

New Mexico

# GOVERNMENTAL CONDUCT ACT *COMPLIANCE GUIDE*

PROVIDED BY THE OFFICE OF THE NEW MEXICO ATTORNEY GENERAL



# THE GOVERNMENTAL CONDUCT ACT NMSA 1978, Chapter 10, Article 16

## Compliance Guide

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Attorney General

### ACKNOWLEDGEMENT

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### Mission

Our mission is to protect New Mexicans in order to make our communities safer and more prosperous. We prosecute criminal and civil offenses; advocate for consumers and those without a voice; empower the public by proactively educating them and connecting them with beneficial resources; and serve as legal counsel for the State and its agents.

### Vision

We aspire to be an innovative leader in New Mexico, recognized for proactively finding solutions and responding to evolving needs by leveraging partnerships with individuals, community organizations, government agencies, and businesses.

As Attorney General, I have made a commitment to the public safety and health of all New Mexico families. Transparency and accountability support democratic government “of the people, by the people, for the people” and democracy fosters the safety and health of our communities.

The New Mexico Governmental Conduct Act (GCA) governs the ethical and legal conduct of public officers and employees at all levels of government. The GCA provides guidance to those trusted to serve the public interest by establishing parameters for ethical and legal conduct. The GCA can also be used by members of the public to evaluate the work of those entrusted with public trust. Along with the Inspection of Public Records Act and Open Meetings Act, the GCA ensures that government functions are carried out in the open, in an honest and fair manner, by people who remain accountable to the public.

An ethical and democratic government encourages participation by the people; it enables people to examine how public officials and employees perform their public duties, and holds all government actors to equally high standards. When public officers and employees know that the public joins them in keeping government open and honest, everyone is safer and the government is healthier.

This Guide is written to help the public understand the standards of conduct expected of government officials and employees and can be used to evaluate those government officials and employees while they carry out their duties and responsibilities.

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2015

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## I. INTRODUCTION

The Governmental Conduct Act, NMSA 1978, Chapter 10, Article 16 (“GCA”), was enacted in 1967 as the Conflicts of Interest Act. The current title was enacted as part of an extensive revision to the law in 1993. The law was not significantly amended again until 2007. Those amendments were followed by additional changes in 2009 and 2011.

Until the GCA was amended in 2011, most of its provisions applied only to state officers and employees. In 2011, the law’s coverage was expanded to officers and employees of all political subdivisions of the state and their agencies. The law’s expanded coverage made it crucial that all state and local government officers and employees in New Mexico understand their ethical responsibilities under the GCA, as well as the specific prohibitions and limitations that ensure that public officers and employees conduct themselves solely in the interest of the public. To that end, the Attorney General has issued this Compliance Guide, which is intended to explain the provisions of the GCA and clarify their application to covered officials and employees. In addition, the Guide will enable members of the public to become more knowledgeable about the standards of conduct the GCA requires and assist them in holding their representatives in government accountable to those standards.

If you would like additional copies of this Guide, or if you have any questions about the Guide or the applicability of the GCA, please contact the Open Government Division of the Office of the Attorney General, P.O. Drawer 1508, Santa Fe, NM 87504-1508, or by telephone at 505-827-6070. The Guide is also posted on the Office of Attorney General’s website at [www.nmag.gov](http://www.nmag.gov).

## II. GOVERNMENTAL CONDUCT ACT

### 10-16-1. Short title.

Chapter 10, Article 16 NMSA 1978 may be cited as the "Governmental Conduct Act."

### 10-16-2. Definitions.

As used in the Governmental Conduct Act:

A. "business" means a corporation, partnership, sole proprietorship, firm, organization or individual carrying on a business;

B. "confidential information" means information that by law or practice is not available to the public;

C. "contract" means an agreement or transaction having a value of more than one thousand dollars (\$ 1,000) with a state or local government agency for:

(1) the rendition of services, including professional services;

(2) the furnishing of any material, supplies or equipment;

(3) the construction, alteration or repair of any public building or public work;

(4) the acquisition, sale or lease of any land or building;

(5) a licensing arrangement;

(6) a loan or loan guarantee; or

(7) the purchase of financial securities or instruments;

D. "employment" means rendering of services for compensation in the form of salary as an employee;

E. "family" means an individual's spouse, parents, children or siblings, by consanguinity or affinity;

F. "financial interest" means an interest held by an individual or the individual's family that is:

(1) an ownership interest in business or property; or

(2) any employment or prospective employment for which negotiations have already begun;

G. "local government agency" means a political subdivision of the state or an agency of a political subdivision of the state;

H. "official act" means an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority;

I. "public officer or employee" means any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators;

J. "standards" means the conduct required by the Governmental Conduct Act;

K. "state agency" means any branch, agency, instrumentality or institution of the state; and

L. "substantial interest" means an ownership interest that is greater than twenty percent.

**10-16-3. Ethical principles of public service; certain official acts prohibited; penalty.**

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

**B.** Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

**C.** Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

**D.** No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**10-16-3.1. Prohibited political activities.**

**A public officer or employee is prohibited from:**

**A.** directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose;

**B.** threatening to deny a promotion or pay increase to an employee who does or does not vote for certain candidates, requiring an employee to contribute a percentage of the employee's pay to a political fund, influencing a subordinate employee to purchase a ticket to a political fundraising dinner or similar event, advising an employee to take part in political activity or similar activities; or

**C.** violating the officer's or employee's duty not to use property belonging to a state agency or local government agency, or allow its use, for other than authorized purposes.

**10-16-4. Official act for personal financial interest prohibited; disqualification from official act; providing a penalty.**

**A.** It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**B.** A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official



act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

#### **10-16-4.1. Honoraria prohibited.**

No legislator, public officer or employee may request or receive an honorarium for a speech or service rendered that relates to the performance of public duties. For the purposes of this section, "honorarium" means payment of money, or any other thing of value in excess of one hundred dollars (\$ 100), but does not include reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service, or payment or compensation for services rendered in the normal course of a private business pursuit.

#### **10-16-4.2. Disclosure of outside employment.**

A public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency.

#### **10-16-4.3. Prohibited employment.**

It is unlawful for a state agency employee or local government agency employee

who is participating directly or indirectly in the contracting process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.

#### **10-16-6. Confidential information.**

No legislator or public officer or employee shall use or disclose confidential information acquired by virtue of the legislator's or public officer's or employee's position with a state agency or local government agency for the legislator's, public officer's or employee's or another's private gain.

#### **10-16-7. Contracts involving public officers or employees.**

A. A state agency shall not enter into a contract with a public officer or employee of the state, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest unless the public officer or employee has disclosed through public notice the public officer's or employee's substantial interest and unless the contract is awarded pursuant to a competitive process; provided that this section does not apply to a contract of official employment with the state. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this section.

B. Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee

of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.

C. Subsection B of this section does not apply to a contract of official employment with a political subdivision. A person negotiating or executing a contract on behalf of a local government agency shall exercise due diligence to ensure compliance with the provisions of this section.

**10-16-8. Contracts involving former public officers or employees; representation of clients after government service.**

A. A state agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$ 1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of the state whose official act, while in state employment, directly resulted in the agency's making that contract or taking that action.

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

C. A local government agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of that local government agency within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of that political subdivision of the state whose official act, while in employment with that political subdivision of the state, directly resulted in the agency's making that contract or taking that action.

D. For a period of one year after leaving government service or employment, a former public officer or employee shall not represent for pay a person before the state agency or local government agency at which the former public officer or employee served or worked.

**10-16-9. Contracts involving legislators; representation before state agencies.**

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

a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

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

#### **10-16-11. Codes of conduct.**

**A.** By January 1, 1994, each elected statewide executive branch public officer shall adopt a general code of conduct for employees subject to his control. The New Mexico legislative council shall adopt a general code of conduct for all legislative branch employees. The general codes of conduct shall be based on the principles set forth in the Governmental Conduct Act.

**B.** Within thirty days after the general codes of conduct are adopted, they shall be given to and reviewed with all executive and legislative branch officers and employees. All new public officers and employees of the executive and legislative branches shall review the employees' general code of conduct prior to or at the time of being hired.

**C.** The head of every executive and legislative agency and institution of the state may draft a separate code of conduct for all public officers and employees in that agency or institution. The separate agency

code of conduct shall prescribe standards, in addition to those set forth in the Governmental Conduct Act and the general codes of conduct for all executive and legislative branch public officers and employees, that are peculiar and appropriate to the function and purpose for which the agency or institution was created or exists. The separate codes, upon approval of the responsible executive branch public officer for executive branch public officers and employees or the New Mexico legislative council for legislative branch employees, govern the conduct of the public officers and employees of that agency or institution and, except for those public officers and employees removable only by impeachment, shall, if violated, constitute cause for dismissal, demotion or suspension. The head of each executive and legislative branch agency shall adopt ongoing education programs to advise public officers and employees about the codes of conduct. All codes shall be filed with the secretary of state and are open to public inspection.

**D.** Codes of conduct shall be reviewed at least once every four years. An amended code shall be filed as provided in Subsection C of this section.

**E.** All legislators shall attend a minimum of two hours of ethics continuing education and training biennially.

#### **10-16-11.1. State agency or local government agency authority.**

Nothing in the Governmental Conduct Act shall be construed to preclude a state agency or local government agency from adopting and publishing ordinances, rules or standards that are more stringent than

those required by the Governmental Conduct Act.

**10-16-13. Prohibited bidding.**

No state agency or local government agency shall accept a bid or proposal from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based. A person accepting a bid or proposal on behalf of a state agency or local government agency shall exercise due diligence to ensure compliance with this section.

**10-16-13.1. Education and voluntary compliance.**

A. The secretary of state shall advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties. This includes advising all those persons at least annually of that act's ethical principles.

B. The secretary of state shall seek first to ensure voluntary compliance with the provisions of the Governmental Conduct Act. A person who violates that act unintentionally or for good cause shall be given ten days' notice to correct the matter. Referrals for civil enforcement of that act shall be pursued only after efforts to secure voluntary compliance with that act have failed.

**10-16-13.2. Certain business sales to the employees of state agencies and local government agencies prohibited.**

A. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible

personal property directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to an employee supervised by the public officer or employee. A public officer or employee shall not receive a commission or shall not profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to an employee supervised by the public officer or employee. The provisions of this subsection shall not apply if the supervised employee initiates the sale. It is not a violation of this subsection if a public officer or employee, in good faith, is not aware that the employee to whom the goods, services, construction or items of tangible personal property are being sold is under the supervision of the public officer or employee.

B. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property, directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to a person over whom the public officer or employee has regulatory authority.

C. A public officer or employee shall not receive a commission or profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to a person over whom the public officer or employee has regulatory authority.

D. A public officer or employee shall not accept from a person over whom the public officer or employee has regulatory authority an offer of employment or an offer

of a contract in which the public officer or employee provides goods, services, construction, items of tangible personal property or other things of value to the person over whom the public officer or employee has regulatory authority.

**10-16-13.3. Prohibited contributions; financial service contractors.**

A. A business that contracts with a state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects shall not knowingly contribute anything of value to a public officer or employee of that state agency or local government agency who has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state.

B. A public officer or employee of a state agency or local government agency that has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state, shall not knowingly accept a contribution of anything of value from a business that contracts with that state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects.

**C. For the purposes of this section:**

(1) "anything of value" means any money, property, service, loan or promise, but does not include food and refreshments with a value of less than one hundred dollars (\$ 100) consumed in a day; and

(2) "contribution" means a donation or transfer to a recipient for the personal use of the recipient, without commensurate consideration.

**10-16-14. Enforcement procedures.**

A. The secretary of state may refer suspected violations of the Governmental Conduct Act to the attorney general, district attorney or appropriate state agency or legislative body for enforcement. If a suspected violation involves the office of the secretary of state, the attorney general may enforce that act. If a suspected violation involves the office of the attorney general, a district attorney may enforce that act.

B. Violation of the provisions of the Governmental Conduct Act by any legislator is grounds for discipline by the appropriate legislative body.

C. If the attorney general determines that there is sufficient cause to file a complaint against a public officer removable only by impeachment, he shall refer the matter to the house of representatives of the legislature. If within thirty days after the referral the house of representatives has neither formally declared that the charges contained in the complaint are not substantial nor instituted hearings on the complaint, the attorney general shall make public the nature of the charges, but he shall make clear that the merits of the charges have never been determined. Days during which the legislature is not in session shall not be included in determining the thirty-day period.

D. Violation of the provisions of the Governmental Conduct Act by any public officer or employee, other than those covered by Subsection C of this section, is

grounds for discipline, including dismissal, demotion or suspension. Complaints against executive branch employees may be filed with the agency head and reviewed pursuant to the procedures provided in the Personnel Act. Complaints against legislative branch employees may be filed with and reviewed pursuant to procedures adopted by the New Mexico legislative council. Complaints against judicial branch employees may be filed and reviewed pursuant to the procedures provided in the judicial personnel rules.

E. Subject to the provisions of this section, the Governmental Conduct Act may be enforced by the attorney general. Except as regards legislators or statewide elected officials, a district attorney in the county where a person resides or where a violation occurred may also enforce that act. Enforcement actions may include seeking civil injunctive or other appropriate orders.

