

## DISCUSSION DRAFT

### INTERIM LEGISLATIVE ETHICS COMMITTEE ADVISORY OPINION 19-02

Pursuant to Section 2-15-9 NMSA 1978, the Interim Legislative Ethics Committee was asked by a legislator to issue an advisory opinion. The legislator who made the initial request, pursuant to Legislative Council Policy No. 15, did not consent to being identified.

The initial question, laid out in a footnote below, did not provide a specific situation but asked the committee generally to establish the appropriate standard of ethical conduct if a legislator is an attorney in a law firm that has state contracts or partners or associates who are registered lobbyists and represents clients before state agencies.<sup>1</sup>

The committee notes that the initial request raises important issues that confront current and future members of the legislature; thus, the committee issues this opinion to provide guidance. Recognizing, however, that questions of appropriate standards of ethical conduct are applicable to all professionals who serve in the legislature, the committee has decided to expand the scope of this opinion to include all legislators engaged in the conduct of their professions while serving as a legislator.

#### Applicability of Relevant Legislative Rules and Other Authorities

The committee is authorized to issue advisory opinions on the interpretation and enforcement of ethical principles as applied to the legislature.<sup>2</sup> These principles are primarily organized in Rule 26, which is identical in each of the House and Senate rules. In addition, the Constitution of New Mexico and state statutes contain provisions that are often parallel to those found in the House and Senate rules, as well as separate provisions applicable to legislators.

#### 1. Rule 26-1(A) provides that:

Members...shall conduct themselves in a manner that justifies the confidence placed in them by the people. The members shall not use their offices for private gain and shall at all times maintain the integrity and discharge ethically the high responsibilities of their legislative positions.

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<sup>1</sup>The original question posed is as follows: "Please define the appropriate standard of ethical conduct if a legislator is an attorney and:

1. is employed by a law firm that has state contracts;  
2. is employed by a law firm that has among its partners or associates lawyers who are registered lobbyists;

3. represents a client in a state agency rulemaking, administrative or adjudicatory proceeding, which may necessarily involve communications and negotiations with state agency officials or staff prior to the conclusion of the proceeding; and

4. represents a client in personal discussions or other communications with state agency personnel in a matter before the state agency."

<sup>2</sup>Section 2-15-8(A) NMSA 1978.

Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct of the members.<sup>3</sup>

The purpose of these principles of ethical conduct is to ensure that a legislator does not use the legislative position for professional or personal advantage, while also recognizing that a strength of citizen legislatures is that members bring expertise through their professional experiences that may not otherwise be available to the legislative process.

2. Rule 26-1(B) contains the following admonitions to avoid a potential conflict of interest:

- (1) a [member] shall not accept anything of value that improperly influences an official act, decision or vote;
- (2) a [member] shall attempt to ensure that his private employment does not impair his impartiality and independence of judgment in the exercise of official duties;
- (3) a [member] shall not receive compensation or reimbursement not authorized by law for rendering services, advice or assistance as a legislator;
- (4) a [member] shall not accept gifts, other than lawfully collected and reported campaign contributions, from persons affected by legislation or from persons who have an interest in a business affected by proposed legislation, where it is known or reasonably should be known that the purpose of the donor in making the gift is to influence the [member] in the performance of his official duties or vote or is intended as a reward for action on his part;<sup>4</sup>
- (5) a [member] shall not accept or engage in employment if the [member] knows it is being afforded him with the intent to influence his conduct in the performance of his official duties.

Each member must assiduously avoid using his or her legislative position for professional advantage. Properly separating legislative roles, duties and powers from a member's professional life is critical to maintaining the trust the people have placed in members of the legislature. Accordingly, a member who is a professional and who is employed by or a partner in a company that has registered lobbyists must not be involved in any of the company's internal or external matters regarding the company's lobbying affairs.

3. Rule 26-1(C) provides that to avoid undue influence, a member shall not:

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<sup>3</sup>See also Section 10-16-3(A), (B) and (C) NMSA 1978 for comparable statutory provisions.

