

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

MATTHEW CHANDLER,

Petitioner,

vs.

HON. JUDGE LESLIE SMITH,

Respondent.

Dona Ana County, New Mexico, Leslie Smith, Judge

**In the Matter of:**

**District Court Cause Number D-307-CR-201100560, State v. Michael Murphy**

SUPREME COURT OF NEW MEXICO  
**FILED**

OCT 12 2011

*James P. Allen*

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**PETITION FOR WRIT OF SUPERINTENDING  
CONTROL, or in the Alternative, for WRIT OF PROHIBITION OR  
MANDAMUS**

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COMES NOW Matthew E. Chandler, District Attorney for the 9<sup>th</sup> Judicial District and Special Prosecutor in the above-captioned cause D-307-CR-201100560 (Third Judicial District) and petitions the Court for a Writ of Superintending Control, or, in the alternative, for a Writ of Prohibition or Mandamus pursuant to the District Court's (Hon. Leslie Smith presiding judge) improvident dismissal of the case on the grounds that the charge was not a criminal statute, contrary to the intent of N.M. Stat. § 10-16-1 (specifically § 10-16-3(B)) which would be implicated in such a proceeding, and states:

## **I. JURISDICTION**

The New Mexico Supreme Court has supervisory and superintending control over all inferior courts in the state, as well as the authority to issue extraordinary relief to persons aggrieved by orders of inferior courts in the state and has original jurisdiction in this matter. **N.M. Const., Art. VI, § 3.**

Petitioner seeks extraordinary relief from the determination made by Judge Leslie Smith and subsequent dismissal of the case, i.e., that § 10-16-3(B) is not a criminal provision. **See State's Exhibit 1**, Order on Defendant's Motion to Dismiss Criminal Complaint (Misdemeanor) and **State's Exhibit 2**, Order on State's Motion to Reconsider Order on Defendant's Motion to Dismiss Criminal Complaint (Misdemeanor).

Petitioner seeks this specific extraordinary relief in light of the extremely unusual circumstances and public importance of the case which render remedies by appeal substantially inadequate or would result in substantial delay. **See State ex rel. Du Bois v. Ryan**, 85 N.M. 575, 514 P.2d 851 (1973); **State Game Comm'n v. Tackett**, 71 N.M. 400, 379 P.2d 54 (1962). Further, Mandamus is appropriate and proper when a complainant seeks to be restored a deprived right (in this case, the statutory right of the State to charge criminal acts), and when constitutionality of a statute is at issue. **See State ex re. Bird v. Apodaca**, 91 N.M. 279, 573 P.2d 213 (1977); **Thompson v. Legislative Audit Comm'n**, 79 N.M. 693, 448 P.2d 799

(1988) (Mandamus is proper remedy for addressing constitutionality of statutes in view of the possible inadequacies of alternative remedies and the necessity of an early decision on a question of great public importance). Last, the alternative relief sought, Prohibition, is proper when an order is erroneous, arbitrary, or tyrannical, or would be gross injustice, or might result in irreparable injury, and there is no plain, speedy and adequate remedy. See **State v Zinn**, 80 N.M. 710, 460 P.2d 240 (1969). See also **State Racing Comm'n v. McManus**, 82 N.M.108, 476 P.2d 767 (1970).

## **II. PROCEDURAL HISTORY**

On June 16, 2011, the State filed a Criminal Complaint, charging a violation of § 10-16-3(B) of the Governmental Conduct Act. This complaint was joined to the existing case D-307-CR-201100560 by permission of presiding judge Smith.

On August 25, 2011, Defense filed a Motion to Dismiss Criminal Complaint (Misdemeanor). The State responded to this Motion on September 9, 2011. The Court decided this Motion and issued an Order granting the Defendant's Motion on September 21, 2011. See **State's Exhibit 1**.

The State filed a Motion to Reconsider the Order on September 26, 2011, and the Court denied the State's Motion on September 29, 2011. According to Rule 12-308, Computation of Time, this Writ is filed timely on or before October 14, 2011.

### **III. REASONS FOR ISSUING WRIT OF SUPERINTENDING CONTROL, or, in the Alternative, a WRIT OF PROHIBITION OR MANDAMUS**

The New Mexico Supreme Court has “superintending control over all inferior courts.” N.M. Const., Art. VI, § 3. In **State v. Roy**, 40 N.M. 397, 60 P.2d 646, 662 (N.M. 1936), the New Mexico Supreme Court stated:

The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise.

There are five specific circumstances when a writ of superintending control will issue: when a ruling, order, or decision of an inferior court is 1) erroneous; 2) arbitrary or tyrannical; 3) does gross injustice to the petitioner; 4) may result in irreparable injury to the petitioner; or, 5) when there is no plain, speedy, and adequate remedy other than by issuance of the writ. **See In the Matter of the Extradition of Martinez**, 20 P.3d 126, 130-31 (N.M. 2001) (*citing Albuquerque Gas & Elec.*, 43 N.M. 234, 89 P.2d at 619). **See also Concerned Residents for Neighborhood, Inc., et al., v. Shollenbarger**, 113 N.M. 667at 670, 831 P.2d 603 at 606 (N.M. Ct. App. 1991) (stating “Mandamus lies to enforce a clear legal right against one having a legal duty to perform an act and where there is no other plain, speedy, and adequate remedy in the ordinary course of the law.”); **State ex rel. Davis v. District Ct. Of Fifth Jud. Dist.**, 67 N.M. 215 at 217, 354 P.2d 145 at 147



9N.M. 1960) (explaining that writ of prohibition is a preventative measure that is only properly exercised where the litigant lacks an avenue of appeal).

This Court should review this petition for several vital reasons. First, the lower court erred in determining that the statute at issue, § 10-16-3(B), is not a criminal provision despite clear legislative intent to establish misdemeanors for any violation of the provisions of the Governmental Conduct Act. Second, the lower court erred in basing its decision, in part, on the lack of available jury instructions. Third, the lower court erred when it described the vagueness of the terms and concepts contained in § 10-16-3(B), although not reaching a concrete determination of overly broad and/or vague terminology contained in the statute. Last, the lower court erred in comparing the Governmental Conduct Act to the Code of Judicial Conduct as rationale for its decision that §10-16-3(B) was not a criminal provision.

