

# NEW MEXICO Lawyer

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## **CHANGING TIMES—**

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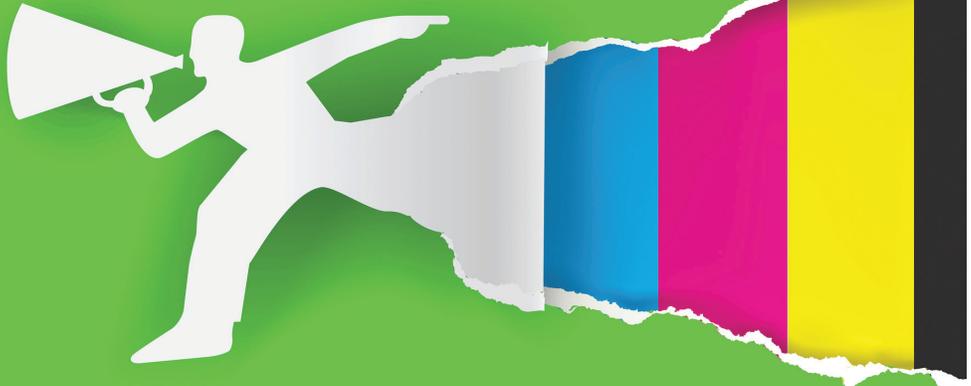


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# Soldiering On In an Era of AUSTERITY

By Sean Cunniff

Although “austerity” is a concept often used to describe economic policies a sea away, New Mexico, with an economy mired in prolonged stagnation, and in an era of shrinking government, has become very much accustomed to the reality of austerity. Austerity has, front and center, increased pressure on public lawyers and decreased access to low-cost legal services.

Austerity—a term often used but perhaps not completely understood—contemplates reductions in government spending to offset declining outputs in the private sector economy. The concept seems relatively intuitive on the surface: as the private economy contracts and government revenues correspondingly decline, government belt-tightening ensues. The government cuts its budget to adapt to fiscal reality, mirroring the economic impacts felt by citizens at work and home. These budgetary cuts result in reductions in government spending, meaning the government contracts in some form and the economic benefits of government spending diminish. While these cuts to government spending serve the outwardly sensible purpose of keeping the government’s books balanced, those same cuts can have the ironic effect of exasperating economic suffering and stagnation.

Austerity has presented a host of challenges for New Mexico. Public lawyers have been on the front lines, confronting these challenges head on. Whether it means undertaking an especially burdensome caseload for an assistant district attorney or public defender, or navigating prolonged vacancies in attorney or support staff positions, public lawyers are among the cast of hardworking public servants keeping New Mexico on track during this difficult period. With optimism growing with respect to the state’s budgetary fortunes, perhaps the time to reinvest in the state’s public law system merits serious consideration.

Austerity has presented a host of challenges for New Mexico. Public lawyers have been on the front lines, confronting these challenges head on.

One need look no further than the New Deal era to understand the benefits of government spending in stabilizing the economy and spurring private-sector growth. The massive public works and other spending components of the New Deal were direct responses to the Great Depression. By comparison, when austerity reaches extreme levels, as it has in Greece, the economic peril can border on existential.

In New Mexico, a struggling state economy and stagnating state revenues have caused a prolonged period of belt-tightening for policymakers in Santa Fe. Because government spending in New Mexico accounts for almost one-quarter of the state’s gross domestic product, static state budgets only further economic distress and depress economic activity.