<sup>4</sup>See also Section 10-16B-3(C) NMSA 1978 for comparable statutory provisions.

- (1) appear for, represent or assist another person in any matter before a state agency, unless without compensation or for the benefit of a constituent, except for [members] who are attorneys or other professional persons engaged in the conduct of their professions, and, in these instances, the [member] shall refrain from references to his legislative capacity, from communications on legislative stationery and from threats or implications on legislative stationery and from threats or implications relating to legislative actions;<sup>5</sup> or
- (2) represent or assist another person in the sale of goods or services to the state or to a state agency, unless the transaction occurs pursuant to procedures set out in the Procurement Code or by public notice and competitive bidding where the Procurement Code does not apply.

While the limitation in Paragraph (1) makes specific reference to attorneys, it also applies to any other professional. Examples of other professionals in this context might include an accountant representing a client in a tax protest, a landlord appearing in court in an owner-resident relations matter or a school administrator representing a school before a hearing officer. Communications with state agency personnel on behalf of a client outside of a formal rulemaking, administrative or adjudicatory proceeding are part of the normal course of business in certain professions, as are communications and negotiations with state agency officials or staff prior to the conclusions of formal proceedings. In both formal proceedings and informal discussions and communications on behalf of a client, a member who is acting in a professional capacity on behalf of a client must refrain from referencing the member's legislative position to gain an advantage or attempt to enhance the member's credibility. A member must never threaten punitive legislative action in such representation.

4. Rule 26-1(D) contains three provisions of relevance to avoid the abuse of office, providing that a member shall not:
  - (1) obtain, or have a direct financial interest in, contracts with the state or with a state agency for goods or services not procured through the state procurement process, through a procurement procedure established by a state agency or after public notice and competitive bidding;<sup>6</sup>
  - (2) grant to, or obtain a special privilege or exemption for himself or another person, which privilege or exemption is not readily available to members of the general community or class to which the beneficiary belongs; or

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<sup>5</sup>See also Section 10-16-9(B) NMSA 1978 for comparable statutory provisions.

<sup>6</sup>See also Section 10-16-9(A) NMSA 1978 for comparable statutory provisions.

- (3) use or disclose confidential information obtained by virtue of his position for the benefit of himself or another.<sup>7</sup>

The provisions of Rule 26 in both the House and Senate rules lay the foundation for expected ethical conduct by members of each chamber in the legislature. The polestar for managing potential conflicts of interest is disclosure. However, the responsibility entrusted to each legislator by the people presents an obligation that is not present in most non-legislative analyses of conflicts of interest. *Mason's Manual of Legislative Procedure* observes that: "The right of members to represent their constituencies is of such major importance that members should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal."<sup>8</sup> Indeed, House Rule 7-6 and Senate Rule 7-5 each lay out the obligation of members to vote unless excused from that obligation.

In addition to the provisions in the House and Senate rules cited above, the Constitution of New Mexico provides two additional limitations relevant to this opinion.<sup>9</sup>

The first constitutional limitation, Article 4, Section 28 of the Constitution of New Mexico, prohibits "any member of the legislature during the term for which he was elected [or] within one year thereafter, [from being] interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term".

It is important to understand that this limitation is not a blanket prohibition against a legislator entering into a contract with the state or a municipality.

A legislator is not prohibited from entering into a contract if the authorization for such contract predates the legislator's current term of office plus one year.<sup>10</sup> It is, however, important to note that the term "any law passed" includes certain appropriations, such that a legislator is barred from obtaining a contract with the state or any local government when the source of funds includes a legislative appropriation for the specific purpose of the contract made during the legislator's term of office or one year thereafter.<sup>11</sup> In addition, this constitutional prohibition lasts

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<sup>7</sup>See also Section 10-16-6 NMSA 1978 for comparable statutory provisions.

