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# EXECUTIVE SUMMARY

This report lays the foundation for a series of focus groups to consider the pros and cons of establishing a New Mexico Ethics Commission, as well as what structure that entity might take. Across the nation, 41 states have an independent ethics commission to provide advice to public officials, handle complaints and perform other functions related to government accountability. The other nine states – including New Mexico – do not have ethics commissions. These states provide oversight through a combination of ethics committees, attorneys general, inspectors general or secretaries of state.

Ethics related matters in New Mexico are currently managed by a combination of agencies and committees including:

- NM Legislative Council Service
- Senate Ethics Committee
- House Rules and Order of Business Committee
- Interim Legislative Ethics Committee
- NM Secretary of State
- NM Attorney General's Office
- NM Judicial Standards Commission

Over the last decade, New Mexico lawmakers have introduced at least 20 bills to establish some form of ethics commission that would consolidate at least some of these functions under one roof. Several recurring variables include:

- **Whom to oversee:** Bills include some combination of officials and/or employees in local government, the legislature, executive branch officials, as well as candidates for elected office, lobbyists, government contractors and seekers of government contracts.
- **Jurisdiction:** Bills include enforcement of some combination of the Campaign Reporting Act, Voter Action Act, Lobbyist Regulation Act, Governmental Conduct Act, Financial Disclosure Act, and Gift Act.
- **Extent of authority:** Options include authority to issue subpoenas, deliver advisory opinions and impose disciplinary actions.
- **Commissioners:** Options range from three to 12 members, with different entities appointing them.
- **Confidentiality and whistleblowers:** Proposals vary regarding when a complaint becomes public, protection of whistleblowers, and penalties for false allegations.
- **Types of law:** Options include a constitutional amendment or stand-alone legislation.

Fundamentally, New Mexico faces important decisions. Goals of public trust, fairness to lawmakers, clear communication, and an impartial process must all be taken into account. This report aims to address the most critical questions and concerns regarding ethics commissions.

***A separate report, released January 2017, summarizes the results of the focus groups. It is available at [nmfirst.org](http://nmfirst.org).***

# FOREWORD

## Purpose of the Project

Multiple legislative efforts to establish an ethics commission in New Mexico have been attempted in recent years. This report – which is part of a larger research project that includes five stakeholder focus groups – strives to provide an independent analysis of approaches taken by other states, past efforts in New Mexico, and potential future options.

## Researcher

**New Mexico First** engages people in critical issues facing their state or community. The public policy organization offers unique events that bring together people to develop their best ideas for policymakers and the public. New Mexico First also produces nonpartisan public policy reports on critical issues facing the state. These reports – on topics including natural resources, education, the economy, healthcare and effective government – are available at [nmfirst.org](http://nmfirst.org).

Our state's two U.S. Senators, Tom Udall and Martin Heinrich, serve as New Mexico First's honorary co-chairs. The organization was co-founded in 1986 by U.S. Senators Jeff Bingaman and Pete Domenici (retired).

## Sponsor

This research was commissioned by the Thornburg Foundation. The organization makes grants in the areas of good government, early childhood development, as well as food and agriculture reform. The foundation works toward high impact outcomes using evidence to understand and solve systemic problems – engaging stakeholders to drive policy reform, and creating meaningful and lasting change.

## Sources

This New Mexico First report draws on the many published resources as well as multiple interviews with experts in their field. Each is footnoted in the text with short references to complete references in the bibliography.

# INTRODUCTION

The American democratic process relies on sound decision-making, leaders with good judgement and public trust. At least 119 people hold statewide elected office in New Mexico, serving their state and communities every day. They serve in the legislature, the governor's office as well as other state offices – and they commit countless hours to the greater good. They are supported by over 18,000 state government employees.<sup>1</sup> The vast majority of these officials and employees do their work ethically and honorably.

However, some do not. In the last decade, the public has seen unethical, or in some cases, criminal behavior in multiple levels of New Mexico government. This includes the offices of the state treasurer, secretary of state and legislature. Some problems were serious while others may have represented modest errors in judgement or reporting.

Most other states have ethics commissions to help address these problems. Since 2010, New Mexico lawmakers have introduced at least 20 bills to establish some form of ethics commission. None became law – perhaps because of the bills' structures, or perhaps because some policymakers believe New Mexico has adequate systems in place to address ethics issues. The public broadly favors the idea of an ethics commission. A 2015 public opinion survey of state voters found that a substantial majority of respondents support establishing an independent government ethics commission (61 percent strongly support, 25 percent somewhat support).<sup>2</sup>

Ethics commissions do not necessarily reduce political corruption; in fact, there is little evidence that they do.<sup>3</sup> Instead the commissions are intended to provide, at minimum, a clear, trusted and fair system for addressing ethical questions or concerns. Ethics commissions also address minor, or accidental, levels of misconduct. In addition, they provide advice to public officials who request it – preventing problems before they occur. Perhaps ethics commissions' most important function is to help guard the public's trust in government.

So, what path should New Mexico take in this matter? Are our existing ethics systems adequate? If not, what structure should an ethics commission take? What assurances exist that it would be managed with integrity and without partisanship? These issues and other must be answered before moving forward as a state. This report aims to address the most critical questions and concerns regarding ethics commissions.

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<sup>1</sup> (U.S. Census Bureau, 2014)

<sup>2</sup> (Research & Polling Inc., 2016) The 450 New Mexicans surveyed included registered voters of all ages, education levels and major regions of the state and comprised republicans, democrats and independents.

