BEFORE THE HEARING SUBCOMMITEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo.

**CHARGING PARTY'S MOTION TO EXCLUDE THE PROPOSED TESTIMONY OF JENNIFER NOYA**

Charging Party moves to exclude the testimony of attorney Jennifer Noya at the formal hearing in this matter. The witness list submitted by Representative Carl Trujillo ("Rep. Trujillo") demonstrates that Ms. Noya's proposed testimony seeks to impermissibly instruct the Hearing Subcommittee about legal standards and conclusions and invades the fact-finding function of the Hearing Subcommittee. That fact-finding function is governed by the Legislature's own Anti-Harassment Policy and not some extraneous standard in unrelated judicial proceedings.

**Introduction**

Rep. Trujillo has disclosed Jennifer Noya, "a lawyer with expertise in employment and sexual harassment law," as an expert witness. *See Respondent's Witness List* (submitted Oct. 19, 2008). According to Rep. Trujillo's Witness List, Ms. Noya will "provide expert testimony on the definition of sexual harassment and its standards." *Id.* Irrespective of Ms. Noya's asserted "expertise in employment and sexual harassment law," the Anti-Harassment Policy is the only standard governing this matter, and the provisions of the Anti-Harassment Policy are clear and straightforward. Accordingly, Ms. Noya's proposed testimony should be excluded because such testimony is irrelevant, improper, and will not aid the Hearing Subcommittee in making the ultimate determination regarding whether Rep. Trujillo committed the offenses outlined by the Investigative Subcommittee's findings of probable cause and whether those offenses violate the Anti-Harassment Policy.

## Argument

Rep. Trujillo's disclosure of a purported expert in "employment and sexual harassment law" reveals his intent to flout the straightforward and clear Anti-Harassment Policy and, instead, insert federal and state law standards related to sexual harassment under federal and state law. Through Ms. Noya's testimony, Rep. Trujillo is advocating that the Hearing Subcommittee disregard the Legislature's own Anti-Harassment Policy and instead make determinations utilizing an inapplicable standard used in courtrooms to decide civil lawsuits brought under Title VII and the New Mexico Human Rights Act. This strategy improperly undermines the principle of separation of powers and is counter to this body's Constitutional duty to police itself.[1]

The matter before the Hearing Subcommittee is not a civil lawsuit, it does not involve emotional distress damages, and it implicates only the Legislature's Anti-Harassment Policy. Any imposition of federal or state law standards offends the bedrock principle of separation of powers and impermissibly constrains the Legislature's entitlement and duty to police itself in any manner it chooses. *See Garcia v. Mt. Taylor Millwork, Inc.,* 1989-NMCA-100, ¶ 8, 111 N.M. 17 (describing the separation of powers as a "fundamental precept."); N.M. Const., Art. 4 §§ 7, 11. ("Each house shall be the judge of the election and qualification of its own members;" "Each house may…punish its members for contempt...."); *see also Contempt,* Black's Law Dictionary (10th ed. 2009) (providing definition of "contempt" as "Conduct that defies the…dignity of

[1] This inference is taken from *Respondent's Response in Opposition to Laura Bonar's Letter Objection to Written Discovery* at 12-13 ("Opposition to Objection") (arguing that federal cases applying Title VII are relevant to this matter).

a…legislature."). By taking a seat in this house, Rep. Trujillo consented to the procedures and the ethical requirements imposed on members of this body.[2]

The determinations the Hearing Subcommittee must make are governed by the straightforward and clear provisions of the Anti-Harassment Policy and subject only to the Legislature's constitutional mandate to punish its members for conduct that defies the dignity of that branch. Ms. Noya's testimony regarding the "definition" and "standards" of sexual harassment in other contexts seeking damages and other relief is therefore irrelevant because the Anti-Harassment Policy defines sexual harassment and the Constitution provides the Hearing Subcommittee with the charge to uphold the standards necessary to preserve the dignity of the body.

