quoting 3, Davis, Administrative Law Treatise, § 20.04)).

³See *Sandia Sav.*, 1964-NMSC-067, ¶ 14 (quoting 3, Davis, Administrative Law Treatise, § 20.04); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 36, 124 N.M. 479, 486, 952 P.2d 474, 481 (Hartz, J., concurring in part and dissenting in part) (“Although *Sandia Savings* forbids agencies from deciding the constitutionality of legislation, it gives agencies the power to determine the ‘constitutional applicability of legislation to particular facts.’ That is, an agency has the authority to determine whether the constitution has been applied correctly on a particular occasion.” (internal citation omitted)). Note, however, that the federal analogue of the “public rights doctrine” in the area of Congressional power to create non-Article III courts is potentially in tension with the New Mexico cases *Sandia Savings* and Judge Hartz’s reading of *Sandia Savings* in his special opinion in *Chavez*. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (Brennan, J.) (recognizing that Congress does not have the same power to create adjunct, non-Article III courts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates.).

⁴See *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶ 22, 346 P.3d 1164, 1171 (“[B]y identifying the judiciary’s function as the determinant of that which constitutes the supreme law of the land—the Constitution—the *Dillon* court guaranteed constitutional litigants that judges,

about the commission's jurisdiction for Anti-Donation Clause claims, and the recommend rule change would treat those claims the same as statutory claims filed with the commission.

Section 1.8.3.11

1.8.3.11.B: Changes last sentence of main paragraph to read: "After reviewing the motion [to dismiss a complaint for failure to state a claim] 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 . . . [grant or deny the motion]." Previously, the rule provided that the general counsel would make a recommendation to the commission on a respondent's motion to dismiss for failure to state a claim, and the commission, in a closed meeting, would decide whether to grant or deny the motion.

Rationale: This rule concerns how respondents' motions to dismiss for failure to state a claim will be adjudicated. By these motions, a respondent argues that, even if the complainant's factual allegations are true, those facts do not constitute a violation of law and, accordingly, the complaint should be dismissed. The general counsel should review and make a recommendation on these motions as part of the general counsel's power to determine whether a complaint is frivolous, unsubstantiated, or supported by probable cause.

The general counsel's recommendation should go first to a hearing officer, who under Section 10-16G-12(A), has the power to dismiss a complaint upon receipt of the general counsel's recommendation. Review by the hearing officer is more convenient and reserves the commission for appeals. If the hearing officer grants the respondent's motion and dismisses a complainant's complaint, the complainant can appeal that dismissal to the full commission, who will hear the appeal in a closed meeting. (Recall, at this point in the procedure, the case is still confidential).

1.8.3.11.B(2): In the first sentence, adds "and" and replaces "complaint and respondent" with "parties". In final sentence, deletes "and direct" and "to" and adds "In that event," and "shall".

Rationale: This change is mainly stylistic. The change makes clear that the general counsel's obligation to initiate an investigation is governed by rule.

1.8.3.11.C: Adds new paragraphs, selected from the New Mexico civil rules of procedure and the New Mexico criminal rules of procedure. The new paragraphs govern the general counsel's investigations into the allegations of a complaint.

and not protests board members with realty backgrounds, hear and decide constitutional issues" (citation omitted)), *aff'd but criticized*, 2017-NMSC-026, ¶ 22, 401 P.3d 751.

Rationale: The previous rule merely restated the statutory provision regarding the general counsel's investigation and was insufficient to provide guidance to the general counsel and the parties about the general counsel's powers of discovery.

1.8.3.11.D: Adds to the final sentence "upon the commission's approval".

Rationale: This addition brings the rule in compliance with NMSA 1978, Section 10-16G-10(I)'s requirement that the commission apply to the district court for an order enforcing a subpoena.

1.8.3.11.F: Changes the first sentence to read: "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." Next, the following sentence is added: "In that event, the complainant and the respondent shall be notified in writing of the decision and the reasons for the dismissal." This change deletes the clause, "the commission will may either dismiss the complaint in a closed meeting pursuant to Subsection B of Section 10-16G-13 NMSA 1978, or direct the general counsel to proceed under 1.8.3.12 NMAC."

