



## FOCUS GROUPS

Establishing a New Mexico Ethics Commission:  
Benefits, Drawbacks & Alternatives

### FOCUS GROUP FINDINGS

- Results from five focus groups held in December 2016

**RESEARCHER:**

New Mexico First

**COMMISSIONED BY:**

Thornburg Foundation



NEW MEXICO FIRST



Copyright 2017

New Mexico First  
P. O. Box 56549  
Albuquerque, New Mexico 87187  
Phone: 505-225-2140  
Website: [www.nmfirst.org](http://www.nmfirst.org)

New Mexico First typically grants permission to reproduce all or part of this document for educational or public policy purposes. Contact us for reproduction authorization.

# CONTENTS

- Executive Summary ..... 4**
- Foreword ..... 5**
  - Purpose of the Project..... 5
  - Researcher..... 6
  - Sponsor..... 6
- Focus Group Findings ..... 7**
  - Reasons to Create an Ethics Commission..... 7
    - Public Trust ..... 7
    - Fragmented Systems..... 7
    - Preventing Honest Mistakes ..... 7
    - Limitations of Legal Systems ..... 7
    - Policymakers Policing Themselves ..... 8
    - Power of Political Parties ..... 8
  - Reasons *Not* to Create an Ethics Commission..... 8
  - Jurisdiction ..... 9
    - Executive Branch, Legislature, Local Officials or All? ..... 9
    - Public Officials, Government Employees or Both? ..... 9
    - Authority Over Statutes ..... 10
  - Commissioners ..... 10
  - Elements of an Ethics Commission..... 11
    - Subpoena Power ..... 11
    - Confidentiality..... 11
    - Whistleblowers and False Accusations ..... 11
    - Staff..... 11
  - Role of Media ..... 11
  - Constitutional Amendment or Standard Legislation? ..... 12
  - Additional Ethics-Related Issues ..... 12
    - Existing Resources..... 12
    - Existing State Laws and Rules ..... 12
    - Procurement Code ..... 13
    - Code of Conduct ..... 13
    - Ombudsman..... 13
    - Funding ..... 13
    - Future Work? ..... 13
  - Conclusion ..... 13
- Appendix: NM Ethics Process ..... 14**

# EXECUTIVE SUMMARY

This report presents results from a series of focus groups about the pros and cons of ethics legislation. Meetings were held in December 2016 with current and former public officials, as well as members of the media. While the research revealed a wide range of perspectives on the structure and timing of an ethics commission, most participants believed that New Mexico needs one. They offered a variety of reasons including public trust, fragmented existing systems, preventing honest mistakes, limitations of existing legal structures, and policymakers being asked to police themselves.

However, focus group participants also voiced concerns about creating an ethics commission at this time. People agreed the state's current financial shortfall presents a major barrier to paying for any new government function. Several participants indicated they would rather wait than launch a new commission without the resources to make it successful. Some participants worried that partisanship would render a commission ineffective. Others believed that the existing system, while disjointed, is working.

If an ethics commission were created, it could take any number of structures. Focus group participants considered several jurisdictional variables including:

- Whether an ethics commission's authority should extend to the executive branch, legislature, or local governments
- Whether to focus just on elected and appointed officials, or extend to all government employees
- Whether to organize the commission by enforcement of statutes, rather than by types of people

Participants also discussed the potential size, appointment structure, and qualifications of a commission. Many people believed the commission should reflect diversity including geography, ethnicity and political affiliation. Additional variables included whether to require a super-majority, staggered terms, inclusion of political independents, and appointee confirmation options.

The focus groups also discussed specific requirements for a potential ethics commission. Several people stressed the importance of any future commission having subpoena power. Participants also noted that confidentiality would play a key role in the effectiveness of any commission and many favored the system used by the Judicial Standards Commission, which does not release information about complaints until they are proven to have probable cause. People also believed that legitimate whistleblowers should continue to be protected from retaliation, but several people also thought that penalties should exist for knowingly filing false complaints.

Also, participants discussed whether a potential ethics commission should be established by constitutional amendment or standard legislation. As the following report illustrates, positions on this matter varied considerably.

The media focus group revealed additional perspectives. Reporters did not believe their investigative process would change considerably if an ethics commission were created, but many thought it could fill critical gaps. Declines in newsroom staff, financial challenges, and increased competition affect reporters' capacity to investigate ethics allegations.

This research effort contributes to a body of knowledge on policy options regarding ethics commissions. Additional details are presented in the following report and a [separate policy backgrounder](#) available at [nmfirst.org](http://nmfirst.org).

