

THE TWENTY-FOURTH DAY

CARSON CITY (Friday), December 3, 2004

Senate called to order at 8:43 a.m.

President Hunt presiding.

Roll called.

All present.

Prayer by the Chaplain, Pastor Albert Tilstra.

Save this moment, O God, from being merely a gesture to custom or convenience, and make it a real experience for each one of us in this place as we call on You for guidance and help.

You have admonished us: "When you stand praying, forgive, if you have aught against any." Give us the grace to lay aside all bitterness or resentment we may be nursing in our hearts, lest their acid eat into our peace and corrode our spirits.

You have said: "It is more blessed to give than to receive." Give us the grace today to think not of what we can get but of what we can give, that a new spirit may come into our work here with a new vision and a new purpose that You will delight and bless.

These things we leave in Your hands knowing that You will give us what is best.

AMEN.

Pledge of allegiance to the Flag.

Senator Raggio moved that further reading of the Journal be dispensed with, and the President and Secretary be authorized to make the necessary corrections and additions.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved that the Senate resolve itself into a Committee of the Whole for the purpose of hearing the Articles of Impeachment against Nevada State Controller Kathy Augustine, with Senator Amodei as Chair of the Committee of the Whole.

Motion carried.

IN COMMITTEE OF THE WHOLE

At 9:12 a.m.

Senator Amodei presiding.

The Articles of Impeachment against State Controller Kathy Augustine considered.

SENATOR AMODEI:

The Twenty-first Special Session of the Nevada Legislature will now come to order. Madam Secretary, will you please show the members who are present. Those who are not present and miss any portion of the proceedings today, please provide them with the CD which allows them to view the material that was gone over by the Committee in their absence. Please make certain this is done prior to taking any votes on any matters of substance regarding the issues before the Committee.

Welcome back, Ms. Normington. I would remind you that you are still under oath. I believe, when we adjourned last night, it was Mr. Greco's turn to address any matters occasioned as a result of questions from the Committee addressed to Ms. Normington last night.

DANIEL J. GRECO (Special Prosecutor):

Ms. Normington, I want to follow up on a very good question asked by Senator Cegavske. Do you recall her asking you about the use of the facsimile machine?

JENNIFER NORMINGTON (former Executive Assistant, Office of the State Controller):

Yes, I do.

MR. GRECO:

Were some documents that were strictly office related faxed by you on the office machine?

MS. NORMINGTON:

Yes.

MR. GRECO:

Were some documents that were campaign-related faxed by you on that facsimile machine?

MS. NORMINGTON:

Yes.

MR. GRECO:

When you faxed those campaign-related documents, was that during office hours?

MS. NORMINGTON:

Yes.

MR. GRECO:

Occasionally, did some of those faxed documents sent on office hours that were campaign related have office letterhead on them?

MS. NORMINGTON:

Yes.

MR. GRECO:

Did Controller Augustine clearly delineate for you a separation of campaign duties versus office duties?

MS. NORMINGTON:

No, she did not.

MR. GRECO:

Can you elaborate on that at all? Did Controller Augustine ever sit down with you and talk about the need to send out facsimiles or letters that were campaign related on her personal stationery or her personal paper as opposed to using office paper?

MS. NORMINGTON:

No, not at the beginning, I was instructed that everything that went out of the office was to go out of the office on Controller Augustine's stationery. I verified with her before sending anything out whether it was to be sent on the "fake letterhead" that was generated in the computer or letterhead that was printed with blue ink which was the informal stationery or on the formal stationery with the foiled Seal of the State. I believe, after the primary; she did bring into the office from her home in Las Vegas some campaign stationery that was 8 1/2 by 11 with matching envelopes. I sent some letters out on that stationery under her direction.

MR. GRECO:

In terms of every facsimile, though, which machine did you utilize?

MS. NORMINGTON:

The one in my office.

MR. GRECO:

That was a state facsimile machine?

MS. NORMINGTON:
Correct.

MR. GRECO:
You faxed those things on state time.

MS. NORMINGTON:
Correct.

MR. GRECO:
You were also asked about that letter of reprimand by the Senators. I want to ask you a couple of follow-up questions. You are conceding, are you not, that those things were in fact underneath your desk?

MS. NORMINGTON:
I am sorry. Could you repeat that? I had trouble hearing you.

MR. GRECO:
You are not disputing the fact that there were several items underneath your desk that were sitting there for quite a while. Correct?

MS. NORMINGTON:
I am not disputing that, no.

MR. GRECO:
Did you ever dispute that from the very beginning?

MS. NORMINGTON:
No.

MR. GRECO:
Ms. Normington, can you tell the Senators why those things sat there?

MS. NORMINGTON:
Those items sat there because Controller Augustine did not want anything to be on my desk. If I was working on one project, that was to be on my desk. Anything else had to be out of sight. I worked on things as I could get to them, as quickly as possible.

MR. GRECO:
That is fine. Therefore, you put them on the floor, and essentially, you forgot about them. Is that a fair way to characterize it?

MS. NORMINGTON:
That would be fair, yes.

MR. GRECO:
Did your workload during the 2002-campaign season, in your opinion, have anything to do with your forgetting about that or leaving those items below your desk?

MS. NORMINGTON:
Absolutely.

MR. GRECO:
Do you think that is the reason why they were under there because you were buried?

MS. NORMINGTON:
Yes.

MR. GRECO:
Lastly, Senator Beers asked you a few questions about those expense reports. Do you remember Senator Beers commenting that he has done a few of those expense reports himself?

MS. NORMINGTON:
Yes.

MR. GRECO:
Everyone chuckled a little bit.

MS. NORMINGTON:
Yes.

MR. GRECO:
Now, in your office in 2002, did Controller Augustine do her own expense reports?

MS. NORMINGTON:
No, I did them.

MR. GRECO:
That is all I had, Mr. Chair.

DOMINIC P. GENTILE (Counsel for Controller Augustine):
I just want to ask you about one area. Yesterday, you said you would take work home and work on it on your home computer. Am I correct?

MS. NORMINGTON:
Correct.

MR. GENTILE:
I take it, then, that you would copy what you had worked on from your home computer and, then bring it to the state computer.

MS. NORMINGTON:
I e-mailed it to myself.

MR. GENTILE:
The work that was on your home computer, was it at any time transferred to either the C-drive on your computer or the network drive at the State Controller's Office?

MS. NORMINGTON:
I would e-mail the documents from the state computer, some of them, to myself at home. I would continue to work on them at home and e-mail them back. Those went to the e-mail on my state computer that was linked to the C-drive.

MR. GENTILE:
We have thirty-some exhibits and some exhibits that have documents in them. Can you tell us every page that contains information that was placed in it that way?

MS. NORMINGTON:
No, I cannot.

MR. GENTILE:
I do not have anything further.

SENATOR AMODEI:
Additional questions from the Committee?

SENATOR CARE:
Ms. Normington, did I understand you to say that not until after the primary election in 2002, was when you, upon Controller Augustine's instructions, began sending out materials that did not have the Controller's official letterhead on it, campaign related. Is that correct?

MS. NORMINGTON:
That was, I believe, the time frame when she provided me with her campaign stationery. I am not sure if it was at that exact time or a little bit prior. I believe it was about the same time

period, June or July of 2002, that I suddenly realized that even facsimiles that we were sending out for fundraisers and things like that should not be on the office letterhead even if it was just computer generated. That is when I created her facsimile cover sheets and a letterhead template in Microsoft Word that said "Committee to Elect Kathy Augustine."

SENATOR CARE:

Do you recall testifying yesterday about three letters that went out to entities that somehow had an affiliation with Neena Laxalt?

MS. NORMINGTON:

Yes, I do.

SENATOR CARE:

The date on those letters was in February of 2002.

MS. NORMINGTON:

I do not have them in front of me, but I presume so, yes.

SENATOR CARE:

There should be a binder, which is Special Prosecutor's Exhibit P-14 with the date-stamp 000389 on the first letter.

MS. NORMINGTON:

Yes, those dates are what you said, February 27, 2002.

SENATOR CARE:

There may be an explanation for it, but I do not see a letterhead of any kind, campaign or official, on that letter. Do you see what I am talking about?

MS. NORMINGTON:

Yes, this is everything that I generated for Controller Augustine to approve. Any letters that went out went through numerous drafts until they had her final approval. Then, I would ask her what type of letter or what letterhead to use. I believe, if my memory serves, this was done on the formal stationery for the Controller's Office. Any of the formal stationery with the foil seal had to have a 2 1/2 inch margin at the top of the page for the date to be in the right position.

SENATOR CARE:

The three letters dated February 27, 2002, are just drafts of letters. Is that correct?

MS. NORMINGTON:

That is correct.

SENATOR TIFFANY:

I am curious as to whether you would have copied those disks from your computer if Ms. Coward had not approached you.

MS. NORMINGTON:

I am not sure. I might if I had more time to think about it.

SENATOR TIFFANY:

You probably would, or you probably would not have; what are you saying? You are not certain? Could you give me a "yes" or a "no" as to whether or not you would have done that?

MS. NORMINGTON:

I believe I would have, yes.

SENATOR TIFFANY:

You think you would have gone ahead and copied those disks no matter if this was an isolated act where you initiated that.

MS. NORMINGTON:
Yes.

SENATOR TIFFANY:
Do you believe that you would have gone to the Attorney General on your own?

MS. NORMINGTON:
I do not know if I would have gone to the Attorney General. I had gone to State Personnel before and they told me that all they could do was help me find another job. They did not have authority over Constitutional Officers.

SENATOR TIFFANY:
If you would not have gone to the Attorney General, why would you have copied the disks or copied the data?

MS. NORMINGTON:
If I did not go to the Attorney General, I would have turned them into Personnel.

SENATOR TIFFANY:
Did Personnel recommend that you do that?

MS. NORMINGTON:
No.

SENATOR TIFFANY:
Then, why would you have thought you should do that?

MS. NORMINGTON:
I wanted someone outside the office to have a record of what had happened. I knew it was my obligation that if there was wrongdoing, I needed to report it. I had reported it to Personnel, and they did aid me in finding another job within the State. I wanted to make certain I had done everything that was my responsibility as a state employee.

SENATOR TIFFANY:
You would have copied the disks so you could have verified you had done something you say the Controller Augustine made you do. However, it was also the reason you were leaving. You copied those for some kind of proof or justification or some other reason? I do not understand the logic there. To me, I think, the only reason you copied those disks was to incriminate the Controller for some reason as opposed to covering your behind. Is that true?

MS. NORMINGTON:
No.

SENATOR TIFFANY:
Then why do you think that would have covered you, justified your position or helped you with the next job?

MS. NORMINGTON:
It had nothing to do with the next job. It just records what happened is what I said happened.

SENATOR TIFFANY:
You just said you did it so THAT when you were looking for another job you could feel comfortable you had done the right thing. This would have been some kind of a backup or justification to doing that. That is what I thought I heard you say. I do not understand why you would take data and turn it over to Personnel because all Personnel does is try to get you the next job.

MS. NORMINGTON:
I did not want the responsibility of knowing this had occurred and feeling I had not turned to or informed someone with a higher authority that had much better judgment on it than I did.

SENATOR TIFFANY:

It sounds to me you copied the data because you wanted someone to review that for right or wrong not about getting the next job or making sure that Personnel knew something.

MS. NORMINGTON:

They could have or they could have not had any opinion on it.

SENATOR TIFFANY:

You just said to me THAT you did that so that someone else could view it and could make a judgment on whether that was right or wrong. Is that not correct?

MS. NORMINGTON:

That is correct. They could have.

SENATOR TIFFANY:

Did you and Ms. Coward work together about coordinating the time you both resigned?

MS. NORMINGTON:

No.

SENATOR TIFFANY:

How did it happen to be you both resigned on the same date, same time?

MS. NORMINGTON:

I turned in my notice after I had a second job. I had another job, and I gave two-weeks notice.

SENATOR TIFFANY:

You are saying it just happened to be coincidental that you both resigned at the same time?

MS. NORMINGTON:

Correct.

SENATOR TIFFANY:

It was just coincidental that she came to you and said, "Let us get a copy of this data."

MS. NORMINGTON:

I cannot speculate as to why.

SENATOR TIFFANY:

You did not ask her why? You did not say, "Why am I doing this"?

MS. NORMINGTON:

You're right. I did ask her, and she told me she was going to go over to the Attorney General's Office.

SENATOR TIFFANY:

Therefore, you did know what it was going to go for?

MS. NORMINGTON:

When she asked for it, yes.

SENATOR TIFFANY:

You did not feel it was necessary to tell your boss about what was going on?

MS. NORMINGTON:

No.

SENATOR RAGGIO:

This is a comment directed to respective Counsels in this matter. We have received an opinion from Legislative Counsel, dated December 2. I believe it has been furnished to each of you. It concerns the two questions for which I raised and requested a legal opinion. One was dealing with the statutory provisions concerning political activities by state employees. Without

going through the whole opinion, the Legislative Counsel has indicated to this Committee that with reference to classified state employees, a classified state employee is prohibited from engaging in political activity during the hours of the state employment. However, on his own time, no such prohibition exists, and classified state employees may engage in whatever political activities they choose as long as they are not using such political activities for the purposes that are set forth in this opinion. They are listed. Also, with reference to unclassified employees, as a general rule, under the State Personnel System, an unclassified state employee may engage in political activities during hours of state employment or at any other time unless those political activities are prohibited by some other statutory provision. The opinion was requested because there was some comment from at least one witness that somehow an unclassified state employee could never engage in such activity.

The other part of the opinion deals with the preparation of campaign-reporting forms. Without going into the full opinion, the Legislative Counsel has stated, at least to this Committee, that the statutes referring to the preparation and filing of campaign-contribution reporting and expenditures does not prohibit a state employee from preparing campaign-reporting forms for the public officer who employs him or her and who is running for reelection. The interest or benefit served by the filing of the forms is in the State's interest in preventing corruption or the appearance of corruption in the political process and is not the personal or financial interest or a private benefit to the public officer. They further state there is not a violation of the Administrative Code 284.770 nor a more restrictive policy on political activity by state employees.

I should direct Counsel's attention to those provisions and ask if in light of this opinion they may want to ask additional questions of this or any other witnesses or whether they have a comment on the opinion.

SENATOR AMODEI:

I believe that Ms. Normington is one of the witnesses that both sides have asked be subject to recall so unless there is an objection by Counsel, you will have an opportunity to review the opinion that Senator Raggio has just talked about. If Ms. Normington's additional testimony, in light of that opinion, is required by either side, the Chair will be happy to request this witness reappear at the request of either side for purposes of responding to issues with respect to that memo. Is there any objection to that procedure?

JOHN L. ARRASCADA (Counsel for Controller Augustine):

No, there is not.

MR. GRECO:

No.

SENATOR CARLTON:

I would like to go back to your visit with the Personnel Department. Did you go with Ms. Coward, or did you go separately?

MS. NORMINGTON:

I went on my own.

SENATOR CARLTON:

Do you know if that was before Ms. Coward went or after.

MS. NORMINGTON:

I do not know.

SENATOR CARLTON:

You are not sure? When you visited with the Personnel Department with whom did you speak?

MS. NORMINGTON:

Kim Foster.

SENATOR CARLTON:

Did she have any legal person with her when you had this discussion?

MS. NORMINGTON:

No.

SENATOR CARLTON:

Did she give you any answer right then, or did she say she would have to get back with you and let you know where you stood?

MS. NORMINGTON:

Regarding what, Senator?

SENATOR CARLTON:

With the conversation, you had with the Personnel Department, you were asking questions about what could be done in your office? Correct?

MS. NORMINGTON:

I went to Personnel on two things. I spoke to Kim Foster about the campaign activities I was being forced to do. I also spoke with her about the hostile work environment.

SENATOR CARLTON:

About how long was that meeting?

MS. NORMINGTON:

Maybe 20 or 30 minutes.

SENATOR CARLTON:

Twenty minutes to one-half hour on those two very important issues, did she give you an answer at the end of that half-hour meeting, or did she say she would get back with you to give you her answer?

MS. NORMINGTON:

She told me she had spoken with the Director of Personnel about those issues. While they were well aware of it, they had no authority over Constitutional Officers. In terms of the hostile work environment, she said they would do everything they could to get me placed into another position. They would let me know when other positions were available where I could interview.

SENATOR CARLTON:

The answer from the Personnel Department was, we cannot do anything to fix this hostile work environment but we can take you out of it and put you somewhere else?

MS. NORMINGTON:

Correct.

SENATOR WASHINGTON:

My question is a clarification on the opinion. Besides Ms. Normington, would Ms. Coward also be available for questioning in light of the opinion?

SENATOR AMODEI:

We have indicated to Ms. Coward she is subject to recall. I believe Mr. Greco requested that for the purposes of impeachment.

MR. GRECO:

What I indicated is that Ms. Coward and Ms. Normington were possible rebuttal witnesses depending on what the Defense might do. I have told both of them, independently, that they are subject to recall.

SENATOR WASHINGTON:

Mr. Wells also indicated he was approached by Controller Augustine to work on her campaign reports, will he be available also?

SENATOR AMODEI:

Mr. Wells has not been reserved for recall although; I believe, his testimony was that he respectfully declined to prepare those reports. I am not certain of his value or necessity for purposes of someone whose testimony actually indicated they prepared a report. His testimony was to the opposite. If you want him added to the list, we can add him to the list as subject to recall for issues related to this opinion.

SENATOR WASHINGTON:

I would like to reserve that right because I think it might be important. I think his opinion was based on the Nevada Administrative Code as opposed to the Nevada Revised Statutes.

SENATOR AMODEI:

Is there any objection to Senator Washington's request from Counsel, on either side, to subject Mr. Wells to recall for purposes of the opinion requested by Senator Raggio?

MR. GRECO:

No objection.

SENATOR AMODEI:

Thank you. He will be placed on the list for that purpose.

SENATOR BEERS:

That letter of reprimand says that the problem issues were discovered at a time when you took sick leave. When was that?

MS. NORMINGTON:

I was out sick from the office when that happened. I do not remember the exact date.

SENATOR BEERS:

This says "last month" and is dated January. Presumably, it was some time in December.

MS. NORMINGTON:

I believe that I was out sick a few days in December.

SENATOR BEERS:

Was it early or late December?

MS. NORMINGTON:

I do not remember.

SENATOR BEERS:

Was your Christmas shopping done?

MS. NORMINGTON:

I do not remember.

SENATOR BEERS:

Let us go ahead and say it was early December. That would have given you a month after the general election to wind down from the intensity of the campaign period; right.

MS. NORMINGTON:

The intensity did not stop.