**A. LEGISLATIVE INTENT AND STATUTE PROVIDES FOR THE ESTABLISHMENT OF MISDEMEANOR CHARGES FOR VIOLATIONS OF THE GOVERNMENTAL CONDUCT ACT.**

Chapter 10, Article 16 of the New Mexico Statutes is cited as the “Governmental Conduct Act”. See NMSA (1978) §10-16-1, Short Title. NMRA (1978) §10-16-3, speaks to the standards and mandates of performance for legislators, public officers, and state employees. Specifically, subsection B provides: “Legislators, 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.”

A crime is broadly defined as an act that violates federal or state law.

Black’s Law Dictionary provides:

“A crime may be defined as any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either, or a combination, of the following punishments...(1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit.”

See Black’s Law Dictionary (1990) 6<sup>th</sup> Ed. at 374.

Later editions of Black’s Law Dictionary add, “the breach of a legal duty treated as the subject matter of a criminal proceeding.” *Id.*, 8<sup>th</sup> Ed. at 399 (referring alternatively to “offense”, defined as “a violation of the law”, 8<sup>th</sup> Ed. at 1110).

In New Mexico, it is clear that crimes consist of malfeasance (e.g., intentional child abuse) OR nonfeasance (e.g., negligent child abuse).<sup>1</sup> The Governmental Conduct Act is comprised of affirmative duties as well as specific prohibitions. For example, § 10-16-3(D) creates a felony offense for accepting or requesting any “money, thing of value or promise...that is conditioned upon or

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<sup>1</sup>Malfeasance is defined as “the doing of an act which a person ought not to do”. Nonfeasance means the “omission of an act which a person ought to do.” Black’s Law Dictionary at 1000. See also *Arellano et al. v. Lopez*, 81 N.M. 389 (1970) for a discussion of the definitions of nonfeasance and malfeasance.

given in exchange for promised performance of an official act”. This is a specific prohibition.

While the Court appears to agree with defense in the sense that § 10-16-3(B) (the charge alleged in this case at bar) proscribes “in positive terms how legislators, public officers, and public employees *should* act” [emphasis in original], **it is nonfeasance if these provisions are violated.** And, this nonfeasance is a criminal offense.

The New Mexico Attorney General’s Office assisted the Legislative Counsel Service in promulgating the New Mexico Legislative Ethics Guide in January, 2011. In this document (attached as **State’s Exhibit 3**), the cumulative provisions of the Governmental Conduct Act are broken down into two categories: “Required Conduct” and “Prohibited Conduct.” **See State’s Exhibit 3** at Table of Contents. **See also State’s Exhibit 3** at the fourth page of the document (“This guide divides the parameters of legislative conduct into two categories: what you must do (required conduct) and what you must not do (prohibited conduct)”). On pages 1 and 2 of the guide (6<sup>th</sup> and 7<sup>th</sup> page of **State’s Exhibit 3**), the Public Service subsection cites **verbatim** to § 10-16-3(B), and refers to Senate Rule 26-1 (A) and House Rule 26-1 (A). The Public Trust subsection cites to § 10-16-3(A) of the Governmental Conduct Act. Further, on page 7 of the guide, Procedures, the penalties are delineated for violations of the Act, i.e., “In addition to civil *and*

criminal procedures, which may be initiated by the secretary of state, the attorney general, or a district attorney, there are several other ways in which action against a member or candidate may be initiated.” [emphasis added].

The Governmental Conduct Act mandates:

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.

See § 10-16-17, Criminal Penalties. [emphasis added]

It is clear that the Legislature intended willful and knowing violations to be **criminal** offenses, as the Act distinguishes remedies for *unintentional* violations:

“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.”

See § 10-13-13.1 (B), Education and Voluntary Compliance.

Further, §10-16-14 creates enforcement procedures, specially carving out the role of the District Attorney as prosecutor for violations. This section does not limit prosecution to felony matters by virtue of the canons of construction, i.e., the New Mexico Legislature did not intend, by its clear language, to limit prosecution to simply a few specifically delineated felony offenses dispersed throughout the Act.

If they had in fact intended this, the Act would not have addressed the matter of misdemeanor charges for violations of *any* provision of the Act. (“unless specified otherwise”, See § 10-16-17). The phrase “unless specified otherwise” refers to the level of the crime (felony vs. misdemeanor) and *not* whether a violation of a particular provision is “excused” from being charged as a criminal offense under the plain meaning of the statute.

The Court’s concern in ¶ 6 of its first Order, i.e., “it is not clear what behavior would violate the terms of the provision” is also not a fatal issue for the State’s case (**State’s Exhibit 1**). **State v. Gamlen** 2009-NMCA-073, cited in the Court’s Order, determined that the ordinance pertaining to “failure to maintain lane” was not unconstitutionally vague, because persons of common intelligence did not have to guess at its meaning and differ as to its application. **See also State v. Fleming**, 2006-NMCA-149, ¶ 3 (an ordinance is constitutional if it is reasonably supported by a plain reading of the language in the ordinance). In **Gamlen**, the Court of Appeals reviewed the language of the ordinance in accordance with the canons of construction. 2009-NMCA-073 at ¶ 19-21 (The terms “lawfully” and “lawful” in Section 8-2-1-42 refer to the particular actions of passing, turning, or changing lanes, and a person of common intelligence can reasonably ascertain which passing, turning, or changing lane maneuvers are lawful).



