

Principles of an Effective State Ethics Commission

Once New Mexico voters pass (hopefully!) the constitutional amendment in 2018 to create an ethics commission, legislators will pass the enabling legislation in 2019. This document is meant to lay out the best practices and principles from ethics commissions across the country, and from legislation debated in New Mexico over the last several years.

Suggested Scope of the Ethics Commission's Enforcement Authority for civil enforcement:

- Campaign Reporting Act (§§1-19-25 et seq. NMSA)
- Voter Action Act (§§1-19A-1 et seq. NMSA)
- Lobbyist Regulation Act (§§2-11-1 et seq. NMSA)
- Governmental Conduct Act (§§10-16-1 et seq. NMSA)
- Financial Disclosure Act (§§10-16A-1 et seq. NMSA)
- Gift Act (§§10-16B-1 et seq. NMSA)
- Procurement Act (§§13-1-1 et seq. NMSA)

These laws currently contain a patchwork of provisions for civil and criminal enforcement by the secretary of state, the attorney general and the district attorneys. The enabling legislation must address these existing provisions in a way that will prevent them from interfering with the new complaint-and-hearing procedure through which the laws will now be enforced by the commission.

The simplest option is to repeal all the existing provisions for civil enforcement, leaving all complaints to the commission as the exclusive method of civil oversight. Alternatively, these existing provisions could be preserved, but in such case, the commission must be substituted in all relevant statutes that provide for the secretary of state or the attorney general to act in each civil-enforcement provision, and the enabling legislation will need to include a proviso that states that none of the provisions in the pre-existing laws (i.e., the requirement in several of campaign reporting statutes that require elaborate efforts to obtain voluntary compliance from the reporting candidate or entity, as a prerequisite to any enforcement action being taken) should be construed to obstruct or delay the enforcement by the new complaint-and-hearing procedures that are adopted by the commission.

In any case, the ministerial duties that are presently performed by the secretary of state under some of these laws, such as registration of lobbyists and receipt and publication of campaign finance reports, will remain the secretary's responsibility.

Best principles for Specific Powers and Duties of the Commission

- The commission will receive complaints from any person alleging a violation by any person of any of the laws within the scope of its authority.
- The commission will review all complaints and make a prompt determination whether the complaint should be dismissed as frivolous or beyond the commission's jurisdiction.

- Complaints not dismissed will be investigated and a determination made within a specified period of time whether probable cause existed to convene a formal hearing.
- The commission will be authorized to issue subpoenas, or to request a court to issue subpoenas, for compulsory appearance of witnesses and production of evidence.
- Following a hearing, the commission will make and publish its determination, accompanied by detailed written findings and conclusions, of whether a violation of the law had been established.
- The commission will be empowered to impose sanctions on violators, including censure and public reprimand, and to refer adjudicated cases to other agencies, employers or prosecutors for possible further disciplinary action.
- The commission will be authorized to issue advisory opinions to persons presenting legitimate questions about whether their own contemplated future conduct will violate any of the laws administered by the commission.
- The commission will have a budget sufficient to allow it to hire staff, including a director and legal counsel, to assist it in carrying out these functions.

Best Principles for Confidentiality of the Commission's Proceedings

- The commission and its staff will be subject to a duty of confidentiality at all stages of a proceeding.
- However, formal hearings will be conducted in public, and all formal determinations and dispositive orders of the commission will be published.

Best Principles for Provisions That Should Not Be Included

- Confidentiality requirements that extend beyond the commission and its staff and attempt to limit discussion of the case by the complainant, the press or the public.
- Provisions for sanctions against complainants that are more severe than the sanctions that may be imposed for the submission of frivolous claims or false testimony in a court of law.
- Provisions eliminating or weakening the absolute privilege that normally precludes actions for defamation based on allegations or evidence submitted to an official tribunal.
- Prohibitions against filing complaints or conducting commission proceedings during an election year, which is the period when the public is most needful of information about possible violations of government ethics and campaign finance laws.
- Provisions requiring or allowing the commission to avoid adjudicating complaints within its jurisdiction by referring the complaints to other agencies before they have been adjudicated by the commission.
- Requirements for proof of "willfulness" as a prerequisite to finding a violation, which will effectively reduce the substantive scope of all the laws the commission will be enforcing, none of which presently requires such proof except when criminal prosecution is being pursued.