STATE ETHICS COMMISSION MEETING

October 2, 2026

PUBLIC MATERIALS

STATE ETHICS COMMISSION

Hon. Celia Foy Castillo, Chair
Jeffrey L. Baker, Member
Stuart M. Bluestone, Member
Hon. Gary Clingman, Member
Hon. Dr. Terry McMillan, Member
Hon. Nan Nash, Member
Dr. Judy Villanueva, Member

October 2, 2026, 9:00 a.m. to 12:00 p.m. (Mountain Time)

A livestream of the meeting will be available on the day of the event at the following YouTube link: https://www.youtube.com/@stateethicscommissionnm3535/streams

Commission Meeting

Chair Castillo Calls the Meeting to Order

1. Roll Call

2. Approval of Agenda

3. Approval of Minutes of September 11, 2026, Special Commission Meeting

Commission Meeting Items	**Action Required**
4. Advisory Opinion 2026-13 – Governmental Conduct Act Restrictions on a Former State Agency Employee's New Proposed Employment with a Private Firm that Contracts with the Agency (*Su*)	Yes
5. Advisory Opinion 2026-14 – Applying Section 10-16-8 of the Governmental Conduct Act to State Executive Branch Staff Members After Their State Service (*Su*)	Yes
6. Public Comment	No

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).

7. Discussion regarding administrative matters under RULONA:
(*Branch*)

    I. 2024-NP-15

8. Discussion regarding administrative matters under State Ethics Commission Act:
(Goodrich)

    I. Administrative Complaint No. 2026-04

9. Discussion regarding current and potential litigation:
(*Farris*)

    I. *SEC v. Shepard,* D-117-CV-2025-00260
    II. *SEC v. Tafoya Lucero,* D-101-CV-2025-02343
    III. *SEC v. Valencia, et al.,* D-820-CV-2026-00147
    IV. *SEC ex rel. Village of Angel Fire v. Lindsey, et al.,* D-809-CV-2024-00091
    V. *SEC v. XYZ Corporation,* D-202-CV-2026-06438
    VI. *Babylon Bee, LLC v. Castillo, et al.,* 1-26-cv-02628
    VII. *Shepard v. Farris and N.M. State Ethics Commission,* 1-26-cv-02732

Upon applicable motion, Commission returns from executive session

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10. Administrative Matters under RULONA: Yes
(*Branch*)

    I. 2024-NP-15

11. Discussion regarding administrative matters under State Ethics Commission Act:
(*Goodrich*)

    I. Administrative Complaint No. 2026-004

12. Discussion of next meeting No
(*Castillo*)

13. Public Comment No

14. Adjournment

If you are an individual with a disability who needs an accommodation to attend or participate in the meeting, please contact the State Ethics Commission at Ethics.Commission@sec.nm.gov at least (1) week prior to the meeting.

The Commission will accept written public comment to Ethics.Commission@sec.nm.gov, with the subject line: "Public Comment: October 2, 2026" until 9:00 am on October 2, 2026.

Individuals wishing to participate by providing oral comment should register and join using the following link https://us02web.zoom.us/meeting/register/r92mvy_tTWi4URZuTwhT6A. *Oral public comment will be heard during the public comment section of the meeting, must address an agenda item above, and will be limited to a maximum of five minutes per individual.*

STATE ETHICS COMMISSION

Commission Meeting Minutes of September 11, 2026, 1:00 PM
[Subject to Ratification by Commission]

Call to Order

Chair Castillo called the meeting to order at 1:00 PM.

1. **Roll Call**

Chair Castillo called roll; the following Commissioners were present:

Hon. Celia Foy Castillo, Chair (attended virtually)
Jeffrey L. Baker (attended virtually)
Stuart M. Bluestone (attended virtually)
Hon. Gary Clingman (attended virtually)
Hon. Dr. Terry McMillan (attended virtually)
Dr. Judy Villanueva (attended virtually)

2. **Approval of Agenda**

Chair Castillo sought a motion to approve the September 11, 2026, agenda. Commissioner Baker moved to approve the agenda; Commissioner Bluestone seconded. Hearing no discussion or objections, Chair Castillo conducted a roll-call vote. All present Commissioners voted in favor. The agenda was approved.

3. **Approval of August 21, 2026, Commission Meeting Minutes**

Chair Castillo sought a motion for approval of the minutes of the August 21, 2026, meeting. Commissioner Bluestone moved to approve the minutes; Commissioner Baker seconded. Hearing no discussion or objections, the August 21, 2026, meeting minutes were approved unanimously by all Commissioners.

4. **Public Comment**

There was no public comment.

Commission Meeting Items

---Begin Executive Session---

Chair Castillo sought a motion to enter executive session. Commissioner Clingman moved to enter executive session under NMSA 1978, § 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Villanueva seconded the motion. Hearing no discussion, Chair Castillo conducted a roll call vote, and all Commissioners voted unanimously to enter executive session.

5. Discussion regarding current and potential litigation:
   (*Farris*)

   I. *Shepard v. Farris and N.M. State Ethics Commission*

---End Executive Session---

Matters discussed in closed meeting were limited to those specified in motion to enter executive session. After concluding discussion of these matters, the Commission resumed public session upon an appropriate motion pursuant to NMSA 1978, § 10-15-1(J).

6. **Resolutions**
   (*Farris*)

Commissioner Bluestone sought a motion to waive the attorney client privilege over attorney-client communication dated February 24, 2025, and the memorandum that asked the Commission to authorize civil action against Joseph Shepard as the President of Western New Mexico University. Commissioner Clingman seconded the motion. Hearing no discussion, Chair Castillo conducted a roll call vote, and all Commissioners voted unanimously to approve the resolution.

7. **Discussion of next meeting**
   (*Castillo*)

Chair Castillo confirmed the next regularly scheduled meeting will take place on Friday, October 2, 2026.

8. **Public Comment**

There was no public comment.

9. **Adjournment**

Chair Castillo raised the adjournment of the meeting. With no objections made, the meeting adjourned at 1:34 PM.

STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2026-13

October 2, 2026[1]

Governmental Conduct Act Restrictions on a Former State Agency Employee's New Proposed Employment with a Private Firm that Contracts with the Agency

QUESTION PRESENTED[2]

This request concerns Section 10-16-8 of the Governmental Conduct Act ("GCA").[3] A public employee resigned from their state agency, which distributes

[1] This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory 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). On July 6, 2026, the Commission received a request for an advisory opinion that detailed the issues as presented herein and Commission staff issued an informal advisory opinion letter in response. *See* 1.8.1.9(B) NMAC. Commissioners Baker and Bluestone requested that this advisory letter be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC. "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." N.M. State Ethics Comm'n Adv. Op. No. 2020-01, at 1-2 (Feb. 7, 2020), *available at* https://nmonesource.com/nmos/secap/en/item/18163/index.do (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. This opinion is based on current law, and the conclusions reached herein could be affected by changes in the underlying law or factual circumstances presented.

[3] *See* NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023).

and oversees contracts and funding for certain local government agency projects.[4] In their state agency role, the employee worked on internal policies and procedures that involved staff decisions in the field, signed off on staff work and contracts with local agencies, and met with outside stakeholders.

After the employee resigned, they were recruited for a private sector position with a firm. This firm provides services that are funded, in part, by the employee's former agency. The employee seeks guidance regarding compliance with Section 10-16-8 if they are to accept the employment position with the private firm.

ANSWER

Under Section 10-16-8(A), the state agency would likely be prohibited from issuing contracts to or taking other favorable action toward the requester's proposed private sector employer based on the facts provided. This is because the requester likely took official action or assisted his agency on contracts involving the proposed employer. Under Section 10-16-8(b), the requester would likely be barred from representing their new employer on any matter they had personal and substantial participation in because the employer deals with the requester's former state agency. Lastly, under Section 10-16-8(D, the requester cannot represent this proposed new business employer in front of their former state agency for a year after their resignation, if they were to be paid to do so.

ANALYSIS

I. Section 10-16-8(A) of the GCA bars state agencies from favoring private businesses represented or assisted by certain former public employees.

Section 10-16-8(A) of the GCA limits contracts involving former public officers. It is intended to ensure that government employees only act in the public's interest while employed, and to protect the public from former public employees using their public service for private gain.[5] The key factor in

[4] The state agency becomes a co-owner on some of the contracts with the local agencies.

[5] *See* NMSA 1978, § 10-16-8 (2011); *see generally Ortiz v. Taxation and Revenue Dep't*, 1998-NMCA-027, ¶ 9, 124 N.M. 677 ("The purpose of 'revolving door' legislation is to enhance public trust and confidence in our governmental agencies by prohibiting conduct which may permit or appear to permit undue influence or a conflict of interest.") and *Principles of the Law: Government Ethics*, Tentative Draft No. 2, American Law Institute § 511 (Mar. 12, 2018) "Section 10-16-8(C)(2) prevents government employees from using their government prerogatives and resources to feather their nest after separating from the government[.]").

determining if these restrictions apply is the extent to which the former government employee's actions led to the contract or other favorable action.

Section 10-16-8(A) provides:

> A state agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:
>
> (1) represented personally in the matter by a person who has been a public officer or employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars ($1,000) and the contract is a direct result of an official act by the public officer or employee; or
>
> (2) assisted in the transaction by a former public officer or employee of the state whose official act, while in state employment, directly resulted in the agency's making that contract or taking that action.[6]

Whether Section 10-16-8(A) prohibits a former [public employee] from working at [public agency] turns on two issues. First, did the [public employee] take an "official act" while a state employee with respect to their contract? Second, if so, did that act directly result in the agency entering into a contract that it would not enter but for the [public employee's] official act? The GCA defines an "official act" as "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority[.]"[7]

II. Section 10-16-8(B) bars former state employees from representing clients in matters they personally and substantially participated in while a state employee.

A. Overview of Section 10-16-8(B)

Section 10-16-8(B) of the GCA provides:

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[6] NMSA 1978, § 10-16-8(A) (2011).

[7] NMSA 1978 § 10-16-2(H) (2011).

> A former public officer or employee shall not represent a person in the person's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.[8]

This section of the GCA prohibits certain conduct by the former state employee rather than the state agency. This provision "prohibit[s] a public employee from transferring the benefit of skills and knowledge acquired from a particular matter to benefit a private client involved in the same transaction or controversy."[9] Section 10-16-(B)'s prohibition works to deter (1) the potential for conflicts of interest for government employees who anticipate separation from government service and (2) a former government employee's use of insider information or connections with current government staff against the public's interest. This "restriction on a former public officer's or employee's representation is stringent considering that it does not expire: a former public officer or employee is forever barred from representing a person in the person's dealings with the government relating to the same matter in which the former officer or employee participated personally and substantially while in public service."[10] Although Section 10-16-8(B)'s prohibition is strict, its scope is correspondingly narrow.

Section 10-16-8(B) contains three elements. First, the former public officer or employee must represent a person in "the person's dealings with the government."[11] Second, the person's dealings with the government must be the

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[8] NMSA 1978, § 10-16-8(B) (2011).

[9] *See* State Ethics Comm'n Adv. Op. 2020-02, at 10-11 (April 3, 2020) *available at* https://nmonesource.com/nmos/secap/en/18164/1/document.do.

[10] *Id.* at 3 (stating that Section 10-16-8(B)'s restriction on a former public officer's or employee's representation is stringent because it does not expire); *cf. also* NMSA 1978, § 13-1-193 (1984) ("It is unlawful for any state agency or local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.").