<sup>3</sup> (Crider & Milyo, 2013)

## Section 1

# ETHICS COMMISSIONS OVERVIEW

Across the country, 41 states provide some form of external oversight of their ethics laws through an independent ethics commission. Of those, seven states have more than one commission to oversee separate branches of government. Nine states – including New Mexico – do not have ethics commissions, and provide oversight through ethics committees, the attorneys general, inspectors general or secretaries of state.<sup>4</sup>

## Key Considerations

In very broad terms, ethics commissions across the country can be grouped in a few ways:

- By *what* they regulate (i.e., violations, campaign finance)
- By *who* they oversee (i.e., executive branch, legislature)
- By *how far* their authority extends (i.e., advisory, punitive)

### WHAT ETHICS COMMISSIONS CAN REGULATE

In terms of scope of work, commissions vary significantly. Some of them focus primarily on providing a fair process for addressing allegations of wrong-doing. Others extend into training, lobbyist registration, campaign finance, voter registration or government accountability. Examples of specific areas of legal authority include:<sup>5</sup>

- Developing forms and manuals, examining reports and monitoring compliance (39 states)
- Conducting ethics training (41 states)
- Issuing subpoenas (39 states)
- Issuing advisory opinions (25 states)
- Issuing orders that are enforceable in court (32 states)
- All of the above (21 states)

In addition, more than 30 commissions regulate financial disclosures of both legislators and lobbyists, while at least 20 oversee overall campaign finance laws.

### WHO ETHICS COMMISSIONS OVERSEE

Structures vary widely regarding different types of people for whom ethics commissions provide oversight.

- State House, Senate or combined chambers
- Legislative branch employees
- Executive branch elected and appointed officials
- Executive branch employees

<sup>4</sup> (National Conference of State Legislatures-M. Comlossy)

<sup>5</sup> Note: In New Mexico First's research, we noted that seven states (Alaska, Illinois, Indiana, Kentucky, New Jersey, New York and Washington) have more than one state ethics commission to oversee distinct branches of government. These institutions may have overlapping authority. These multiple ethics institutions within the same state are combined in the numbers above.

- Judicial branch
- Lobbyists
- Local Government
- Political Candidates
- Vendors/Contractors

#### EXTENT OF AUTHORITY

In some states, ethics commissions have the authority to: 1) accept complaints, 2) investigate those complaints, and 3) issue penalties or sanctions for people who commit ethical violations. However, other states limit commission authority somewhere along that continuum. The U.S. Constitution and several state constitutions, including New Mexico's, contain clauses governing House and Senate authority to punish or expel their own members for contempt or disorderly conduct. Several states with these clauses limit their ethics commissions' legislative oversight to accepting and investigating complaints. The final decisions about penalties are determined by a legislative committee of peers.

#### ADDITIONAL VARIABLES

Ethics commissions around the country vary in size, with most between five and nine private citizens appointed by a combination of legislative leaders, the governor, and other state office holders. Most serve four or five-year terms. At least 34 commissions compensate their members; ten do not. Most at least provide per diem expense reimbursement.

### Office of Congressional Ethics

In addition to state models, there are federal examples. One is the Office of Congressional Ethics (OCE), established by the U.S. House of Representatives in 2008. It is an independent, nonpartisan entity charged with receiving and reviewing allegations of misconduct concerning U.S. House members or staff. Key elements of the OCE structure follow: <sup>6</sup>

- **Separate entities for investigation versus penalties:** The OCE screens complaints and investigates whether they have merit. The OCE may dismiss complaints if they appear to lack merit, or may forward them to the separate House Committee on Ethics if there appears to be a potential violation. This committee – comprised of House members – then reviews valid complaints and issues any sanctions or penalties.
- **Transparency and confidentiality:** The OCE issues a quarterly report providing the number of cases reviewed, and in what stage of review or dismissal they may be. The complaints themselves (including the name of the lawmaker) remain confidential if dismissed; the existence of the complaint becomes public if it is forwarded to the House Committee on Ethics.
- **Structure:** The OCE is comprised of a professional staff with expertise in ethics issues; it also has a board of directors who are private citizens, and cannot work for the federal government. Drawing on staff advice, the board votes on whether to dismiss or forward complaints. The OCE does not sanction, discipline or recommend sanctions.

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<sup>6</sup>(U.S. House of Representatives Office of Congressional Ethics, 2016), (U.S House of Representatives, 2016)

## STRENGTHS AND WEAKNESSES OF THE MODEL

The U.S. Constitution allows the House and Senate to punish – and even expel – its own members. This clause has been interpreted to mean that, if a member commits an ethical violation, the penalty or consequence should be determined by his or her peers (as opposed to an external organization). However, peers investigating their peers can raise difficulties, awkwardness, and concerns about public transparency. For these reasons, the OCE and House Ethics Committee were intentionally structured as separate entities: one for investigating complaints, and the other for deciding penalties. (This system is similar to that of the New Mexico Judicial Standards Commission, described on page 14.) However, critics point out that the House Ethics Committee has broad authority of its own, sometimes creating confusion or duplication of effort. Long-time observers of this approach recommend that any states considering whether to adopt this approach should develop clear divisions of labor between the two entities.<sup>7</sup>

## State Models

There are almost as many different models as there are ethics commissions. Below are three examples, with large, mid-sized, and smaller jurisdictional authorities.