SENATOR BEERS:

It did not?

MS. NORMINGTON:

No, it lessened some, but it did not stop. There was still quite a bit of work to do.

SENATOR BEERS:

Therefore, the personnel documents going back to April of 2002, you had already hit that level of intensity that was requiring you to neglect your nonpublic-relations Controller duties.

MS. NORMINGTON:

Yes, there was still another report to file for the Secretary of State that was due in January.

SENATOR BEERS:

These personnel files found under your desk in a folder of personnel documents to be filed dated back to April of 2002. At the time they were found, they had been there for up to eight months.

MS. NORMINGTON:

There were some, yes.

SENATOR BEERS:

Was the overwhelming nature of the campaign activity starting in April that you were unable to get these things done?

MS. NORMINGTON:

It was beginning in the spring, yes. It got worse and worse.

SENATOR BEERS:

Then, this letter of reprimand is solely because of how busy you were with political activity?

MS. NORMINGTON:

That is my belief.

SENATOR BEERS:

Were there two letters of resignation? I think in Exhibit D-1, there is a letter of resignation from you dated January 22, which is nine days prior to your end date. You just said you gave your standard two-weeks notice after you found your other job.

MS. NORMINGTON:

I gave approximately two weeks. It was two days short.

SENATOR BEERS:

Two days prior to this would have been 11 days prior, which is still under two weeks. This is actually closer to one week than two. It is eight or nine days. Two weeks would be fourteen. You are telling us it is a coincidence you and Ms. Coward terminated on the same day?

MS. NORMINGTON:

I chose that day to be my end date. I was counting calendar days.

SENATOR BEERS:

Me too, and it is nine.

MS. NORMINGTON:

Okay. I trust you.

SENATOR BEERS:

It is January 22. Was that your last day, January 31?

MS. NORMINGTON:

That was the last day I worked, the last day of employment with the way the pay scale works actually turned out to be February 1.

SENATOR BEERS:

Okay.

MS. NORMINGTON:

I gave that notice because it coincided with the end of the pay period. There would not have to be additional forms filled out. The Department of Tourism where I was going wanted me to start as soon as possible. The understanding between me, Controller Augustine and Tourism was

that I train my replacement. I also trained, because it was a temporary replacement, the person who came back as a permanent replacement.

SENATOR COFFIN:

There has been much anxiety, tension and other aspects that might go beyond that kind of atmosphere being painted here of almost violence in the office, temper tantrums and objects being thrown at people. I do not think we have asked you directly what you would define by that. Did Controller Augustine ever hit you?

MS. NORMINGTON:

No.

SENATOR COFFIN:

Did Controller Augustine ever put her arm or hand or any part of her body on you and threaten you?

MS. NORMINGTON:

No.

SENATOR COFFIN:

Did she pick any object up, whether it be a piece of paper or a book, and throw it at you?

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

In the air?

MS. NORMINGTON:

Controller Augustine would toss it. It would go towards me, usually, hit my desk right in front of me and, then, slide into me.

SENATOR COFFIN:

It happened more than once.

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

Why did it not hit you in the face, the chest or some other place? How far away was she?

MS. NORMINGTON:

Controller Augustine was usually either in front of my desk or to the side of my desk. She was several steps away. Sometimes, she was right next to me.

SENATOR COFFIN:

Did you ever witness her doing that with anyone else?

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

Was it the same description or a different description of what you experienced?

MS. NORMINGTON:

No, it was the same.

SENATOR COFFIN:

The paper, while headed in your direction, was thrown at the desk and slid at you and contacted you in that fashion?

MS. NORMINGTON:

That was not my understanding. I felt like it was thrown at me.

SENATOR COFFIN:

Do you think that Controller Augustine could have thrown it at you if she tried?

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

These did not hit you directly.

MS. NORMINGTON:

There were a few times they did.

SENATOR COFFIN:

Pieces of paper, what about heavy objects, like books or file folders full of documents or something else?

MS. NORMINGTON:

File folders, yes.

SENATOR COFFIN:

Did you feel injured?

MS. NORMINGTON:

Not injured but scared.

SENATOR COFFIN:

Did you think she was about to erupt into physical violence?

MS. NORMINGTON:

There were times, yes.

SENATOR COFFIN:

Did she ever erupt into physical violence?

MS. NORMINGTON:

Not with me.

SENATOR COFFIN:

Did she ever threaten to do that?

MS. NORMINGTON:

The most she said, a few times, was, "Sometimes, I could just kill you."

SENATOR COFFIN:

Are you talking about you or the cat?

MS. NORMINGTON:

I am talking about myself.

SENATOR COFFIN:

Could just kill you because why?

MS. NORMINGTON:

For mistakes that had been made on punctuation in a letter.

SENATOR COFFIN:

Exactly, when did that happen, the dates and so on?

MS. NORMINGTON:

It happened regularly. I cannot give you specific dates.

SENATOR COFFIN:

Did you report that to anyone?

MS. NORMINGTON:

I believe I told the Assistant Controller and the Chief Deputy Controller.

SENATOR COFFIN:

Exactly, what words did Controller Augustine use and what were the exact words she used, under oath here.

MS. NORMINGTON:

Specifically, there were a few times when she would look at me and say, "I do not know what to do with you. Sometimes, I could just kill you."

SENATOR COFFIN:

Have you ever said that to anyone?

MS. NORMINGTON:

No.

SENATOR COFFIN:

Have you ever said that to yourself?

MS. NORMINGTON:

No.

SENATOR COFFIN:

Have you ever heard anyone say that?

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

Was it in another context?

MS. NORMINGTON:

Yes.

SENATOR COFFIN:

Was it meant to be a physical warning or one of those kind of metaphorical-frustration sort of outlets?

MS. NORMINGTON:

I do not know. It depends.

SENATOR COFFIN:

Did it happen when you made mistakes?

MS. NORMINGTON:

For myself, from Controller Augustine, yes.

SENATOR COFFIN:

Yet, you were not touched. Things were not thrown directly at you. I am just concluding that they were not really tossed at you. Did you see them? I am not going to put words in your mouth. Your testimony speaks for itself. You did not witness a physical attempt to hurt anybody else in this office; correct?

MS. NORMINGTON:

Correct.

SENATOR COFFIN:

You did see papers slammed down on a table and those papers would continue to fly until they stopped. They might have been against someone's stomach, chest or just the desk?

MS. NORMINGTON:

That happened at times, yes. Usually, the papers hit right in front of me, and I felt that they were being thrown at me.

SENATOR COFFIN:

However, she could have thrown them at you if she had wanted to. Is that right? You testified that she could have if she had wanted to. Is that right?

MS. NORMINGTON:

She did throw them at me.

SENATOR COFFIN:

There is a big difference in throwing something at someone with intent to hit them and another thing about throwing them at a desk in frustration and they may go off on the floor. Did you see that happen also?

MS. NORMINGTON:

Yes, I did. Maybe, I do not understand your question. She did not throw anything at me as in an overhand throw the way a baseball pitcher would pitch. Nothing was thrown like that.

SENATOR COFFIN:

That is helpful. Thank you.

SENATOR HORSFORD:

Can you turn to Prosecutor's Binder No. 2, Exhibit P-18 with the date-stamp page 536?

MS. NORMINGTON:

Yes.

SENATOR HORSFORD:

What are those documents, the current ongoing projects?

MS. NORMINGTON:

This was a list I kept for a period of time of what my assignments were during that week so I could keep track of everything I was doing and what had been accomplished. When Controller Augustine either asked me in person or called me from Las Vegas, I could tell her what I had on my "to-do" list, where I was on it and things of that nature.

SENATOR HORSFORD:

You compiled or kept this at your state computer?

MS. NORMINGTON:

Yes, it was on the state computer.

SENATOR HORSFORD:

There is something on this. Who is Robin, fourth to the bottom?

MS. NORMINGTON:

Robin was a young lady in the office. She had left Nevada to go work in Florida.

SENATOR HORSFORD:

Was she terminated or did she resign?

MS. NORMINGTON:

She resigned. The term termination paperwork is a personnel term.

SENATOR HORSFORD:

Yesterday, I asked about an elected officials' responsibility in doing what was right and following the law. What do you feel is the employee's responsibility, your personal responsibility, in knowing the policies within the manual and seeking guidance or direction from your superior? What level of responsibility do you feel you have in this?

MS. NORMINGTON:

I feel I should, and any state employee should, know what is legal and illegal to do on state time. If something wrong has occurred, I believe that employee has the responsibility to report it when it is appropriate or safe for them to do so.

SENATOR HORSFORD:

The Committee has heard testimony from Mr. Wells and Ms. Coward who are your superiors; correct?

MS. NORMINGTON:

Correct.

SENATOR HORSFORD:

They had urged you on a number of occasions to take your complaint further.

MS. NORMINGTON:

Correct.

SENATOR HORSFORD:

Why did you not do so earlier?

MS. NORMINGTON:

I did not do it earlier because I was afraid. Anytime I said anything to Controller Augustine about if we should do this or you need to prioritize things for me, do you want me to do all the personnel work and get that done, I am supposed to do it. Then you walk out five minutes later and say, "You need to add these things into my contribution report, and I want that in five minutes." She screamed at me so much. Controller Augustine berated me so much I was afraid. I did anything I could to avoid a confrontation with her.

SENATOR HORSFORD:

You felt you were verbally abused at the work place? You felt intimidated to a point where you could not seek refuge through your superiors or from the Department of Human Resources?

MS. NORMINGTON:

Correct.

SENATOR HORSFORD:

I really want to understand how you came to do so much campaign work. Based on what you have presented and what has been presented by the Prosecutor, this is the equivalent of a campaign manager. Based on my experience, it takes a lot of time and work and effort to do a lot of what you have done. Can you explain for my benefit how you came to be doing so much campaign work when you were hired to be an executive assistant to Controller Augustine?

MS. NORMINGTON:

Controller Augustine made it clear I was to do whatever she gave me. Any assignment she gave me to do, I was to do. She made a point of telling me when Ms. Hetherington in the Las Vegas Office told her that she did not feel comfortable doing things on state time. Controller Augustine made a point of telling me that that was okay because Ms. Hetherington was classified. As an unclassified employee, that just was not the nature of the beast here. I had to do things just as they came up and as Controller Augustine gave them to me. It was very clear from the onset that whatever she gave me to do was not to be questioned.

SENATOR TITUS:

You said a minute ago that when you left to go to work for the Department of Tourism, one of the conditions was that you would train your temporary replacement and your permanent replacement.

MS. NORMINGTON:

Correct.

SENATOR TITUS:

Did you train this new person to do all of these campaign activities like entering into the forms the checks as they came in, designing invitations, making phone lists and keeping those spread sheets? Is that what you trained this person to do?

MS. NORMINGTON:

No, I did not.

SENATOR TITUS:

But, you said that was 100 percent of the job and if it is a political job, why did you not train this new person to do all of that? What was left for this person to do? They did not have to bring in the checks because that had been moved to someone else? Did she greet children as they came into the Controller's Office or what?

MS. NORMINGTON:

Answering the telephone, keeping Controller Augustine's calendar, keeping track of all of the invitations she had, answering those and the personnel documents, I stressed how important it was that those were done. Those needed to be done before anything else. I was well aware of the importance of that. I felt if Controller Augustine wanted someone else to work on the campaign, after I had, she would tell that person to do it.

SENATOR TITUS:

You did not mention to this new person that to do those kinds of things would be a big part of your responsibility in this unclassified position?

MS. NORMINGTON:

To the best of my recollection, the only thing I mentioned to her was that I had moved campaign documents into Controller Augustine's folder on the F-drive so she knew where to find them. I did not know if the IT Department was going to erase the hard drive on the computer. I did not want her to have to sit and rebuild everything if that occurred.

SENATOR RAGGIO:

You have given in response to several questions various estimates of the amount of time you spent on campaign-related activities. On one occasion, almost 100 percent and in response on other occasions, a lesser amount but still a substantial amount of time on campaign-related activities. If you deduct the time you spent on preparation and filing of campaign-expenditure reports, what would your estimate be of the time you spent on campaign-related activities? Do you understand my question?

Ms. Normington:

I believe I do.

SENATOR RAGGIO:

Let us assume with the campaign-expenditure report that the preparation and filing is not considered a political activity. What percentage of your time would have been spent on what you term political activity? You will have to give me some time period. We talked about the last four months of the campaign or six months during the major part of the political-campaign period.

MS. NORMINGTON:

I would say that probably starting in April to May of 2002 through November and into December of 2002, disregarding what you have just said, the preparation of the filing reports, I would estimate that probably 35 to 50 percent of my time was still spent on campaign activities.

SENATOR RAGGIO:

Are you including in that or not the compilation of the copies of these checks as they came in? Would you consider part of it as political activity or would that be part of the preparation and filing of the campaign reports?

MS. NORMINGTON:

I consider those two different activities because one was for Controller Augustine's personal use, and that was updated at times on a daily basis or more than once a day. The forms for the Secretary of State were transposing numbers and information from her running total report onto the form actually set up by the Secretary of State.

SENATOR NOLAN:

With respect to the letters in the Defense exhibits, a number of campaign letters were sent out. One of which was to Neena Laxalt, if you will recall. We discussed briefly the letterhead that you maintain in the office.

MS. NORMINGTON:

Yes, I recall that. Was that a Defense exhibit or a Prosecution exhibit?

SENATOR NOLAN:

It was a Prosecution exhibit. You indicated that the office maintained at least three letterheads, the official state letterhead, a fake letterhead and what we refer to as the red and black campaign letterhead.

MS. NORMINGTON:

The office maintained three letterheads. What I am calling a fake letterhead is just something that is in the computer. There was informal state letterhead, which had the state seal on it in blue ink listing the Controller, Chief Deputy Controller and Assistant Controller. It listed certain chiefs. There was also the formal letterhead, which I believe had the Controller's name on it. It has the foiled State Seal. The office used those three. Then Controller Augustine brought in a fourth letterhead, which as you described, was done in red and had her photo on it. I believe it said, "Committee to Elect Kathy Augustine."

SENATOR NOLAN:

The letters we looked at were entered under Exhibit D-14. I think the one to Ms. Laxalt was the first one that we used as an example. It was a fundraising letter. It was intended to seek support for Controller Augustine's reelection. You indicated that those letters went out on official state letterhead because you needed enough room to allow that to fit onto the letterhead. Is that right?

MS. NORMINGTON:

That is correct.

SENATOR NOLAN:

There seems to be some question in your mind as to whether or not they went out on official letterhead. You qualified that by saying that the reason you felt that they went out on official state letterhead was because that was the letterhead that would best fit the letter. I took an example of the campaign letterhead provided to us and underlay it on that letter you provided. The campaign letter fits nicely on the campaign letterhead. Are you comfortable saying that these campaign letters went out on official state letterhead?

MS. NORMINGTON:

I am comfortable with these letters because I do not believe Controller Augustine brought that letterhead in until late April or early May.

SENATOR NOLAN:

In your mind, you are comfortable that letter absolutely went out not on the fake letterhead or any other letterhead but went out on official state letterhead.

MS. NORMINGTON:

That is correct.

SENATOR NOLAN:

Mr. Chair, this is perhaps a procedural question to you. Have the witnesses been instructed that it is customary in other civil or criminal proceedings not to talk with each other during the process? Have they also been asked not to watch the proceedings of this trial or the testimony of other witnesses?

SENATOR AMODEI:

Yes.

SENATOR NOLAN:

This is a follow up to Senator Raggio's question. You are talking to 21 people who fill out these campaign reports, and some of us have done it for years. We have a realistic understanding of the time involved in what it really takes to fill out one of these campaign reports. Some of us procrastinate, and we will do it the day before filing is done. Some of us work at it over a period of time. I am going to ask you to reiterate so that I understand your answer to Senator Raggio's question. If you take out the time that you indicated you felt it took to file these campaign reports, it took 35 percent of your time in the position you were in to complete those reports.

MS. NORMINGTON:

Maybe, I misunderstood the Senator's question. It was my understanding that he asked me to estimate how much time I spent on campaign work, not factoring in the campaign reports that you are talking about for the Secretary of State. Please correct me if I am hearing you wrong. Are you asking me that? I am confused as to what you are asking.

SENATOR NOLAN:

Let me finish. I believe that you said that taking out the amount of time you spent on filling out these campaign-expenditure reports and the amount of time left for you to do additional work in the office was 35 percent.

MS. NORMINGTON:

No, what I said was that taking out those reports that Senator Raggio spoke of, that my best estimate is 35 to 50 percent of my time was spent on additional campaign work.

SENATOR NOLAN:

Thank you for making that clarification.

SENATOR BEERS:

Senator Horsford had brought to our attention these current ongoing projects. In Prosecution Binder No. 1, Exhibit P-3, this is the forensic information that had been prepared by the Attorney General's Office. Time-stamp page 75 is the disk that contains these reports. On time-stamp page 80 is the detail of what is on that disk. It starts with a deleted folder called Toastmasters and then includes the four ongoing projects and then what appear to be legitimate schedules of events, travel itineraries and information about professional conferences. Did Controller Augustine ask you to prepare a list of your ongoing projects and then want you to stop?

MS. NORMINGTON:

The State Controller wanted me to always have a list that she could review of what my ongoing projects were so she could look at it. The lists varied from using a day timer or a steno pad to using what I put on the computer. Controller Augustine really preferred a steno pad.

SENATOR BEERS:

Therefore, for a month you put it on a computer and then went back to a steno pad.

MS. NORMINGTON:

It was more than a month. I did not keep all the records of it. I changed it and changed the date.

SENATOR BEERS:

In June, you made separate copies for each week saving them under a new name but the date appears to have the same file name. After that, you just used the same one repeatedly?

MS. NORMINGTON:

Yes, I was trying to save computer space.

SENATOR BEERS:

There is only the one month in our whole binder set?

MS. NORMINGTON:

I believe there are some examples from the month. I do not know if it is the whole month or not.

SENATOR AMODEI:

Mr. Greco, do you have anything else?

MR. GRECO:

No.

SENATOR AMODEI:

Mr. Gentile?

MR. GENTILE:

Ms. Normington, you are telling the Senate that the letters that have been inquired about, specifically the one to Ms. Laxalt, were sent out not on the red letterhead but that they were on some different letterhead? Am I correct?

MS. NORMINGTON:

You are correct.

MR. GENTILE:

You told this to the Attorney General. You gave him all of the information that is on these disks back in February of 2003. You told him who those letters went out to, did you not?

MS. NORMINGTON:

Exactly.

