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NMAC

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) Recent filing date:

New ☐ Amendment ☒ Repeal ☐ Emergency ☐ Renumber ☐

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?

Please list attachments or Internet sites if applicable.

Yes ☐ No ☒

If materials are attached, has copyright permission been received?

Yes

☐

No

☐

Public domain

☒

Specific statutory or other authority authorizing rulemaking:

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.

Notice date(s):

Hearing date(s):

Rule adoption date:

Rule effective date:

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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.

[1] Reasons for adopting rule, and summary of agency analysis:

The amendments add definitions of important terms to account for changes to the complaint filing process. The amendments streamline and improve the processes governing the investigation of complaints, the issuance and enforcement of subpoenas, and the conduct of hearings on complaints. The amendments (i) conform the State Ethics Commission's administrative rules with Laws 2021, Chapter 109 (House Bill 244, as amended), which amends the State Ethics Commission Act to delete the notarization requirement for administrative complaints; (ii) conform the commission's administrative rules with the commission's electronic case management and filing system; (iii) improve the efficient and fair administration of the commission's administrative cases by resolving several gaps and ambiguities that staff have noted in the Commission's first sixteen months of jurisdiction for administrative complaints, by (among other things) allowing complainants to amend their complaints, limiting complainants in the number of complaints they may file in a calendar year (to prevent vexatious litigants), enabling the executive director to make jurisdictional determinations more efficiently, enabling the general counsel to make probable cause determinations more efficiently, formalizing the process by which the commission may initiate administrative complaints, and clarifying the commission's subpoena powers.

[2] Reasons for any change between the published proposed rule and the final rule:

The only change between the published proposed rule and the final rule is located at Subsection 1.8.3.9(E) NMAC. At the meeting in which the Commission adopted the final rule, the Commission amended 1.8.3.9(E) to add paragraph (4), which provides "a commissioner's vote to initiate a complaint pursuant to this Subsection E is not grounds for recusal pursuant to Subsection A of 1.8.2.8 NMAC."; and to add an "; and" at the end of paragraph (3). The reason for this change is to clarify the Commission's view that it may initiate complaints under the statutory authority provided by Section 10-16G-5(C)(1), NMSA 1978, without having to recuse if, following a hearing officer's order, the administrative matter is appealed to the full Commission.

[3] Reasons for not accepting substantive arguments made through public comment:

No substantive arguments were submitted to the Commission in writing or at the public rule hearing relating to the proposed amendments to 1.8.3 NMAC.

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

Name:

New Mexico State Ethics Commission

Check if authority has been delegated

☐

Title:

Executive Director

Signature: (BLACK ink only OR Digital Signature)

Jeremy Farris

Digitally signed by Jeremy Farris
Date: 2021.08.16 15:56:02 -06'00'

Date signed:

8/16/2021

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This is amendment to 1.8.3 NMAC amending Sections 1, 7, 9, 10, 11, renumbered 13, 14 15 and 16; and adding new Section 12; and renumbering subsequent existing sections after new Section 12, effective 9/14/2021.

1.8.3.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, New Mexico 87106.

[1.8.3.1 NMAC-N, 01/01/2020; A, 09/14/2021]

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. “Candidate” as used in this part, has the same meaning as it does in Subsection G of Section 1-19-26 NMSA 1978 of the Campaign Reporting Act, Section 1-19-25 NMSA 1978.

F. “Case management system” is the commission’s electronic filing and notification system for complaints, which may be accessed at <https://proceedings.sec.state.nm.us>.

[E] G. “Claim” is a complainant’s allegation that a respondent violated a particular provision of law.

[F] H. “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] I. “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] J. “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] K. “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] L. “Party” and “Parties” means the named persons in a proceeding before the commission or a hearing officer.

[K] M. “Person” means any individual or entity.

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

[M] O. “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] P. “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, 01/01/2020; A, 09/14/2021]

1.8.3.9 COMPLAINTS: FILING REQUIREMENTS AND LIMITATIONS; AMENDMENTS; NOTICE; TIME LIMITATIONS; CONSOLIDATION; COMMISSION-INITIATED COMPLAINTS:

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, or a restricted donor subject to the Gift Act.