**B. THE ABSENCE OF JURY INSTRUCTIONS IS NOT DETERMINATIVE OF WHETHER A STATUTE IS “CRIMINAL”, AND IS NOT RELEVANT TO THE ISSUE AT BAR.**

The State concedes that there is not a Uniform Jury Instruction for this charge. However, the General Use Note of Criminal Jury Instructions provides that “for a crime in which no uniform jury instruction on essential elements is provided, an appropriate instruction stating the essential elements must be drafted.” NMRA (1978), General Use Note (2011 Edition at page 360). The Note further states that “for other subject matters not covered by a uniform instruction, the court may give an instruction which is brief, impartial, free from hypothesized facts and otherwise similar in style to these instructions.” **Id.** See also **State v. Martinez-Rodriguez** 2001-NMSC-021 (“the instruction correctly reflected the language of the statute and contained all the essential elements of the offense); **State v. Cawley**, 110 N.M. 705, 710, 799 P.2d 574, 579 (1990) (“Generally, an instruction that parallels the language of the statute and contains all essential elements of the crime is sufficient.”); **State v. Gunzelman**, 85 N.M. 295, 301, 512 P.2d 55, 61 (1973) (holding that “instructions are sufficient which substantially follow the language of the statute or use equivalent language”), overruled on other grounds by **State v. Orosco**, 113 N.M. 780, 783, 833 P.2d 1146, 1149 (1992).

In this case, the charge pertains to a number of behaviors exhibited by the defendant indicating nonfeasance. It is not accurate to say that the Court would

“have to instruct the jury” that if they found the defendant guilty of the other charges, that they must find the defendant guilty of the misdemeanor. These counts (felonies and misdemeanor) are related but are mutually exclusive based upon the fact pattern.

Moreover, many uniform jury instructions do not delineate the specific fact pattern in the essential elements. For example, UJI-14-201, Willful and Deliberate Murder, only lists three elements: that the defendant killed a person, that the killing was deliberate, and that the incident happened in New Mexico on a particular date. There is no requirement for delineating how the killing was accomplished. The particular facts are for parties to develop (or negate) during the course of a trial and to argue during closing.

**C. § 10-16-3(B) IS NOT VAGUE OR OVERLY BROAD.**

While the lower court stopped short of ruling on whether the Governmental Conduct Act provision was unconstitutionally vague or overly broad, Petitioner asks this Court to make this determination.

A challenge to a statute based on a claim of vagueness is analyzed in light of the facts of each particular case. See *State v. Wood*, 117 N.M. 682 at 687 (Ct. App. 1994). The fact that a term or phrase is not defined within a statute does not necessarily render that statute unconstitutional. See *State v. Jim*, 107 N.M. 779 at 783 (Ct. App. 1988). See also *State v. Sanders*, 96 N.M. 138 at 140 (Ct. App.

1981) (holding that the word “knowing” has an established meaning although not defined in the statute). Claims of vagueness in New Mexico are ordinarily analyzed by application of the rules of statutory construction. **See State v. Luckie**, 120 N.M. 274 at 277 (Ct. App. 1995).

First and foremost, the constitutionality of a statute is presumed. **See City of Albuquerque v. Jones**, 87 N.M. 486 at 488 (1975). Second, a statute is construed in a manner so as to uphold it against a claim of unconstitutionality if a reasonable and practical construction can be given to the language in question. **See State v. Segotta**, 100 N.M. 498 at 500 (1983). **See also Luckie**, 120 N.M. at 177-78. Third, the statute is considered as a whole in determining legislative intent, and words and phrases of the statute are given their “generally accepted meaning.” **Segotta**, 100 N.M. at 500.

The language in § 10-16-3(B) is sufficient to withstand the constitutional challenge of vagueness. There are definitions of the terms contained in New Mexico case law. **See e.g., In re: Morris** 74 N.M. 679, dissent (defining integrity). When phrases or words are “readily susceptible of definition by resort to case law”, persons of “ordinary intelligence” do not have to speculate as to the meaning of the terms. **See State v. Luckie**, 120 N.M. at 277-278.

New Mexico case law has indicated that the intent of the Legislature is to be sought first in the meaning of the words used, and when they are free from

ambiguity, no other means of interpretation should be used. See **Arnold v. State**, 94 N.M. 381 (1980). See also **State v. Pitt**, 103 N.M. 778 (1986). The New Mexico Supreme Court opined in **State v. Ellenberger** that “it is not the business of the courts to look beyond the plain meaning of the words of a clearly drafted statute in an attempt to divine the intent of the Legislature”. 96 N.M. 278 at 288 (1981).

That said, while some words/phrases contained in § 10-16-3(B) may not be specifically defined in case law, they still may be deemed sufficient, as the terms have acquired reasonable certainty by established usage, interpretation, and a settled common sense meaning, and may be defined in Black’s Law Dictionary and/or Webster’s Dictionary. *Id.*, citing to **People v. McGirr**, 198 Cal. App. 3d 629, 243 Cal. Rptr. 793, 796 (Ct. App. 1988). See also **In re Termination of Parental Rights of Reuben and Elizabeth O. v. Dept. Human Services**, 104 N.M. 644 (Ct. App. 1986) (holding that “foreseeable future” does provide a commonly understood standard); **State v. Baldonado**, 92 N.M. 272 (Ct. App. 1978); **Rio Grande Kennel Club v. City of Albuquerque**, 2008-NMCA-093; **Gruschus v. Bureau of Revenue**, 74 N.M. 775 (1965).

The concepts used in § 10-16-3 are commonly used words, and defined either by case law or in Black’s Law Dictionary/Webster’s Dictionary. The language in §10-16-3(B) is sufficient to withstand the constitutional challenge of

vagueness. While some words/phrases contained in § 10-16-3(B) may not be specifically defined in case law, they still may be deemed sufficient, as the terms have acquired reasonable certainty by established usage, interpretation, and a settled common sense meaning, and may be defined in Black's Law Dictionary and/or Webster's Dictionary. *Id.*, citing to **People v. McGirr**, 198 Cal. App. 3d 629, 243 Cal. Rptr. 793, 796 (Ct. App. 1988). See also **State v. Baldonado**, 92 N.M. 272 (Ct. App. 1978). If a term is capable of reasonable application to varying fact patterns, it is constitutionally sufficient. See **State v. Jim**, 107 N.M. 779 at 783-784 (Ct. App. 1988).