MR. GENTILE:

To your knowledge, has the Attorney General used his subpoena power or his investigator to go and visit any of the addressees to see if they happen to have a copy of that letter?

MS. NORMINGTON:

I do not know.

MR. GENTILE:

Would you go to Exhibit P-18, page 000539?

MS. NORMINGTON:

Yes.

MR. GENTILE:

Would you go to the fourth bullet?

MS. NORMINGTON:

Yes.

MR. GENTILE:

Would you look at the last two words?

MS. NORMINGTON:

Yes.

MR. GENTILE:

Would you tell me if the State Controller told you to spell *La Voce* with an h?

MS. NORMINGTON:

No.

MR. GENTILE:

I have nothing further.

SENATOR AMODEI:

Ms. Normington, I want to thank you for indulging us with two days of your presence. You are dismissed as a witness. You are subject, however, pursuant to the request of Counsel, to recall for potential rebuttal or if there are any matters or additional questions arise regarding the opinion on preparation of campaign-finance reports. I would remind you that the provisions of your subpoena request that you not discuss your testimony with other people until the proceedings are over.

MS. NORMINGTON:

Thank you.

MR. GRECO:

I was going to take up that issue of the subpoenas regarding the issue you raised last night when you told the attorneys that some subpoenas had been issued to the Attorney General's Office for some personnel records. Apparently, there was some delay. Once you informed me of that, I called the Attorney General's Office. I asked them to deliver those. Mr. Liebherr is here with those records. Mr. Gardner is here because he is going to be a short witness in a little while. I do not know whether or not there is any legal objection that they wish to lodge. I wanted to stress to the other members of the Senate that when you brought that issue up, the Washoe County District Attorney's Office was not involved with that office. We are not counsel for them. The person that needed to address the Senate is a representative of the Attorney General's Office.

SENATOR AMODEI:

I appreciate your efforts. I was going to update the witness list. We know that Ms. Normington and Ms. Coward are subject to recall pursuant to Senator Washington's request. Mr. Wells is subject to recall for the purpose stated. Unless there is an objection from the Committee, I want to remove Mr. Liebherr and Mr. Gardner from Committee subpoena because I am informed that the Attorney General's Office is supplementing their response to Item 3 of that subpoena. That information will be provided to Defense Counsel this morning. I see their names on other lists and believe they will be in front of us in any event. I want to thank you for your assistance in the matter. The only other witness besides Ms. Normington, Ms. Coward and Mr. Wells that remain subject to recall at this point would be Ms. Jennings for rebuttal or clarification purposes as the other testimony comes in. That is pursuant to a Committee request. Is that everyone else's understanding?

MR. GRECO:

I would ask when they deliver those records to the Defense, pursuant to the subpoena, if there is only a single copy, that they provide me with a copy as soon as they receive it.

SENATOR AMODEI:

Is there any objection to that, gentlemen?

MR. GENTILE:

No objection.

MR. GRECO:

Since the subpoena issues have been dealt with, my next witness will be Gerald Gardner.

CLAIRE JESSE CLIFT (Secretary of the Senate):

Please raise your right hand. Do you solemnly swear or affirm that the testimony and any evidence you shall give in this matter shall be the truth the whole truth and nothing but the truth?

GERALD GARDNER (Chief Deputy Attorney General, Criminal Justice Division, Office of the Attorney General):

I do.

MRS. CLIFT:

Please be seated. State your name and spell it for the record.

MR. GARDNER:

Gerald Gardner, g-e-r-a-l-d,-g-a-r-d-n-e-r.

MR. GRECO:

Mr. Gardner, what do you do for a living?

MR. GARDNER:

I am the Chief Deputy Attorney General in charge of the Criminal Justice Division for the State of Nevada, Office of the Attorney General.

MR. GRECO:

How long have you been employed by the Attorney General's Office?

MR. GARDNER:

For approximately two and one-half years.

MR. GRECO:

Are you familiar with the Attorney General's investigation into the matter of Controller Augustine?

MR. GARDNER:

I am.

MR. GRECO:

When did you first become connected or involved in that matter?

MR. GARDNER:

I believe I was first preliminarily briefed on the matter in April, 2003.

MR. GRECO:

Senator Titus and some other Senators have asked questions about how it is we ended up here. By that I mean, Mr. Gardner, procedurally how is it that we have ended up in this impeachment proceeding as opposed to alternate proceedings? Do you have knowledge about that?

MR. GARDNER:

I believe I do.

MR. GRECO:

Did the matter start as a potential criminal investigation?

MR. GARDNER:

Yes, it did.

MR. GRECO:

Who was the lead investigator on the case?

MR. GARDNER:

Senior Investigator Dale Liebherr.

MR. GRECO:

At some point, were you aware the decision was made to refer the matter to the Ethics Commission?

MR. GARDNER:

Yes, I was.

MR. GRECO:

By the time the matter was referred to the Ethics Commission, were you aware if Controller Augustine had a defense attorney?

MR. GARDNER:

That is true.

MR. GRECO:

Who was that?

MR. GARDNER:

At the time, it was John Arrascada.

MR. GRECO:

Prior to the filing of the ethics stipulation that resolved the matter, did you and Mr. Arrascada discuss the language of the proposed counts in the ethics complaints?

MR. GARDNER:

Yes, we did.

MR. GRECO:

Were there some revisions proposed by either side that went back and forth?

MR. GARDNER:

There were numerous drafts that were sent back and forth between Mr. Arrascada and me over a course of several weeks. There was a final conference where we sat down together for three or four hours and discussed, literally, every word of the ethics complaint.

MR. GRECO:

Is the final draft that you and Mr. Arrascada agreed on the final draft that the Commission ended up adopting and approving in its stipulation?

MR. GARDNER:

The final draft of the ethics complaint was what was submitted to the Ethics Commission. The Commission subsequently entered into somewhat different stipulations with Controller Augustine. The final draft of the stipulation was their creation, and I had nothing to do with that.

MR. GRECO:

Did you actually see the final draft of the ethics complaint that Controller Augustine, ultimately, admitted violating? Have you seen that?

MR. GARDNER:

I have seen the ethics complaint that was the basis of the stipulation, yes.

MR. GRECO:

Have you seen the actual stipulation that was approved and ratified by the Ethics Commission?

MR. GARDNER:

Yes, I have.

MR. GRECO:

Did you and Mr. Arrascada discuss criminal charges and whether or not those would be pursued or not pursued in lieu of Controller Augustine's admission to the ethics violations?

MR. GARDNER:

We did.

MR. GRECO:

Please describe those discussions for the Senators.

MR. GARDNER:

The discussion of filing criminal charges was something we discussed from the beginning. I believe the first time I ever spoke with Mr. Arrascada was in February, 2004. The issue of what the Attorney General's Office intended to do with this case was immediately brought to the table. At that point, I was still receiving documents and investigative reports relating to this investigation. I was not in a position to discuss resolution of the case at all. What I did agree to do was to forward to Mr. Arrascada, immediately, all the investigative reports, documentary evidence and all of the evidence that we had already obtained in this case. I did that. I continued to do that as the reports were completed. I would estimate that Mr. Arrascada and I spoke about once a week over the course of the next four to six weeks. At various times, Mr. Arrascada asked for more time to review the documents and to review the evidence. Throughout those conversations, he asked what our intention was with the case as to whether we were going to file criminal charges or just go to the Ethics Commission.

MR. GRECO:

Did you, ultimately, agree that in consideration of Controller Augustine admitting the ethics violations that the Attorney General's Office would not pursue criminal charges?

MR. GARDNER:

What we ultimately agreed to do was to file an ethics complaint with the Nevada Commission on Ethics. That is the same ethics complaint Mr. Arrascada and I sat together and discussed for approximately four hours. I told Mr. Arrascada if Controller Augustine admitted to all of the facts contained in that complaint, admitted that they were willful violations and the Ethics Commission accepted that admission and stipulation, that we would not file criminal charges.

MR. GRECO:

Are there certain ramifications that occur when a person admits to the types of ethical violations that Controller Augustine did in terms of referral to some other body for some other proceeding?

MR. GARDNER:

Yes.

MR. GRECO:

Please describe those for the Senators.

MR. GARDNER:

If an officer who is removable from office by impeachment is found guilty of even one willful violation of the Nevada Ethics Code, it is automatically referred to the Assembly for impeachment.

MR. GRECO:

That is how it ended up in the Assembly.

MR. GARDNER:

Yes.

MR. GRECO:

Prior to the Assembly hearing, were you preparing to present evidence?

MR. GARDNER:
Yes.

MR. GRECO:
Were you preparing to present the evidence in the normal question and answer format?

MR. GARDNER:
Yes.

MR. GRECO:
Were you preparing for a hearing that would include direct examination and cross-examination?

MR. GARDNER:
Yes, I was.

MR. GRECO:
Up until, approximately, 48 hours before the Assembly hearing, is that what you believed was going to occur based upon all the contacts you had with the Assembly or others individuals?

MR. GARDNER:
The Assembly hearing took place on Wednesday morning. On late Monday night, probably 8:00 p.m. or 9:00 p.m., I learned the proceeding was not going to take a question and answer forensic-examination procedure but rather a legislative hearing with narrative-written statements by the witness.

MR. GRECO:
Did that cause the witnesses to frantically prepare some statements on a rushed time frame?

MR. GARDNER:
It did cause some witnesses to be very concerned about whether they could even prepare such a statement in, essentially, one working day. Most of these witnesses did have fulltime jobs at the time.

MR. GRECO:
That is all I have, Mr. Chair.

SENATOR AMODIE:
Mr. Gentile?

MR. GENTILE:
Mr. Chair, because Mr. Arrascada was a party to certain conversations, legal ethics would prohibit him from taking the stand later to impeach if that were necessary. I must do the examination. I believe that legal ethics still apply even in legislative proceedings.

SENATOR AMODEI:
Thank you for that footnote, please proceed.

MR. GENTILE:
Mr. Gardner, to your knowledge, the Attorney General's Office has never employed the power of its criminal investigation process, which is the use of investigator's badges, even subpoena power, to initiate an ethics matter?

MR. GARDNER:
No.

MR. GENTILE:
The reason we are here is that your jurisdiction is essentially a criminal jurisdiction. You are the Chief of the Criminal Division?

MR. GARDNER:

Our jurisdiction is criminal, civil and administrative.

MR. GENTILE:

You are the Chief of the Criminal Division?

MR. GARDNER:

That is true.

MR. GENTILE:

Okay. There is a Chief of the Civil Division?

MR. GARDNER:

There is.

MR. GENTILE:

You do not do administrative matters as the Chief of the Criminal Division.

MR. GARDNER:

We have units within the Criminal Division that do conduct administrative matters and conduct civil litigation.

MR. GENTILE:

In this case, you used as your investigator, someone who actually works for the Worker's Compensation Finance Unit?

MR. GARDNER:

That is incorrect. He currently works for the Worker's Compensation Unit. At the time, he was assigned to the investigation of the matter of Controller Augustine, he was an investigator in General Investigations.

MR. GENTILE:

When you were having your discussions with Mr. Arrascada, you would agree that from the perspective of Controller Augustine there was a threat. Not that you articulated a threat but the mere fact that she was being investigated by the Criminal Division of the Attorney General's Office, would put forth a threat that she might be charged with a crime?

MR. GARDNER:

The entire investigation in my review of it was done as a criminal investigation from the beginning.

MR. GENTILE:

The answer is yes?

MR. GARDNER:

That is correct.

MR. GENTILE:

It was, essentially, stated by the Attorney General's Office that this had to go to the Ethics Commission, and she had to admit to a willful violation or else you were going to file charges against her.

MR. GARDNER:

From the beginning of our communication regarding this case, Mr. Arrascada was desperate to avoid criminal charges being filed against his client. He provided me with a variety of offers in lieu of filing criminal charges.

MR. GENTILE:

It is fair to say?

MR. GARDNER:

It is fair to say that, ultimately, we agreed that the filing of the Ethics Commission complaint was the fairest and most appropriate resolution in this case.

MR. GENTILE:

I don't have anything further.

SENATOR AMODEI:

Redirect, Mr. Greco?

MR. GRECO:

You have mentioned that Controller Augustine admitting the ethics violation caused, per the law, that the matter be a mandatory referral to the Assembly for consideration of impeachment proceedings; correct?

MR. GARDNER:

Correct.

MR. GRECO:

Now, were you and Mr. Arrascada both aware of that when you were finalizing your negotiations?

MR. GARDNER:

Yes.

MR. GRECO:

The fact that it was referred for impeachment, the impeachment was not a surprise to Mr. Arrascada. He knew that was going to occur?

MR. GARDNER:

It was something Mr. Arrascada and I had explicitly discussed.

MR. GRECO:

I should not say the impeachment. He knew there was going to be a referral to the Assembly for the possibility of impeachment; correct?

MR. GARDNER:

Yes.

MR. GRECO:

You were both well aware of that; correct?

MR. GARDNER:

Correct.

MR. GRECO:

You also said that Mr. Arrascada was desperate to avoid criminal prosecution; correct?

MR. GARDNER:

That is correct in my view.

MR. GRECO:

He was doing what he thought was in the best interest of his client; correct?

MR. GENTILE:

Objection. I do not think he could be a mind reader.

MR. GRECO:

That is fine. I will withdraw the question. I have no further questions.

SENATOR AMODEI:

Recross, Mr. Gentile?

MR. GENTILE:
Nothing further.

SENATOR AMODEI:
Questions of Mr. Gardner from the Committee?

SENATOR RAGGIO:
Mr. Gardner, we are now keenly aware that the Nevada Statutes require that when someone is found guilty or deemed by stipulation to be guilty by the Ethics Commission of a willful violation, that it must be referred to the Assembly for purposes of an impeachment proceeding. That being the case, was any consideration given to having the matter referred to the Ethics Commission without the language that it was a willful violation? We are now aware that we have the definition of willful violation that it can be either knew or reasonably should have known that violation of the ethics statutes occurred. Was discussion had or consideration given knowing that had to be the situation to merely submitting it as an ethics violation without deeming it willful?

MR. GARDNER:
From the perspective of the Attorney General's Office, we were quite firm that the ethics complaint had to contain language reflecting willful violations. We had spent a great deal of time with the witnesses in this case. We felt strongly they were truthful and had experienced what they testified to and what they stated to in their reports. We felt we had an obligation to these former employees and some current employees to accurately relate what it was they had been forced to do. In our minds, that was a willful violation, and we were not going to budge on that.

SENATOR CARE:
As a threshold matter, you do not have any personal or first-hand knowledge of the conduct alleged or stipulated to actually by Controller Augustine in the stipulation? Is that correct?

MR. GARDNER:
That is correct.

SENATOR CARE:
In your mind did the language in the stipulation distinguish between reasonably should have known, should have known and knew?

MR. GARDNER:
Senator Care, to discuss that outside the circumstances of this case, reasonably should have known means that there was evidence surrounding objective facts surrounding the circumstances that would have caused any reasonable person to know that this was going on. In other words, not turning a blind eye. That would be my definition of reasonably should have known. Knew means actual knowledge. Knew means someone caused it to happen, perhaps expressed conscious knowledge of this going on, either directed it to take place or directed people to do this particular work. That is how I would distinguish between reasonably should have known and knew. In our view and in the complaint that was filed by our office, the facts supported actual knowledge.

SENATOR CARE:
"Reasonably should have known," I will use that in layman's terms, could mean the equivalent of Controller Augustine not paying attention, and if she had been paying attention she would have known, but she was not paying attention, and therefore, she reasonably should have known?

MR. GARDNER:
I do not believe so. In the criminal-justice system, the most common place where you see that term used is probably in possession of stolen property or possession of stolen vehicle cases. For example, if a person driving a car with the ignition key punched out or wires dangling from under the dashboard stopped by police officers says, "Well, I did not know it was stolen. Someone loaned it to me." That person reasonably should have known the car was stolen and

turned a blind eye to all of the objective evidence that it was stolen. In this case, "reasonably should have known" means that there were clear articulable facts that any reasonable person would have identified.

SENATOR CARE:

To follow up on a question asked by Mr. Gentile, I think your response was that it started as a criminal investigation. The question to you was did it start as a criminal investigation, and you testified that it did. I do not want to mischaracterize your testimony. When the Attorney General's Office first got involved, it did start as a criminal investigation; correct?

MR. GARDNER:

It was referred to us as a complaint from a member of the public, and it was given to the then acting-Chief of the Criminal Investigations Division, Dale Liebherr. It was a criminal investigation. All subsequent action in this case, interviews, subpoenas, if any, were done through the criminal authority and for no other reason.

SENATOR CARE:

That investigation was, ultimately, turned over to the Ethics Commission; correct?

MR. GARDNER:

The results of the concluded investigation were turned over to the Executive Director of the Ethics Commission.

SENATOR CARE:

What is the statutory authority for the Attorney General's Office to turn over to the Ethics Commission a criminal investigation or the results of a criminal investigation?

MR. GARDNER:

The results of the criminal investigation once the investigation is concluded are matters of public record. They are public documents. We could have turned them over to anybody. The media could have requested them from us had they known about this investigation which they did not. We would have, under Donrey v. Bradshaw, been required to turn it over to them. Our authority to turn over the documents is statutory and case law regarding what constitutes a privileged or confidential document. These do not. Our authority is to refer this to the Ethics Commission for their proceedings under Nevada Revised Statute 281, which encourages, as a matter of legislative policy, government agency employees to refer improper governmental actions to the Ethics Commission.

SENATOR CARE:

Is that the statute that specifically says person, sometimes referred to as a requestor? There is also the requestor, the public official him or herself, who wants to know in advance if certain conduct might be unethical. Is that the statute you are talking about?

MR. GARDNER:

No, it is a different statute. I believe it is Nevada Revised Statute 281.621.

SENATOR CARE:

Does your office or your division have a standard for when and when not to turn a criminal investigation over to the Ethics Commission?

MR. GARDNER:

We have recently created, in the Attorney General's Office, the Public Integrity Unit. Prior to the creation of this unit in 2003, we probably prosecuted fewer than half a dozen state-employee misconduct cases. Since that time, we prosecuted, in 2004 alone, more than 30 state-employee misconduct cases. It is our policy, although not written, that every single case will be evaluated on its own merits. Some will be proceeded upon criminally, and some will seek alternative resolutions including the Ethics Commission. We remain of the position that the Ethics Commission is a valid entity to send investigations of state-employee misconduct.

SENATOR CARE:

Any state agency can do this including the District Attorney's Office?

MR. GARDNER:

I do not see why not.

SENATOR CARE:

Who made the decision to refer this complaint or investigation to the Ethics Commission?

