

FOCUS GROUPS

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

BACKGROUND REPORT

- Focus group participants are urged to read this report before the event.

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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.

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.

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.¹ 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).²

Ethics commissions do not necessarily reduce political corruption; in fact, there is little evidence that they do.³ 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.

¹ (U.S. Census Bureau, 2014)

² (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.

³ (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.⁴

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:⁵

- 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

⁴ (National Conference of State Legislatures-M. Comlossy)

⁵ 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:⁶

- **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.

⁶(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.⁷

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.⁸

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.⁹ 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:

⁷ (McGehee, 2016)

⁸ (State of Texas)

⁹ 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.”¹⁰

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.¹¹

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.¹²

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.

¹⁰ (Aikin)

¹¹ (National Conference of State Legislatures, 2016), (State of Connecticut)

¹² (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.¹³ 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 ¹⁴

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.

¹³ (NM Office of the Attorney General, 2011)

¹⁴ (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 ¹⁵

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.¹⁶

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.

¹⁵ (House Rule 9-13-3)

¹⁶ (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.¹⁷ 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.¹⁸

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.¹⁹

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:²⁰

- 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.

¹⁷ (NM Legislative Council Service, 2014, p. 5)

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

¹⁹ (NM Secretary of State, 2016), (Vigil, 2016)

²⁰ (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.²¹

All 50 states and the District of Columbia have a judicial disciplinary agency similar to the NMJSC.²² 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.²³

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.²⁴

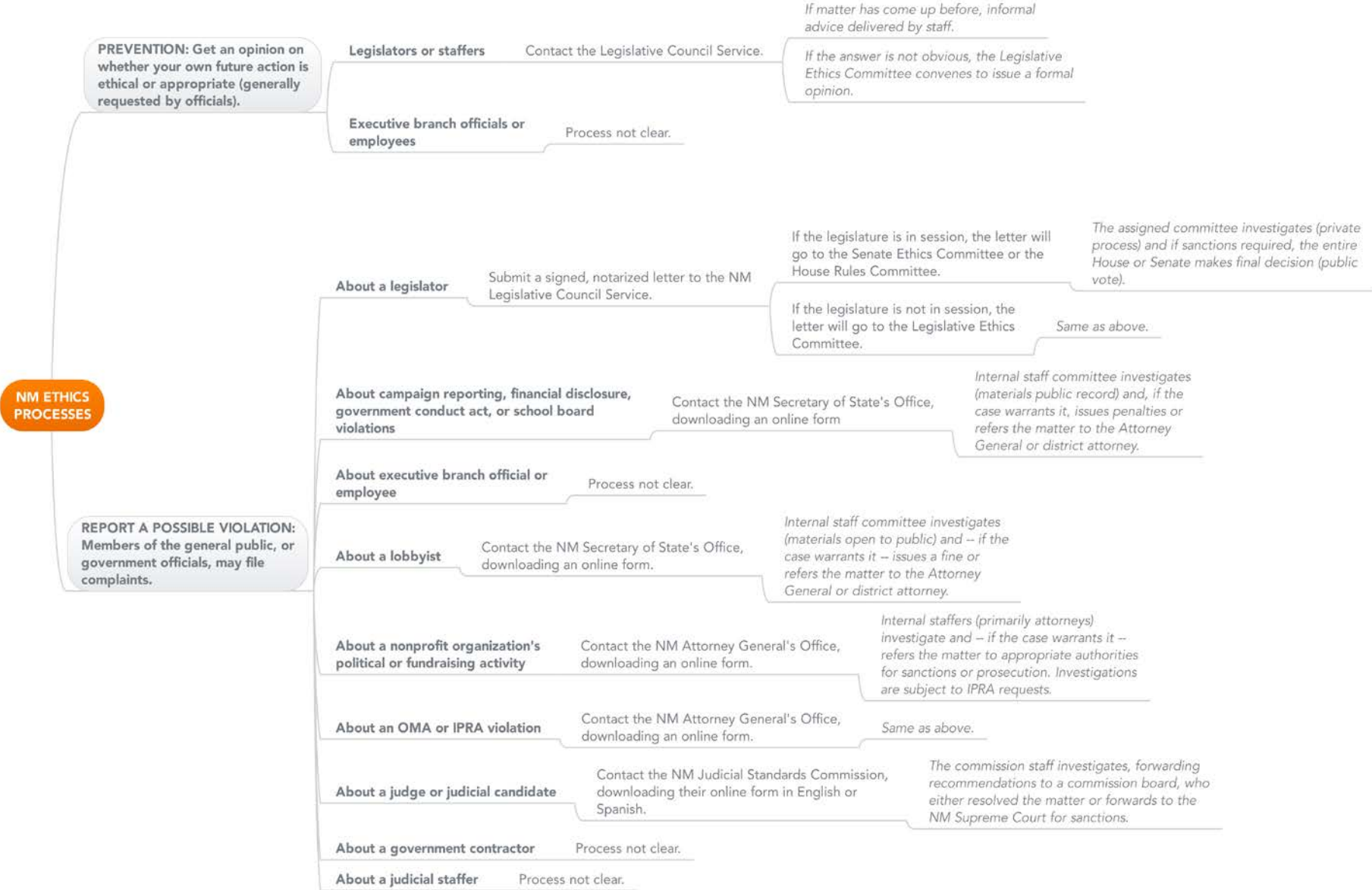
²¹ (Article VI Sec.32, 34-10-1-10-4, NMSA), (Roybal, 2016)

²² (NM Judicial Standards Commission)

²³ (New Mexico Judicial Standards Commission, 2015)

²⁴ (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:²⁵

- 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

²⁵ (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.²⁶

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

²⁶ (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

Overview²⁷

- 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

Details²⁸

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](#)

²⁷ (National Conference of State Legislatures-M. Comlossy)

²⁸ (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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FOCUS GROUPS

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

FOCUS GROUP FINDINGS

- Results from five focus groups held in December 2016

RESEARCHER:

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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.

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.¹ 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.

¹ 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.

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.² 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.³

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.

² 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.

³ 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

