BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo,

Respondent.

**RESPONDENT'S RESPONSE IN OPPOSITION TO LAURA BONAR'S LETTER OBJECTION TO WRITTEN DISCOVERY**

On the eve of her deposition, Laura Bonar unilaterally declared that she would not appear to testify under oath about her allegations of sexual harassment against Representative Trujillo.[1] Ms. Bonar also broadly objected to producing records and information directly relevant to her claims of sexual harassment against Representative Trujillo.[2] Ms. Bonar did not make any specific objection to any particular discovery request, but instead made only a general, wholesale objection to all discovery requested by Respondent (the "Objection").

The Subcommittee should overrule the Objection because (1) the discovery requests served on Ms. Bonar are already narrowly tailored to seek information directly relevant to her claims of sexual harassment against Representative Trujillo; (2) Ms. Bonar did not make any specific objection to any particular

[1] *See* 10/19/18 Letter from Monagle to Jackson re "Objections to Discovery Requests") (attached as Exhibit 1) ("I will not be producing my client for a deposition.")
[2] *Id.* ("I object to the procedural validity of the interrogatories and requests for production that you sent to my client in this case.")

request, as required; and (3) her Objection was untimely. Ms. Bonar is the primary witness in this case, and her refusal to be cross-examined under oath and to turn over records relevant to her claims of sexual harassment against Representative Trujillo deeply prejudice his ability to defend himself.

Ms. Bonar's failure to appear for her deposition and failure to respond to discovery requests also disqualifies her from testifying at the Formal Hearing. The Scheduling Order entered by the Subcommittee expressly provides that the failure of a party to appear for her deposition or to timely respond or cooperate with written discovery "shall be grounds to preclude the witness from testifying at the formal hearing . . . ." Scheduling Order at ¶¶ 4(a) and (b) (entered on September 26, 2018).[3] The Subcommittee should enforce its own order.

Finally, Representative Trujillo has been given a very short time and very few tools to gather evidence to defend himself against Ms. Bonar's claims that he sexually harassed her nearly 5 years ago. Because she is the only witness who claims to have firsthand knowledge of sexual harassment, Representative Trujillo sought Ms. Bonar's deposition from the outset. Ms. Bonar's deposition had been scheduled for three weeks on a date that she and Special Counsel committed to have her appear. Ms. Bonar purposely delayed notifying Respondent that she would not appear for her deposition until the Friday afternoon before her Monday

[3] Respondent will separately file a motion asking the Committee to enforce its own order and strike Ms. Bonar as a witness.

morning deposition. The delay was in bad faith, and intended to interfere with Representative Trujillo's defense. Ms. Bonar openly admits that her goal is to remove Representative Trujillo from office, and that motive must be considered when looking at her conduct here.

For these reasons, and those stated below, Respondent requests that Ms. Bonar's objection based on the "procedural invalidity" of the Scheduling Order be overruled.

## Background and Procedural History

### The Policy

In 2018, the New Mexico Legislative Council adopted a new Anti-Harassment Policy which admirably seeks to protect those in and around the Legislature from sexual harassment.[4] Legislative Council Policy No. 16 creates procedures for filing a complaint outside of the session, and requires that: "Any charge seeking the discipline of a member of the legislature during the interim shall be in writing, under oath or affirmation, signed by a . . . member of the public, addressed to the legislative council and filed with the legislative council service at the state capitol." Legislative Policy No. 16(F) (emphasis added).

[4] The Anti-Harassment Policy states that "Sections 2-15-7 through 2-15-12 NMSA 1978; Senate Rules 9-13-1 through 9-13-6; House Rules 9-13-1 through 9-13-7; or Legislative Council Policy No. 16 shall apply to the process regarding complaints against legislators." Where a complaint is received outside of the session, the Legislature delegated its power to investigate sexual harassment claims to the Interim Legislative Ethics Committee (the "Committee") N.M.S.A. § 2-15-7(B) ("All matters arising in the interim pertaining to legislative ethics shall be referred to

**The Open Letter**

On May 2, 2018, lobbyist Laura Bonar posted an open letter on the internet publicly accusing Representative Trujillo of sexually harassing her five years earlier. Ms. Bonar did not verify her claims by signing the letter under oath, as required, or follow any of the other requisite steps.[5] During the subsequent investigation, Special Counsel conducted only an informal interview of Ms. Bonar, and Representative Trujillo had no opportunity to cross-examine her about her claims during the investigation. To date, Ms. Bonar's claims have never been tested under oath or through cross-examination.