MR. GARDNER:

It was one of several options I had developed in the early stages of this case referring to long-term resolutions of the case. It was one of the options I had proposed. Ultimately, the decision was made by me and by other members of my office including the Attorney General.

SENATOR CARE:

How many people altogether?

MR. GARDNER:

All told, three people within the office had knowledge of the case in addition to Investigator Liebherr. There were only three attorneys who discussed this case with any regularity. We kept a very tight lid on this case.

SENATOR CARE:

It is fair to say, because he represents the office, the ultimate decision would have been made by the Attorney General; correct?

MR. GARDNER:

The Attorney General provides me with guidance on just about every major important thing that I do. At the same time, I have nearly 12 years of criminal prosecution experience and the Attorney General does not. He relies very heavily on my advice.

SENATOR CARE:

Did you personally have any discussion with any employees or former employees at the State Controller's Office in the course of this investigation?

MR. GARDNER:

No, I did not.

SENATOR CARE:

Did you personally have any communications with anyone affiliated with the Ethics Commission prior to the investigation being turned over to them?

MR. GARDNER:

Yes, I did. I spoke to Ms. Jennings.

SENATOR CARE:

What did you say?

MR. GARDNER:

I actually called her when I first received the case in April or May to discuss hypothetical procedures whether a violation of such a description would be considered by the Ethics Commission. I also asked her if they would accept an ethics complaint from our office and the investigation. I was told that they would. That was very important in our decision to do so.

SENATOR CARE:

Did you, in your discussions with Ms. Jennings prior to the complaint being filed with the Ethics Commission, offer an opinion of any kind about Controller Augustine?

MR. GARDNER:

No, in fact I was very careful never to let Ms. Jennings know any details of this case that would perhaps reveal who the subject was. I never mentioned Controller Augustine's name. I

honestly believed that until the day the ethics complaint was delivered to her, she had no idea who we were talking about when we discussed this in hypothetical terms.

SENATOR CARE:

In the course of the negotiations with your office and Controller Augustine's Counsel, at any time did Controller Augustine or one of her representatives offer to resign under certain circumstances?

MR. GARDNER:

I am also conscious, as is Mr. Gentile, of a lawyer's ethics. Normally, conversations and furtherance of negotiations are not to be discussed. I believe that has been waived in this case by the nature of my examination so far. Therefore, I am going to answer that question.

MR. GENTILE:

I am going to indicate an objection to that. I did not call Mr. Gardner. If there is any kind of a privilege, it reposes with Controller Augustine. We certainly have not waived it.

MR. GRECO:

I agree with Mr. Gentile.

SENATOR CARE:

Let me be certain I understand. There is a statute that says discussions of settlement are not admissible into evidence in a proceeding. This is not a trial, as such. Is that what you are referring to?

MR. GARDNER:

Correct. I am conscious about legal ethics not disappearing because of this case as stated in Mr. Gentile's comments earlier. I just want to make certain that this body understands I am cognizant of those legal ethics too. I will answer the question.

MR. GENTILE:

We waive the privilege.

MR. GARDNER:

I received a call from Mr. Arrascada, possibly in February or March 2004. Mr. Arrascada first asked me if I was sitting down. Then he asked me what would I think if Controller Augustine agreed to resign from office for personal reasons; could this whole thing go away?

SENATOR CARE:

What was your response?

MR. GARDNER:

I was very taken aback by the call. After a moment of thought, I told him that it did not sound like a likely solution for me, but I would have to discuss it with my superiors.

SENATOR CARE:

After you had done that, did you further respond to Mr. Arrascada?

MR. GARDNER:

I said that it was not acceptable.

SENATOR CARE:

What was his response?

MR. GARDNER:

We moved on to the next topic.

SENATOR WIENER:

Mr. Gardner, you sounded as if you had some concerns about changing of language. Based on your investigation, you found "willful to include" knew. You mentioned two stages of draft. One

stage of a draft that you had negotiated with Mr. Arrascada, and then, another draft that came out of the Ethics Commission where the word knew was excluded. Is that correct?

MR. GARDNER:

The draft I worked on with Mr. Arrascada was the draft of my complaint. That draft took some time to arrive at. It started out, essentially, as a recitation of the investigative report. After many discussions and meetings with Mr. Arrascada, we agreed to remove what Mr. Arrascada believed was inflammatory language that did not necessarily go to the ethics violations.

SENATOR WIENER:

You had stated you had talked to Stacy Jennings in the early days of the case to discuss procedural matters as well as asking her if they would accept an ethics complaint. On what basis would they deny to process an ethics complaint? If they had chosen to deny it, would you have gone forward with the criminal complaint?

MR. GARDNER:

With respect to the first part of your question, she never articulated to me as to what basis they would deny any ethics complaint. She seemed to feel that an ethics complaint from the Office of the Attorney General and an investigation that had been conducted by them was extremely appropriate for referral to the Ethics Commission based on the fact that we are the primary law-enforcement agency in the State. With respect with what I would have done had she turned it down, I would have continued the case for possible criminal charges. I would have made that decision independent of the decision to send the case to the Ethics Commission.

SENATOR WIENER:

If you had to make that decision now, would you have taken that forward as a criminal complaint?

MR. GARDNER:

I would have to say the answer is yes.

SENATOR RHOADS:

We received a memo dated December 2, 2004, from Senator Raggio. One of the opinions in that memo states: "An unclassified state employee may engage in political activities during hours of state employment or at any other time unless those political activities are otherwise prohibited by another statutory provision." Do you agree with that statement?

MR. GARDNER:

I must respectfully disagree with that statement.

SENATOR RHOADS:

You disagree?

MR. GARDNER:

Under Nevada Administrative Code 284.770, this specifically says that employees may vote as they choose and express their political opinions on all subjects without recourse. No employee may engage in political activity during the hours of his or her state employment to improve the chances of a political party or a person seeking office or at any time engage in political activity to secure a preference for promotion, transfer or increase in pay.

SENATOR COFFIN:

Would not the appropriate agency for felonies or misdemeanors committed within Carson City reside with the county?

MR. GARDNER:

Under Nevada Revised Statute Chapter 228, the Attorney General's Office has vested exclusive jurisdiction of investigating and prosecuting crimes committed by state employees in the course of their employment.

SENATOR COFFIN:

Is a Constitutional Officer considered a state employee?

MR. GARDNER:

I would say so.

SENATOR COFFIN:

The reason I ask this is because we have had testimony that the complaint was walked over to your office after consulting with one of your Deputy Attorney Generals and the Department of Personnel head who indicated that they did not think there was anything that could be done in these instances regarding the same facts we are here for today. Did you talk to the deputy that was over there and ascertain why he or she told the employee in question that he did not feel it was appropriate to go any further than that?

MR. GARDNER:

I did not speak with the Deputy Attorney General at that time. I have since learned, recently, about that conversation and event. That conversation was with a Deputy Attorney General who is a civil or a human resources deputy by the name of Jim Spencer. He does not work in the Criminal Division. He was being consulted based on his knowledge of personnel law and what recourse Ms. Coward and others might have in terms of a hostile work environment and other personnel actions. He was not considering the case in terms of validity of criminal investigation or criminal prosecution. I do not believe that he had anything to do with the criminal case once the investigation began. In fact, I do not believe he has been a part of the criminal investigation.

SENATOR COFFIN:

A memo did not come to you saying there had been a contact with Jim Spencer requesting and denying assistance?

MR. GARDNER:

I believe I only learned about that several weeks after the Assembly hearing.

SENATOR COFFIN:

We have had testimony that the case was then handed to the Attorney General directly. Did he then call you, immediately, and say that this is something we need to look at and indicate that it is sensitive because this involves a State Constitutional Officer? In essence, this involves my equal in the State and that it is a politically dicey thing?

MR. GARDNER:

I think you are talking about two different things. There was the initial contact by Controller Augustine's employees to Ms. Greene of Personnel and Mr. Spencer. I believe that was done while they were still employed. After Ms. Coward left the Controller's Office, she came to our office with the diskettes and other materials with the specific purpose of referring this as a public-integrity matter of possible governmental misconduct. I do not believe the Attorney General met with her personally. Someone in the Carson City office did. Within a matter of weeks, it was referred to Dale Liebherr to begin a criminal investigation. From that point on, the Attorney General did not involve himself in the day-to-day investigation. We occasionally talked about the case and the progress that was being made. Did he consider this a sensitive matter due to Controller Augustine being a fellow Constitutional Officer, absolutely. We all felt that way.

SENATOR COFFIN:

I am not really trying to rope the Attorney General into this in some fashion. You did say you did not conduct a forensic examination or a cross-examination of witnesses or anything in response to a question earlier. How would you know whether there should be a criminal prosecution based solely upon work that was not ordered but a decision could have been reached without that?

MR. GARDNER:

Virtually, all charging decisions and prosecution offers are made without the charging prosecutor meeting with the witnesses or the complainants who have made the complaints. That is for a variety of reasons. The prosecutor should not be made a witness by having interviewed these people prior to filing the charges. In addition, we rely on the work of our investigators. In this case, the investigation was voluminous. There were dozens and dozens of pages of investigative materials and literally thousands of pages of forensic evidence that had been taken from computers. In reviewing that and confirming the facts and the questions that I might have had with my investigator including sending him to do follow-up interviews which he did. There was more than enough for me to make a reasonable-charging decision in this case.

SENATOR COFFIN:

This is the first time the witnesses have been talked to other than the prepared statements that they made in front of the Assembly, which they say, were made in your office. Were they crafted in your office?

MR. GARDNER:

There were several witnesses we interviewed the day before the Assembly hearings. They were Ms. Miles, Mr. Wells and a few others. We wrote down every single word they told us in those pretrial interviews. We provided them with an outline of their statements. They crafted that into their own Assembly testimony.

SENATOR COFFIN:

The first draft of the statements of testimony given by these witnesses was prepared by the Attorney General's Office?

MR. GARDNER:

It was not a draft of the statement. It was a transcription of their interview statements. It was given to them with the express direction that they rewrite it, edit it, delete, add or change anything that did not accurately reflect their own statements.

SENATOR COFFIN:

Why did you feel the need to provide that for people? Could they not construct their own?

MR. GARDNER:

Michelle Miles, who was wheelchair bound in a one-room apartment with no typewriter or computer, was one of the witnesses who was expressing a great deal of panic about the idea of preparing a statement in less than 24 hours. The others, essentially, prepared their own statements. Ms. Normington, Ms. Coward and Mrs. Valdez all did their statements unaided. We were simply assisting a small number of witnesses who had never testified before in any legislative proceeding with the format, how to introduce themselves, how to show respect to the tribunal. We absolutely did not provide them with any testimony as far as the substance of their statements.

SENATOR COFFIN:

In my layman's opinion, Mr. Gardner, I think what you have done is to provide a first draft. If we want to split hairs, this could be called suggested-talking points. Do you recall you said this; are you sure; yes, well, let us put it down? That was what was handed to them. That makes you party to the case in my layman's opinion. It makes you somehow involved in this case.

MR. GARDNER:

All trials require witness preparation. That does not mean you put words in their mouth. That does not mean you coached them. It is a necessary part of any trial preparation. The defense lawyers do it. Prosecutors do it. That means you sit down with the witnesses, usually a day or two before their testimony, and you ask them questions. You ask them questions. You do not put words in their mouths. When you get those answers, you write those answers down. That forms the basis of your question-and-answer that you intend to conduct in a forensic examination as we are doing today in a normal question-and-answer. When we discovered, 24 hours before the Assembly proceeding, that it was not going to take a question-and-answer proceeding but was

going to be conducted as a legislative hearing, there were witnesses that were panicked. Rather than provide them with our questions and answers, we advised them in terms of guidelines, what the Assembly expected, how to introduce themselves, and we provided them with transcripts of their statements that they had made to us.

SENATOR CEGAVSKE:

You stated that Ms. Coward was no longer working for Controller Augustine when she brought the diskettes over.

MR. GARDNER:

That was my understanding. She had just recently departed Controller Augustine's office.

SENATOR CEGAVSKE:

She testified yesterday and stated she could not remember if it was Thursday or Friday and was still employed at that time. You had made the comment that she was a member of the public. Does it make a difference if it is a member of the public or someone employed at the office that is bringing that over?

MR. GARDNER:

I think you are correct that she was just about to have her last day in office, and it was about a week before. It makes absolutely no difference. We accept complaint referrals from current employees, past employees, employees who plan to stay there for years and employees who are leaving the next day.

SENATOR CEGAVSKE:

In the entire gathering of information, was there at any time that you or anyone from the Attorney General's Office talked to Controller Augustine?

MR. GARDNER:

Yes, in about January, 2004, one of the very last things done in the course of this investigation, Investigator Liebhr and Chief Investigator Honey contacted Controller Augustine and asked if she would be willing to sit down for an interview. She agreed.

SENATOR CEGAVSKE:

Is any of the conversation Controller Augustine had with you any of the information that we have?

MR. GARDNER:

I know there is a report and a transcript. I do not know if it is in one of the exhibits.

SENATOR CEGAVSKE:

Is that information available for our information? You referred to having hundreds of exhibits, and then, you further stated thousands. I feel there is an exaggeration on your part. Is there something we do not have or we have not seen?

MR. GARDNER:

We added that up in terms of the exhibits actually before the members. It is actually 1,035 pages.

SENATOR BEERS:

I got the impression that the person that brought you the complaint did not tell you that they had already pursued this matter with Personnel.

MR. GARDNER:

I never met Ms. Coward until the day of the ethics hearing. She did not tell me anything. From reviewing the investigation reports, she may have mentioned to the investigator that she had referred this to the State Personnel Office.

SENATOR BEERS:

Do you think your investigator talked to the Deputy Attorney General?

MR. GARDNER:
I do not know.

SENATOR BEERS:
Do we have the investigative reports? Did the office ever investigate the possibility that individuals who brought you these complaints embellished their stories because they were angry at recent demotions and reprimands?

MR. GARDNER:
In any case, you have to evaluate witness credibility as far as what their motives and biases might be. In this case, we were aware there was a single reprimand against Ms. Normington. We were aware that duties had been taken away from Ms. Coward. They were duties that she valued, and she was not happy about that. The investigator questioned them about that. I questioned them also in preparation for the Assembly hearing. I was confident that this was not an issue affecting their credibility in any way. Ms. Normington believed the reprimand was about not keeping up with her work and was directly related to being forced to do campaign duties. Ms. Coward believed that she was being taken away from the debt-collection job, although according to Controller Augustine she was very good at that job, because Controller Augustine wanted her to do more work related to speechwriting and political issues. She was not interested in doing those tasks. It certainly did not outweigh the credibility that we felt with the witnesses' testimony.

SENATOR BEERS:
We have had testimony from the chief accountant that it was his idea to put an accountant in charge of the Debt Collection Unit. It was not done at Controller Augustine's initiative. I presume you did not have the benefit of that information.

MR. GARDNER:
No, I did not.

SENATOR BEERS:
I am concerned about the disks that were brought to the Attorney General's Office for a couple of reasons. There were 40-blank pages that were consecutive out of the 1080 pages plus a few others are blank. There was a 150-page printout of a PDF file that was a membership list from an organization in Las Vegas working in communications. That file, according to testimony, was to be sent to Controller Augustine for purposes of being entered into a database for fundraising purposes. Upon not being able to find even the first name on that file in any of the mailing lists in the printouts, we then heard a modification that only some of them were asked to be entered. Another disk appeared to have very legitimate government travel itineraries along with four monthly schedules. This is just a few that we have looked at closely. I am also concerned about the "chain of custody" of these disks. Being knowledgeable about computers, I do not think there is any way for you to determine that they were created on a state computer versus a private computer.

MR. GARDNER:
I may not be the correct person to talk to about technical-computer issues. I do know that when the disks were delivered to our office, they were securely kept in an evidence vault. Prior to that point, we can only rely on our forensic examiner, Ms. Supera, to talk about the meaning of the date stamps, time stamps and things that are on the disks. The blank pages were provided for reinforcing the whole integrity of the disks. In other words, we were providing you with everything that came off those disks from start to finish. If someone else decided to do the same download of the disks later, they would get the exact same thing. That is the reason for the larger volumes. I apologize if I exaggerate. I felt that there were hundreds if not thousands of pages when I first got them. The blue binders presented to the Assembly had the blank pages removed. At least, I believe they were. Anything that we did not believe was directly related to campaign work was taken out. Those are the binders we intended to present to the Assembly. The red binders that were presented by the Ethics Commission became exhibits by virtue of that fact. I

did not know they were going to be exhibits. We did not mean to provide anything that was not directly related to the campaign work.

SENATOR BEERS:

To the best of your knowledge, all the work at the Attorney General's Office was done off the disks that were provided by the people bringing you the complaint. You did not go to Controller Augustine's office, remove the personal computer and actually look at the personal computer?

MR. GARDNER:

I believe our investigator felt it would be too late. We did get the zip drive that had been preserved by a member of the Information Systems.

SENATOR BEERS:

They brought you the zip drive with a collection of floppies. That had a recent backup of a group-wise drive and from the forensic report, you did not have the group-wise drive to be able to restore and review it. Is that correct?

MR. GARDNER:

That does sound correct.

SENATOR BEERS:

You did not find the copy of all these documents in Controller Augustine's folders in that group-wise system?

MR. GARDNER:

Not to my knowledge.

SENATOR BEERS:

During the course of the investigation, Ms. Coward never told you that she put them there?

MR. GARDNER:

No.

SENATOR HORSFORD:

This is a plea bargain between the Attorney General's Office and Counsel for Controller Augustine to stipulate to willful wrongdoing and to proceed with an ethics complaint. Am I reading that correctly in its simplest form?

MR. GARDNER:

There were discussions of a plea bargain, to use that term. Ultimately, the terms of any discussion that we had regarding how Controller Augustine might resolve this case without having criminal charges filed, in our view, the terms were not met by Controller Augustine due to the reply to the ethics complaint, minimization of her actions and blaming the employees. Prior to the ethics complaint, we informed Defense Counsel that we did not consider ourselves to have reached an agreement.

SENATOR HORSFORD:

You testified earlier that you and Mr. Arrascada had several discussions to try to reach an agreement to avoid proceeding with criminal charges. Is that correct?

MR. GARDNER:

Correct.

SENATOR HORSFORD:

They were to stipulate to the final Ethics Commission report.

