

STATE ETHICS
COMMISSION MEETING

February 3, 2023

PUBLIC MATERIALS

PUBLIC MATERIALS
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STATE ETHICS COMMISSION

Hon. William F. Lang, Chair
Jeffrey L. Baker, Member
Stuart M. Bluestone, Member
Hon. Garrey Carruthers, Member
Hon. Celia Foy Castillo, Member
Ronald Solimon, Member
Dr. Judy Villanueva, Member

Friday, February 3rd, 2023, 9:00 a.m. to 12:00 p.m. (Mountain Time)

Meeting Link: [Here](#)

Meeting ID: 249 033 4843

Passcode: Hello123

Public Meeting

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of December 9, 2022 Commission Meeting

Commission Meeting Items

Action Required

- | | |
|--|-----|
| 4. Administrative Hearings Office Presentation
(<i>Brian VanDenzen and members of AHO staff</i>) | No |
| 5. Settlement with Bernadine Martin and Christina Esquibel related to
Procurement Code
(<i>Manierre</i>) | No |
| 6. Legislative session update
(<i>Farris</i>) | No |
| 7. Advisory Opinion 2023-01
(<i>Boyd</i>) | Yes |

- | | |
|--|-----|
| 8. Advisory Opinion 2023-02
(<i>Farris</i>) | Yes |
| 9. Advisory Letter 2022-024
(<i>Farris</i>) | Yes |

Upon applicable motion, Commission goes into executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) and 10-15-1(H)(7) (attorney client privilege pertaining to litigation).

10. Discussion regarding current and potential litigation:
(*Boyd, Manierre, Randall*)
 - a. Update to the Commission concerning *State Ethics Commission v. Working Families Organization, Inc.*, D-506-CV-2022-00942
 - b. Update to the Commission concerning Commission Resolution 2022-05
 - c. Update to the Commission concerning Commission Resolution 2022-08
 - d. Update to the Commission concerning Commission Resolution 2022-09
 - e. Update to the Commission concerning Commission Resolution 2022-10
 11. Discussion regarding administrative matters under State Ethics Commission Act:
(*Manierre*)
 - a. Administrative Complaint No. 2022-038
 - b. Administrative Complaint No. 2022-040
 - c. Administrative Complaint No. 2022-046
 - d. Administrative Complaint No. 2022-047
 - e. Administrative Complaint No. 2023-001
- (*Farris*)
- f. Administrative Complaint No. 2022-015 (90-day extension)

Upon applicable motion, Commission returns from executive session

- | | |
|---|-----|
| 12. Actions on Administrative Complaints | Yes |
|---|-----|
- Administrative Matters under State Ethics Commission Act:
- a. Administrative Complaint No. 2022-038
 - b. Administrative Complaint No. 2022-040
 - c. Administrative Complaint No. 2022-046
 - d. Administrative Complaint No. 2022-047
 - e. Administrative Complaint No. 2023-001
 - f. Administrative Complaint No. 2022-015
- | | |
|--|----|
| 13. Discussion of next meeting:
(<i>Lang</i>) | No |
|--|----|

14. Public Comment

No

15. Adjournment

For inquiries or special assistance, please contact Suha Musa at Ethics.Commission@sec.nm.gov

SEC Office
800 Bradbury Dr. SE,
Suite 215
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Hon. William F. Lang
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Judy Villanueva

STATE ETHICS COMMISSION

Commission Meeting Minutes of December 9, 2022 | 9:00AM-1:00PM

[Zoom Recording](#)

[Subject to Ratification by Commission]

1. Call to Order

Chairman Lang called the meeting to Order at 9:02 AM.

2. Roll Call

The roll was called; the following Commissioners were present:

Jeffrey L. Baker, Commissioner
Stuart M. Bluestone, Commissioner
Hon. Garrey Carruthers, Commissioner
Hon. Celia Foy Castillo, Commissioner
Ronald Solimon, Commissioner
Judy Villanueva, Commissioner
Hon. William Lang, Chair

3. Approval of Agenda

Chair Lang sought a motion to approve the agenda. Commissioner Baker moved to approve the agenda; Commissioner Carruthers seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the agenda unanimously.

4. Approval of October 14, 2022 Commission Meeting Minutes

Chair Lang sought a motion to approve the minutes of the October 14th Commission meeting. Commissioner Baker moved to approve the minutes; Commissioner Carruthers seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the minutes unanimously.

Commission Meeting Items

5. Advisory Opinion No. 2022-10

Deputy General Counsel Rebecca Branch presented an overview of advisory opinion 2022-10, which addresses the following questions:

1. An individual served as a deputy secretary of a state agency. After leaving the agency, may the individual work on a contractual basis for a healthcare corporation during the year after the individual separated from the state agency?

2. After the one-year separation period may this individual join the healthcare corporation as an employee?

(To read the full opinion following its issuance, [click here](#).)

Chair Lang sought a motion to adopt Advisory Opinion 2022-10. Commissioner Bluestone moved to adopt the opinion; Commissioner Carruthers seconded. After a discussion on the merits of the opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved Advisory Opinion 2022-10 unanimously.

6. Resolution 2022-07

General Counsel Walker Boyd provided an overview of Resolution 2022-07 and sought a motion from the Commission to adopt the resolution. Chair Lang sought a motion to adopt Resolution 2022-07. Commissioner Carruthers moved to adopt the resolution; Commissioner Foy-Castillo seconded. After a brief discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved Resolution 2022-07 unanimously.

7. Update on Settlements of litigated and pre-litigated matters

Director Farris provided an update on recent settlements, including the lawsuit filed against Mr. Gabriel Vargas and Double Eagle Real Estate for violations of the Governmental Conduct Act, which resulted in a \$13,000 payment to the SEC. Special Counsel KC Manierre provided an update on a settlement with Ms. Mary Lou Kern, the former Colfax County Manager for revolving door violations of the Governmental Conduct Act, resulting in a \$500 payment to the SEC.

Commissioner Carruthers mentioned that even though the Commission is enforcing maximum penalties for violations, these penalties are perhaps still too minor. Commissioner Bluestone agreed with Commissioner Carruthers' sentiments and stated that the Commission and its staff should advocate for higher penalties, especially in cases of revolving door violations.

Commissioner Baker agreed and emphasized a need to increase penalties authorized by the Commission.

8. 2022 Annual Report

Director Farris offered an overview of the draft 2022 annual report and the legislative priorities of the Commission. Chair Lang sought a motion to adopt the 2022 Annual Report. Commissioner Solimon moved to adopt the report; Commissioner Carruthers seconded. After a discussion on the merits and role of the State Ethics Commission on legislative efforts, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the 2022 Annual Report unanimously.

9. Executive Session

Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings), 10-15-1(H)(7) (attorney-client privilege pertaining to litigation), and 10-15-1(H)(2) (limited personnel matters). Commissioner Bluestone moved to enter executive session; Commissioner Foy-Castillo seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and entered executive session.

---Beginning of Executive Session---

The following matters were discussed in executive session:

Discussion regarding current and potential litigation:

- Commission authorization of civil action regarding violations of Sections 10-16-3 and 10-16-3.1(C), and 10-16-4(A) of the Governmental Conduct Act by an elected official of a local public body
- Commission authorization of civil action regarding violations of the Procurement Code by a state employee
- Commission authorization of civil action regarding violations of Section 10-16-4(C) of the Governmental Conduct Act by a former public official
- Update for the Commission regarding Resolution 2022-05

Discussion of administrative matters under the State Ethics Commission Act subject to settlement approval:

- Administrative Complaint No. 2022-18
- Administrative Complaint No. 2022-32
- Administrative Complaint No. 2022-33
- Administrative Complaint No. 2022-34

Discussion regarding administrative matters under Revised Uniform Law on Notarial Acts:

- 2022-NP-05 (*In re commission of Perez*)
- 2022-NP-10 (*In re commission of Miller*)
- 2022-NP-12 (*In re commission of Hanson*)
- 2022-NP-13 (*in re commission of Galloway*)
- 2022-NP-15 (*In re commission of Munch*)
- 2022-NP-16 (*In re commission of Cordova*)
- 2022-NP-17 (*In re commission of Al-Assi*)

Discussion regarding administrative matters under State Ethics Commission Act

- Administrative Complaint No. 2022-044
- Administrative Complaint No. 2022-043
- Administrative Complaint No. 2022-042
- Administrative Complaint No. 2022-041
- Administrative Complaint No. 2022-039
- Administrative Complaint No. 2022-037
- Administrative Complaint No. 2022-06
- Administrative Complaint No. 2022-032
- Administrative Complaint No. 2022-030
- Administrative Complaint No. 2022-027
- Administrative Complaint No. 2022-015

Executive Director 2022 evaluation

The matters discussed in the closed meeting were limited to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session upon an appropriate motion.

---End of Executive Session---

10. Authorizations on Civil Litigation

Director Farris asked the Commission for the following motions on the following litigative matters:

- **Commission authorization of civil action regarding violations of Sections 10-16-3 and 10-16-3.1(C), and 10-16-4(A) of the Governmental Conduct Act by an elected official of a local public body:** Director Farris sought a motion to authorize the attorney staff to file a civil action against Yvonne Otero, the Torrance County Clerk, for violations of the Governmental Conduct Act, and to refer the case to the District Attorney of the Seventh Judicial District to initiate removal proceedings. Commissioner Carruthers moved as stated above; Commissioner Foy-Castillo seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **Commission authorization of civil action regarding violations of the Procurement Code by a state employee:** Director Farris sought a motion to authorize the staff to send a demand letter, and if necessary, file a civil action against Bernadine Martin, the District Attorney for the 11th Judicial District for violations of the Procurement Code. Commissioner Bluestone moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **Commission authorization of civil action regarding violations of Section 10-16-4(C) of the Governmental Conduct Act by a former public official:** Director Farris sought a motion to authorize the staff to send a demand letter, and if necessary, file a civil action against Stephanie Stringer, the former chair of the Water Quality Control Commission, for violations of the Governmental Conduct Act. Commissioner Foy-Castillo moved as stated above; Commissioner Baker seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.

11. Actions on Administrative Complaints Nos. 2022-044, 2022-043, 2022-042, 2022-041, 2022-039, 2022-037, 2022-006, 2022-030, 2022-027, 2022-015, 2022-018, 2022-032, 2022-033, and 2022-034

Director Farris asked the Commission for the following motions on the following administrative cases:

- **In administrative case 2022-044, motion for an order of dismissal due to a lack of jurisdiction:** Commissioner Solimon moved as stated above; Commissioner Bluestone seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-043, motion for an order of dismissal due to a lack of jurisdiction:** Commissioner Solimon moved as stated above; Commissioner Foy-Castillo

seconded as stated above. Chair Lang conducted a roll-call vote. Commissioners Bluestone, Carruthers, Foy-Castillo, Solimon, Villanueva, and Chair Lang voted in the affirmative. Commissioner Baker was recused from the vote. The motion was approved.

- **In administrative case 2022-042, motion for an order of dismissal due to a lack of jurisdiction:** Commissioner Solimon moved as stated above; Commissioner Bluestone seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-041, motion for an order of dismissal due to a lack of jurisdiction:** Commissioner Solimon moved as stated above; Commissioner Bluestone seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-039, motion for an order of dismissal due to a lack of jurisdiction:** Commissioner Solimon moved as stated above; Commissioner Bluestone seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-037, motion for an order of dismissal under 9(C) and (D):** Commissioner Foy-Castillo moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-006, motion for a 90 day extension:** Commissioner Carruthers moved as stated above; Commissioner Villanueva seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-030, motion for a 90 day extension:** Commissioner Foy-Castillo moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. Chair Lang conducted a roll-call vote. Commissioners Baker, Carruthers, Foy-Castillo, Solimon, Villanueva, and Chair Lang voted in the affirmative. Commissioner Bluestone recused himself from the vote. The motion was approved.
- **In administrative case 2022-027, motion for a 90 day extension:** Commissioner Carruthers moved as stated above; Commissioner Villanueva seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.