The Legislature is an independent, coequal branch of government, not bound by the courts or the executive. *See Chavez v. Luna,* 1889-NMSC-016, ¶ 6, 5 N.M. 183 ("General superintending control over inferior courts possessed by the district and supreme courts in this territory does not extend to the judicial action of the legislative houses in the cases where it has been deemed necessary to confer such powers upon them with a view to enable them to perfect their legislative houses and perform their legislative duties"). And it falls to the Hearing Subcommittee to carry out the grave constitutional imperative of self-policing its members according to its own standards and procedures. Accordingly, the Hearing Subcommittee should exclude Ms. Noya's testimony because such testimony is irrelevant and will only serve to distract and confuse issues that are unrelated to the disciplinary issue before the Subcommittee.

[2] Rep. Trujillo's oath of office included swearing to "discharge with integrity and ethically the high responsibilities [of the office]." Oath of Ethical Conduct, *House of Representatives Oath, Fifty-First Legislature First Session* available at https://www.nmlegis.gov/Publications/Legislative_Procedure/ethics_guide_2016.pdf.

## I. Expert Testimony is Unnecessary to Determine Whether Rep. Trujillo Violated the Anti-Harassment Policy.

The determinations this Subcommittee must make are simple and straightforward: did Rep. Trujillo act in the manner asserted by Laura Bonar, and, if so, were those actions a violation of the Legislature's Anti-Harassment Policy. These are matters that can only be answered by the Hearing Subcommittee's determination of the facts and by an examination of the plain language of the Anti-Harassment Policy itself. Rep. Trujillo's "expert" testimony is intended to divert the Subcommittee's attention away from these relevant considerations.

The Legislature's Anti-Harassment Policy could not be any clearer: not only does it provide a cogent definition of sexual harassment, it provides numerous examples. In fact, the Legislature's Anti-Harassment Policy contains nearly two pages devoted to defining and describing sexual harassment, complete with examples:

> Verbal harassment – requests or demands for any type of sexual favor; repeated requests for a date; sexual innuendoes; suggestive comments; use of sexually offensive words or phrases in any language; jokes of a sexual nature; or "kidding", teasing and threats, any of which are unwelcome and sexual in nature.
>
> Physical harassment – unwelcome physical contact, such as touching, tickling, pinching, hugging, patting, cornering, kissing, fondling and forced sexual harassment.

*See Anti-Harassment Policy* at 2.

Given the definitions and examples provided by the Anti-Harassment Policy itself, Ms. Noya's testimony regarding some other "definition" and "standard" related to sexual harassment claims in civil litigation is unnecessary. The members of this subcommittee do not need expert testimony to define "unwelcome physical contact," "sexual innuendo," "repeated requests for a date," "suggestive comments," or verbal harassment that is "unwelcome and sexual in nature." These words and phrases have plain and ordinary meanings that the Hearing Subcommittee is more

than capable of understanding and applying, as is its Constitutional obligation to its members based on the very standard this independent branch of government has adopted.

Rep. Trujillo's request to have an expert on sexual harassment testify is therefore puzzling. This witness has no firsthand knowledge of the factual background, no special expertise on the relevant legislative policy, and can no more define the relevant terms than the members of the Hearing Subcommittee themselves. Accordingly, the Hearing Subcommittee should exclude Ms. Noya from providing unnecessary and irrelevant testimony at the formal hearing.

**II. Rep. Trujillo Seeks to Improperly Import Federal Law into this Proceeding.**

In eliciting testimony from Ms. Noya, Rep. Trujillo is seeking to blur the lines between application of the Legislature's Anti-Harassment Policy under the procedures and standards set forth in Legislative Council Policy No. 16, with civil litigation of sexual harassment claims under federal and state laws. Indeed, he has already attempted to take the Subcommittee down this misleading path. In his recent Opposition to Laura' Bonar's Objection to Written Discovery, Rep. Trujillo cites to factors used in federal court for deciding sexual harassment cases under Title VII, as if this matter were a civil lawsuit in the District of New Mexico. *See* Opposition to Objection at 12-13. Rep. Trujillo even states that "the ultimate question…is whether Representative Trujillo engaged in sexual harassment that was sufficiently severe and pervasive to constitute a hostile work environment." *Id.* at 12.

