STATE ETHICS COMMISSION

# ADVISORY OPINION NO. 2022-10

December 9, 2022[1]

## QUESTIONS PRESENTED[2]

An individual served as a deputy secretary of a state agency. After leaving the agency, may the individual work on a contractual basis for a healthcare corporation during the year after the individual separated from the state agency?

After the one-year separation period may this individual join the healthcare corporation as an employee?

## ANSWER

Yes, to both questions.

[1] This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

[2] The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." NMSA 1978, § 10-16G-8(A)(2) (2019). On August 3, 2022, the Commission received a request for an informal advisory opinion that detailed the issues as presented herein. *See* 1.8.1.9(A) NMAC. Commissioner Bluestone requested that it be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

## ANALYSIS

1. Relevant law

The Governmental Conduct Act, NMSA 1978, Sections 10-16-1 to -18 (1993, as amended through 2019) prohibits a former government employee from representing a person or corporation in dealings with the government in a matter in which that employee personally and substantially participated while a state employee.[3] The Governmental Conduct Act does not define "matter,"[4] and New Mexico courts have not addressed whether one or more matters are the same in the context of subsection 10-16-8(B). Subsection 10-16-8(B), however, is modeled on Rule 16-111(A)(2) NMRA and ABA Model Rule of Professional Conduct 1.11(a)(2).[5] While the individual who requested the advice is not an attorney, the comparison to Rule 16-111 NMRA is helpful in this assessment. The rule

> represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the

[3] *See* NMSA 1978 § 10-16-8(B) (2011).

[4] *See* NMSA 1978, § 10-16-2 (2011).

[5] Rule 16-111(A)(2) NMRA and ABA Model Rule 1.11(A)(2) provide:

> [A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Like the Governmental Conduct Act, these rules are "intended to deal with what [is] conventionally referred to as the "revolving door" situation of lawyer transfer between government and private employment." *See* Discussion Appendix to Proposed Model Rule of Professional Conduct 1.11 at the February 1983 ABA Midyear Meeting, in ABA Ctr. for Prof'l Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013 279 (Art Garwin ed., 2013); *see also* Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 533 (Summer 1996) (collecting state statutes, including subsection 10-16-8(B), which "are the same or similar to the standard imposed by . . . ABA Model Rule 1.11").

> special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.

Rule 16-111 NMRA, comment [4]; *accord* ABA Model Rule of Professional Conduct 1.11 cmt.

The Governmental Ethics Task Force, created by Laws 1992, Chapter 109, and signed into law by Governor Bruce King, drafted the Governmental Conduct Act's revolving door provisions. The task force described subsection 10-16-8's purposes in similar terms:

> The amendments proposed by the task force preclude public officers and employees, after leaving government service, from representing any person before or against the government on specific matters in which the former officer or employee participated personally and substantially while in government. . . . This provision is designed to balance the competing interests involved—ensuring that the government officer or employee acts only in the public interest and not in a way that might "feather his or her nest" for post-government employment, while at the same time not barring the officer or employee from representation before his or her agency for such a long period that it would deter government recruitment of the best talent available.

Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations*, at 19 (N.M. Legislative Council Service Info. Memo. No. 202.90785, Jan. 27, 1993).

Given subsection 10-16-8(B) and Rule 16-111(A)(2)'s shared phrasing and purpose, the definition and interpretation of the word "matter" in the latter context guides the Commission's analysis.[6] Rule 16-111 NMRA and ABA Model Rule of Professional Conduct 1.11 define the term "matter" as follows:

> "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 16-111(E) NMRA; *accord* ABA Model Rule of Prof. Conduct 1.11(e).

In determining whether two or more matters are the same for purposes of subsection 10-16-8(B), the Commission will consider whether the matters' underlying facts, parties, and temporal relationship are the same or overlap substantially. *See Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶ 26, 292 P.3d 466 (concluding that Rule 16-111 "indicate[s] a fact-specific, transactional approach to determining the scope of '[the] matter'") (second alteration original); *see also* Rule 16-111 cmt. [10] ("In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties and the time elapsed.").