### TEXAS ETHICS COMMISSION

Texas operates one of the nation’s most rigorous ethics commissions. Created in 1991 by constitutional amendment, the Texas Ethics Commission has wide-ranging jurisdiction and is housed in the legislative branch. It operates with the support of 34 employees. The eight commissioners may serve up to two four-year terms, and may not be lobbyists or elected officials. They may, however, be former officials. Commissioners are not paid and can be reimbursed for expenses.<sup>8</sup>

The Texas Ethics Commission provides oversight over the legislature, executive branch, candidates, some local officials, lobbyists and vendors. It provides at least some of oversight and ethics support for all public servants. It is responsible for administering several laws, some of which include:

- Political contributions, expenditures and advertising
- Personal financial disclosure of state officers and conduct of state officers and employees
- Lobbyist registration, reports, and activities
- Certain conflicts of interest

Minor violations – such as good faith reporting errors – can be addressed by staff. The commission both accepts and initiates complaints. If a violation occurs, the complaint is resolved using one of three levels of orders reflecting the seriousness of the violation. Law prohibits “frivolous complaints” and allows fines for people determined to have done so.

Texas’ appointment process is somewhat unique. The ethics commission is comprised of four Democrats and four Republicans.<sup>9</sup> It is intentionally even-numbered, with a super-majority of six required for all major votes including rules and sanctions. This structure requires bipartisan cooperation by design. Members are appointed by:

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<sup>7</sup> (McGehee, 2016)

<sup>8</sup> (State of Texas)

<sup>9</sup> The law contains provisions for hypothetically including third parties if or when appropriate.

- The governor, who appoints four seats (two Democrats and two Republicans) from a list of nominees provided by the legislature
- The lieutenant governor, who appoints two seats (one Democrat and one Republican) from a list provided by the relevant party caucus in the Senate.
- The speaker of the House, who appoints two seats (one Democrat and one Republican) from a list provided by the relevant party caucus in the House

Regardless which party is in office, the commission must remain politically balanced and commissioners are not removed or dismissed with elections. The super-majority voting structure, overlapping terms, and strict rules ensuring that appointing officers can “hire but not fire” helps insulate the commission from partisanship. “All parties and branches know it is in their self-interest to appoint sensible, ethical people,” commented one commissioner interviewed for this report. “We don’t think about political affiliation; instead we just focus on the work.”<sup>10</sup>

### **CONNECTICUT OFFICE OF STATE ETHICS**

Connecticut offers an example of a mid-sized ethics structure. It does not have a “commission” but performs comparable functions through the Connecticut Office of State Ethics. This office addresses accountability in state government through education, interpretation and enforcement of the state’s code of ethics. The office oversees ethics issues for legislative and executive branches, as well as registered lobbyists. It is governed by a nine-member Citizens Ethics Advisory Board that is appointed by the governor and legislature. The office’s work is conducted by a 14-member staff. It may issue advisory or declaratory rulings and assess fines for violations.<sup>11</sup>

A wide array of other functions was consolidated in 2011 within the state’s Office of Government Accountability, including the Elections Enforcement and Freedom of Information commissions.

### **ILLINOIS COMMISSIONS**

In Illinois, the process is smaller and split between at least two entities. The state has an Executive Ethics Commission (EEC) that receives complaints, conducts administrative hearings, publishes ethics guides, issues subpoenas, and makes rulings and recommendations in disciplinary cases. The Commission has jurisdiction over the employees and officers of the state’s Executive Branch. The EEC also provides independent oversight of the procurement process.<sup>12</sup>

The EEC has a nine-member commission. Five commissioners are appointed by the Governor, and one member each is appointed from the Attorney General, Secretary of State, Comptroller, and Treasurer. No more than five commissioners may be of the same political party. The commission is supported by a five-member staff and meets monthly.

The state operates a separate Legislative Ethics Commission, with eight appointed members, to address issues regarding the Illinois General Assembly. It meets as needed to address violations.

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<sup>10</sup> (Aikin)

<sup>11</sup> (National Conference of State Legislatures, 2016), (State of Connecticut)

<sup>12</sup> (State of Illinois)

## Section 2

# ETHICS RESOURCES IN NEW MEXICO

Ethics related matters in New Mexico are currently managed by a combination of seven or more agencies and committees. The state Attorney General’s office has noted that New Mexico has no central public body with responsibility to investigate all ethics violations. Instead, enforcement is “piecemeal” with various agencies sharing authority over different elements.<sup>13</sup> However, within the current system, each of these entities perform valuable services. Each institution carries different levels of authority to address specific situations. (See chart, page 15.)

## New Mexico Legislative Ethics Committees and Resources

Authority for considering ethics complaints against New Mexico legislators lies with one of three committees, depending on when the allegation surfaces. Committees include:

- Senate Ethics Committee
- House Rules and Order of Business Committee
- Interim Legislative Ethics Committee

All these committees are supported by legislative staff, including the New Mexico Legislative Council Service (LCS). Complaints, which must be signed and notarized, are submitted to the LCS.

### SENATE ETHICS COMMITTEE <sup>14</sup>

Eight members serve on this committee. The president pro tempore chairs the group, which also includes majority floor leader, majority whip, minority floor leader, minority whip, majority caucus chair, minority caucus chair and one member of the minority party appointed by the senate minority floor leader. Responsibilities include: receiving and investigating complaints; issuing advisory opinions; and interpreting or enforcing ethical principles.

The committee only meets if a complaint is filed or a request for an advisory opinion is made. If a complaint is filed, the committee creates a subcommittee to investigate the matter. The subcommittee includes the president pro tempore plus an equal number of Republicans and Democrats. The committee does not have subpoena power, but it has the power to issue oaths (requiring people testifying to tell the truth). The investigating subcommittee’s job is to determine if there is probable cause, similar to a grand jury. The committee may hire outside counsel, or it may rely on staff support from the LCS. If the subcommittee determines that that probable cause exists to believe the complaint is warranted, the matter is taken up by the full committee. If that larger group determines that a violation occurred, it recommends a punishment to the full chamber. Sanctions may range from reprimands to removal from office. These punishments require a public vote from the full Senate.