[11] *Id.* Note that although the GCA does not define the term "represent," it is commonly understood to mean "to assume or occupy the role or functions of (a person), typically in restricted, and usually formal situations; to be entitled to speak or act on behalf of (a person,

same "matter" as one in which the former public officer or employee participated in while in public service.[12] Third, the former public officer's or employee's participation in that matter must have been personal and substantial.[13]

B. Defining what constitutes a "matter" under Section 10-16-8(B)

The GCA does not define "matter" and New Mexico courts have not addressed whether one or more matters are the same in the context of Section 10-16-8(B). This section, however, is modeled on Rule 16-111(A)(2) NMRA and ABA Model Rule of Professional Conduct 1.11(A)(2).[14] The rule

> represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to

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group, organization, etc.); … to act or serve as the spokesperson or advocate of." OED Online, Represent v.1 (Oxford University Press, March 2021), www.oed.com/view/Entry/162991.

[12] *See* § 10-16-8(B).

[13] *See id.*

[14] Rule 16-111(A)(2) NMRA and ABA Model Rule 1.11(A)(2) provide:

> [A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Rule 16-111(A)(2) contains a provision, not present in the statute, allowing the "appropriate agency" to allow the representation by giving informed written consent. The Commission does not express an opinion on whether the rule or the statute controls in this matter; *see also* State Ethics Comm'n Adv. Op. 2020-02, at 11 ("While the Commission 'may issue advisory opinions on matters related to ethics,' NMSA 1978, § 10-16G-8(A), the Commission will not issue advisory opinions regarding the application of the Rules of Professional Conduct for attorneys, Rule Set 16 NMRA.").

> confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.[15]

The Governmental Ethics Task Force, created by Laws 1992, Chapter 109 and signed into law by Governor Bruce King, drafted the GCA's revolving door provisions. The task force described Section 10-16-8(B)'s purpose in similar terms:

> The amendments proposed by the task force preclude public officers and employees, after leaving government service, from representing any person before or against the government on specific matters in which the former officer or employee participated personally and substantially while in government. . . . This provision is designed to balance the competing interests involved—ensuring that the government officer or employee acts only in the public interest and not in a way that might "feather his or her nest" for post-government employment, while at the same time not barring the officer or employee from representation before his or her agency for such a long period that it would deter government recruitment of the best talent available.[16]

Given Section 10-16-8(B) and Rule 16-111(A)(2)'s shared phrasing and purpose, the definition and interpretation of the word "matter" in the latter context

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[15] Rule 16-111 NMRA, comment [4]; *accord* ABA Model Rule of Professional Conduct 1.11 cmt.

[16] Rep. H. John Underwood & James B. Mulcock, Governmental Ethics Task Force, Final Report—Findings and Recommendations, at 19 (N.M. Legislative Council Service Info. Memo. No. 202.90785, Jan. 27, 1993).

guides the Commission's analysis.[17] Rule 16-111 NMRA and ABA Model Rule of Professional Conduct 1.11 define the term "matter" as follows:

> "matter" includes: (1) 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; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.[18]

Thus, in determining whether two or more matters are the same for purposes of Section 10-16-8(B), the Commission will consider whether the matters' underlying facts, parties, and temporal relationship are the same or overlap substantially.[19]

C. Describing "personal and substantial participation" of a former public employee or official

The GCA does not define what it means for a former public officer or employee to have "participated personally and substantially" in a matter while they

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[17] *See id.*; *Cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Marquez v. Larrabee et al.*, 2016-NMCA-087, ¶ 12 (stating that New Mexico courts may look to the Federal Rules of Civil Procedure and caselaw interpreting those rules for guidance in interpreting substantially similar provisions in New Mexico court rules); and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (West 2012) (discussing "prior-construction" cannon of statutory interpretation).

[18] Rule 16-111(E) NMRA; *accord* ABA Model Rule of Prof. Conduct 1.11(e). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (1975). Here, the ABA defined the term "matter" as follows:

> The term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties … The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.

Id.

[19] *See Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 26 (concluding that Rule 16-111 "indicate[s] a fact-specific, transactional approach to determining the scope of '[the] matter'") (second alteration original).

were a public officer or employee" and New Mexico courts also have not addressed this issue in the context of Section 10-16-8(B). Federal post-employment restrictions provide applicable guidance.

Federal conflict-of-interest law defines "participated" to mean "an action taken as an officer or employee through decision, approval, recommendation, the rendering of advice, investigation, or other such action[.]"[20] It defines "personally" to mean that "to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter.[21]

Federal conflict-of-interest laws define "substantially" in the following ways. 5 C.F.R. § 2637.201(d) provides:

> "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party."[22]

5 CFR § 2640.103(a)(2) provides:

> To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory

[20] 18 U.S.C. § 207(i)(2) (2018).

[21] 5 CFR § 2640.103(a)(2) (2002); *see also* 5 C.F.R. § 2637.201(d) (1991).

[22] § 2637.201(d); *see, e.g.*, *United States v. Clark*, 333 F. Supp. 2d 789 (E.D. Wis. 2004) (applying the above definition in its analysis regarding disqualifying defense counsel who previously worked as an assistant United States attorney).

> involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. […]

III. Applying Sections 10-16-8(A) and (B) to this inquiry.

A. Application of Section 10-16-8(A)

Section 10-16-8(A)(1) of the GCA prohibits the state agency from contracting or taking other favorable action toward a private (including non-profit) entity *represented by* the former employee.[23] In order for Section 10-16-8(A) to apply, the requester must have (1) taken an "official" act with respect to any contract between their new employer and a local government agency where the state agency is a co-owner on the contract, and (2) have that act directly result in the contract that the state agency would not have entered into but for the requester's official act.[24]

From the facts presented in the request, we do not have sufficient detail to know whether the requester's new employer has contracted with the state agency in the past, and whether the requester used their discretionary authority to decide, recommend, approve or sign off on any of these contracts.[25] Given the requester's description of their duties as a state employee, it seems possible that they could have done so. Accordingly, if a contract between the state agency and a local agency for the requester's new private employer is the direct result of the requester's official act while a state employee, then the requester's representation of the local agency in a matter involving the state agency would annul the state agency's authority to contract with or take any favorable action toward the local agency. As we understand the requester's description of the workings of the state agency and their role in it, the requester would likely run into frequent conflicts of interest that would prevent the state agency from awarding contracts to the

[23] § 10-16-8(A).