- **In administrative case 2022-015, motion for an authorization to seek subpoena:** Commissioner Bluestone moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-018, motion for settlement approval:** Commissioner Bluestone moved as stated above; Commissioner Foy-Castillo seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-032, motion for settlement approval:** Commissioner Baker moved as stated above; Commissioner Carruthers seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-033, motion for settlement approval:** Commissioner Carruthers moved as stated above; Commissioner Villanueva seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.
- **In administrative case 2022-034, motion for settlement approval:** Commissioner Foy-Castillo moved as stated above; Commissioner Baker seconded as stated above. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative and approved the motion unanimously.

12. Administrative Matters Under Revised Uniform Law on Notarial Acts (RULONA), Case Nos. 2022-NP-05, 2022-NP-10, 2022-NP-12, 2022-NP-13, 2022-NP-16 and 2022-NP-17

Deputy General Counsel Rebecca Branch sought motions on the following cases under the Revised Uniform Law on Notarial Acts:

- **In 2022-NP-05, *In re notary public commission of Perez*, motion to issue a dismissal of the NCA and complaint:** Commissioner Foy-Castillo moved as stated above; Commissioner Bluestone seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.
- **In 2022-NP-10, *In re notary public commission of Miller*, motion to issue a dismissal of the complaint:** Commissioner Carruthers moved as stated above; Commissioner Foy-Castillo seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.

- **In 2022-NP-12, *In re notary public commission of Hanson*, motion to issue a dismissal of the complaint:** Commissioner Baker moved as stated above; Commissioner Foy-Castillo seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.
- **In 2022-NP-13, *In re notary public commission of Galloway*, motion to issue a Default Order:** Commissioner Carruthers moved as stated above; Commissioner Foy-Castillo seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.
- **In 2022-NP-15, *In re notary public commission of Munch*, motion to issue a dismissal of the complaint:** Commissioner Foy-Castillo moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.
- **In 2022-NP-16, *In re notary public commission of Cordova*, motion to issue a dismissal of the complaint:** Commissioner Carruthers moved as stated above; Commissioner Baker seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.
- **In 2022-NP-17, *In re notary public commission of Al-Assi*, motion to approve the settlement agreement:** Commissioner Carruthers moved as stated above; Commissioner Solimon seconded as stated above. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the motion.

13. **Selection of Next Meeting**

Chair Lang confirmed that the next meeting would take place on February 3, 2022. The meeting will be held over Zoom.

14. **Public Comments**

Tony Ortiz, a member of the NM Ethics Watch, praised the quantity and quality of the Commission's work. NM Ethics Watch and other ethics groups are involved in efforts to modernize the legislature, and they hope the Commission can be a part of those conversations.

No additional public comments were made.

15. **Adjournment**

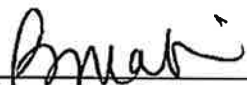
Chair Lang raised adjournment of the meeting. With no objections made, the meeting was adjourned at 1:25 PM.


[Subject to Ratification by Commission]

SETTLEMENT AGREEMENT

The Executive Director of the State Ethics Commission, on behalf of the State Ethics Commission, and Bernadine Martin ("Martin") hereby stipulate as follows:

1. Martin agrees to comply with the competitive-bidding provisions or properly procure services through applicable exclusions of the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended 2019), including the use of a request for proposal process to procure special prosecution and conflict prosecution attorney services in excess of \$60,000, exclusive of GRT. Martin further agrees to issue a request for proposal to procure special prosecution and conflict prosecution attorney services, if the Office of the Eleventh Judicial District Attorney – Division II requires contracts for such professional services, within 180 days after the date of this Settlement Agreement. Martin also agrees to provide the State Ethics Commission with a copy of any Request for Proposal that the Office of the Eleventh Judicial District Attorney – Division II issues within 180 days after the date of this Settlement Agreement.
2. Martin agrees to participate in a training on the Procurement Code offered or authorized by the State Purchasing Division of the General Services Department or New Mexico State University's Cooperative Extension Service (viz., NM EDGE), along with any members of her staff currently designated to act as procurement officers on behalf of the office within six months of agreeing to this settlement. Martin agrees to provide documentation of such training to the State Ethics Commission.
3. Upon receipt of records documenting compliance with subpart 2 of this agreement, the Commission agrees it will not pursue a civil enforcement action for Martin's violations of the Procurement Code related to contracts between the Office of the Eleventh Judicial District Attorney – Division II and Brandon Vigil for those contracts entered into between January 1, 2021, and the date of this agreement.

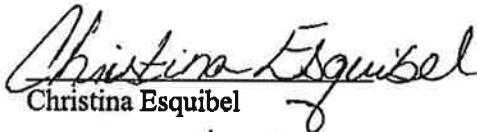

Bernadine Martin
Dated: 1/20/23


Jeremy Farris, Executive Director
Dated: 1/20/23

SETTLEMENT AGREEMENT

The Executive Director of the State Ethics Commission, on behalf of the State Ethics Commission, and Christina Esquibel ("Esquibel") hereby stipulate as follows:

1. Esquibel agrees to participate in a training on the Procurement Code offered or authorized by the State Purchasing Division of the General Services Department or New Mexico State University's Cooperative Extension Service (NM EDGE) within six months of agreeing to this settlement. Esquibel will provide documentation of such training to the State Ethics Commission.
2. Upon receipt of records documenting compliance with subpart 1 of this agreement, the Commission agrees it will not pursue a civil enforcement action for Esquibel's violations of the Procurement Code related to contracts between the Office of the Eleventh Judicial District Attorney – Division II and Brandon Vigil for those contracts entered into between January 1, 2021, and the date of this agreement, in which Esquibel was involved.


Christina Esquibel

Dated: 01/20/2023


Jeremy Farris, Executive Director

Dated: 1/20/23



STATE ETHICS COMMISSION

[Draft] ADVISORY OPINION NO. 2023-01

February 3, 2023¹

QUESTIONS PRESENTED²

A legislator owns and was, until elected to the legislature, the chief executive officer (CEO) of a corporation that provides services to the state pursuant to contracts and grant agreements. The legislator has resigned as CEO but continues to hold an ownership interest in the corporation. The legislator asks what the law requires with respect to any legislative matters or duties that may affect the legislator's interest in the corporation or otherwise present a conflict of interest.

ANSWER

Several laws apply when a legislator owns a corporation having business relationships with the State of New Mexico:

Article IV, Section 28 of the New Mexico Constitution, known as the "Emoluments Clause," generally prohibits a legislator from having a direct or indirect interest in a contract authorized by legislation passed during the term of the legislator's office and for one year thereafter. Although the Emoluments

¹ This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." NMSA 1978, § 10-16G-8(A)(2) (2019).

Clause would not apply to existing contracts with state agencies, the Emoluments Clause would bar any new contract that is authorized by legislation passed during the requester's current term of office and for one year thereafter.

Subsection A of Section 10-16-3 of the Governmental Conduct Act imposes an obligation on legislators to refrain from taking official acts for the purpose of benefitting a personal interest. While this provision might apply to legislative acts on legislation that may directly or indirectly benefit the corporation, the Commission lacks jurisdiction to adjudicate a claim alleging a violation based on legislative actions (such as a committee or floor vote).

Subsection C of Section 10-16-3 of the Governmental Conduct Act requires a legislator to disclose real or potential conflicts of interest. Disclosure of the requester's ownership of and employment by the corporation on the legislator's annual Financial Disclosure Statement is likely sufficient to discharge the disclosure obligation under Subsection C of Section 10-16-3.

Section 10-16-9 of the Governmental Conduct Act prohibits a state agency from entering into a contract with a business substantially owned by a member of the legislature, unless the contract is awarded in accordance with the Procurement Code and is not a small purchase or sole source contract. Section 10-16-9 also prohibits a legislator from appearing for, representing, or assisting another person before a state agency unless certain exceptions apply. Because the requester is the owner of the corporation, a state agency must award any contract with the corporation in accordance with the Procurement Code. Likewise, the requester is prohibited from appearing for, representing, or assisting the corporation in a matter before a state agency.

ANALYSIS

I. Article IV, Section 28 of the State Constitution

Article IV, Section 28 of the New Mexico Constitution, known as the "Emoluments Clause," provides:

No member of the legislature shall, . . . during the term for which he [or she] was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

Because the requester owns (and was previously employed by) the corporation, the requester holds an interest (whether direct or indirect) in contracts between state agencies and the corporation. A contract only runs afoul of the Emoluments Clause if it is entered into under authority granted to a state agency during the legislator's term of office and for one year after. And "authorized by any law" does not extend to appropriations bills. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (stating that an appropriation for a contract does not "authorize" the contract for purposes of determining whether the contract is a prohibited emolument; instead, whether the contract is "authorized" by a law passed during a legislator's term is based on the law authorizing the specific contract); *see also State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 37, 111 N.M. 495 ("*Otero* held that an appropriations bill does not 'authorize' a contract of employment with the state within the meaning of this provision." (citing *Otero*, 1928-NMSC-021)); State Ethics Comm'n Adv. Op. 2021-02, at *4 (Feb. 5, 2021) (Emoluments Clause does not automatically prohibit contract between state agency and nonprofit corporation that has a legislator on its board of directors); N.M. Att'y Gen. Op. 88-20 (Mar. 7, 1988) ("The test [for an Emoluments Clause violation] would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is 'yes,' the act had no bearing on the contract and did not authorize it. If the answer is 'no,' the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.") (citing Note, *Legislative bodies-conflict of interest*, 7 N.M. L. Rev. 296 (1967)).

Applying this rule to the facts presented in the request, the contracts made between the corporation and state agencies before the requester assumed legislative office do not violate the Emoluments Clause because they are authorized by laws that were passed before the legislative term. The fact that a contract between a state agency and the corporation is funded by an appropriation approved during the requester's term of office does not bar that contract. However, if new legislation is passed during the requester's upcoming term that authorizes one or more state agencies to enter into other contracts, the Emoluments Clause would operate to bar the corporation owned by the requester from being a party to such a contract by virtue of the requester's ownership interest in the corporation.

II. Governmental Conduct Act

A. **Section 10-16-3(A) of the Governmental Conduct Act does not require a legislator to recuse from a vote affecting a financial interest, although it might prohibit a vote that is for the purpose of benefitting a financial interest.**

The Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), does not require a legislator to recuse from a vote on legislation that implicates a conflict of interest. This is a function of not only the Act's definitions and text but also the protection conferred on Members by Article IV, Section 13 of the New Mexico Constitution. Two sections of the Governmental Conduct Act are relevant.

First, Section 10-16-4(B) provides that “a public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest . . . [that is not] proportionately less than the benefit to the general public.” § 10-16-4(B). Under the Governmental Conduct Act, a “financial interest” means “(1) an ownership interest in business or property; or (2) any employment or prospective employment for which negotiations have already begun.” NMSA 1978, § 10-16-2(F) (2011). Legislators, however, are expressly excluded from the definition of a “public officer or employee.” § 10-16-2(I). Accordingly, the disqualification requirement in section 10-16-4(B) does not require a legislator to recuse from any vote.

Second, Section 10-16-3(A) also bears on the question of recusal. Unlike section 10-16-4(B), section 10-16-3(A) applies to legislators. That section provides:

A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

§ 10-16-3(A). Under this provision, a legislator may not use the powers and resources of their legislative office “to obtain personal benefits or pursue private interests.” *Id.*

Whether a legislator uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a

question of fact. § 10-16-3(A); *see, e.g., State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence). Furthermore, whether a particular use of “the powers and resources” of a legislator’s office results in “personal benefits” to the legislator or advances their “private interests” is also a question of fact.

According to the facts in the request, the requester holds two financial interests in the corporation: employment and ownership. *See* § 10-16-2(F). Accordingly, the Governmental Conduct Act prohibits the requester from taking any official act for the purpose of benefitting either the requester’s ownership or employment interests in the corporation. However, the facts in the request do not provide sufficient additional information to opine as to whether the requester’s participation in a particular legislative matter would violate section 10-16-3(A).

Although the facts presented in the request do not suggest a violation of Section 10-16-3(A) of the Governmental Conduct Act, a legislator may *voluntarily* recuse from participation in a matter that affects (or has the appearance of affecting) their interest. A decision to recuse on this basis, although not required by law, would demonstrate that a legislator is not using the powers of his or her legislative office “to obtain personal benefits or pursue private interests.” § 10-16-3(A). Voluntary recusal from voting on matters affecting a legislator’s interest would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain.