Rationale: This is an important and necessary change. The new rule more faithfully follows NMSA 1978, Section 10-16G-10(E), which provides, "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." § 10-16G-10(E) (emphasis added). The State Ethics Commission Act accords this important and non-reviewable determination to the general counsel, which, by statutory design, is the office that is closest to the facts and the most insulated from political influence.

Section 10-16G-12(A) is also relevant to this particular rule. That section provides that "Upon receipt of the general counsel's recommendation, the commission or hearing officer shall: (1) dismiss a complaint and notify the complainant and respondent of the dismissal; or (2) set a public hearing, as soon as practicable." § 10-16G-12(A).

The rule now out for public comment is based on the disjunctive "or" in Section 10-16G-12(A). The current version of the rule allows the commission to receive the general counsel's determination on probable cause and to second guess the general counsel's determination that a complaint is not supported by probable cause.

The current rule, however, ignores the non-discretionary language in Section 10-16G-10(E), which provides that, if the general counsel finds that a complaint is not supported by probable cause, "*the complaint shall be dismissed*." § 10-16G-10(E) (emphasis added). In view of Section 10-16G-10(E), the purpose of Section 10-16G-12(A) is not to allow either a hearing officer or the commission to overrule the general counsel's determination. Rather, the purpose of Section 10-16G-12(A) is, first, to make clear what happens following the general counsel's determination; and, second, to indicate who does the administrative work of dismissing the complaint following the general counsel's specific

determination that the complaint lacks probable cause—namely, a statutory entity with the power to dismiss a complaint: either a hearing officer or the commission. As Section 10-16G-10(E) makes plain, either a hearing officer’s power or the commission’s power of dismissing a complaint upon a general counsel’s finding that it is not supported by probable cause is not discretionary. The new rule reflects that this dismissal power is not discretionary. The new rule also provides that, as between the statutorily-available options of a hearing officer or the commission, a hearing officer will issue the dismissal of a complaint following a general counsel’s determination that it is not supported by probable cause. There is no need to convene a quorum of the commission to carry out an administrative, non-discretionary dismissal.

The new rule is not only more faithful to Section 10-16G-10(E). The new rule is also supported by an analogy to criminal practice, an analogy that reveals some of the separation of powers principles at work in the State Ethics Commission Act. In criminal practice, a prosecutor decides after an investigation whether to prosecute criminal charges against a defendant. A judge cannot overrule the prosecutor’s discretion to indict, and, similarly, a judge cannot review the prosecutor’s investigation and decide that a prosecutor incorrectly chose not to prosecute a case. Nor, for basic separation-of-powers principles, should a judge have the power to second-guess a prosecutor’s choice and require the prosecutor to file an indictment. If a judge had the power both to indict and then to preside over a (juryless) criminal trial, we would all have less liberty.

In the statutory scheme that the State Ethics Commission Act creates, the general counsel exercises the quasi-prosecutorial function of deciding whether or not a particular complaint, after full investigation, should be made public and heard by an administrative tribunal. The commission and the hearing officers, by contrast, exercise the judicial function of deciding whether claims of statutory or constitutional violation have merit and imposing any corresponding remedies. Accordingly, the State Ethics Commission Act creates a structural protection for respondents by establishing two, independent points for review and potential dismissal. The general counsel must first determine that a complaint is supported by probable cause (allowing a complaint to be made public); then, after that, the hearing officer (or the commission on appeal) must also determine that the complaint has merit. This structural protection is not accidental; it is meant to protect the respondent.