<sup>8</sup>*Mason's Manual of Legislative Procedure*, Section 522.

<sup>9</sup>While references to attorney general opinions are sometimes helpful in understanding the intent of the Constitution of New Mexico, the committee notes that each chamber is the ultimate arbiter of the meaning of those provisions that subject its members to discipline.

<sup>10</sup>See 1961-62 Op. Att'y Gen. No. 61-42.

<sup>11</sup>See 1991 Op. Att'y Gen. No. 91-11.

for the entire term for which the legislator was elected plus one year. Resignation from office does not remove the prohibition.<sup>12</sup>

Accordingly, a member who is a professional and is employed by or a partner in a company that has state contracts that were authorized by a law enacted during the member's term should ensure that the member does not violate Article 4, Section 28 of the Constitution of New Mexico. Regarding any of the company's state contracts that were not authorized by a law enacted during the member's term, the member should disclose the member's direct participation in any of those contracts on the member's financial disclosure statement.

The second constitutional limitation, Article 4, Section 39 of the Constitution of New Mexico, concerns bribery in three different ways:

- A. no member of the legislature "shall vote or use his influence for or against any matter pending in either house in consideration of any money, thing of value or promise thereof";
- B. no person "shall directly or indirectly offer, give or promise any money, thing of value, privilege or personal advantage, to any member of the legislature to influence him to vote or work for or against any matter pending in either house"; and
- C. no member of the legislature "shall solicit from any person or corporation any money, thing of value or personal advantage for his vote or influence".

A violation of any of these provisions is a felony, which means proof would have to be beyond a reasonable doubt and could subject the member to removal from office.<sup>13</sup>

Finally, the committee directs members to an additional provision in the Governmental Conduct Act specific to legislators:

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.<sup>14</sup>

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<sup>12</sup>See 1969 Op. Att'y Gen. No. 69-49; 1972 Op. Att'y Gen. No. 72-10.

<sup>13</sup>See 1965 Op. Att'y Gen. No. 65-229.

<sup>14</sup>Section 10-16-9(A) NMSA 1978.

A legislator may bid on a state contract if there was notice of the bid and the bidding was competitive.<sup>15</sup> The same rules apply to a company owned by a legislator.<sup>16</sup> As used in the above subsection, "substantial interest" means an ownership interest that is greater than 20 percent.<sup>17</sup>

### Summary

In summary, a legislator who is engaged in the conduct of the legislator's profession:

1. should bring the knowledge and experience gained in that profession to the legislative process to enhance the work of the legislature;
2. must exercise independence in decision making in the legislative capacity, which includes not allowing any evaluation or decision regarding renewal, retention or promotion in the legislator's profession to be tied in any way to the performance of legislative duties;
3. shall not use the legislative office for private gain, nor vote or use the influence as a legislator in consideration of any money, thing of value or promise thereof;
4. shall make required disclosures on the legislator's financial declarations or as otherwise provided by law; and
5. shall not vote on any question in which the legislator has a direct personal or pecuniary interest and the legislator is excused from voting.

### Conclusion

Pursuant to Paragraph (3) of Subsection D of Legislative Council Policy No. 15, advisory opinions issued by this committee are prospective only. This opinion does not reflect on previous actions by members. In the future, as provided in Paragraph (4) of Subsection D of Legislative Council Policy No. 15, a legislator who acts in good faith reliance upon this opinion shall be immune from sanctions for conduct allowed by the opinion, unless this opinion is subsequently rejected by the relevant House of Representatives or Senate standing committees prior to the conduct in question. A copy of this opinion shall be provided to each legislator and retained in the library of the Legislative Council Service.

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Co-Chair, Interim Legislative  
Ethics Committee

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DATE:

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<sup>15</sup>See 1967 Op. Att'y Gen. No. 67-133.

<sup>16</sup>See 1989 Op. Att'y Gen. No. 89-34.

<sup>17</sup>Section 10-16-2(L) NMSA 1978.