# FOREWORD

## Purpose of the Project

Several legislative efforts to establish an ethics commission in New Mexico have been attempted in recent years; all failed. This research project aimed to collect information on past efforts, gather feedback on potential future ones and compile it for lawmakers and others who are considering options for future efforts. The project contained three major components:

- A [comprehensive backgrounder](#) on the pros and cons of ethics commissions, as well as case studies on other states and bill comparisons of past legislation
- Five focus groups (described below)
- This report, summarizing the findings of the focus groups.

Because previous research collected input from the general public and business sector, this project did not attempt to duplicate that work.<sup>1</sup> Data revealed high degrees of public support for the establishment of an ethics commission. However, neither the general public nor business leaders would be obliged to answer to such a commission. For this reason, New Mexico First directed our research to the perspectives of people who – in their capacity as public servants – potentially would have to accept and trust this type of oversight.

Four focus groups were conducted in Las Cruces and Albuquerque, with participants including Republicans and Democrats in the following categories of current and former public officials:

- State legislators
- Cabinet secretaries
- Mayors
- County commissioners
- City councilors
- State and federal judicial branch officials
- State agency officials

A fifth focus groups gathered insights from working members of the media who, absent an ethics commission, often vet and investigate ethics allegations on their own.

**Note: All focus group attendees read the corresponding backgrounder on ethics commission options before the meetings. Readers are urged to do the same since essential context is presented in the other report. Both documents can be downloaded at [nmfirst.org](http://nmfirst.org).**

---

<sup>1</sup> Prior research on public and business sector opinions regarding ethics commissions was collected by the New Mexico firm, Research & Polling, in 2015 and 2016.

## 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 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 retired U.S. Senators Jeff Bingaman and Pete Domenici.

## 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.

# FOCUS GROUP FINDINGS

## Reasons to Create an Ethics Commission

While the focus groups revealed a wide range of perspectives on the structure and timing of an ethics commission, most participants believed that New Mexico needs one. They offered a variety of reasons.

### **PUBLIC TRUST**

A small number of unethical or criminal acts by public officials create negative headlines that are bad for the reputations of public leaders, focus group participants said. Some indicated that every bad decision by a policymaker further damages public trust. While participants agreed that an ethics commission would not necessarily address all the reasons the public is frustrated (such as perceived hyper-partisanship or worries about campaign finances), most believed it would at least create a transparent vehicle to address citizen complaints, allegations of wrong-doing and essential training for public officials.

Participants also noted that the current absence of an ethics commission results in most allegations being vetted by the media. There are pros and cons to this reality, further addressed on page 11. Commented one former cabinet official, “What we have is an erosion of public trust, partly from public officials getting caught doing something wrong, and partly from the media sometimes putting out false or incomplete information.”

### **FRAGMENTED SYSTEMS**

All participants agreed that current system is highly fragmented. Ethics related matters in New Mexico are currently managed by a combination of seven or more agencies and committees, including three legislative committees, the Legislative Council Service, the Secretary of State, the Attorney General and the New Mexico Judicial Standards Commission. Participants also noted that the diffused approach results in gaps, particularly regarding the executive branch and government contractors. Noted one public official, the public is looking for consistency and uniformity: “We need a one-stop shop for ethics questions.” (*See the appendix, page 14, for a flow chart of the existing system. Also, see the [separate backgrounder](#) for detailed information on the combination of ethics entities.*)

### **PREVENTING HONEST MISTAKES**

Participants in every focus group indicated that, if an ethics commission were established, education of public officials would be one of its most important roles. This education would include training for at least legislative and executive branch officials. People also agreed that expanding the availability of advisory opinions (on what is, or is not, appropriate) would also be highly valuable. This function would build on the existing collection of 11 advisory opinions available online through the Interim Legislative Ethics Committee. Commented a former official, “One function of an ethics commission is answering questions – drawing bright lines in gray areas.”

### **LIMITATIONS OF LEGAL SYSTEMS**

Not all ethical violations rise to criminal behavior, agreed the focus group participants. Perhaps the majority of ethical concerns are not illegal, but they may warrant investigation and possible reprimand. Focus group participants, especially those with experience in litigation, pointed to the

value of an ethics commission with common sense prosecutorial discretion. Such a structure would ensure that potential penalties, fines or warnings could be calibrated to the problem.