#### **10-16-17. Criminal penalties.**

Unless specified otherwise in the Governmental Conduct Act, any person who knowingly and willfully violates any of the provisions of that act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$ 1,000) or by imprisonment for not more than one year or both. Nothing in the Governmental Conduct Act shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.

#### **10-16-18. Enforcement; civil penalties.**

A. If the secretary of state reasonably believes that a person committed, or is about to commit, a violation of the Governmental Conduct Act, the secretary of state shall refer the matter to the attorney general or a district attorney for enforcement.

B. The attorney general or a district attorney may institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred and fifty dollars (\$250) for each violation not to exceed five thousand dollars (\$5,000).

### III. THE GOVERNMENTAL CONDUCT ACT: AN OVERVIEW

#### A. Earning the Public Trust

##### The Law - Section 10-16-3

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

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

##### Commentary

This part of the GCA summarizes why we have ethics laws: to help ensure the public's trust in the honesty of our elected and appointed public officials. When members of the public trust their government to act with integrity, they are more likely to vote, to voice opinions on issues, to resolve disputes through the courts and administrative agencies, to pay their taxes fully and otherwise comply with the law. Their trust in government depends upon the belief that government will keep its promises, give out truthful and complete information, act with transparency, distribute public benefits and burdens fairly, and use resources funded by the public for the benefit of the community. The public's belief in the integrity of their government will be determined entirely by the acts of its elected officials and appointed

personnel, from the highest elected officials forging policy, to the thousands of public employees diligently conducting the daily work of government.

#### B. Who is Covered by the GCA?

##### The Law - Sections 10-16-2

As used in the Governmental Conduct Act: ...

G. "local government agency" means a political subdivision of the state or an agency of a political subdivision of the state.

I. "public officer or employee" means any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators.<sup>1</sup>

K. "state agency" means any branch, agency, instrumentality or institution of the state.

##### Commentary

Since it first became law in 1993, the GCA has been expanded to address an increasing number of ethical issues by a growing list of public employees. Over time the definition of persons covered by the Act has been expanded to include judges, members of public boards and commissions, employees of state

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<sup>1</sup>Except where the context suggests otherwise, this Compliance Guide uses the terms "employee," "officer" and "official" interchangeably to refer to public officers and employees covered by the GCA.

institutions, local government employees, and, for certain purposes, legislators. The addition of local government officers and employees in 2011 extended the GCA's requirements to thousands of elected and appointed officers and employees who work for political subdivisions, including municipalities, counties, school boards, local housing authorities, mutual domestic water consumers associations and Spanish and Mexican land grants.

With the 2011 amendments to the GCA, virtually every person working in every government entity within New Mexico that is created by state law or local ordinance is now under the GCA. This includes everyone working in government agencies, boards and commissions, public educational institutions at all levels, state hospitals and correctional institutions, all judges and court staff, and legislative staff. Even volunteers who are eligible to receive per diem and mileage compensation for attending meetings of government boards and commissions, at any level of government, are covered. The only exception is that elected legislators are not covered in general, but certain provisions of the GCA specifically apply to them, their families or their family businesses, as will be shown in later sections of this Compliance Guide.

The GCA applies only to New Mexico state and local government officers and employees. It does not cover officers and employees of the federal government, governments of Native American tribes and pueblos or governments of states other than New Mexico.

Example 1:

*A member of a local school board receives no salary, but is eligible for per diem and mileage reimbursement. This member never asks for reimbursement of his travel expenses,*

*however. The member is subject to the GCA because he is eligible for reimbursement, whether or not he ever claims it.*

Example 2:

*An employee of a state agency works in a bureau that is funded totally with federal grants. Even though the GCA does not apply to federal agencies, all state or local government employees are subject to the GCA, regardless of their funding source.*

Example 3:

*A non-profit agency receives a major portion of its program's budget from state funds. The director of the agency pressures an employee to support a certain political candidate. While the director's actions would be a violation of the GCA in a state or local government agency, the managers of the non-profit agency are not subject to the GCA in exercising their supervision of employees even though the non-profit agency receives public money.*

## **C. Basic Principles of Conduct Required of Public Officials**

The GCA helps to ensure that the people who operate state and local government and public institutions act honestly, diligently, transparently, fairly, within the limits of their lawful authority, and with integrity. The key that binds all these strands together is the concept of *rule of law*, sometimes referred to as *a government of laws, not of men and women*. What these phrases signify is that the people who make and carry out the laws do so according to binding legal principles, not according to their personal interests and whims. Adherence to the rule of law is necessary for fair decisions by the government, respect for the government, meaningful vot-



ing and public petitions to the government, and the existence of personal liberties.

When conflicts exist about what action government should take, as in disputes over zoning variance requests, for example, not every citizen may be happy with the outcome. A businessperson proposing a development may feel that the zoning authority's decision is too restrictive, while local residents may object to the same decision as disruptive of their quiet enjoyment of their existing lifestyle. It is impossible for officials to please everyone, and officials may hold and ultimately act on values that some of their constituents reject. But every citizen is entitled to the assurance that, like it or not, each decision that public officials make and the actions taken to implement that decision have not resulted from payoffs, personal or family interests, or secret deals, but rather from honest consideration of the facts and the officials' beliefs that they are acting in the best interest of the community.

This Compliance Guide will now look in greater detail at specific rules established by the GCA designed to protect the public from abuses by public servants, and at how these rules are enforced. We will also look at other New Mexico statutes that work with the GCA to create our state's system of public ethics law.

## IV. HOW DOES THE GOVERNMENTAL CONDUCT ACT PROTECT THE PUBLIC FROM IMPROPER INFLUENCE?

### A. What Constitutes Improper Influence?

#### The Law – Section 10-16-3

**D. No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.**

#### The Law – Section 10-16-2

**As used in the Governmental Conduct Act: ...**

**H. “official act” means an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority.**

#### Commentary

Nothing undermines confidence in government more than a real or perceived culture of corruption—where public assets, services and powers are, or appear to be, for sale by the officials to whom they have been entrusted. When officials are or seem to be “lining their own pockets” or enriching their political treasuries in exchange for conducting the business of government, the public becomes appropriately outraged. Government officials and employees are supposed to manage public property and provide ser-

vices by applying the law as it is written and in ways that best serve the public interest - not to allow officials or their friends or families to profit personally by dealing in their public trust.

The GCA was adopted primarily to erect a wall against this kind of abuse of power. It makes it a fourth degree felony for any public officer or employee or legislator to ask for or receive any money, thing of value, or a promise of any money or thing of value in exchange for the promised performance of an official act. It also makes it illegal for a person to offer any money or other thing of value in exchange of the promised performance of an official act.<sup>2</sup> A violation of this provision is punishable by eighteen months imprisonment and a fine not to exceed \$5,000. See NMSA 1978, § 31-18-15.

For a violation of Section 10-16-3(D) to occur, there must be a promised performance of an official act in exchange for the payment of money or other thing of value.<sup>3</sup> The GCA defines an “official act” as a decision or other action in a matter that involves the

<sup>2</sup> Similar misconduct, including bribery, is a crime under several other state laws. For example, see NMSA 1978, §§ 30-24-1 and -2.

<sup>3</sup> As discussed below, the GCA includes an absolute prohibition against payments and gifts to certain government officials and employees even if the gifts are not conditioned on the promised performance of an official act. In addition, the Gift Act, NMSA 1978, §§ 10-16B-1 to -4, restricts gifts lobbyists and similar donors may make to legislators and other public officials. See Appendix I, Part A.

use of discretionary authority. A government official performs an “official act” when the official uses his or her discretion to make a decision or take action that the official determines is appropriate based on the applicable facts and circumstances. In contrast, a public officer or employee who has no choice but to grant an application, for example, if the applicant meets the criteria specified by law does not have discretionary authority and is not performing an official act for purposes of the GCA.

The GCA does not require that the officer or employee who receives the illegal payment or thing of value personally perform the promised official act. A violation may occur if the officer or employee has sufficient influence or authority to direct another officer or employee to perform an official act on a matter of interest to the person who makes the payment.

Example 4:

*The purchaser of a lot goes to a county clerk's office to request copies of a filed deed. The clerk asks for a copying fee, matching the fee schedule posted on the wall. The purchaser says he wants it copied without a fee, and accuses the clerk of demanding a bribe. He finally pays the fee under protest, watches the clerk stamp his check as received, and gets a receipt. The clerk has acted properly. The fee was required by law and the clerk had no discretion to decide whether or not to charge the fee. Accordingly, the fee was not paid or received in exchange for the promised performance of an official act.*

Example 5:

*The Oil Conservation Division issues permits to drill oil wells. Drilling applications are subjected to close scrutiny by the Division,*

*which has discretionary authority to grant or deny an application. An oil producer shows up at a district office of the Division to file a request to get a permit to drill a well, says he is new to the State and is introduced to the district director for a courtesy visit in his office. After the director reaches behind him for some literature about his division, he turns back to find an open box that has appeared on his desk. In the box are two matched pearl-handled revolvers. The oil producer says nothing, but smiles. The director asks him to leave and take the box with him, and immediately calls his supervisor. The producer has illegally offered the director something of value by plainly offering the guns to him—even though nothing was said and no cash was offered. It may be a challenge to prove the allegation in a criminal case because nothing specific was requested or promised in exchange for the gift. But since the producer was in the process of filing an application related to his business interests, the director correctly rejected the gift and reported it.*

Example 6:

*A governor's aide finds himself in debt and in danger of defaulting on his mortgage. Around this time, he is contacted by a long-time friend who owns a construction firm. The friend asks for the aide's help in getting awarded a contract to construct a bridge. Without telling the governor, the aide approaches the agency in charge of awarding the contract. He falsely tells the agency director that the governor really wants his friend to get the contract, in any way they can make that happen. Then the aide asks his friend for a long-term, interest-free loan of a substantial sum that will pay off his mortgage debt. He gets the money and the contractor gets the contract. When the full transaction comes out, however, they both also get jail terms. Even though the payment*

*was called a loan, the fact that it was offered without interest at a market rate made it a thing of value. The loan was illegal under the GCA because it was made in exchange for the performance of an official act that produced a substantial benefit to the lender.*

## **B. Gifts from Financial Services Companies**

### **The Law – Section 10-16-13.3**

**A. A business that contracts with a state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects shall not knowingly contribute anything of value to a public officer or employee of that state agency or local government agency who has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state.**

**B. A public officer or employee of a state agency or local government agency that has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state, shall not knowingly accept a contribution of anything of value from a business that contracts with that state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects.**

**C. For the purposes of this section:**

**(1) “anything of value” means any money, property, service, loan or promise, but does not include food and refreshments with a value of less than one hundred dollars (\$100) consumed in a day; and**

**(2) “contribution” means a donation or transfer to a recipient for the personal use of the recipient, without commensurate consideration.**

### **Commentary**

Much of the greatest concern in recent years about ethics in New Mexico government has focused on financial services provided to the state, largely because so much money is involved, especially in the state’s pension and permanent funds. States have found that the large fees associated with handling investments from multi-billion dollar funds can be tempting enough to induce some financial firms to engage in unethical tactics. Similarly, the successful marketing of bonds to fund construction projects requires involvement by financial services companies knowledgeable about bond markets, which entitles them to earn substantial fees. Thus, the state legislature enacted a provision of the GCA making it unlawful for any financial services firm to “contribute” money or any other valuable items to a public official with authority over such transactions, or for any such official to accept such a contribution.

For purposes of the prohibition, a contribution of anything of value is a donation or transfer by a financial services provider to a government official without anything in return from the official. Food and refreshments of under \$100 value consumed in a single day are not considered things of value and may be contributed without violating Section 10-16-13.3.

### **Example 7:**

*A city financial division manager and the city councilor who heads the finance committee are invited by a bond placement service company to New York City. The company wants to make a presentation to them on*

*how the company would represent the city's interest if retained. The company offers to pay all their travel expenses and to provide tickets to a Broadway play. The officials must reject all the offered travel and entertainment expenses except for up to \$100 per day in food and refreshments. The city will have to pay for the trip beyond that, and the officials will have to buy their own theater tickets, or the placement service company will have to send their representatives to New Mexico to make the presentation on its behalf.*

## **V. WHAT CONFLICTS OF INTEREST MUST PUBLIC OFFICIALS AND EMPLOYEES AVOID?**

### **A. Public Interest Prevails Over Conflicting Private Interests**

#### **The Law - Section 10-16-3(C)**

**Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.**

#### **The Law - Section 10-16-4**

**A. It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.**

**B. A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.**

**C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new finan-**

**cial interest will be directly affected by the officer's or employee's official act.**

#### **Commentary**

These sections from the GCA strongly warn all public officials and employees at any level of New Mexico state or local government against using their public authority to benefit their private financial interests. "Financial interest" for purposes of the GCA is an interest held by an individual or the individual's family that is an ownership interest in business or property or any employment or prospective employment for which negotiations have already begun. The GCA defines "family" as a person's spouse, parents, children or siblings, by consanguinity (blood relationship) or affinity (through marriage). See Section 10-16-2(E), (F).

