

## **Opinion 12-06**

**OPINION OF: GARY K. KING, Attorney General**

October 29, 2012

**TO:** Jason A. Marks, Commissioner, New Mexico Public Regulation Commission, P.O. Box 1269, Santa Fe, New Mexico 87504-1269

**BY:** Sally Malavé, Assistant Attorney General

### **QUESTIONS:**

1. Is the consolidation of the Legal Division of the Public Regulation Commission (“PRC”) and Office of General Counsel (“OGC”) under a single attorney manager legally permissible under any circumstances? If so, what are those circumstances and restrictions?
2. Is the consolidation of the Legal Division and OGC under a single attorney manager legally permissible if that attorney-manager remains a member of OGC and engages in advisory activities with commissioners while limiting his or her communications with Legal Division attorneys to scheduling of work assignments, performance review, hiring and discipline, and similar administrative functions? If such an arrangement is permissible, would all contacts affecting a specific case need to be disclosed to all parties pursuant to 1.2.3.9 (A) NMAC?
3. Is the consolidation of the Legal Division and the Office of General Counsel (“OGC”) under a single attorney manager consistent with 1.2.3.8 NMAC, which prohibits substantive communications between OGC and Legal Division on contested cases? If not, did the Commission violate the law by modifying an administrative rule without going through a formal rulemaking procedure?
4. Is it permissible for attorneys to be routinely moved back and forth between representing advocacy staff and serving as advisors to the Commission? Can attorneys be moved between the advocacy and advisory functions if they are segregated from advising the Commission on any matter related to a case they have worked on in an advocacy capacity?

### **CONCLUSIONS:**

1. The OGC and Legal Division may not be consolidated under a single attorney manager under any circumstances.
2. A single attorney manager may not remain a member of the OGC and engage in advisory activities with commissioners while performing administrative functions for Legal Division attorneys.

3. Because we conclude that the PRC may not adopt a policy consolidating the OGC and under a single attorney manager, it is not necessary for us to address whether the policy is consistent with 1.2.3.8 NMAC.

4. PRC attorneys may not be routinely moved back and forth between representing advocacy staff and serving as advisors to the PRC without calling into question Rule 16-107 of the Rules of Professional Conduct, which prohibits a lawyer from representing one or more clients if there is a significant risk that the dual representation will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

#### **FACTS:**

The PRC adopted a policy placing the lawyers of its Legal Division and OGC under the supervision of a single supervising attorney.

#### **ANALYSIS:**

As a preliminary matter, there are several rules of statutory construction that guide our analysis. State agencies are created either by constitutional or statutory provision and their powers are limited to the power and authority expressly granted by or necessarily implied from those provisions. See Qwest Corp. v. New Mexico Public Regulation Commission, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 446 (internal citations omitted). Our primary concern is to determine and give effect to legislative intent by looking first to the plain language of the statute. Id. We closely examine the overall structure of the statute, as well as the statute's particular function within a legislative scheme. See TNT Taxi, LTD, Co. v. New Mexico Public Regulation Commission, 2006-NMSC-016, ¶ 5, 139 N.M. 550, 552.

We begin our analysis by reviewing the relevant constitutional and statutory provisions that establish the PRC, authorize it to retain its own counsel, and include the legal division as one of its organizational units. The New Mexico Constitution created the PRC and charged it with the "responsibility for chartering and regulating business corporations in such a manner as the legislature shall provide." N.M. Const., Article XI, sections 1 and 2 (adopted November 5, 1996). These provisions otherwise do not mandate or direct that the PRC take any particular shape or form except as "the legislature shall provide." Id.

In accordance with Article XI, §§ 1 and 2, the legislature enacted the Public Regulation Commission Act, NMSA 1978, Sections 8-8-1 through 8-8-21 (1998) (the "Act"). Section 8-8-4 of the Act sets out the general powers and duties of the PRC, including but not limited to the power to:

- (1) appoint and employ such professional, technical and clerical assistance as it deems necessary to assist it in performing its power and duties;

- (2) delegate authority to subordinates as it deems necessary and appropriate, clearly delineating such delegated authority and any limitations;
- (3) retain competent attorneys to handle the legal matters of the commission and give advice and counsel in regard to any matter connected with the duties of the commission and, in the discretion of the commission, to represent the commission in any legal proceeding; and
- (4) organize into organizational units as necessary to enable it to function most efficiently, subject to provisions of law requiring or establishing specific organizational units.