Next, subsection 10-16-8(D) of the Governmental Conduct Act provides that "[f]or 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

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[6]*Cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Marquez v. Larrabee et al.*, 2016-NMCA-087, ¶ 12, 382 P.3d 968 (stating that New Mexico courts may look to the Federal Rules of Civil Procedure and caselaw interpreting those rules for guidance in interpreting substantially similar provisions in New Mexico court rules); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (West 2012) (discussing "prior-construction" cannon of statutory interpretation).

state agency or local government agency at which the former public officer or employee served or worked." NMSA 1978, § 10-16-8(D) (2011).

2. Application to the facts presented in the request for advice

The requester is a former deputy secretary who served in state government. The request indicates that the former deputy secretary, through their limited liability company, will work as a contractor for a healthcare corporation during the year after she separated from state government and, after that initial year, the corporation might hire her as an employee. Under the contract, the former deputy secretary will assist in writing a proposal for a contract award and, upon award, direct the implementation of contract services. During the contract period, the requester will not have direct or indirect communications with either the state agency that formerly employed her or other state entities that have responsibilities relating to the contract.

These facts do not indicate that, by contracting with or seeking employment by the healthcare corporation, the former deputy secretary would represent a person or corporation in their dealings with the government in a matter in which the former deputy secretary personally and substantially participated while a state employee. Indeed, because the facts indicate that, during the contract period, the former deputy secretary will not directly or indirectly communicate with state agencies that oversee the contract, it seems the former deputy secretary will not "represent" the healthcare corporation before any state agency, whether on a matter the former deputy secretary previously participated in personally and substantially or otherwise. Accordingly, the former deputy secretary may, as the contract provides, assist in writing a proposal for a procurement and, upon award, direct implementation for the corporation without acting as the corporation's agent before any state agency and triggering either of the prohibitions on representation set out in subsections 10-16-8(B) or (D).

We observe that subsection 10-16-8(B)'s prohibition is perpetual.[7] If, in the future (and perhaps after the contract period expires), the requester's duties for the

[7] *See* 2020 Op. Ethics Comm'n No. 2020-02 at 3 (stating that subsection 10-16-8(B)'s restriction on a former public officer's or employee's representation is stringent because it does not expire) and Office of the New Mexico Attorney General, Governmental Conduct Act Compliance Guide at 37 (2015) ("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

healthcare corporation requires the requester to represent their employer or another on a matter that overlaps with her work for state government, the requester will need to consider whether her participation in the matter, as a former deputy secretary, was personal and substantial. Those facts are not presented in the request, and this advisory opinion does not address them.

We also observe that subsection 10-16-8(A)(2) of the Governmental Conduct Act prohibits a state agency "from entering into a contract with , or tak[ing] any action favorably affecting, any person or business that is: . . . 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." According to the request, the requester did not interact or have communication with the agencies involved in the procurements during her tenure in state government; accordingly, the former deputy cabinet secretary's assistance to a corporation in preparing a written proposal for submission to those agencies does not appear to implicate those agencies' duty not to enter into a contract or take other favorable action under subsection 10-16-8(A)(2).

Finally, under the Governmental Conduct Act, for one year after leaving state employment, former state employees may not represent a person or corporation for pay before the state agency that employed them. *See* § 10-16-8(D). If the requester will have no communications with their former employer, then, again, she would not represent the healthcare corporation before her former state agency and, thus, her contract work for the healthcare corporation would not involve "represent[ation] . . . before" her former employer in violation of subsection 10-16-8(D). Likewise, nothing in subsection 10-16-8(D) prohibits the former deputy cabinet secretary from seeking and obtaining employment with the healthcare corporation, either now or in the future.

## CONCLUSION

The former deputy secretary may work as a contractor for a healthcare corporation during the year after she separated from state employment, so long as

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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.").

she does not represent the healthcare corporation before her former state agency for pay. After the one-year "cooling off" period, the former deputy cabinet secretary may seek employment with the healthcare corporation, but may not represent the healthcare corporation or another person before the government on any matter in which she personally and substantially participated while a state employee.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**
**JEFFREY L. BAKER, Commissioner**
**STUART M. BLUESTONE, Commissioner**
**HON. GARREY CARRUTHERS, Commissioner**
**HON. CELIA FOY CASTILLO, Commissioner**
**RON SOLIMON, Commissioner**
**JUDY VILLANUEVA, Commissioner**

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