

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



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November 3, 2020

Joyce Bustos, Chair  
New Mexico Judicial Standards Commission  
P.O. Box 27248  
Albuquerque, NM 87125-7248

**Re: Opinion Request: Constitutionality of Certain Provisions in Senate Bill 668,  
Passed During the 2019 Regular Session**

Dear Chair Bustos:

You requested an Attorney General Opinion regarding the constitutionality of certain provisions of the State Ethics Commission Bill (SB 668) passed during the 2019 Regular Session of the New Mexico Legislature. Specifically, you asked whether a floor amendment, adopted and included in the final bill signed by the Governor, impermissibly expanded the Judicial Standards Commission's ("the Commission") oversight from justices, judges and magistrates to include "court-appointed commissioners, hearing officers, administrative law judges or special masters while acting in a judicial capacity." NMSA 1978, § 34-10-2.1(A) (1977, amended eff. Jan. 1, 2020).

You noted that Article III of the New Mexico Constitution establishes the separation of powers of our three branches of state government. N.M. Const. art. III. You also identified those express provisions of the New Mexico Constitution which authorize legislative encroachment on the power of the judiciary, citing Article VI, Sections 10, 16, 23, 24 and 26, authorizing *inter alia*, legislative determination of judicial pay and districts, and those portions of Section 32 allowing legislation regarding the selection of, and staggering of terms of certain members. N.M. Const. art. VI, § 10, §§ 23 to -24, § 26, § 32.

Finally, you expressed the Commission's concerns that, if it proceeds upon a complaint against a commissioner, hearing officer, or special master, the Commission will be acting unconstitutionally and thereby subject itself to litigation. In light of such concerns, the Commission requests an opinion as to whether the recent amendment to Section 34-10-2.1 expanding the Commission's jurisdiction to encompass "court-appointed commissioners, hearing officers, administrative law judges or special masters is constitutional." § 34-10-2.1(A) (1977, amended eff. Jan. 1, 2020).

## ANALYSIS

A fundamental aim of statutory construction is to determine legislative intent, accomplished primarily by looking at the language of the statute and its legislative purpose. *State v. Andrews*, 1997-NMCA-017, ¶ 5, 123 N.M. 95, 934 P.2d 289. Statutes are to be read literally, so long as their words are plain and unambiguous, and a literal reading would not lead to an injustice, absurdity, or contradiction. *Id.*; see also *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369. The rules of statutory construction apply equally to interpret the Constitution. *State v. Boyse*, 2013-NMSC-024, ¶ 9 (citing *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 17, 141 N.M. 657, 160 P.3d 566).

The New Mexico Constitution should be interpreted in a way “that reflects the drafter’s intent.” *Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830, 832 (quoting *State v. Lynch*, 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73).

The questions you raise about the constitutionality of the 2019 legislative amendment implicate the separation of powers between government branches. The New Mexico Constitution created three co-equal branches of state government: the legislative, executive, and judicial. N.M. Const., art. III. Article III of the Constitution clearly provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

The Supreme Court detailed the Commission’s origins in its 2003 decision, *State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa*, 2003-NMSC-017, 73 P.3d 197. In 1964, the sole method of removing a judge from office was impeachment. *Espinosa*, 2003-NMSC-017, ¶ 10. This prompted the 1964 Constitutional Revision Commission to recommend the creation of the Commission, noting the lack of “appropriate judicial disciplinary machinery.” *Id.* (quoting *1964 Report of the Constitutional Revision Commission*, at 116). The 1967 Constitutional Revision Commission echoed the need for an independent commission to oversee judicial performance, conduct and fitness. *Id.* (quoting *1967 Report of the Constitutional Revision Commission*, at 88). Hence, the voters approved a constitutional amendment creating the Commission during the November 7, 1967 special election. N.M. Const. art. VI, § 32.

The Supreme Court has described the Commission’s role as a “weighty responsibility” vested in the Commission by our Constitution. *In re Salazar*, 2013-NMSC-007, ¶ 7, 299 P.3d 409, 411. As a co-equal branch of government, the judiciary is obligated to ensure integrity and high standards of conduct of its members. *Id.* In essence, the Commission serves “the role of watchdog for the judiciary.” *Espinosa*, 2003-NMSC-017, ¶ 11.