NMSA 1978, § 8-8-4(B). In addition, Section 8-8-13 authorizes PRC's Chief of Staff, with the consent of the Commission, to hire "advisory staff with expertise in regulatory law, engineering, economics and other professional or technical disciplines to advise the commission on any matter before the commission." § 8-8-13. Among the advisory staff's duties are analyzing case records, analyzing recommended decisions, advising the Commission on policy issues, and assisting the Commission in writing final orders. See id.

It is evident from this statutory scheme that the PRC has the authority to retain lawyers and establish an office of general counsel as an organizational unit of the PRC to handle the legal matters of the Commission and give it advice and counsel with respect to all matters that may come before the Commission. While the Act does not *mandate* the creation of an office of general counsel within the PRC's organizational structure, once established, the OGC exists to serve the Commission as its only client.

The Legal Division, on the other hand, is one of several organizational units *required* by the Act to be maintained by the PRC and, as such, may be not abolished, except by an act of the legislature. See § 8-8-6.2 Its job is to:

- (1) provide legal counsel for the commission in matters not involving advice on contested proceedings before the commission; and
- (2) provide legal counsel to all divisions, including the legal component of the staff that represents the public interest in matters before the commission.

NMSA 1978, § 8-8-10(B) (emphasis added).<sup>3</sup> The statute thus limits the Legal Division's advisory role vis-à-vis the Commission to uncontested matters, but assigns it a much broader role with respect to the entire agency. It contemplates that the Legal Division will serve as general counsel to the various divisions within the PRC and will provide legal representation when a division appears on behalf of the public interest in contested proceedings before the Commission.

In light of this statutory framework, the threshold question is whether the Act allows the PRC to consolidate the OGC and Legal Division under any circumstances.<sup>4</sup> The short

answer is no. While the PRC may “organize into organizational units as necessary to enable it to function most efficiently,” the PRC’s authority to do so is “subject to provisions of law requiring or establishing specific organizational units,” such as the Legal Division. See § 8-8-4(B). Any attempt to consolidate the OGC and the Legal Division into one unit is contrary both to the plain language of Act and its underlying legislative intent. The Act clearly requires the PRC to maintain the Legal Division as its own organizational unit, separate from any other organizational unit, whether statutorily created by the legislature or subsequently created by the PRC.

Because the Act does not allow consolidation of the OGC and Legal Division, we are left to consider whether, without consolidation, the two units may be supervised by a single attorney-manager who will remain a member of OGC and engage in advisory activities with commissioners while limiting his or her communications with Legal Division attorneys to scheduling of work assignments, performance review, hiring and discipline, and similar administrative functions.

We believe such an arrangement would be problematic under the reasoning in Matter of Rates and Charges of the Mountain States Telephone and Telegraph Co., 99 N.M. 1 (1992), involving a telephone company’s appeal of the Corporation Commission’s denial of its application for a rate increase. The telephone company claimed that the Attorney General’s representation of both the state and of unrepresented customers of Mountain Bell was a conflict of interest and a violation of the Attorney General’s duty to represent the commission. Before getting to the merits of the company’s appeal, and even though it found that Mountain Bell had waived any objection to the Attorney General’s intervention in the case, the Court felt compelled to answer the basic questions presented by Mountain Bell’s claims. See 99 N.M. at 4. The Court found that although the Attorney General provided commissioned assistant attorneys general to the Commission as its legal counsel, these individuals functioned independent of the Attorney General and the Attorney General exercised no control over them. As such, the Court concluded that no conflict of interest existed, and the Attorney General could properly represent the state and the unrepresented customers. See id.

The Court’s reliance on the independence of the Commission’s attorneys is instructive to the question at hand. Its conclusion apparently would have been different if it had found that the Attorney General did in fact control the assistant attorneys general assigned to provide counsel to the Commission. This leads us to believe that a court will find it improper and a potential conflict of interest for a single attorney-manager from the OGC to exert any level of control over Legal Division attorneys.