B. Section 10-16-3(C) of the Governmental Conduct Act requires a legislator to disclose real or potential conflicts of interest, and disclosure of the requester’s ownership of and employment by the corporation on an annual financial disclosure statement is sufficient to meet this requirement.

Section 10-16-3(C) of the Governmental Conduct Act imposes two duties: (i) a duty of “full disclosure of real or potential conflicts of interest,” and (ii) a duty to “avoid undue influence and abuse of office in public service.”

The Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended through 2021) imposes a duty on legislators to disclose in writing their employment. *See* NMSA 1978, § 10-16A-3(D)(1) (2021). If the requester has disclosed ownership of and employment by the corporation on an annual Financial Disclosure Statement, that statement would be sufficient to meet the disclosure required by Subsection 10-16-3(C). Of course, the minimum disclosure required

by the Financial Disclosure Act is just that—a minimum. The Secretary of State permits Financial Disclosure Statement filers to supplement their disclosures with additional information, and it may be prudent to include in a Financial Disclosure Statement information about the corporation’s contracts with state agencies.³

C. Section 10-16-9 of the Governmental Conduct Act prohibits a legislator from appearing for, representing, or assisting the corporation before a state agency.

1. Subsection A of Section 10-16-9

Subsection A of Section 10-16-9 provides:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator’s family or with a business in which the legislator or the legislator’s family has a substantial interest unless the legislator has disclosed the legislator’s substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

Under Section 10-16-9(A), a state agency can enter into a contract with a legislator or a business owned by a legislator, so long as: (1) the legislator has disclosed his or her substantial interest; (2) the state agency awards the contract in

³ It could be argued that Section 10-16-3(C) imposes an additional duty on a legislator to orally disclose outside employment at or before the time of a vote affecting their employer, and such an oral disclosure may be prudent. But because a legislator’s speech (or failure to speak) in committee or floor debates is immune from investigation or prosecution under the Speech or Debate Clause, neither the State Ethics Commission nor a prosecutor could pursue an action against a legislator for failing to disclose a potential conflict of interest during a committee or floor debate. *See also* State Ethics Comm’n Adv. Op. 2021-07 (Apr. 2, 2021) (providing a detailed overview of the Speech or Debate Clause’s application to legislative acts), *available at* https://nmonesource.com/nmos/secap/en/nav_date.do (last accessed Feb. 2, 2023). Note, however, that a legislator’s duty to disclose a conflict of interest outside the context of legislative proceedings is not subject to Speech or Debate Clause immunity. *See State v. Gregorio*, 451 A.2d 980, 982 (N.J. Super. Ct. Law Div. 1982)).

accordance with the provisions of the Procurement Code; and (3) the state agency does not award the contract as either a sole source or a small purchase contract. If those conditions are met, the legislator may bid on (and be awarded) a state agency contract.⁴

The requester has a “substantial interest” in the corporation because the requester is its owner. *See* NMSA 1978, § 10-16-2 (2011) (defining “substantial interest” as “an ownership interest that is greater than twenty percent”). Accordingly, Subsection A of Section 10-16-9 operates to prohibit a state agency from entering into a contract with the corporation *unless* the requester’s ownership interest is disclosed, the contract is awarded in accordance with the provisions of the Procurement Code, and the contract is not a sole source or small purchase contract.

2. Subsection B of Section 10-16-9

Subsection B of Section 10-16-9 provides:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

This provision prohibits a legislator from “appear[ing] for, represent[ing] or assist[ing] another person in a matter before a state agency,” unless an exception applies. The provision recognizes several exceptions to this broad prohibition: (1) the legislator is not receiving compensation; (2) the legislator is acting for the

⁴ To be sure, other statutory provisions apply to bids on state-agency contracts. For example, under NMSA 1978, Section 10-16-13 (2011), “[n]o state agency or local government agency shall accept a bid or purpose from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based.” § 10-16-13. The facts presented in the request, however, do not suggest that Section 10-16-13—or other provisions that apply to conflicts of interest in procurement, *e.g.*, NMSA 1978, §§ 13-1-190 through -195 (1984, as amended 2009)—are relevant to this advisory opinion.

benefit of a constituent; or (3) the legislator is an attorney or another professional person engaged in the conduct of his or her profession. If an exception applies and operates to permit a legislator to “appear for, represent or assist another person in a matter before a state agency,” the legislator is nonetheless prohibited from making “references to the legislator’s legislative capacity except as to matters of scheduling,” from “communicat[ing] on legislative stationery,” and “[making] threats or implications relating to legislative actions.”

That a legislator’s actions benefit (or are intended to benefit) a group of persons does not make out a violation of Subsection 10-16-9(B). Instead, a legislator must have been acting as an agent or otherwise assisting “another person”—i.e., one or more identified legal persons, to come within the scope of the prohibition set out in Subsection 10-16-9(B). The corporation is another “person”; accordingly, the requester is prohibited from appearing for, representing, or assisting the corporation in a matter before a state agency unless an exception applies. Based on the facts presented in the request, it does not appear that an exception applies.

The first exception set out in section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the representation is unpaid. But it does not appear that the requester is unpaid; instead, according to the request, the requester is both an owner and employee of the corporation, suggesting that any assistance to the corporation would be compensated, whether in the form of profits or wages. Accordingly, any representation or assistance on behalf of the corporation is not “unpaid” so as to be permitted by Section 10-16-9(A).

The next exception set out in Section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the representation is for the benefit of a constituent. But the corporation is not a constituent. The Governmental Conduct Act does not define “constituent.” Dictionaries define “constituent” as a person who votes for an elected official in government. *See* Constituent, Merriam-Webster (“any one of the people who live and vote in an area: a member of a constituency”) (last accessed Feb. 2, 2023); Constituent, Black’s Law Dictionary (11th ed. 2019) (“Someone who is represented by a legislator or other elected official.”). Although corporations enjoy the right to freedom of speech under the First Amendment,⁵ the First Amendment right is not

⁵ *See Citizens United v. Federal Election Com’n*, 558 U.S. 310, 347 (2010).

the same as the right to vote in an election.⁶ Accordingly, the corporation is not a “constituent” so as to permit the requester to appear for, represent, or assist it before a state agency.

The final exception set out in section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the legislator is an attorney or other professional person engaged in the conduct of their profession. This provision only applies to legislators who are licensed professionals, such as attorneys. As the 1993 Ethics Task Force Report (which contains the original proposed Subsection 10-16-9(B)) explains, “[d]isclosure of lawyer-legislators’ interests under the Campaign Reporting Act and the proposed Financial Disclosure Act, when coupled with the provisions of the house and senate rules, as well as the rules of professional responsibility governing lawyers . . . strikes the appropriate balance” between an outright ban on representation and no restrictions at all. Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations* 20, N.M. Legislative Council Service Info. Memo. No. 202.90785 (Jan. 27, 1993). The text of Subsection 10-16-9(B), its relationship with other ethics statutes, and legislative history establish that a legislator must be licensed and regulated by the state to qualify for Subsection 10-16-9(B)’s narrow “professional persons” exception. The facts set out in the request indicate that the requester is not a licensed attorney or other licensed professional. Accordingly, an appearance on behalf of the corporation in a matter before a state agency is not likely the capacity of a professional person engaged in the conduct of a profession, and is therefore not permitted under Section 10-16-9(B).

Because an exception does not apply, Section 10-16-9(B) likely prohibits the requester from appearing for, representing, or assisting the corporation before a state agency. Even if an appearance, representation, or assistance is otherwise permitted by Section 10-16-9(B), the requester is still prohibited from “[making] references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.” § 10-16-9(B).

⁶ See NMSA 1978, § 1-1-4(A) (2019) (defining “qualified elector” to mean “any resident of this state who is qualified to vote under the provisions of the constitution of New Mexico and the constitution of the United States”); U.S. Const. Amend. XXVI (extending franchise to all citizens over the age of eighteen).

CONCLUSION

The Emoluments Clause does not prohibit a legislator from having direct and indirect interests in contracts between a corporation owned by the legislator and a state agency, so long as the legislation authorizing the contract became law before the requester's current term of office. The Governmental Conduct Act does not require the legislator to recuse from matters affecting the corporation, and the disclosure of the requester's employment and ownership of the corporation on the requester's annual Financial Disclosure Statement is sufficient to fulfill the disclosure obligations for potential conflicts of interest under the Governmental Conduct Act. Section 10-16-9 of the Governmental Conduct Act operates to prohibit a state agency from entering into a contract with the corporation unless the contract is made in accordance with the Procurement Code and is not a small purchase or sole source contract. Section 10-16-9 of the Governmental Conduct Act also likely prohibits the requester from appearing for, representing, or assisting the corporation in a matter before a state agency.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RON SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner



STATE ETHICS COMMISSION

[Draft] ADVISORY OPINION NO. 2023-02

February 3, 2023¹

QUESTION PRESENTED²

A legislator's children own and operate a company that has contracts with state agencies to provide those state agencies with services. The contracts are awarded through a competitive process, i.e., by submitting bids or proposals in response to an invitation to bid (ITB) or request for proposals (RFP). The company rents storage space from the legislator, and the legislator has no other financial interest in the corporation. The legislator asks what conduct and disclosure requirements apply to him because of his relationship with his children's business.

ANSWER

I. Section 10-16-9 of the Governmental Conduct Act

Section 10-16-9 of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), is the main statutory provision that governs a legislator's conduct with respect to a business in which the legislator's family has a substantial interest. Subsection A provides the conditions under which a state agency may contract with such a business, and Subsection B provides rules

¹ This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." NMSA 1978, § 10-16G-8(A)(2) (2019).

regarding the legislator's representation of or assistance with the business before a state agency.

A. Subsection A of Section 10-16-9

Subsection A of Section 10-16-9 provides:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

Under Section 10-16-9(A), a state agency can enter into a contract with a legislator's business or a business owned by a legislator's family, so long as: (1) the legislator has disclosed his or her substantial interest, if the legislator has any substantial interest; (2) the state agency awards the contract in accordance with the provisions of the Procurement Code; and (3) the state agency does not award the contract as either a sole source or a small purchase contract. If those conditions are met, the corporation may bid on (and be awarded) a state agency contract.³

Section 10-16-9(A) applies to contracts between state agencies and the company owned by the legislator's children. *See* NMSA 1978, § 10-16-2 (2011) (defining "family" as "an individual's spouse, parents, children or siblings, by consanguinity or affinity"). Accordingly, Subsection A of Section 10-16-9 requires the legislator to disclose any substantial interest the legislator has in the

³ To be sure, other statutory provisions apply to bids on state-agency contracts. For example, under NMSA 1978, Section 10-16-13 (2011), "[n]o state agency or local government agency shall accept a bid or proposal from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based." § 10-16-13. The facts presented in the request, however, do not suggest that Section 10-16-13—or other provisions that apply to conflicts of interest in procurement, *e.g.*, NMSA 1978, §§ 13-1-190 through -195 (1984, as amended 2009)—are relevant to this advisory opinion.

company. Considering the facts that the request provides, the legislator's only interest in their children's company is a rental agreement for storage space. This is not a "substantial interest" of which the Governmental Conduct Act requires disclosure before a state agency could enter a contract with the company. *See* NMSA 1978, § 10-16-2(L) (2011) (defining "substantial interest" to mean "an ownership interest that is greater than twenty percent").

Section 10-16-9(A) also operates to prohibit a state agency from entering into a contract with the corporation unless the contract is awarded in accordance with the provisions of the Procurement Code, and the contract is not a sole source or small purchase contract. According to the facts in the request, however, the contracts between the corporation and state agencies were entered into pursuant to a competitive process and consistent with the Procurement Code's requirements. Accordingly, under Section 10-16-9(A), a state agency may award contracts to the company owned and operated by the legislator's children.

B. Subsection B of Section 10-16-9

Subsection B of Section 10-16-9 provides:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

This provision prohibits a legislator from "appear[ing] for, represent[ing] or assist[ing] another person in a matter before a state agency," unless an exception applies. The provision recognizes several exceptions to this broad prohibition: (1) the legislator is not receiving compensation; (2) the legislator is acting for the benefit of a constituent; or (3) the legislator is an attorney or another professional person engaged in the conduct of his or her profession. If an exception applies and operates to permit a legislator to "appear for, represent or assist another person in a matter before a state agency," the legislator is nonetheless prohibited from making "references to the legislator's legislative capacity except as to matters of

scheduling,” from “communicat[ing] on legislative stationery,” and “[making] threats or implications relating to legislative actions.”