Defendant had claimed that the statute is overly broad because it "criminalizes speech that is protected by the First Amendment". The "speech" in this case at bar consists of the defendant's attempt to influence judicial appointments and the selection process with clear, unequivocal, and articulable threats and promises. This speech is simply not protected by the First Amendment because it constitutes clear and definable criminal activity. Defendant's generalization is absurd, and cannot be applied to a myriad of crimes, including assault (threats) and solicitation (particularly when the "solicitee" does not accept the request). Taking the defendant's perspective would ridiculously exonerate those who solicit murder or threaten others – and these acts are "speech" crimes. In these types of cases (including this case at bar), the focus of criminality is



directed at conduct and intent. What particular words were spoken are essentially irrelevant. **See State v. Gattis**, 105 N.M. 194 at 197 (1986). **See generally State v. Cruz**, 110 N.M. 780 (Ct. App. 1980).

Further, the defendant claimed that provocative speech and speech that attempts to influence the selection process is “legal activity.” However, defendant erred in this statement. First, whether the charges constitute “legal activity” is an issue for the fact-finder. Second and more importantly, provocative speech may not always be protected under the First Amendment. **See State v. Gattis**, 105 N.M. 194 at 198 (Ct. App. 1986). The **Gattis** Court reaffirmed the test to determine what speech is protected by the First Amendment, i.e., courts must balance the right against other state interests. **Id.** In this case at bar, the state interests regarding members of the judiciary are clearly reflected in the Judicial Code of Conduct and case law. **See, e.g., In Re: William A. Vincent**, 2007-NMSC-056 (there is a compelling state interest of judicial impartiality). A judge does not lose all free speech rights when assuming the Bench; however, when a judge “fails to recognize and properly exercise unique power and responsibility”, the judge endangers the justice system. **Id.** at ¶ 21.

The United States Supreme Court has discussed the issue of regulation of conduct that may be protected by the First Amendment. **See United States v. O’Brien**, 391 U.S. 367 (1968). The **O’Brien** Court promulgated a four-part test:

whether the regulation is within the constitutional powers of the government; whether the regulation furthers an important or substantial government interest; whether the governmental interest is unrelated to the suppression of free expression; and, whether the restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest. **Id.** at 377.

In this case, the Governmental Conduct Act was within the constitutional powers of the Legislative Branch in New Mexico. The Act furthers an important/substantial governmental interest (establishing standards of performance and behavior for legislators, public officials, and employees) which is unrelated to the express purpose of suppressing speech. As to the last prong, the restrictions on free speech are at best, minimal. There are many alternative and acceptable channels other than threats and bribery that the defendant could have chosen to employ to express his preferences or opinions. See generally **State v. Ongley**, 118 N.M. 431 (Ct. App. 1994).

**D. THE GOVERNMENTAL CONDUCT ACT IS NOT COMPARABLE TO THE CODE OF JUDICIAL CONDUCT FOR THE PURPOSES OF THIS ANALYSIS.**

The Code of Judicial Conduct had been implemented for at least a decade prior to the decision in **State v. Maestas**, 2007-NMSC-001, 140 N.M. 836 (2007) (holding that the Governmental Conduct Act specifically excluded the judiciary). Subsequent to **Maestas**, the New Mexico Legislature amended the Governmental

Conduct Act to apply to the judiciary.

The presumption in New Mexico is that the legislature is “well-informed as to existing statutory and common law”. See **Inc. County of Los Alamos v. Johnson**, 108 N.M. 633 at 634, 776 P.2d. 1252 at 1253 (1989). The fact that the New Mexico Legislature enacted the judiciary inclusion amendment to the Governmental Conduct Act reflects the Legislature’s belief that some forms of judicial misconduct were subject to criminal penalties as well as Judicial Standards Commission referrals, and that other forms of judicial misconduct were only subject to adjudication by the Judicial Standards Commission. It is not the role of courts to question the wisdom, policy or justness of legislation. See **U.S. Xpress, Inc. V. N.M. Taxation and Revenue Dept.**, 2006-NMSC-017, 139 N.M. 589, 136 P.3d. 999 (2006). See also **State v. Cleve**, 1999-NMSC-017, 127 N.M. 240, 980 P.2d. 23 (1999).

The lower court in this case at bar stated that if § 10-16-3 (B) were a criminal statute, then any violation of NMRA 21-100 or any other section of the Code of Judicial Conduct would “also qualify” as a violation of § 10-16-3(B), and a member of the judiciary could be subject to criminal prosecution. This is clearly erroneous.

In an analogous ruling, a similar issue was litigated. See **Ortiz v. Taxation and Revenue Dept.**, 1998-NMCA-027, 124 N.M. 677. 945 P.2d. 109 (Ct. App.

1998). In **Ortiz**, the Petitioner's attorney argued that the Rules of Professional Conduct prohibited the same type of conduct as § 10-16-8( C), and resultantly, that the Rules should control over the Governmental Conduct Act. **Id.** The Supreme Court held that the Governmental Conduct Act and the Rules of Professional Conduct prohibit different types of conduct, and that the Governmental Conduct Act supplements the disciplinary rule. 1998-NMCA-027 at ¶ 15-18.

The **Ortiz** Court also declared that the Comment to Rule 16-111 (the Rule in issue) specifically provides that attorneys are subject not only to Rule 16-111, but also to statutes and governmental regulations regarding conflict of interest. **Id.** at ¶ 18. Interestingly, the same provision is included in the Comment section of Rule 21-100 (the Rule of concern to the lower court): "Actual improprieties under this standard include *violations of law*, court rules, or other specific provisions of this Code." [emphasis added].

Because of this dual accountability, the **Ortiz** Court held that an attorney who is a public officer or employee is subject to both Rule 16-111 and § 10-16-6. **Id.** at ¶ 18. This Court by analogy, should arrive at the same holding for the judiciary based on the **Ortiz** analysis.