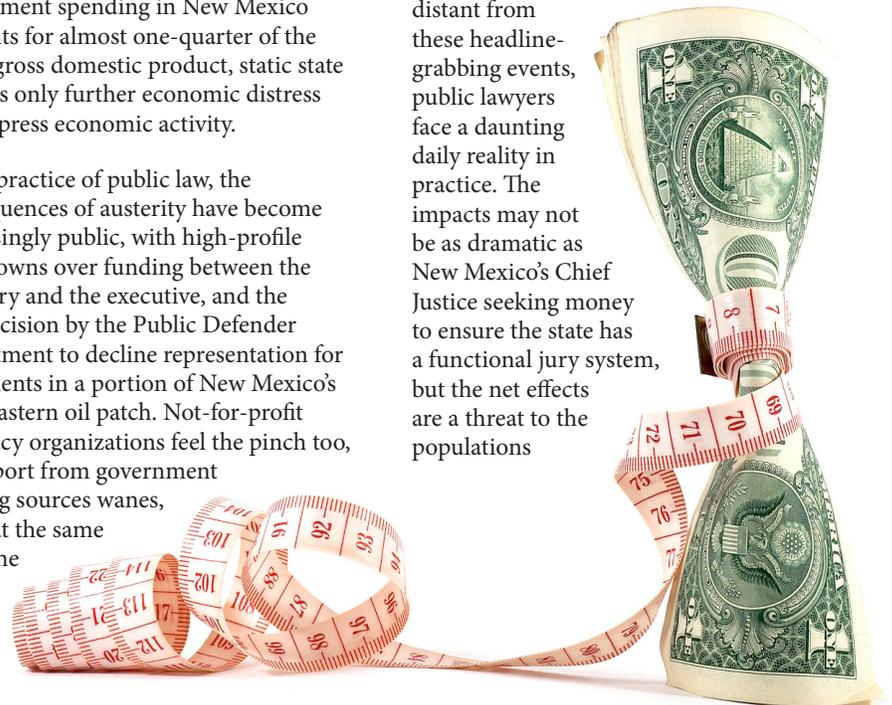
In the practice of public law, the consequences of austerity have become increasingly public, with high-profile showdowns over funding between the judiciary and the executive, and the dire decision by the Public Defender Department to decline representation for new clients in a portion of New Mexico’s southeastern oil patch. Not-for-profit advocacy organizations feel the pinch too, as support from government funding sources wanes, while at the same time, the

strain of a stagnant economy spikes demand for their services.

In the area around Hobbs, where the Public Defender Department took its stand, these converging forces are readily apparent. Tethered to the current downturn in the region’s “boom and bust” energy extraction industry, crime in the area has been on the rise. At the same time, the department’s employees are overworked because of the state’s ongoing budgetary difficulties. For some indigent New Mexicans, a public defender is the only means to secure their basic constitutional right to a lawyer.

The New Mexico Supreme Court’s request for emergency funding made to the Board of Finance likewise implicates foundational aspects of our judicial system, with the Chief Justice seeking an emergency infusion of \$600,000 in emergency funding to maintain a functioning jury system and avoid staff furloughs.

In the trenches, distant from these headline-grabbing events, public lawyers face a daunting daily reality in practice. The impacts may not be as dramatic as New Mexico’s Chief Justice seeking money to ensure the state has a functional jury system, but the net effects are a threat to the populations



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who rely on the work of public lawyers and a diminished work experience and quality of life for public lawyers.

The numbers are telling: according to legislative staff, since 2009 the state government workforce has decreased from approximately 25,000 to 21,500—and more than 20 percent of positions in state government are vacant. At the same time, the demand for many government services has surged, in particular with respect to indigent criminal defense, child welfare, and a host of other services involving public lawyers. At times, state employment has even been subject to a hiring freeze, the most recent of which was just lifted.

Tightening the vise further are decreases in access to legal services from non-profits and legal aid. Both serve to fill gaps in meeting the needs of the indigent and working poor, in both the criminal and civil realms, but especially the latter.

In New Mexico, 28 percent of the state's residents are eligible for civil legal assistance from the Legal Services Corporation, the Congressionally created not-for-profit entity that provides access to the justice system for low-income citizens. The universe of those eligible for LSC services has been expanding, while funding from the state and federal governments has declined. As a result, LSC must turn away most clients that come through its doors.

President Donald J. Trump's budget proposal seeks to eliminate federal government funding for the LSC entirely. In response, American Bar Association President Linda Klein expressed outrage, noting that the organization provides legal services to 1.9 million Americans annually, in every congressional district. Klein noted, "Some of the worthy services the LSC provides include securing housing for veterans, protecting seniors from scams, delivering legal services to rural areas, protecting victims of domestic abuse and helping disaster survivors."