If the commission could second guess the general counsel’s determination that a complaint is not supported by probable cause and correspondingly make a complaint publicly available and set the case for a hearing, then the structural protection of two independent points of review that the Act creates for respondents evaporates. This commission would have the power both to ensure that complaints are publicly prosecuted and, then, to turn around and adjudicate those complaints. Again, I doubt that the State Ethics Commission Act’s language and structural reasoning allows the commission to have that combined power.⁵

⁵Under the current rule out for public comment, if the commission overturned the general counsel’s determination that the complaint against a respondent was not supported by probable cause, and if the respondent were subsequently found liable by the commission’s final decision,

I recognize the foregoing analysis impugns the commission’s power, under Section 10-16G-5(C)(1), to initiate complaints in the commission’s own administrative hearing process by approval of five commissioners (as opposed to filing such actions in district court); however, I believe that power is also problematic for similar reasons.

1.8.3.11.H: Creates a new subsection, providing: “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.”

Rationale: This subsection makes clear that, at any point, the complainant can exit the proceeding; however, if the complainant exits the case without there being a settlement with the respondent, that the commission has the power, under Section 10-16G-5(C)(1), to initiate a new case on the same facts; or, alternatively, to file a civil action in district court under Section 10-16G-9(F). Also, if the general counsel has found that a complaint is supported by probable cause, the complainant must file a motion to dismiss with the hearing officer, allowing the general counsel an opportunity to intervene.

Section 1.8.3.12

1.8.3.12.A(2): Creates a new paragraph allowing for consolidation of cases before the commission, by providing: “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.”

Rationale: The new paragraph allows the director to consolidate cases involving related questions. The new paragraph serves the efficient administration of cases before the commission.

1.8.3.12.B: Adds the clause, “from the complainant or after referral from another, agency whichever is later,” so that the first sentence of this subsection reads in its entirety, “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

the respondent’s counsel would likely file a petition for a writ of certiorari and argue that, given the Act, the rule is *ultra vires*. In response to that petition, the commission might then rely on a *Chevron*-style argument that the commission’s interpretation of its enabling statute—specifically, the interpretation of the disjunctive “or” in Section 10-16G-12(A)—is reasonable and should be accorded deference.

is later, the director shall report to the commission at a duly convened meeting on the status of the investigation.”

Rationale: This rule is necessary to ensure that the commission’s 90-day clock on dispositions (or the director’s updates to the commission) is not ticking while a complaint resides with another agency. For example, the Secretary of State must first attempt to attain voluntary compliance with certain statutes over which there is shared jurisdiction. In the event of a referral from the commission to the Secretary of State, the commission’s clock under 10-16G-11(A) should not be ticking while the Secretary of State attempts to achieve voluntary compliance.

1.8.3.12.D: Deletes this section.

Rationale: First, as the Secretary of State pointed out in her pre-filed written comments, the State Ethics Commission Act makes no provision for mediation of complaints. Second, mediation seems to favor respondents. Because complainants are not seeking to recover for any injury, but are instead blowing the whistle, it is unclear why a complainant would prefer mediation to a public hearing. Mediation will not enable a complainant to receive a quicker recovery (unlike in civil litigation). A respondent, by contrast, would prefer mediation to avoid a public hearing. Third, mediation, especially where the commission is meant to pay the expenses, would cause unnecessary administrative burdens: professional services contracts will have to be executed and approved, within the 90-day post-complaint period for setting a public hearing. Fourth, a mediation rule opens the door to a host of unanswered procedural questions that come in tow: is the mediation term sheet a public record? Is the general counsel or executive director required to participate in a mediation? Is the mediator permitted to engage in *ex parte* communication with the hearing officer or general counsel?

Of course, the absence of a mediation rule does not mean that mediation of disputes is prohibited. The current proposed rules permit the general counsel to enter into a proposed settlement agreement with the respondent, *see* 1.8.3.11(G) NMAC, and a complainant may voluntarily dismiss a complaint at any time, *see* 1.8.3.11(H) NMAC. Thus, in the absence of any mediation rule, the parties would still be permitted to engage in mediation and, if successful, dismiss the complaint or propose a settlement for approval by the commission.

Section 1.8.3.13

1.8.3.13.A: Adds “act on or”. Deletes “evidentiary” and “or one or more members of the commission”.