**The Investigation**

On July 27, 2018, the Investigative Subcommittee entered its *Findings and Recommendations of the Investigative Subcommittee to the Hearing Subcommittee of the Interim Legislative Ethics Committee Regarding Representative Trujillo* (the "Findings and Recommendations"). The Investigative Subcommittee adopted the findings and recommendations of the Special Counsel, and found no probable cause to support multiple claims made by Ms. Bonar against Representative Trujillo. Those claims have now been dismissed.

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this special interim legislative ethics committee."). This same statute requires that "the New Mexico legislative council shall develop procedures to carry out the provisions of this section, in accordance with the existing procedures in the house and senate rules." N.M.S.A. § 2-15-9(A).

[5] Ms. Bonar's multiple violations of the applicable procedures is the subject of a pending Motion to Dismiss (filed October 4, 2018).

The only remaining allegations to be heard by the Subcommittee are Ms. Bonar's claims that:

1. On January 28, 2014, Ms. Bonar asked to sit next to Respondent at a hearing before the House Consumer and Public Affairs Committee, and that he allegedly responded that: "you can sit next to me anytime, Laura. At dinner. By the fire. In the pool."[6]

2. On February 5, 2014, Respondent "pulled' her aside in the corridor outside of the House Chambers and asked her "When can we meet?"[7]

"The Special Counsels' role in recommending the existence or absence of probable cause is not equivalent to a finding that conduct prohibited by the Anti-Harassment Policy has occurred,"[8] only that there appears to be sufficient evidence on the above claims to proceed to a Formal Hearing.

**The Scheduling Order for a Formal Hearing**

The applicable Legislative Council rules provide that "[a]t the time a formal hearing is scheduled, the hearing subcommittee shall establish and notify the parties of the preliminary schedule and the procedures to be followed."[9] "[S]pecial legal counsel to the investigative subcommittee shall become the charging party and present the case against the legislator being charged."[10] The only "parties" to the proceeding are the Charging Party and the Respondent (the legislator being

[6] *See* Findings and Recommendations at 34-36.
[7] *Id.* at 36-37.
[8] *Id.* at 5.
[9] Legislative Council Policy 16(L).
[10] Legislative Council Policy 16(J)(1).

charged). Legislative Policy 16(K) provides that the "parties shall have an opportunity to be heard, to request the presence of witnesses and the production of relevant evidence and to cross-examine witnesses against them."

On September 26, 2018, the Subcommittee formally entered a Scheduling Order submitted by the only parties to this proceeding (the Charging Party and Respondent).[11] In accordance with Legislative Policy 16(L), the Scheduling Order established the preliminary schedule and procedures to be followed. Over Respondent's objection, the Scheduling Order did not permit Respondent to issue subpoenas to third parties for depositions and records. Instead, third party discovery was more narrowly limited to three tools: (1) deposition of *witnesses* identified by the opposing party; (2) requests for production of documents from witnesses; and (3) interrogatories (written questions) to witnesses.

Because the Scheduling Order did not grant Respondent subpoena power (i.e. no power to compel third parties to act), the parties instead agreed, and the Subcommittee ordered, that "[f]ailure of a witness to appear or cooperate shall be grounds to preclude the witness from testifying at the formal hearing . . . ." With respect to "written discovery," the Subcommittee likewise ordered that "[f]ailure of

[11] Respondent noted that he did not agree to all of the proposed procedures in the Scheduling Order, and reserved the right challenge particular procedures by Motion. Scheduling Order at ¶ 8. On October 4, 2018, Respondent filed two emergency motions seeking expedited consideration: (1) Respondent's Motion to Appoint an Independent Hearing Officer; and (2) Motion to Allow Respondent to Issue Subpoenas. Despite requests for an expedited hearing, neither motion has been scheduled for hearing as of the time of this filing.

a witness to timely respond or cooperate with written discovery shall be grounds to preclude the witness from testifying at the formal hearing . . . ." In other words, the Order already addresses what's happened here: when one side's witness fails to appear for a deposition or respond to written discovery, that side cannot call the witness at the Formal Hearing.