#### **IV. RELIEF REQUESTED**

This case presents both important procedural and constitutional questions, and is a matter of first impression in New Mexico. As a consequence, Petitioner

implores this Court to issue a Writ of Superintending Control, and/or in the alternative Prohibition and Mandamus.

Specifically, the Petitioner seeks (1) reinstatement of the misdemeanor charge based on the legislative intent to create criminal penalties for violation(s) of the Governmental Conduct Act, (2) a finding that the specific provision § 10-16-3(B) is not vague or overly broad; and (3) a finding that the judiciary is subject to both Rule 20-100 and § 10-16-3.

I, Matthew E. Chandler, having been duly sworn upon my oath, state that I have read the above petition, and that the statements contained in the petition are true and correct to the best of my knowledge. Further Affiant sayeth not.

  
\_\_\_\_\_  
Matthew E. Chandler  
District Attorney (Special Prosecutor)  
417 Gidding St., # 200  
Clovis, NM 88101-7560  
(575) 769-2246

Subscribed and sworn to before me this 12<sup>th</sup> of October, 2011.

  
\_\_\_\_\_  
Notary Public

My Commission expires: March 27, 2013



**CERTIFICATE OF SERVICE BY FACSIMILE AND MAIL**

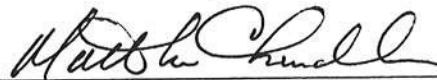
I hereby certify that a true and correct copy of the foregoing Petition for Writ of Superintending Control, or in the Alternative, Writ of Prohibition or Writ of Mandamus was duly service upon the following by facsimile and/or mail on this 12<sup>th</sup> day of October, 2011, and that the original and six (6) copies were delivered to the New Mexico Supreme Court.

The Honorable Leslie Smith  
3<sup>rd</sup> Judicial District Court  
201 W. Picacho Ave., #A  
Las Cruces, NM 88005

Gary King  
Attorney General  
P.O. Box 1508  
Santa Fe, NM 87504-1508

Michael Stout  
Attorney for Michael Murphy  
910 Lake Tahoe Court  
Las Cruces, NM 88007

On the 12<sup>th</sup> day of October, 2011.



Matthew E. Chandler  
District Attorney (Special Prosecutor)  
417 Gidding St., # 200  
Clovis, NM 88101-7560  
(575) 769-2246

**ENDORSED COPY**

STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT

FILED

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STATE OF NEW MEXICO

DISTRICT COURT  
DONA ANA COUNTY, NM

v.

Criminal Cause No. CR-2011-560  
CR-2011-1046  
Judge Leslie C. Smith

**MICHAEL MURPHY,**  
Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS**  
**CRIMINAL COMPLAINT (MISDEMEANOR)**

**THIS MATTER** comes before the Court on Defendant's Motion to Dismiss Criminal Complaint (Misdemeanor), filed on August 25, 2011. The Court finds the motion is well-taken and should be **GRANTED**.

**I. Issues**

1. Defendant raises three issues in the motion to dismiss: 1) whether NMSA § 10-16-3(B) is a criminal statute; whether the provision is unconstitutionally vague; and 3) whether the provision is overly broad. (See Mtn to Dismiss Criminal Complaint.)

**II. Analysis**

2. NMSA § 10-16-3(B) states:

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.

3. Defendant contends that the provision is not a criminal statute, because it "does not state



specific prohibitions which are criminalized.” (Mtn to Dismiss Criminal Complaint at 2.)

The Court agrees.

4. When section 10 is read as a whole, it is clear where the Legislature prohibited specific, named conduct. For example, § 10-16-3(D) states that “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.” Among other things, § 10-16-3.1 prohibits a public officer or employee from “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.” And section 10-16-6 prohibits legislators and other public officers and employees from using or disclosing certain confidential information.
5. Where the Legislature intended to prohibit specific behavior, it stated those prohibitions in clear language. The language used in the provision in question is not so clear – rather than prohibiting certain conduct, § 10-16-3(B) simply states in positive terms how legislators, public officers, and public employees *should* act.
6. Moreover, if this were a criminal statute, it is not clear what behavior would violate the terms of the provision. What behavior would violate “the confidence placed in [a public employee] by the people”? What conduct would fail to “maintain the integrity” of “the high responsibilities of public service”? The wording – if it were a criminal statute – is too vague and subjective to give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also State v. Gamlen*, 146 N.M. 668, 672, 213 P.3d 818, 822 (N.M. App.

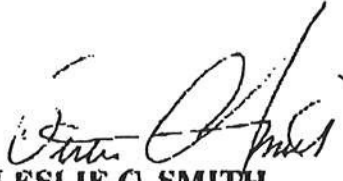
2009).

7. And if this provision was a criminal statute, it would be difficult for the Court to instruct a jury in this case. For example, the State may argue that a public employee guilty of bribery would also be guilty of failing to ethically discharge "the high responsibilities of public service" as specified in § 10-16-3(B). Defendant has previously been charged under a felony bribery statute. So here, the Court would have to instruct the jury that if "you find the Defendant guilty of Count I or II or III or IV, you *must* find Defendant guilty of the misdemeanor charge" at issue. In the Court's experience, I have never instructed the jury that if you find defendant guilty of crime A you must find defendant guilty of crime B. To argue to the contrary would mean that bribery or solicitation (felonies) may not be determined to be unethical conduct by the jury.<sup>1</sup>
8. The Court does not find it necessary to go further into whether the provision is unconstitutionally vague or overbroad, however, because the Court finds that this provision is not a criminal statute.

**WHEREFORE,**

**IT IS ORDERED** that the Motion to Dismiss Criminal Complaint (Misdemeanor) is **GRANTED.**

**IT IS SO ORDERED.**

  
**LESLIE C. SMITH**  
**DISTRICT JUDGE PRO TEMPORE**

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<sup>1</sup> The State did assure the Court during oral arguments on this motion that the misdemeanor is not a lesser included offense.