[24] *See id.*

[25] *See* § 10-16-2(H).

requester's new private employer. This is because in those contracts, the state agency would become a co-owner on the contract, and during the requester's tenure at the state agency, their personal signature was required on those contracts.

Restrictions under this section last for one year after ending employment with the state agency.[26] So long as the contract exceeds one thousand dollars and is a direct result of the requester's official act while a state employee, then, for one year following the requester's separation from the state agency, the state agency would be prohibited from contracting with or favorably acting toward the company the requester represents.[27]

Section 10-16-8(A)(2) also prohibits such transactions when the former employee *assists* the private entity.[28] Similarly to the restriction arising from an entity *represented by* the former employee, this restriction arises when the employee's official act, while in state government, "directly resulted in the agency's making that contract or taking that action."[29] But unlike the restriction in Section 10-16-8(A)(1), which lasts only one year after the end of the former employee's state employment, this restriction is permanent.[30] It also applies to contracts in any amount, however small.[31] Assisting might include working in the new employer's office to research information that would help them get the contract from the requester's former state agency. From the information provided in the request, it seems likely that the requester took official acts, or at least assisted with them, which led to the contracts. Consequently, the state agency

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[26] *See* § 10-16-8 (A).

[27] *See id*.

[28] *See id.*

[29] *Id.*

[30] *See* State Ethics Comm'n Adv. Op. 2020-02, at 10-11 (stating that subsection 10-16-8(B)'s restriction on a former public officer's or employee's representation is stringent because it does not expire); *cf. also* § 13-1-193 ("It is unlawful for any state agency or local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.").

[31] *See* § 10-16-8(A)(2).

would likely be prohibited from contracting with or favorably acting toward the requester's new employer without violating Section 10-16-8(A).

B. Application of Section 10-16-8(B)

The facts presented in the request do not provide sufficient detail for the Commission to make any explicit determinations as to whether the requester's employment with the company would violate Section 10-16-8(B). It is helpful, however, to explain the law thoroughly such that the requester may decide as to whether they would violate the GCA by accepting and acting in their proposed new role at the private firm.

Section 10-16-8(B) contains three elements: (1) representation in a "dealing with the government"; (2) dealings that are the "same matter"; and (3) "personal" and "substantial" participation.[32]

Regarding the first element, although we do not have conclusive information from the facts provided about the requester's specific duties in their new role, it is likely that their work would be considered representation in a "dealing with the government" because they would be working with local agencies that receive funding from a state agency.

Regarding the second and third elements, the facts in the request do not specify whether the requester's new employer has already signed contracts with local agencies where the state agency is a co-owner on those contracts, and whether the requester has taken any official act that led to the creation of those contracts.

If the requester's involvement, while employed by the state agency, in any matters with your new employer and the state agency was "personal" and "substantial," then the requester may not represent their new employer in its dealings with the state agency on those matters. To allow such conduct would enable a public employee to set the stage for their future employment in the private sector, even if doing so meant compromising the public interest while they could still do so.[33]

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[32] *See* § 10-16-8(B).

[33] *See* State Ethics Comm'n Adv. Op. 2022-10 at 3.

IV. Additionally, Section 10-16-8(D) prevents a former public officer or employee, for one year after leaving employment, from representing for pay a person before a state agency where they previously worked.

Even if the restrictions of Section 10-16-8(A) and Section 10-16-8(B) did not apply, Section 10-16-8(D) clearly prohibits the requester from representing a proposed new business employer in front of their former state agency for a year after their resignation, if they were to be paid to do so.[34]

Section 10-16-8(D) provides that "[f]or a period of one year after leaving government service or employment, a former public officer or employee shall not represent for pay a person before the state agency or local government agency at which the former public officer or employee served or worked."[35] Subsection (D) contains several elements. First, whether the former employee represents a person "for pay."[36] Second, whether the representation is "before" the former employee's former government employer.[37] Third, whether the representation occurs within the one year after leaving government service.[38] And, although the Governmental Conduct Act does not define the term, "represent" is commonly understood to mean "to act in the place of or for usually by legal right."[39]

Unlike the restrictions created by Section 10-16-8(A), Section 10-16-8(D) imposes a prohibition on the requester as the employee, not on their new employer. The requester could not appear in person, nor through written documents, on behalf of their new employer, to represent them in matters to be determined by their former state agency.

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[34] *See* NMSA 1978, § 10-16-8(D) (2011).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Represent, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/represent (last accessed Mar. 29, 2023); *see also* Representative, *Black's Law Dictionary* (11th ed. 2019) ("1. Someone who stands for or acts on behalf of another.").

CONCLUSION

Section 10-16-8 of the GCA establishes three post-employment restrictions that the requester, their proposed employer, and their former state agency should comply with if the requester accepts a position with this firm. First, under Section 10-16-8(A), the state agency would likely not be able to award contracts to, or otherwise act favorably toward, the requester's prospective employer. Based on the facts in the request, the requester appears to have taken or assisted in official acts that concerned contracts involving the private employer. Second, the requester would likely be barred from representing their new employer on any matter in which their participation as a state employee was personal and substantial under Section 10-16-8(B). Finally, Section 10-16-8(D) prohibits the requester, for one year following resignation, from appearing for pay on their new employer's behalf before their former state agency.

SO ISSUED.

HON. CELIA F. CASTILLO, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARY L. CLINGMAN, Commissioner
HON. DR. TERRY MCMILLAN, Commissioner
HON. NAN NASH, Commissioner
DR. JUDY VILLANUEVA, Commissioner

STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2026-14
October 2, 2026[1]

Applying Section 10-16-8 of the Governmental Conduct Act to State Executive Branch Staff Members After Their State Service

QUESTION PRESENTED[2]

This request concerns the application of Section 10-16-8 of the Governmental Conduct Act ("GCA") to state executive branch staff members and their post-state-service. Specifically, the request seeks a deeper understanding of what "personal and substantial involvement in a matter means" in two areas. First,

[1] This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory 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). On July 8, 2026, the Commission received a request for an advisory opinion that detailed the issues as presented herein and Commission staff issued an informal advisory opinion letter in response. *See* 1.8.1.9(B) NMAC. Commissioners Baker and Bluestone requested that this advisory letter be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC. "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." N.M. State Ethics Comm'n Adv. Op. No. 2020-01, at 1-2 (Feb. 7, 2020), *available at* https://nmonesource.com/nmos/secap/en/item/18163/index.do (quoting § 10-16G-8(A)(2)). For the purpose of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. This opinion is based on current law, and the conclusions reached herein could be affected by changes in the underlying law or factual circumstances presented.

as it relates to legislation, and second, as it relates to discussing policy decisions with executive branch officials and agencies.