Importantly, the Scheduling Order also provides that "[a]ny objection to written discovery that cannot be resolved by the parties must be made by motion and filed with the Legislative Council Service . . . ." These are the ground rules established by Order of the Subcommittee. The Scheduling Order was promptly posted and publicly available on the website for Interim Legislative Ethics Committee.

**The Scheduling of Ms. Bonar's Deposition**

Counsel for Respondent first requested dates to depose Ms. Bonar on September 7 – well before entry of the Scheduling Order. Respondent again asked to depose Ms. Bonar by emails dated September 17 ("I will want to depose at least the following witnesses . . . : 1. Laura Bonar") and September 21 ("I'd like to start with Laura Bonar."). Respondent followed up by email dated September 23 ("I'd like to depose Laura Bonar before Jennings, so please let me know where we stand with respect to Bonar."). Special Counsel responded by email on September 25: "I

have sent a request to her attorney re: availability. Should know by tomorrow." The Subcommittee entered the Scheduling Order the next day.

On October 2, after conferring with Ms. Bonar's personal counsel (who was copied by Special Counsel on the emails scheduling her deposition), Special Counsel offered two dates for Respondent to depose Ms. Bonar: "Ms. Bonar is available for a deposition on Oct. 22 or 23."[12] During the discussions about scheduling and sequencing of depositions, Respondent's counsel made clear why it was important to depose Ms. Bonar first: "I always seek to depose the plaintiff or claimant first in every case I defend . . . so that I get the unvarnished truth from the prime witness at the outset, as best I can."

Respondent communicated to both Special Counsel and to personal counsel for Ms. Bonar (Levi Monagle) that her deposition would be scheduled for October 22: "Gentlemen, Let's book Monday October 22 for Ms. Bonar's deposition." That same day, Respondent issued a Notice of Deposition formally notifying both Special Counsel and Ms. Bonar's personal counsel that Respondent was scheduling her deposition to occur on October 22 (the earliest date she provided). Exhibit 3. Ms. Bonar's personal counsel asked whether Respondent would attend the deposition, but never objected to proceeding with it.

[12] *See* email dated 10/2/18 discussing scheduling of Ms. Bonar's deposition (Exhibit 2).

**Written Discovery to Laura Bonar**

On October 8, Respondent served written discovery on Ms. Bonar – sending copies to both Ms. Bonar's personal counsel and to Special Counsel. A copy of Respondent's written discovery responses are attached as Exhibit 4.[13] The discovery requests alert Ms. Bonar that they are being issued "[p]ursuant to Paragraph 4(b) of the Scheduling Order" and request that she "please answer the below interrogatories and respond to the below requests for production within ten (10) days, or by October 18, 2018." Under the Scheduling Order, Respondent was entitled to ask 25 interrogatories and serve 25 requests for production, but instead served only 13 interrogatories and 16 requests for production.

Ms. Bonar has not identified any specific objection to any particular request, and Respondent should not have to preemptively defend his discover requests where the objecting party has not made any specific objection to any request. Nevertheless, Ms. Bonar broadly claims that these discovery requests are irrelevant and simply a fishing expedition. Actual review of Respondent's written discovery proves otherwise. For example:

- Respondent's Interrogatory No. 2 asks that she "[p]lease identify all persons whom you believe may have knowledge or information . . . relevant to the allegations of sexual harassment made by you against Representative Carl Trujillo." Respondent should be entitled to know who may have information about Mr. Bonar's claims.

[13] *See* Respondent's First Set of Interrogatories and Requests for Production to Laura Bonar (Exhibit 4).

- Interrogatory No. 3 asks whether Ms. Bonar "has obtained a written statement relevant to the allegations of sexual harassment made by you against Representative Carl Trujillo," and Request for Production No. 1 asks her to produce them. Respondent should be entitled to know whether Ms. Bonar obtained written statements from witnesses, and should be entitled to obtain them in discovery.

- Interrogatory No. 5 asks that Ms. Bonar identify every person with whom she has "communicated regarding the allegations of sexual harassment made by you against Representative Carl Trujillo."

- Interrogatory No. 7 asks that Ms. Bonar identify social media postings that refer or relate to "Representative Carl Trujillo" or "the allegations of sexual harassment made by you against Representative Trujillo." Request for Production No. 6 asks her to produce the same.