**ENDORSED COPY**

STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO

**FILED**

2011 SEP 29 PM 4:48

DISTRICT COURT  
DONA ANA COUNTY, NM

v.

Criminal Cause No. CR-2011-560  
CR-2011-1046  
Judge Leslie C. Smith

**MICHAEL MURPHY,**  
Defendant.

**ORDER ON STATE'S MOTION TO RECONSIDER ORDER ON DEFENDANT'S  
MOTION TO DISMISS CRIMINAL COMPLAINT (MISDEMEANOR)**

**THIS MATTER** comes before the Court on the State's Motion to Reconsider Order on Defendant's Motion to Dismiss Criminal Complaint (Misdemeanor), filed on September 26, 2011. For the reasons stated herein, the Court finds the motion is not well-taken and should be **DENIED.**

1. As discussed in the original order, the Court is not convinced that NMSA § 10-16-3(B) is a criminal statute for the reasons set forth in the original opinion.
2. Nowhere in its response brief (to the original motion) nor its brief for this motion to reconsider does the State set forth any plausible explanation about how the Court will instruct a jury on NMSA § 10-16-3(B). Furthermore, at oral argument on the original motion and again at oral argument on this motion to reconsider, the Court invited counsel for the State to provide some kind of guidance on how the Court would instruct the jury on NMSA § 10-16-3(B). The State was unable to come up with anything helpful.

**STATE'S  
EXHIBIT  
2**

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3. Article VI § 32 of the New Mexico Constitution establishes a "judicial standards commission," the function of which is to investigate and decide on discipline for justices, judges and magistrates for "willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance . . . ." NM Const. Art. VI § 32; *see also* NMSA § 34-10-2.1. The Judicial Standards Commission ("JSC") uses the Code of Judicial Conduct as a guide in its investigations and decisions. *See* NMRA § 21-900(A) ("Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control.")

4. NMSA § 10-16-3(B) states:

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.

5. Section 21-100 of the Code of Judicial Conduct states:

A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

NMRA § 21-100.

6. If NMSA § 10-16-3(B) were a criminal statute, it would appear that any violation of NMRA § 21-100 would also qualify as a violation of NMSA § 10-16-3(B). NMSA § 10-16-17 provides that a violation of § 10-16-3(B) is a misdemeanor punishable "by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year or both." NMSA § 10-16-17. If NMSA § 10-16-3(B) were a criminal statute, then any violation of NMRA § 21-100 (or, presumably, any section of the Code of Judicial

Conduct) would subject a judge to imprisonment for up to a year. It is unlikely that the Legislature intended such a result.

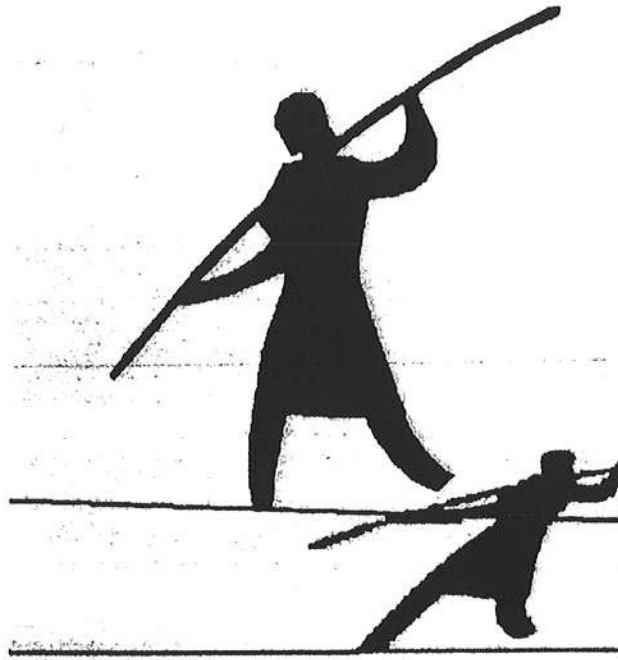
**WHEREFORE,**

**IT IS ORDERED** that the State's Motion to Reconsider Order on Defendant's Motion to Dismiss Criminal Complaint (Misdemeanor) is **DENIED**.

**IT IS SO ORDERED.**

Approved telephonically September 29, 2011  
**LESLIE C. SMITH**  
**DISTRICT JUDGE PRO TEMPORE**

# NEW MEXICO LEGISLATIVE ETHICS GUIDE



**Legislative Council Service**  
*January 2011*

STATE'S  
EXHIBIT  
**3**

New Mexico Legislative Council Service  
411 State Capitol  
Santa Fe, New Mexico 87501  
(505) 986-4600  
[www.nmlegis.gov](http://www.nmlegis.gov)  
202.182994

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Several sources of authority govern the conduct of legislators: the constitution of New Mexico, statutes, the rules of the house and senate and advisory opinions from the various ethics committees. This guide captures the essence of the law, rule or opinion cited as it applies to legislators. Members are strongly urged to consult the specific law, rule or opinion.

All legislators should become familiar with the following acts, which appear in full in the Appendix section of this guide.

**Governmental Conduct Act**

(Chapter 10, Article 16 NMSA 1978)

**Lobbyist Regulation Act**

(Chapter 2, Article 11 NMSA 1978)

**Campaign Reporting Act**

(Sections 1-19-25 through 1-19-36 NMSA 1978)

**Financial Disclosure Act**

(Sections 10-16A-1 through 10-16A-8 NMSA 1978)

**Gift Act**

(Chapter 10, Article 16B NMSA 1978)

In addition, legislators who do business with the state should also pay particular attention to the **Procurement Code** (Sections 13-1-28 through 13-1-199 NMSA 1978), which applies to many state purchases.

The rules of the house and the senate govern the specific conduct of house and senate members. Each house adopts its own rules. Copies of the rules are included in the legislative handbook and are posted on the legislature's web site ([www.nmlegis.gov](http://www.nmlegis.gov)). Advisory opinions are also posted on the web site.