Rationale: The addition of “act on or to” is necessary because, under these suggested rules, hearing officers will be doing work other than conducting hearings. For example, hearing officers will also decide respondents’ motions to dismiss for failure to state a claim. They will also dismiss complaints following the general counsel’s determination that a complaint is not supported by probable cause. The deletion of “evidentiary” is for accuracy. Given

the hearing officer's powers under Subsection 1.8.3.13.H, the hearing officer is likely to conduct non-evidentiary hearings before the evidentiary hearing, such as hearings relating to scheduling matters, discovery issues, and pre-evidentiary motions.

1.8.3.13.A: Deletes “; *provided*, that no member of the commission shall be paid any compensation, other than per diem and mileage, for serving as a hearing officer. If any commissioner presides over an evidentiary hearing on a complaint, that commissioner shall recuse from presiding over any appeal relating to the same complaint.”

Rationale: The Commission received a comment arguing that Commissioners should not serve as hearing officers because “the public and the participants in the ethics [complaint] process may all too readily question whether having Commissioners sitting in judgment of one another builds the type of confidence in the system to make it work effectively and credibly.” The Commission agrees with this comment and voted to delete language in this rule permitting Commissioners to serve as hearing officers.

1.8.3.13.B: Deletes “unreasonable,” as unnecessary.

1.8.3.13.C: Adds the introductory clause, “If a hearing officer has not already notified the parties of a hearing through the issuance of a scheduling order,”.

Rationale: The director is unlikely to be the commission's agent that notifies the parties of when the hearing will be scheduled. This notification is likely to be done by the hearing officer through the issuance of a stipulated pre-hearing order or a subsequent scheduling order.

1.8.3.13.F: Adds “parties”. Deletes “respondent and the complainant”. For brevity.

1.8.3.13.G: Deletes current language in subsection and replaces current language with the following: “The hearing officer shall permit the general counsel to intervene upon request.”

Rationale: This rule change makes clear that only the general counsel may intervene in proceedings before hearing officers. Intervention by the general counsel is needful. For example, in a case where the complainant is an unrepresented state employee blowing the whistle on improper conduct and the respondent is a powerful state employee or public official with Risk Management Division provided counsel, then the general counsel should have the ability to intervene on behalf of the complainant.

Yet, intervention should be limited to the general counsel only. This limitation is for reasons of administration. At this early stage, it would impose an onerous administrative burden to allow for intervention by any person. Recall that, unlike civil practice before the state and federal courts, where licensed attorneys have assigned electronic filing credentials and can easily file into cases on behalf of their clients, the commission would have to create new account credentials for any person that wants to appear before the commission as a party and file papers. In the beginning of the commission's operation, this would create a burden.

Furthermore, the suggested change to Subsection 1.8.3.13.G incentivizes persons wanting to appear before the commission to file complaints with the commission or to submit amicus briefs.

1.8.3.13.H(13): Deletes “unethical” as unnecessary and not readily susceptible to definition.

1.8.3.13.J & J(1): Adds “who appear” and “to request the commission’s authority to petition a district court”.

Rationale: Clarity and conformance to NMSA 1978, Section 10-16G-10(I).

1.8.3.13.J(4): Adds “Before the hearing”. For clarity.

1.8.3.13.K: Creates new subsection, providing: “Any person may timely file an amicus brief, not to exceed ten pages, with the director, for consideration by the hearing officer.”

Rationale: Allows persons to file amicus briefs with hearing officer. This ability allows a form of participation for entities that might otherwise seek to intervene in a case as a party.

1.8.3.13.M: Adds “termination”. Deletes “conclusion”, “or constitutional provision”, and “enforcement”. Adds new paragraph headings.

Rationale: Clarity and accuracy. Separates what the hearing officer may do in their discretion (e.g. impose fines and recommend commensurate disciplinary action), from what the hearing officer must do (e.g., state the reasons for their decision, and provide the parties with the notice of the right to appeal).

1.8.3.13.M(4): Deletes “the”. For style.

1.8.3.13.N: Deletes extant language in subsection, and replaces with: “Clear and convincing evidence is required to support a finding by a hearing officer that a respondent’s conduct was fraudulent or willful.” For style.

1.8.3.13.O: Creates new subsection, providing: “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.”