A public employee who takes an official act primarily to improve the employee's financial interest or position risks a fourth degree felony conviction. Even when the primary motive is something other than benefiting a public employee's financial interest, the GCA generally disqualifies a public employee from taking an official act that directly affects the employee's financial interests, unless the benefit to the public clearly outweighs the financial benefit to the employee. If a public employee has any doubt as to whether the employee should be disqualified from engaging in an official act that has an effect on the employee's financial interest, the best course is full disclosure. As indicated in Section 10-16-3(C), full disclosure of potential conflicts is a primary means of addressing and vetting situations that have the potential for improper self-dealing.

Example 8:

*Sitting on huge sums in its permanent funds, a state agency's fund managers advertise for a professional consulting firm to provide advice on how best to invest the money. Several consulting firms apply. The state fund managers secretly agree to hire one consulting firm if it advises large investments in Mutual Fund A. The state fund managers are major shareholders in Mutual Fund A and will share in its profits from this transaction. The fund managers have violated the GCA because they took official action for the primary purpose of enhancing their financial interests and could be subject to imprisonment.*

Although the GCA's provisions, including those discussed in this Part, are primarily concerned with financial conflicts of interest, the GCA's ethical principles, including Section 10-16-3(C)'s "guiding principle" of full disclosure, apply to any bias or interest that would adversely affect a government employee's ability to perform the employee's duties exclusively in the public interest. Any time a state or local government employee has a personal interest that could reasonably be perceived as unduly influencing the employee's conduct in a particular matter contrary to the public interest, the employee should disclose the interest, at a minimum, and refrain from acting or participating in the matter, if necessary.

In some cases, laws outside the GCA may dictate a public employee's conduct in the face of a conflict. For example, when acting in a quasi-judicial capacity, the members of a state or local adjudicatory body are subject to Article VI, Section 18 of the New Mexico Constitution, which prohibits a judge from hearing a case "in which either of the parties are related to him by affinity or consanguini-

ty, within the degree of first cousin...." See also Appendix I.B.

For conflicts of interest expressly addressed by the GCA, one way to look at how public officials and employees can avoid those conflicts is to consider the subject in three categories:

- 1) *private business and the public workplace;*
- 2) *outside employment; and*
- 3) *former government employees.*

To those three general categories might be added a fourth, more specific, one:

- 4) *conflicts of interest for legislators.*

We will look at how the GCA protects government employees, commercial interests, and the general public against potential favoritism or abuses of power by banning conflicts in all these categories.

## **B. Private Business and the Public Workplace**

### *1. Selling products or services at work*

#### **The Law - Section 10-16-13.2**

**A. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to an employee supervised by the public officer or employee. A public officer or employee shall not receive a commission or shall not profit from the sale or a transaction to sell goods, services, construction or items of tangible**

**personal property to an employee supervised by the public officer or employee. The provisions of this subsection shall not apply if the supervised employee initiates the sale. It is not a violation of this subsection if a public officer or employee, in good faith, is not aware that the employee to whom the goods, services, construction or items of tangible personal property are being sold is under the supervision of the public officer or employee.**

#### Commentary

Public officers and employees, like anyone else, may have hobbies or skills that they wish to share with friends, family and colleagues. It may seem nonintrusive and even a favor to offer to sell handmade crafts to fellow employees, or to others with whom we deal through our work.

But if taken too far, such transactions can become coercive and abusive of authority. For example, employees who seek to supplement their income through profitable sales to the people whom they supervise put their staff in a bind: their employees may worry that turning down the supervisor's offer will lead to less favorable assignments, performance reviews, or other personnel actions. Even solicitations for worthy charities may become unwelcome if accompanied by implications that failure to donate could lead to unfavorable treatment, that those who donate will be favorably treated, or if the solicitations get too persistent. Employee time that is supposed to be devoted to public service may be diverted into private business or efforts on behalf of private charities. Occasionally, solicitations may even violate the law, such as in gambling pools.

The GCA controls some of this behavior by labeling as unlawful certain private dealings in the public workplace. Specifically, a su-

pervisor is prohibited from selling for profit any goods or services to her employees, whether directly or indirectly through her family or any business in which the supervisor has a substantial interest. Nor may a supervisor take a commission or otherwise profit from a sale to an employee she supervises, even if the supervisor does not participate in the transaction directly or indirectly through the supervisor's family or business.

There are two exceptions to the GCA's prohibition against sales to supervised employees. First, the prohibition does not apply if an employee initiates the sale. Second, the law provides a "good faith" defense - if the supervisor did not know that the sale was being made to a supervised employee, the sale does not violate the law.

The restrictions apply to the supervisor, the supervisor's family (spouse, parents, children or siblings), or any business in which the supervisor has a substantial interest. The GCA defines "substantial interest" as an ownership interest of greater than 20%. See Section 10-16-2(L).

#### Example 9:

*A receptionist with no supervisory responsibility in a municipal government office sews angel dolls for her family around Christmas-time. She shows them to her co-workers and several ask if they can buy one. Realizing that her handiwork is in demand, she posts a sign in the office break room offering the dolls for sale. The sales do not violate her office's policies and do not detract significantly from her work duties. She has not violated the GCA, because she is selling to people who initiated the sale and over whom she has no supervisory authority.*



Example 10:

*During a coffee break at work, a county department head asks his staff to discuss what their family members do. When his turn comes up, the department head makes known that his brother runs a car repair business and that he would be happy to schedule repair work for anyone on the staff, promising them a good deal. This statement violates the GCA because the supervisor initiated it and it solicits sales from employees he supervises for a family-run business. It does not matter whether the department head personally profits from the business, because his family member does.*

Example 11:

*A county employee knows that his supervisor's brother is the sole owner of a car repair shop, but the supervisor has never mentioned this to his staff. The employee brings his car into this shop for repairs. As he picks it up and pays, the employee says to the shop owner: "Be sure to tell your brother I brought my car to you—he's my boss, you know." Although the employee/customer may be trying to curry favor with his boss, there is no violation of the GCA. The supervisor did not promote his brother's services to his staff, has no financial interest in his brother's business, and the employee initiated the transaction. Even if there had been a problem, the supervisor appears to have a "good faith" defense, in that he did not know his brother was selling his services to the supervisor's employee.*

Example 12:

*A state agency chief legal counsel signs up as an agent for a prepaid legal services company. The company pays for the services of an attorney to anyone who pays a monthly subscription. The legal counsel has no own-*

*ership interest in the company, but receives a commission from each sale, which he arranges during breaks, lunch and after work hours. He sends out an email to the entire agency to let everyone in the agency know that they can buy this service from him.*

*He has violated the GCA by offering services to staff he works with and, in some instances, may directly supervise. Even though the business does not belong to him or a family member, he cannot make a commission from sales to employees he supervises. As for agency personnel he does not supervise, he is carefully avoiding conducting his sales during work hours. Nevertheless his use of agency "powers and resources" to make his business known for his personal benefit, including his implicit endorsement as the agency lawyer for this legal services business and the use of office email to promote it, would seem to violate the ethical principles in the GCA against self-dealing.<sup>4</sup>*

2. Selling to regulated entitiesThe Law - Section 10-16-13.2

**B. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property, directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to a person over whom the public officer or employee has regulatory authority.**

**C. A public officer or employee shall not receive a commission or profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to a person over whom**

<sup>4</sup> Section 10-16-3(A) (see above, Part III.A).

**the public officer or employee has regulatory authority.**

Commentary

The law restricting public officials or employees from selling to individuals or entities over whom they have regulatory authority is similar to the provision against sales to supervised employees. As with the restrictions on sales to supervised employees, the agency employee may not sell or profit directly, through the employee's family or through a business in which the employee has a substantial interest and the employee may not receive a commission or profit from a sale to a person over whom the employee has regulatory authority.

The restrictions on sales to regulated entities differ from those on sales to supervised employees in two respects. First, the restriction against selling to regulated persons and entities applies to any employee with regulatory authority over the person or entity, not just to employees who are supervisors or otherwise part of the agency's management. Second, the restriction on sales to regulated persons does not expressly provide a good faith defense when a government officer or employee is not aware that an individual or entity to whom a sale is made is under the employee's regulatory authority.

Example 13:

*A staff accountant for a utility company that is regulated by the Public Regulation Commission is attending a social reception. He tells a Public Regulation Commission hearing officer that his wife has just filed for divorce. The hearing officer suggests that he retain her husband, who is a family law specialist. The suggestion violates the GCA, because the accountant is an employee of an entity regulated by the Commission and the*

*hearing officer likely would be viewed as having regulatory authority over the utility company. It is against the law for the hearing officer to sell legal services to the regulated entity employee indirectly through a family member.<sup>5</sup>*

Example 14:

*The wife of a Superintendent of Insurance runs an office supply business. During a meeting, the Superintendent hands his wife's business card to the president of a regulated company, but says nothing about it. The company president has his purchasing agent order, but in the agent's own name, a two-year supply of paper, pens, and printer ink cartridges from the business. The agent pays with a company check. The sale violates the GCA because the Superintendent is selling office supplies through his wife's business. His wife may not have known the name of the company purchasing agent who placed the order, but the Superintendent's action in handing her business card to the president promoted the sale. The payment by company check left no doubt who the buyer was.*

3. Contracting with public employees

**The Law – Section 10-16-7**

**A. A state agency shall not enter into a contract with a public officer or employee of the state, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest unless the public officer or employee has disclosed**

<sup>5</sup>See also Section 8-8-19 of the Public Regulation Commission Act for ethical considerations specific to Commission candidates, Commissioners and staff.

**through public notice the public officer's or employee's substantial interest and unless the contract is awarded pursuant to a competitive process; provided that this section does not apply to a contract of official employment with the state. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this section.**

**B. Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.**

**C. Subsection B of this section does not apply to a contract of official employment with a political subdivision. A person negotiating or executing a contract on behalf of a local government agency shall exercise due diligence to ensure compliance with the provisions of this section.**

#### Commentary

Apart from contracts of employment, the GCA puts restrictions on state employees wishing to contract with any state agency and on local government employees attempting to contract with the local government agency that employs them.<sup>6</sup> The re-

strictions apply to the employee, the family of the employee (spouse, parents, children or siblings); or to any business in which the employee or the employee's family has a substantial (over 20%) interest.

The restrictions are not absolute. It is possible for public employees to contract with the government that employs them, provided they meet two conditions.

First, the employee must *publicly* disclose the substantial interest he or she holds. The GCA does not define how that disclosure must be accomplished. It appears that the purpose of the notice is to alert the public to the potential conflict of interest inherent in a public body contracting with its own employee or their family, to ensure transparency and accountability. If the transaction is appropriately publicized, for example, people who might have offered to provide the same service would be able to ensure that proper procedures are followed; and other members of the public would be assured that no "backroom deals" were made to favor insiders, perhaps at an unfair cost to taxpayers.

Even though the GCA does not specify the form of public notice that should be provided, it should be adequate to serve the purposes of providing transparency and accountability. That would mean that, at a minimum, anyone who is reasonably attentive to developments concerning the applicable government agency would be alerted to the situation. Presumably, adequate notice could include anything from posting a notice conspicuously at city hall, to buying a newspaper announcement, to arranging to have it

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<sup>6</sup> For purposes of the GCA, a "contract" is "an agreement or transaction having a value of more than one thousand dollars (\$1,000) with a state or local government agency" for

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a wide variety of purposes. See NMSA 1978, § 10-16-2(C).

appear prominently in the agency newsletter or website.

Some guidance regarding the appropriate form of notice might be found in the Open Meetings Act,<sup>7</sup> which requires public bodies to give advance notice of their meetings to the public. Lacking statutory direction, it would be advisable for a state agency that is contemplating a contract with a state employee, or local government agency that is contemplating a contract with one of its own employees, or a family member or the employee's or family member's business, to use the same form of notice it uses to publicize meetings. For example, a local government body might note in its published meeting agenda that it will consider approving a contract with one of its employees.

Second, state government agencies intending to contract with a state employee and local government agencies intending to contract with one of their employees, their family members or businesses, must award the contract through a competitive process. Usually, this requirement will be met by following the competitive sealed bid process or the competitive sealed proposal process delineated in the Procurement Code.<sup>8</sup> Some

local government entities may be excluded from the Procurement Code, such as municipalities that have adopted home rule charters and have enacted their own purchasing ordinances.<sup>9</sup>

The employee negotiating or executing the contract on behalf of the government agency is responsible for using due diligence to ensure that the rules described above are followed. Specifically, a state agency should ask potential contractors whether they are state officers or employees and a local government agency should ask potential contractors whether they are officers or employees of that agency. If so, the required public notice must be made and the contract awarded through a competitive process.

Example 15:

*A municipal full-time fire chief owns several dump trucks for private trash hauling from construction sites. The city has no trucks of its own, and its previous contract hauling service has just gone out of business. At a city council meeting, the city manager announces that his office will put out a request for proposals to contract with a new hauling service for its solid waste. The fire chief stands up and, on the record, states that he would like to submit a proposal to be awarded the contract in accordance with the rules of the Procurement Code's Request for Proposals (RFP) competitive sealed proposal process. He responds to the RFP properly and does not discuss his proposal with anyone in municipal government. When the city clerk gives the agenda to the local newspaper for the meeting at which the proposals will be considered, she includes a special note that the city fire chief has submitted a proposal. The fire chief's proposal is lawful, since he has made public disclo-*

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<sup>7</sup> NMSA 1978, § 10-15-1(D), (F).