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<sup>13</sup> (NM Office of the Attorney General, 2011)

<sup>14</sup> (Senate Rule 9-13-1)

The process is confidential unless the investigating subcommittee determines that there is probable cause to believe the charge is warranted. The committee may adopt its own rules if necessary.

#### **HOUSE RULES AND ORDER OF BUSINESS COMMITTEE <sup>15</sup>**

If a complaint is filed with the House Rules and Order of Business Committee, an investigative subcommittee is created. The House Speaker and the two floor leaders select an equal number of members from each party to serve. The chair of House Rules also serves – and leads the subcommittee – but only votes if there is tie.

This House committee functions like its Senate counterpart, with investigations remaining confidential unless the investigating subcommittee determines probable cause exists to believe the charge is warranted. Sanctions are considered by the full House, in a public vote.

#### **INTERIM LEGISLATIVE ETHICS COMMITTEE**

If an ethical complaint about a state representative or senator is lodged between legislative sessions, it is considered by the Interim Legislative Ethics Committee (ILEC). The committee was established by statute in 1993. That year, a government ethics task force recommended the ILEC's creation to address the legislature's lack of authority to address ethical complaints between legislative sessions.<sup>16</sup>

The ILEC may issue advisory opinions on the interpretation and enforcement of ethical principles, investigate complaints from another member of the legislature or a member of the public, investigate referrals from the state attorney general, the secretary of state or a district attorney, and make recommendations to the Senate or House of Representatives regarding proposed sanctions for a legislator's ethical misconduct.

Members to the ILEC are appointed by the Legislative Council and represent both houses as well as both political parties. The ILEC convenes only when it receives a complaint, a request for an advisory opinion, or a referral from other government agencies. Complaints remain confidential until it is determined that probable cause exists to believe the charge is warranted. The ILEC does not have subpoena power.

#### **NEW MEXICO CONSTITUTION**

Article 4 of the New Mexico Constitution addresses the role of the legislature in determining consequences for members who behave inappropriately. It reads:

*Each house may determine the rules of its procedure, punish its members or others for contempt or disorderly behavior in its presence, and protect its members against violence; it may, with the concurrence of two-thirds of its members, expel a member, but not a second time for the same act. Punishment for contempt or disorderly behavior or by expulsion shall not be a bar to criminal prosecution.*

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<sup>15</sup> (House Rule 9-13-3)

<sup>16</sup> (Subsection D, 2-15-8 NMSA), (Governmental Ethics Task Force, 1993, p. 21)

## LEGISLATIVE ETHICS GUIDE AND TRAINING

Every two years, the LCS updates and publishes the Legislative Ethics Guide, providing direction to legislators. The guide addresses laws, rules, or opinions related to ethical conduct of legislators.<sup>17</sup> Some people find this resource highly useful; others suggest that it is primarily a rule book with little guidance on fundamentally ethical behavior. There is also a two-hour mandatory training that all legislators take part in every two years.

## Secretary of State

New Mexico's Office of the Secretary of State investigates complaints related to elections and ethics under the Election Code. Any person may file a written complaint with the Secretary of State alleging violations of the Financial Disclosure Act, Campaign Reporting Act, Government Conduct Act or Lobbyist Regulation Act, Municipal Election Code, School District Reporting Act or the Help America Vote Act.<sup>18</sup>

Complaints are investigated by an internal review committee of staff members, along with any attachments or exhibits. All complaints, review materials and processes are public record. If, at the end of the committee's investigation it determines that a violation occurred, the committee will issue a final determination and may refer the matter to the New Mexico Attorney General's Office or a district attorney for review or enforcement. The Secretary of State's office may also issue fines.<sup>19</sup>

## Attorney General

The New Mexico Office of the Attorney General processes several types of public complaints, of which four are potentially relevant to this discussion:<sup>20</sup>

- Charitable organization complaints (including nonprofits that engage in political activity)
- Open Meetings Act (OMA) complaints
- Inspection of Public Records (IPRA) complaints
- Any concern about fraud or corruption

For the first three items above, online forms and clear instructions are provided on the Attorney General's website. Any other type of potential violation may be reported through the Constituent Affairs email portal. When complaints are received, each party is contacted, facts gathered by staff attorneys or certified law enforcement investigators, and a determination made about whether a violation occurred. Depending on the nature of the case, a determination may be made at the staff level or may require a direct decision from the Attorney General. If so, enforcement may be administered by the Office of the Attorney General or the district attorneys in their respective jurisdictions. In addition, private citizens may bring a civil lawsuit against the offending public body.