Rationale: Adds necessary language to maintain compliance with a specific provision of the Governmental Conduct Act. NMSA 1978, Section 10-16-13.1 bears on the commission’s remedial power for violations of the Governmental Conduct Act. That section requires the opportunity for the respondent to cure violations under certain circumstances.

1.8.3.13.O: Creates new subsection, providing: “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.”

Rationale: For completeness. Adds language to explain what happens if a hearing officer determines, after a full hearing, that the respondent *did not* violate any law within the commission’s jurisdiction.

1.8.3.13.Q. Adds “new, sealed”.

Rationale: To protect commission computers from viruses and malware.

Section 1.8.3.14

1.8.3.14.A: Adds “Except as provided by Subsections E and F of 1.8.3.14 NMAC,” and “final”

Rationale: Makes plain that there are exceptions to the ordinary appellate procedure in two instances. Makes clear there are no interlocutory appeals of evidentiary rulings.

1.8.3.14.C & D: Switches the order of sections B and C.

Rational: The rule addressing briefing should precede the rule addressing oral argument, mirroring the chronological order of appellate procedure.

1.8.3.14.C: Replaces the section with a new section providing: “The commission shall schedule oral arguments, if requested by either party or ordered by the commission within sixty days of the notice of appeal.”

Rational: For clarity.

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

Rationale: Allows for amicus briefs to be filed with commission sitting on appeal.

1.8.3.14.F: Creates new subsection, providing: “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.”

Rationale: This rule follows civil practice for appeals of district court rulings on motions to dismiss for failure to state a claim upon which relief can be granted made under Rule 1-012(B)(6). In legal parlance, the rule provides that there is no “interlocutory appeal” for such dismissals.

In other words, if the respondent loses his or her motion to dismiss for failure to state a claim, then the respondent cannot stop the normal course of the proceedings by appealing the hearing officer’s ruling. But a respondent likely still could presents those arguments to the commission on appeal. For instance, the respondent likely would have an opportunity to make substantially similar arguments about why they did not violate the law before the hearing officer and, then, if necessary, appeal the final decision of a hearing officer to the commission.

By contrast, if a respondent wins his or her motion to dismiss for failure to state a claim, and the hearing officer accordingly dismisses the complaint, then the complainant has the ability to appeal that final decision of the hearing officer to the commission.

1.8.3.14.G: Creates a new subsection, providing: “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.”

Rationale: This rule makes clear that, if the general counsel determines a complaint is not supported by probable cause, not only is the hearing officer’s dismissal of the complaint non-discretionary (as discussed above in the commentary on 1.8.3.11.F), but also the commission cannot review the hearing officer’s dismissal and, by implication, the general counsel’s determination. This rule cements the non-discretionary nature of the general counsel’s determination that a complaint is not supported by probable cause.

1.8.3.14.H: Creates a new subsection, providing “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.”

Rationale: This rule serves as a signpost for how to seek judicial review of a final commission action on appeal. While there is no right of appeal from a final commission decision, parties may nevertheless seek judicial review of final commission decisions by petitioning for a writ of certiorari from a district court under Rule 1-075 NMRA.⁶

Section 1.8.3.15

1.8.3.15.A(1): Deletes “and”. Adds “and any related records”.

⁶Several cases support this rule. See *Giddings v. SRT-Mountain Vista, LLC*, 2019-NMCA-025, ¶ 12; *RIO Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 27, 144 N.M. 636, 645, 190 P.3d 1131, 1140; *Tri-State Generation & Transmission Ass’n, Inc. v. D’Antonio*, 2011-NMCA-014, ¶¶ 10-12, 149 N.M. 386, 389–90, 249 P.3d 924, 927–28.

Rationale: This rule provides that 30 days after the director provides notice to the respondent of the general counsel's finding of probable cause, the director will make publicly available: the complaint, the notification to the respondent, any response filed by the respondent, and related records. "Related records" is meant to include filings such as a complainant's response to a respondent's motion to dismiss. Operationally, the intention is, 30 days after the director provides notice to the respondent of the general counsel's finding of probable cause, the commission will make available to the public all docket entries filed by either party up to that point.