- Interrogatory No. 8 simply asks whether Ms. Bonar kept a journal, diary or calendar that could help refresh her recollection as to events in 2013, 2014, and 2015. The claims Ms. Bonar made against Respondent in May 2018 arise from conduct she alleges occurred nearly five years ago. Respondent denies that he sexually harassed Ms. Bonar, and he should be entitled to any calendars or journals that kept track of Ms. Bonar's activities to see if the prove (or disprove) her factual claims.

Request for Production No. 3 asks that, for the period of January 1, 2018 forward, that she produce communications with: (a) Representative Brian Egolf, or anyone acting on his behalf; (b) Special Counsel Tom Hnasko; (c) Special Counsel Theresa Parish; (d) Raul Burciaga, Director of the Legislative Council Service; (e) Julianna Koob; and (f) Andrea Romero, or anyone acting on her behalf. As discussed at length in Respondent's Motion to Dismiss, Ms. Bonar did not follow the requirements of the Anti-Harassment Policy when she publicly posted her Open Letter on the internet. In addition to denying that he sexually harassed Ms.

Bonar, Representative Trujillo contends that his confidentiality was violated and that Ms. Bonar and others ignored required procedures to his detriment. A legislator charged with misconduct under the Anti-Harassment Policy should be entitled to test whether proper procedures were followed to charge him in the first place.

For example, the Anti-Harassment Policy provides that "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. If any one of the legislative leaders or outside counsel determines that the complaint should be investigated further, the complaint shall be forwarded to an investigative subcommittee." Upon information and belief, Speak Egolf is the legislative leader who determined that the complaint should be investigated further, thus prompting the investigation of Respondent. Respondent should be entitled to see any communications between Ms. Bonar and Speaker Egolf or Special Counsel so that there is transparency in a process. A handful of individuals should not be allowed to decide in secret which claims are investigated, and which are not. In a case where Ms. Bonar did not follow the rules to file a complaint, Respondent is entitled to know who authorized the investigation. Moreover, Special Counsel investigated the claims against

Respondent, and Respondent should be entitled to see what Ms. Bonar told Special Counsel.

The Anti-Harassment Policy requires that "[i]f the person making the complaint is anyone other than a legislative employee, the person making the complaint shall report it to the Director of the Legislative Council Service or the chief clerk. Mr. Burciaga is the Director of the Legislative Council Service, and Respondent should be entitled to see what, if anything, Ms. Bonar communicated to him.

Julianna Koob is another lobbyist who has also been identified as a potential witness by the Charging Party. Ms. Koob made her own separate claims against Respondent. Respondent should be entitled to see communications between Ms. Bonar and Ms. Koob because they may prove (or disprove) that the two acted in concert with political motives to remove Respondent from office. Respondent adamantly denies that he sexually harassed Ms. Bonar, and should be allowed to obtain discovery about other motives that Ms. Bonar may have had to accuse him of misconduct.

The ultimate question before the Subcommittee is whether Representative Trujillo engaged in sexual harassment that was sufficiently severe and pervasive to constitute a hostile work environment. "In order to prevail on a hostile work environment sexual harassment claim, [the Charging Party] is required to show

that the unwelcome, sexually-oriented conduct was sufficiently severe or pervasive as to alter the conditions of [Ms. Bonar's] employment and create an abusive working environment. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365 (10th Cir. 1997). Courts consider "a variety of factors" in this holistic analysis, "including[ ] 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. (citations omitted). Moreover, courts assess whether the work environment "[is] both subjectively and objectively hostile or abusive." *MacKenzie v. City & Cty. of Denver*, 414 F.3d 1266, 1280 (10th Cir.2005)

Respondent has therefore requested that Ms. Bonar sign a release so that Respondent can obtain her employment records to determine whether there is any evidence in her personnel file to suggest that the conditions of her employment changed or that he somehow interfered with her work performance. Respondent has similarly requested that Ms. Bonar identify any mental health providers from who she sought treatment between the time of the alleged sexual harassment forward to determine (1) whether she reported the alleged sexual harassment to her mental health providers (either at the time or later); (2) whether there is evidence that proves (or disproves) how she felt subjectively about the claimed sexual harassment. In her Open Letter posted to the internet, she claimed that she was

"sickened with frustration and guilt" and "sickened with a sense of hopelessness and injustice." If true, her mental health records should reflect the same, and if they do not, that evidence would tend to support Respondent's story that there was no sexual harassment.