<sup>17</sup> (NM Legislative Council Service, 2014, p. 5)

<sup>18</sup> (Subsection A: 10-16A-6, Subsection B: 1-19-34.4, 2-11-8.2, NMSA)

<sup>19</sup> (NM Secretary of State, 2016), (Vigil, 2016)

<sup>20</sup> (NM Office of the Attorney General )

## New Mexico Judicial Standards Commission

The New Mexico Judicial Standards Commission (NMJSC) is an independent state agency that investigates allegations of judicial misconduct by state or municipal judges and judicial candidates. It was established in 1968 by state constitution and statute. Before the commission was established, the only recourses for judicial misconduct were recall or impeachment – both extreme and costly solutions. The commission allows for corrective measures that can more appropriately fit different levels of misconduct.<sup>21</sup>

All 50 states and the District of Columbia have a judicial disciplinary agency similar to the NMJSC.<sup>22</sup> In our state, the 13-member multi-party commission serves for staggered terms. It includes:

- Seven public members appointed by the governor
- Four judges appointed by the NM Supreme Court
- Two attorneys appointed by the New Mexico Board of Bar Commissioners
- A professional, nonvoting, staff that manages the work of the commission

At the end of an investigation, the commission votes to either close the case or refer it to the New Mexico Supreme Court for sanctions. Allowable sanctions include removal, retirement and/or disciplinary actions.<sup>23</sup>

The process is highly confidential. Complaints do not become public until referred to the Supreme Court. This level of confidentiality is intended to protect the integrity of the investigation, safely enable the public to come forward with complaints, and protect judges from false or frivolous allegations of wrong-doing.<sup>24</sup>

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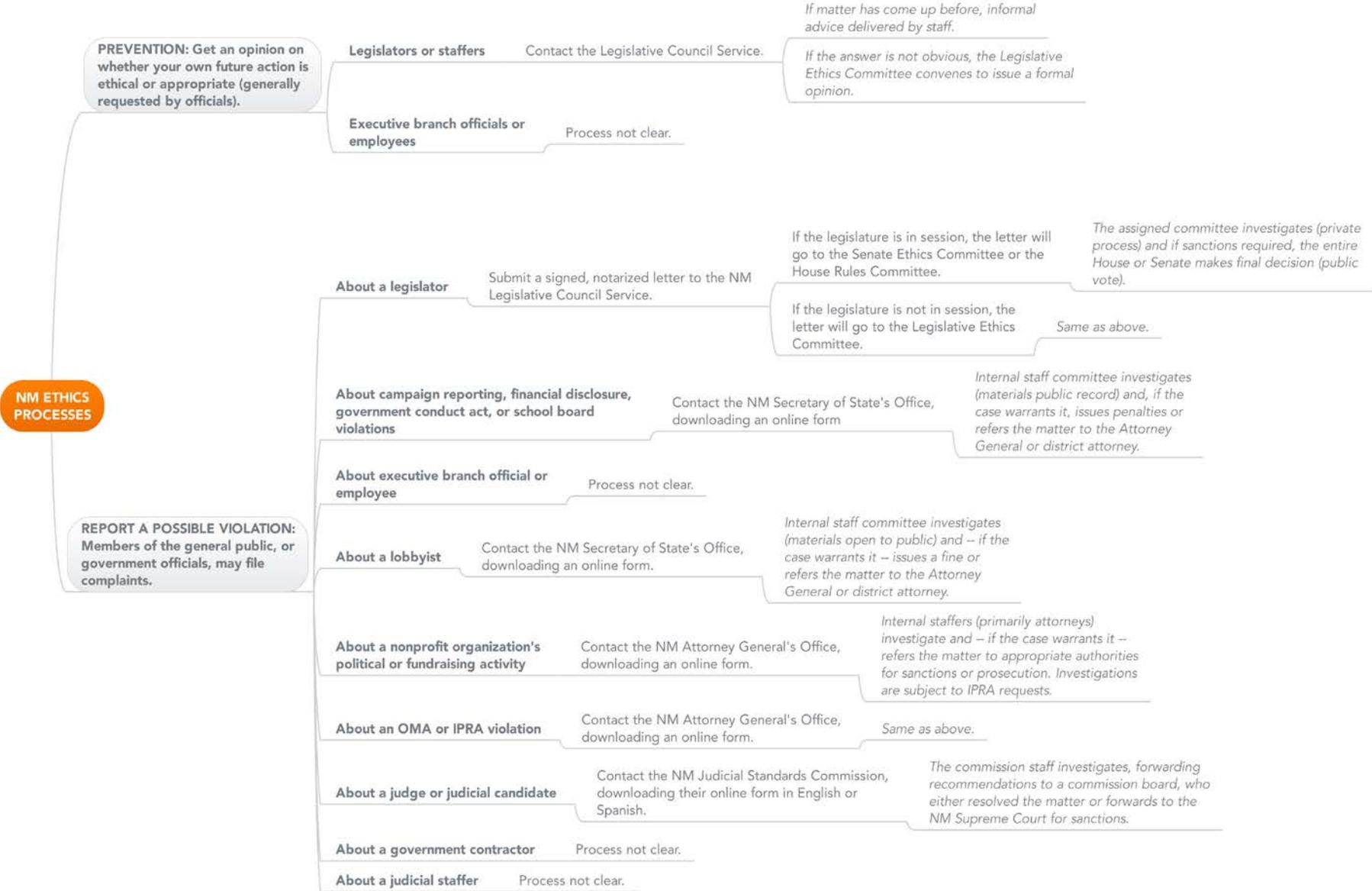
<sup>21</sup> (Article VI Sec.32, 34-10-1-10-4, NMSA), (Roybal, 2016)

<sup>22</sup> (NM Judicial Standards Commission)

<sup>23</sup> (New Mexico Judicial Standards Commission, 2015)

<sup>24</sup> (Roybal, 2016)

**NEW MEXICO ETHICS PROCESS**



### Section 3

## POLICY OPTIONS FOR NEW MEXICO

Legislators, policy organizations and a statewide task force have all introduced proposals in the last decade to establish some form of ethics commission – with the purpose of aligning or supporting the entities listed in the previous section.