At the same time that public interest lawyers and organizations face drastic cuts in funding, recessionary times have

the ironic effect  
of driving

increased demand for the services of those same lawyers and organizations. The housing crisis, the opioid epidemic, the deleterious impacts of chronic unemployment, rising crime, etc., elevate the need for skilled criminal and civil lawyers working for people without the resources to pay attorney fees.

In addition to obvious difficulties like a shrinking lawyer workforce, government lawyers and other public interest lawyers must navigate a host of other challenges: from overworked support staff, to fewer litigation resources, to overwhelming and ever-changing responsibilities. Adding to the mix is the indignity and real world consequences of stagnating (or often frozen) wages, not to mention increases in the cost of health insurance and other benefits, which have long been the redeeming pecuniary upside of accepting a more modest public interest wage.

For many state employees, austerity has meant dealing with the frustrating reality of failing to keep pace with the cost of living. While cause exists to be grateful for steady, meaningful work and dignity in sharing in the collective sacrifice during tough economic times, such prolonged periods of financial regression can be difficult to stomach. For many, this has meant that the temptation to leave government, or public service altogether, is too powerful to resist.

At the same time, policymakers have made some choices that appear to exasperate the tension between dwindling resources, fewer personnel, and surging demand. A recent episode highlights a curious trend: the New Mexico Public Education Department went before the Board of Finance on Feb. 21, 2017 to request \$540,000 in emergency funding to pay legal fees to outside counsel defending the department in lawsuits challenging the sufficiency of education funding. The legal fees had actually already been paid, in addition to \$1.2 million that had already been appropriated for the current fiscal year. In June, a six-week trial began in which it was estimated that another \$2.5 million in state funds would be required to fund the government's defense.

This is not the only time the state government has declined to field in-house lawyers to defend or prosecute the state's interests. Instead of litigating, the role of many government lawyers is limited to oversight of the work done by private litigation counsel. As was noted

at the Board of Finance meeting last winter by PED's secretary, expenditures by PED's private counsel were subject to "monitoring" by the public lawyers at PED.

In the past, such litigation was handled by government lawyers. In the landmark Zuni litigation, for instance, which concerns the manner in which capital improvements to education facilities are funded, lawyers from the New Mexico Attorney General's Office represented the state. That lawsuit, which is now nearing 20 years of existence, is still being defended by lawyers from the AG's office. The cost of defending the Zuni litigation is a tiny fraction of what has been assembled to fund PED's engagement in a six-week trial.

Going forward, the lessons that New Mexico learns from this era of austerity can inform how we navigate the future.

In the short term, the public law would benefit from an infusion of resources. Taking steps to avoid emergencies like the Supreme Court having to secure funding for juries seems to be a prudent first step. Shoring up such foundational aspects of the judiciary protects our constitutional system from peril.

For those soldiering along in the public law trenches, finding ways to keep compensation more in step with the cost of living would be a welcome development. After so many years of sacrifice, the personal financial and psychological benefits of stabilized wages would be a welcome boost to the ranks of government lawyers. Improving the financial outlook of public lawyers would also undoubtedly serve to keep quality lawyers working inside of government and in the public interest.

Long-suffering core functions, like the state's district attorneys and public defenders, are also long overdue for better compensation and improved staffing levels.

Finally, perhaps this is the time to consider upping the ranks of government lawyers. By bringing in and retaining more lawyers with litigation chops and other core skills, reliance on private counsel can be reduced. At the same time, the state could shore up its capacity to effectively defend and prosecute litigation. ■

*Sean M. Cunniff is an assistant attorney general with the Attorney General's Office. He is a past chair of the State Bar Public Law Section.*



# A LONG TIME COMING:

## New Mexico Legislature Adopts Uniform Rulemaking Procedures

By Bill Brancard



The 2017 Legislature achieved a milestone for New Mexico administrative law with the passage of uniform procedures for rulemaking by state agencies. House Bill 58 (HB 58)<sup>1</sup> amends the State Rules Act to provide requirements for public notice, comment periods, and public hearings prior to the adoption of a rule change along with standards for developing a record, explaining the rule change, and filing the rule. While previous attempts to adopt a uniform rulemaking bill have failed, this year the sponsors of HB 58, Senator Daniel Ivey-Soto and Representatives Linda Trujillo, Nate Gentry and Tomás Salazar, navigated the bill through committees and floor debates, where it was amended several times, and achieved final passage and the Governor's signature.

