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# Discussion Group Report: Governmental Conduct


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# GOVERNOR'S ETHICS AND CAMPAIGN FINANCE REFORM TASK FORCE DISCUSSION GROUP REPORT-GOVERNMENTAL CONDUCT

**Group Leader:** Hilary Tompkins

**Other Participants:** Senator Gaye Kernan, Maralyn Budke, Justin Miller

## **I. Overview:**

“Governmental conduct” covers behavior by a wide range of individuals, engaging in a broad scope of activities, and is addressed by a variety of statutes, rules, and codes of conduct. This report concerns the conduct of all persons occupying a position of public trust in New Mexico: elected officials, appointed officials, and classified and exempt state employees. All of these individuals owe important ethical duties to the citizens of New Mexico.

Laws and rules regulating government conduct are largely concerned with 1) restrictions on the behavior of individual actors, and 2) disclosure and reporting of government activities so that those activities are open and transparent to the public. Regulations covering behavior restrictions and disclosure may be found in the Campaign Reporting Act, the Lobbyist Regulation Act, Senate and House ethical rules, agency policy manuals, the Governmental Conduct Act, the Open Meetings Act, the Procurement Code, the Financial Disclosure Act, the Personnel Act, NMAC personnel regulations, and the Inspection of Public Records Act. This list is not comprehensive.

This report focuses on government conduct in the following issue areas drawn from the Task Force matrix: gifts, reporting, nepotism, honoraria, lobbying, and conduct of public officers and employees. Each of these subcategories will be considered separately.

### **A. Gifts:**

#### **1. Existing law:**

New Mexico has no general law prohibiting gifts or requiring the disclosure of gifts to public officials. However, the issue of giving gifts to public officials arises in various places in New Mexico law.

The Governmental Conduct Act stresses that legislators, public officers, and public employees shall use the powers and resources of public office only for public, not personal or private, interest. NMSA § 10-16-3(A). Giving or receiving gifts is not prohibited, but it is a felony for gifts to be “conditioned upon or given in exchange for promised performance of an official act.” NMSA § 10-16-3(D).

As of the 2006 legislative session, the Procurement Code, NMSA §§ 13-1-28 *et seq.*, was amended to prohibit giving money or gifts to an elected public official involved in the decision making process regarding a prospective contract.

Both the New Mexico Senate and House of Representatives have ethical rules that prohibit legislators from accepting gifts (other than campaign contributions) from persons affected by legislation if it is known or should be known that the donor is trying to influence or is rewarding the legislator's official action. Senate and House Rule 26-1.

## **2. Problem areas:**

- Need to determine whether to ban, limit, or report gifts.
- Enforcement.
- Public perception.

## **B. Reporting and disclosure:**

### **1. Existing law:**

The Financial Disclosure Act, NMSA §§ 10-16A-1 *et seq.*, requires candidates for statewide and legislative office, elected officials in those offices, and officials whose appointment is subject to confirmation by the Senate to file a financial disclosure statement. The statement must include the filer's name and address, sources of income, real estate business interests, memberships on boards of for-profit businesses, professional licenses, and financial interaction with state agencies.

The Procurement Code, NMSA § 13-1-28 *et seq.*, now requires all persons attempting to get certain state contracts to disclose campaign contributions in the previous two years to a public official involved in the contract decision-making process.

The Campaign Reporting Act will be addressed in more detail by the Campaign Finance discussion group. The Lobbyist Regulation Act is covered in more detail below.

## **2. Problem areas:**

- Thresholds for reporting financial interests may be too high (\$5000 for income, \$10,000 for business interests).
- Investigation by the Secretary of State is not mandatory.
- Secretary of State's forms do not match the legal requirements of the statute (i.e. no heading for "nature of the income source").
- The Procurement Code allows a prospective contractor to contribute immediately after the awarding of a contract.

## **C. Honoraria:**

### **1. Existing law:**

New Mexico law makes it a felony for a legislator, public officer, or employee to knowingly request or receive an honorarium for a speech related to the performance of public duties. NMSA § 10-16-4.1. Honorarium is defined as payment of money, or any other thing of value in excess of \$100, but does not include reasonable lodging, food, or travel expenses. NMSA § 10-16-4.1.

New Mexico law is as strict as or stricter than a majority of other states. National Conference of State Legislatures, *available at* [http://www.ncsl.org/programs/ethics/e\\_honorarium.htm](http://www.ncsl.org/programs/ethics/e_honorarium.htm). Some states allow honoraria but require disclosure, some allow honoraria only up to a certain amount, and some prohibit it altogether if related to official duties.

### **2. Problem areas:**

None. New Mexico law is reasonably strong and is not overly restrictive.

## **D. Nepotism:**

### **1. Existing law:**

It is unlawful for elected or appointed officials to employ as “clerk, deputy, or assistant” persons related by consanguinity or affinity within the third degree. NMSA § 10-1-10. The prohibition does not apply when compensation is less than \$600 per year and does not apply to public school teachers. NMSA § 10-1-10.