<sup>8</sup> NMSA 1978, §§ 13-1-28 to -199. The Procurement Code's provisions governing procurement by competitive sealed bids and competitive sealed proposals are found at NMSA 1978, Sections 13-1-102 to -122. The Code provides exceptions from the requirement for competitive sealed bids and proposals for small contracts and sole source procurements. See Sections 13-1-125, 13-1-126. However, procurements achieved by those methods would not meet the GCA's requirement for a contract awarded through a competitive process.

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<sup>9</sup> NMSA 1978, § 13-1-98(K).

*sure of his interest and followed the competitive process.*

Example 16:

*Same situation as in the above example, except that the trash hauling business is owned by the fire chief's uncle. Since the definition of family is limited to spouse, parents, children or siblings, the restrictions of the GCA do not apply—no disclosure is required and non-competitive methods can be used, provided they are otherwise consistent with applicable law.*

Example 17:

*A state agency that hears administrative appeals of its actions issues a Request for Proposals (RFP) under the competitive sealed proposal process of the Procurement Code for contract hearing officers who are licensed New Mexico attorneys. The RFP also invites current state employees with hearing officer experience to respond to the RFP as long as they disclose their current state agency employment status. Sam Smith, an attorney who is employed by another state agency and works a four-day flex schedule, submits a proposal to serve as a hearing officer. He discloses that he is a full-time state agency employee but will perform his hearing officer duties on his day off from the state agency that employs him. The agency publishes a notice in the local newspaper listing the proposals it has received and indicating those submitted by state employees. The agency awards Smith a contract to be a hearing officer based on its evaluation of the weighted evaluation factors in the RFP. Smith has given sufficient public notice that he is a state employee.*

4. Preserving confidentiality

**The Law - Section 10-16-6**

**No legislator or public officer or employee shall use or disclose confidential information acquired by virtue of the legislator's or public officer's or employee's position with a state agency or local government agency for the legislator's, public officer's or employee's or another's private gain.**

Commentary

This provision protects confidential information from being disclosed for personal use by an employee who has access to it through an official position, to benefit either the employee or anyone else privately. While most government information is considered public, there are many records that are by law withheld from public viewing. Such confidential records include, for example, individual and business tax returns, many materials developed for litigation, school records, and medical records. This provision of the law is one of the provisions in the GCA that extend to legislators as well as other public officials and employees.<sup>10</sup>

Example 18:

*An emergency medical technician employed by the county fire department drives a seriously injured accident victim to the county hospital, and ascertains the victim's condition from the medical staff. She then calls an attorney friend, details the victim's condition, and provides the victim's phone number*

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<sup>10</sup> See also the Inspection of Public Records Act, NMSA 1978, ch. 14, art. 2 (requiring public bodies to make public records available for inspection and copying, with certain limited exceptions).

*so the attorney can offer to represent him. This conduct violates the GCA, because the EMT, a county employee, has used confidential medical information obtained from the county hospital staff for the private benefit of the attorney.*<sup>11</sup>

Example 19:

*A clerk for a board that regulates nursing home administrators is filing correspondence when he notes a highly critical letter, marked "confidential," from the family of a resident regarding a nursing home administrator whose license is up for renewal. The clerk knows the administrator of the nursing home, can't believe the criticism, and feels she should know about this as it may negatively affect the business of the nursing home. The board's practice act protects the confidentiality of complaints until the board takes action on them. Because the letter is a confidential complaint, sending the letter to the nursing home administrator, or even notifying her about it, would violate the GCA.*

## C. Outside Employment

### 1. Basic principles

#### The Law - Section 10-16-3

**A. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.**

#### The Law - Section 10-16-4.2

**A public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employ-**

**ment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency.**

#### Commentary

Like many other Americans today, many public employees have difficulty making ends meet. When the opportunity arises, even some full-time employees for government take second jobs in the private sector to help support themselves and their families. The only problem with this under the GCA occurs when the second (or subsequent) job interferes with performance on the employee's government job. This might happen under several circumstances:

#### a. When the employee cannot fully attend to her public duties because of the outside employment

Public employees who work at second jobs unrelated to their official duties are required by the GCA only to disclose to their agencies that they have taken the outside work. This allows supervisors to evaluate the situation for any potential problems. Policies of the agency, whether at the state or local government level, may create additional requirements. Such policies often direct that public employees not take any outside work that interferes with the performance of official duties. If such interference occurs, say because the employee leaves work early due to the hours she has to be at her other job, appropriate corrective or disciplinary action may be taken.<sup>12</sup>

<sup>11</sup> It also would likely violate the Emergency Medical Services Act. See § 24-10B-4.1.

<sup>12</sup> The State Personnel Board has promulgated rules governing disciplinary action against state classified employees. See Rule 1.7.11.10 NMAC.

b. When the employee uses public resources to conduct outside work

Employees sometimes try to use their time at their agency or the agency's supplies or equipment for outside work. Examples may include using an agency telephone for private business during work hours, or using computers, copiers, telephones, fax machines, vehicles or other equipment in support of the private business. Some offices will track such personal use of equipment and supplies and obtain reimbursement from the employees, and time used for non-official work can be self-reported; but except in extreme cases an honor system must ultimately be relied on. Emergencies will of course arise requiring some flexibility, but that should usually be the rare exception. In any case, the GCA prohibits use of public resources for private interests, so managers have a duty to rein in any significant use of public time or resources.

c. When the employee's private work conflicts with the public interest

The strongest statements by the GCA on this subject relate to employees whose outside financial interests conflict directly or indirectly with the interests of the public they have committed to serve. As discussed in earlier in this Part, public officials and employees must avoid such conflicts of interest.

Example 20:

*A staff member in the county purchasing office is tasked with reviewing the telephone service used in the county jail, to see if costs can be reduced. The official, on her own time and without anyone in her office knowing, is a paid marketing consultant to a private telephone service company that supplies software for blocking and limiting in-*

*mates' calls and automatically reversing the charges. She approaches her company, which offers the county better service at lower rates than the competition. Even though she may have been able to get a great deal, the purchasing official must immediately disclose this conflict and disqualify herself from any role in the review because it benefits a company that pays her.*

Example 21:

*Laura is a single mom whose full-time salary at her city job isn't enough to pay her bills and raise her kids. She responds to an Internet ad to become a telephone marketer from home. At first, she only places calls after the kids are in bed or on weekends, but she leaves people her personal cell phone number to call her back. Calls start coming relatively often during her work hours. These calls are too short to keep track of, but they start interrupting her performance of her official duties several times a day. Laura's business has begun to cross the line of ethical conduct. Even though the return calls are coming on her personal cell phone, she is using an office resource—her time—for her private business. She will need to disclose the business to her supervisor, and to make adjustments, possibly giving her callers her home number or cell number used only on her own time, and asking them to leave a message she can return.*

2. Prohibited employment

The Law - Section 10-16-4.3

**It is unlawful for a state agency employee or local government agency employee who is participating directly or indirectly in the contracting process to become or to be, while such an employee, the employee of any person or business contracting**

**with the governmental body by whom the employee is employed.**

### **The Law - Section 10-16-13.2**

**D. A public officer or employee shall not accept from a person over whom the public officer or employee has regulatory authority an offer of employment or an offer of a contract in which the public officer or employee provides goods, services, construction, items of tangible personal property or other things of value to the person over whom the public officer or employee has regulatory authority.**

### **Commentary**

While public employees may take outside work to supplement their incomes if they disclose it, these two sections of GCA draw a line barring them from taking employment that would create inherent conflicts of interest. No amount of disclosure or remedial action would make such employment allowable.

#### **a. Employees participating in the contracting process**

The first category of forbidden employment is between a government contractor and an agency employee who is involved in the agency's contracting process. Section 10-16-4.3's prohibition applies to public employees who "directly or indirectly" participate in the contracting process.

The GCA does not define "directly or indirectly" for purposes of Section 10-16-4.3's prohibition against contemporaneous employment. However, useful guidance is found in the Procurement Code, which defines "direct or indirect participation" in a similar context (see discussion in the next paragraph) as "involvement through deci-

sion, approval, disapproval, recommendation, formulation of any part of a purchase request, influencing the content of any specification, investigation, auditing or the rendering of advice." See NMSA 1978, § 13-1-53. Thus, an employee of the agency who formulates the specifications for a contract, decides which individuals, businesses or organizations will receive contracts from the agency, is involved with overseeing the performance of the entity awarded the contract or similarly participates in the contracting process may not serve that entity as an employee so long as it has the contract.

The Procurement Code contains a similar provision, which prohibits state or local government employees who are "participating directly or indirectly in the procurement process" from becoming employees of persons or businesses who contract with the employees' agencies. See NMSA 1978, § 13-1-193. In contrast to the GCA, however, the Procurement Code permits a state agency or local government body to waive the Code's prohibition against contemporaneous employment if certain conditions are met. See NMSA 1978, § 13-1-194. Consequently, a government employee who participates in the procurement process for contracts covered by the Procurement Code will be subject to the specific provisions of the Code governing contemporaneous employment with a contractor, including the Code's waiver provision. For procurements or contracts that are outside the scope of the Procurement Code,<sup>13</sup> the more absolute prohibi-

<sup>13</sup> The GCA's coverage is broader than the Procurement Code's. The Code generally applies to the procurement of items of tangible personal property, services and construction." NMSA 1978, § 13-1-30. The GCA applies to the same transactions, plus contracts for the acquisition, sale or lease of any land or building, licenses, loans and the pur-



tion in Section 10-16-4.3 of the GCA will apply.

Example 22:

*Jane Doe is a contracts manager in a state agency monitoring whether mental health services contractors with her agency are complying with the terms of their professional services contracts. Annually, she participates in the drafting of the request for proposals and the proposal evaluation process that leads to the award of those contracts pursuant to the Procurement Code. Jane is also a licensed social worker employed by one of her state agency's contractors on weekends as a mental health counselor. Because she is directly involved in the state agency's contracting process, Jane's concurrent position with the contractor raises a question under Section 10-16-4.3 of the GCA. In this case, however, the contracting process in which Jane participates is covered by the Procurement Code, so Jane might be permitted to retain her outside position if she meets the requirements for a waiver under Section 13-1-194.*

Example 23:

*John Barrister is a county attorney who reviews county contracts for legal sufficiency before recommending them to the county commission. He signs his name on the same signature page where the county manager will also sign to legally bind the county after approval has been granted by a majority of the county commissioners. John signs and approves for legal sufficiency a contract with a local law firm that has also contracted with John to do legal research on public issues outside John's regular hours with the county. By virtue of his review of and signa-*

*ture on county contracts, John is directly involved in the contracting process. Accordingly, unless all the contracts John is responsible for reviewing and signing are covered by the Procurement Code (which allows for a waiver of its contemporaneous employment prohibition), the best course for John would be to terminate his contract with the law firm consistent with the GCA's prohibition against contemporaneous employment with contractors.*

b. Employees with regulatory authority

The second type of outside employment forbidden to all state and local government officers and employees under the GCA is a job or contract with an entity that the *officer or employee* regulates. The employee may not work for the entity, nor provide it with any goods or services under a contract. Interestingly, this section of the GCA does not prohibit all employees of an agency that regulates the entity from taking such work: it prohibits only the *employees* who themselves have regulatory authority over the entity from working for or contracting with it. This might mean, for example, that a rate analyst who reviews and reports on rate filings by a public utility but does not have authority to *approve* the rate filings would not violate this section by working for the utility.

Example 24:

*A state agency employee, on his own time, writes a successful grant application on behalf of a non-profit organization for federal funds that are awarded through a contract with his state agency. The employee, who tells his supervisor from the outset what he is doing, has no role in selecting the grantees, but is charged with monitoring progress under the grants once awarded to ensure that the work is completed on time. The em-*

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chase of financial securities or instruments. See NMSA 1978, § 10-16-2(C).