According to the facts presented in the request, the legislator is in no way involved in the state agency procurement process on behalf of the corporation. Because there is no suggestion in the request that the requester is appearing for, representing, or assisting the corporation in a matter before a state agency, there is no basis to conclude that Section 10-16-9(B) applies.

II. Section 10-16-3 of the Governmental Conduct Act

A. Subsection A of Section 10-16-3

Like Section 10-16-9, Section 10-16-3 of the Governmental Conduct Act also applies to legislators. Section 10-16-3(A) provides:

A legislator or public officer or employee shall treat the legislator’s or public officer’s or employee’s government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

§ 10-16-3(A). Under this provision, a legislator may not use the powers and resources of their legislative office “to obtain personal benefits or pursue private interests.” *Id.* Whether a legislator uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a question of fact. § 10-16-3(A); *see, e.g., State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence). Furthermore, whether a particular use of “the powers and resources” of a legislator’s office results in “personal benefits” to the legislator or advances their “private interests” is also a question of fact.

According to the facts presented in the request, the legislator holds an indirect financial interest in the corporation in the form of a rental contract between the company and the legislator. While the storage-rental contract does not constitute a “financial interest” as defined by the Governmental Conduct Act, *see* § 10-16-2(F), Section 10-16-3(A) likely prohibits the legislator from using the powers of their legislative office (such as designating an appropriation) for the purpose of benefiting their children’s company. Beyond that general guideline, the facts in the request do not provide sufficient additional information to opine as to

whether the requester’s participation in a particular legislative matter would violate section 10-16-3(A).

If, during the course of their legislative service, the legislator confronts a bill that implicates the company owned by the legislator’s children, the Governmental Conduct Act does not require the legislator to recuse from a vote on such legislation.⁴ The legislator, however, may *voluntarily* recuse from participation in a legislative matter that affects (or has the appearance of affecting) their interest and the interest of their children’s company. A decision to recuse on this basis, although not required by law, would demonstrate that a legislator is not using the powers of his or her legislative office “to obtain personal benefits or pursue private interests.” § 10-16-3(A). Voluntary recusal from voting on matters affecting a legislator’s interest would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain.⁵

B. Subsection C of Section 10-16-3

Section 10-16-3(C) of the Governmental Conduct Act requires the legislator to disclose real or potential conflicts of interest, and disclosure of the legislator’s interests in the storage-rental contract on their annual financial disclosure statement is sufficient to meet this requirement. Section 10-16-3(C) of the Governmental Conduct Act imposes two duties: (i) a duty of “full disclosure of real or potential conflicts of interest,” and (ii) a duty to “avoid undue influence and abuse of office in public service.” The Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended through 2021) imposes a duty on legislators to disclose in writing the sources of gross income above \$5,000 in the previous

⁴ Section 10-16-4(B) provides that “a public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer’s or employee’s financial interest . . . [that is not] proportionately less than the benefit to the general public.” § 10-16-4(B). Under the Governmental Conduct Act, a “financial interest” means “(1) an ownership interest in business or property; or (2) any employment or prospective employment for which negotiations have already begun.” NMSA 1978, § 10-16-2(F) (2011). Legislators, however, are expressly excluded from the definition of a “public officer or employee.” § 10-16-2(I). Accordingly, the disqualification requirement in section 10-16-4(B) does not require a legislator to recuse from any vote.

⁵ Note also that the Speech or Debate Clause of the New Mexico Constitution, N.M. Const., art. IV, § 13, likely prevents the Commission from adjudicating an administrative claim based on a legislative act. *See* State Ethics Comm’n Adv. Op. 2021-07 (Apr. 2, 2021) (providing a detailed overview of the Speech or Debate Clause’s application to legislative acts), *available at* https://nmonesource.com/nmos/secap/en/nav_date.do (last accessed Feb. 2, 2023).

calendar year. *See* NMSA 1978, § 10-16A-3(D)(2) (2021). The required disclosure of gross income must state “the nature of the income source” in “broad categories.” *Id.* To the extent the requester receives more than \$5,000 in rental income from their children’s company, a statement that the legislator had made more than \$5,000 in rental income would be sufficient to meet the disclosure required by Subsection 10-16-3(C).

Of course, the minimum disclosure required by the Financial Disclosure Act is just that—a minimum. The Secretary of State permits Financial Disclosure Statement filers to supplement their disclosures with additional information, and it might be prudent to include in a Financial Disclosure Statement information about the company’s contracts with state agencies, which, in any event, might also be available on the Sunshine Portal.

III. Article IV, Section 28 of the State Constitution

Finally, we observe that the Emoluments Clause of Article IV, Section 28 of the New Mexico Constitution imposes requirements on the legislator because of their indirect financial interest in their children’s business. The Emoluments Clause provides:

No member of the legislature shall, . . . during the term for which he [or she] was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

A contract violates the Emoluments Clause if it is entered into under authority granted to a state agency during the legislator’s term of office and for one year after. However, a contract is not “authorized by any law” simply because it is funded by an appropriations bill. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (stating that an appropriation for a contract does not “authorize” the contract for purposes of determining whether the contract is a prohibited emolument; instead, whether the contract is “authorized” by a law passed during a legislator’s term is based on the law authorizing the specific contract); *see also State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 37, 111 N.M. 495 (“*Otero* held that an appropriations bill does not ‘authorize’ a contract of employment with the state within the meaning of this provision.” (citing *Otero*, 1928-NMSC-021)); State Ethics Comm’n Adv. Op. 2021-02, at *4 (Feb. 5, 2021) (Emoluments Clause does not automatically prohibit contract between state agency and nonprofit corporation that has a legislator on its board of directors); N.M. Att’y Gen. Op. 88-20 (Mar. 7, 1988) (“The test [for an

Emoluments Clause violation] would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is “yes,” the act had no bearing on the contract and did not authorize it. If the answer is “no,” the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.”) (citing Note, *Legislative bodies-conflict of interest*, 7. N.M. L. Rev. 296 (1967)).

The Emoluments Clause applies to prohibit contracts in which a legislator holds a direct interest (e.g., a contract between a state agency and the legislator) as well as contracts in which the legislator holds an “indirect[]” interest, such as a contract between a state agency and a business that is owned or partly owned by a legislator. Although it is unclear how attenuated a legislator’s relationship with a contract must be before the contract is not prohibited by the Emoluments Clause, prior legal opinions have concluded that a legislator holds an “indirect” interest in a contract when the legislator is able to and will likely realize a benefit from the contract’s execution. For example, in one advisory opinion, the Attorney General concluded that a legislator held an indirect interest in a contract between a political subdivision and a company where the legislator had an “ongoing contractual relationship” with the company “to perform work attributable specifically to the project that the legislature funded.” N.M. Att’y Gen. Op. 91-11 (Oct. 17, 1991). Other opinions have held that the mere fact that a legislator has a relationship with a business that may hold contracts with a state agency does not imply that any contract between the business and a state agency authorized during the legislator’s current term of office is prohibited. *See* N.M. Att’y Gen. Op. 03-01 (Jan. 15, 2003) (opining that contracts between a state agency and a nonprofit corporation that employs a legislator did not violate the Emoluments Clause).

Assuming that the legislator has an “indirect interest” in any contracts between their children’s company and state agencies (in view of the rental-storage agreement), the facts presented in the request do not allow an analysis of how the Emoluments Clause applies to the contracts. If the legislation authorizing the state agencies to enter the contracts were enacted during the legislator’s term, then the Emoluments Clause would prohibit the legislator from having an indirect financial interest in the contracts. From the facts presented and considering that, under *State ex rel. Baca v. Otero*, 1928-NMSC-021 and its progeny, such legislation would not include any appropriations bills funding the contracts, we are unable to form a view when such legislation was enacted. Going forward, however, if new legislation is passed during the requester’s current or future terms of office authorize one or more state agencies to enter into contracts, the Emoluments Clause may operate to bar the legislator’s director or indirect interest in such

contract. In that circumstance, if the company secures a state-agency contract authorized by new legislation, then the company might have to secure a lease for storage from another vendor.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RON SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner



STATE ETHICS COMMISSION

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Jeremy D. Farris, Executive Director

January 23, 2023

To: State Ethics Commissioners
From: Jeremy Farris
Re: Section 10-16-9(B) of the Governmental Conduct Act

With the consent of Chair Lang, the State Ethics Commission has been asked by members of the legislature to consider the staff's interpretation of Section 10-16-9(B) of the Governmental Conduct Act. This memorandum explains the Staff's interpretation of Section 10-16-9(B) and provides the Commission with a set of options that the Commission may take to address the legislators' request. As is explained below, I recommend that the Commission take no action signaling agreement or disagreement with Commission staff's interpretation of Section 10-16-9(B), and instead signal its support for an amendment to Section 10-16-9(B) that will address the legislators' concerns, while preserving the core ethical principles that motivate Section 10-16-9(B).

I. Section 10-16-9(B)

Section 10-16-9(B) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2019), provides as follows:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation *or* for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, *in those instances*, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

§ 10-16-9 (emphasis added).

II. The interpretation and application of Section 10-16-9(B) by the Commission's staff.

A. Interpretation of Section 10-16-9(B)

Since first encountering questions regarding the application of Section 10-16-9(B), the Commission's staff have interpreted this section as follows:

- First, the statute prohibits legislators from representing or assisting individuals or businesses in a matter before a state agency except in certain instances.

- Second, the statute allows legislators to represent or assist individuals or businesses in a matter before a state agency in three instances: (i) the legislator is unpaid; (ii) the legislator is paid but is representing or assisting a constituent; and (iii) legislator is paid but is an attorney or other licensed professional engaged in the conduct of their profession.
- Third, “in those instances” where the legislator is allowed to represent or assist an individual or business in a matter before a state agency, the legislator may not do three things: (i) make references to the legislator’s legislative capacity except as to matters of scheduling; (ii) make communications on legislative stationery; and (iii) make threats or implications relating to legislative actions.

The Commission’s staff have so interpreted Section 10-16-9(B), considering the statute’s structure, text, and purpose.

The statute’s structure has a logical clarity: First, the statute lays out a *default rule*: legislators may not represent persons before state agencies. Second, the statute provides *exceptions* to the default rule: there are certain instances in which a legislator may represent persons before state agencies. Third, when the exceptions to the default rule applies, it provides some *secondary rules*: when legislators are permissibly representing persons before state agencies, there are still certain actions legislators cannot take.

Focusing on the text, Section 10-16-9(B) is word-for-word the same as House Rule 26-1(C)(1), available at https://nmlegis.gov/Publications/legislative_procedure/house_rules_22.pdf, except the statute replaces “and” with “or” in the clause, “unless without compensation *or* for the benefit of a constituent.” In this clause, the statute’s use of the disjunctive “or”—instead of the conjunctive “and”—changes the meaning of Section 10-16-9(B) as compared to the meaning of the House rule. Under the house rule, a representative may represent or assist a person in a matter before a state agency if and only if the representative is unpaid *and* the person assisted is a constituent. By contrast, under the statute, legislators, even legislators who are not attorneys or other licensed professional engaged in the conduct of their professions, may represent or assist other individuals or persons in a matter before a state agency if (i) they are unpaid *or* (ii) they are paid, but representing a constituent.

Section 10-16-9(B)’s purpose is to prohibit legislators from using their legislative office to unduly influence a state agency’s decision-making in a matter affecting a specific individual, non-profit organization or business, rather than their constituency or the public as a whole. Accordingly, a legislator may be paid to represent a specific person in a matter pending before a statute agency only in certain instances and, even in those instances of permissible representations and permissible assistance, the legislator cannot take certain actions that the statute views as *per se* undue influence, like referencing their legislative status or making threats regarding the state agency’s budget or other priorities.