1.8.3.15.B: Deletes "or". Adds "or any related records".

Rationale: This rule clarifies that the commission will not release any document related to the matter in which a complaint is dismissed for being frivolous or unsubstantiated. This rule serves as a kind of prophylaxis for the commission's obligation under NMSA 1978, Section 10-16G-10(E) to "not make public a complaint that has been dismissed pursuant to this subsection or *the reasons for the dismissal.*" § 10-16G-10(E) (emphasis added).

1.8.3.15.C(2): Adds "by a majority vote pursuant to Subsection H of Section 10-16G-10 NMSA 1978".

Rationale: Achieves consistency with the statute.



NEW MEXICO STATE ETHICS COMMISSION

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CONCISE EXPLANATORY STATEMENT FOR NMAC 1.8.3

(NMSA 1978, § 14-4-5.5 & 1.24.25.14.F NMAC)

Reasons for not accepting substantive arguments made through written pre-filed public comment

Submitted to New Mexico State Records Center and Archives: December 5, 2019

Section 1.8.3.1 through 1.8.3.6

No comments were received.

Section 1.8.3.7

1.8.3.7(K): The Secretary of State argued for “expanding the definition of ‘person’ under subsection K to: ‘any individual or entity, including but not limited to a federal, state or other governmental unit or subdivision, or an agency, department or instrumentality thereof.’”

Rationale: the current definition of “person,” includes any “entity,” and “entity” includes governmental units or subdivisions. Therefore, the proposed expansion is unnecessary.

1.8.3.7(O): The Secretary of State argued for “including a definition of “referral date,” defined as the date contained on the communication or correspondence referring a complaint to the SEC from any public agency or entity, local, state or federal.” This change accompanies a separate change to 1.8.3.9(A)(6) advocated by the Secretary of State to include a specific reference to the “referral date” of a complaint “to ensure a consistent calculation of the date of filing with the commission.”

Rationale: 1.8.3.9(A)(7) states that a complaint is timely for statute of limitations purposes if it is timely filed with the entity that later refers the complaint to the Commission. Since the date of referral is not relevant to the statute of limitations, an additional definition of “referral date” is unnecessary.

Section 1.8.3.8

No comments were received.

Section 1.8.3.9

1.8.3.9(A)(1)(a): Mr. Kenneth S. Resnick argues that the rules should include a definition of “actual knowledge” clarifying that a complainant “need not have “actual knowledge” (in the sense of direct, first-hand and personal knowledge) of all the factual elements of the alleged violation before filing a complaint.”

Rationale: “actual knowledge” is defined as “[d]irect and clear knowledge, as distinguished from constructive knowledge[.]”¹ Courts generally discuss the term in the context of determining whether a party’s knowledge of some fact or condition triggers (or defeats) a statute of limitations defense or some other legally-significant condition precedent.² “[Actual knowledge] does not mean first-hand knowledge, but only ‘knowledge’ as the word is used in common parlance[.]”³ Therefore, the proposed change is unnecessary.

Section 1.8.3.10

The commission did not receive any substantive arguments that were not accepted.

Section 1.8.3.11

1.8.3.11(E): The Secretary of State argues that “promptly notify” should be replaced with a definitive time.

Rationale: This addition would only create an internal administrative burden. The time frame under issue is when the general counsel should announce their decision resulting from their investigation on probable cause, a decision that is not otherwise open to public view.

Section 1.8.3.12

1.8.3.12(A): The Secretary of State argues that “promptly notify” should be replaced with a definitive time.

Rationale: This addition would only create an internal administrative burden. The time frame under issue is when the general counsel should announce their decision resulting from their investigation on probable cause, a decision that is not otherwise open to public view.