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

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(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 Subsection C of Section 10-16G-5 NMSA 1978; or

(c) by accepting a complaint filed with another public agency or legislative body and forwarded by that agency or legislative body 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 electronically on the commission's case management system, or on a form prescribed by the commission and provided at no cost to the complainant or in a substantially equivalent form, which the director or the director's designee shall record electronically on the commission's case management system;

(b) state the name and, to the extent known to the complainant, the respondent's 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 and sworn to by the complainant, under penalty of false statement.

(3) The director shall reject 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 respondent's mailing address or email address, 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) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC may be amended once as a matter of course at any time before a responsive pleading is served. Otherwise, the complainant may amend the complaint by leave of the director. An amended complaint must be filed within seven days of the director's determination under Paragraph (3) of Subsection A of 1.8.3.10 NMAC that the commission has jurisdiction over the complaint.

(5) Unless the director grants the complainant leave, the commission shall not accept a complaint filed by a complainant who, within the previous calendar year, filed two complaints that were subsequently dismissed. In applying for leave to file a third or subsequent complaint within the same calendar year, the complainant shall explain how, as compared to the dismissed complaints, the proposed complaint concerns different facts, asserts different claims, or asserts claims against different respondents.

(6) By registering and filing a complaint through the commission's case management system, a party agrees to accept electronic service of subpoenas, notices, and other filings as a condition of submitting filings with the commission.

~~[(4)]~~ (7) 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]~~ attorney representing ~~[any]~~ party shall enter an appearance with the commission and register on the commission's case management system. 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 a]~~ Any official notice, ~~[including a subpoena issued pursuant to Subsection J of Section 10-16G-10 NMSA 1978],~~ 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]~~ is 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 1978 and this rule, excludes:

(i) conduct undertaken by an elected public official in furtherance of his or her campaign for election or reelection; and

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(ii) any duty or obligation that by law is personal, rather than official, in nature.

~~[(5)] (8)~~ The commission may proceed with any complaint~~[, irrespective of whether the complaint is notarized,]~~ that is forwarded to the commission by another ~~[state]~~ public 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)](9)~~ 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)] (10)~~ 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-]~~candidate 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]~~ and, if applicable, returned to the referring entity.

D. The director may consolidate a complaint with any other pending complaint involving related questions of fact or laws; provided that the consolidation will not unduly delay resolution of an earlier-filed complaint, unduly prejudice any complainant, or compromise the right of any complainant or respondent to confidentiality under these rules.

E. The Commission may initiate a complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist, lobbyist's employer, or a restricted donor subject to the Gift Act, if:

(1) any commissioner or the director presents to the commission information or documents showing a violation of any statute or constitutional provision over which the commission has jurisdiction;
(2) the director determines that the complaint would be within the commission's jurisdiction;
and

(3) five commissioners vote to initiate the complaint.
(4) A commissioner's vote to initiate a complaint pursuant to this Subsection E is not grounds for recusal pursuant to Subsection A of 1.8.2.8 NMAC.

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F. If the commission initiates any complaint under Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978 and Subsection E of 1.8.3.9 NMAC, then the director shall:

(1) provide the respondent with notice of the complaint in accordance with Subsection A of 1.8.3.10 NMAC; and

(2) forward the complaint to the general counsel to initiate an investigation in accordance with 1.8.3.11 NMAC.

G. If the director determines that the complaint, either in whole or in part, is subject to referral to another state or federal agency in accordance with Subsection D of Section 10-16G-9 NMSA 1978, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, Subsection D of Section 10-16-14 NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2 NMSA 1978, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notice to the respondent of the referral.

H. When the commission initiates its own administrative complaint, the commission may serve in an appellate role after a hearing officer decision, and the commission will be limited to reviewing the record developed at the hearing. As such, except as provided in Subsection E of 1.8.3.9 NMAC, Subsections I & J of Section 10-16G-10 NMSA 1978, Subsection A of Section 10-16G-11 NMSA 1978, Subsection A of 1.8.3.12 NMAC, or Subsection J of 1.8.3.14 NMAC, the commission shall not receive any information related to a complaint filed pursuant to Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978 and Subsection E of 1.8.3.9 NMAC until an appeal is made pursuant to 1.8.3.15 NMAC.