B. Application in the course of the State Ethics Commission's work

In the course of the Commission's work, staff have had occasion to apply Section 10-16-9(B) twice. First, in the administrative case No. 2020-31, *Karen Whitlock v. Rebecca Dow*, the Commission approved a settlement agreement in which the respondent agreed to pay a \$500 civil penalty to the State Ethics Commission for two violations of Section 10-16-9(B). *See Whitlock v. Dow*, No. 2020-31 (July 5, 2020) (Dkt # 46) (settlement agreement); (Aug. 5, 2022) (Dkt # 50) (Commission approval of settlement agreement). In that matter, the general counsel had found probable cause to conclude:

From July 1, 2019 to March 2, 2021, Dow violated NMSA 1978, Section 10-16-9(B) by representing or assisting AppleTree [Educational Center, a domestic nonprofit corporation] in a matter or matters before the Public Education Department, the Children Youth and Families Department, and the Early Childhood Education and Care Department, in violation of NMSA 1978, Section 10-16-9(B). AppleTree is not a constituent, Dow's representation was paid, and Dow is not a professional person engaged in the conduct of her profession. In the alternative, Dow made prohibited references to her legislative capacity on August 13, 2019 and December 31, 2019.

Whitlock v. Dow, No. 2020-31 (Jan. 6, 2022) (Dkt # 26) (Section 10-16G-10(G) notice to Respondent Dow). Accordingly, in administrative matter No. 2020-31, even assuming the respondent was permitted to assist a 501(c)(3) non-profit organization in matters pending before state agencies, the general counsel found probable cause to conclude that the respondent twice had made prohibited references to her legislative capacity. The respondent settled these claims in exchange for paying a \$500 civil penalty to the Commission.

Second, following the biannual ethics presentation that I presented to the Members on December 12, 2022, the following day, on December 13, 2022, Amy Chavez-Romero, Assistant Director for Legislative Affairs at the Legislative Council Service submitted the following request for an informal advisory opinion:

[May a legislator use] legislative stationery to write a letter of support to a state agency, such as a letter in support of [Waste Isolation Pilot Plant ("WIPP")] to the environment department, a letter in support of an organization that is apply[ing] for a grant from the state, or letters in support of constituents to state agencies?

On December 28, 2022, Ms. Chavez-Romero submitted the following request for clarification:

May a legislator communicate with or make an inquiry with a state agency on behalf of a single constituent through legislative staff, such as through the staff of the chief clerks' offices or legislative

majority or minority leadership offices? I should note that Subsections D and E of Legislative Council Policy No. 14 do address how the House and Senate Chief Clerks approach constituent services and general correspondence.

On December 16, 2022, the general counsel provided an informal advisory opinion in response to the December 12, 2022 request. The general counsel provided a revised informal advisory opinion on January 5, 2023, in response to the December 28, 2022 request for clarification. *See* Ex. 1, Informal Advisory Opinion 2022-024 (*rev'd*) (Jan. 5, 2023).¹

III. Letters from the Legislative Council Service and the Senate Majority Leader Wirth and Senate Minority Leader Baca

On January 11, 2023, Ms. Chavez-Romero sent the general counsel a request for reconsideration of his Informal Advisory Opinion 2022-024 (*rev'd*) (Jan. 5, 2023). *See* Ex. 2, Ltr. from A. Chavez-Romero, LCS, to W. Boyd, SEC (Jan. 11, 2023). Then, on January 17, 2023, Senator Peter Wirth, the Senator Majority Leader, and Senator Gregory A. Baca, the Senator Minority Leader, sent Chair Lang a letter, requesting that the Commission review and reverse the Informal Advisory Opinion 2022-024 (*rev'd*) (Jan. 5, 2023). *See* Ex. 3, Ltr. from Hon. P. Wirth & Hon. G. Baca, Senate, to Hon. W. Lang, SEC (Jan. 17, 2023). On Chair Lang's request, I responded to Senator Wirth and Senator Baca on January 19, 2023, informing the Senators that the Commission will address this issue at the Commission's upcoming February 3, 2023 meeting. *See* Ex. 4, Ltr. from J. Farris, SEC, to Hon. P. Wirth & Hon. G. Baca, Senate (Jan. 19, 2023).

IV. The issue

Informal Advisory Opinion 2022-024, consistent with the Commission's previous applications of Section 10-16-9(B), advises that the statute prohibits Members, when representing or assisting a person in a matter before a state agency (either without compensation or for the benefit of a constituent) from: (i) referencing their legislative capacity (except as to matters of scheduling); (ii) making communications on legislative stationery; and (iii) making threats or implications relating to legislative actions.

Senator Wirth, Senator Baca, and Ms. Chavez-Romero interpret Section 10-16-9(B) to apply these prohibitions *only* when a Member is a paid attorney (or similar professional) engaged in the conduct of his or her profession. It seems as though the Senators and Ms. Chavez-Romero press their reading of Section 10-16-9(B) because the Members are accustomed to using their legislative stationery (and perhaps also making other references to their legislative capacity)

¹ Note that draft advisory opinions 2023-01 and 2023-02, on the agenda for the Commission's February 3, 2023 meeting, also respond to requests regarding what conduct legislators must and may not take with respect to businesses in which they have financial interests. Those draft advisory opinions make reference to the interpretation of Section 10-16-9(B) that the Commission's attorneys have consistently applied.

when, not acting as attorneys representing clients, they appear before, represent or otherwise assist individuals, businesses, and non-profits in matters pending before state agencies.

The different readings come down to a difference in the interpretation of the phrase “in those instances” in Section 10-16-9(B). The Commission’s attorneys have read “in those instances” to refer to instances of permissible representations of other persons, whether by lawyers or non-lawyer legislators. The Senators read the phrase to refer only to instances of representations by lawyer (and other professional) legislators engaged in the conduct of their profession. I don’t think this difference of interpretation may be resolved by pointing to a comma placement in the text, because, when looking at the words and punctuation, the English language permits both interpretations of the statute. To resolve the difference, the Commission should consider the statute’s meaning and purpose. And, as between these two interpretations of Section 10-16-9(B), I believe the reading the Commission’s attorneys have consistently applied is the better reading and, moreover, is the *ethics-maximizing* reading of the statute, harmonizing with the ethical principles set forth in Section 10-16-3. I think the Commission’s attorneys’ interpretation is the better reading for two main reasons:

First, under the Senators’ reading, Section 10-16-9(B)’s prohibitions against legislators’ making reference to their legislative capacity or threats or implications with regard to legislative action do not apply if the legislator is a non-lawyer or non-professional. Hence, under the Senators’ reading, Section 10-16-9(B) would *not prohibit* a non-lawyer, non-professional legislator, when appearing before, representing or assisting an individual or business in a matter pending before a state agency (either because the legislator is unpaid or because they are representing a constituent), to make reference to their legislative capacity and to make threats or implications relating to legislative actions. *Pace* the Senators’ reading, I do not believe the statute means that a non-lawyer legislator may both (i) assist an individual before a state agency on a contract or procurement matter affecting that individual (and even be paid to do so if the individual is a constituent); and (ii) when doing so, make reference to their legislative office and make threats or otherwise imply that some legislative action will occur unless the state agency takes favorable action. That reading of Section 10-16-9(B) is contrary to government ethics, and contrary to the Governmental Conduct Act’s interpretative guide for the statute’s conduct-regulation provisions that legislators “shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.” NMSA 1978, § 10-16-3(B) (2011). *See State v. Gutierrez, et al.*, No. S-1-SC-38367, consolidated with No. S-1-SC-38368, slip op. ¶ 38 (Sept. 26, 2022) (“Seen as ethical principles, these provisions provide general guidance for the purpose and application of the GCA generally, and thus these provisions are not surplusage.”) (citation omitted).

Second, I don’t believe that it makes much sense to prohibit a lawyer legislator from (i) referencing their legislative capacity (except as to matters of scheduling); (ii) making communications on legislative stationery; and (iii) making threats or implications relating to legislative actions, when the lawyer legislator is engaged in the practice of law before a state agency, *but not* apply the same prohibitions to a non-lawyer legislator when the non-lawyer

legislator is appearing on behalf of an individual or business (if unpaid) or an individual (if paid, and the individual is a constituent) on a matter pending with a state agency.

These prohibitions address problems that are not specific to lawyers; rather, they address problems that are germane when any legislator represents or assists other persons before state agencies. Because all legislators (and not only lawyer legislators) have significant powers over state agencies—particularly with respect to budget appropriations, but also with respect to the imposition of duties—legislators should not be able to refer to their powers of legislative office when representing or assisting an individual or business in a matter that individual or business has pending with that state agency. That would be undue influence. And because the Governmental Conduct Act allows legislators—both lawyers and non-lawyers—to appear for individuals, businesses, and non-profits before state agencies in several instances (including paid and unpaid instances), the Act’s prohibitions on what legislators may not do during representations or assistance should apply irrespective of whether the legislator is a lawyer or not. Moreover, it is even more important that the Governmental Conduct Act impose some restrictions on the non-lawyer-legislators when appearing before other persons before state agencies, because they, unlike the lawyer-legislators, are not subject to rules of professional conduct. *See* Rule Set 16 NMRA (“Rules of Professional Conduct”).

After thinking about the correspondence on this issue, I believe the statute needs amendment. For reasons sounding in government ethics, the statute prohibits non-lawyer legislators from referencing their power as a legislator when they are assisting a business or non-profit, in which they have an interest, in a contract or procurement matter pending before a state agency. Yet, there seems to be little wrong with a legislator using their stationery in a letter to the Human Services Department to advocate, without pay, for a constituent in an issue regarding the constituent’s benefits. (That, to my mind, is the most charitable hypothetical favoring the Senators’ reading.) In order for the law to treat each circumstance appropriately, the statute needs amendment.

V. The Commission’s options

With respect to the Informal Advisory Opinion, under the Commission’s rules, the Commission can (1) do nothing; or (2) instruct the director to draft “an advisory opinion for the Commission to consider for issuance as an advisory opinion.” 1.8.1.9(B)(3). If the instruction were other than to convert the informal advisory opinion into an advisory opinion, that instruction would need to be specific to enable me to draft an advisory opinion for the Commission to consider at a future meeting.

Separately, the Commission can also recommend to the legislature an amendment to Section 10-16-9(B), supplementing the Commission’s 2022 annual report in which the Commission made several recommendations for legislation. *See* NMSA 1978, § 10-16G-5(B)(5) (2019).

Given these options, I believe the best course of action is to recommend legislation and do nothing with respect to the informal advisory opinion. Informal Advisory Opinion 2022-024

is not binding on the Commission; it only memorializes the views of the Commission's attorney staff, considering the law and the request presented. *See* 1.8.1.9(B)(1) NMAC. Also, I do not recommend that the Commission attempt to draft by committee the holding of advisory opinion in open session. And, if it can be avoided (and it can in this instance), I do not recommend that the Commission take any action that contradicts or tends to contradict the Commission's prior actions in administrative proceedings.

Instead, I propose that the Commission recommend the following amendment:

Section X. Section 10-16-9(B) NMSA 1978 (being Laws 1967, Chapter 306, Section 9, as amended) is amended to read:

A. A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

B. Except as otherwise provided in Subsection C of this section, a legislator shall not appear for, represent or assist another person in a matter before a state agency unless that appearance, representation or assistance is:

(1) provided without compensation; ~~[or]~~

(2) for the benefit of a constituent ~~except~~
~~for legislators who are attorneys or other professional persons~~
~~engaged in the conduct of their professions and, in those~~
~~instances, the]; and~~

(3) not a matter that affects the legislator's
financial interest or financial position.

C. A legislator may appear for, represent or assist
another person in a matter before a state agency when the
legislator is an attorney or other professional who is making
the appearance or providing the representation or assistance
while engaged in the conduct of the legislator's profession.
The legislator shall ~~[refrain from]~~ not make references to the
legislator's legislative capacity except as to matters of
scheduling ~~[from communications on]~~ or use legislative
stationery, ~~[and from]~~ legislative email or any other indicia
of the legislator's legislative capacity when appearing for,
representing or assisting a constituent or client in a matter
before a state agency.

D. A legislator shall not make direct or indirect
threats or implications relating to legislative actions in any
instance in which the legislator appears for, represents or
assists another person in a matter before a state agency."