ANSWER

Under Section 10-16-8(B), executive branch staff, following their state service, likely may represent individuals or entities in their dealings with the governing regarding (1) legislation; and (2) policy and administrative matters on which they advised executive branch officials and agencies while in state service, so long as they do not undertake a representation before the government, in what could be considered the same "matter" as one in which they participated in a "personal and substantial" way. Generally, a "matter" would not include general legislative, policymaking, rule-making, or regulatory activity by a government employee not involving discrete, identifiable transactions or conduct involving a particular situation and specific parties.

ANALYSIS

Section 10-16-8 of the GCA limits contracts involving, and representations by, former public officers and employees.[3] Section 10-16-8 of the GCA, sometimes referred to as the "revolving door" statute, is intended to ensure that a government employee only acts in the public interests while employed. The statute, however, is not meant to bar the employee from representing others before the government for such a long period that it would deter government recruitment of the best talent available.[4] Section 10-16-8 thus protects the public from the misuse of public office for private gain.[5]

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[3] *See* NMSA 1978, § 10-16-8 (2011). Although this opinion's analysis focuses on Section 10-16-8(B), the former executive branch staff should proactively follow Sections 10-16-8(A) and (D) when considering future employment.

[4] *See* State Ethics Comm'n Adv. Op. 2022-10 (Dec. 9, 2022) *available at* https://nmonesource.com/nmos/secap/en/item/18748/index.do.

[5] *See generally Ortiz v. Taxation and Revenue Dep't*, 1998-NMCA-027, ¶ 9, 124 N.M. 677 ("The purpose of 'revolving door' legislation is to enhance public trust and confidence in our governmental agencies by prohibiting conduct which may permit or appear to permit undue influence or a conflict of interest.") and *Principles of the Law: Government Ethics*, Tentative Draft No. 2, American Law Institute § 511 (Mar. 12, 2018) ("Section 10-16-8(C)(2) prevents government employees from using their government prerogatives and resources to feather their nest after separating from the government[.]").

I. Section 10-16-8(B) of the GCA likely would not prohibit former executive branch staff from post-state service that involves legislation or policy work.

A. About Section 10-16-8(B) generally

Section 10-16-8(B) applies to all public officials and employees, regardless of whether they are an attorney or not.[6] Section 10-16-8(B) provides:

> [a] former public officer or employee shall not represent a person in the person's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.[7]

This provision "prohibit[s] a public employee from transferring the benefit of skills and knowledge acquired from a particular matter to benefit a private client involved in the same transaction or controversy."[8] Section 10-16-(B)'s prohibition works to deter (1) the potential for conflicts of interest for government employees who anticipate separation from government service and (2) a former government employee's use of insider information or connections with current government staff against the public's interest. This "restriction on a former public officer's or employee's representation is stringent considering that it does not expire: a former public officer or employee is forever barred from representing a person in the person's dealings with the government relating to the same matter in which the former officer or employee participated personally and substantially while in

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[6] Similarly, ABA Model Rule 1.11(A)(2) applies whenever a "former government lawyer participated substantially in a matter as a public officer or employee, regardless of whether the lawyer was functioning as a lawyer at the time." Douglas R. Richmond, *As the Revolving Door Turns: Government Lawyers Entering or Returning to Private Practice and Conflicts of Interest*, 65 ST. LOUIS U. L. J. 325, 331 n. 32 (2021). *See e.g.*, *Great Divide Wind Farm 2 LLC v. Aguilar*, 426 F. Supp. 3d 949, 976 (D.N.M. 2019) (Browning, J.) (where a lawyer's prior involvement in a matter as a Commissioner on the New Mexico Public Regulation Commission rather than as a lawyer did not alter the court's analysis under Rule 16-111(A)(2) NMRA) and Pa. Eth. Op. 2012-2, 2012 WL 7148213, at *1 (Phila. Bar. Ass'n, Prof'l Guidance Comm. 2012) ("Rule 1.11 does not contemplate whether the specific duties of the public officer or employee are categorized as attorney/non-attorney.").

[7] NMSA 1978, § 10-16-8(B) (2011).

[8] *See* State Ethics Comm'n Adv. Op. 2020-02, at 10-11 (April 3, 2020) *available at* https://nmonesource.com/nmos/secap/en/18164/1/document.do.

public service."[9] Although Section 10-16-8(B)'s prohibition is strict, its scope is correspondingly narrow.

Section 10-16-8(B) contains three elements. First, the former public officer or employee must represent a person in "the person's dealings with the government."[10] Second, the person's dealings with the government must be the same "matter" as one in which the former public officer or employee participated in while in public service.[11] Third, the former public officer's or employee's participation in that matter must have been both personal and substantial.[12]

B. What constitutes a "matter" in the context of Section 10-16-8(B)

i. Rule 16-111(A)(2) NMRA and ABA Model Rule of Professional Conduct 1.11(A)(2)

The GCA does not define "matter" and New Mexico courts have not addressed whether one or more matters are the same in the context of Section 10-16-8(B). This section, however, is modeled on Rule 16-111(A)(2) NMRA and ABA Model Rule of Professional Conduct 1.11(A)(2).[13] The comparison to Rule

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[9] *Id.* at 3 (stating that Section 10-16-8(B)'s restriction on a former public officer's or employee's representation is stringent because it does not expire); *cf. also* NMSA 1978, § 13-1-193 (1984) ("It is unlawful for any state agency or local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.").