*ployee violated the GCA's prohibition against contracting to provide services to an entity that contracts with the employee's agency when the employee participates directly or indirectly in the contracting process. Merely disclosing his role to his supervisor did not remove the unlawful conflict.*

Example 25:

*A roofing contractor who is a member of the Construction Industries Commission is asked by a New Mexico-licensed general contractor to subcontract for roofing services to build several private residences. Since taking office, the commissioner has not had to vote on the general contractor's license renewal or resolve any disputes, and nothing is pending. The commissioner is willing to disqualify himself should any controversies or other regulatory actions involving this contractor come before the Commission. The GCA nonetheless bars the commissioner from taking the subcontract. His eligibility for per diem and mileage reimbursement as a commissioner subjects him to the GCA, and his status as a commissioner gives him regulatory authority over the contractor. The GCA therefore bars him from accepting the contract to provide construction, or any other paid services, to the regulated contractor.*

Example 26:

*A private taxi service contracts with the city to provide free safe rides to customers at bars who might otherwise drive drunk. The cab company owner has to appear occasionally at city hall on various contract matters. During these visits, he strikes up a casual friendship with a city policeman assigned to security duty at city hall. When the cab company owner starts to experience vandalism at his garage, he asks the police officer if he can provide security guard ser-*

*vice at night for his company garage. Since the police officer has no role in the city's contracting process, he may accept the offer as long as it is also allowable under his department's policies regarding outside employment.*

3. Honoraria and expense reimbursements

**The Law - Section 10-16-4.1**

**No legislator, public officer or employee may request or receive an honorarium for a speech or service rendered that relates to the performance of public duties. For the purposes of this section, "honorarium" means payment of money, or any other thing of value in excess of one hundred dollars (\$100), but does not include reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service, or payment or compensation for services rendered in the normal course of a private business pursuit.**

Commentary

The GCA forbids state and local government officials from accepting payment or gifts of over \$100 in value for performing services related to their official duties. The statute therefore seems to allow occasional tokens of appreciation to be given to speakers from government, but the value of a gift may not exceed \$100. Reimbursement for reasonable and bona fide expenses incurred for meals, lodging or travel is allowed because that reimbursement presumably is intended to save the government agency the expense of traveling, not the public official personally. (Salaried state officers are barred by the state constitution from accepting any compensation in addition to their salaries, which may absolutely preclude them from accepting honoraria in exchange for services that

relate to the performance of their public duties. See Appendix I, Part B.)

Example 27:

*A highway engineer working for the State occasionally moonlights by designing private roads for rural residents. He does all the work at nights and on weekends or personal leave time, works from home and uses only his own supplies and equipment. The private landowners pay him for his services. These fees appear to be allowable under Section 10-16-4.1 of the GCA as "payment or compensation for services rendered in the normal course of a private business pursuit." Even though the engineer is using the same skills he uses at work, the private roads he is building do not appear to relate to his work. However, it is still important (and legally required under Section 10-16-4.2) that he notify his supervisor of this work, so that the agency management can assure themselves that the work does not conflict in some way with their plans for public roads or with the engineer's duties. For example, the engineer should not put his agency in jeopardy of being accused of favoritism if his private clients also come to the agency for publicly funded services.*

Example 28:

*An appellate judge is asked by people he does not know to officiate at their wedding on a weekend at an out of town resort in New Mexico. The judge indicates that he can do so, but that since this would require work after business hours and travel, he would want to be paid a gratuity of \$100 plus travel expenses. The couple may compensate the judge for his travel expenses, but the judge may not accept the gratuity. The gratuity does not exceed the limit set in the GCA, but judges are also subject to the Code of Judicial Conduct, which prohibits acceptance of*

*any fee for performing a wedding. See Rule 21-312 NMRA, Comment 3. So, the judge would not be subject to the penalties that result from violations of the GCA, but might be subject to discipline under the Code of Judicial Conduct.*

## **D. Former Public Employees**

### 1. Restrictions on contracts with former public employees

#### **The Law: Section 10-16-8**

**A. A state agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:**

**(1) represented personally in the matter by a person who has been a public officer or employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the public officer or employee; or**

**(2) assisted in the transaction by a former public officer or employee of the state whose official act, while in state employment, directly resulted in the agency's making that contract or taking that action.**

**C. A local government agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:**

**(1) represented personally in the matter by a person who has been a public officer or employee of that local government agency within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the public officer or employee; or**

**(2) assisted in the transaction by a former public officer or employee of that political subdivision of the state whose official act, while in employment with that political subdivision of the state, directly resulted in the agency's making that contract or taking that action.**

### Commentary

Paragraph (1) of Section 10-16-8(A) prohibits state agencies from contracting with or taking action favorably affecting any person or business: 1) that is personally represented in a matter by a person who, within the past year, was an officer or employee of the state; 2) when the value of the contract or action exceeds \$1,000, and 3) when the contract is a direct result of an official act by the public employee or officer.

While the restriction in paragraph (1) on former employees only applies to contracts or actions with a value over \$1,000 and expires after a year, paragraph (2) applies a stricter standard. This subparagraph prohibits a state agency from contracting with any person or business that is “assisted” in the transaction by a former state officer or employee whose official act, while in state employment, directly resulted in the agency’s making that contract or taking that action. Paragraph (2) places no limits on the amount of the contract or the length of time after the employee has left government for the contract to be illegal.

For both these paragraphs, the GCA defines the term “official act” as: “an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority.” See NMSA 1978, § 10-16-2(H). See also Part IV.A of this Guide for a discussion of what constitutes an “official act” for purposes of the GCA.

Section 10-16-8(C) applies the same rules that apply to state agencies under Subsection (A) to local government agencies and restricts those agencies from entering into transactions with contractors assisted or represented by former local government employees.

For both Section 10-16-8(A) and (C), deciding whether paragraph (1) or (2) applies to a particular situation may prove challenging. For one thing, the GCA provides no definition of “direct result.” Moreover, in deciding whether to apply subparagraph (1) or (2), the agency would have to distinguish between a contractor that is “represented personally” by a former agency employee versus one that is “assisted in the transaction” by the employee. Because of these difficulties, we urge agencies to be extremely cautious before entering into contracts with companies that are represented or assisted in the contracting process by former employees.

### Example 29:

*Robert Smith is a cabinet secretary who plans to retire in two months. Before he retires, he asks his Administrative Services Division Director to issue a request for proposals for up to \$100,000 in landscaping services at one of his Department’s residential treatment facilities. Smith knows that his brother-in-law Jones owns a landscaping company and needs the business. Two months after his retirement, Smith helps his brother-in-law respond to the RFP by drafting part of the proposal, which is timely submitted to his former state agency. He also attends a meeting with Jones and state agency procurement officials to help negotiate a “best and final offer.” The state agency awards the contract to Jones. The state agency has violated this section of the GCA. Smith’s official act of ordering the issuance of a request for proposals before retiring*

*directly results in his brother-in-law's opportunity to respond to the RFP. Then within a year of retiring Smith personally represents his brother-in-law by writing part of the proposal response and joining his brother-in-law in the negotiation of the contract, which exceeds \$1,000. Under these circumstances, the state agency cannot award the contract to Jones.*

Example 30:

*Judy Jones is a former division director of a large state agency that contracts for community-based substance abuse services. While still working for her state agency, she wrote a request for proposals for her division to award a contract that she knew her husband, a substance abuse counselor, would receive, given the specific weighted evaluation factors favorable to her husband she included in the RFP. The state agency violated the GCA by awarding the contract to Jones' husband because he was assisted in the transaction by his wife, whose official acts while still in office directly resulted in the award of the contract to him. Had Jones' husband in this example participated with Jones in the preparation of the weighted evaluation factors in the RFP, the state agency also would have violated Section 10-16-13 of the GCA, which prohibits state and local government agencies from accepting "a bid or proposal from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based."*

2. Restrictions on former employees' transactions with government agencies

**The Law - Section 10-16-8**

**B. A former public officer or employee shall not represent a person in the per-**

**son's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.**

**D. For a period of one year after leaving government service or employment, a former public officer or employee shall not represent for pay a person before the state agency or local government agency at which the former public officer or employee served or worked.**

Commentary

Subsection B creates an absolute restriction on certain former public officers or employees. It prevents them from representing a person in the person's dealings with the government on a matter in which the public officer or employee participated "personally and substantially" while working for either the state agency or local government involved. The amount of the contract or the length of time that the employee has been gone from public service is immaterial. "Personally and substantially" are not defined in the statute, so they should be read as commonly used. "Personally" would therefore mean "in person" and "substantially" would mean more than a passing, peripheral or minor involvement.

Section D creates still another absolute restriction on former officials or employees of state or local government. It establishes a one-year period when a former public officer or employee is prohibited from representing "for pay" a person before the state agency or local government agency at which the former public officer or employee served or worked. This restriction applies no matter how extensive or limited the former employee's involvement may have been in the particular project or contract while the em-

ployee worked at the government agency. The employee may even have worked in a division of the same state or local government agency that was unrelated to the contract or interest of the person he is representing; the prohibition still applies for a year after the employee leaves the agency. A common application of the prohibition has been to former agency attorneys attempting to represent private clients in matters before their former agencies.<sup>14</sup>

Example 31:

*Lawrence Little designed a software program while a state employee to track prisoners in the Department of Corrections system. After he retires, Little is hired as a consultant by a large private corrections company to update and improve the software he designed for the state. Little is asked by the private company to negotiate a contract with the state employee who succeeded him to replace the software program originally created by Little with an updated version owned by the private company. Little and his successor at the state would violate the GCA if Little negotiated a new contract on behalf of the private company because he was personally and substantially involved in the creation of the original software used by the state.*

Example 32:

*A retired municipal park maintenance supervisor contracts with a private security firm, which asks her to talk with city officials about hiring them to provide services at city hall. Even though the former city employee was not involved with security while employed by the city, the law bars her from*

*representing the security firm for pay in discussions with her former employer for a year after her retirement date. She can volunteer these services to the security company, however.*

Example 33:

*Stanley Smith is a wastewater engineer who has left the Environment Department to do private consulting. Three months after entering the private sector, Smith is retained by a private company to testify on its behalf before the Environment Department's appointed hearing officer on proposed new wastewater regulations. Smith can only do so under the GCA if he was not personally and substantially involved in the drafting of the proposed regulations before he left his state position and does not accept compensation for his testimony.*

## E. Legislative Conflicts of Interest

### 1. Contracts with legislators

#### The Law- Section 10-16-9

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

<sup>14</sup> See Ortiz v. Taxation and Revenue Department, 124 N.M. 677, 954 P. 2d 109 (Ct. App. 1998).

### Commentary

This section of the GCA establishes rules for our unsalaried citizen legislators when they are conducting their private business activities.<sup>15</sup> It applies when legislators attempt to contract with a state agency directly, through their families or through a business in which they or their families have a substantial interest.

There are three key requirements that must all be met before a state agency may enter into a contract with such an entity. First, the legislator must disclose his or her substantial interest. Second, the contract must be awarded under the Procurement Code, except that a legislator/contractor is not eligible for a sole source or small purchase contract. And third, the agency contracting personnel must exercise due diligence to be sure that no conflict addressed by this provision is overlooked. The due diligence requirement might be met by requiring the contractor to complete a form requiring disclosure of any conflicts of interest, including whether the potential contractor is a legislator, a family member or a business in which the legislator or legislator's family has a substantial interest.

The purpose of Section 10-16-9 is to prevent legislators from using their public office for personal gain and exploiting the unfair advantage they could theoretically have by threatening retaliation through legislative actions, such as voting against a budget item sought by the state agency. Even if a legisla-

tor did nothing wrong to get a contract with a state agency, the public could reasonably be concerned that the legislator had an unfair advantage by reason of his power. Moreover, agency personnel might believe that a legislator who is denied a contract would retaliate, perhaps during their budget hearings, even if the legislator had no intention of doing so.

### Example 34:

*A state agency awards a small purchase contract to the daughter of a state legislator to write an informational brochure for the agency. The contract is approved by all appropriate authorities, who do not know of the proposed contractor's family relationship to an elected official. There is no question that the proposed contractor is qualified to perform the work required by the contract. The contract award violates the GCA because it prohibits families of legislators from receiving a small purchase contract. In addition, the proposed contractor's relationship to the legislator was not disclosed. The contracting personnel at the agency might have avoided the improper contract award if they had performed the due diligence required by the GCA, including appropriate inquiries to determine whether a conflict existed.*

### 2. Legislators as representatives of parties before state agencies

### The Law: Section 10-16-9

**B. A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall**

<sup>15</sup> Members of the legislature are also subject to sanctions for unethical conduct as recommended to their respective houses by the Interim Legislative Ethics Committee, see NMSA 1978, §§ 2-15-7 to -9, and to removal through impeachment, N.M. Const., Art. IV, § 36.

**refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.**

Commentary

Legislators can represent or assist constituents before a state agency for the benefit of those constituents, but must do so without compensation. Legislators who are attorneys and other professionals can receive compensation for their representation of clients or for professional services rendered but cannot refer to their legislative status, except for scheduling purposes, and cannot use legislative stationery for private purposes or engage in threats or implications relating to legislative actions.

Example 35:

*A senator who is also an attorney licensed to practice law in New Mexico sues on behalf of a client against a state agency for breach of contract. The state agency's attorney successfully petitions the district court for a contempt order and fine against the senator after he fails to appear for depositions of his clients. Angered by this, the senator refuses to pay the fine and seeks revenge against the state agency attorney. He asks a fellow legislator on the Senate Finance Committee to eliminate the salary of the state agency attorney from the agency's budget. The Senate Finance Committee refuses to act on the attorney's salary and at a contempt of court hearing, the senator pays his fine.*

*The senator violated the GCA and possibly other laws by attempting to use his legislative office to gain personal advantage in a lawsuit he initiated as a licensed attorney for compensation. His effort to mitigate his*

*offense by belatedly paying the fine may be raised as a defense to his actions, but the abuse of his legislative office may still subject him to ethical sanctions by the Senate in addition to civil or criminal penalties under the GCA.*



## VI. POLITICAL ACTIVITY

This Part addresses the GCA's provisions governing political activity allowed or prohibited for state and local government officials. For additional constraints under other state and federal laws, see Appendix I.C: Political Activity.