¹ Black’s Law Dictionary (11th ed. 2019)

² See, e.g., *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 18, 145 N.M. 542, 202 P.3d 801 (discussing requirement that an insurer with “actual knowledge of the identity of a class-two insured with an allegedly compensable claim” disclose to the insured the benefits the insured may be entitled to receive under a policy); *Higgins v. Board of Directors of New Mexico State Hospital*, 1964-NMSC-034, 73 N.M. 502, 389 P.2d 616 (discussing Workers Compensation Act’s provision requiring notice to an employer of a covered injury within 30 days of occurrence, except where the employer has “actual knowledge” of an accident that caused a claimed injury). “Actual knowledge” thus does not necessarily imply “firsthand knowledge.”

³ *Collins v. Big Four Paving, Inc.*, 1967-NMSC-019, ¶ 13, 77 N.M. 380, 423 P.2d 418.

Section 1.8.3.13

1.8.3.13: The Secretary of State correctly notes there are no provisions that set forth the procedures for binding arbitration for certain Financial Disclosure Act claims under NMSA 1978, Section 10-16A-8(B).

Rationale. None will be added to NMAC 1.8.3, because the statute, Section 10-16A-8(B)-(D), provides enough clarity as to procedure. For example, the statute makes clear the Uniform Arbitration Act applies to such post-commission proceedings.

1.8.3.13(A): The Secretary of State argues that this provision should be modified so that “the State Ethics Commission provide a list of at least five arbitrators provided by the [Commission] from which the person against whom the complaint has been filed may select one within a specified number of days.”

Rationale: The Ethics Commission Act and these rules contemplate a hearing officer taking evidence and issuing a final decision on a complaint after the general counsel determines the complaint is supported by probable cause. *See* NMSA 1978, §§ 10-16G-5(A)(3), -12, -13, -16(B). Although NMSA 1978, § 10-16A-6(B) (2019) states that a respondent may demand binding arbitration after the State Ethics Commission imposes a civil penalty under the Financial Disclosure Act, any binding arbitration pursuant to the Act would be conducted under those statutory provisions, not these rules.

1.8.3.13(A): Mr. Kenneth S. Resnick argues that hearing officers should be required to have “minimum years of legal experience” and “some minimum relevant subject-matter experience” with the rules of civil procedure, rules of evidence, and litigation/trial practice.

Rationale: The rules currently require hearing officers to be “familiar with the ethics and election laws enforced by the commission,” and the Commission can set additional minimum requirements as necessary during the process of contracting with hearing officers.

1.8.3.13(M): Mr. Kenneth S. Resnick argues that a hearing officer should be permitted to “make any observations or recommendations with respect to any perceived gaps, weaknesses, ambiguities in the public ethics regulations (substantive or procedural) or other constructive suggestions for systematic improvements in the public ethics sphere.”

Rationale: Because the hearing officer serves as the chief factfinder in the Commission’s complaint process, it would not be appropriate to give the hearing officer authority to offer suggested revisions to the laws they have been charged with interpreting and enforcing. This could create an appearance that their decision was motivated less by what they determined to be the law and more by what they believe the law should or should not proscribe. Moreover, a hearing officer can and should issue detailed findings of fact that would permit the commission, sitting in an appellate capacity, to serve the

same function. In addition, under the current rules the hearing officer is (by design) separate from political influence, being selected by the director, not the commissioners. But by the same token, the hearing officer is less accountable to the public, which elects the legislators who in turn nominate Commission members. As a bipartisan body, the Commission's recommendations will carry more weight with the legislature than the recommendations of a hearing officer.⁴

Section 1.8.3.14

1.8.3.14(B)(3): The Secretary of State argues that a page limit of 10 pages for an appellate brief seems too limited, and suggests that, if the NMSEC implements a 10-page limit, it should be exclusive of the cover page, table of contents, list of authorities, and signature page/certification of service.

Rationale: The Commission's subject matter jurisdiction is limited. With that limitation in mind, ten pages is enough to adequately frame the arguments.

Section 1.8.3.15

The commission did not receive any substantive arguments that were not accepted.

⁴ See NMSA 1978, § 10-16G-9 (stating that "the state ethics commission shall submit a report to the legislature and the office of the governor regarding whether to extend commission jurisdiction," and if so "address . . . recommended changes to existing law.").