### **POLICYMAKERS POLICING THEMSELVES**

Former and current legislators spoke candidly about the challenges associated with potentially censuring or expelling their colleagues. The culture of the legislature requires collaboration and collegiality. One lawmaker cannot advance her or his policy goals without the votes of colleagues. Participants noted that this type of collaboration is not a bad thing; instead, it is a requirement of a well-functioning democratic system. However, some participants said, this collegiality creates a potential conflict when lawmakers become obligated to investigate ethics violations or sanction their peers.

Commented one focus group participant: “For us, if an ethics issue comes up, these are people we’ve served with, have known for years, developed close relationships with. Regardless of party, some things are nonpartisan as far as how we deal with each other. I’ve seen men and women in the legislature struggle with this. The advantage of a commission – even just the investigative part of it – is that it gives us a separation.”

It is noteworthy, however, that some former legislators felt differently. They pointed to other examples, such as the New Mexico Medical Board or the New Mexico Real Estate Commission, in which members police themselves. Some focus group participants said these other groups are different because their business model is based on competition with one another rather than required collegiality. Others argued that, while self-regulation is never easy, these groups do it and without apparent conflicts of interest.

### **POWER OF POLITICAL PARTIES**

Current systems that handle criminal ethics violations (district attorneys, secretary of state, state auditor, attorney general) all rely on people who run for office with the support of their political parties. While these elected officials are generally trusted, several participants believed that initial investigations should be at least vetted by an independent entity that is not beholden to one political party or another.

## **Reasons *Not* to Create an Ethics Commission**

Across the board, focus group participants voiced concerns about paying for any new government function in current economic conditions. (The fiscal shortfall was identified as one reason for considering the constitutional amendment option; see page 12.) Even some people who supported an ethics commission indicated they would rather wait on legislation than launch a new system without the resources to make it successful.

A few participants voiced doubts about whether an ethics commission would solve the problems it would be designed to address. They feared partisanship would render it ineffective. Others said that the existing system, while disjointed, is working; they did not believe the fragmentation is enough of a problem to justify establishing something new. “Whatever we do, let’s not forget that a lot of what we have in place right now is working,” commented a former legislator.

Other people supported an ethics commission for the executive branch (or even city/county officials) but opposed it for legislators. They believed that the existing legislative ethics committees functions adequately.



## Jurisdiction

If an ethics commission were created, it could take any number of structures. Focus group participants considered several jurisdictional variables.

### **EXECUTIVE BRANCH, LEGISLATURE, LOCAL OFFICIALS OR ALL?**

Most of the focus group participants recommended that a potential ethics commission direct its oversight to the legislative and executive branches. Practically all participants agreed there is no clear system of ethical oversight for the executive branch. Participants were aware of the existing legislative ethics committees.<sup>2</sup> Several commented that these groups handled previous concerns with fairness and integrity. Several also agreed, however, that this current system lacks transparency with its process. Still, others reinforced the point raised above, that while the existing system operates well, it also places legislators in a highly difficult position of investigating and sanctioning their peers.

Several people favored the structure used by the U.S. House of Representative's Office of Congressional Ethics, in which the equivalent of an ethics commission staff accepts complaints, investigates the allegations, and offers recommendations for sanctions. Final punishment or censure remains within the authority of House Ethics Committee. (See [separate backgrounder](#) for details on this structure.)

Most participants suggested holding off on expansion to cities, counties or school boards – at least initially. However, local officials in Las Cruces talked at length about the ways cities and counties are struggling with these issues. Participants in that meeting urged either: the establishment of a statewide ethics commission that includes local officials; or establishment of local entities to address this need. Whatever model might be pursued, it is noteworthy that some local ethics boards exist in New Mexico.<sup>3</sup>

If local options were developed, some participants indicated that different standards, policies, and processes would be required for different levels of government. Others argued that the fundamentals of government ethics (i.e., avoiding conflicts of interest, not abusing power, transparency, and appropriate use of public funds) are the same principals whether the official is a school board member or a state legislator.

### **PUBLIC OFFICIALS, GOVERNMENT EMPLOYEES OR BOTH?**

Most focus group participants suggested the commission focus on elected and appointed officials only. They believed including the thousands of government employees would be too big a scope. Instead, they suggested that existing personnel systems continue to be deployed for government employees and that employee handbooks include clear guidelines on ethical behavior including conflict of interest and financial gain.

Other participants, however, pointed out that each state agency has its own ethics policies and standards. Enforcement varies by department. Policies also vary considerably at city and county levels. The absence of consistency is one reason to consider the option of including government employees within the commission's oversight – for ethics issues only.