Rep. Trujillo's use of the term "sufficiently severe" or pervasive acknowledges his attempt to improperly inject federal law standards into this proceeding. In so doing, Rep. Trujillo is either: (1) conceding that he sexually harassed Laura Bonar but arguing that the behavior should not be judged by the definitions within the Anti-Harassment Policy; or (2) arguing that the behavior complained of does not, in any event, violate the Anti-Harassment Policy. Both arguments rely

on an improper attempt to import federal law and disregard the plain terms of the Anti-Harassment Policy.

As Rep. Trujillo points out, federal courts consider "a variety of factors" when determining whether harassing behavior constitutes a "hostile work environment" under federal law, such as "the frequency" and "severity" of the conduct, as well as whether it "is physically threatening." *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1365 (10th Cir. 1997). But, the Legislature's Anti-Harassment Policy is to the contrary. It seeks to "prevent, correct and discipline *any* behavior that violates this policy," and acknowledges that "Harassment can be a single serious incident."[3] *See Anti-Harassment Policy*, p. 1. The two standards are completely different, and rightly so. One determines severe sanctions for egregious violations of federal law, the other polices and maintains the ethical integrity of our state's legislature. Thus, the Legislature's Anti-Harassment Policy sets a higher standard of conduct, which is necessary to protect the integrity of the of the constitutional body.

Title VII of the Civil Rights Act[4], on which Rep. Trujillo relies,[5] authorizes compensatory and punitive damages up to $300,000, while the Legislature in an ethics matter is limited to disciplinary measures, including reprimand, censure, or expulsion. *Compare* 42 U.S.C. § 1981a(b)(3) and Legislative Council Policy No. 16(N). Rep. Trujillo cannot pretend the two are

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[3] This approach is in line with recently updated "zero tolerance" sexual harassment policies. *See, e.g., New Jersey General Assembly Anti-Discrimination and Anti-Harassment Policy* (adopted 9/19/18); *On the day of Kavanaugh hearing, NJ adopts 'zero tolerance' policy on sexual harassment*, Trenton Bureau, northjersey.com, https://www. northjersey. com/story/news/new-jersey/2018/09/24/metoo-new-jersey-lawmakers-upgrade-sexual-harassment-policy/1410395002/ (published Sept. 27, 2018).

[4] The federal law providing a private cause of action for workplace sexual harassment.

[5] *See* Opposition to Objection at 13 (citing *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1365 (10th Cir. 1997)).

interchangeable—or even relevant to one another. Unnecessarily adopting such a heightened standard for a violation would compromise the Legislature's function and be at odds with the Legislature's goal of achieving "an environment…free from all forms of harassment." *See* Anti-Harassment Policy, p. 1.

**III. A Hostile Work Environment is Not the Only Possible Violation of the Policy.**

Rep. Trujillo is incorrect in asserting that the issue in this matter is whether his conduct created a hostile work environment for Ms. Bonar; such an assertion disregards the plain language of the Anti-Harassment Policy. The relevant portion of the policy states:

> Sexual harassment includes unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature when:
>
> 4. such conduct has the purpose or effect of interfering with a person's work *or* creating an intimidating, hostile, or working environment.[6]

*See Anti-Harassment Policy* at 2 (emphasis added).

Rep. Trujillo ignores the use of the conjunction "or." Creating a hostile work environment violates the policy, as does interfering with a person's work at the Legislature. The Anti-Harassment Policy's recitation of examples of sexual harassment include: "sexual innuendo," "suggestive comments," "unwelcome physical contact." *Id.* Ms. Bonar's allegations, if proven, fall squarely within these examples and constitute a clear violation of the policy because the alleged sexual harassment interfered with her work at the Legislature. Federal law analyzing hostile work environment under Title VII is not pertinent to that conclusion.

As discussed at length in the Charging Party's Opposition to Rep. Trujillo's Motion to Dismiss, this is a formal hearing convened in accordance with Legislative Council Policy No. 16,

[6] This definition, along with examples, is substantially identical to the previous policy. *See* No-Harassment Policy (enacted May 2, 2008)

not a civil suit for damages in a court of law. Accordingly, the "definitions" and "standards" applicable in state or federal sexual harassment cases do not apply here. Testimony focused on these irrelevant standards, rather than the facts of this case, only confuses the issues and makes it more difficult to answer the ultimate questions. Rep. Trujillo's attempt to distract the subcommittee with testimony on irrelevant law, by a witness with no firsthand knowledge of the case, should therefore be rejected.