HB 58 is the culmination of a lengthy effort to provide uniform administrative rulemaking procedures for New Mexico. Almost a half century ago, the Legislature passed the New Mexico Administrative Procedures Act (NMAPA)<sup>2</sup>, which included rulemaking standards, but then failed to apply the NMAPA to any agency. Since then, rulemaking procedures have appeared in various substantive laws, but no law required that every agency provide

basic process protections such as public notice and hearing. The New Mexico Supreme Court, meanwhile, determined that “[t]here is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory only.”<sup>3</sup>

The recent push for uniform rulemaking standards began with a task force which, in 2010, drafted rulemaking legislation based on the newly revised Model State Administrative Procedures Act. Bills based on the task force proposal were introduced in several sessions and failed. HB 58 is a departure from the task force's proposal but maintains the idea of housing rulemaking procedures in the State Rules Act, rather than in the NMAPA.

### Purposes and Impacts of HB 58

The legislation serves several purposes. First, there are the goals of uniformity and the need to provide basic procedures for agencies that currently lack them. Second, the procedures in HB 58 focus on increased notice to the public during the rulemaking process and providing greater transparency about the authority and technical support for an agency's rule proposal. The impact of HB 58 on agencies will vary depending on the agency's current requirements for rulemaking. Much of the rulemaking structure in HB

58 is already followed by most agencies. Some specific requirements will likely be new to agencies but the greatest impacts may be the deadlines for providing notices, holding hearings, filing the final rule and completing the rulemaking proceeding; all which create the potential for legal challenges.

### HB 58 Outline

HB 58 is drafted as amendments to the State Rules Act.<sup>4</sup> The Rules Act, which had previously focused on the format, filing and publication of rules, applies to all state rules and no rule is valid until published in the *New Mexico Register* as provided in the Act. HB 58 amends existing provisions of the Rules Act and also adds several new sections covering public notice, public participation and rule hearings, agency record, concise explanatory statements, emergency rules, and procedural rules.

### Notice

The greatest impact of HB 58 concerns public notice. HB 58 defines the content of the public notice, the distribution of the notice, the timing of the notice and the frequency of notice. Section 4 of HB 58 lists seven categories of information that must be included in the notice including a summary of the rule text, an explanation of the rule's purpose and how to obtain a copy of the rule and a description of how to comment on the rule or participate in the hearing. The agency must also provide citations to the legal authority authorizing the rule and to any technical information that served as a basis for the proposal.

The distribution list for the notice is found in the definition of the new term “provide to the public.” The agency is required to post the notice on its website and on the “sunshine portal,” to send it by e-mail or regular mail to persons who requested notice or participated in the rulemaking and to make it available in the agency's offices. The notice must also be provided to the Legislative Council Service. Not included in the definition is the traditional notice by publication. HB 58 does require certain notices to be published in the *New Mexico Register*.

In addition to the notice of proposed rulemaking, HB 58 requires notice at various other points in the rulemaking process. Public notice is required whenever the agency changes the date of the hearing or the deadline for submitting comments. The agency must file the final rule with the records administrator and provide notice. If the records administrator makes minor, non-substantive corrections to the filed rule and then notifies the agency, the agency must provide public notice of the corrections. Also, if the agency terminates the rulemaking at any time after the notice of proposed rulemaking, it must publish a notice of termination in the Register and provide notice.

### Hearings

While many agencies currently hold public hearings on rules, HB 58 makes it a requirement for all agencies. HB 58 offers few details on the conduct of a public hearing and instead grants agencies the authority to determine the way parties and the public can participate in a public hearing. The Attorney General must, by January 1, 2018, adopt procedural rules for hearings that apply to agencies that have not adopted their own rules. Agency rules must provide for at least as much public

The greatest impact of HB 58 concerns public notice.

participation as the Attorney General's rules.