With respect to attorneys being moved back and forth between representing advocacy staff and serving as advisors to the Commission, the Act itself does not appear to prohibit such movement. However, we believe such movement between the OGC and the Legal Division would implicate Rule 16-107 of the Rules of Professional Conduct governing representation involving concurrent conflicts of interest.

Rule 16-107 in its entirety states:

A. Representation involving concurrent conflict of interest. Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

B. Permissible representation when concurrent conflict exists. Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

See Rule 16-107 NMRA (2008). Rule 16-107 acknowledges that concurrent conflicts of interest can arise from a lawyer's multiple responsibilities to his or her clients, or from the lawyer's own interests, and is designed to protect the lawyer's relationship to each of his or her clients. See Committee Commentary [1], Rule 16-107 NMRA.

Within the context of the PRC, Rule 16-107 requires each Legal Division attorney to undertake a conflicts analysis before accepting any assignment to ensure that there is no significant risk that his or her representation of the Commission or a division, as the case may be, will not be materially limited by the lawyer's responsibilities to his or her other clients or a third party.<sup>5</sup> See Committee Commentary [2], Rule 16-107 NMRA. The first step in this conflicts analysis calls for the Legal Division and each of its attorneys to identify its existing clients within the agency.<sup>6</sup>

After identifying its existing client(s), the Legal Division must determine whether representing the Commission in a particular enforcement action or appeal will be directly adverse to those clients. Direct adversity may exist if, in defending a Commission order on appeal, Legal Division attorneys are asked to take a position that

is contrary to the position the Division advocated during the proceedings below. If such is the case, the Legal Division will have a concurrent conflict under Paragraph (A) (1) of the rule. The Legal Division also may encounter a concurrent conflict under Paragraph (A) (2) if its representation of the Commission in a particular matter may be or is materially limited as a result of the Legal Division's responsibilities to its existing clients, including its continuing responsibilities to existing clients in past or unrelated matters.

If a concurrent conflict exists, the Legal Division may represent the Commission only if, in its judgment, it can meet each of the four requirements of Paragraph (B) as to each contemplated matter. That is, the Legal Division must reasonably believe that it would be able to represent the Commission, as well as its existing clients, competently and diligently; the representation is not prohibited by law;<sup>7</sup> the representation does not involve the assertion of a claim by the Commission against another of the Division's clients; and each affected client provides informed consent in writing.

We believe Rule 16-107 is a significant obstacle to having the same attorneys represent advocacy staff and advise the Commission. However, because concurrent conflicts analyses are necessarily based on the particular set of facts presented, we are unable to state that Rule 16-107 generally prohibits the representations being contemplated by the PRC. We therefore would urge every lawyer at the PRC to become familiar with and routinely consult Rule 16-107 and its expanded commentary before undertaking any matter.

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[1] See *New Mexico Public Regulation Commission - 2012 Management Study: Reforming the PRC*, at page 8, recommending that the head of the legal staff be allowed "to maintain a level of flexibility in allocating staff resources to assist in areas, thus minimizing backlog issues."

[2] The other organizational units mandated by the Act are the administrative services division, the consumer relations division, the insurance division and the transportation division. See § 8-8-6.

[3] Section 8-8-10(A) also provides that "the commission shall set minimum requirements for the director of the legal division, including membership in the New Mexico bar and administrative and supervisory experience." Id.

[4] We generally understand "consolidate" means to combine several items or units into one. See Black's Law Dictionary 308 (6th ed. 1990).

[5] Because the Commission, arguably, is the only client of the OGC, we limit our discussion to the conflicts analysis to be performed by lawyers in the Legal Division. However, the same type of analysis would apply whenever an OGC attorney was moved to the Legal Division.

[6] For example, the Legal Division may identify its clients by referring to prior proceedings or Commission orders that are being enforced or appealed. It may consider which organizational units of the PRC or members of an organizational unit the Legal Division represented or received information from in any proceeding.

[7] Whether the Legal Division may represent the Commission in any enforcement or appeal action is questionable in view of the Act's provisions prohibiting Legal Division attorneys from advising the Commission on contested proceedings. See § 8-8-10 (B).