STATE ETHICS COMMISSION

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January 5, 2023

EXHIBIT

1

Amy Chavez-Romero
Assistant Director for Legislative Affairs
Legislative Council Service
490 Old Santa Fe Trail
Santa Fe, NM 87501

Via email only: Amy.Chavez-Romero@nmlegis.gov

Dear Ms. Chavez-Romero:

Thank you for your request for an opinion concerning specific matters related to ethics. This letter is the Commission staff's informal opinion issued in response to your December 13, 2022 request and revised to address a supplemental question you submitted on December 28, 2022.

Question presented

Your December 13, 2022 request states:

[May a legislator use] legislative stationery to write a letter of support to a state agency, such as a letter in support of [Waste Isolation Pilot Plant ("WIPP")] to the environment department, a letter in support of an organization that is apply[ing] for a grant from the state, or letters in support of constituents to state agencies?

On December 28, 2022, you submitted the following request for clarification:

May a legislator communicate with or make an inquiry with a state agency on behalf of a single constituent through legislative staff, such as through the staff of the chief clerks' offices or legislative majority or minority leadership offices?

I should note that Subsections D and E of Legislative Council Policy No. 14 do address how the House and Senate Chief Clerks approach constituent services and general correspondence.

Answer

Subsection 10-16-9(B) of the Governmental Conduct Act prohibits a legislator from using legislative letterhead within the scope of an appearance, representation, or assistance of another person in a matter before a state agency. *See* NMSA 1978, § 10-16-9(B) (2007). A letter in support of WIPP is not prohibited because WIPP is not a "person" under the

Governmental Conduct Act. A letter on legislative stationery to a state agency in support of an organization seeking a grant, however, is likely prohibited. There are not enough facts in the request to opine on whether a letter on legislative letterhead “in support of an organization” is a violation.

A legislator may communicate with or make an inquiry with a state agency on behalf of a single constituent, either directly or through legislative staff, so long as the legislator does not use legislative stationery or make threats or implications related to legislative action.

Analysis

I. Relevant law

Subsection B of Section 10-16-9 of the Governmental Conduct Act provides:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

This provision broadly prohibits a legislator from “appear[ing] for, represent[ing] or assist[ing] another person in a matter before a state agency,” unless an exception applies. The provision recognizes several exceptions to this broad prohibition: (1) the legislator is not receiving compensation; (2) the legislator is acting for the benefit of a constituent; or (3) the legislator is an attorney or another professional person engaged in the conduct of his or her profession. If an exception applies and operates to permit a legislator to “appear for, represent or assist another person in a matter before a state agency,” the legislator is nonetheless prohibited from making “references to the legislator’s legislative capacity except as to matters of scheduling,” from “communicat[ing] on legislative stationery,” and from “[making] threats or implications relating to legislative actions.”

That a legislator’s actions benefit (or are intended to benefit) a group of persons does not, by itself, make out a violation of Subsection 10-16-9(B). This conclusion flows directly from Subsection 10-16-9(B)’s text, because “[t]he text of a statute . . . is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). Further:

Unless a word or phrase is defined in the statute . . . being construed, its meaning is determined by its context, the rules of grammar and common usage. A word or phrase that has acquired a technical or

particular meaning in a particular context has that meaning if it is used in that context.

NMSA 1978, § 12-2A-2 (1997).

But, a legislator would violate Subsection 10-16-9(B) when he or she “appear[s] for, represent[s] or assist[s] *another person* in a matter before a state agency” and an exception does not apply. (Emphasis added). “Person” in Subsection 10-16-9(B) means an “individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity[.]” NMSA 1978, § 12-2A-3(E) (1997) (defining “person” in “the statutes and rules of New Mexico”). Use of the term “another person” in Subsection 10-16-9(B), rather than “private interests” (as appears in Subsection 10-16-3(A)), implies that a Subsection 10-16-9(B) violation must be based on allegations that the legislator was acting in a representative capacity, not simply that the legislator’s actions were motivated to benefit others. In other words, there must be some allegation that the respondent has a relationship (whether as an agent of a principal, a joint venturer, or simply an informal enterprise) with the person the legislator is appearing for, representing, or assisting. *Cf.* Restatement (Third) of Agency § 1.01 (2006) (defining “agency” as a “relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act”).

The interpretation that Subsection 10-16-9(B) prohibits a legislator from acting on behalf of one or more individuals but does not prohibit actions by a legislator that incidentally benefit others is bolstered when the Subsection is viewed as a whole and in relation to other statutes dealing with the same subject matter. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15 (“In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part.” (internal quotation marks and citation omitted)); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (explaining that statutes *in pari materia* must be construed in reference to each other). Subsection 10-16-9(B) states that an otherwise-prohibited representation is permissible if it is “for the benefit of a constituent[.]” The use of the singular “constituent” reinforces the interpretation of “another person” as referring to one or more individuals, not more diffuse interest groups such as “plaintiffs’ lawyers” or “law enforcement.”

Other provisions in the Governmental Conduct Act support interpreting “another person” in Subsection 10-16-9(B) to refer to a discrete person or persons, not a broad category or group. First, as noted above, the Legislature used broader terminology in Subsection 10-16-3(A), prohibiting a legislator from “us[ing] the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” The Legislature could have used similarly broad language in Subsection 10-16-9(B) and prohibited a legislator from appearing for, representing, or assisting any “private interest” in a matter before a state agency, but it did not. Instead, it used the phrase “another person.” Elsewhere, Subsection 10-16-3(D) prohibits a member of the Legislature from “request[ing] or receiv[ing], and *no*

person may offer a legislator . . . any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.” § 10-16-3(D) (emphasis added). Interpreting the term “person” in Subsection 10-16-9(B) to include “interest groups” would carry over to Subsection 10-16-3(D); as a consequence, a legislator’s acceptance of contributions otherwise permitted by the Campaign Reporting Act from members of a union or industry group, for example, would be a fourth-degree felony if the legislator solicited those contributions with a promise to vote for or against legislation affecting the group’s interests.

In sum, the requirement that statutes governing the same subjects be read *in pari materia* so as not to bring the statutes into conflict supports interpreting Subsection 10-16-9(B) as applying only where a legislator undertakes to appear for, represent, or assist an identified person or persons, not interest groups in general. See *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15 (a statute must be read “as a whole so that each provision may be considered in relation to every other part” (cleaned up)).

If a legislator appears for, represents, or assists another person in a matter before a state agency, the question is then whether the legislator’s conduct is permitted under one or more of the exceptions set forth in Subsection 10-16-9(B). Again, an exception applies when a legislator appears for, represents or assists another person in a matter before the state agency and the legislator either:

- a. Does not receive compensation;
- b. Is acting for the benefit of a constituent; or
- c. The legislator is an attorney or other professional person engaged in the conduct of the legislator’s profession.

If one of those exceptions applies (i.e., “in those instances,”) and a legislator is allowed to represent a person before a state agency, the legislator may not make a reference to his or her legislative capacity outside matters of scheduling, communicate on legislative stationery, or make threats or implications relating to legislative actions.

While the language “in those instances” appears in the statute immediately following the third authorized representation (an attorney or other professional person engaged in the conduct of his or her profession), we interpret “those instances” to refer to each of the three categories of representation, not simply the third. There are two flaws in the argument that a legislator’s obligation not to make reference to his or her legislative capacity, use legislative stationery, or make threats or implications relating to legislative actions applies only where a legislator is an attorney or other professional.

First, the statute refers to “in those instances,” i.e., the statute’s text recognizes that there is more than one “instance” where the prohibitions apply. If the Legislature intended for the

prohibition against use of legislative stationery to apply only to legislators acting in a professional capacity, the statute would say “in *that* instance . . .”.

Second, interpreting the duty not to use legislative stationery as applicable only to legislators acting in a professional capacity would give rise to absurd results. Under Section 10-16-9(B), a non-lawyer, non-professional legislator, is permitted to represent a person for pay in a matter before a state agency, so long as the person paying the legislator is a constituent. *See* § 10-16-9(B) (“A legislator shall not appear for, represent, or assist another person in a matter before a state agency, unless without compensation *or* for the benefit of a constituent . . .” (emphasis added)). It would make no sense to permit a non-lawyer, non-professional legislator to use legislative stationery (and to make threats and implications related to legislative actions) on behalf of a constituent who is paying them, but not a legislator who is an attorney or other professional person advocating on behalf of a client. For these reasons, the best reading of Subsection 10-16-9(B) is that the prohibition against the use of legislative letterhead applies to all instances where a legislator appears for, represents, or assists another person in a matter before a state agency.

II. Application to the specific factual situations presented in your request

Your question asks whether four examples violate Subsection 10-16-9(B): (1) a letter in support of WIPP to the environment department, (2) a letter in support of an organization that is applying for a grant from the state, (3) “letters in support of constituents to state agencies;” and (4) communications or inquiries with a state agency on behalf of a single constituent through legislative staff, such as through the staff of the chief clerks’ offices or legislative majority or minority leadership offices. With the caveat that these examples are thin on detail and broadly phrased, I offer some analysis as to whether each example suggests a violation of Subsection 10-16-9(B).

With respect to writing a letter in support of WIPP, the letter is not a violation of Subsection 10-16-9(B) because WIPP is not a “person.”¹ When used generally in statutes, the word “person” excludes both sovereigns and their agencies. *See* NMSA 1978, § 12-2A-3(E) (1997) (providing the definition of “person” in New Mexico statutes and omitting any reference to federal or state governmental agencies); *see also, e.g., Stansell v. N.M. Lottery*, 2009-NMCA-062, ¶ 12, 146 N.M. 417, 211 P.3d 214 (“Our Supreme Court has stated that ‘[w]hen the [L]egislature has wanted to include . . . governmental bodies in its statutes, it has known how to do so. Since the Legislature did not include any governmental body or the Lottery within the UPA’s definition of ‘person’, the Lottery is not subject to the UPA.” (alteration original) (citing *S. Union Gas Co. v. N.M. Pub. Serv. Comm’n*, 82 N.M. 405, 406, 482 P.2d 913, 914 (1971), *overruled on other grounds by De Vargas Sav. & Loan Ass’n v. Campbell*, 87 N.M. 469, 535 P.2d 1320 (1975))); *see also Lucero v. Richardson & Richardson, Inc.*, 2002-NMCA-013, ¶ 11,

¹ I take the request’s reference to WIPP to be a reference to the nuclear waste storage facility owned by the Department of Energy, not any person involved in the operation of that facility. To the extent support is made on behalf of a private entity such as a non-governmental contractor, they likely would fall under the definition of “person” under the Governmental Conduct Act.

131 N.M. 522, 39 P.3d 739 (“[A]bsent express words to the contrary, neither the state nor its subdivisions are included within general words of a statute” (citation omitted)); *cf. also, e.g., Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1862 (2019) (“In several instances, this Court has applied the presumption against treating the Government as a statutory person when there was no question of immunity, and doing so would instead exclude the Federal Government or one of its agencies from accessing a benefit or favorable procedural device.”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 273-74 (2012) (“[T]he word *person* traditionally excludes the sovereign. . . . Noninclusion of the sovereign means non-inclusion of agencies of the sovereign as well.” (citing cases)). Accordingly, writing a letter in support of WIPP to the Environment Department is not a prohibited appearance, representation, or assistance for “another person” that potentially violates Subsection 10-16-9(B).

With respect to “a letter in support of an organization that is applying for a grant from the state,” the letter is likely prohibited if it is on legislative letterhead. An application to receive grant funds from the state is a “matter,”² and an “organization,” especially an incorporated organization such as a domestic nonprofit, is “another person.” Unless the legislator is acting wholly of his or her own volition and not at the request of the organization, a letter in support of the organization’s grant application would be an appearance, representation, or assistance on behalf of another person subject to the requirements of Subsection 10-16-9(B). Accordingly, the legislator would be prohibited from communicating the letter of support on legislative letterhead.

It is not possible to analyze whether “letters in support of constituents to state agencies” are in violation of Subsection 10-16-9(B). At the outset, it is unclear whether the letter of support relates to a “matter” before a state agency. Even if it does, if the letter to a state agency is in support of a group of constituents (such as business owners or ranchers in the legislator’s district), then the letter would not be prohibited because it is not transmitted on behalf of “another person.” However, if the legislator sends a letter at the instruction of an identified constituent (e.g., the legislator is asked by a named constituent to send a letter of concern regarding the agency’s treatment of the constituent in an adjudication), then the provisions of Subsection 10-16-9(B) would apply.