## IV. The Testimony Would Be Barred under the New Mexico or Federal Rules of Evidence.

Ironically, if this proceeding were in federal or state court, the proposed testimony would be rejected out of hand. There are at least five reasons why this testimony would be excluded by a court: (1) legal experts are generally not proper witnesses; (2) testimony regarding the definition of "sexual harassment" is not proper; (3) testimony regarding "the standards" applicable to sexual harassment is not proper; (4) the proposed testimony is irrelevant; and (5) the proposed testimony will not aid the Subcommittee in weighing the evidence.

It is well-established in New Mexico that expert testimony is confined to illuminating questions of fact rather than rendering conclusions of law. *See Beal v. Southern Union Gas Co.,* 1960-NMSC-019, ¶ 33, 66 N.M. 424 (conclusions of law by witnesses are "obviously improper as an invasion of the province of the jury and the court."); *State v. Clifford,* 1994-NMSC-048, ¶ 20, 117 N.M. 508 ("[S]uffice it to say that opinion testimony that seeks to state a legal conclusion is inadmissible."). For this reason, attorneys are generally not eligible to proffer expert testimony—their province of expertise is the law itself rather than an obscure technical field. *See, e.g., The Pinal Creek Group v. Newmont Mining Corp.,* 352 F.Supp.2d 1037, 1043 (D. Ariz. 2005) ("Courts have held that expert testimony by lawyers, law professors, and others concerning legal issues is

improper.") (citations omitted); Weinstein's Federal Evidence § 702.03[3] ("Expert testimony is not admissible to inform the finder of fact as to the law…").

These concerns are heightened by Rep. Trujillo's vague statement that Ms. Noya will testify regarding the "definition of sexual harassment." It is improper for an expert witness to seek to define a critical term for the finder of fact. *See State v. Danek,* 1993-NMCA-062, ¶ 30, 117 N.M. 471 (it was legal error to allow an expert witness to testify regarding the definition of the term "security" in a securities fraud case); *State v. Gibson,* 1992-NMCA-017, ¶ 31, 113 N.M. 547 (testimony from an attorney is not "the appropriate manner of presenting the law to the jury."). This prohibition applies equally to Ms. Noya's anticipated testimony on "the standards" applicable to sexual harassment. Expert testimony is not proper "when the purpose of the testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based." *Gianfrancisco v. Excelsior Youth Centers, Inc.,* 88 Fed. R. Evid. Serv. 1347 (D. Colo 2012), citing *Specht v. Jensen,* 853 F.2d 805, 810 (10th Cir. 1988). This is especially applicable to sexual harassment cases. *See Kishaba v. Hilton Hotels Corp.,* 737 F.Supp 549, 556 (D. Haw. 1990) (determination of what constitutes sexual harassment "must turn on the facts of each case.").

Ms. Noya's proposed testimony will also not aid the subcommittee because the issues in this case are "not so impenetrable as to require expert testimony." *Wilson v. Muckala,* 303 F.3d 1207, 1219 (10th Cir. 2002). This hearing must ultimately answer a relatively simple question: whether Rep. Trujillo sexually harassed Laura Bonar in violation of the Anti-Harassment Policy. "When the normal experiences and qualification of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper." *Frase v. Henry,* 444 F.2d 1228, 1231 (10th Cir. 1971).

Determining this issue does not require technical expertise or profound scientific knowledge; it is precisely the sort of question best left to a close examination of *factual* rather than *opinion* evidence. In sexual harassment cases, the Tenth Circuit has reached this exact conclusion: when the proffered expert testimony is not on some obscure issue but seeks to impinge on the judgment of the jury, it is proper to exclude it. *Wilson,* at 1218. The Hearing Subcommittee should follow the Tenth Circuit's example and exclude Ms. Noya's testimony because it improperly invades the Subcommittee's fact-finding province.

**Conclusion**

For all these reasons, the subcommittee should exclude the proposed testimony of Ms. Noya, as such testimony would be irrelevant, improper, and unhelpful.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I caused a true and correct copy of the foregoing ***Charging Party's Motion to Exclude the Proposed Testimony of Jennifer Noya*** to be served via electronic communication on the following:

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