### Record

An essential part of judicial review is determining whether the agency action is supported by substantial evidence in the record. However, neither the statutes nor the courts have defined precisely what must be contained in a record. HB 58 does so. Section 7 lists the elements of a record including the notice publications, rule text, public comments, hearing transcript and explanatory statement. Also included is "any technical information that was relied upon in formulating the final rule."

### Concise Explanatory Statement

A new statutory requirement, though not necessarily a new legal requirement, is the preparation of a "concise explanatory statement" which includes a reference to the authority authorizing the rule and

any required findings. While the phrase "concise explanatory statement" is new, courts have long required agencies to provide a statement of reasons for a rule change.<sup>5</sup> Now, an agency will be required to file the statement with the state records administrator and provide the statement to the public.

### Deadlines

Sprinkled through HB 58 are deadlines and time frames that an agency or the state records administrator must track. The notice of proposed rulemaking must be provided to the public and published in the New Mexico Register at least 30 days before the public hearing on the rule. However, the notice will need to be developed well in advance because the New Mexico Register is only published twice a month and the Records Administrator requires submission of the notice at least twelve days before the publication date. Once the rule is adopted, the agency must file the rule and provide notice to the public within 15 days. The records administrator then has 90 days to publish the rule. If the records administrator makes nonsubstantive changes to the rule, it must notify the

*continued on page 10*

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# A Decent Proposal:

## Adopt a Code of Conduct for New Mexico Administrative Law Judges and Hearing Officers

By Felicia L. Orth



ALJs and those employed by the judicial branch are not included in this discussion, nor are those who only occasionally serve as "hearing officers" by virtue of chairing a board or commission.) These practical distinctions do not alter the basic strictures assuring fairness in administrative due process.

In roughly 30 states and several large cities across the country, ALJs have been collected into a central panel rather than attached to the agencies, board or commissions they serve. This structure is thought to increase the perception of independence or impartiality by those participating in the hearings,<sup>3</sup> and such panels facilitate the adoption and enforcement of a code of conduct by the chief ALJ. Apart from establishing

### Introduction

New Mexico administrative law judges and hearing officers in the executive branch (collectively, "ALJs") play a central role in assuring fairness and due process in executive agency actions. Their conduct should ensure public confidence in their impartiality, integrity and competence.

Some individual state agencies, boards and commissions have adopted rules addressing ex parte contact or other specific ethical issues. However, unlike many states, New Mexico does not have a broadly applicable code of conduct for its state ALJs.

The matter was raised during an Administrative Law Institute presentation<sup>1</sup>, and a subcommittee of the Public Law Section drafted a proposed code of conduct that could be adopted for use by the executive branch.

The Public Law Section encourages the adoption by executive agencies of the draft

Code of Conduct for New Mexico ALJs as an excellent way of promoting fairness in administrative due process.

### New Mexico ALJs and Other Hearing Officials

The proposed code of conduct would apply to all who perform duties in the executive branch that are functionally equivalent to those performed by judges in the judicial branch, regardless of differences in title, education, position or status. Many practical distinctions can be drawn within the corps of New Mexico state ALJs and hearing officials: dozens of ALJs are lawyers, but not all; some are subject matter experts. Most are employees of the agency in question and others provide hearing services as contractors. Many work as individuals when conducting hearings; at the State Engineer's Office they work as teams or panels. Some work directly for cabinet secretaries; some work for boards and commissions. One group of ALJs was moved in 2015 from the agency they served to the Department of Finance and Administration.<sup>2</sup> (Federal

a central panel, many states have extended the application of the state judicial code of conduct for Article III judges to their ALJs. The New Mexico Supreme Court has declined to extend the New Mexico Judicial Code of Conduct to ALJs. Whatever might be said about the similarity of function, ALJs are part of the executive branch and the direct application of the entire Judicial Code of Conduct would be overreaching and unnecessary. Those familiar with the Judicial Code of Conduct will recognize many of the rules from Canons 1 and 2 of that Code in the draft code proposed for ALJs. Canons 3 and 4 of the Judicial Code of Conduct are not a good fit for ALJs directly. As noted below in Section 11, many of the rules constraining judges from community engagement and political activity would be unnecessarily onerous when applied to ALJs. ALJs should nevertheless reduce the possibility that their private lives will interfere with the performance of their duties.