### **The Law – Section 10-16-3.1**

**A public officer or employee is prohibited from:**

**A. directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose;**

**B. threatening to deny a promotion or pay increase to an employee who does or does not vote for certain candidates, requiring an employee to contribute a percentage of the employee's pay to a political fund, influencing a subordinate employee to purchase a ticket to a political fundraising dinner or similar event, advising an employee to take part in political activity or similar activities.**

### **Commentary**

People who take jobs in government do not give up all their rights to participate as citizens in our democracy. They can vote, donate to candidates, and work on their own time for candidates and political parties and causes. Those elected to office or appointed by elected officials are entitled, and expected, to use public resources at their disposal to fulfill their public commitments made during their political campaigns, consistently with their other duties of office. That justifies their appointing like-minded

people - who serve with virtually no job security - to key policy positions without going through the usual civil service procedures.

At the same time, election to office does not entitle officials to use publicly funded resources to finance their political campaigns. Nor does election success entitle the officials to hire or remove staff from civil service positions, or to treat employees differently based on their political views. Thus, the challenge is how to respect the civil rights of individuals and the legitimate political expectations of office-holders, while protecting the public against political misuse of their resources.

The GCA (and, for certain officials, the federal Hatch Act) attempts to strike a balance among these competing concerns. While respecting the constitutional rights of public employees and officials to participate in democratic processes, the law attempts to protect the taxpayers against use of public resources and personnel to benefit political parties, candidates or officeholders. The law also protects public employees from unfavorable treatment at their jobs simply for not having supported favored candidates.

### **A. Coercing Employees to Offer Political Support**

The GCA protects *all* New Mexico governmental employees - whether at the state or local government level, and whether or not they are career civil service appointees - against being coerced by their employers to support political candidates, parties or causes. Under this law, public employees are protected not only from coercion to make contributions of money, but anything else of value, including their time. And employees

are protected against being coerced to contribute not only to specific candidates, but also to “a party, committee, organization, agency or person for a political purpose.” So, the prohibition encompasses requiring contributions even to candidates in non-partisan elections or to political action committees, for example.

The GCA further prohibits *threats* to deny an employee a promotion or pay increase because of how the employee decides to vote, even if such threats are not carried out. The protection of this subsection extends both to classified (civil service) and exempt (politically appointed) employees. Implicitly, it also prevents a public officer or employee from terminating another employee because of his or her vote or attempting to affect the employee’s political choices in other ways, including:

- requiring an employee to contribute a percentage of the employee’s pay to a political fund;
- influencing a subordinate employee to purchase a ticket to a political fundraising dinner or similar event; and
- advising an employee to take part in political activity or similar activities.

Example 36:

*After a change of administrations, the new state agency head calls in her entire agency staff and “suggests” that they all “seriously consider making contributions” to the new governor’s political party, and that such contributions will be “duly appreciated.” She mentions in the next sentence that she will be reviewing which exempt employees to retain and who throughout the agency will be getting raises or promotions. Her obvious implication tying the political support of the employees with their opportunities to retain their jobs or receive raises or promotions will not be lost on any of her*

*staff. This coercive conduct violates the GCA.*

Example 37:

*A supervisor privately asks an employee to contribute to a political action committee. The committee uses the funds it raises to produce and air ads on television in support of specific candidates the committee endorses. The supervisor’s request violates the GCA, even though there is no implied threat or reward attached. Since the political action committee attempts to influence voter behavior during an election, and contributions to the committee can be viewed as participating in the committee’s activities, the supervisor’s request amounts to “advising the employee to take part in political activity or similar activities.”*

Example 38:

*The lieutenant governor decides to make a run to succeed the term-limited governor he has been serving under. His administrative aide tells his exempt (non-civil service) staff that there will be an organizing meeting on Saturday for those wishing to help on the campaign. John, a legislative aide to the lieutenant governor, decides to attend because he supports his boss and wants to serve as an aide should he become governor. Since John’s decision to attend is entirely voluntary, and his participation in the campaign meeting will occur on a weekend, there is no violation of the GCA.*

## **B. Running for Office**

The GCA does not itself authorize public employees to seek or forbid them from seeking election to public office. However, state employees in the classified service are restricted from running for office under the State Personnel Act and the federal Hatch

Act creates a special rule for government employees whose positions are primarily federally funded. See Appendix I.C for further discussion on those laws.

## **C. Using Public Assets for Political Purposes**

### **The Law - Section 10-16-3.1**

**A public officer or employee is prohibited from: ...**

**C. violating the officer's or employee's duty not to use property belonging to a state agency or local government agency, or allow its use, for other than authorized purposes.**

### **Commentary**

The law protects taxpayers from use by public employees of public funds or resources to support political activity and other unauthorized purposes. This applies to all public employees, state or local, exempt or classified. Of course, actions that may look like public service to the supporter of an official may look like politicking to his opponents. For example, if a political officeholder running for re-election uses his official car, driver and security detail to attend a luncheon for a private interest group, where he tells his audience what his administration is doing for them, it may look like campaigning. But if the politician does not ask for or accept donations of money or their votes, the expenditures would be legitimate efforts to inform the public of their government's actions.

### **Example 39:**

*A county clerk running for re-election asks her staff to put a stack of her election flyers on the counter where the public can see them and take them if they like, but staff*

*members are instructed not to say anything about the flyers to anyone. Despite the code of silence, putting the flyers on the counter where the public does official business with the clerk's office is an illegal use of public resources under the GCA.*

## VII. IMPLEMENTATION OF THE GOVERNMENTAL CONDUCT ACT

### A. Codes of Conduct

#### The Law - Section 10-16-11

A. [E]ach elected statewide executive branch public officer shall adopt a general code of conduct for employees subject to his control. The New Mexico legislative council shall adopt a general code of conduct for all legislative branch employees. The general codes of conduct shall be based on the principles set forth in the Governmental Conduct Act.

C. The head of every executive and legislative agency and institution of the state may draft a separate code of conduct for all public officers and employees in that agency or institution. The separate agency code of conduct shall prescribe standards, in addition to those set forth in the Governmental Conduct Act and the general codes of conduct for all executive and legislative branch public officers and employees, that are peculiar and appropriate to the function and purpose for which the agency or institution was created or exists.

D. Codes of conduct shall be reviewed at least once every four years.

#### The Law- Section 10-16-11.1

Nothing in the Governmental Conduct Act shall be construed to preclude a state agency or local government agency from adopting and publishing ordinances, rules or standards that are more stringent than those required by the Governmental Conduct Act.

### Commentary

The GCA *requires* each official of government who is elected statewide to adopt a general code of conduct, based on the principles in the GCA, governing employees of his or her agency. There are seven such officials under the New Mexico Constitution: the governor, lieutenant governor, secretary of state, attorney general, state auditor, state treasurer, and commissioner of public lands. The New Mexico Legislative Council is directed by the GCA to adopt a code of conduct for legislative employees.

State executive and legislative agencies, and state institutions, are *permitted* to adopt separate codes of conduct specific to their circumstances. Those codes may prescribe ethical standards for employees of the agency additional to those of the GCA.

All codes of conduct should be filed with the Secretary of State and open to public inspection. The GCA requires that the codes be reviewed every four years, which coincides with the terms of office of elected officials in the executive branch.

The GCA does not specifically address the adoption of codes of conduct by local government agencies. Nevertheless, local governments may find it advantageous to adopt their own codes, since doing so allows local governing bodies to address their particular ethical issues and experience. It also provides an opportunity for constituents to participate in the process of adapting the ethical code to their locale, which could help promote greater public understanding of the ethical rules binding their elected and appointed officials. In any event, the GCA expressly allows local government agencies, as

well as state agencies, to adopt standards that are more stringent than those required by the GCA.

Example 40:

*A cabinet secretary decides to adopt a code of conduct for her employees. Her code includes a provision disciplining anyone who sells anything to an employee that they supervise, even if the employee initiates the sale. The code provision banning all sales to supervised employees is stricter than the GCA provision allowing such sales when initiated by the supervised employee. This stricter agency-specific rule is permitted by the GCA.*

## **B. Education**

### **The Law - Section 10-16-13.1**

**A. The secretary of state shall advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties. This includes advising all those persons at least annually of that act's ethical principles.**

### **The Law - Section 10-16-11**

**B. Within thirty days after the general codes of conduct are adopted, they shall be given to and reviewed with all executive and legislative branch officers and employees. All new public officers and employees of the executive and legislative branches shall review the employees' general code of conduct prior to or at the time of being hired.**

**C. The head of each executive and legislative branch agency shall adopt ongoing education programs to advise public officers and employees about the codes of conduct.**

**E. All legislators shall attend a minimum of two hours of ethics continuing education and training biennially.**

### Commentary

The GCA places considerable emphasis on educating public officers and employees about the requirements of the law and agency codes of conduct. While penalties for violating these requirements are included in the law, the New Mexico Legislature clearly intended education to be the first resort to prevent problems from arising, rather than disciplinary or legal action after violations have already occurred. Each statewide elected official and agency head is mandated to provide education on the general code of conduct and any applicable separate code of conduct. The Secretary of State is given general responsibility to educate all those subject to the ethical requirements of the law, while all legislators are required to take two hours of ethics training every other year. All public employees are required to receive copies of their agency codes of conduct, either within 30 days of the code's adoption or when new employees are hired.

## **C. Enforcement**

When education fails, tools for enforcing the GCA include: voluntary compliance after notice, disciplinary action, civil actions, criminal penalties, and impeachment.

### *1. Voluntary compliance*

### **The Law - Section 10-16-13.1**

**B. The secretary of state shall seek first to ensure voluntary compliance with the provisions of the Governmental Conduct Act. A person who violates that act unintentionally or for good cause shall be given ten days' notice to correct the matter.**

**Referrals for civil enforcement of that act shall be pursued only after efforts to secure voluntary compliance with that act have failed.**

Commentary

When violations of the GCA come to the attention of the Secretary of State, the Secretary is given the authority to refer the violations to an appropriate prosecutorial agency for civil or criminal enforcement action. But before referring an alleged violation for civil enforcement, the Secretary must first give anyone who has violated the GCA “unintentionally or for good cause” ten days’ notice to correct the violation. Thus, the Act imposes on the Secretary a duty to make at least a preliminary determination as to whether or not a violation was intentional.

Example 41:

*An employee privately notifies the Secretary of State that her agency has entered into a sole source contract with a company represented by a former employee of the agency. The employee does not know whether the violation of the GCA, which requires the agency to use a competitive process in such circumstances, was an honest error or was a deliberate attempt to evade the law. The Secretary of State assumes that the violation was an honest error and notifies the agency head, allowing ten days for him to take corrective action, such as voiding the contract, before the Secretary of State refers the issue to the Attorney General.*

2. Disciplinary action

**The Law - Section 10-16-11**

**C. The separate codes [of conduct], upon approval of the responsible executive branch public officer for executive branch**

**public officers and employees or the New Mexico legislative council for legislative branch employees, govern the conduct of the public officers and employees of that agency or institution and, except for those public officers and employees removable only by impeachment, shall, if violated, constitute cause for dismissal, demotion or suspension.**

**The Law – Section 10-16-14**

**B. Violation of the provisions of the Governmental Conduct Act by any legislator is grounds for discipline by the appropriate legislative body.**

**C. If the attorney general determines that there is sufficient cause to file a complaint against a public officer removable only by impeachment, he shall refer the matter to the house of representatives of the legislature. If within thirty days after the referral the house of representatives has neither formally declared that the charges contained in the complaint are not substantial nor instituted hearings on the complaint, the attorney general shall make public the nature of the charges, but he shall make clear that the merits of the charges have never been determined.**

**D. Violation of the provisions of the Governmental Conduct Act by any public officer or employee, other than those [removable only by impeachment], is grounds for discipline, including dismissal, demotion or suspension.**

The GCA provides for disciplinary action, including dismissal, demotion or suspension, in response to violations of the Governmental Conduct Act by any state or local government employee. The law similarly provides for disciplinary action when a state executive or legislative branch employee

violates the separate code of conduct governing the employee's conduct. See Part VII.A, above.

For classified state employees, the State Personnel Act and implementing regulations govern disciplinary action for violations of the GCA. Complaints against legislative branch employees are handled according to procedures adopted by the Legislative Council and complaints against judicial branch employees are governed by procedures specified in the judicial personnel rules. See Section 10-16-14(D). Local governments will look to their respective rules and ordinances for the appropriate procedures when their officers and employees are alleged to have violated the GCA.

To make clear that no official is above the law, the legislature provided that violations of the GCA are grounds for removal by impeachment. The N.M. Constitution provides that elected executive branch officials, district judges and legislators may be removed from office by impeachment proceedings, which is the responsibility of the House of Representatives.<sup>16</sup> The GCA authorizes the Attorney General to refer the evidence of a GCA violation by an impeachable official to the House. The House has thirty days to either dismiss the allegations or institute hearings. After thirty days, the Attorney General is required to take the allegations against the official to the public, but must point out that the allegations were not proven.