The express language of the 1967 constitutional amendment authorized the Commission to investigate and to recommend the discipline, removal or retirement of “a justice, judge or magistrate.” N.M. Const. art. VI, § 32. The language specifying the Commission’s oversight of justices, judges and magistrate has not been altered since the Commission’s 1967 creation, although voters have approved several amendments to Section 32. These changes included substituting a sentence listing the basis for discipline (1978 amendment, adopted at the November 7, 1978 general election); the addition of one magistrate as a Commission member (1998 amendment, adopted at November 3, 1998 general election); and multiple changes in 2012 to increase the Commission’s membership, alter the terms of members, and to remove the gendered words “he” and “his” in references to justices, judges or magistrates. (2012 amendment, adopted at November 6, 2012 general election).

Neither the 1967 constitutional amendment nor the successive iterations of Section 32 contain any grant of authority to the legislature in relation to the Commission’s jurisdiction. The sole grant of authority Section 32 provides the legislature concerns the selection and staggered terms of Commission members. N.M. Const. art. VI, § 32 (stating Commission consists of two justices or judges, one magistrate and two lawyers “selected as may be provided by law”; and gubernatorial appointments serve five-year terms staggered “as may be provided by law”).

Article VI contains other sections granting the legislature the authority to legislate in regards to the judicial branch. Section 11 states that supreme court justices shall receive “such salary as may hereafter be fixed by law.” NM Const. art. VI, § 11. Compensation of district court judges is equally within the legislative branch’s authority. Section 17 states “[t]he legislature shall provide by law for the compensation of the judges of the district court.” N.M. Const. art. VI, § 17. Further examples of legislative authority expressly granted by the Constitution include allowing the legislature to establish the appellate jurisdiction of the supreme court (Section 2); the establishment of judicial districts (Section 12); and the judicial districts and limited original jurisdiction to be exercised by magistrate courts (Section 26). N.M. Const. art. VI, § 2, § 12, § 26.

The functions of the Commission are judicial functions. *Espinosa*, ¶ 14. The Constitution does not provide a grant of authority to the legislature regarding the Commission’s jurisdiction. Accordingly, the 2019 amendment to Section 34-10-2.1(A), expanding the jurisdiction of the Commission beyond justices, judges and magistrates, is an impermissible encroachment upon the independent and co-equal judicial branch, and is likely therefore unconstitutional. *See* N.M. Const., art. III.

As noted in your letter, there are multiple systems of discipline in place regulating the conduct of judicial employees acting in a quasi-judicial capacity. These systems derive from professional and judicial codes of conduct, and statutes referencing these codes. All attorneys practicing in New Mexico, including those employed in quasi-judicial capacities, are subject to discipline pursuant to the Rules of Professional Conduct, which are administered and enforced by the Disciplinary Board and Supreme Court. Rules 16-100 to 16-805 NMRA.

The judiciary exercises direct oversight of its employees acting in a quasi-judicial capacity through the application of the Judicial Code of Conduct. Rules 21-001 to 21-406 NMRA. The Code requires all judges to supervise their staff and others subject to their direction and control to ensure they act in a manner consistent with the Code. Rule 21-212. The Code expressly conditions the employment of those acting in a quasi-judicial capacity upon their compliance with certain enumerated Rules. Rule 21-004(C)(setting out the rules quasi-judicial employees must comply with). Any violation of the relevant rules must be addressed by the chief judge of the district employing that individual. Rule 21-406(D). The Code provides that the Supreme Court and the Disciplinary Board retain jurisdiction to hear violations of the Code of Judicial Conduct by hearing officers and special commissioners. *Id.*

Additionally, constraints on quasi-judicial employees are embedded in various statutes referencing the Judicial Code of Conduct. For example, Section 40-4B-4(C) requires that child support hearing officers appointed by the district courts conform to Canons 21-100 through 21-500 of the Code of Judicial Conduct. NMRA 1978, § 40-4B-4(C)(1988). Violations of the canons are grounds for dismissal pursuant to Section 40-4B-4(C). Similarly, domestic violence commissioners have a statutory obligation to conform to the relevant canons of the Code of Judicial Conduct, and shall be dismissed from employment for violation of the canons. NMRA 1978, § 40-13-9(B)(3)(2005).

In conclusion, the expanded Commission oversight contained in the version of Section 34-10-2.1(A) effective January 1, 2020 is an unconstitutional encroachment upon judicial authority. Judicial employees acting in a quasi-judicial capacity are now subject to valid laws and rules comprising a system of discipline. The only means by which such employees may be brought within the Commission's oversight is through a public vote to amend the plain language of Article VI, Section 32 of the New Mexico Constitution.

Respectfully,



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