The draft code is not intended as an exhaustive guide for ALJ conduct; those who are licensed as lawyers must also comply with the New Mexico Rules of Professional Conduct, and all may be subject to additional codes of conduct adopted by the agencies they serve. All state employees are subject to the Governmental Conduct Act, NMSA 1978, Section 10-16-1, et seq., providing for certain codes of conduct, none specific to ALJs.<sup>4</sup>



consultation between hearing officers, with a supervising hearing officer, or between a subject matter expert hearing officer and a lawyer assigned to advise that hearing officer; what it precludes is a hearing officer allowing the substitution of another's judgment for his or her own.”

*Section 5. Ensure the Right to Be Heard*

*Section 6. Maintain Order and Decorum*

### **The Proposed Canons**

In drafting the proposed code, the subcommittee reviewed pertinent New Mexico regulations, codes of conduct from many other states, the New Mexico Code of Judicial Conduct (Canons 1 and 2) and model codes published by national hearing official organizations.

The draft code of conduct includes 13 canons, or sections, each with a narrative explanation, examples or relevant New Mexico case law, and commentary similar to the commentary included in the New Mexico Code of Judicial Conduct.

*Section 1. Promote Public Confidence in the Integrity of the Process*

*Section 2. Perform Duties Competently and Diligently*

*Section 3. Perform Duties Without Bias, Prejudice or Harassment*

The drafting committee easily agreed on much of the language in the draft code. ALJs should promote public confidence in the integrity of the hearing process, perform their duties competently and diligently, and perform their duties without bias, prejudice or harassment.

*Section 4. Avoid External Influences and the Impression of External Influence*

The duty to avoid external influences in Section 4 was the subject of extended discussion as it related to supervisory input or the input of a lawyer assigned to advise a non-lawyer hearing officer or

Their conduct should ensure public confidence in their impartiality, integrity and competence.

subject matter expert. This was because many ALJs are supervised by other ALJs; others are supervised by cabinet secretaries, boards or commissions, creating a risk of influence. A supervisor may properly direct necessary procedures for the hearing process, timelines, the format of a report, and many other matters that do not go to the merits of an action. ALJ colleagues can sometimes offer helpful suggestions for tangled matters based upon their own experience. A subject matter expert can properly be advised on the applicable law without undermining his or her impartiality on the merits of a matter. The drafting committee considered a wide variety of possible scenarios to distinguish between appropriate and inappropriate supervision, advice or consultation in their drafting of the proposed language:

“Regardless of a hearing officer’s employment or contractual relationship with a party agency, the hearing officer should exercise independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct result in a case, maintaining decisional independence from agency management and programs. This provision is not intended to preclude

Section 6, requiring the ALJ to maintain order and decorum, to remain courteous and direct all others to remain courteous, is a critical part of any ALJ’s job and is simply stated (and is sometimes a great challenge without a bailiff or contempt power).

*Section 7. Avoid Ex Parte Communications*

Section 7 is the lengthiest and most explicit of the sections, and is drawn largely from the ex parte provisions adopted by the Public Regulation Commission in Section 1.2.3 NMAC. Subsections include the definition of such communications, when they are prohibited, when they are permitted, and when disclosure is required. The committee discussed, but did not ultimately include, a provision for the use of outside experts retained by the ALJ. The committee did not want to encourage the use of such experts.