### 3. Civil actions

#### **The Law - Section 10-16-18**

**A. If the secretary of state reasonably believes that a person committed, or is about to commit, a violation of the Gov-**

**ernmental Conduct Act, the secretary of state shall refer the matter to the attorney general or a district attorney for enforcement.**

**B. The attorney general or a district attorney may institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred fifty dollars (\$250) for each violation not to exceed five thousand dollars (\$5,000).**

#### Commentary

When the Secretary of State refers a matter for prosecution - after trying to obtain voluntary compliance when appropriate - the Attorney General or district attorney has the option of filing a civil or criminal action, or possibly even both. The prosecutor may decide that there is not sufficient evidence to hold the state or local government official criminally responsible, because, for example, the prosecutor cannot prove that the act was done with criminal intent. In that case, the prosecutor may still be able to ask a court for an injunction, to prevent further misconduct from happening. If misconduct has already happened, the prosecutor can ask the court to impose civil penalties up to the limits authorized in the GCA.

Although the GCA allows the Secretary of State to refer cases to the Attorney General or appropriate district attorney, those agencies have independent authority to prosecute violations of the GCA, regardless of how the violations come to their attention.

<sup>16</sup> See N.M. Const., Art. IV, § 36.

Example 42:

*A secretary for a licensing commission that oversees chiropractors calls the Attorney General's Office (AGO) to report that the commission's director is secretly selling office furniture to the chiropractors they regulate. The AGO investigates and finds that the director's husband owns the furniture business and the director, who is living separately from, but still married to, her spouse, was not aware that chiropractors were buying from the family store. The director is unable to get her estranged husband to stop selling the furniture, and tells the AGO there is nothing else she can do. The AGO might ask a court for an injunction requiring her to either stop the furniture sales or step down as director, at least until she takes legal action (such as a separation agreement) that removes her interest in the furniture sales. The AGO might also request a civil penalty of between \$250 and \$5000, as permitted by the GCA.*

4. Criminal proceedings**The Law- Section 10-16-17**

**Unless specified otherwise in the Governmental Conduct Act, any person who knowingly and willfully violates any of the provisions of that act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year or both. Nothing in the Governmental Conduct Act shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.**

Commentary

The GCA contains two provisions the violation of which constitutes a fourth degree fel-

ony. Those provisions, as discussed previously in this Guide, prohibit a government employee from (1) requesting or receiving money or other thing of value in exchange for the promised performance of an official act, Section 10-16-3(D) [see discussion in Part IV.A], and (2) taking an official act for the primary purpose of enhancing the employee's financial interest, Section 10-16-4(A) [see discussion in Part V.A].

Otherwise, public officers and employees who deliberately violate the requirements of the GCA and who are prosecuted by the attorney general or a district attorney may be convicted of misdemeanors. While the public employee may try to argue in her defense that the violation was unintentional, the employee is responsible to know the law. A judge may sentence a person convicted of a misdemeanor violation under the GCA to up to a year in jail, a fine of up to \$1,000, or both. These penalties apply not only to the officials themselves, but also to private citizens who violate the GCA.

Prosecutors may also charge the violators under other anti-corruption statutes, such as bribery laws. These can result in much stronger sentences. See Appendix II for a partial list of state and federal laws, many of which include the potential for long prison terms.



## **APPENDIX I**

### **OTHER LAWS THAT REGULATE GOVERNMENTAL CONDUCT**

#### **A. ADDENDUM TO PART IV: THE GIFT ACT**

##### **1. Limitations under the Gift Act on Gifts to State Officers, Employees and Candidates**

#### **The Law - Section 10-16B-3**

**A. A state officer or employee or a candidate for state office, or that person's family, shall not knowingly accept from a restricted donor, and a restricted donor shall not knowingly donate to a state officer or employee or a candidate for state office, or that person's family, a gift of a market value greater than two hundred fifty dollars (\$250).**

**B. A lobbyist registered with the secretary of state, the lobbyist's employer or a government contractor shall not donate gifts of an aggregate market value greater than one thousand dollars (\$1,000) in a calendar year to any one *state* officer or employee or to any one candidate for state office.**

#### **Commentary**

The Gift Act, NMSA 1978, §§ 10-16B-1 to -4, sets limits on what state officials and employees, candidates and their families, whether paid or not, may accept as gifts. The purpose is to avoid any appearance that state officials or employees are performing their official duties or using their authority for purposes unrelated to the interests of the public they represent.

The Gift Act defines “state officer or employee” as “any person who has been elected to, appointed to or hired for any state office and who receives compensation in the form of a salary or is eligible for per diem or mileage.” Section 10-16B-2(E). Under this definition, unpaid members of state boards and commissions who are *eligible for* per diem and mileage reimbursement—even if they never ask for any reimbursement—are subject to the limits on gifts they may accept under this law.<sup>17</sup>

In addition to identifying those who are covered, the Gift Act defines what does and does not constitute a gift, and identifies people from whom a gift may not be accepted if it exceeds certain limits. The Act generally defines a “gift” as something of value that one person donates or transfers to another person, without getting something of equivalent value in return. The statute contains a number of exceptions to this definition. Payments to state officials that are not considered “gifts” for purposes of the Gift Act include things of value given by close friends or family, legal campaign donations, loans at genuine interest rates, reasonable compensation for services rendered, legitimate returns on investments, and reimbursement of certain out of pocket expenses. See Section 10-16B-2(B).

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<sup>17</sup> Unlike the GCA, the Gift Act does not cover officials or employees of municipal and county governments, school districts, and other political subdivisions.

The Gift Act does not impose an absolute limit or prohibition on gifts to state officials. The law applies only to gifts from “restricted donors.” A “restricted donor” under the Gift Act is essentially someone who stands to, or hopes to, benefit, either personally or for a client, from an official act that is the responsibility of the recipient. Restricted donors include potential contractors, people who have matters pending before a regulatory agency and lobbyists. See Section 10-16B-2(D). A public official under the Act cannot accept from a restricted donor a gift whose market value is greater than \$250. The restricted donor may not make such a gift either to the officer or employee, a candidate for state office, or a member of that person’s family.

While it is not illegal to offer several gifts of less than \$250 to a person, certain restricted donors face an annual limit on gifts as well. Any registered lobbyist,<sup>18</sup> the lobbyist’s employer, or a government contractor is limited to gifts of an aggregate market value of less than \$1,000 per year to any single state official.

Example 1:

*An environmental organization’s lobbyist invites members of the Environmental Improvement Board to attend and sit on a panel at a 5-day conference in Colorado on water quality laws. The lobbyist offers that the organization will pay for each member’s registration and travel expenses as well as a \$500 honorarium for their time away from their home and jobs. As long as the educational program is bona fide, the reimbursement of the officials’ out of pocket travel and*

*registration expense is allowed—even if it exceeds the \$1000 annual limit on gifts from restricted donors—because such reimbursements are an exception to the definition of “gifts” in the Gift Act. The \$500 honorarium might be permissible under the Gift Act as reasonable compensation for services rendered, but would be barred under the GCA’s limitations on honoraria.<sup>19</sup>*

Example 2:

*A petroleum producer offers to treat a new cabinet secretary, whose office regulates his industry, to lunch for a one-on-one talk about the general state of his industry at an expensive restaurant. The cabinet secretary does not wish to offend the constituent and wants to learn the producer’s perspectives on his industry, but does not wish to pay for the high-priced lunch himself. The secretary decides to see how it plays out, and when the bill arrives, notes that it totals about \$300. The lunch is a gift within the meaning of the Gift Act, and the petroleum producer is likely a restricted donor under the Act. The producer will be a restricted donor if he has a pending case before the secretary’s agency or has hired a registered lobbyist to represent his interests. Since the value of the secretary’s meal apparently came in below \$250, the gift may be legal. Nevertheless, the secretary should think hard about the appearance that this expensive lunch would give to members of the public, the legislature or the media for his administration.*

<sup>18</sup> Lobbyists are required by the Lobbyist Regulation Act to register and file expenditure reports with the secretary of state. See NMSA 1978, §§ 2-11-3, 2-11-6.

<sup>19</sup> NMSA 1978, Section 10-16-4.1 (limiting to \$100 honoraria paid for speeches or services rendered that relate to the performance of public duties). See also Part V.C.3, above.

Example 3:

*The same cabinet secretary is invited to be a guest speaker at a petroleum producers' association at their annual banquet. His expense to travel there comes out of his agency travel budget, but he does not offer to reimburse the association for his lunch. If, as is likely, the value of the lunch is less than \$100, there is no problem under either the Gift Act or the GCA with the cabinet secretary accepting the free lunch.*

Example 4:

*After the director of the Bureau of Elections oversees a flawless election, a grateful non-partisan national voter's rights organization based in Washington D.C. declares her their Election Official of the Year and sends her a jeweled gold victory cup worth \$400. The gold cup is a gift whose value exceeds \$250. But since the donor organization has no interest that may be affected by the official actions of the director, it is not a "restricted donor" under the Gift Act. The gift may therefore be accepted.*

## 2. Soliciting Gifts to Charities

### The Law: Sections 10-16B-3(C)

**A state officer or employee shall not solicit gifts for a charity from a business or corporation regulated by the state agency for which the state officer or employee works and shall not otherwise solicit donations for a charity in such a manner that it appears that the purpose of the donor in making the gift is to influence the state officer or employee in the performance of an official duty.**

Commentary

In addition to limiting gifts that may be perceived by the public (whether correctly or not) as bribes to public officials, the Gift Act bars state government officers and employees from requesting that businesses their agencies regulate make donations to charitable organizations. A state officer or employee also is generally prohibited from soliciting donations for a charity in a way that would suggest that the donor's purpose is to influence how the officer or employee performs an official duty.

Example 1:

*An attorney for a company walks into the hearing room of the commission that regulates the company to present the company's argument for its proposed rates. Conspicuously posted in the hearing room is a banner proclaiming: "The employees of this agency give 100% support to Feed and Clothe our Children, Inc." While the decision is still pending a few days later, the regulated company sends a \$1000 donation to that charity. The agency's decision to post the banner in its hearing room, where regulated companies asking for rate relief will inevitably see it, creates an appearance that a company donating to that charity may receive favorable treatment from the regulators. Accordingly, it may violate the Gift Act as a solicitation.*

Example 2:

*A town mayor meets with a Health Department official over increasing funding in the Department's existing contract for a not-for-profit clinic operating in his community. The official notes that the agency is leaning towards the requested contract funding increase, and suggests that the mayor might help close the deal if he and other prominent*

*citizens put together a donation of private funds to support the purchase of some medical equipment for the clinic. Although the Health Department official may be trying to support a good cause, the suggestion that a private charitable donation could influence the official's decision to fund the clinic violates the Gift Act.*

## **B. ADDENDUM TO PART V: STATE CONSTITUTIONAL LIMITS**

### *1. Honoraria*

#### **The Law - Article XX, Section 9 of the New Mexico Constitution**

**No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law.**

#### **Commentary**

The New Mexico Constitution limits the payment state officers may accept for performing their public duties to their salary only. While the GCA permits acceptance of honoraria up to \$100 in value, the constitutional prohibition seems to bar payment in any amount. State officers should seek legal advice on how to handle any given circumstance, but would be well advised to follow the stricter constitutional prohibition and refuse honoraria in any amount.

### *2. Conflicts in Quasi-Judicial Proceedings*

The governing bodies of state agencies, local governments and local government agencies frequently have dual roles. When it formulates policy and engages in rulemaking, a governing body acts in a legislative capacity. A governing body acts in an adju-

dicative or quasi-judicial capacity when it determines facts and applies law and legal standards it administers to decide the rights and obligations of individual parties.

When a governing body acts in a quasi-judicial capacity, the governing body's members are required to be impartial. New Mexico courts consistently have held that a member of a governing body who has a bias for or against a party in an adjudicatory proceeding that prevents the member from making an objective or impartial decision is disqualified from participating in the proceeding.

The courts have strictly applied the right to an impartial tribunal in quasi-judicial proceedings. Most recently, the Court of Appeals addressed a board of county commissioners' 3-2 decision to approve an application for a zoning change, where one of the commissioners who voted in favor of the change was a first cousin of the applicant. See Los Chavez Community Ass'n v. Valencia County, 2012-NMCA-44, 277 P.3d 475. The Court of Appeals not only evaluated the commissioner's participation in the matter under the state constitution's guarantee of due process, but also applied Article VI, Section 18 of the constitution, which absolutely prohibits a judge from hearing a case in which a party is "related to [the judge] by affinity or consanguinity, within the degree of first cousin," unless all the parties consent. The court held that this constitutional "presumption of bias" automatically disqualified the commissioner from participating in the zoning matter involving her first cousin and reversed the board's decision.

The Court of Appeals' rationale extends beyond the local zoning proceeding it considered. Consequently, we believe that the kinship-based disqualification requirements of Article VI, Section 18 apply to the members

of any state or local public body when it acts in a quasi-judicial or administrative adjudicatory capacity. Absent the consent of all parties, a member of a quasi-judicial body must be disqualified from participating in a matter if the member is related to one of the parties by marriage or blood, within the degree of first cousin. Of course, due process principles generally require members of a quasi-judicial body to consider any interest or bias that would prevent them from acting impartially in a particular matter and to recuse themselves if necessary.