Respondent committed in advance to keep any mental health records obtained confidential:

> Respondent agrees that all mental health records obtained shall be kept confidential, and shall not be publicly disclosed to anyone other than Respondent and Respondent's Counsel, except that Respondent may seek to admit such records at the Formal Hearing in this matter if Respondent determines they are relevant to allegations made by you against Representative Trujillo. If Respondent intends to use your mental health records at the Formal Hearing, Respondents' counsel will alert Special Counsel and your counsel in advance, and request that such portion of the Formal Hearing be closed to protect your confidential mental health records from public disclosure.

Request for Production No. 10.

All of the discovery served on Ms. Bonar was limited to fact questions that are expected to be at issue at the Formal Hearing. Undersigned counsel has practiced employment law and defended sexual harassment claims for fifteen years. These types of interrogatories and requests for production are standard.

> [D]iscovery is permitted as to matters that "are or may become relevant" or "might conceivably have a bearing" on the subject matter of the action, or where there is "any possibility" or "some possibility" that the matters inquired into will contain relevant information. Conversely, courts have said that discovery will be permitted unless the matters inquired into can have "no possible bearing upon," or are "clearly irrelevant" to the subject matter of the action.

*United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 70, 96 N.M. 155, 174, 629 P.2d 231, 250

Because Ms. Bonar delayed making these claims for years, there is no longer any video record and there are no witnesses who might recall what did or did not happen in a committee hearing room or corridor. Importantly, Special Counsel found "all witnesses to have been credible and that each [was] genuinely committed to his or her version of events." In a he said/she said case like this where both parties are credible and the testimony of Ms. Bonar and Representative Trujillo will be the only first-hand evidence, it is critical that the person accused of misconduct have the right to obtain potentially relevant records and information that the complaining party did not readily volunteer when she complained of misconduct, and to depose and cross-examine the person who accused him of misconduct.

**The Untimely Objection**

On October 2, Special Counsel and Ms. Bonar's personal counsel both agreed that Ms. Bonar could be deposed three weeks later, on Monday October 22. Respondent noticed the deposition that day, and served written discovery responses six days later (on October 8). Under the requirements of the Scheduling Order, Ms. Bonar's written discovery responses were due on Thursday, October 18. In this already compressed timeframe, Ms. Bonar's counsel stood silent during that

entire period. On October 18, Ms. Bonar's counsel asked: "Would you be amenable to granting an extension until tomorrow afternoon?" Because Ms. Bonar's deposition was scheduled to occur shortly thereafter, Respondent did not agree to the extension, but instead conditioned the extension on whether Ms. Bonar could produce her records electronically:

> I think that's fine, but we would like to have these materials in hand so that they can be reviewed over the weekend/in advance of Ms. Bonar's deposition on Monday. Can you produce them electronically tomorrow so that we are able to accomplish that?

10/18/18 Email from Jackson to Monagle (Exhibit 5). Any agreement to an extension of the time to produce records was conditioned on Ms. Bonar actually producing records. Her lawyer never responded.

Instead of producing records, or providing specific responses and objections to Respondent's written discovery requests, as required, Ms. Bonar issued a letter broadly objecting to all written discovery and refusing to appear for her deposition at all. Ms. Bonar's general Objection to discovery violates the requirements of the Discovery Order, and Ms. Bonar purposely delayed making the Objection until the eve of her deposition.

Paragraph 4(b) of the Discovery Order provides that: "The requirements of Rules 1-033 and 1-034 NMRA shall apply, except that the responding party shall serve a written response and produce any responsive records and information within 10 days after service." Interrogatories are simply written questions to be

answered under oath. Rule 1-033 provides that: "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable." NMRA, Rule 1-033(C)(1). "All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived . . . ." NMRA, Rule 1-033(C)(4).

Ms. Bonar did not answer a single interrogatory (in whole or part), nor state any objection to any particular interrogatory with the required specificity.

> The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have. This rule is generally applicable '(r)egardless of how outrageous or how embarrassing the questions may be.' When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories.

*United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 241, 96 N.M. 155, 210, 629 P.2d 231, 286.

With respect to requests for production, Rule 1-034 similarly provides that:

> The party upon whom the request is served shall serve a written response [and that the] response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to . . . . If objection is made to part of an item or category, the part shall be specified.

NMRA, Rule 1-034. Ms. Bonar did not respond to a single request for production, nor did she state any objection to any particular request for production, nor did she

produce any records whatsoever. This is discovery abuse, and the Scheduling Order already provides the remedy.