MR. GARDNER:

They were to admit to the facts of the ethics complaint which described Controller Augustine's actions in requiring her employees to do campaign work on state time. The written response did not accomplish that sufficiently. The ethics hearing was in closed

session for many hours. We were there as witnesses prepared to go forward with a full-blown ethics hearing. At which point, we would have gone back to the office and continued to evaluate the case for criminal charges. They entered into a stipulation that had been drawn up by the Ethics Commission and the Executive Director which was somewhat different from the ethics complaint that we had drafted and even had different charges. We considered ourselves to still have the legal authority to file criminal charges. In fact, we still do to this day. We made the decision that because the stipulation had been entered into, it was going to be referred for impeachment that was the most appropriate procedure at this point.

SENATOR HORSFORD:

The final stipulation that was approved by the Ethics Commission was acceptable enough to the Attorney General's Office based on the other options that you had still available to you?

MR. GARDNER:

I disagree. We did not find it acceptable.

SENATOR HORSFORD:

Ms. Jennings testified there was a provision in the original language that Controller Augustine would resign within five days. Do you recall that language in an earlier draft of this stipulation?

MR. GARDNER:

We were never privy to that draft or to any of that negotiation procedure. I heard about that afterwards. I understood it differently. I understood it as essentially saying that we are going to refer this for impeachment proceedings. Of course, if you resign before that takes place, then, we would have no authority to refer it for impeachment proceedings. I never understood that to be a bargaining term. I could be wrong. I was not part of that negotiation.

SENATOR HORSFORD:

In the discussion you had with Mr. Arrascada in February or March, 2004, you indicated that he called and stated what would you think if Controller Augustine resigned for personal reasons and the rest of this would just go away. Can you give the Committee some understanding of what the internal discussions were and how the Attorney General's Office arrived at the decision not to accept that offer made by Controller Augustine's Counsel to resign?

MR. GARDNER:

When these charges were first brought to our attention, we had no choice but to take these very seriously. We believed the witnesses to be credible. We would do the same in any other case brought by any person against any person or any head of an agency. We would not have simply brushed under the rug any case with facts like this no matter who the subject of the investigation was. We simply could not do that.

SENATOR HORSFORD:

Am I to take it from that, the intent was not necessarily to get her removed from office but to get to the truth and to the justice of the matter based on the facts and the evidence that was presented to you?

MR. GARDNER:

I absolutely agree with that statement. That is 100 percent our motivation in pursuing this case. These victims would have the right to have their stories investigated, properly brought out in a public hearing, if necessary, or have Controller Augustine admit to them. That was our motivation.

SENATOR HORSFORD:

This is a very significant complaint and process that we have gone through and the precedence not to go forward with criminal charges. I am trying to understand the Attorney General's Office and their final determination stating they still have the right to do so. Based on remarks that have been made by their office, it is indicated that criminal charges will not be pursued. If the actions that took place by Controller Augustine were so egregious, why would

Controller Augustine not be held accountable, as would any citizen in the State of Nevada, for breaking the law?

MR. GARDNER:

We did feel that the actions were egregious misconduct of a public officer. We are also conscious of the extremely high burden of proof in a criminal trial. By the time the ethics complaint had been sustained or the stipulation agreed to, we had been exploring how we would proceed in a criminal charge. Our intent was to ask a district court judge in the First Judicial District in Carson City to convene a grand jury to call witnesses. That would have required summons being issued for 50 or more citizens of Carson City and assembling a grand jury of 17. That would have taken weeks if not months with motions, habeas corpus and petitions. We estimated that we probably would not have a criminal trial until the end of 2005, if we were lucky. By the time the Ethics Commission had issued its stipulation and the Governor had announced that he planned to call a special session for impeachment, we realized that was going to be much more expeditious, more efficient and, in our view, perhaps, a more fair procedure.

SENATOR TITUS:

Since that March decision by the Attorney General's Office not to accept the resignation, you have had the Governor, Senator Ensign and other leading public officials call for the resignation of Controller Augustine in order to put this to rest. If you think about it, since that decision in March, you have cost the State of Nevada hundreds of thousands of dollars and hours of personnel time that could have been spent on more productive, substantive policy issues. You have lost an opportunity for the voters to choose a new Controller. It could have gone on the ballot because it would have been prior to the close of filing. I am a strong supporter in ethics, never having been a double dipper myself. I think it is very important that we go after people who violate those laws. In this case and under these circumstances, in retrospect, do you think this has been the right way to pursue this?

MR. GARDNER:

I am very respectful of your comments and sensitive to the issue of the cost of these proceedings. I hope I was clear that the offer of resignation was to be for personal reasons to make this whole thing go away with no statement, no admission and no acknowledgement of what wrongs had been done. We could not accept that. We simply could not accept that. The calls for resignation have come since Controller Augustine stipulated to three willful violations of the Code of Ethics. It is a different thing in my view. I understand that it has been very costly and burdensome to the members of the Senate. I know I am and I believe the State of Nevada is grateful for that commitment. I do not mean to be cliché here but justice does not come cheap, takes hard work and, unfortunately, takes some money. That is what we do. I am very respectful of your comments, Senator Titus. However, I do not think we would have done anything differently.

SENATOR CARE:

The treatises on impeachment say that the purpose of these impeachment trials is to protect the public. A criminal investigation is intended, if there is substance to it, to ultimately resolve and punish the offender. It is not the same thing to protect the public or punish. I am having trouble understanding how it is that your office could be satisfied that if we cannot get this, we will be satisfied with that. They are not one and the same in my judgment. Would you care to comment on that?

MR. GARDNER:

I agree with that analysis. I think the purpose of impeachment is for the government to protect the public from wrongdoing of a government agent. We believe that is what happened here. The resources of the State Controller's Office were misappropriated and were not put into the areas they should have been. Employees had to be taken off assignments that they should have been doing. Principles of accounting duties were violated. This is a matter of protecting the public. Punishment is a more difficult thing to talk about. We are not without compassion and sensitivity. The idea of prosecuting Controller Augustine and having her become a convicted

felon and possibly face incarceration, certainly weighed in our analysis in determining that this was the best procedure to protect the public.

SENATOR COFFIN:

What makes you think this would have risen to the level of a felony?

MR. GARDNER:

We saw in this investigation and in the results more than probable cause to have charged under Nevada Revised Statute 197.110, misconduct of a public officer. That statute states that misconduct of a public officer is a category D felony to use state employees, state facilities or state equipment for your own personal gain. Your private personal campaign for reelection is your personal gain. It is not the business of the State. Ms. Normington, Ms. Coward, Mrs. Valdez and Ms. Kennedy were state employees.

SENATOR COFFIN:

Did you possibly realize that by pursuing this kind of complaint, you opened the door to selective prosecution? It is widely known that political activity occurs in other elected offices in the State.

MR. GARDNER:

I do not know if it is widely known. In cases that are referred to me, we will review them for prosecution.

SENATOR COFFIN:

We have a record of assigning positions to the Constitutional Officers, including yours, that are used for a variety of purposes. We know that they cannot spend all their time on the law and processing legal paperwork. They have to project the authority and image of the office. We have always felt there should be some flexibility. I am talking from the appropriations point of view. The Ways and Means Committee and the Finance Committee have always known that even though a job description did not say political assistant, that person needed it because they are in politics. Your boss is in politics as is the Governor and so is the State Controller. I cannot believe that this did not cause someone in your office to raise the question of how many dollars are we really talking about, how much does an electron cost for computer usage, how much does it cost to use a facsimile machine when it is domestic. Is it possible the interrogation of the witnesses would reduce it to somewhere between that area where you thought it might be or to a de-minimus state? The Legislative Branch has tried not to intrude too much on the affairs of the Executive Branch. Your office and the other State Constitutional Officers have asked for people who could help them in projecting their office. We are not talking about the "everyone does it" argument. What we have discovered is not a wholesale appropriation of state resources. We have seen activity being done, periodically, to advance the office, and we have seen some to advance the campaign. The sum does not add up to very much. That will be arguable. That is why we are here. Again, it leaves everyone in this State open to wondering why this Constitutional Officer is being singled out. If you had proceeded to convict, you can bet that your boss and every other State Constitutional Officer will start seeing complaints. This will be the measurement. This is a low bar. Were there discussions about that?

MR. GARDNER:

There was never a moment's thought to the fact that this would open up any kind of Pandora's Box for state officials who were doing the right thing.

SENATOR COFFIN:

This should not have been your bailiwick anyway. You are not the political arm of the Attorney General's Office. If I were the Attorney General, I would have thought, wait a minute, I live in a glass house too.

MR. GARDNER:

I respectfully disagree with that.

SENATOR HARDY:

I would just like to get your perspective on something. I am not sure what I think about this matter. I am very interested to hear what you think. Is it possible that the standard of protecting the public could have been met by accepting Controller Augustine's offer of resignation for personal reasons? On the other hand, is there more to protecting the public than just having the person that has allegedly committed the infractions removed?

MR. GARDNER:

There is more to it. There is the benefit that is obtained by employees who feel validated by having their complaints taken seriously, something that carries on to employees throughout the state, throughout government. There is, certainly, we hope, the deterrence value to other elected officials or even nonelected officials who would abuse their office in this manner. It is much more than simply making one single problem go away.

SENATOR HARDY:

I appreciate that perspective. My initial reaction was that standard would have been met. I began questioning that as I sat here. I appreciate your perspective very much.

SENATOR AMODEI:

Did you discuss employee expectations regarding your investigation with the employees of the Controller's Office who came forward to you?

MR. GARDNER:

I do not think I understand the question.

SENATOR AMODEI:

Your response to Senator Hardy was that one of your considerations was employee expectations in terms of coming forward and trying to do the right thing. As part of your investigation, did you discuss the expectations of Ms. Coward, Ms. Normington and Mrs. Valdez as part of your criminal investigation?

MR. GARDNER:

I did not. I had never met any of these people until the day of the ethics hearing. I do not believe that was discussed in any of the interviews with the investigator.

SENATOR AMODEI:

How did you form an opinion as to what their expectations were with respect to this matter?

MR. GARDNER:

I am not simply talking about the expectations, individually, of Ms. Coward or Ms. Normington. I am talking about the widespread effect of having state employees report misconduct and having that validated and having other employees throughout the State see that something will be done. It will not be ignored, and it will not be said that nothing can be done about this.

SENATOR AMODEI:

Are you aware that as you sit here today after completing the investigation as to what, if any, the expectations of those employees were with respect to that office?

MR. GARDNER:

No, I am not.

SENATOR AMODEI:

At that time that your office made the decision to refer this matter to the Ethics Commission, did you have an understanding as to what the potential result of such a referral could be in terms of punishment?

MR. GARDNER:

No.

SENATOR AMODEI:

You were not aware that the referral to the Ethics Commission would result in certain actions? According to testimony that Ms. Jennings gave citing a statute in Nevada Revised Statute, it would then require automatic referral to the Assembly for potential impeachment.

MR. GARDNER:

I was aware of the potential penalties if they sustained the complaint. I had no knowledge of whether they would even do that. It is a two-part process. The initial body could have decided there was not just and sufficient cause and rejected it outright. Certainly, if a complaint were sustained, I knew that the finding of one willful violation would result in automatic impeachment as well as potential fines.

SENATOR AMODEI:

You had that awareness at the time that you participated with several other attorneys at the office as well as the Attorney General in making that ultimate decision?

MR. GARDNER:

Correct.

SENATOR AMODEI:

If I have heard your testimony correctly, the difference between referring it to the Ethics Commission for the initiation of a process that could result in this Constitutional Officer and the difference between accepting a resignation was the process in terms of airing these complaints and validating employees. The other things, in your opinion and not speaking for anyone else in your office, made that preferable?

MR. GARDNER:

We could not sweep this under the rug and make it go away in a deal like that. We could not do it.

SENATOR AMODEI:

Is the answer to my question yes?

MR. GARDNER:

Yes.

SENATOR AMODEI:

You have also indicated that you had heard in a short amount of time that you had planned to appear before the Assembly and conduct a hearing in some nature or fashion in support of the referral from the Ethics Commission regarding the investigation that your office undertook in this matter.

MR. GARDNER:

Correct.

SENATOR AMODEI:

What type of hearing were you planning to conduct before the Assembly?

MR. GARDNER:

My understanding is that the rules for the Assembly hearing were being discussed right up to the last minute. We had to prepare for something not knowing what it was going to be. Having done the research myself into impeachment procedures and having discussed some of these matters with Legislative Counsel, I was expecting this to be a question-and-answer hearing. That was what I was preparing for.

SENATOR AMODEI:

How did you find out that it would not be?

MR. GARDNER:

Brenda Erdoes, Legislative Counsel, informed me on Monday night.

SENATOR AMODEI:

Your understanding was that the proceeding was to start Wednesday morning. Your earlier testimony was that because of that information to have the witnesses, at least for your part of the presentation, reduce their statements to writing to be submitted in that context.

MR. GARDNER:

I informed the witnesses of the new format and asked them to prepare narrative statements to present before the Assembly.

SENATOR AMODEI:

Do you have an opinion on the selection of the format that was ultimately used?

MR. GARDNER:

I do.

SENATOR AMODEI:

Would you share that opinion with this Committee, please?

MR. GARDNER:

I think the format that was used worked very well. The Defense had every opportunity to present their own witnesses. It was the equivalent of a grand jury which would have been, essentially, witnesses presenting their testimony. The Defense would have had the opportunity to present as much exculpatory and defense evidence as they would have liked. The difference in this case is that the Assembly members would have the opportunity to ask questions themselves. That is guaranteeing much more intensive questioning of the witnesses.

SENATOR AMODEI:

Is it your opinion that what happened in the Assembly was the equivalent of a grand-jury proceeding in the State of Nevada?

MR. GARDNER:

It was not a criminal proceeding. You have to analogize that it is either a grand jury or a preliminary hearing prior to a criminal trial. What that requires is merely a presentation of slight or marginal evidence just to get the matter to the tribunal that will try the matter. In this case, there was no burden of proof established in the Assembly hearing. The evidence was detailed and extensive. It provided the Assembly with more than enough evidence to send it to the Senate.

SENATOR AMODEI:

Could you describe for the Committee the nature of your interaction with the Ethics Commission and the personnel prior to sending over the report of your investigation?

MR. GARDNER:

My sole contact with the Ethics Commission was with Executive Director Jennings. It was limited to a handful of phone calls and one meeting when she happened to be in our building, the Grant Sawyer Building in Las Vegas. We discussed procedures for referring matters to the Ethics Commission. We further discussed ramifications and what the outcome of such a procedure might be and whether or not the Attorney General's Office could refer such matters to the Ethics Commission. We did not talk about the facts of the case.

SENATOR AMODEI:

Is there anything that occurred after your referral in the way of your interaction with the Ethics Commission?

MR. GARDNER:

I do not believe I even spoke to Ms. Jennings until before the hearing was scheduled. That was limited to her telling me that I was being subpoenaed as a witness.

SENATOR AMODEI:

Are you aware of any investigation that was done after your office turned over its investigation report to the Ethics Commission, if any?

MR. GARDNER:

I believe from speaking with Ms. Jennings at the Ethics Commission hearing, she may have even stated this on the record, that they verified the investigation by conducting their own telephone interviews of the witnesses. I do not know if they interviewed all the witnesses or some of the witnesses. I believe she stated that.

SENATOR AMODEI:

Are you aware of whether or not your office provided any support or advice to the Governor's Office during the course of these proceedings?

MR. GARDNER:

I am not aware of that.

SENATOR AMODEI:

You have no knowledge of any interaction between your office and the Governor's Office as a predicate to the Governor's decision to call a special session of the Legislature.

MR. GARDNER:

I have no knowledge of that.

SENATOR WIENER:

You raised the issue of hoping you were sitting down when you received that telephone call from Mr. Arrascada and the offer was made by Controller Augustine for resignation for personal reasons. You felt that was unacceptable. Is that an accurate recollection?

MR. GARDNER:

That is accurate.

SENATOR WIENER:

You felt further that public employees had a right to be able to bring forward their concerns and we would not brush that aside or sweep that away. I am paraphrasing; I apologize. You received a telephone-call offer, and you heard the language of an offer of resignation, the qualifier for personal reasons was given to you, and you said it was unacceptable. What language could you have heard in that offer of resignation for a purpose or a reason for resigning that you would have responded as being acceptable?

MR. GARDNER:

It is a tough question. I do not think I really had considered that before. It is clear to me that our decision was partly because there had to be an acknowledgement of wrongdoing. I do not know what form that could have taken. It took the form of the stipulation of the ethics complaint. I cannot say what other form such a public acknowledgement of wrongdoing might have taken. That is really all I can say.

SENATOR WIENER:

Language to that extent that resigning with some explanation of an admission of wrongdoing might have satisfied the concerns and needs of the Attorney General's Office on behalf of the people of Nevada.

MR. GARDNER:

I really cannot say that is true. That requires me to speculate and requires me to speculate as to what would have satisfied other people in our office.

SENATOR WIENER:

Would that also include the Attorney General?

MR. GARDNER:
Certainly.

SENATOR TIFFANY:
Senator Wiener asked some of the questions that I was going to ask. Some of the motivation to move forward on this investigation was to validate the state employees. That was one of the prongs. The second was that you would not have proceeded if you did not think you found some wrongdoing. Is that accurate?

MR. GARDNER:
That is correct.

SENATOR TIFFANY:
Will state employees now feel that this is an open floodgate for their validations? Did you think about that? This is a precedence we are setting here.

MR. GARDNER:
I do not think that is the case.

SENATOR TIFFANY:
I hope you think about this. My thought was, oh my God, this is a format for validating state employees. I do not know what the future is going to hold for the rest of politically-elected officials. Did you consider the information they brought you as being stolen? I consider that stolen information.

MR. GARDNER:
Are you referring to the diskettes?

SENATOR TIFFANY:
Yes, I am.

MR. GARDNER:
I did not consider that fact. I suppose you could look at it that way. We were not focused on the wrongdoing. We were not conscious of any charges of wrongdoing against the employees themselves. At this point, we were focused on the wrongdoing that was alleged by the employees.

SENATOR TIFFANY:
Would not that be a standard that you asked from now on? If you are going to turn over this information, how did you get it? It looked as if in their testimony that they were colluding, sharing the disks back and forth from one disk drive to the other. It was not taken with Controller Augustine's knowledge at all. There was information in there that was personal invitations to things other than a fundraiser which are stolen databases. I was somewhat surprised that you did not ask about that.

MR. GARDNER:
I cannot say that the investigator did not ask those questions. However, my view is that that information should have never been on the state computer in the first place. I am not sure it can be stolen from a state computer. It should not have been there.

SENATOR TIFFANY:
We have heard other opinions from the Legislative Counsel Bureau that some of that information was okay. We have a little bit of a contest, here. If state employees come to you to use this for their validation and we are going to use the same standards to either go on a felony charge or an impeachment charge, are we going to look at how the information got there and is it stolen? We also heard that it was clear that some people wanted to thwart Controller Augustine's potential political ambitions. Did you take that into consideration under this complaint?