[10] § 10-16-8(B). Note that although the GCA does not define the term "represent," it is commonly understood to mean "to assume or occupy the role or functions of (a person), typically in restricted, and usually formal situations; to be entitled to speak or act on behalf of (a person, group, organization, etc.); … to act or serve as the spokesperson or advocate of." OED Online, Represent v.1 (Oxford University Press, March 2021), www.oed.com/view/Entry/162991.

[11] *See* § 10-16-8(B).

[12] *See id.*

[13] Rule 16-111(A)(2) NMRA and ABA Model Rule 1.11(A)(2) provide:

> [A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or

16-111 NMRA is particularly apt when a public body is analyzing any potential revolving door issue that involves a former public employee who is also an attorney.[14] The rule

> represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is

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> employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Rule 16-111(A)(2) contains a provision, not present in the statute, allowing the "appropriate agency" to allow the representation by giving informed written consent. The Commission does not express an opinion on whether the rule or the statute controls in this matter; *see also* State Ethics Comm'n Adv. Op. 2020-02, at 11 ("While the Commission 'may issue advisory opinions on matters related to ethics,' NMSA 1978, § 10-16G-8(A), the Commission will not issue advisory opinions regarding the application of the Rules of Professional Conduct for attorneys, Rule Set 16 NMRA."). Additionally, former Governor's Office staff members who are also attorneys should further examine ABA Model Rule 1.9, which governs duties to former clients. Rule 1.9 includes matters that are "substantially related" and could be interpreted such that "activities such as lobbying or policymaking could be considered matters even if no identifiable parties are involved." Stacy M. Ludwig, The Revolving Door: Professional Responsibility Considerations for Attorneys Entering or Leaving the Department of Justice, 57 U.S. Att'ys Bull. (Sept. 2009), at 9.

[14] *See id.* at 4-5.

> disqualified only from particular matters in which the lawyer participated personally and substantially.[15]

The Governmental Ethics Task Force, created by Laws 1992, Chapter 109 and signed into law by Governor Bruce King, drafted the GCA's revolving door provisions. The task force described Section 10-16-8(B)'s purpose in similar terms:

> The amendments proposed by the task force preclude public officers and employees, after leaving government service, from representing any person before or against the government on specific matters in which the former officer or employee participated personally and substantially while in government. . . . This provision is designed to balance the competing interests involved—ensuring that the government officer or employee acts only in the public interest and not in a way that might "feather his or her nest" for post-government employment, while at the same time not barring the officer or employee from representation before his or her agency for such a long period that it would deter government recruitment of the best talent available.[16]

Given Section 10-16-8(B) and Rule 16-111(A)(2)'s shared phrasing and purpose, the definition and interpretation of the word "matter" in the latter context guides the Commission's analysis.[17] Rule 16-111 NMRA and ABA Model Rule of Professional Conduct 1.11 define the term "matter" as follows:

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[15] Rule 16-111 NMRA, comment [4]; *accord* ABA Model Rule of Professional Conduct 1.11 cmt.

[16] Rep. H. John Underwood & James B. Mulcock, Governmental Ethics Task Force, Final Report—Findings and Recommendations, at 19 (N.M. Legislative Council Service Info. Memo. No. 202.90785, Jan. 27, 1993).

[17] *See id.*; *cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Marquez v. Larrabee et al.*, 2016-NMCA-087, ¶ 12 (stating that New Mexico courts may look to the Federal Rules of Civil Procedure and caselaw interpreting those rules for guidance in interpreting substantially similar provisions in New Mexico court rules); and Antonin Scalia & Bryan A. Garner, *Reading Law: The*

> "matter" includes: (1) 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; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.[18]

The ABA has discussed when a "matter" is the "same" and whether a former government attorney would be prohibited from working on an issue after moving to private sector employment.[19] This discussion explains how general legislative advocacy or broad policy work as an attorney would not constitute a "matter." The ABA has written that in contrast to litigation,

> work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law.[20]

The "same 'matter' is not involved [when a government employee works on the above issues] because there is lacking the discrete identifiable transactions or

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Interpretation of Legal Texts 322 (West 2012) (discussing "prior-construction" cannon of statutory interpretation).

[18] Rule 16-111(E) NMRA; *accord* ABA Model Rule of Prof. Conduct 1.11(e). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (1975). Here, the ABA defined the term "matter" as follows:

> The term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties … The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.

Id.

[19] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (1975).

[20] *Id.*

conduct involving a particular situation and specific parties."[21] For example, a lawyer who had participated on behalf of the federal government in a rulemaking would be permitted to represent a private party in a matter closely related to that rulemaking under Rule 1.11.[22] Some courts have found that in cases regarding conflicts of interest for lawyers, "the longer the time between the relevant cases, events, or representations, the less likely it is that the matters are the same."[23]

ii. Instructive federal authority

In the absence of controlling state authority, federal post-employment law, including 18 U.S.C. § 207 and its implementing regulations, also provides developed and directly relevant interpretive guidance. Federal case law has held that a "matter" does not include general legislative, policymaking, rule-making, or regulatory activity by a government agency.[24] Federal statutes and Rule 1.11

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[21] *Id. See also* U.S. Office of Gov't Ethics, Legal Advisory LA-16-08, Introduction to the Primary Post-Government Employment Restrictions Applicable to Former Executive Branch Employees (Sept. 23, 2016) ("Examples of particular matters involving specific parties include contracts, cases, claims, investigations, grants, and other matters focused on identified parties[]" in the context of federal post-government employment restrictions).

[22] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-409, Conflicts of Interest: Successive Government and Private Employment, at 9 (1997).

[23] Richmond, *supra* note 6, at 333 (citing *Commonwealth v. Sherlock*, No. 2069, 2014 WL 10790103, at *4 (Pa. Super. Ct. Oct. 3, 2014) (finding that two matters that were separated by eight years were not the same); *see also* Rule 16-111 cmt. [10] ("In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties and the time elapsed.").