Rather challenge any particular written discovery request, Ms. Bonar challenged the "procedural validity" of the Scheduling Order entirely. Ms. Bonar first claimed that her counsel should have included in the "negotiation" of the Scheduling Order. But Ms. Bonar is not a party. Under the rules that apply to this proceeding against Representative Trujillo, there are only two parties: the Charging Party and the Respondent. Pursuant to Legislative Council Policy No. 16(J)(1), the Special Counsel has already been "appointed to be the charging party and [to] present the case against the legislator being charged." Special Counsel already acts as prosecutor and advocate for Ms. Bonar's claims. It would be unfair and contrary to the applicable rules to force Representative Trujillo to defend himself on multiple fronts against multiple lawyers advocating the same position, as he has been forced to do here.

Special Counsel is now the sole advocate for Ms. Bonar against Representative Trujillo at the Formal Hearing. Ms. Bonar is simply a witness. If Special Counsel felt that Ms. Bonar's personal counsel was entitled to provide input into the Scheduling Order, he could have asked for it before the Order was entered. Special Counsel controlled the submission of the Scheduling Order for approval by the Legislative Council Service (LCS), the Subcommittee and anyone

else whose approval was required. While Ms. Bonar had the right to timely object to discovery (now waived), she has no standing to challenge the validity Scheduling Order itself.

Ms. Bonar should not be allowed to challenge or change the rules established by the Subcommittee a month after-the-fact. It would be fundamentally unfair to change the rules in a way that further limits Representative Trujillo's ability to defend himself with only forty (40) days remaining before the Formal Hearing.

Third, Ms. Bonar's claim to have no knowledge about the formation and negotiation of the Scheduling Order is demonstrably false. The Objection states that: "As Ms. Bonar's attorney, I was never included in any phase of this negotiation- or even alerted to the fact that a negotiation was ongoing- and only became aware of this negotiation recently, after it had longsince concluded. Letter from Monagle to Jackson (Ex. 1). That's simply not true.

On October 2, at the same time her attorney committed to have Ms. Bonar sit for her deposition on October 22, Special Counsel copied Ms. Bonar's counsel on the extensive correspondence negotiating the Scheduling Order, which had only been entered days earlier. In fact, the email on which her lawyer is copied is titled "RE: Draft Scheduling Order." Exhibit 6.

By way of background, the original scheduling order drafted by Special Counsel provided that: "[t]he parties may engage in written and oral discovery, including the taking of depositions of witnesses designated by the other party." In this extensive back and forth between Special Counsel and Respondent's counsel – which is later copied to Ms. Bonar's attorney – Respondent explains:

> [I]n terms of discovery, we have amplified the procedures for taking depositions/serving written discovery, essentially to follow the rules of civil procedure but with expedited deadlines. We've also added the ability to issue subpoenas to third parties, but leaving enforcement to the committee itself. Subpoenas are needed because, if a respondent is unable to require the attendance of witnesses and production of records from parties outside the proceeding, then there are no real teeth these discovery provisions (and no real discovery). The various rules that are said to apply to this proceeding are not consistent, but the House Committee rules expressly provide for the issuance of subpoenas in these types of hearings.

Exhibit 6.

The revised Scheduling Order proposed by Respondent specifically addressed third party discovery, and stated:

> a) Third Party Discovery. Either party may issue subpoena(s) requiring a person to (1) attend and give testimony; or (2) to produce and permit inspection, copying, testing or sampling of designated documents, electronically stored information or tangible things in the possession, custody or control of that person, at a time and place therein specified. The form of the subpoena shall be in substantially the same as that required for Rule 1-045 NMRA but modified for issuance by the Hearing Subcommittee. Rule 1-045's requirements shall apply to the issuance and enforcement of such subpoenas, except that this Hearing Subcommittee shall have sole authority to adjudicate and enforce subpoenas. Given the short timeframe between this scheduling order and the formal hearing date, the Hearing Subcommittee directs that all

> discovery shall be expedited, and thus any person responding to a subpoena must do so within seven (7) days of service. Any objection to a subpoena shall be made by motion and filed with the Hearing Subcommittee, and shall be decided following a preliminary hearing by either the Hearing Subcommittee or Hearing Officer sufficiently in advance of the formal hearing to allow the party seeking such information or testimony to obtain and consider use of it at the formal hearing.