<sup>2</sup> The New Mexico legislature operates three ethics committees, one in the House, one in the Senate and one joint committee addressing matters between sessions. See [separate backgrounder](#) for details.

<sup>3</sup> In Albuquerque, the Board of Ethics' authority is primarily over election-related activity. Santa Fe's Ethics and Campaign Review Board has slightly broader authority, including elections, campaign finances as well as violations of the city's Code of Ethics.

A few participants recommended the ethics commission include oversight of candidates for public office, including how they are spending campaign funds, honesty in elections, etc. Other participants again favored a smaller scope. They preferred to let the Secretary of State's office retain authority over candidates as part of its management of the election process.

#### **AUTHORITY OVER STATUTES**

Some participants said the commission's jurisdiction should not be driven by *who* it oversees but instead by *what statutes* it enforces. Some examples include:

- Governmental Conduct Act (which governs ethical and legal conduct of all employees and officials in all levels of government)
- Gift Act (which governs gifts to state officials, state employees, and registered lobbyists)
- Procurement Code (which governs state handling of government contracts and contractors)
- Campaign Reporting Act (which governs reporting obligations for candidates for public office)
- Open Meetings Act (which governs how the public is informed of public meetings)
- Lobbyist Regulation Act (which governs reporting by registered lobbyists)

Additional relevant acts exist. Depending on which statutes would be included, and what limiting factors applied, the complexity and required staff of an ethics commission would be affected.

### **Commissioners**

Across the board, focus group participants noted that any future ethics commissioners must demonstrate high degrees of integrity. They agreed that the selection process for the commissioners is probably the most important – and potentially challenging – element of any future legislation. Many people agreed the commission should reflect diversity including geography, ethnicity and political affiliation.

A range of additional ideas were offered:

- Consider structuring it to require a super-majority, thus requiring bipartisan collaboration.
- Appoint people with staggered terms.
- Recognize the role of independents in New Mexico's electorate, and potentially include one or more independents or third-party members on the commission.
- Possibly structure the membership (via a mix of Democrats, Republicans, and independents) so that no single political party has a majority.
- Consider inviting appointees from each of the three branches of government.
- Consider requiring each appointing entity to confirm one another's selections – thus ensuring more trust and less partisanship.

Regarding the size of the commission, focus group perspectives varied. People agreed that three members would be too small and ten too big. Beyond that, there was no consensus.

## Elements of an Ethics Commission

### **SUBPOENA POWER**

Practically all participants agreed that, if an ethics commission is established, it should have subpoena power. This authority would include the ability to issue subpoenas regarding witnesses, records, or other evidence relevant to an investigation.

### **CONFIDENTIALITY**

People had different positions about confidentiality. Most participants favored the system used by the Judicial Standards Commission, which keeps complaints confidential until they are proven to have merit. Others, particularly in the media group, believed that system is too closed. Some participants favored models in other states and the U.S. House of Representatives in which commissions release reports on the numbers of investigations and dismissals, but without names. Under those rules, names are only released if an allegation is revealed to have merit.

### **WHISTLEBLOWERS AND FALSE ACCUSATIONS**

In the meetings where the issue came up, focus group participants believed that legitimate whistleblowers should continue to be protected from retaliation. (Such protection applies to people who file a complaint, participate in an investigation, or testify in a hearing.) However, there was a mix of ideas about people who file false accusations. Many participants believed there should be clear penalties for knowingly filing a frivolous complaint. People recognized the difficulty of proving malicious intent, but they believed some consequence should be delivered if it occurs.

### **STAFF**

In the focus groups that raised staffing issues, most people thought an ethics commission would need at least some paid staff. The same is true for most states, and some transferred employees from existing departments when they created their ethics commissions. However, a few participants in the Las Cruces focus group recommended that the ethics commissioners themselves handle the work without a permanent staff.

## Role of Media

Most, but not all, of the reporters who took part in the media focus group, generally favored the establishment of an ethics commission. One member of the press suggested that, instead of creating a commission, the state expand the authority of an existing entity, such as the Attorney General, to conduct these activities.

Many of the reporters' perspectives echoed that of public officials and thus were already presented. For example, some media people shared officials' concerns that a future ethics commission is not under-funded, mistakenly seen as a "silver bullet," or used as political fodder for false complaints. However, unlike some public officials who perceived that the press might publish allegations whether proven true or not, the reporters in this discussion shared that they receive tips against policymakers, vet them rigorously, and reject some as frivolous. They indicated they would probably continue to deploy these same strategies – whether or not there is an ethics commission. However, they also said that an ethics commission might inform their work, would be another valued source, and in some cases might influence timing or other aspects of their stories.