[1.8.3.9 NMAC-N, 01/01/2020; A, 09/14/2021]

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 a complaint, the director shall notify the respondent of the filing of the complaint; provided that, for any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, the director shall ensure that the complaint satisfies the filing requirements set forth in Paragraph (1) of Subsection A of 1.8.3.9 NMAC before notifying 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] complaint to determine whether [the complaint] it 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, unless otherwise provided below, the director shall:

(1) provide the complainant with notice that the commission has jurisdiction for the complaint;

(2) provide the respondent with notice of the complaint and inform the respondent that 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; and

(3) forward the complaint to the general counsel to initiate an investigation. Upon receiving the respondent's responsive pleading, the general counsel may request the complainant to file a response, which, if requested, is due within 15 days from the date of the respondent's responsive pleading. The response may answer the complaint's assertion of facts and present arguments that the complaint is frivolous, unsubstantiated or not supported by probable cause.

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D. If the director determines that the complaint, either in whole or in part, is ~~[not wholly within the commission's jurisdiction, or is within the jurisdiction of]~~ subject to referral to another state or federal agency~~[either in whole or in part]~~, pursuant to Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, ~~[or]~~ Subsection D of Section 10-16-14 NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2 NMSA 1978, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notices to the complainant and the respondent of the referral.

E. If the director determines that the complaint is within the jurisdiction of the commission and recommends that the commission should not act on some or all aspects of the complaint, then the commission shall decide whether to dismiss some or all aspects of the complaint under Subsection C of Section 10-16G-9 NMSA 1978.

~~[E]~~ **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]~~ **G.** 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 B 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]~~ **H.** 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, 01/01/2020; A, 09/14/2021]

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

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]~~ **B.** 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. The general counsel, or the general counsel's designee, may:

- (1) ~~[The general counsel, or the general counsel's designee, may send to any party requests for production of]~~ Request to inspect books, records, documents and other evidence reasonably related to a

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complaint; request[s-for admission] the complainant or respondent to admit certain facts; and serve written interrogatories, to be responded to under oath 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) Interview a witness under oath and outside the presence of the parties; and

(2)(3) [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.]

C. 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. If a party refuses to respond to the general counsel's request for information or 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 either a hearing officer or the commission determines the failure was substantially justified or is harmless.

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:

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_____ (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, 01/01/2020; A, 09/14/2021]

1.8.3.12 SUBPOENAS; ENFORCEMENT:

A. If the general counsel determines it is necessary, the director shall request the commission's authority to file a petition with the designated district court judge or other judge pro tempore as designated pursuant to order of the chief judge of the supreme court:

_____ (1) _____ 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;

_____ (2) _____ to order enforcement if the person subpoenaed neglects or refuses to comply; or

_____ (3) _____ to resolve any assertion of privilege.

B. 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. The petition shall be filed *ex parte* and under seal pursuant to procedures for filing established by the designated district court judge.

C. If the petition is granted, subpoenas shall be issued by the general counsel and served as follows:

_____ (1) _____ If the subject of the subpoena is the complainant or the respondent, by email to the complainant or respondent if the complainant or respondent has previously agreed to receive notice of filings with the commission by email;

_____ (2) _____ On a department or agency of the state by service on the department or agency's general counsel, or by service in the manner set out by law for serving the department or agency; and

_____ (3) _____ On any other person by handing it to the person or their attorney, leaving it at the person's office or dwelling house with some person of suitable age and discretion then residing there.

D. A subpoena issued pursuant to this Section may command the appearance of a witness at a deposition or at a hearing pursuant to 1.8.3.14 NMAC. A person who is not a party or an officer of a party may not be commanded to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person unless the subpoena is to attend and give testimony at a hearing. A subpoena ordering a person to attend a deposition via telephone or web conference complies with the requirements of this subsection.

E. A party claiming an interest in the materials responsive to the commission's subpoena or the recipient of the subpoena may serve a written objection on the general counsel or the general counsel's designee within 14 days after service of the subpoena. If an objection is timely served, the person subject to a subpoena need not comply with the subpoena until the commission files a motion to compel compliance pursuant to Subsection F of 1.8.3.12 NMAC and the motion is granted.