MR. GARDNER:

There was nothing in the investigative reports or any of the evidence that indicated to me that there was an attempt or conspiracy to thwart Controller Augustine's ambitions.

SENATOR TIFFANY:

That was in the testimony.

MR. GARDNER:

I do not disagree with you. I do not recall seeing that. We evaluate witnesses' credibility on a variety of factors. We take all of those things into consideration. Our evaluation of the credibility of witnesses and the strength of the case is, ultimately, what would prevent this floodgate from being opened as you have put it. That is part of the analysis in any criminal case. You have to weigh witness credibility against both the hard evidence and the corroboration of witness testimony when you have multiple witnesses saying the same thing. We did not have concerns about witness credibility in this case.

SENATOR TIFFANY:

I hope you look at that bar very seriously about motivation. It may seem minor to you. It seems major to somebody like me. If you are to spend 12 or 14 years in political office and want to have other intentions, that because you have an employee that is upset that they could use this as a tool now out of validating state employees. I hope that you are looking at the bar. You may or may not get another complaint like this again. It sure looks like it is punishment to me, not protection of the public.

SENATOR AMODEI:

Are there any other questions for Mr. Gardner? Mr. Greco, do you have any follow up?

MR. GRECO:

No questions.

SENATOR AMODEI:

Mr. Gentile, recross?

MR. GENTILE:

Chief Deputy Gardner, you have been a prosecutor for 12 years?

MR. GARDNER:

I was originally hired by the Clark County District Attorney's Office in 1991 to work in their criminal appellate division. In 1992 I was deputized as a prosecutor. I stayed there until 2000 and have been a Chief Deputy for the Attorney General's Office for two and one-half years.

MR. GENTILE:

The answer is yes. You have been a prosecutor for 12 years.

MR. GARDNER:

Yes, either as an appellate attorney doing criminal work or a prosecutor. The first year I was not a prosecutor.

MR. GENTILE:

My reason for asking that is when you were with the Clark County District Attorney's Office you were in the courtroom everyday?

MR. GARDNER:

Pretty much.

MR. GENTILE:

You handled hundreds of criminal cases?

MR. GARDNER:

Yes.

MR. GENTILE:

You were involved in the plea-bargaining process in hundreds of criminal cases?

MR. GARDNER:

Yes.

MR. GENTILE:

Most Senators are not familiar with that system. When plea-bargaining goes on, sometimes a prosecutor will make an offer on a case first?

MR. GARDNER:

Yes.

MR. GENTILE:

Sometimes, a defense lawyer will make inquiries as to whether the prosecutor will be willing to make a particular deal. Right?

MR. GARDNER:

That is true.

MR. GENTILE:

It has been your experience that when a defense lawyer initiates it, they have to go back to their client to see if the client is willing to accept it. Correct?

MR. GARDNER:

I do not know if that is always the case.

MR. GENTILE:

You have certainly experienced that being the case?

MR. GARDNER:

I cannot say that is true. I do not know what discussions have taken place with the client before the offer is brought to me. I do not know what authority the attorney may already have to make a negotiation on behalf of his client.

MR. GENTILE:

That is the point I am trying to make. The point is discussions take place, and you do not know whether the lawyer has talked to his client about what he is talking to you about or not.

MR. GARDNER:

That is true.

MR. GENTILE:

Sometimes, you will say, "Yes, I will make the deal"; then, he talks to his client. You have seen that happen in the courtroom?

MR. GARDNER:

Correct.

MR. GENTILE:

In this instance, there was no courtroom. Right?

MR. GARDNER:

Correct.

MR. GENTILE:

You responded to a question about whether you would file a criminal charge in this case today. Do you remember Senator Wiener asking you this question?

MR. GARDNER:

I do not believe that was the question.

MR. GENTILE:

It was something close to that. Have you heard the cross-examination of the witnesses in this case?

MR. GARDNER:

No, I have not.

MR. GENTILE:

Have you seen the demeanor of the witnesses in this case when they have been cross-examined?

MR. GARDNER:

I have not been observing this case because I have been under subpoena, no.

MR. GENTILE:

You have not read a transcript of any of the testimony in this case?

MR. GARDNER:

No, I have not.

MR. GENTILE:

You never interviewed any of the witnesses in this case before making a decision to demand the willful violation to the ethics complaint. Am I right?

MR. GARDNER:

I disagree with your characterization of the demand.

MR. GENTILE:

Prior to the ethics case occurring, not until the day we were in a different part of this building, you had personally never interviewed any of these witnesses?

MR. GARDNER:

That is correct.

MR. GENTILE:

You were relying on the printed page handed to you in a report?

MR. GARDNER:

I was relying on the printed page, the documentary evidence and my discussions with Senior Investigator Dale Liebherr.

MR. GENTILE:

You never issued any subpoenas to test any of that information. Am I correct?

MR. GARDNER:

What I said was that I did not know if subpoenas were issued as part of the investigation. I did not know that.

MR. GENTILE:

You talked about a grand jury and how expensive it would have been to present this to a grand jury. A grand jury in Nevada gets to ask questions of the witnesses. Does it not?

MR. GARDNER:

That is correct.

MR. GENTILE:

Just like the Senators have asked questions of these witnesses?

MR. GARDNER:

That is correct.

MR. GENTILE:

Just like the Assembly members asked questions of some of the witnesses.

MR. GARDNER:

Correct.

MR. GENTILE:

You have presented cases to grand juries, have you not? You know that you cannot present hearsay evidence to a grand jury in Nevada?

MR. GARDNER:

That is true.

MR. GENTILE:

You know when witnesses appear in front of a grand jury they appear one at a time. Correct?

MR. GARDNER:

Correct.

MR. GENTILE:

You saw Jennifer Normington and Jeannine Coward sitting next to each other testifying at the same time in the Assembly. Did you not?

MR. GARDNER:

Not for their primary testimony. The second time they were called in to do housekeeping on some exhibits, I think they sat next to each other.

MR. GENTILE:

You saw them sitting next to each other up in the gallery; did you not?

MR. GARDNER:

The Assembly gallery?

MR. GENTILE:

Yes.

MR. GARDNER:

I did.

MR. GENTILE:

In a grand jury, witnesses go in one at a time; do they not?

MR. GARDNER:

They testify one at a time.

MR. GENTILE:

They do not get to hear each other's testimony, and then, the next one comes in to testify. Do they?

MR. GARDNER:

No, they do not.

MR. GENTILE:

In the course of your investigation, did you subpoena or somehow otherwise get your hands on the State Controller's travel schedule to see if she was in the State of Nevada on any of the occasions on which these people said things happened?

MR. GARDNER:

I believe there is a calendar that is part of the documentary evidence from the computer disks. I do not know of any other calendar.

MR. GENTILE:

You say you believe that. Is that the calendar that has "x" marks on it?

MR. GARDNER:

No, that calendar is a calendar that was prepared as demonstrative evidence by our office.

MR. GENTILE:

Did you inquire as to how often the State Controller was in her office in the last five months before the election?

MR. GARDNER:

We did ask the witnesses that question in preparing them for the hearing.

MR. GENTILE:

They did not say anything about that at the hearing. Was there an answer they did not know?

MR. GARDNER:

I believe the witnesses testified there were times that she traveled. They made travel reservations for her.

MR. GENTILE:

In the cases you have been involved with over the years, you have gone to trial in some cases. You and I have tried a case together.

MR. GARDNER:

About a year ago, today, we were in trial against each other.

MR. GENTILE:

Yes, we were. You and I have entered into discussions on cases not this one but other cases. Right?

MR. GARDNER:

True.

MR. GENTILE:

You do not win all of your cases; do you?

MR. GARDNER:

I certainly do not.

MR. GENTILE:

Juries do not always find people guilty you feel need to be prosecuted?

MR. GARDNER:

I have about a 90-percent conviction rate. The answer is yes.

MR. GENTILE:

You told the Committee you were there at the ethics hearing. There was no ethics hearing, but you were there the day it was set?

MR. GARDNER:

I was subpoenaed and was waiting in the witness-waiting area most of the day.

MR. GENTILE:

You were there as a witness?

MR. GARDNER:

Correct.

MR. GENTILE:

As you told the Senators, you have been percipient to nothing in this case.

MR. GARDNER:
That is true.

MR. GENTILE:
One other thing about grand juries, when a witness goes into a grand jury alone with no other witnesses there and takes an oath, they do not read from prepared texts; do they?

MR. GARDNER:
No, they do not.

MR. GENTILE:
Please open the Defense Binder No. 1, Exhibit D-18. Have you ever seen this exhibit?

MR. GARDNER:
I have recently.

MR. GENTILE:
Recently? When did you first see it?

MR. GARDNER:
Perhaps, Monday or Tuesday of this week.

MR. GENTILE:
Shane Chesney is a Deputy Attorney General. He was a Deputy Attorney General in January, 2004?

MR. GARDNER:
That is correct.

MR. GENTILE:
Among his duties as a Deputy Attorney General, he provided legal advice to the State Controller's Office. Did he not?

MR. GARDNER:
That is my understanding.

MR. GENTILE:
The Attorney General is Brian Sandoval, and you both work for him?

MR. GARDNER:
Yes.

MR. GENTILE:
Your investigator Liebherr and his boss, is that Linda Honey?

MR. GARDNER:
She is the Chief of the Investigations Division now. She was not when this case was first started.

MR. GENTILE:
She used the title "Chief" that day.

MR. GARDNER:
I do not know what day you are talking about.

MR. GENTILE:
You are right; you would not know what day. You told the Committee there was an interview conducted by Investigator Liebherr, and did you mention Linda Honey at that time they interviewed the State Controller Kathy Augustine?

MR. GARDNER:
Correct.

MR. GENTILE:

Do you recall that it occurred on January 28, 2004?

MR. GARDNER:

That sounds correct.

MR. GENTILE:

We may be off a day. I will check. On January 28, 2004, the investigators interviewed Controller Augustine, the day before this letter is dated?

MR. GARDNER:

Yes.

MR. GENTILE:

At the time the two investigators spoke to Controller Augustine, Mr. Chesney was there as her counsel. Correct?

MR. GARDNER:

I learned that after the fact, yes.

MR. GENTILE:

At that time, they identified themselves as investigators from the Attorney General's Office; did they not?

MR. GARDNER:

They always do. I do not know if that is reflected in the transcript of the interview or not.

MR. GENTILE:

You have read all the reports in this case; have you not?

MR. GARDNER:

Yes.

MR. GENTILE:

You know they gave Controller Augustine Miranda warnings when they interviewed her. Do you remember that?

MR. GARDNER:

Yes, that is correct.

MR. GENTILE:

They asked her to sign a waiver of her right to remain silent.

MR. GARDNER:

Correct.

MR. GENTILE:

She did sign that waiver of her right to remain silent. Am I right?

MR. GARDNER:

Yes.

MR. GENTILE:

She did that on the advice of the lawyer, Mr. Chesney, who was there advising her.

MR. GRECO:

I am going to object because Mr. Chesney is on the list. They will be calling him, and I think it is hearsay and should not be admitted yet.

SENATOR AMODEI:

Please rephrase your question as to whether or not he has any beliefs regarding that as opposed to calling for hearsay.

MR. GENTILE:

Is it your understanding that Mr. Chesney advised her to waive her Miranda rights based on your reading of your report?

MR. GARDNER:

I do not understand that to be the case. I have not reviewed the transcript recently. I am not certain what Mr. Chesney's exact words were to Controller Augustine.

MR. GENTILE:

She did sign the waiver and talked to the investigators. You have read that transcript?

MR. GARDNER:

Correct.

MR. GENTILE:

Mr. Chesney interposes himself from time to time and encourages her to say more things. Am I right?

MR. GARDNER:

Not with respect to the misconduct allegations.

MR. GENTILE:

He does not tell her, "Do not answer that question;" does he?

MR. GARDNER:

There was other subject matter in that interview that he thought he was there for.

MR. GENTILE:

You have spoken to him about it?

MR. GARDNER:

I have learned since the filing of your letter exactly what Mr. Chesney's position is and why he was there that day.

MR. GENTILE:

The next day, he sent this letter advising the State Controller that he had a conflict of interest.

MR. GARDNER:

As I now see that, yes.

MR. GENTILE:

Does that happen all of the time where an investigator goes in to talk to someone who your office represents and the person who represents that person tells him or her to answer the question?

MR. GARDNER:

I am certain that is what happened. I am not convinced that he did tell his client to talk on this particular matter.

MR. GENTILE:

Mr. Liebherr's report stated that Mr. Chesney advised her to sign off on her Miranda rights.

MR. GARDNER:

I think, then, that Mr. Liebherr and Mr. Chesney are the people whom you need to talk to about that. I was not there. Our office has dual functions. We are a civil office and a criminal office.

MR. GENTILE:

You stated two days before the Assembly hearing you knew you were not going to be presenting the evidence to the Assembly.

MR. GARDNER:
That is correct.

MR. GENTILE:
That was in response to that letter where I brought up this conflict. That was how that happened?

MR. GARDNER:
That is correct.

MR. GENTILE:
Somehow, you were advised that it was not going to be question and answer?

MR. GARDNER:
I was advised that we were not going to serve in the roll of prosecutor and that the format of the hearing was not going to be question and answer. It would be a legislative hearing.

MR. GENTILE:
It really was not like a grand jury, then?

MR. GARDNER:
I did not say it was like a grand jury. I analogized it to a grand jury if you were talking about a criminal proceeding.

MR. GENTILE:
Someone said he did not think you had a conflict of interest. It was to avoid that issue all together.

MR. GARDNER:
It was to avoid any question concerning that issue.

MR. GENTILE:
You prepared the witnesses for the Assembly?

MR. GARDNER:
I had been preparing them that entire week. I had been there since Monday morning interviewing witnesses. The hearing was on Thursday.

MR. GENTILE:
You gave them the narrative question-and-answer statements they gave to Investigator Liebherr when he interviewed them on tape. Those interviews were then transcribed. Right?

MR. GARDNER:
That is incorrect.

MR. GENTILE:
They were not transcribed?

MR. GARDNER:
The original witness interviews with Mr. Liebherr were transcribed, but as far as I know, we did not give those to the witnesses.

MR. GENTILE:
Did you not tell the Committee earlier that they were given something to read; then, they were told to put it into summary in their own words?

MR. GARDNER:
Certain witnesses, I believe, Michelle Miles and Jim Wells were given the transcripts of their pretrial interviews conducted the week before the Assembly hearing.

MR. GENTILE:
You recorded those?

MR. GARDNER:

No, we wrote them down. We interviewed them and wrote down their statements.

MR. GENTILE:

You gave them your notes of their statements?

MR. GARDNER:

That is correct.

MR. GENTILE:

This comes as a surprise. I would ask they be produced because there may have been some information in those statements that would have been cross-examination material. We have never known of this.

MR. GARDNER:

They are not notes. We gave the typed version. I believe what you see you got already in discovery.

MR. GENTILE:

You did type up the paper they read from, their narrative to the Assembly which was made part of the Assembly record?

MR. GARDNER:

Incorrect.

MR. GENTILE:

What they read from, your office typed up?

MR. GARDNER:

Incorrect, they wrote their own statements.

MR. GENTILE:

It was their own statements?

MR. GARDNER:

Yes.

MR. GENTILE:

From an interview?

MR. GARDNER:

From an interview.

MR. GENTILE:

That is what I am getting at. You interviewed them; the interviews were recorded, and then, you gave those to them?

MR. GARDNER:

With Michelle Miles and Jim Wells, we wrote down their statements and we provided them an outline of those statements. We told them this was the proper format for the Assembly hearing. We told them to go over the statements; correct any mistakes, rewrite them, delete, edit, change anything in them that did not accurately reflect the statement they had given us that day. We told them these statements were to be in their own words.

MR. GENTILE:

Over the years, you have examined many witnesses?

MR. GARDNER:

Correct.

MR. GENTILE:

Would you agree that they might not necessarily have said it the same way a week later or two weeks later if you did not give them the transcript of what they said?

MR. GARDNER:

A week later, perhaps, this was hours later.

MR. GENTILE:

You have seen witnesses change what they say in hours, too. Have you not?

MR. GARDNER:

I cannot say that I have.

MR. GENTILE:

You said you had reviewed all of the documents including the printout, the hard copy documents that came off the computer disks in this case.

MR. GARDNER:

Correct.

MR. GENTILE:

How long did that take?

MR. GARDNER:

It took weeks.

MR. GENTILE:

You were at the Assembly when they conducted the impeachment hearing?

MR. GARDNER:

Yes.

MR. GENTILE:

The members of the Assembly got those documents at 2:00 p.m. of the afternoon the hearing started; correct?

MR. GARDNER:

I am not certain exactly what time. I believe it was the day of the hearing.

MR. GENTILE:

By 10:00 a.m. the next morning, they voted to impeach. Did they not?

MR. GARDNER:

Jurors do not see the evidence until the moment it is introduced into evidence. Then they deliberate on it.

MR. GENTILE:

Presumably, they look at the evidence. Do they not?

MR. GARDNER:

Yes, they are instructed to do so.

MR. GENTILE:

You gave a definition of reasonably should have known as based on articulated facts that any reasonable person should have identified. Is it not a fact that the standard in terms of legal standard "reasonably should have known" comes up when you have a duty to know and you do not have any excuse even if in fact you did not know? That is the "reasonably should have known" standard, is it not?

MR. GARDNER:

I do not know if the word "duty" appears in the definition of "reasonably should have known."

MR. GENTILE:

When you have an obligation or a duty, are you familiar with civil or criminal litigation in which "reasonably should have known" were the jury instructions given to the jury?

MR. GARDNER:

Yes.

MR. GENTILE:

Does it not have in it a component part where you have a duty and where you are held by law to know? It does not matter if you did not know. You should know because you have that legal duty.

MR. GARDNER:

My understanding of the term is that it hinges more on a person having sufficient facts that they should know the existence of something to be true.

MR. GENTILE:

You are talking about willful blindness?

MR. GARDNER:

That may be the corollary to it.

MR. GENTILE:

It might be an opposition, but the definition of "reasonably should have known" arises from having a duty to know.

You said something about releasing these files to the Ethics Commission because the investigation was over. Am I right?

MR. GARDNER:

Correct.

MR. GENTILE:

Yet you say if the defendant did not do what she was supposed to do at the Ethics Commission, you still could have prosecuted. Right?

MR. GARDNER:

Correct.