With respect to whether a legislator may engage in communications or inquiries with a state agency on behalf of a single constituent through legislative staff, the same analysis applies: such efforts would constitute assistance for the benefit of a constituent, and would therefore be permitted under Subsection 10-16-9(B), whether the communications are direct or through

² The Governmental Conduct Act does not define “matter,” and New Mexico courts have not analyzed the meaning of the term “matter” in Section 10-16-9(B). However, the Commission has previously opined that the term “matter” in Section 10-16-8 of the Governmental Conduct Act (which applies to revolving-door issues) to mean “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.” *See* State Ethics Comm’n Adv. Op. 2022-10 (Dec. 9, 2022) (quoting Rule 16-111(E) NMRA).

legislative staff.³ The legislator's assistance would only be prohibited if it involved the legislator's use of legislative letterhead or threats or implications related to legislative actions. *See* § 10-16-9(B). Legislative staff would not be prohibited from using legislative letterhead, because they are not "legislators" subject to the prohibitions against such uses in Subsection 10-16-9(B).

Conclusion

Subsection 10-16-9(B) of the Governmental Conduct Act prohibits a legislator from using legislative letterhead within the scope of an appearance, representation, or assistance of another person in a matter before a state agency. A letter in support of WIPP to a state agency is not prohibited because WIPP is not a "person" under the Governmental Conduct Act. A letter on legislative stationery to a state agency in support of an organization seeking a grant is likely prohibited. There are not enough facts in the request to opine on whether a letter on legislative letterhead "in support of constituents" is a violation. A legislator is permitted to communicate with state agencies on behalf of a constituent, whether directly or indirectly through Legislative Council Service staff, so long as the legislator does not engage in prohibited uses of legislative stationery or make threats or implications related to legislative action.

This is an informal advisory opinion. It is specific to you and the facts presented in your request. *See* 1.8.1.9(B)(2) NMAC. It is not binding on the Commission, but it may be used as evidence of good faith if you make a decision in reasonable reliance on the opinion. *See* 1.8.1.9(B)(4) NMAC. If you believe that I have misapprehended the facts or should reconsider my analysis, please write to walker.boyd@sec.nm.gov.

Very truly yours,

/s/
Walker Boyd

³ This letter opinion does not analyze whether the Legislative Council Policies permit this type of assistance. *See, e.g.,* State Ethics Comm'n Adv. Op. No. 2020-02 at *11 (Apr. 3, 2020) (declining to interpret and apply rules enforced by judicial branch on separation-of-powers concerns).

State of New Mexico
Legislative Council Service

411 State Capitol, Santa Fe, New Mexico 87501
(505) 986-4600
Raúl E. Burciaga, Director



January 11, 2023

File No. 202.224006

VIA EMAIL: walker.boyd@sec.nm.gov

Walker Boyd
General Counsel
State Ethics Commission
800 Bradbury Drive SE, Suite 215
Albuquerque, NM 87106

Dear Mr. Boyd:

Thank you for your analysis of Section 10-16-9 (B) NMSA 1978 and the latest advisory letter, which you provided to us on January 5, 2023 and is enclosed herein. We would respectfully request that you reconsider the manner in which Section 10-16-9 (B) NMSA 1978 is interpreted in the letter.

As you know, Subsection B of Section 10-16-9 NMSA 1978 provides that:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

The advisory letter observes that Section 10-16-9 (B) NMSA 1978 generally prohibits a legislator from appearing for, representing or assisting another person in a matter before a state agency, but

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that prohibition does not apply when a legislator: "a) does not receive compensation; b) is acting for the benefit of a constituent; or c) is an attorney or other professional person engaged in the conduct of the legislator's profession".

The advisory letter states that "[i]f one of those exceptions applies (i.e. 'in those instances,') and a legislator is allowed to represent a person before a state agency, the legislator may not make reference to his or her legislative capacity outside matters of scheduling, communicate on legislative stationery, or make threats or implications relating to legislative actions". The advisory letter opines that the language "in those instances" refers "to each of the three categories of representation, not simply the third".

We respectfully disagree with this portion of the advisory letter. It is our opinion that "in those instances" places conditions only upon the exception that allows legislators to assist a person before a state agency (if that person is not a constituent or if the representation is for compensation) if the legislators are attorneys or other professional persons engaged in the conduct of their professions.

Had the intent of this provision been to include all those exceptions relating to legislative stationery and legislative actions, it would be standard drafting practice to have listed them together with one lead-in phrase (i.e., "unless" or "except") as opposed to listing two distinct exceptions. The phrase "unless without compensation or for the benefit of a constituent" is set off because that is one of the core responsibilities of a legislator: to assist a constituent without compensation. If that phrase is set aside, you have one clear sentence stating that a legislator cannot appear for, represent or assist another person before a state agency except as an attorney or other professional person. The phrase "unless without compensation or for the benefit of a constituent" stands independent of the remainder of that subsection.

The advisory letter notes that "the statutes' text recognizes there is more than one 'instance' where the prohibitions apply". It further states that "[i]f the Legislature intended for the prohibition against use of legislative stationery to apply only to legislators acting in a professional capacity, the statute would say 'in *that* instance'". We believe this argument is incorrect because it appears more probable that "in those instances" refers to the language that immediately precedes it. The phrase "except for legislators who are attorneys *or* other professional persons engaged in the conduct of their professions" immediately precedes "in those instances, the legislator shall refrain from references to the legislator's legislative capacity. . .". The phrase "except for legislators who are attorneys or other professional persons engaged in the conduct of their professions" is written in the plural. Moreover, two separate situations, or instances, are enumerated as part of the exception: 1) those instances in which legislators who are attorneys are representing a person before a state agency in the conduct of their professions; and 2) those instances in which legislators who are "other professional persons" engaged in the conduct of their professions. Thus, the proper language to refer to those collective instances must be followed by "in *those*

instances". The phrase "in those instances" simply clarifies that the conditions to refrain from references to legislative capacity, use of legislative stationery and threats related to legislative action should be applied to those instances in which legislators are representing clients as attorneys or in another representative capacity.

The advisory letter further opines that an absurd result would ensue if the statute is read to permit "a non-lawyer, non-professional legislator to use legislative stationery (and to make threats and implications related to legislative actions) on behalf of a constituent who is paying them, but not a legislator who is an attorney or other professional person advocating on behalf of a client". While an absurd result could stem from such a reading, we do not agree that the language of the statute necessitates such a reading.

The statute merely clarifies that a legislator acting in a professional capacity is prohibited from referring to his or her legislative capacity, using legislative stationery or making threats or implications related to legislative actions. For instance, it would be a reasonable interpretation that a legislator acting as an attorney (and in a nonlegislative capacity) before a state agency shall refrain from referring to his or her legislative capacity or from using legislative stationery because he or she would be appearing on behalf of another person in a nonlegislative capacity. In addition, it would be reasonable that a legislator acting as an attorney should refrain from threats or implications related to legislative actions.

It is also important to analyze whether an absurd result would stem from application of the prohibitions against legislators who are not representing clients before a state agency as lawyers or in another professional capacity. For example, consider the following scenarios:

- A legislator (without compensation) uses legislative stationery while writing to a state agency to inquire about services that might be available to a constituent.
- A legislator calls a state agency about a constituent who has not received a response from the state agency on some matter involving neither an administrative proceeding nor a judicial matter.
- A legislator sends a letter to a state agency asking for support of or feedback on a legislative initiative involving that agency that has been requested by the constituent. Only a legislator can request or introduce legislation.
- A legislator asks a legislative agency (Legislative Council Service, Legislative Education Study Committee, Legislative Finance Committee) or the office of one of the chief clerks (who are statutorily charged with providing constituent services) to inquire about a matter with a state agency, and the respective agency or office uses legislative stationery and makes the request on behalf of the named legislator.
- A constituent *knows* the individual is a legislator; it is the primary reason why the constituent contacted the legislator.

In such cases, not allowing a legislator to use legislative stationery or to refer to his or her own legislative capacity would result in an absurd reading of the statute. In fact, it appears that any other interpretation of the statute would lead to an absurd result. The same absurdity would arise if a legislator in similar situations would be prohibited from including "Representative" or "Senator" preceding his or her name in an email. The public knows and expects legislators to act on behalf of or for the benefit of a constituent or any member of the public, whether or not that person is a district constituent.

The advisory letter specifically discusses whether the statute could be construed to allow a non-lawyer, non-professional legislator from using legislative stationery on behalf of a *paying* constituent. However, the opinion applies the statute to conduct that is already prohibited by Section 10-16-3 (A) NMSA 1978 of the Governmental Conduct Act. That provision mandates that a legislator use the power and resources of public office "only to advance the public interest and not to obtain personal benefits or pursue private interests". Obtaining compensation from a constituent for some action taken by that legislator in a legislative capacity (as opposed to an act as a lawyer or in another professional capacity) would seem to run afoul of this provision.

It appears such conduct would be further prohibited by Article 4, Section 39 of the Constitution of New Mexico. It provides that:

Any member of the legislature who shall vote *or use his influence* for or against any matter pending in either house in consideration of any money, thing of value or promise thereof, shall be deemed guilty of bribery . . . or any member of the legislature who shall solicit from any person or corporation any money, thing of value or personal advantage for his vote *or influence* as such member shall be deemed guilty of solicitation of bribery.

Section 10-16-3 NMSA 1978 of the Governmental Conduct Act contains a similar prohibition:

D. No legislator . . . may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.

The advisory letter also suggests that unless the prohibitions in Section 10-16-9 (B) NMSA 1978 are applied to all of the exceptions enumerated in that statute, the statute could be construed to allow a non-lawyer, non-professional legislator to make threats or implications related to legislative actions, leading to an absurd result. However, even in the absence of the application of such prohibitions in the statute to the enumerated exceptions, an absurd result does not ensue because other provisions of law already prohibit such conduct. As previously discussed, Article 4, Section 39 of the Constitution of New Mexico and Section 10-16-3 NMSA 1978 already prohibit members of the legislature from making threats or implications related to legislative actions. Given that threats or implications to a state agency regarding legislative actions would

Walker Boyd
January 11, 2023
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be prohibited by the aforementioned provisions, the absence of application of such similar prohibition in Section 10-16-9 (B) NMSA 1978 to legislators acting on behalf of constituents without pay and in a legislative capacity does not result in legalizing any conduct that would constitute a threat or implication relating to legislative action.

We appreciate your work in providing the advisory letter. We will look forward to your response to our request for your reconsideration of the application of Section 10-16-9 NMSA 1978.

Sincerely,



RAÚL E. BURCIAGA
Director



AMY CHAVEZ-ROMERO
Assistant Director for Legislative Affairs

REB/ACR:clm

enc.

cc: Jeremy D. Farris, Executive Director, State Ethics Commission



New Mexico State Senate

STATE CAPITOL

Santa Fe, New Mexico 87501

EXHIBIT

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January 17, 2023

The Honorable William F. Lang
Chair, New Mexico State Ethics Commission
800 Bradbury Dr. SE, Suite 215
Albuquerque, NM 87106

Sent via email to Ethics.Commission@sec.nm.gov

Re: State Ethics Commission Staff Informal Opinion – Use of Legislative Stationary and Letters in Support of Constituents

Dear Judge Lang:

This letter is in response to the informal opinion issued by New Mexico State Ethics Commission (“Commission”) General Counsel, Walker Boyd, to the Legislative Council Service, on December 16, 2022.

We respectfully disagree with Mr. Boyd’s conclusion regarding the use of legislative stationary and reference to our legislative capacity when assisting constituents before state agencies. According to Mr. Boyd, when a legislator is “acting for the benefit of a constituent,” the legislator “may not make a reference to his or her legislative capacity outside matters of scheduling” or “communicate on legislative stationery.”