### Task Force on Ethics Reform

In 2006, Governor Richardson’s Task Force on Ethics Reform recommended establishing an independent state ethics commission to investigate, reprimand and recommend removal suspension or demotion. The project was co-chaired by former New Mexico Governor Garrey Carruthers and Suellyn Scarnecchia, former dean of the University of New Mexico Law School. Key elements included:<sup>25</sup>

- Commission be independent – insulating it from political and partisan influences
- Authorized to issue its own regulations and rules of operation
- Authorized to issue subpoenas
- Oversight over unethical conduct of state officials, legislators, legislative employees, government contractors and lobbyists
- Confidential investigations

For appointed and elected executive branch officials, executive branch employees, judicial employees, government contractors and lobbyists, the commission would have the power to issue forms of discipline including reprimand or censure. The commission could also recommend removal, suspension or demotion.

For legislators and legislative employees, to preserve the preservation of separation of powers and align to the existing state constitution, the commission would be limited to providing results of investigations to the legislature and making recommendations regarding discipline. The power to impose disciplinary action would be left to the legislature’s discretion.

The ethics commission would also establish statewide standards for conduct for all state officers and employees, and it would implement training programs. The commission would also have authority to make recommendations on revisions to state ethics laws and issue advisory opinions in a confidential setting.

### APPOINTMENTS AND INTENDED BENEFITS

Under the 2006 task force’s proposal, composition of the commission would include eight members, no more than four from the same political party, who would serve staggered four-year terms and no more than two consecutive terms. Four members would be appointed by the governor, and the remaining members appointed by the Democrat and Republican leaders of the House and

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<sup>25</sup> (Governor Richardson’s Task Force on Ethics Reform, 2006)

Senate. Current state government officials could not be commissioners. Commissioners would be compensated only for reimbursement for travel and per diem expenses.

## Legislative Options

Based on previous legislation introduced in New Mexico – as well as preliminary drafts of possible upcoming bills – there are several recurring variables, summarized below.

### WHOM TO OVERSEE

Just as ethics commissions across the country vary regarding who the commissions oversee (see page 7), so too do past and upcoming draft bills in New Mexico. In a nutshell, bills include some or all of the following: local officials and employees, legislative and/or executive branch officials and employees, candidates for elected office, lobbyists, government contractors and seekers of government contracts.

The strongest points of contention appear to relate to the executive and legislative branches. Given that New Mexico already has an Interim Legislative Ethics Committee, some people champion an ethics commission focused exclusively on the executive branch. Others argue for inclusion of the legislature; they worry that the current system (which has the legislature both confidentially investigating and then sanctioning itself) is too closed a process. However, some legislators strongly support the current system – worrying that more public processes could be used for partisan or frivolous allegations.

### EXTENT OF AUTHORITY

Past and upcoming draft legislation offer various options:

- Hold enforcement jurisdiction over various existing government laws including some or all of the following: Campaign Reporting Act, Voter Action Act, Lobbyist Regulation Act, Governmental Conduct Act, Financial Disclosure Act, Gift Act
- Carry the authority to issue subpoenas regarding witnesses, records, or other evidence relevant to an investigation
- Issue advisory opinions only
- Impose disciplinary actions, penalties and sanctions
- Issue advisory opinions for legislators, but have broader authority to impose penalties for all others
- Reprimand or censure violators

### APPOINTEES

Major differences exist regarding the size of potential ethics commissions as well as how members would be selected. Some options include:

- 12 members, with three appointed by the governor, three by the chief justice of the state Supreme Court, three by the New Mexico State Bar, three by the Secretary of State, and one each recommended by the New Mexico Municipal League, the New Mexico Association of Counties, and the New Mexico Schools Boards Association

- 11 members, with five appointed by the governor (and at least one appointed from each congressional district), four appointed by legislative leaders, and two district court judges of different parties appointed by the chief justice of the NM Supreme Court; overall, no more than five commissioners of the same party
- Nine members, appointment process not stated
- Seven members, one each appointed by the House majority leader, House minority leader, Senate majority leader, Senate minority leader, and chief justice of the NM Supreme Court plus two appointed by the governor (one democrat and one republican)
- Three members, one Democrat, one Republican and one Independent appointed by the chief justice of the NM Supreme Court

Some proposals also call for geographic representation or cultural diversity. Others address who may *not* serve, including former elected officials, lobbyists or heads of state political parties.

#### **WHISTLEBLOWERS AND CONFIDENTIALITY**

Some legislative options explicitly protect whistleblowers against retaliatory action – extending the protection to those who file a complaint, participate in the investigation, or testify in a hearing. By contrast, other proposals penalize or fine whistleblowers who file frivolous complaints or publicly discuss ethics complaints they filed.

The penalty issues are tied to concerns that some people might use an ethics commission for partisan gain, to unfairly embarrass lawmakers, or to make false accusations. Legislator opinion about the likelihood of such outcomes appears to vary widely.

Lawmakers and advocates also disagree about when a complaint should become public. Some people believe all information should remain confidential until a ruling is made. Others argue for full transparency and would make the complaint process open from the point a complaint is filed. And some take a position in between, advocating that a complaint remain confidential just until it is determined that matter is not frivolous and merits further review.

#### **TYPES OF LAW**

Ethics commission bills in New Mexico have taken two formats: constitutional amendment and standard legislation.

A constitutional amendment requires a resolution to pass in both the state House and Senate. Then it goes to voters, who approve or reject it. The amendment does not require the Governor's signature to become law. It contains broad statements of law, but not the specific rules regarding implementation. Therefore, a constitutional amendment requires subsequent legislation that spells out the details. Passing a constitutional amendment is ultimately a lengthier process than passing stand-alone legislation.<sup>26</sup>

Supporters of this approach point out that a constitutional amendment establishes foundational principals that are intended to stand the test of time. They believe that an ethics commission is important enough for the people to vote on it and solidify it within the Constitution. Another

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<sup>26</sup> (NM Legislative Council Service, 2016)

potential benefit some identify is that – in current tough economic times – the constitutional amendment approach would delay the need to find the necessary funds for two to three years.