This guide divides the parameters of legislative conduct into two categories: what you must do (required conduct) and what you must not do (prohibited conduct). What you must do is generally related to campaign reporting and financial disclosure. What you must not do generally relates to the jobs you may not hold, the contracts into which you may not enter and the ways in which you must separate your legislative life from your business and your family life.

You may contact any of the following agencies for further assistance with ethics questions.

Attorney General Gary King  
P.O. Box 1508  
Santa Fe, New Mexico 87504  
(505) 827-6000

Secretary of State Dianna J. Duran  
State Capitol North, Suite 300  
Santa Fe, New Mexico 87503  
(505) 827-3600

Legislative Council Service  
411 State Capitol  
Santa Fe, New Mexico 87501  
(505) 986-4600



## **REQUIRED CONDUCT**

### ***Campaign Fund Reporting***

In a non-election year or in a year in which a legislator is not a candidate, a legislator shall file a report of campaign expenditures and contributions, or a statement of no activity, on the second Mondays in April and October. In an election year in which a legislator is a candidate, a legislator shall file on the second Monday in April, the second Monday in May, the second Monday in September, the second Monday in October, the Thursday before a primary or general election and 30 days after a primary or general election. In addition, any contribution of \$500 or more received in the week before a primary or general election must generally be reported within 24 hours (Subsections A and B of Section 1-19-29 NMSA 1978).

### ***Employment***

Members shall attempt to ensure that their private employment does not impair their impartiality (Senate Rule 26-1(B)(2), House Rule 26-1(B)(2)).

### ***Ethics***

Members shall attend a minimum of two hours of ethics continuing education and training biennially (Subsection E of Section 10-16-11 NMSA 1978, Senate Rule 26-2, House Rule 26-2).

Members shall sign a code of ethics (Senate Rule 26-2, House Rule 26-2).

### ***Financial Disclosure***

Each legislative candidate shall file a financial disclosure statement upon becoming a candidate. Members shall, during the month of January, file financial disclosure statements. The statements shall set out all sources of gross income greater than \$5,000, a general description of New Mexico real estate owned, New Mexico business interests of \$10,000 or more, memberships on for-profit boards, the name of each state agency that was sold \$5,000 or more in goods or services in the previous year and each state agency before which they represented or assisted clients in the course of employment (Subsections A and C of Section 10-16A-3 NMSA 1978).

### ***Lobbyist Expenditures***

Lobbyists and lobbyists' employers shall report every expenditure, even if unrelated to lobbying, and political contributions made on behalf of members (Subsection A of Section 2-11-6 NMSA 1978). Although members face no requirement under this section, they should be aware of the requirement on lobbyists and lobbyists' employers.

### ***Public Service***

Members shall conduct themselves in a manner that justifies the confidence placed in them by the people and maintain the integrity of and discharge ethically the high responsibilities of public service (Subsection B of Section 10-16-3 NMSA 1978, Senate Rule 26-1(A), House Rule 26-1(A)).

***Public Trust***

Members shall treat their government positions as public trusts and use the powers and resources of their offices only to advance the public interest (Subsection A of Section 10-16-3 NMSA 1978).

***Voting - House***

Representatives shall vote on each question unless excused by a majority vote (House Rule 7-5).

***Voting - Senate***

Senators shall vote on each question unless they have a direct personal or pecuniary interest in the question (Senate Rule 7-5).

## **PROHIBITED CONDUCT**

### ***Appearance Before a State Agency***

Members shall not appear for, assist or represent anyone before a state agency, unless without compensation or for the benefit of a constituent, except attorneys or other professionals engaged in their professions, and in those cases, members shall refrain from references to their legislative capacities and from communications on legislative stationery (Subsection B of Section 10-16-9 NMSA 1978, Senate Rule 26-1(C)(1), House Rule 26-1(C)(1)).

### ***Business Cards***

Members may distribute legislative business cards in virtually any situation because business cards serve only to introduce the legislator, but members should not distribute legislative business cards when they are campaigning (Interim Legislative Ethics Committee, Advisory Opinion No. 97-1).

### ***Business with the State or a Municipality***

Members shall not be directly or indirectly interested in any contract with the state or a municipality authorized by any law passed during the legislators' terms and for one year thereafter (Article 4, Section 28 of the constitution of New Mexico).

Members and their families shall not enter into any contract with a state agency unless the contract is awarded in accordance with the Procurement Code, except they shall not be eligible for sole source or small purchase contracts (Subsection A of Section 10-16-9 NMSA 1978, Senate Rule 26-1(D)(1), House Rule 26-1(D)(1)).

Members shall not represent another person in a sale to a state agency unless the transaction occurs pursuant to the Procurement Code (Senate Rule 26-1(C)(2), House Rule 26-1(C)(2)).

### ***Campaigns - Funds and Contributions***

Candidates shall not use campaign funds except for expenditures for their own campaigns; donations to another candidate covered by the Campaign Reporting Act, which includes only state, county and judicial candidates, a political committee or a political party; donations to the state general fund; donations to certain charitable, educational, religious or governmental organizations; or refunds to contributors, except that members may use campaign funds for expenditures that are reasonably related to performing the duties of the office, except personal and legislative session living expenses. The attorney general's office has concluded that the restriction limiting a candidate to making donations only to other candidates covered by the act may be vulnerable to legal challenge and that it is permissible to donate to any political candidate, including federal candidates (Subsection A of Section 1-19-29.1 NMSA 1978, Attorney General Advisory Letters to Legislative Council Service, July 23, 2009 and June 24, 2010).

A legislative candidate shall not accept a campaign contribution from a political

committee that is greater than \$5,000 or from any other entity that is greater than \$2,300 in a primary or general election (Subsection A of Section 1-19-34.7 NMSA 1978).