*Section 8. Take Care in Making Public Statements on Pending Matters*

*Section 9. Disqualification May Be Necessary*

Discussion on Section 8, regulating public statements that might reasonably be expected to impair the fairness of a pending matter, centered on the primary exception necessary to allow for public explanations of procedures. ALJs are often asked to explain their process to those who have not participated before. The subcommittee’s discussion on Section 9, related to disqualification, was extended for research into the reach of

the third degree of familial relationship that would cause impartiality to be reasonably questioned. New Mexicans are well connected to one another in myriad ways; although the committee considered expanding the provision's reach still further, the committee proposes to use the same constraints used in the New Mexico Code of Judicial Conduct.

*Section 10. Report Known Misconduct By Colleagues and Lawyers*

Lawyer ALJs are bound already by the directive in Section 10 to report known misconduct by colleagues and lawyers. The directive seems duplicative, but the committee felt it important to extend the requirement to non-lawyer hearing officers. Lawyers often appear before non-lawyer hearing officers, and it is important to protect the public from unsavory practices or those who would undermine the integrity of the hearing process in any agency.

*Section 11. Personal Conduct Should Minimize the Risk of Conflict*

The committee discussed Section 11 at length, requiring ALJs to minimize the risk of conflict and disqualification in their personal activities. It is primarily in this section that the differences between Article III judges and ALJs require adjustment of constraints. New Mexico judges are governed on this topic by Canon 3, Sections 21-301 through 315, NMRA, and are precluded from several activities in connection with community organizations, public speaking and fundraising. NMRA Canon 4 further constrains political and campaign activity. ALJs are proscribed in the proposed code from activities that will interfere with the performance of their duties or lead to frequent disqualification, but are not otherwise constrained. This less onerous provision is appropriate considering the less public role held by ALJs and the fact that they are generally employed, not elected, appointed, or confirmed by the Senate, for example.

*Section 12. Do Not Disclose or Make Personal Use of Nonpublic Information*

*Section 13. Do Not Accept Things of Value*

Sections 12, prohibiting the disclosure of nonpublic information, and 13, prohibiting the acceptance of gifts from parties or lawyers before the tribunal, address issues already addressed in the Governmental Conduct Act. Their inclusion in the draft code reinforces the constraints in the administrative hearing context and extends them to those who serve as ALJs who are not employed in state government.

Notably, the proposed code does not yet include an enforcement provision. The most likely appropriate provision will provide for complaints to the head of the agency in question, with an investigation and potential discipline to be based on the outcome, consistent with existing personnel rules and agency codes of conduct. In the case of a central panel, the complaint would be handled by the chief judge.

**Conclusion**

As the Supreme Court noted in *Butz v. Economou*, 438 U.S. 478 (1978), within the executive branch the role, if not power, of the modern hearing official or administrative law judge is "functionally comparable" to that of a trial judge: He or she may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing and make or recommend decisions. It is important to structure the process and apply the ethical codes that will assure the exercise of independent judgment on the evidence, free from pressures by the parties or other officials within the agency. Fair and competent hearing personnel are essential to administrative due process. The Public Law Section Board encourages all who practice in administrative venues to review the draft code of conduct, including the commentary, and to submit comments. Visit [www.nmbar.org/publiclaw](http://www.nmbar.org/publiclaw). In the fall, the Board will present the final draft for adoption by New Mexico's executive agencies. ■

**Endnotes**

<sup>1</sup> Serving as an ALJ for the state of New Mexico for 15 years had provided many examples of times when a code of conduct would have been helpful in discerning an ethical response to surprising or challenging circumstances, many of which were shared during the

presentation, and many of which are shared by other ALJs: feeling compelled to do technical research after a hearing when a private expert witness has lied about something important, or when comparably credentialed experts submit exactly contrary opinions; taking tours of far-flung facilities before a hearing where ex parte opportunities abound; having a lawyer appear in a matter when months earlier he had made an aggressive sexual pass during a conference; being physically threatened during a hearing; having pro se participants seek too much assistance from staff; and a spouse's employment by a party in extensive rulemaking. Carolyn Wolf, then Chair of the Public Law Section Board, agreed that the ALJs and those appearing before them would all benefit from a code of conduct. She established and chaired the drafting subcommittee and invited me to help with the task. The subcommittee also included Sean Cunniff, James Martin and Thomas W. Olson.