[24] *See, e.g., Laker Airways Ltd. V. Pan American World Airways*, 103 F.R.D. 22 (D.D.C. 1984) (where a lawyer who worked on federal antitrust issues in overseas air travel, and who wrote the recommendation on whether Lake Airways was permitted to fly, was not prohibited from representing Lake Airways in a private antitrust action against other airlines) and *National Bonded Warehouse Association, Inc. v. U.S.*, 718 F. Supp 967 (Ct. Int'l Trade 1989) (where a former lawyer for a federal agency involved in the development of agency regulations was able to subsequently represent a class of plaintiffs challenging the regulations' validity). Additionally, some federal agencies, in their revolving door ethics guidance, also do not consider matters that do not involve "specific parties" to constitute a matter that requires a former employee to be banned from future employment. For example, in the federal Department of the Interior's internal guide about certain post-employment restrictions, it states the following with regards to 18 U.S.C. § 207(a)(1):

concerning post-employment conflict of interest restrictions focus on whether a matter is "particular" and whether there are specific, identifiable parties. For example, the Office of Government Ethics has codified this principle at 5 CFR § 2641.201(h), which provides:

> Particular matter involving a specific party or parties —
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> (1) ***Basic concept.*** The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.
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> (2) ***Matters of general applicability not covered.*** Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters

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> Particular matters of general applicability are not covered by the lifetime ban, including legislation, rulemaking of general applicability, formulation of general policies, standards or objectives, or other particular matters of general applicability.

U.S. Dep't of the Interior, Dep't Ethics Office, *Quick Guide: Certain Post-Employment Restrictions in 18 U.S.C. § 207*, at 3, https://www.doi.gov/sites/default/files/deo-decision-trees-207a1-and-207a2.pdf (last visited July 29, 2026).

> involving specific parties. [statutory text about international agreements omitted].[25]

Accordingly, in light of the foregoing authorities, when determining whether two or more matters are the same for purposes of Section 10-16-8(B), the Commission considers whether the matters' underlying facts, parties, and temporal relationship are the same or overlap substantially.[26]

C. Describing "personal and substantial participation" of a former public employee or official

The GCA does not define what it means for a former public officer or employee to have "participated personally and substantially" in a matter while they were a public officer or employee" and New Mexico courts also have not addressed this issue in the context of Section 10-16-8(B). Again, federal post-employment restrictions provide applicable guidance.

Federal conflict-of-interest law defines "participated" to mean "an action taken as an officer or employee through decision, approval, recommendation, the rendering of advice, investigation, or other such action[.]"[27] It defines "personally" to mean "to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter.[28]

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[25] 5 C.F.R. § 2641.201 ("Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially") (2024).

[26] *See Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 26 (concluding that Rule 16-111 "indicate[s] a fact-specific, transactional approach to determining the scope of '[the] matter'") (second alteration original); *see, e.g.*, *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177 (D.C. 1982) (holding that participation by a former federal official on a task force that approved guidelines for development of a waterfront area in D.C. did not constitute the same "matter" as a subsequent proceeding that considered a specific design proposal) and *Martley v. City of Basehor*, No. 19-02138-DDC-GEB, 2019 WL 6340132 (D. Kan. Nov. 27, 2019) (holding prior resolution and current lawsuit were not the "same matter," and that attorney's routine, perfunctory drafting role did not amount to "personal and substantial" participation warranting disqualification).

[27] 18 U.S.C. § 207(i)(2) (2018).

[28] 5 CFR § 2640.103(a)(2) (2002); *see also* 5 C.F.R. § 2637.201(d) (1991). With regards to state equivalents of Rule 1.11(A), federal courts have held that attorneys supervising other attorneys

Federal conflict-of-interest laws define "substantially" in the following ways. 5 C.F.R. § 2637.201(d) provides:

> "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party."[29]

5 CFR § 2640.103(a)(2) provides:

> To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single

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in some matters were found to have participated in a "personal" and "substantial" manner. *See, e.g.*, *United States v. Smith*, 995 F.2d 662 (7th Cir. 1993) (holding that a supervisor's involvement was "personal" and "substantial" when his supervisee was in charge of investigating a related case but he attended high-level meetings about the case and signed an immunity agreement for one of the government's witnesses). *See also* Ludwig, *supra* note 13, at 4 ("The 'substantial' participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule … does not require that the attorney was directly responsible for the prior matter in question.").

[29] § 2637.201(d); *see, e.g.*, *United States v. Clark*, 333 F. Supp. 2d 789 (E.D. Wis. 2004) (applying the above definition in its analysis regarding disqualifying defense counsel who previously worked as an assistant United States attorney).

> act of approving or participating in a critical step may be substantial. […]

Additionally, it is helpful to consider the ways in which federal courts have defined what it means for a former government attorney to participate in a "personal and substantial" manner to warrant disqualification under Rule 1.11.[30] Rule 1.11's "use of the conjunction 'and' is critical to courts when analyzing whether a lawyer should be disqualified."[31] An attorney's former participation must be both "personal" and "substantial."

II. Applying Section 10-16-8(B) to this inquiry

While New Mexico courts have not addressed whether general legislative advocacy or broad policy work constitute a "matter" under Section 10-16-8(B), a public employee's work on legislation or policies of general applicability likely would not constitute a "matter" for the purposes of Section 10-16-8(B) given analogous federal law. Even if the matters were the same, a former public employee would likely be able to engage in post-state representation of a client before the government on that matter, so long as the employee did not have personal and substantial participation while in state service.

The federal Office of Government Ethics provides helpful examples to illustrate the above. The following examples to Section 2641.201(h)(2) illustrate how "matters of general applicability" are not covered by federal post-state employment restrictions:

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[30] *See, e.g.*, *Great Divide*, 426 F. Supp. 3d at 976 (holding that "[t]he substantial participation requirement means that a lawyer's involvement in a matter on a cursory, ministerial, or superficial basis will not support discipline or disqualification"); *see also* Richmond, *supra* note 6, at 338 ("A lawyer's participation in a single meeting while a public employee or official is not normally considered 'substantial'" (citing *Ex parte Utilities Bd. of City of Tuskegee*, 274 So. 3d 229 (Ala. 2018)).