Special Counsel objected to the inclusion of this language, and to the issuance of subpoenas generally, on grounds that the Interim Legislative Ethics Committee lacks the power to issue subpoenas.

On October 4, Respondent filed an emergency motion to authorize subpoena power to prevent exactly the tactics being used now - the evasion of discovery by attacking the legitimacy of the process. Respondent requested expedited consideration, but the Motion for Subpoena Power has not yet been scheduled to be heard.

In any event, on October 2, Ms. Bonar's personal counsel was copied on the "negotiation" of the Scheduling Order before she was served with written discovery, and Ms. Bonar never raised any objection at all until October 22, 2018. Ms. Bonar's counsel possessed the written "negotiations" on the same day he committed to have her appear for deposition. The protests about being excluded from negotiating the Scheduling Order are simply bad excuses for Ms. Bonar's failure to appear for her deposition and failure to timely respond to written discovery.

**Legislative Council Service Invitation to Submit Specific Objections**

The Discovery Order expressly requires that: "Any objection to written discovery that cannot be resolved by the parties must be made by motion and filed with the Legislative Council Service." Discovery Order at ¶4(B). Rather than file a motion for protective order making specific objections to particular requests, or providing specific responses and objections, Ms. Bonar's counsel instead wrote a letter on the eve of Ms. Bonar's deposition making only a general objection. Ms. Bonar's personal counsel copied the Legislative Council Service's Senior Staff Attorney for the Subcommittee, Jon Boller.

In an attempt to help expedite and resolve the issue, Mr. Boller invited Ms. Bonar's counsel by email to submit specific objections to particular discovery requests, and to submit proposed amendments to the scheduling order.

> In the interests of getting a timely response from the Hearing Subcommittee concerning your objections to the validity of the interrogatories and requests for production your client received from Mr. Jackson, it would be helpful to know exactly what interrogatories and requests for production are being objected to. You are welcome to submit objections to the Subcommittee, along with your proposed amendments to the Scheduling Order regarding the scope of discovery. I would hope that the Co-Chairs of the Subcommittee may then give the parties a timely response so that depositions may proceed as scheduled.

10/20/18 Email from Boller to Monagle (Exhibit 7).

Respondent promptly objected to the suggestion that personal counsel for Ms. Bonar submit "proposed amendments to the Scheduling Order regarding the

scope of discovery," because she's not a party. Respondent also explained that there was no time to "fix" this problem.

> While I genuinely appreciate your attempt to try to keep proceedings on track, Ms. Bonar's deposition is scheduled to proceed this coming Monday morning (36 hours from now). In light of Ms. Bonar's last minute refusal to appear for her deposition and complete refusal to respond to any written discovery, there is nothing that can be done to proceed with the deposition "as scheduled."

*See* 10/20/18 Letter from Jackson to Boller (Exhibit 8).

Respondent also objected to the submission of a letter objecting to discovery, rather than a motion, as expressly required by the Scheduling Order.

> [T]he Subcommittee should resist engaging in any decision-making based on letter-writing and email campaigns. At this point, Mr. Monagle has simply copied you on a letter to me generally objecting to providing any discovery. As you can see, Respondent has a number of substantive responses to Ms. Bonar's decision to refuse to participate in discovery. In light of the seriousness of the claims made by Ms. Bonar and the consequences for Representative Trujillo, these questions should be decided by presentment of formal motion and hearing so that the opposing party has a fair opportunity to respond, and so that decisions are made with transparency and there is record for public review.

Exhibit 8 at 4 ("If Special Counsel or personal counsel for Ms. Bonar want to present questions to the Subcommittee that impact Representative Trujillo's rights, I request that they be required to do so by formal motion . . . .").

**Follow-Up Letter from Ms. Bonar**

Despite Respondent's objections, Ms. Bonar submitted a second letter on October 22, 2018 (Exhibit 9) ("Please find attached correspondence directed to Mr.

Boller, responding to his initial request for additional information relating to the substance of my discovery objections."). This letter simply repeats the prior arguments and fails to provide any specific objection to any particular discovery request. The letter again refuses to produce any records beyond what Ms. Bonar has already voluntarily produced to assist her admitted effort to remove Respondent from office.