Other states take varied approaches to nepotism regulation. A survey of state laws by the NCSL indicates that the majority of states address nepotism as a general ethical consideration (for example in employee handbooks of the state legislature (NC), state hiring policies (WA), etc.), but do not have specific legislation prohibiting nepotism, at least with regard to state legislators.

### **2. Problem areas:**

- Only applicable to elected or appointed officials.
- “Clerk, deputy, or assistant” language is restrictive: “Only a very few jobs meet the strict definitions of ‘clerk, deputy, or assistant’ to the hiring official”- New Mexico Municipal League paper, “Nepotism: It’s All Relative,” available at [www.nmml.org/Nepotism.pdf](http://www.nmml.org/Nepotism.pdf).

## **E. Lobbying:**

### **1. Existing law:**

The Lobbyist Regulation Act, NMSA §§ 2-11-1 *et seq.*, requires lobbyists to pay an annual fee and file a registration statement including information about the lobbyist, the lobbyist's employer, and the issue to be lobbied. Each lobbyist and employer must also report expenditures and political contributions. NMSA § 2-11-6. Lobbyists and lobbyist employers may not make political contributions during a period surrounding the legislative session. NMSA § 2-11-8.1.

### **2. Problem areas:**

- Electronic reporting is not required. NMSA § 2-11-6(B).
- Contributions may be funneled indirectly: information about contributions from other contributors, delivered by lobbyists or lobbyist employers, need only be reported if they exceed \$500. NMSA § 2-11-6(A)(3).
- Secretary of State is not required to investigate reports. NMSA § 2-11-8.2.

## **F. Conduct of public officers and employees:**

### **1. Existing law:**

The Governmental Conduct Act proclaims that “full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct” and calls for “reasonable efforts” to be made to avoid undue influence and abuse of office. NMSA § 10-16-3(C). Public officers and employees may not take an official act in order to enhance their own financial interests, and must disqualify themselves from official action directly affecting their financial interest. NMSA §§ 10-16-4(A) and 10-16-4(B). Public officers and employees are not allowed to use confidential information for private gain. NMSA § 10-16-6. State agencies cannot do business with public officers, employees, or legislators unless the business relationship is disclosed. NMSA §§ 10-16-7 and 10-16-9. Agencies and the legislative council must create and adopt individualized codes of conduct. NMSA §10-16-11.

### **2. Problem areas:**

- Disclosure of conflict of interest is a “guiding principle” but is not mandated.
- Public officers and employees are not prohibited from taking official acts for the purpose of financially benefiting family and friends.
- The governor may exempt individuals from having to disqualify themselves from taking action directly affecting their financial interest.
- There is no requirement for recurring training in codes of conduct.

## **II. Options:**

**A. Gifts:**

- Ban gifts to all public officials and employees.
- Require public officials to disclose all gifts of money and other items.
- Place a monetary limit on gifts from donor.

**B. Reporting:**

- Lower the threshold for reporting financial interests.
- Require the Secretary of State to investigate a random sample of financial disclosure reports.
- Require electronic reporting for easier and more efficient public access.

**C. Honoraria:**

- No recommendations.

**D. Nepotism:**

- Expand the positions to which nepotism restrictions apply (beyond clerk, deputy, and assistant).
- Apply nepotism restrictions to high level appointed positions also.

**E. Lobbying:**

- Require electronic reporting.
- Require Secretary of State to investigate a random sample of reports.
- Track indirect contributions through lobbyists more accurately.

**F. Conduct of public officers and employees:**

- Mandate disclosure and disqualification when there is a conflict of interest; avoid all appearance of impropriety.
- Remove governor's power to exempt a public officer from the disqualification provision. 10-16-4.
- Add a prohibition against disclosing confidential information (currently only a prohibition against using it for private gain). 10-16-6.
- Strengthen prohibition against entering into contracts with public officers or employees- include contracting with legislators (in addition to public officers and employees) and apply prohibition to family members as well, unless there is full disclosure of the financial interest and it is a competitive contracting process. 10-16-9.
- Require all public officers and employees to undergo periodic ethical training (legislators must do 2 hours every other year, NMSA § 10-16-11).
- Forfeiture of state pensions for violations of ethical or criminal laws.
- Establish a personnel code for exempt employees.

**III. Experts:**

1. Professor Deborah L. Rhode, Director of the Stanford Center on Ethics.

- a. Costs: Airfare \$374 + shuttle \$40 + 3 nights St. Francis Hotel \$330 = \$754.
- 2. Leah Rush, Director of State Projects, Center for Public Integrity
  - a. Costs: Airfare \$431 + shuttle \$40 + 3 nights St. Francis Hotel \$330 = \$810.

\*\*\* Availability of experts is not confirmed.