BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo,

Respondent.

RESPONDENT'S RESPONSE IN OPPOSITION TO CHARGING PARTY'S MOTION TO EXCLUDE PROPOSED TESTIMONY OF JENNIFER NOYA

The Motion should be denied because Special Counsel – now acting as the Charging Party – has already offered its own one-sided "expert" opinion to the Hearing Subcommittee about legal standards that should be applied to adjudicate hostile work environment claims against Respondent. Where, as here, Respondent's reputation and political career are at stake, he should have the same opportunity.

As a preliminary matter, the Charging Party claims that "the Anti-Harassment Policy is the only standard governing this matter," and that the Hearing Subcommittee should not "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 argument ignores that Special Counsel repeatedly cited federal and state law in its Recommendations to the Investigative Subcommittee to support its probably cause findings.

Special Counsel's repeated reliance on federal and state law to support the charge against Respondent are discussed at length in Respondent's Response to the Charging Party's Notice of Intent to Limit Testimony. Special Counsel cannot credibly cite federal and state law to support their claims against Respondent, and then declare the same laws "inapplicable" or "irrelevant" when he seeks to present a contrary view.

Moreover, under the Anti-Harassment Policy, actionable sexual harassment exists under only four circumstances:

> Sexual harassment includes unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature when:
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> 1. submission to such conduct is made, either explicitly or implicitly, a term or condition of a person's employment;
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> 2. submission to or rejection of such conduct by a person is used as the basis for employment decisions affecting that person;
>
> 3. submission to or rejection of such conduct by a person is used as the basis for decisions or actions related to the support or opposition of legislation or other legislative processes; or
>
> **4. such conduct has the purpose or effect of interfering with a person's work or creating an intimidating, hostile or offensive working environment.**

Of these four, categories, the only remaining claims against Representative Trujillo fall under the fourth category: hostile work environment. The term "hostile work environment" is a term of art developed under federal and state anti-discrimination laws.

That is why, at page 7 of their Recommendations to the Investigative Subcommittee, under the heading "Specific Acts of Alleged Harassment and Application of Anti-Harassment Policy," Special Counsel quote *Semsroth v. City of Wichita*, 304 Fed. Appx. 707, 722 (l0th Cir. 2008), for the proposition that "in considering whether a hostile work environment exists to support a sexual harassment claim, factfinder should consider 'all the circumstances from the perspective of a reasonable person in the plaintiffs [sic] position.'" Recommendations at 7. *Semsroth* is a federal appellate opinion applying Title VII to adjudicate a hostile work environment claim.

On page 32 of their Recommendations, Special Counsel cite *Ulibarri v. State of New Mexico Dep 't of Corrections, Acad.*, 2006-NMSC-009, 139 N.M. 193 for the proposition that "an isolated incident or an offhand comment does not support a sexual harassment claim."

On page 35 of their Recommendations, Special Counsel support their recommendation that the Investigative Subcommittee find sufficient evidence to charge Respondent with creating a hostile work environment by citing *Turnbull v. Topeka State Hasp.*, 255 F.3d 1238, 1243-44 (l0th Cir. 2001) for the proposition that "a single incident is sufficient to constitute a hostile work environment where the incident is objectively abusive or humiliating." Special Counsel also cite *Macias v. Southwest Cheese Co.*, LLC, 624 Fed. Appx. 628 (10th Cir. 2015) for

the proposition that "the legal standard for assessing severity does not require physical contact."

If federal and state law do not apply, are irrelevant, and will not inform the Subcommittee, why did Special Counsel cite them to support their recommendations? Respondent should have fair opportunity to present his counter-view of the legal standards. Respondent believes the most effective way to do so is through a live witness.

The New Mexico Legislature is a citizen legislature, and most of the members of the Hearing Subcommittee are not lawyers nor are they likely versed in employment law, or the factors to be considered when adjudicating whether a "hostile work environment" exists. The Anti-Harassment Policy expressly recognizes the need for expert advice on this topic, because it specifically provides that, where a sexual harassment complaint is made a against a legislator: "The respective legislative leaders shall consult with outside counsel who is experienced in employment law and in the investigation of claims of harassment and determine whether the complaint should be investigated further."

Respondent disputes that Special Counsel has accurately or fully described federal and state law on "hostile work environment" claims, and because it is his reputation at stake, Respondent should be permitted fair opportunity to present its

own expert "experienced in employment law and in the investigation of claims of harassment."

Jennifer Noya is a shareholder at the Modrall Sperling Law Firm, and Ms. Noya has over 20 years experience in both litigating and investigating sexual harassment and hostile work environment claims. Ms. Noya is not being called to express an opinion on whether Respondent created a hostile work environment, or any other ultimate question of fact. Ms. Noya is being called to express opinions about the legal standard to be applied to whatever facts the Subcommittee may find, and to express opinions about the customs and practices typically used when investigating hostile work claims, and the customs and practices of discipline.

Fed.R.Evid. 702 does not strictly apply here but helpfully explains the general concept that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ms. Noya's specialized knowledge in employment law and the investigation of hostile work environment claims may assist the Hearing Subcommittee to understand whether the conduct alleged is sufficiently severe or pervasive to create a hostile work environment.

The Charging Party cites various cases that hold that an expert may not express opinions on the law, but this is not a trial in a court-room. In a courtroom, the judge is the sole arbiter of the law. *First Nat'l Bank in Albuquerque v. Sanchez*, 112 N.M. 317, 324, 815 P.2d 613, 620 (1991) (the trial court has "the exclusive province and responsibility" of telling the jury whether conduct is or is not "legal"). Here, there is no judge to direct a jury on the law. Respondent moved to have a Special Hearing Officer appointed to facilitate the Formal Hearing, and that motion was denied. Here, we have a legislative subcommittee trying to weigh evidence and find facts without the benefit of knowing the extensive law around hostile work environment claims. Ms. Noya's testimony will help provide tools for the Subcommittee decide ultimate questions of facts.

As the Charging Party frequently reminds Respondent, the Rules of Civil Procedure and Rules of Evidence do not apply. There are no rules limiting the presentation of witnesses – expert or otherwise. There is no presiding judge experienced in employment law to guide proceedings or decision-making. There are there no jury instructions to outline the legal standards to be applied to facts.

Where, as here, the Charging Party has been the only party given opportunity to present its expert opinion on the law of sexual harassment and hostile work environment, Respondent should have fair opportunity to respond.

Respectfully submitted,

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We hereby certify that a true and
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