By contrast, stand-alone legislation requires passage in the House and Senate, and approval by the governor. It does not go before the voters, and does not become part of the state constitution. It can be overturned or amended the same way. Proponents of this approach favor it for various reasons. It is simplest and quickest way to pass an ethics commission. It would not layer more content into the constitution, which is a plus for people who believe the state constitution is already too detailed with clauses that should have been simple legislation. Lastly, the legislative approach lays out all the specifics of the new law, as opposed to a constitutional amendment that – by design – offers only broad and general language.

#### **OTHER DETAILS**

It is worth noting that most proposals also call for the commission to have a professional staff, including an executive director. In addition, most proposals would make the ethics commission an independent state agency – rather than housing it inside an existing branch or department.

## CONCLUSION

This report lays a foundation for a series of focus groups with former and current public officials, state and local leaders, and members of the media. The groups will consider the pros and cons of establishing a New Mexico Ethics Commission, as well as what structure that entity might take. What is the best way to appoint commissioners, and how might partisan-driven decisions be avoided? How broad an umbrella might the commission cover (executive, legislative, local, candidates, lobbyists, contractors)? Should it have the authority to issue penalties, or just be advisory? These and other matters will be considered.

Fundamentally, New Mexico faces important decisions. Goals of public trust, fairness to lawmakers, clear communication, and an impartial process must all be taken into account. Past policy debates have made it seem these goals are at odds with one another, but are they? Is there a policy solution that advances them all? Perhaps.

An additional report will be published by January 2017 with results from the focus group deliberations.

## Appendix

# ETHICS ENTITIES BY STATE

### Overview<sup>27</sup>

- Number of states with at least one ethics commission: 41
- Number of states with more than one ethics commission: 7
  - Alaska
  - Illinois
  - Indiana
  - Kentucky
  - New Jersey
  - New York and
  - Washington
- Number of states without ethics commissions, deploying various other systems: 8
  - Arizona
  - Idaho
  - New Hampshire
  - New Mexico
  - North Dakota
  - South Dakota
  - Vermont
  - Wyoming

### Details<sup>28</sup>

#### Alabama

Committees: Senate Constitution, Campaign Finance, Ethics and Elections Committee; House Elections Committee

Commission: [Alabama State Ethics Commission](#)

#### Alaska

Committee: [Alaska Select Committee on Legislative Ethics](#)

Commission: [Alaska Public Offices Commission](#)

#### Arizona

Committees: Senate Ethics Committee, House Ethics Committee

Commission: No commission

Other Agency with External Oversight: [Arizona Office of the Secretary of State](#)

#### Arkansas

Committees: Senate State Agencies and Governmental Affairs Committee, House State Agencies and Governmental Affairs Committee

Commission: [Arkansas Ethics Commission](#)

#### California

Committees: Legislative Ethics Committee, Judiciary Committee

Commission: [California Fair Political Practices Commission](#)

#### Colorado

Committee: No standing committee

Commission: [Colorado Independent Ethics Commission](#)

Other Agency with External Oversight: [Colorado Office of the Secretary of State](#)

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<sup>27</sup> (National Conference of State Legislatures-M. Comlossy)

<sup>28</sup> (National Conference of State Legislatures, 2016)

**Connecticut**

Committee: No standing committee

Commission: [Office of State Ethics](#)

**Delaware**

Committees: Senate Ethics Committee, House Ethics Committee

Commission: [Delaware State Public Integrity Commission](#)

**Florida**

Committees: Senate Ethics and Elections Committee, House Rules, Ethics and Elections Committee

Commission: [Florida Commission on Ethics](#)

Other Agency with External Oversight: Lobbyist Registration Office, Smarter Government Council

**Georgia**

Committees: Senate Ethics Committee, House Ethics Committee

Commission: [Georgia Government Transparency and Campaign Finance Commission](#)

**Hawaii**

Committees: Senate Judiciary Committee, House Legislative Management Committee

Commission: [Hawaii State Ethics Commission](#)

**Idaho**

Committees: Senate Judiciary and Rules Committee, State Affairs Committee

Commission: No commission

Other Agency with External Oversight: [Office of the Secretary of State](#)

**Illinois**

Committees: Senate Executive Committee, House Conflicts of Interest Committee and House Executive Committee

Commissions: [Illinois Legislative Ethics Commission](#), [Illinois Executive Ethics Commission](#)

Other Agency With External Oversight: [Illinois Secretary of State](#)

**Indiana**

Committees: Senate Ethics Committee, House Ethics Committee, House Public Policy, Ethics and Veterans Affairs Committee

Commissions: [Office of the Indiana Inspector General and Indiana State Ethics Commission](#); [Indiana Lobby Registration Commission](#)

**Iowa**

Committees: Senate Ethics Committee, House Ethics Committee

Commission: [Iowa Ethics and Campaign Disclosure Board](#)

**Kansas**

Committees: Senate Elections and Local Government Committee, House Government Organization and Elections Committee

Commission: [Kansas Governmental Ethics Commission](#)

**Kentucky**

Committees: Senate State and Local Government Committee, House State Government Committee

Commission: [Kentucky Legislative Ethics Commission](#), [Kentucky Executive Branch Ethics Commission](#)