Members of the media also acknowledged the struggles their industry faces. While several took pride in past investigative work, they shared how time-consuming and difficult such efforts are. Declines in newsroom staff, financial challenges and increased competition from social media or other outlets that do not adhere to journalistic standards all create a changing media environment. Reporters indicated that an ethics commission could fill a gap in the capacity to investigate allegations.

The reporters' ideas on ethics commission confidentiality rules varied. Unlike most public officials who favored the New Mexico Judicial Standards Commission's rule of confidentiality until a complaint is determined to have probable cause, most reporters recommended that information be released earlier.

## Constitutional Amendment or Standard Legislation?

Ethics commission bills in New Mexico have taken two formats: constitutional amendment and standard legislation. Focus group participants compared these options. A proposed constitutional amendment must first be approved by the voters in New Mexico. It contains broad statements of law, but not the specifics. If it passes, subsequent legislation spells out the details.

Some participants favored this approach because it would ensure an ethics commission would stand the test of time. It would also "move the ball forward" without asking for any appropriations yet. Funds would not be required for two to three years.

Other participants questioned the value of adding an ethics commission to the constitution. Some believed that past attempts contained too much detail for the constitution. They favored either a very bare-bones constitutional amendment with perhaps just the establishment of a commission or traditional legislation that requires lawmakers to hammer out all the details at once.

## Additional Ethics-Related Issues

### EXISTING RESOURCES

Several participants acknowledged and voiced appreciation for existing ethics-related assets. The most commonly mentioned entities included the combination of legislative ethics committees, the Legislative Council Service, and the existing legislative ethics training. People also voiced considerable respect for the Judicial Standards Commission. Frequently pointed to as a model, the organization was widely seen as a fair system to defend the public against bad behavior by judicial officials while protecting those officials from false or partisan-driven allegations.

### EXISTING STATE LAWS AND RULES

Several people commented that existing ethics statutes and rules lack details. Whether or not an ethics commission is established, amending and clarifying existing laws and regulations would be helpful, agreed several former officials. Examples included campaign finance, the disclosure of business matters that might present a conflict of interests or required reporting. People also commented that many existing rules, such as in the Government Conduct Act, provide a solid foundation but they lack enforcement. Other participants suggested the tightening of existing agency rules. For example, existing rules require the Secretary of State's office to review 10 percent of certain campaign finance filings; one former legislator recommended such reviews be increased to 100 percent.

### **PROCUREMENT CODE**

Millions of state dollars are spent each year through government contracts. The state procurement code governs these contracts. Rules set thresholds for whether services must go to public bid, parameters for Requests for Proposals, and multiple other regulations regarding public expenditures for property, services or construction. Some focus group participants suggested that ethical oversight of government contractors remain a priority – whether through a future ethics commission or existing efforts by the state General Services Department.

### **CODE OF CONDUCT**

People in the Las Cruces meeting suggested that public officials develop a simple, straight-forward code of conduct, much like the one-page code used in the U.S. Armed Forces. This symbolic document does not replace the more detailed set of military laws, but it is a statement of values that servicemen and women know and honor. Participants suggested that public officials develop something similar and be required to review and sign-off on it every year.

### **OMBUDSMAN**

Some former legislators suggested that, until an ethics commission is established, perhaps the state could minimally establish a centralized ombudsman or hotline to help people navigate existing systems. The ombudsman would also collect existing rules and procedures for state agencies, review for consistency and potentially offer suggestions for improvements.

### **FUNDING**

One focus group brainstormed ways to finance a future ethics commission, other than through the state's general fund. Ideas included: service fees to existing agencies; transferring functions (and the staff that go with them) from existing agencies; add another checkbox to the New Mexico tax return for voluntary donations to the ethics commission (along with other charitable funds already listed); or house the ethics commission within an existing agency that has some of the same authorities (such as the State Auditor or Attorney General) thus saving administrative costs.

### **FUTURE WORK?**

The Las Cruces focus group recommended additional research or a new statewide study group on ethics commissions – particularly regarding how to meet the needs of city, county, school board, and other local offices.

## **Conclusion**

This research effort contributes to a body of knowledge on policy options regarding ethics commissions. Fundamentally, New Mexico faces important decisions. Goals of public trust, fairness to lawmakers, clear communication, and a fair process must all be taken into account. It is up to people and policymakers of New Mexico to determine next steps.

# APPENDIX: NM ETHICS PROCESS