MR. GENTILE:

You released these files while the case was still open. Did you not?

MR. GARDNER:

The investigation was concluded. That is the critical part of this.

MR. GENTILE:

If the investigation is concluded and the statute of limitations has not run out and you can still indict, I can come in from the *Las Vegas Sun* tomorrow and demand under Donrey v. Bradshaw that you give up the information.

MR. GARDNER:

Unless there are compelling reasons not to, such as; compromising the prosecution, revealing the identity of witnesses who need protection and also the protection of the person who has not been proven guilty. Those are considerations under Donrey v. Bradshaw and other authorities we can consider in deciding whether or not to release documents included in the investigation.

MR. GENTILE:

You have never communicated with the defendant, I should not say "you" because you did not communicate with any of the witnesses either until recently, but your office did not communicate with any of the other people at the State Controller's Office other than these four people we have heard from to see if there was anyone else who would say favorable things?

MR. GARDNER:

As far as whether the investigator had contacted other people within the office, I do not know. I do know he interviewed people who did not testify in the Assembly.

MR. GENTILE:

Finally, the Attorney General does not have a criminal-law background, does he?

MR. GARDNER:

No, he does not.

MR. GENTILE:

He relies heavily on your judgment?

MR. GARDNER:

That is correct.

MR. GENTILE:

I do not have anything further.

SENATOR AMODEI:

Any other questions from the Committee?

SENATOR CARE:

Did the investigation your office turned over to the Ethics Commission contain any of the comments by Controller Augustine to your investigators at the time Mr. Chesney was present?

MR. GARDNER:

I believe it did.

SENATOR CARE:

Do you know whether the conclusion reached in the investigation would have been any different without the comments made by Controller Augustine while she was represented by Mr. Chesney and in the presence of Mr. Chesney and the investigators?

MR. GARDNER:

We conclusively decided the interview with Controller Augustine had no impact on the investigation and would not have altered it in any way. In fact, it contains very little nor is it any help to the case. It had no impact on everything that was done before then in terms of the investigation.

SENATOR HARDY:

"Reasonably should have known" is key to what you stipulated in the agreement. "Willful blindness" is a new term for me. Let us accept the definition given by Mr. Gentile. "Reasonably should have known" means you had a duty to know whether you did know or not. "Willful blindness" means there is evidence around you that you ignored. Did "willful blindness" or "reasonably should have known" occur in your estimation?

MR. GARDNER:

I believe it was, probably, both. I do not believe the distinction is that great. "Reasonably should have known" does mean that you had a duty to know something was going on, but it requires that there has to be some evidence you knew about it.

SENATOR HARDY:

If your answer is "that it was both," that satisfies me.

SENATOR AMODEI:

Does either Counsel wish to reserve Mr. Gardner for recall?

MR. GRECO:

The State does not need to hold him.

MR. GENTILE:

Neither does the State Controller.

SENATOR AMODEI:

Call the next witness, please.

MR. GRECO:

Kim Foster.

MRS. CLIFT:

Would the witness please stand and raise your right hand? Do you solemnly swear or affirm that the testimony and any evidence you shall give in this matter shall be the truth, the whole truth and nothing but the truth?

KIM FOSTER (Administrative Service Officer III, Department of Personnel):

I do.

MRS. CLIFT:

Please be seated. State your name and spell it for the record.

MS. FOSTER:

Kim Foster, k-i-m,-f-o-s-t-e-r.

MR. GRECO:

What do you do for a living?

MS. FOSTER:

I have a position with the State of Nevada Department of Personnel. My title is Administrative Service Officer III. At the Department, my title is Chief of Administrative Services because it more descriptive of what my job responsibilities are.

MR. GRECO:

Did you have the same job in 2002?

MS. FOSTER:

Yes, I did.

MR. GRECO:

In 2002, did you meet a gentleman named Mr. Normington?

MS. FOSTER:

Yes, I did.

MR. GRECO:

Did Mr. Normington put you in contact with Ms. Normington?

MS. FOSTER:

Yes, he did.

MR. GRECO:

Was that his wife or his daughter?

MS. FOSTER:

His daughter.

MR. GRECO:

What was her first name?

MS. FOSTER:

Jennifer.

MR. GRECO:

Did you learn there was a problem involving the daughter and employment?

MS. FOSTER:

Yes, I did.

MR. GRECO:

Did you meet with Jennifer Normington in 2002?

MS. FOSTER:

Yes, around the end of December, 2002.

MR. GRECO:

When you met Ms. Normington was that in the Personnel Office?

MS. FOSTER:

Yes, we met in my office on a lunch hour.

MR. GRECO:

Did she discuss with you some problems at work?

MS. FOSTER:

Yes, she did.

MR. GRECO:

Who was her employer at that time?

MS. FOSTER:

Controller Augustine.

MR. GRECO:

At the end of that meeting, were you able to intervene in her problem in the Controller's Office?

MS. FOSTER:

Ms. Normington came to me looking for another place of employment because she was having issues with Controller Augustine.

MR. GRECO:

Did the topic of the Controller being an elected official come up?

MS. FOSTER:

I was aware that the State Controller was an elected official and so was Ms. Normington.

MR. GRECO:

When employees are employees in elected officials' offices and they come to you, if there is a disagreement with their employer, is it harder for Personnel to intervene versus the cases where the head of the office is not an elected official?

MS. FOSTER:

The Department of Personnel's place is to advise employees of their rights and their options when they are having issues with their employer regardless of whether it is an elected official or not.

MR. GRECO:

When Ms. Normington was speaking with you, did her having to work on campaign activities come up?

MS. FOSTER:

Yes, she never specifically said she worked on election-campaign activities during work hours, however. She said she worked on election-campaign activities. Those activities included giving speeches and attending campaign functions.

MR. GRECO:

Did she tell you it was all during the middle of the night?

MS. FOSTER:

No, she did not.

MR. GRECO:

The timeframe did not come up?

MS. FOSTER:

Correct, she did not specify a timeframe.

MR. GRECO:

Referring to March, 2002, do you recall having some contact with another of the Controller's employees, Jim Wells?

MS. FOSTER:

I do not know if it was March, 2002. I consistently had contact with Jim Wells within the business environment.

MR. GRECO:

Can you recall him talking to you about a problem with Controller Augustine asking or requiring employees to do campaign-related work on state time? Is that the topic he discussed with you?

MS. FOSTER:

There was a circumstance during the meeting I was having with Mr. Wells. We were talking about our budgets because we were both going through the budget process the first time. It was a new system. I met with him. During that meeting he discussed that Controller Augustine had requested him to do some campaign activity, and he was going to refuse to do that. He was fearful of the repercussions.

MR. GRECO:

Did he discuss sending an e-mail to Controller Augustine where he objected to having to do campaign-related work on state time?

MS. FOSTER:

He told me he planned to send an e-mail to Controller Augustine saying he was going to refuse to do that.

MR. GRECO:

That is one of the topics he talked to you about; correct?

MS. FOSTER:

Correct.

MR. GRECO:

Look at Exhibit P-42. We have had testimony about this e-mail. Look at the bottom e-mail starting with the name Jim Wells, 8/01/02 at 1:46 p.m. In the first paragraph, he is asked to assist Controller Augustine in preparing a campaign-expense report.

MS. FOSTER:

Where it says, "I get a job done. Requiring me to complete the report qualifies as work and as such violates prohibitions engaging in political activities during the hours of employment"?

MR. GRECO:

He prefaces it with, "while I do not mind preparing your campaign expense report." I am asking is that the topic he was talking to you about in terms of sending an e-mail to Controller Augustine?

MS. FOSTER:
I believe so.

MR. GRECO:
Did you find out whether or not Mr. Wells had sent the e-mail?

MS. FOSTER:
No.

MR. GRECO:
Was he mulling it over in his mind when he spoke with you as to whether he should or should not send the e-mail?

MS. FOSTER:
Yes, I think he was.

MR. GRECO:
Did it seem to be a difficult process for him?

MS. FOSTER:
Yes.

MR. GRECO:
Do you know a Controller's employee named Sherry Valdez?

MS. FOSTER:
Yes, I do.

MR. GRECO:
Did you have any contact with her after the Assembly impeachment hearings?

MS. FOSTER:
Yes, I did.

MR. GRECO:
Was that at your office or her office?

MS. FOSTER:
Sherry came to my office.

MR. GRECO:
Can you remember the exact date she came to your office?

MS. FOSTER:
No, I do not remember the exact date. I know it was after the Assembly hearing.

MR. GRECO:
When she came to your office, did you notice anything unusual about her demeanor?

MS. FOSTER:
She was very shaky, very emotional and fearful. She was very torn down as a person.

MR. GRECO:
Who was she fearful of?

MS. FOSTER:
Primarily, she was fearful, since the Governor had just appointed an acting-Deputy Controller who she felt was very loyal to Controller Augustine, she would be treated in the same manner by this person as she was treated by Controller Augustine.

MR. GRECO:
That is all I have, Mr. Chair.

SENATOR AMODEI:
Mr. Arrascada?

MR. ARRASCADA:
Did you and Jim Wells have a working relationship?

MS. FOSTER:
Correct.

MR. ARRASCADA:
When Mr. Wells spoke to you, he did not come to speak to you in your official capacity as an employee or as an administrator of the Department of Personnel. Is that right?

MS. FOSTER:
That is right.

MR. ARRASCADA:
In your position with the Department of Personnel, you would not actually see people who come in with grievances. You are on the administrative side. Is that not right?

MS. FOSTER:
That is correct.

MR. ARRASCADA:
The area in which you are speaking to Mr. Wells about as a friend is not an area that you would normally discuss with state employees who come in with grievances?

MS. FOSTER:
Correct.

MR. ARRASCADA:
After Mr. Wells spoke to you about this, he asked you and did not ask the Department of Personnel to take any action. Correct?

MS. FOSTER:
Correct.

MR. ARRASCADA:
Let us discuss how you met Ms. Normington. You met her father who was a professor at the University of Phoenix?

MS. FOSTER:
Yes, I took two classes from him at the University of Phoenix.

MR. ARRASCADA:
He found out you worked at the Department of Personnel?

MS. FOSTER:
When you go to the University of Phoenix, they link your employment with what you are learning. You write many papers about where you work. That is how he learned I worked at the Department of Personnel.

MR. ARRASCADA:
He knew you worked at the Department of Personnel?

MS. FOSTER:
Correct.

MR. ARRASCADA:
He asked you to speak to his daughter, Jennifer. Correct?

MS. FOSTER:

Yes, I think so. I do not remember exactly how that all came about. I do not know if he talked to me in the halls at school or sent me an e-mail. I do not believe he called me. I know I was put in contact with Jennifer through her father.

MR. ARRASCADA:

You were put into contact with Jennifer through her father. Correct?

MS. FOSTER:

Correct.

MR. ARRASCADA:

When you met with Jennifer, again, this was not in your normal official capacity in your employment in the Department of Personnel. Correct?

MS. FOSTER:

Correct.

MR. ARRASCADA:

When you met with Jennifer, you do not recall her saying anything about working on a private campaign during state time? Correct?

MS. FOSTER:

Correct.

MR. ARRASCADA:

Let us talk about the grievance system in the Department of Personnel. You are familiar with the statistics from the grievance system with Department of Personnel; are you not?

MS. FOSTER:

Yes.

MR. ARRASCADA:

When I talk about the grievance system it is for classified state employees; correct?

MS. FOSTER:

Yes, it is.

MR. ARRASCADA:

Not for unclassified employees?

MS. FOSTER:

Correct.

MR. ARRASCADA:

Classified employees who have an issue with a supervisor or boss can file a grievance. It goes through different levels of the grievance system. Correct?

MS. FOSTER:

Correct. It would start at the agency level. They would file with their immediate supervisor. They could go to the deputy, the director and there is a period of time between each one of these steps while they are trying to resolve the grievance process. The last place to go is the Department of Personnel where it is filed to be heard with the Employee Management Committee.

MR. ARRASCADA:

When the agency head is the person who the grievance is being filed against, then the person filing the grievance goes directly to the Department of Personnel. Is that correct?

MS. FOSTER:

That would be correct.

MR. ARRASCADA:

They do not come to see you? They see someone in that area of specialty in the Department of Personnel.

MS. FOSTER:

They would file the paperwork. The form would be filed with the section under my management.

MR. ARRASCADA:

There are 14,000 people in the statewide system excluding the University. Is that correct?

MS. FOSTER:

At this time, it is closer to 16,000 people.

MR. ARRASCADA:

We have established you are familiar with the number of grievances filed in recent years. Correct?

MS. FOSTER:

I do not have the statistics in front of me, but I rather know.

MR. ARRASCADA:

In the year, 2000, roughly 23 grievances were filed system wide. Is that correct?

MS. FOSTER:

I think that is right.

MR. ARRASCADA:

In 2001, 58 grievances were filed; correct?

MS. FOSTER:

I am assuming these statistics are coming from the statistics I provided to Mr. Gamage a few days ago when he called me on your behalf. If you were quoting those statistics, those would be correct.

MR. ARRASCADA:

In 2002, about 96 grievances were filed; correct?

MS. FOSTER:

That sounds correct.

MR. ARRASCADA:

In 2003, 75 grievances were filed.

MS. FOSTER:

Yes.

MR. ARRASCADA:

In 2004, 60 grievances have been filed. Correct?

MS. FOSTER:

Correct.

MR. ARRASCADA:

Not a single one of these grievances from 2000-2004 were filed against Controller Augustine.

MS. FOSTER:

There were no grievances filed against Controller Augustine.

MR. ARRASCADA:

There has never been a grievance filed against Controller Augustine since she has been in office.

MS. FOSTER:

Not to my knowledge.

MR. ARRASCADA:

You testified during direct examination you assisted Ms. Normington in getting a new position in the state system. Correct?

MS. FOSTER:

Yes.

MR. ARRASCADA:

You assisted her in obtaining an executive assistant position with the Department of Tourism.

MS. FOSTER:

Yes.

MR. ARRASCADA:

Shortly, thereafter, she was calling you about problems with her employment at the Department of Tourism. Was she not?

MS. FOSTER:

I vaguely remember her calling me with some issues. I do not have any memory of the specifics.

MR. ARRASCADA:

She was calling you about issues regarding her employment at Department of Tourism?

MS. FOSTER:

I believe so.

MR. ARRASCADA:

Nothing further.

SENATOR AMODEI:

Mr. Greco.

MR. GRECO:

You told Mr. Arrascada there has never been a grievance filed against Controller Augustine. Is that correct?

MS. FOSTER:

Yes, it is.

MR. GRECO:

In terms of the total number of grievances received by your office, is it true there are relatively few filed against state-level elected officials? Do you know what I mean by state level?

MS. FOSTER:

Yes.

MR. GRECO:

There are very few grievances filed against state-level elected public officials?

MS. FOSTER:

I do not remember any, but I could not swear to that because I have not looked at the files or statistics he has quoted.

MR. GRECO:

The Controller is just one state-level official, but there are a lot of state-level elected officials?

MS. FOSTER:
Yes.

MR. GRECO:
With that large number, you cannot remember a single grievance filed against a state-level elected official in recent years?

MS. FOSTER:
Correct.

MR. GRECO:
Mr. Arrascada asked you if you can recall Ms. Normington ever making a specific claim about doing campaign-related work on state time. You stated, yes.

MS. FOSTER:
Yes.

MR. GRECO:
She was not specifically asked a time?

MS. FOSTER:
That is right. She was not specific as to the time.

MR. GRECO:
She talked to you about her complaint about having to do election work, but the topic of when she had to do it did not come up?

MS. FOSTER:
Correct.

MR. GRECO:
You did not ask her?

MS. FOSTER:
No, I did not.

MR. GRECO:
That is all I have.

SENATOR AMODEI:
Mr. Arrascada.

MR. ARRASCADA:
You did not go into detail with Ms. Normington because you are aware that Jeanne Greene was meeting with Jeannine Coward?

MS. FOSTER:
Correct.

SENATOR AMODEI:
Questions of Ms. Foster from the Committee?

SENATOR CARLTON:
There has been much discussion during the past few days about classified versus unclassified. Please put the record straight on the differences between the two. You have stated that the classified employees have grievance procedures whereas the unclassified employee does not. Please describe to the Committee the difference between the two classifications.

MS. FOSTER:
The unclassified employees job titles and salaries are set by statute. Department of Personnel does not give them job titles or write class specifications for them. They do not have the

grievance rights. They are "at-will" employees. They are not offered the same protection rights that classified employees have.

SENATOR CARLTON:

It would be harder for you to intervene to protect these employees because they are unclassified?

MS. FOSTER:

Correct.

SENATOR CARLTON:

I want to make certain that when we hear things about grievance procedures that state employees are not protected by a collective-bargaining agreement. The grievance procedures they have are worked out between management and employees, and there is no contract involved. It is a policy-grievance procedure?

MS. FOSTER:

Correct.

SENATOR CARLTON:

Is there any indication as to why dates of these grievances have ebbed and flowed? Were there any particular areas of more grievances than others in these different years that come to mind?

MS. FOSTER:

No, not without doing some research.

SENATOR CARLTON:

When a classified employee comes to you and files a complaint, it goes through the chain?

MS. FOSTER:

When a classified employee determines there has been something done that they think they should be able to file a grievance for, there are 20 days after the incident occurs to file the paperwork. They file the paperwork with their direct supervisor. That supervisor has 10 days to respond.

SENATOR CARLTON:

That covers the point I wanted to make. If they do not make the complaint within the first 20 days, they would have to wait until something else would happen. If it is beyond that date, it is dead?

MS. FOSTER:

That is correct.

SENATOR BEERS:

When you met with Jennifer Normington at the end of December of 2002, did she have a cold? Did she say if she had just been sick?

MS. FOSTER:

Yes, she did. I would compare the way she was as to the way Sherry Valdez was when she came to the office. They seemed very torn down, emotional, fearful of losing their jobs. They had mortgages to pay, and they needed their jobs.

SENATOR BEERS:

In Exhibit D-2, the letter of reprimand, did she mention any of that to you?

MS. FOSTER:

No, she did not.

SENATOR BEERS:

If she came back from sick leave, found that the paperwork listed in the letter of reprimand had been found, could she, in anticipation of the letter of reprimand, have contacted you with her desire to find another job?

MS. FOSTER:

I have no recollection of her talking about this letter.

SENATOR BEERS:

There has been testimony about 12 of the 40 classified positions in the Controller's Office have turned over since Controller Augustine took over. Does that sound right?

MS. FOSTER:

I do not have knowledge of those statistics.

SENATOR BEERS:

Do you know what the percentage is in the Highway Patrol?