## **C. ADDENDUM TO PART VI: POLITICAL ACTIVITY**

### *1. The State Personnel Act*

#### a. Protection of classified state employees from coerced political activity

#### **The Law - Section 10-9-21**

**A. No employer shall dismiss an employee for failure or refusal to pay or promise to pay any assessment, subscription or contribution to any political organization or candidate; however, nothing contained in this section shall prevent voluntary contributions to political organizations.**

**E. No person shall be refused the right of taking an examination, from appointment to a position, from promotion or from holding a position because of political or religious opinions or affiliation or because of race or color.**

#### Commentary

In addition to the GCA's protections for all employees of state or local government, classified state employees are protected by the Personnel Act from being pressured into political activity. Classified state employees

are those whose jobs and status are protected against the whims of political change. In contrast, non-classified (exempt) employees and officials, whose positions are not covered by the Personnel Act, may be hired and removed at the discretion of elected officials (except when the personnel action is motivated by unlawful discrimination or violation of constitutional rights).

The Personnel Act starts with a basic rule that prohibits a state employer from *dismissing* a classified employee for failing or refusing to make a contribution to a political candidate or organization. As with the GCA, this includes partisan or non-partisan candidates; and political organizations include not only political parties, but also other organizations with a political purpose, like political action committees.

The Personnel Act also prohibits denying appointments to state positions or promotions because of political opinions or affiliation. State Personnel Board Rules reinforce these protections. See Personnel Board Rule 1.7.6.10 and 1.7.6.11 NMAC.

#### b. Running for office

#### **The Law - Section 10-9-21**

**B. No person in the personnel office or employee in the service shall hold political office except for a non-partisan county or municipal office or be an officer of a political organization during his employment. For the purposes of the Personnel Act, being a local school board member or an elected board member of any post-secondary educational institution shall not be construed to be holding political office, and being an election official shall not be construed to be either holding political office or being an officer of a political organization.**

**C. Any employee who becomes a candidate for public office shall, upon filing or accepting the nomination and during the campaign, take a leave of absence.**

Commentary

The Personnel Act forbids classified state employees from holding partisan office. Although they cannot hold partisan office, state employees may run for partisan political office if they are authorized an unpaid leave of absence once they have either filed for or accepted the nomination. See also Personnel Board Rule 1.7.6.11 NMAC. State employees are not prohibited from running for or holding non-partisan elected offices, such as municipal government or school board positions. But they are prohibited from serving as officers in political organizations, such as being elected to their state party's central committee or as county chair of a party.

Example 1:

*An employee of the State Corrections Department runs for election to the board of the local community college. Since state employees are not barred from seeking election to boards of post-secondary institutions, this is allowable. If elected, however, the employee should be mindful of potential conflicts of interest that might arise while serving on the school board.*

Example 2:

*The deputy secretary of a state agency, who is exempt from the State Personnel Act, runs in a partisan election for probate judge in her hometown. Because this court only holds session to act on occasional uncontested probate cases one afternoon a week, and the state official is allowed to work on a flextime schedule, she does not serve as judge during her working hours for the state agency. The*

*arrangement is allowable because of this scheduling that separates her work for state government from her work as a judge. Nevertheless, the employee should consult her supervisor to make sure she is not creating any other conflict of interest for the agency. A classified employee would be barred from seeking this office because it is partisan.*

c. Using public assets for political purposes

**The Law - Section 10-9-21**

**F. No employee or probationer shall engage in partisan political activity while on duty.**

Commentary

This provision of the Personnel Act explicitly prohibits on-the-job partisan political activity by classified state employees.

Example 1:

*The county party chair asks a state classified employee who volunteers for the party to make phone calls to get people to the polls. The employee uses her personal cell phone to make calls during her off-work hours, but leaves a lot of voice mail messages. Voters start calling her back on her cell phone throughout the workday. This partisan activity during state government working hours violates the State Personnel Act.*

2. The Procurement Code

**The Law - Section 13-1-191.1**

**B. A prospective contractor subject to this section shall disclose all campaign contributions given by a prospective contractor or a family member or representative of the prospective contractor to an applicable public official of the state or local pub-**

**lic body during the two years prior to the date on which a proposal is submitted or, in the case of a sole source or small purchase contract, the two years prior to the date on which the contractor signs the contract, if the aggregate total of contributions given by the prospective contractor or a family member or representative of the prospective contractor to the public official exceeds two hundred fifty dollars (\$250) over the two year period.**

#### Commentary

This section of the Procurement Code, which applies to expenditures by state agencies and local public bodies for the procurement of goods and services, seeks to create transparency in the public contracting process. It requires prospective contractors in a procurement involving competitive sealed proposals, a sole source contract or a small purchase contract to publicly disclose campaign contributions they or their family members made to an “applicable public official.” An “applicable public official” is an elected official who has authority to: (1) award or influence the award of the contract for which the potential contractor is submitting a proposal or (2) negotiate a sole source or small purchase contract. See Section 13-1-191.1(G)(1). The disclosure requirement applies to campaign contribution(s) to the official cumulatively exceeding \$250 over a two-year period.

A disclosure form must be submitted to the applicable state agency or local public body with a proposal as part of the response to the request for proposals. The procuring state agency or local public body is required to indicate on the form the name or names of every applicable public official for which disclosure is required. See Section 13-1-191.1(C).

In addition to the requirement for disclosing campaign contributions, potential contractors and their family members are prohibited from giving campaign contributions to an applicable public official while the procurement process or negotiations for a sole source or small purchase contract are pending. See Section 13-1-191.1(E).

#### Example 1:

*A successful candidate for statewide office announces that he will accept campaign contributions to retire his campaign debt after he assumes office. Six months after the candidate is elected, the office issues a request for proposals. A former campaign donor contributed \$500 to the candidate on election eve, but does not respond to the officeholder’s new appeal for donations. He submits a timely proposal in response to the RFP. Since the campaign contribution was made within the two years prior to the date the proposal was submitted and the campaign contribution exceeded \$250, the disclosure requirement of the Procurement Code applies. The prospective contractor must disclose his contribution. As head of the office, the newly elected officer is an “applicable public official” because he has authority to influence the award of the contract, even if he never in fact uses that authority.*

#### 3. The Hatch Act,

#### 5 U.S.C. Sections 1501 to 1508

The federal Hatch Act restricts political activity by certain federally funded officials and employees of state and local government. Specifically, the Hatch Act applies, with certain exceptions, to government employees “whose principal employment is in connection with an activity which is financed in whole or in part” by federal loans or grants. These federal rules prevent cov-

ered employees from “interfering with or affecting” the result of an election by using their official authority or influence; soliciting political contributions from public employees; or running for office.

a. Political interference

**The Law - 5 U.S.C. Section 1502(a)**

**A State or local officer or employee may not...**

**(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office.**

Commentary

State and local government officials and employees “whose principal employment is in connection with an activity which is financed in whole or in part” with federal loans or grants are required to comply both with state law and with the federal Hatch Act. See Section 1501(4). Public employees covered by this Act are prohibited from “interfering with or affecting” the result of an election by using their official authority or influence. This applies to any election, partisan or not. Officials should not be misled into thinking that only crimes such as vote tampering are prohibited. Any attempt by a covered state or local government officer or employee to affect the result of an election is illegal.

Example 1:

*A state environmental official is working late on a federally funded Superfund project that is being used to support half his salary. His paycheck comes from the state agency that employs him, however. A friend and big supporter of his agency, who is running for city council, rushes in. He is on his way to a*

*candidate forum but has almost run out of campaign flyers to distribute. He asks to use the office copier machine to run off more flyers, which the official permits. This conduct—using office paper and copier services to aid his friend’s campaign -- may violate the federal Hatch Act. It also violates the GCA’s prohibition against using property belonging to the state agency for other than authorized purposes. See Part VI.C, above.*

Example 2:

*The director of the department overseeing building code enforcement for a city is told by the mayor’s secretary to ask the local building industry for campaign contributions. The city has a sizable grant from the U.S. Department of Housing and Urban Development to strengthen its code enforcement capacities, but the official’s own salary is paid entirely from City funds. Nevertheless, if the director’s principal employment is in connection with the federally financed code enforcement program, the director’s solicitation of campaign donations would likely violate the Hatch Act.*

Example 3:

*An officer in the food inspection section within the same department described in the previous example leaves flyers supporting the mayor’s reelection at each restaurant he inspects. Unlike the department’s code enforcement section, the food inspection section receives no federal funding. The officer’s actions during business hours are questionable, but they do not violate the federal Hatch Act. The employee is not covered by the Act because he exercises no functions in connection with the federally funded project, even though he works for a department that receives federal funds.*



b. Political contributions

**The Law – 5 U.S.C. Section 1502(a)**

**A State or local officer or employee may not...**

**(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes.**

Commentary

This section of the federal Hatch Act prohibits essentially the same conduct, coercing public employees to support political causes, as the GCA [see Part VI, above]. The more severe federal penalties of the Hatch Act could be imposed against employees who work on federally funded programs and are covered by the Hatch Act.

c. Running for office

**The Law – 5 U.S.C. Section 1502(a)**

**A State or local officer or employee may not...**

**(3) be a candidate for elective office.**

Commentary

This section of the federal law prohibits covered state and local government employees from running for partisan political office. It does not bar state or local government employees from running for non-partisan offices. See Section 1503. Also, the

federal Hatch Act does not prevent officials already holding elective office from running for any elected office, regardless of any federal funding to support their salaries or programs. See Section 1502(c).

## **APPENDIX II**

### **STATE AND FEDERAL LAWS RELATED TO ETHICS**

The following is a partial listing of laws that govern the conduct and ethical responsibilities of government officials and employees in New Mexico.

#### **New Mexico Laws**

##### **Open Meetings Act: §§ 10-15-1 to -4**

Requires public bodies to conduct open meetings, noticed in advance to the public.

##### **Inspection of Public Records Act: §§ 14-2-1 to -12**

Requires public bodies to make public records available to the public for inspection and copying.

##### **Governmental Conduct Act: §§ 10-16-1 to -18**

Provides restraints and obligations on public officers and employees concerning:

- Private benefits, § 10-16-3(A)(4)
- Bribes/consideration/honest services, § 10-16-3(D)
- Conflicting financial interests, §§ 10-16-3(C), 10-16-4
- Disclosures, §§ 10-16-3(C), 10-16-4.2, 10-16-7(A), (B)
- Honoraria, § 10-16-4.1
- Confidential information, § 10-16-6
- Contracts with current or former public employees/families, §§ 10-16-7, 10-16-8
- Sales to supervised employees or regulated entities, § 10-16-13.2
- Political activity prohibitions, § 10-16-3.1
- Legislator and family conflicts of interest, § 10-16-9
- Due diligence responsibilities of contract negotiators, § 10-16-7(C)

##### **Gift Act: §§ 10-16B-1 to -4**

Limits gifts to any state employee, candidates, or family member to:

- \$250 per gift (from “restricted donors”)

- \$1000 per year (from lobbyists, their employers, or contractors)

State officer or employee may not solicit donations for charities from regulated entities or where purpose is to influence their official acts.

##### **Financial Disclosure Act: §§ 10-16A-1 to -8**

Requires disclosure of financial interests by state officials and employees, particularly when they may influence official actions.

##### **Whistleblower Protection Act: §§ 10-16C-1 to -6**

Protects public employees who disclose improper conduct by state or local government agencies against retaliation.

##### **Fraud Against Taxpayers Act: §§ 44-9-1 to -14**

Empowers citizens or the Attorney General to file *qui tam* action for damages and restitution against anyone filing false claims with the state. Protects whistleblowers, both from within and outside state government, from retaliation.

##### **Procurement Code: §§ 13-1-28 to -199**

Governs purchases of goods, services and construction by state and local agencies, including provisions prohibiting participation by interested employees or their family members, campaign contributions to public officials involved in a purchase, contingent fees, contemporaneous employment by contractors, and use of confidential information.

**Personnel Act: § 10-9-21 (“Little Hatch Act”)**

Applies to state employees in the classified service:

- Prevents public employees from seeking *partisan* political office
- Prevents supervisors from requiring political contributions
- No partisan political activity while on duty
- Pre-empted by federal Hatch Act where applicable

**Criminal Statutes:**

- Bribery: § 30-24-2
- Concealing campaign funds: § 1-19-34.3
- Demanding illegal fees: § 30-23-1
- Embezzlement: § 30-16-8
- Extortion: § 30-16-9
- RICO: § 30-42-4
- Soliciting or receiving illegal kickbacks: § 30-41-1
- Tampering with public records: § 30-26-1
- Unlawful interest in a public contract: § 30-23-6

**Federal Criminal Laws**

- RICO: 18 U.S.C. §§ 1961, 1962
- Extortion: 18 U.S.C. § 1951
- Mail fraud: 18 U.S.C. § 1341
- Using fictitious name: 18 U.S.C. § 1342
- Wire fraud: 18 U.S.C. § 1343
- Tax evasion: 26 U.S.C. § 720



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