**Louisiana**

Committee: Senate and Governmental Affairs Committee

Commission: [Louisiana Board of Ethics](#)

**Maine**

Committees: Senate Committee on Conduct and Ethics, House Ethics Committee / House Joint Legal and Veterans Affairs Committee

Commission: [Maine Commission on Governmental Ethics and Election Practices](#)

**Maryland**

Committees: [Joint Committee on Legislative Ethics](#), Commerce and Government Matters Committee

Commission: [Maryland State Ethics Commission](#)

**Massachusetts**

Committees: Senate Ethics Committee, House Ethics Committee

Commission: [Massachusetts State Ethics Commission](#)

**Michigan**

Committees: Senate Government Operations Committee, House Constitutional Law and Ethics Committee

Commission: [Michigan State Board of Ethics](#)

**Minnesota**

Committees: Senate Election Law Committee, House Committee on Ethics

Commission: [Minnesota Campaign Finance & Public Disclosure Board](#)

**Mississippi**

Committees: Senate Management Committee, House Ethics Committee

Commission: [Mississippi Ethics Commission](#)

**Missouri**

Committees: Senate Ethics Committee, House Ethics Committee, Rules, Joint Rules, Resolutions & Ethics Committee

Commission: [Missouri Ethics Commission](#)

**Montana**

Committees: Senate Ethics Committee, Senate Rules Committee, House Ethics Committee

Commission: [Montana Commissioner of Political Practices](#)

**Nebraska**

Committee: Government Military and Veterans Affairs Committee

Commission: [Nebraska Accountability & Disclosure Commission](#)

**Nevada**

Committees: Senate Government Affairs Committee, House Elections, Procedures, and Ethics Committee

Commission: [Nevada Commission on Ethics](#)

Other Agency With External Oversight: Nevada Legislative Counsel Bureau

**New Hampshire**

Committee: Legislative Ethics Committee

Commission: No commission

Other Agency With External Oversight: [New Hampshire Secretary of State](#)

**New Jersey**

Committees: Joint Committee on Ethical Standards, State Government Committee

Commission: [New Jersey State Ethics Commission](#), [New Jersey Election Law Enforcement Commission](#)

**New Mexico**

Committees: Senate Rules Committee, House Rules and Order of Business Committee

Commission: No commission

Other Agency With External Oversight: Office of the Secretary of State, Ethics Administration

**New York**

Committees: [Senate Ethics Committee](#), Assembly Ethics and Guidance Committee

Commissions: [New York State Joint Commission on Public Ethics](#), [New York State Legislative Ethics Commission](#)

**North Carolina**

Committees: Senate Rules and Operations Committee, House Ethics Committee

Commission: [North Carolina State Ethics Commission](#)

**North Dakota**

Committees: Senate Judiciary Committee, Senate Rules Committee, House Judiciary Committee

Other Agency With External Oversight: [North Dakota Secretary of State](#)

**Ohio**

Committees: [Joint Legislative Ethics Committee](#), House Ethics and Standards Committee, House Rules, Ethics and Elections Committee

Commission: [Ohio Ethics Commission](#)

Other: [Board of Commissioners on Grievances and Discipline](#)

**Oklahoma**

Committee: Government Operations and Agency Oversight Committee  
 Commission: [Oklahoma Ethics Commission](#)

**Oregon**

Committees: Senate Rules and Elections Committee, House Rules and Elections and Public Affairs Committee  
 Commission: [Oregon Government Ethics Commission](#)

**Pennsylvania**

Committees: Senate State Government Committee, House State Government Committee  
 Commission: [Pennsylvania State Ethics Commission](#)  
 Other Agencies With External Oversight: Pennsylvania Office of Attorney General, Pennsylvania Department of State

**Rhode Island**

Committee: Senate Judiciary Committee  
 Commission: [Rhode Island Ethics Commission](#)

**South Carolina**

Committee: Senate Ethics Committee, House Committee on Ethics, House Public Policy, Ethics and Veterans Affairs Committee  
 Commission: [South Carolina State Ethics Commission](#)

**South Dakota**

Committee: Senate State Affairs Committee, House State Affairs Committee  
 Commission: No commission  
 Other Agency With External Oversight: [South Dakota Secretary of State](#)

**Tennessee**

Committee: Senate Ethics Committee, House Governmental Organization and Elections Committee  
 Commission: [Tennessee Bureau of Ethics and Campaign Finance](#)

**Texas**

Committees: State Affairs Committee, Senate Committee on Administration, House General Investigating Committee  
 Commission: [Texas Ethics Commission](#)

**Utah**

Committees: Senate Ethics Committee, House Ethics Committee  
 Commission: Independent Legislative Ethics Commission  
 Other Agency with External Oversight: Utah Attorney General

**Vermont**

Committee: Senate Rules Committee  
 Commission: No commission  
 Other Agency with External Oversight: Vermont Office of the Secretary of State

**Virginia**

Committees: Senate Rules Committee, House Rules Committee  
 Commission: No commission

**Washington**

Committees: Joint Administration Rules Review Committee, House Rules Committee  
 Commissions: [Washington State Legislative Ethics Board](#), [Washington State Public Disclosure Commission](#), [Washington Executive Ethics Board](#)

**West Virginia**

Committees: Senate Committee on Judiciary, House Ethics Committee  
 Commission: [West Virginia Ethics Commission](#)

**Wisconsin**

Committee: Joint Committee on Legislative Organization  
 Commission: [Government Accountability Board](#)

**Wyoming**

Committees: Senate Judiciary Committee, Rules and Procedures Committee  
 Commission: No commission

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