This determination is inconsistent with our reading of the statute and the Interim Legislative Ethics Committee’s (“Committee”) Advisory Opinion No. LEC96-1. In that advisory opinion, it is stated:

“Communications that relate reasonably to the exercise of the powers or duties of a legislator include, for example, communications with constituents, other public officials, interest groups, the media and the general public on issues of public policy. Thus, as noted in House and Senate Ethics Rules 26-1, it is appropriate to use official legislative stationery to send letters to state agencies on behalf of constituents, unless the legislator is acting instead as a paid attorney or similar professional engaged in the conduct of his profession, in which case communications should not be sent on legislative stationery. See Senate Rule 26-1 C (1) and House Rule 26-1 C (1).”

The Committee thus determined that a legislator’s prohibition of using legislative stationery applied only in such instances when the legislator is an attorney or other professional. Although

The Honorable William F. Lang
January 17, 2023
Page 2

Mr. Boyd deemed this argument as flawed, it is consistent with our reading of the statute and the formal advisory opinion of a legislative committee.

We would ask that the Commission review and reverse Mr. Boyd's informal opinion. Our members need clarification on this important issue as soon as possible. We would ask that you address this issue on or before February 13, 2023.

Respectfully,



PETER WIRTH
State Senator
Senate Majority Leader



GREGORY A. BACA
State Senator
Senate Minority Leader

Enclosure: Interim Legislative Ethics Committee Ethics Advisory Opinion No. LEC96-1

New Mexico State Legislature

STATE CAPITOL

Santa Fe

INTERIM LEGISLATIVE ETHICS COMMITTEE

ETHICS ADVISORY OPINION NO. LEC96-1

Pursuant to Section 2-15-9 NMSA 1978, the Interim Legislative Ethics Committee was asked to issue an ethics advisory opinion establishing an appropriate standard of conduct for the use of legislative stationery. This opinion responds to that request.

The request, submitted by Senator Joseph J. Carraro, "seeks guidance for all legislators on when it is, and is not, appropriate to use legislative stationery and when it is necessary to use only personal or 'campaign election committee' stationery." Letter from Senator Joseph J. Carraro to Senator Manny M. Aragon and Speaker Raymond G. Sanchez, dated June 5, 1996, page 1. Senator Carraro voluntarily waived confidential treatment of his opinion request.

The Interim Legislative Ethics Committee met on July 22, 1996 to discuss and review issues relevant to the appropriate uses of legislative stationery.

Advisory Opinion Summary:

The use of official legislative stationery should be limited only to matters that reasonably relate to official legislative business. Official legislative stationery should not be used to solicit campaign election contributions or votes, even if the stationery is paid for by the legislator and a disclaimer expressly noting that fact is printed on the stationery.

Discussion:

The Governmental Conduct Act sets forth basic principles that govern the ethical conduct of legislators, public officers and employees. Section 10-16-1 et seq. NMSA 1978. Guiding principles include the following:

A legislator, public officer or employee shall treat his government position as a public trust. He shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests incompatible with the public interest. . . .

A legislator, public officer or employee shall conduct himself in a manner that justifies the confidence placed in him by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service. [Subsections A and B of Section 10-16-3 NMSA 1978.]

The use of official legislative stationery raises ethical questions that relate to whether the use is consistent with the public trust; advances only the public interest as opposed to personal or other interests; and maintains the integrity of public office and the proper exercise of its powers.

Official legislative stationery includes stationery that carries the official, gold-embossed state seal or a reasonable facsimile of it or states in bold letters at or near the top of the stationery "State of New Mexico," "New Mexico State Legislature," "New Mexico State Senate," "House of Representatives" or some similar heading. All of these are designations that the stationery is an official letterhead of the state and a public body. The stationery accordingly connotes that it is being used for official business of the state and the public body identified on the stationery.

The use of the state seal on official legislative stationery is significant. As the Attorney General has stated, "the state seal historically has been the indicia of authority of the state." Attorney General Opinion No. 6521 (1955). The state seal "is used to authenticate charters, etc., and to authenticate the acts of the state of New Mexico, and it is intended to import authenticity to the fact that the item bearing the same is directly related to the sovereign state of New Mexico." Attorney General Opinion No. 5569 (1952). The use of the state seal thus should be limited to matters that relate to the conduct of official business of the state.

The same conclusion applies to a reproduced copy of the official state seal or even a seal that may be technically different from the official seal but creates a reasonable impression that it is official.

Similarly, stationery that is conspicuously identified, usually at the top of the page, as being from a public body implies that it concerns official business of the body. Thus, stationery that states at the very top "New Mexico State Legislature," "New Mexico State Senate" or "New Mexico House of Representatives" gives the impression it is an official communication from that particular public body. So does a copy of legislative stationery that removes or obscures the state seal or that, because of the type, wording and layout used, leads a reasonable person to believe that the stationery is official.

For these reasons, the use of legislative stationery of a public body that includes the official state seal or a reasonable facsimile of it, or that reasonably appears to be official stationery of a legislative body, should be limited to matters that relate to the conduct of legislative business.

In most instances, this standard should not be difficult to define and apply. Communications that relate reasonably to the exercise of the powers or duties of a legislator include, for example, communications with constituents, other public officials, interest groups, the media and the general public on issues of public policy. Thus, as noted in House and Senate

Ethics Rules 26-1, it is appropriate to use official legislative stationery to send letters to state agencies on behalf of constituents, unless the legislator is acting instead as a paid attorney or similar professional engaged in the conduct of his profession, in which case communications should not be sent on legislative stationery. See Senate Rule 26-1 C (1) and House Rule 26-1 C (1).

Surveys of constituents on current issues, expressions of the legislator's opinions on matters of public policy, and letters of recommendations about current or former legislative staff are generally appropriate uses of legislative stationery. Political communications that are not directly election-related, such as correspondence about scheduling party caucus meetings, are also appropriate uses of legislative stationery.

It would be proper for a legislator to use official legislative stationery, as defined here, to argue for or against a particular ballot question. A legislator could also use official legislative stationery to urge public action on specific public policy issues.

It is not appropriate, however, to use official legislative stationery for campaign reelection purposes. Specifically, it would not be proper to use a legislator's official stationery to solicit campaign contributions or to solicit votes for the legislator's reelection to or election to another public office. Those uses are beyond the scope of official legislative powers or duties and serve instead only partisan election purposes. Likewise, an issues survey of constituents that is printed on official stationery, is sent near the time of an election and includes with the survey a request for reelection support would not be appropriate.

The same conclusion is true even if the official legislative stationery is paid for by the legislator from his own personal or campaign reelection funds and even if the stationery includes a disclaimer to that effect. The disclaimer is usually printed in relatively small type size at the bottom of the page and notes in brackets or parentheses that it was not paid for with public money or taxpayer dollars or was paid for by the legislator personally or from some other nonpublic source.

The problem is that such stationery, even with the disclaimer, still conveys the general impression that it is an official communication from the public body. And that is simply not the case. Official legislative stationery should be limited to communications that concern official legislative business. Campaign reelection purposes are not official legislative business, no matter who pays for the stationery and no matter how the payment is disclosed.

It is nevertheless always true that a legislator does properly hold the title of Senator or Representative, and the legislator is perfectly entitled to be identified as such. Accordingly, if stationery is not printed at public expense and is identified at the top as coming from "Senator X" or "Representative Y," that is entirely appropriate. In that case, the letter is from the person who is a senator or representative, and it does not imply it is an official communication from the public body in which the legislator serves. Such stationery may be used for non-official purposes, even if it notes below the legislator's name his or her chamber, committee memberships and addresses,

including that at the State Capitol. That type of stationery could be used for personal letters or to solicit contributions to worthy nonprofit causes.

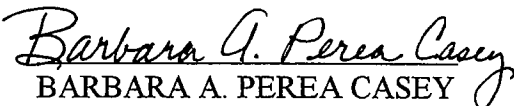
Campaign reelection stationery could state at the top something like "Committee to Reelect Senator X". That stationery could then be used for any authorized campaign reelection activities.


It would not, however, be appropriate to include on personal or campaign reelection stationery the official state seal or conspicuously note at the top the name of the public body in which the legislator serves. Those uses could improperly lead a reasonable person to conclude that the stationery is the property of the public body, rather than the legislator personally, and that it concerns official public business.

Pursuant to the provisions of Paragraph (3) of Subsection D of Legislative Council Policy No. 16, advisory opinions issued by the Interim Legislative Ethics Committee are prospective only. This advisory opinion is not intended to reflect on prior uses of legislative stationery, since no opinion or other guidance on the use of legislative stationery has previously been available.

In the future, as provided in Paragraph (4) of Subsection D of Legislative Council Policy No. 16, any legislator who acts in good faith reliance upon this advisory opinion shall be immune from sanctions for conduct allowed by the opinion, unless this advisory opinion is subsequently rejected by the relevant House of Representatives or Senate standing committee prior to the conduct in question.

A copy of this advisory opinion shall be mailed to all legislators and shall be retained in the library of the Legislative Council Service.


BARBARA A. PEREA CASEY
State Representative
Co-Chair, Interim Legislative
Ethics Committee


GARY DON REAGAN
State Senator
Co-Chair, Interim Legislative
Ethics Committee

Date: September 3, 1996



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
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Hon. William F. Lang (Chair)
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

January 19, 2023

EXHIBIT

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Via electronic mail only

The Honorable Peter Wirth
Senate Majority Leader
c/o Lorraine Montoya
lorraine.montoya@nmlegis.gov

- and -

The Honorable Gregory A. Baca
Senate Minority Leader
c/o Vincent Torres
vincent.torres@nmlegis.gov

Dear Senate Majority Leader Wirth and Senate Minority Leader Baca:

Thank you for your January 17, 2023 letter to William Lang, Chair of the State Ethics Commission. Chair Lang has requested that I respond to your letter on his behalf. Considering your long tenure as attorneys in New Mexico and leaders in the Senate, I appreciate you sharing your views on Section 10-16-9(B) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2019).

In your letter, you request that the Commission review and reverse an informal advisory opinion that Walker Boyd, the Commission's General Counsel, issued on December 16, 2022 and then revised on January 5, 2023. That informal advisory opinion advised that NMSA 1978, Section 10-16-9(B) (2007), prohibits Members, when representing or assisting a person before a state agency (either without compensation or for the benefit of a constituent) from: (i) referencing their legislative capacity (except as to matters of scheduling); (ii) making communications on legislative stationery; and (iii) making threats or implications relating to legislative actions. Your January 17, 2023 letter, citing to Interim Legislative Ethics Committee Advisory Opinion No. LEC96-1, interprets Section 10-16-9(B) to apply these prohibitions *only* when a Member is a paid attorney (or similar professional) engaged in the conduct of his or her profession. There are good faith arguments in support of each interpretation.¹

This question of statutory interpretation is somewhat narrow, and I stress that the Members' use of their legislative stationery in general is not at issue. The question regarding the correct interpretation of Section 10-16-9(B) bears exclusively on conduct (including the use of legislative stationery) that Members might take *when representing or assisting persons in matters before state agencies*. To be sure, the Members may make use of their legislative

¹ Ms. Amy Chavez-Romero, the Assistant Director of Legislative Affairs, Legislative Council Service (copied hereto), very capably provided several arguments supporting your view of Section 10-16-9(B) in a January 11, 2023 request for reconsideration of the informal advisory opinion.

State Ethics Commission

To: Hon. Peter Wirth and Hon. Gregory A. Baca

January 19, 2023

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stationery to make communications on issues of public policy with constituents, interest groups, the media, other Members, local public officials, federal officials, the general public, and even state agency heads when the Members are *not* representing or assisting other persons on matters pending before a state agency. To my knowledge, neither the Commission nor its staff has suggested otherwise.

Consistent with your request, the State Ethics Commission will address the issue in open session during its February 3, 2023 meeting. Please note that the December 16, 2022 informal advisory letter is not binding on the Commission. At the February 3 meeting, the Commission may issue an advisory opinion on this issue, recommend legislation that would amend Section 10-16-9(B), or take both actions in tandem. *See* NMSA 1978, §§ 10-16G-5(B)(5) & 10-16G-8(A) (2019).

Respectfully,

/s/ Jeremy Farris

Jeremy Farris

Executive Director

State Ethics Commission

cc: Hon. William F. Lang, Chair, State Ethics Commission (via email)
Raúl Burciaga, Director, Legislative Council Service (via email)
Amy Chavez-Romero, Assistant Director of Legislative Affairs, Legislative Council Service (via email)