Members and candidates shall not solicit campaign contributions between January 1 and adjournment of a regular session, nor from the time a proclamation has been issued calling a special session and the adjournment of that session (Subsection A of Section 1-19-34.1 NMSA 1978).

Lobbyists and lobbyists' employers shall not make campaign contributions to legislators or legislative candidates between January 1 and adjournment of a regular session, nor from the time a proclamation is issued calling for a special session and adjournment of that session (Subsections B and C of Section 2-11-8.1 NMSA 1978).

Members shall not solicit or receive contributions for any purpose on the floor or in the lobby of the senate or the house (Senate Rule 1-5, House Rule 1-5).

#### ***Campaigns - Lobbyists***

Lobbyists shall not serve as campaign chairs, treasurers or fundraising chairs for candidates (Subsection A of Section 2-11-8.1 NMSA 1978).

#### ***Civil Office***

Members shall not, during the term for which they were elected, be appointed to any civil office in the state, nor shall they within one year thereafter be appointed to any civil office created, or the emoluments of which were increased, during such term (Article 4, Section 28 of the constitution of New Mexico).

#### ***Confidential Information***

Members shall not use confidential information acquired by virtue of their offices for private gain (Section 10-16-6 NMSA 1978, Senate Rule 26-1(D)(3), House Rule 26-1(D)(3)).

#### ***Employment***

Members shall not accept employment if the members know that it is being afforded them with the intent to influence their conduct (Senate Rule 26-1(B)(5), House Rule 26-1(B)(5)).

#### ***Kickbacks, Bribes, Money and Gifts***

Members shall not solicit or receive a kickback, bribe or rebate in exchange for referring business to a person who may be paid with public money (Section 30-41-1 NMSA 1978).

Members shall not vote or use their influence for or against any pending matter in consideration of money or any other thing of value, or solicit money or any other thing of value, for their votes or influence (Article 4, Section 39 of the constitution of New Mexico).

Legislators shall not request or accept anything of value that is conditioned upon promised performance of an official act (Subsection D of Section 10-16-3 NMSA 1978; Section

30-24-2 NMSA 1978).

Members shall not accept anything of value that improperly influences an official act (Senate Rule 26-1(B)(1), House Rule 26-1(B)(1)).

Members shall not receive compensation as a state officer or employee or compensation unauthorized by law for rendering services, advice or assistance as legislators (Section 2-1-3 NMSA 1978, Senate Rule 26-1(B)(3), House Rule 26-1(B)(3)).

Members shall neither request nor receive an honorarium of money, or any other thing of value in excess of \$100, for a speech or service that relates to the performance of public duties (Section 10-16-4.1 NMSA 1978).

Members, their spouses and their dependent children may not accept a gift worth more than \$250 from lobbyists, lobbyists' clients, persons doing business or seeking to do business with the legislature or persons who will be financially affected by the member's official duties in a way that is greater than the effect on the public generally or a substantial class of persons to which the donor belongs (Subsection A of Section 10-16B-3 NMSA 1978).

A lobbyist, lobbyist's client or government contractor shall not give gifts worth more than \$1,000 in a year to a member (Subsection B of Section 10-16B-3 NMSA 1978).

Members shall not accept gifts, other than lawfully collected campaign contributions, from persons affected by legislation where it is known that the purpose of the donation is either to influence the member or to reward the member's actions (Senate Rule 26-1(B)(4), House Rule 26-1(B)(4)).

***Railroad Travel***

Members shall not use a pass for or receive transportation over any railroad upon terms not open to the public (Article 4, Section 37 of the constitution of New Mexico).

***Special Privileges and Private Gain***

Members shall not grant to, or obtain a special privilege or exemption for, themselves or others if the privilege or exemption is not readily available to members of the general community or class to which the beneficiary belongs (Senate Rule 26-1(D)(2), House Rule 26-1(D)(2)).

Members shall not use the powers and resources of their offices to obtain personal benefits or pursue private interests incompatible with the public interest (Subsection A of Section 10-16-3 NMSA 1978).

Members shall not use their offices for private gain (Senate Rule 26-1(A), House Rule 26-1(A)).

***Stationery***

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Members shall use official legislative stationery, which is stationery that contains the state seal, only for matters that relate to the conduct of legislative business (Interim Legislative Ethics Committee, Advisory Opinion Nos. 96-1 and 97-1).

Members should refrain from using official legislative stationery to write letters to state agencies on behalf of constituents who are immediate family members, except when the immediate family member is a part of a larger class of similarly situated constituents (Interim Legislative Ethics Committee, Advisory Opinion No. 97-2).

## PROCEDURES

In addition to civil and criminal procedures, which may be initiated by the secretary of state, the attorney general or a district attorney, there are several other ways in which action against a member or candidate may be initiated.

### *Complaints*

Any legislator or member of the public may file a written, sworn complaint with the New Mexico legislative council alleging that a legislator has acted unethically (Subsection D of Section 2-15-9 NMSA 1978). The complaint will be referred to the interim legislative ethics committee.

Any person may file a written complaint with the secretary of state alleging that provisions of the Financial Disclosure Act, Campaign Reporting Act or Lobbyist Regulation Act have been violated (Subsection A of Section 10-16A-6 NMSA 1978, Subsection B of Section 1-19-34.4 NMSA 1978, Subsection B of Section 2-11-8.2 NMSA 1978).

Any senator may file a complaint with the senate ethics committee alleging unethical conduct by a senator (Senate Rule 9-13-3).

Any member of the public and any representative may file a complaint with the house rules and order of business committee alleging unethical conduct by a representative (House Rule 9-13-2).

### *Ethics Committee Advisory Opinions*

Any legislator may seek an advisory opinion from the interim legislative ethics committee or, during a session, the house rules and order of business committee or the senate ethics committee (Subsection C of Section 2-15-9 NMSA 1978, Senate Rule 9-13-2, House Rule 9-13-1).

### *Expulsion*

Any member may move under Article 4, Section 11 of the constitution of New Mexico for the expulsion of another member upon a vote of two-thirds of the chamber's membership.