<sup>2</sup> The New Mexico Taxation and Revenue Hearings Bureau was dissolved. The ALJs hearing tax disputes are now part of an Administrative Hearings Office within DFA, and are led by a chief hearing officer appointed by the New Mexico Governor. NMSA 1978, Section 7-1B-6. The Act establishing the office also requires the promulgation of a hearing officer code of conduct. The chief hearing officer expects to complete that rulemaking by the end of 2017. (Telephone call with Brian Vandenzon, 6/9/17.)

<sup>3</sup> A 2010 task force (mentioned by Bill Brancard in his note) drafted legislation establishing such a panel in New Mexico, but the related bills introduced over the years have never passed.

<sup>4</sup> Attempts to establish a state ethics commission and expand that Act during the 2017 legislative session were not successful. This would have been another opportunity to mandate a code of conduct for ALJs. See Senate Bill 72 and House Bill 462, the "Public Accountability Act," stalled in the Senate Rules Committee and the House Judiciary Committee, respectively.

*Felicia L. Orth retired as an ALJ from the State of New Mexico in 2014 and now serves a number of state and local entities as an ALJ under contract. She is a member of the State Bar Public Law Section Board of Directors.*

## A Long Time Coming

*continued from page 6*

agency within 10 days. The agency then has 30 days to provide public notice of the changes. Finally, if an agency fails to take action on a proposed rule after publishing a notice of proposed rulemaking, the rulemaking will automatically terminate in two years.

### What is missing?

Perhaps the most notable gap in HB 58 is the absence of a judicial appeal provision. This is especially noteworthy since the current statute for appeals of administrative decisions, NMSA 1978 Section 39-3-1.1, does not cover rulemaking actions.<sup>6</sup> To appeal a rule adopted under the HB 58 procedures, potential appellants must employ the appeal provision in the specific authorizing statute or, if no provision exists, file a petition for a writ of certiorari under Rule 1-075.

### What's Next?

HB 58 will likely trigger debates, and possible litigation, over how its procedures fit with existing rulemaking requirements in substantive laws. For instance, many existing laws require the notice to be published in "a newspaper of general circulation." Is that requirement superseded by HB 58 or is it now in addition to the notice requirements in HB 58? A possible solution may be for the Legislature to start amending existing requirements to reconcile them with HB 58. Although HB 58 leaves some questions unanswered, it accomplishes the legislature's goals of providing minimum uniform procedures and greater transparency in the rulemaking process. ■

### Endnotes

<sup>1</sup> Laws 2017, Chapter 137

<sup>2</sup> NMSA 1978, Sections 12-8-1 et seq.

<sup>3</sup> *Livingston v. Ewing*, 1982-NMSC-110, ¶14, 98 N.M. 685

<sup>4</sup> NMSA 1978, Sections 14-4-1 et seq.

<sup>5</sup> *See e.g.*, *City of Roswell v. NM Water Quality Control Comm'n*, 1972-NMCA-160, ¶16, 84 N.M. 561 ("the record must indicate the reasoning of the Commission and the basis on which it adopted the regulations").

<sup>6</sup> Section 39-3-1.1.H. ("Final decision" does not mean a decision by an agency on a rule.")

*Bill Brancard is general counsel for the Energy, Minerals and Natural Resources Department. He has served as chair of the State Public Law Section and the Natural Resources, Energy and Environmental Law Section. He also served on the 2010 task force mentioned in the article.*

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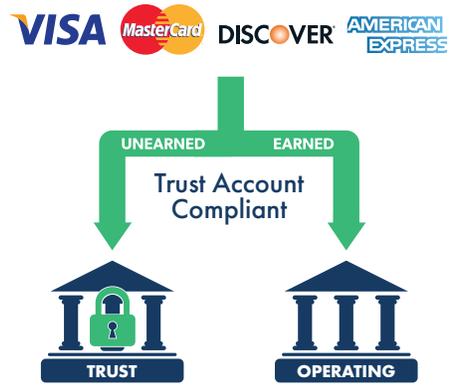
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