[31] Richmond, *supra* note 6, at 338. *See, e.g.*, *Martley*, 2019 WL 6340132, at *7; *Great Divide*, 426 F. Supp. 3d at 975-76; *Arroyo v. City of Buffalo*, No. 15-CV-753A(F), 2017 WL 3085835 (W.D.N.Y. July 20, 2017) (refusing to disqualify a former assistant district attorney who was personally involved in the matter but not substantially involved); and *United States v. Dancy*, No. 3:08CR189, 2008 WL 4329414 (E.D. Va. Sept. 16, 2008) (reversing a defense lawyer's disqualification where additional evidence showed that while she was personally involved in the matter as a prosecutor, her involvement was insubstantial).

Example 1: A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 2: The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

Example 3: An employee of the National Science Foundation formulated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

Example 4: An employee in the legislative affairs office of the Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS on behalf of a private organization seeking to influence the Administration to insist on certain amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as a DHS employee in formulating the agency's position on proposed private

> relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.
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> *Example 5:* An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.[32]

Because the request did not provide details about the specific daily functions and responsibilities of executive branch staff, each staff member remains in the best position to assess whether their own involvement in given situations rises to the level of personal and substantial participation under Section 10-16-8(B). The hypothetical examples below are intended only as illustrative guidance and not a substitute for that fact-specific analysis.

Example 1: General legislative work that would not constitute a "matter."

> A staff member helped draft and negotiate a comprehensive education reform bill affecting testing standards statewide. After leaving state service, the staff member is retained by a nonprofit organization to lobby

[32] 5 C.F.R. § 2641.201(h)(2), exs. 1-5.

the legislation for amendments to the law enacted. Because the bill established general testing standards applicable to all students in New Mexico instead of specific students, the staff member would not be prohibited to lobby for amendments to the testing laws.

Example 2: General policy formation for a program would not constitute a "matter."

A staff member worked on efforts to formulate statewide criteria for a new economic development grant program open to any qualifying New Mexico business. The staff member had no interest in any company potentially qualifying for the grant benefit. The staff member is not prohibited from later representing a specific company in that company's application for funding under the program, because the member's earlier participation was in the general formulation of program standards, not in a matter involving that (or any) specific business.

Example 3: Task force service on a statewide issue would not constitute a "matter."

A staff member served on an interagency task force examining ways to reduce statewide housing shortages and issued a report recommending broad zoning and permitting reforms for residential housing. The staff member is not prohibited from later representing a specific housing developer in their permit applications so long as the member did not work on anything related to that developer's permit application while a public employee.

Example 4: General appropriations bill work would not constitute a "matter."

A staff member worked on the administration's proposed general appropriations act which allocated funding across dozens of state agencies and programs. Because the act applies broadly across state government and does not single out a specific private party, it is not a particular

> matter involving specific parties. The member is not prohibited from later advising a nonprofit generally about state funding opportunities under the enacted budget.

Example 5: Earmarked funding for a specific nonprofit organization would constitute a "matter."

> If the staff member in *Example 4* instead worked on a specific budget line item on an appropriations bill that earmarked funds for a single named nonprofit organization project, that earmark is a particular matter involving a specific party. So long as their work was personal and substantial, the member would not be able to later represent that nonprofit in its dealings with the state concerning the earmarked funds.

Example 6: Private relief provision would constitute a "matter."

> A staff member was the only person who worked on a proposed budget provision that granted a one-time water rights allocation to a specifically named acequia association. So long as their work was personal and substantial, this staff member would be prohibited from later representing the acequia, or anyone else, in dealings with the state concerning that water allocation.

As the last two examples illustrate, even if the matters are the same, Section 1-16-8(B) only bars a former staff member's representation of a person before the government if the staff member's participation on the matter was personal and substantial. In the context of this inquiry, the statutory elements would likely require that a staff member was directly involved in a matter in a significant way, i.e., the staff member directly advised on, or, moreover, exercised delegated authority to make a decision or take an official action, and that the decision or official action would not have been taken, in the way that it was, but for the staff member's participation.

To illustrate, a staff member who only had general awareness of a policy initiative, attended routine meetings, or handled administrative tasks related to the initiative likely would not have participated "substantially." In contrast, a staff member who directly supervised a team working on the policy initiative and who signed off on a critical decision point would likely have had "personal" and "substantial" participation. This is true even if the supervising staff member was not uniquely involved in determining the ultimate outcome. When examining the extent of a former staff member's involvement in a "matter," the analysis depends on not how much time the staff member spent on the matter, but on how significant their role was in the matter.

CONCLUSION

Former state executive branch staff likely may represent individuals or entities in their dealings with the governing regarding (1) legislation (2) policy and administrative matters on which the staff advised executive branch officials and agencies while in state service. If, however, the staff advised on a specific executive action that involved specific, identifiable parties (as opposed to an action of general applicability), and if the staff directly gave advice that was significant in reaching the executive decision on that matter, then the staff member, post-service, may not represent a person in their dealings with the government on that same matter. If the staff are also attorneys, however, there are separate rules of professional conduct that we do not explicitly provide advice on in this opinion. Beyond the above guidance, and without further facts, the Commission cannot definitively answer whether former state executive branch staff participated personally and substantially in matters that pose a potential conflict of interest.[33]

SO ISSUED.

HON. CELIA F. CASTILLO, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARY L. CLINGMAN, Commissioner
HON. DR. TERRY MCMILLAN, Commissioner
HON. NAN NASH, Commissioner
DR. JUDY VILLANUEVA, Commissioner

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[33] *See, e.g.* Office of Gov't Ethics, Informal Advisory Letter 99 x 21, Letter to an Alternate Designated Agency Ethics Official, at 1-2 (Nov. 12, 1999) (stating that determining whether Section 207 applies "to representative activity of a former employee depends on the facts in each instance" and that "[b]ecause each agency is familiar with its own programs, the agency typically is in the best position to make a prospective determination on matters such as whether a particular matter is one that involves specific parties or whether an employee's involvement in that matter is personal and substantial.").