Without filing any Motion to support it, Ms. Bonar's counsel requests an order *in limine* "tying the scope of relevance to the" Findings and Recommendations. That's unnecessary because all of Respondents' discovery requests are already limited to fact issues raised in the Findings and Recommendations. Ms. Bonar attempts to turn the rules upside down by arguing that "[R]espondent has given reason whatsoever for his discovery requests." It is the party resisting discovery (Ms. Bonar) who is required to make specific objections to discovery. Under the Scheduling Order, Ms. Bonar was required to make specific objections in the first place, and having been offered a second chance to make specific objections by Mr. Boller, she again refused to do so.

**Argument**

Ms. Bonar's eleventh hour Objection is far too late. The parties scheduled Mr. Bonar's deposition three weeks earlier on October 2 – a date that both Special Counsel and Ms. Bonar's personal attorney committed to have her appear. The

written discovery she generally objected to was served on both Special Counsel and Ms. Bonar's personal counsel on October 8. Ms. Bonar and her personal counsel had ample time to make this type of general objection well in advance so that the deposition could proceed as schedule. But Ms. Bonar purposely waited until the 2:35 pm on the Friday afternoon before her Monday morning deposition to raise any objection. It is outrageous that the person who made very serious allegations against Representative Trujillo is both refusing to testify under oath and refusing to produce relevant records.

A publicly elected official accused of misconduct should be fairly allowed to defend himself – especially where, as here, the allegations against him were not made under oath but rather through an internet posting. The Subcommittee selected December 3 and 4 for the Formal Hearing on this matter, and Representative Trujillo was given only two months to take discovery and prepare his defense. Because the Scheduling Order entered by the Subcommittee already provides only a short time and limited discovery tools, Representative Trujillo immediately began scheduling depositions and issuing written discovery requests in compliance with the Scheduling Order. Ms. Bonar's refusal to cooperate 40 days out cannot be cured and will have a ripple effect on all discovery sought by Respondent in this case.

Ms. Bonar is and has always been the primary witness in this case. Ms. Bonar's complete refusal to appear for her deposition and produce records, and her failure to object in a timely way, deeply prejudices Representative's Trujillo's ability to fairly defend himself against accusations made by her.

Furthermore, the discovery served on Ms. Bonar was narrowly tailored to claims made by her in this case. If Ms. Bonar had specific objections, it was incumbent on her to make timely and specific objections in formal responses to each specific discovery request. The Subcommittee has ordered that the requirements of Rule 1-033 and 1-034 apply to discovery requests in this proceeding, and only the Respondent has complied with those rules and limitations. Those rules require that the objecting party (Ms. Bonar) provide formal responses with specific objections to specific requests. *See, e,g.*, NMRA, Rule 1-033(C)(4) ("All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived . . .").

Ms. Bonar's discovery responses were due on Thursday, October 18, and she failed to timely respond at all. The letter sent by Ms. Bonar's lawyer the following day (October 19) fails to provide any response or make any specific objection, but rather vaguely complains about the entire process. Having already failed twice to provide any specific objections, Ms. Bonar should not now be invited to make more specific objections after-the-fact – whatever objections she

may have had have been waived. *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 241, 96 N.M. 155, 210, 629 P.2d 231, 286 ("The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have.").

Ms. Bonar has disqualified herself as a witness. The Scheduling Order approved by the Subcommittee, LCS, and Special Counsel expressly provides that:

1. "The failure of a witness to appear [for a deposition] or cooperate shall be grounds to preclude the witness from testifying at the formal hearing"; and

2. "Failure of a witness to timely respond or cooperate with written discovery shall be grounds to preclude the witness from testifying at the formal hearing."

The Subcommittee should enforce its Order.

Respondent is not deflecting from the merits. Representative Trujillo adamantly denies that he sexually harassed Ms. Bonar. Respondent has been seeking to cross-examine Mr. Bonar about her claims against Representative Trujillo from the outset because they have <u>never</u> been tested under oath. She posted them on the internet. Ms. Bonar is interfering with Respondent's ability to challenge her claims under oath.

## Conclusion

This matter is the first time that the Legislature's anti-harassment policy is being applied. As such, the Subcommittee should be mindful that the procedures followed here will likely become a roadmap for future cases. If the Subcommittee allows Ms. Bonar to evade and ignore discovery here without consequence, it will set a precedent and encourage future parties to do the same. Ms. Bonar has openly refused to cooperate with discovery, and there should be consequences.

Respectfully submitted,

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We hereby certify that a true and
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