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F. If a person, including a party, 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. The designated district judge or other district court may impose sanctions or other relief permitted by law, including contempt, if a person neglects or refuses to comply with an order enforcing the subpoena and compelling compliance.
[1.8.13.12 NMAC-N, 09/14/2021]

[1.8.3.12] 1.8.3.13 GENERAL COUNSEL'S PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; 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.] If the general counsel finds probable cause to support the allegations of the complaint, the general counsel shall report promptly the general counsel's findings and recommendations to the director, and the director shall:

(1) promptly notify both the complainant and the respondent:
(a) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;
(b) of the finding of probable cause as to specific claims; and
(c) 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; and

(2) 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.

B. 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.

C. 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.

D. 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.

[B] E. 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] F. 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

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(2) the agreement shall be effective upon approval by the commission at a public meeting.
[1.8.3.12 NMAC-N, 01/01/2020; Rn 1.8.3.13 NMAC & A, 09/14/2021]

**[1.8.3.13] 1.8.3.14 HEARING OFFICERS; SUMMARY DISPOSITION; 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. A hearing officer shall conduct a hearing fairly and impartially.

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. In the event of a conflict between these procedural rules and the rules of evidence governing proceedings in the state courts, these procedural rules control. 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)] (7) of Subsection A of 1.8.3.9 NMAC.

G. The hearing officer shall permit the general counsel to intervene upon request. If the complaint was initiated by the commission under Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978 and Subsection E of 1.8.3.9 NMAC, then the general counsel shall represent the commission at the hearing.

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.

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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. Evidence shall be presented by the parties at the hearing consistent with the terms agreed to in a prehearing conference or as set forth in a scheduling order entered under Subsection H of 1.8.3.14 NMAC. The hearing officer may allow a deviation from the agreed-upon process for good cause.

(1) The general counsel shall present any evidence collected in the investigation relating to the complaint that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is allowed by the hearing officer.

(2) The respondent may present evidence that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is otherwise allowed by the hearing officer.

(3) The general counsel or the general counsel's designee may authenticate evidence produced during an investigation if the source of the evidence declines a request to appear and testify about the evidence and the hearing officer determines that there are no other reasonable means for authenticating the evidence.

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

[L] M. 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] N. After the termination of the hearing, or in lieu of a hearing if, upon a motion by a party or the general counsel, the hearing officer concludes there is no genuine dispute as to any material facts, [if] the hearing officer [finds by a preponderance of] shall issue written findings and conclusions on whether the evidence establishes that the respondent's conduct as alleged in the complaint [constituted] constitutes a violation of any law within the jurisdiction of the commission. [the hearing officer] The hearing officer's 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] O. Clear and convincing evidence is required to support a finding by a hearing officer that a respondent's conduct was fraudulent or willful.

[O] P. 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 NMSA 1978, before taking any action under Subsection M of 1.8.3.13 NMAC.

[P] Q. 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] R. [Either] A party may request copies of [exhibits, documents, records in the administrative file,] evidence considered by the hearing officer or a copy of the audio recording of the [proceeding] hearing 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

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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, 01/01/2020; Rn 1.8.3.14 NMAC & A, 09/14/2021]

[1.8.3.14] 1.8.3.15 APPEALS:

A. ~~[Except as provided by Subsections E and F of 1.8.3.14 NMAC, the]~~ 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.

(5) If the hearing officer issued a final decision on a complaint that was initiated by the commission under Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978 and Subsection E of 1.8.3.9 NMAC, or where the general counsel has intervened under Section G of 1.8.3.14 NMAC, then the general counsel may appeal the hearing officer's decision within 30 days of the issuance by filing a notice stating the information required in subsections (1) through (4) above.

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] E. If a hearing officer dismisses a complaint, pursuant to Subsection B of 1.8.3.13 NMAC, 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] G. 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, 01/01/2020; Rn 1.8.3.15 NMAC & A, 09/14/2021]

[1.8.3.15] 1.8.3.16 OPEN RECORDS AND CONFIDENTIALITY:

A. Thirty days after the director provides notice pursuant to Subsection [F] A of [1.8.3.11] 1.8.3.13 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.

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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.

[1.8.3.15 NMAC-N, 01/01/2020; Rn 1.8.3.16 NMAC & A, 09/14/2021]