MS. FOSTER:

I do not know that either. We can get those percentages for you if you would like.

SENATOR BEERS:

Pretty quick?

MS. FOSTER:

I think so.

SENATOR BEERS:

When you met with Jim Wells, this was your first budget under Integrated Financial System (IFS)? This was a meeting to try to figure out the mysteries of budgeting with IFS?

MS. FOSTER:

With Nevada Executive Budget System (NEBS).

SENATOR BEERS:

With NEBS, the first time. You like it now?

MS. FOSTER:

Absolutely.

SENATOR BEERS:

The point of that meeting was budgeting under NEBS. The meeting was not called for him to discuss his concerns with being asked to do the political work. The meeting was called for NEBS, and he mentioned it. Is that how it went?

MS. FOSTER:

That is exactly how it went.

SENATOR CEGAVSKE:

Once Mr. Wells told you about his concerns in the Controller's Office, what advice did you give him or was he just sharing with you?

MS. FOSTER:

I did not give him any advice. I felt he had given the matter serious thought, and he had decided that he was not going to take any action in helping with the campaign. He was sharing that with me, personally, and not asking me to take any action on it. It was in confidentiality.

SENATOR CEGAVSKE:

How did anyone find out that he had said this to you?

MS. FOSTER:

The first time I spoke with this to anyone was when I was questioned by the Prosecution and by the Defense.

SENATOR CEGAVSKE:

That is when they found out he had confided in you on that issue?

MS. FOSTER:

Correct.

SENATOR NOLAN:

When you met with Ms. Normington, she mentioned that part of her responsibilities were in giving speeches and attending campaign functions. Did she tell you those were responsibilities or did she imply those were duties she held in a positive context, as a positive attribute, for looking for another position or in a context that those duties were something she was displeased with performing?

MS. FOSTER:

In my opinion, it was in a negative context.

SENATOR NOLAN:

Did Ms. Normington mention any other personnel she felt were also having problems in the Controller's Office?

MS. FOSTER:

No, she did not.

SENATOR AMODEI:

Thank you for your testimony. Unless there is an objection, Ms. Foster, you are released from your subpoena.

SENATOR CARLTON:

Is there going to be anyone else here from Personnel?

SENATOR AMODEI:

I do not know if there is, but pursuant to the Committee's authority if you wish to hear from someone from Personnel whose job description involves actual personnel policies, I am certain we can get that person for the Committee. Any objection to the release of this witness?

MR. ARRASCADA:

No objection.

MR. GRECO:

No objection.

SENATOR AMODEI:

Mr. Greco, you next witness.

MR. GRECO:

Jeanette Supera.

MRS. CLIFT:

Would the witness please stand and raise your right hand? Do you solemnly swear or affirm that the testimony and any evidence you shall give in this matter shall be the truth, the whole truth and nothing but the truth?

JEANETTE SUPERA (Chief Deputy Investigator, Medicaid Fraud Control Unit, Office of the Attorney General):

I do.

MRS. CLIFT:

Please be seated. State your name and spell it for the record.

MS. SUPERA:

Jeanette Supera, j-e-a-n-e-t-t-e,-s-u-p-e-r-a.

MR. GRECO:

What office do you work for?

MS. SUPERA:

The Office of the Attorney General of Nevada.

MR. GRECO:

What is your specific job title?

MS. SUPERA:

My title is Chief Deputy Investigator with the Medicaid Fraud Control Unit.

MR. GRECO:

Prior to being in the Fraud Control Unit, do you have some computer-related experience in the Attorney General's Office?

MS. SUPERA:

Yes, I do. I am certified in computer forensics by the International Association of Computer Investigative Specialists. I received that certification in 1995.

MR. GRECO:

Prior to your assignment in the Medicaid Unit, did you also do some forensic-computer work for the State?

MS. SUPERA:

While employed with the Medicaid Fraud Control Unit, I did.

MR. GRECO:

Tell the Committee what you mean by forensic examinations of computers.

MS. SUPERA:

I can take computers that have been seized or have been in evidence for criminal or civil purposes. I can inspect them so we can find out exactly what is on the computer.

MR. GRECO:

During your tenure in the Attorney General's Office, how many years would you estimate you did forensic-computer-examination work?

MS. SUPERA:

I have been certified since 1995. When an investigator needs some kind of computer forensics done, I have been assigned to do it.

MR. GRECO:

Does computer-forensic work include examining storage mediums like zip drives or disks and diskettes?

MS. SUPERA:

Yes, it does.

MR. GRECO:

Did you play some roll in the Attorney General's investigation of the Controller Augustine case?

MS. SUPERA:

I did.

MR. GRECO:

Can you recall what month you were first contacted by any investigator in that case?

MS. SUPERA:

It was in February or March of this year.

MR. GRECO:

This year, 2004?

MS. SUPERA:

Yes.

MR. GRECO:

Who first contacted you?

MS. SUPERA:

Dale Liebherr.

MR. GRECO:

Who is he?

MS. SUPERA:

He is an investigator in the Attorney General's Office.

MR. GRECO:

Did he ask you to examine certain items?

MS. SUPERA:

Yes, he did.

MR. GRECO:

What were you asked to examine?

MS. SUPERA:

He brought in 12, 3.5-inch disks and asked me to examine the disks and to find out what was on them.

MR. GRECO:

Would looking at one of the reports you compiled in this matter help you to refresh your recollection as to the month and year you were asked to examine those items?

MS. SUPERA:

Yes, it would.

MR. GRECO:

After having a chance to look at the first page of the forensic report, did that refresh your recollection as to the month you were first asked to examine the storage medium in the Controller Augustine case?

MS. SUPERA:

Yes, it does. It was February, 2003.

MR. GRECO:

What specifically were you given by Investigator Liebherr?

MS. SUPERA:

I was given 12, 3.5-inch disks.

MR. GRECO:

Were you given a zip drive as well?

MS. SUPERA:
At a later date.

MR. GRECO:
Can you recall how much later in time you received the zip drive?

MS. SUPERA:
Only a couple of weeks later.

MR. GRECO:
Describe what a zip drive is.

MS. SUPERA:
A zip drive is an ancillary medium you can plug into a computer, and it will act as a separate hard drive.

MR. GRECO:
Does a zip drive look like a CD, or does it look like a component that is removed from the hardware of the computer?

MS. SUPERA:
You can get external zip drives or internal ones but the one I got was a disk. They do look different from the 3.5-inch disks.

MR. GRECO:
Are you familiar with a program called Encase?

MS. SUPERA:
Yes, I am.

MR. GRECO:
Describe what that program does.

MS. SUPERA:
Encase is a computer program created by Guidance Software you put onto a computer system that will help in the examination of computer systems and software. It will also assist in doing bit-stream imaging of other computer systems.

MR. GRECO:
Does the Encase program allow you to determine the name of files?

MS. SUPERA:
Yes, it does.

MR. GRECO:
And the name of folders?

MS. SUPERA:
Yes, it does.

MR. GRECO:
Can the Encase program give you more specific information other than the name of the file and the folder?

MS. SUPERA:
Yes, it does.

MR. GRECO:
What types of additional, specific information can the Encase program give you?

MS. SUPERA:

It gives you a variety of information about what is on the disks including short file names, a last-created date, a last-written-to date, and a last-access date. It also gives you the file size, the physical size and the logical size of the information that is on the system and a variety of other information.

MR. GRECO:

When you examined the 12 floppy disks and the zip drive in the Controller Augustine case, did you find files on those storage mediums?

MS. SUPERA:

Yes, I did.

MR. GRECO:

The zip drive is essentially a backup drive, is that correct?

MS. SUPERA:

In this case, it was a backup of another system.

MR. GRECO:

Did you see similar file and folder names on both the zip drive and the 12 floppy disks?

MS. SUPERA:

Yes, I did.

MR. GRECO:

Did they appear to be duplicates of one another?

MS. SUPERA:

Yes, they did.

MR. GRECO:

When you examined the files in the Controller Augustine case, did you see any files that had been last written on in either 2001 or 2002?

MS. SUPERA:

Yes, I did.

MR. GRECO:

A few, or many?

MS. SUPERA:

Many.

MR. GRECO:

Please look at Exhibit P-46. Do you recognize this document?

MS. SUPERA:

Yes, I do. It is a report I created at the request of the Defense Counsel Wednesday of this week. It is exact duplicates of the reports in the files.

MR. GRECO:

When you say they are exact duplicates of the reports in the file, do you mean Exhibit P-3 and Exhibit P-4 in the large blue binders?

MS. SUPERA:

Yes.

MR. GRECO:

In addition to the Encase reports in Exhibit P-3 and Exhibit P-4, was there other extraneous material in those two exhibits not actually part of the Encase report run?

MS. SUPERA:
Yes, there were.

MR. GRECO:
Is that why Exhibit P-46 is thinner than Exhibit P-3 and Exhibit P-4 combined?

MS. SUPERA:
Yes.

MR. GRECO:
Is the original, in front of you, the actual Encase report you ran pursuant to the Defense request this week?

MS. SUPERA:
Yes, it is.

MR. GRECO:
Is there one other difference besides the extraneous material being deleted versus the original two, Exhibit P- 3 and Exhibit P-4?

MS. SUPERA:
Yes, the last written to date is in chronological order on these reports.

MR. GRECO:
By running this in chronological order, do you believe that would assist the trier of fact in understanding your testimony? Would it make it easier for them?

MS. SUPERA:
Yes.

MR. GRECO:
I move for the admission of Exhibit P-46.

CHARLES D. LOMBINO (Counsel for Controller Augustine):
No objection.

MR. GRECO:
When you ran the Encase reports and looked at actual file names, did you see some file names that appeared they might be campaign related?

MS. SUPERA:
Yes, I did.

MR. GRECO:
Did you go through with my investigator where you matched file names in the Encase report to exhibits in the blue binders that other witnesses have already authenticated?

MS. SUPERA:
Yes, we did.

MR. GRECO:
Do you recognize Exhibit P-12?

MS. SUPERA:
Yes.

MR. GRECO:
Is that one of the Encase results you achieved when you ran the Encase report?

MS. SUPERA:
Yes, it is.

MR. GRECO:

When you run these reports, do you give certain numbers to the report runs as you go through each individual disk or zip drive?

MS. SUPERA:

Yes, when I received the disks I made a bit-stream image of each of the disks. I work off that image. They will be question documents.

MR. GRECO:

Which floppy disk did this item come from?

MS. SUPERA:

Question 2.

MR. GRECO:

It was labeled Q2?

MS. SUPERA:

Yes.

MR. GRECO:

Is that one of the twelve floppy disks Investigator Liebherr gave you?

MS. SUPERA:

Yes, it is.

MR. GRECO:

Do you recognize Exhibit P-14, "Nevada Nurses Campaign Packet"?

MS. SUPERA:

May I look at my notes?

MR. GRECO:

Certainly.

MS. SUPERA:

This is not one that is in my notes.

MR. GRECO:

Look at Exhibit P-19. Do you recognize that exhibit?

MS. SUPERA:

Yes, I do.

MR. GRECO:

Is that one of the files you generated when you ran your Encase report?

MS. SUPERA:

Yes, it is.

MR. GRECO:

From which disk did that item come from?

MS. SUPERA:

It was on No. 11.

MR. GRECO:

Was the title of that one, "June 9 Fundraiser Invite List"?

MS. SUPERA:

Yes, it was.

MR. GRECO:
In Exhibit P-14, date-stamp page 412, do you recognize that item?

MS. SUPERA:
Yes, I do.

MR. GRECO:
The item titled, "Kathy Augustine Biography"?

MS. SUPERA:
Yes.

MR. GRECO:
Is that one of the files you found when you ran your Encase report?

MS. SUPERA:
Yes, it was.

MR. GRECO:
What is the title of Exhibit P-12?

MS. SUPERA:
The title is, "The Committee to Elect Kathy Augustine, Asian American Political Action Committee."

MR. GRECO:
On date-stamp page 378 of Exhibit P-12, to whom is the salutation made?

MS. SUPERA:
It says, "Dear Boulder City Republican Women."

MR. GRECO:
Is that another of the individual files you ran with the Encase report?

MS. SUPERA:
Yes, it is.

MR. GRECO:
You said every item in Exhibit P-12 is an item you achieved by running the Encase report. Is that correct?

MS. SUPERA:
Yes, it was.

MR. GRECO:
Can you remember how many pages of file materials there were when you printed out the individual files from all of the disks?

MS. SUPERA:
I cannot give you a number of pages.

MR. GRECO:
Was it a lot?

MS. SUPERA:
Three, three-inch binders.

MR. GRECO:
Did you turn those over to someone?

MS. SUPERA:
I did.

MR. GRECO:
Who did you turn them over to?

MS. SUPERA:
Dale Liebherr.

MR. GRECO:
Are there any peculiarities in the Word documents in terms of the finished product produced when you run an Encase report?

MS. SUPERA:
Yes.

MR. GRECO:
Are Word documents different from other documents in terms of dates on the document when you run them through an Encase report?

MS. SUPERA:
Encase will allow you to pull up a document in the original form it was written. The Word program changes the date to today's date for you. The dates on the original will be different from the date you pulled it up from the Encase program.

MR. GRECO:
Have you accessed a Word-form document on your own computer?

MS. SUPERA:
Yes.

MR. GRECO:
If you pull up a document you have used before, then pull it up on a later date, does Word automatically reflect today's date on the top of the document?

MS. SUPERA:
Yes, it does.

MR. GRECO:
When you run an Encase report, does the Word program perform that same function?

MS. SUPERA:
Yes, it does.

MR. GRECO:
Is that why many of the letters and memos in the file have the date you ran the Encase report on them?

MS. SUPERA:
Yes, it does.

MR. GRECO:
Does that have anything to do with the date that the file was created?

MS. SUPERA:
No, it does not.

MR. GRECO:
On the second page of Exhibit P-12, where it says, Question 1, does that refer to floppy-disk No. 1?

MS. SUPERA:
Yes, it does.

MR. GRECO:

Let us go over the columns. The first one is file name; correct?

MS. SUPERA:

Yes.

MR. GRECO:

Under last accessed, every date says 1-24-03. Is that the date you performed your forensic examination?

MS. SUPERA:

No.

MR. GRECO:

What does that date reflect?

MS. SUPERA:

That date reflects the date the disk was created.

MR. GRECO:

On a column, at the top, titled, "Last Accessed," if someone copied folders onto one floppy disk and that disk was turned over to you, would the date of last access reflect the date the individual copied the files from whatever source computer they were working with?

MS. SUPERA:

Yes, that would.

MR. GRECO:

What does "Last Written" signify?

MS. SUPERA:

The last-written date will indicate the last time a person went into that file, made any changes and saved them in that file. If they just looked at it, it would not change the last-written-to date. However, if they even put in a comma, that will change the last-written-to date on the Encase program.

MR. GRECO:

The last-written-to date tells you the last date the document was modified even if it is only adding a comma; correct?

MS. SUPERA:

That is correct.

MR. GRECO:

However, it does not tell you the date the file was actually created.

MS. SUPERA:

No, it does not.

MR. GRECO:

Look at the "File Created." Every date is the same date under "Last Accessed." Is that correct?

MS. SUPERA:

Yes, it is.

MR. GRECO:

Does "File Created" mean the day the file was first written to on the subject-source computer?

MS. SUPERA:

No, it does not.

MR. GRECO:

Explain what "File Created" means.

MS. SUPERA:

The file-created date in Encase is the date the file was created at that location. If someone is doing a copy of a file from location to another, it will change that last-created date to the date it was done.

MR. GRECO:

Once you ran Encase reports and create the pages with the copies of the file documents, you turned those over to Investigator Liebherr?

MS. SUPERA:

Correct.

MR. GRECO:

How thick was that large stack of documents?

MS. SUPERA:

It was three, three-inch binders.

MR. GRECO:

Did those documents become the bulk of the first two binders you see in front of you?

MS. SUPERA:

Yes, they did.

MR. GRECO:

Were you asked to look at the same binders at the Assembly three weeks ago? Did you get the chance to do that?

MS. SUPERA:

I did not look at them in the Assembly.

MR. GRECO:

Did you look at them before the Assembly?

MS. SUPERA:

Yes, I did.

MR. GRECO:

Do you recognize these documents in these binders before you as the same documents you saw then?

MS. SUPERA:

Yes, I did.

MR. GRECO:

Would that same breakdown also apply for all the other Encase reports you have in Exhibit P-6? Do the same columns appear on each of the Encase reports?

MS. SUPERA:

Yes, they do.

SENATOR AMODEI:

Did I hear this witness indicate that Exhibit P-46 was a compilation, distilled of Exhibit P-3 and Exhibit P-4?

MR. GRECO:

It is the same data, but changed into chronological order. All the superfluous exhibits that are not Encase reports were removed. Counsel for both sides thought it would be easier for the trier of fact to understand it in this format.

SENATOR AMODEI:

Have we admitted Exhibit P-1 through Exhibit P-4? Since this is a compilation, is there an objection to the admission of those?

MR. LOMBINO:

No objection.

SENATOR AMODEI:

Exhibits P-3 and P-4 will be admitted also.

Mr. Lombino, please proceed with cross-examination.

MR. LOMBINO:

I am going to review the 12 floppy disks you reviewed. I will refer to the original printed out materials. Are those three red binders the original printouts you got from the disks?

MS. SUPERA:

Yes, they appear to be.

MR. LOMBINO:

The way you organized those as Question 1 through Question 12 are the 12 floppy disks copied by Ms. Normington and provided to the Attorney General's Office for you to examine.

MS. SUPERA:

They were the 12 disks I was provided by Dale Liebherr and requested to examine.

MR. LOMBINO:

Those 12 disks are in Volume 1 and Volume 2 of those red binders?

MS. SUPERA:

That is correct.

MR. LOMBINO:

The zip drive was Question 13?

MS. SUPERA:

Yes.

MR. LOMBINO:

That is in the third red binder?

MS. SUPERA:

Yes.

MR. LOMBINO:

You were at the Assembly hearing; correct? Your testimony indicated you spent, approximately, two weeks reviewing this material.

MS. SUPERA:

Yes.

MR. LOMBINO:

You were originally looking for evidence of a crime?

MS. SUPERA:

I was not told what I was looking for. I was asked to look at the disks and find out what was on them.

MR. LOMBINO:

Look at the first volume of the original documents under the tab, Encase Report, the third page under Specific Findings, second sentence, "It should be noted that these diskettes were searched not only for evidence of a crime and evidence of financial involvement." Does that refresh your recollection you looked for evidence of a crime?

MS. SUPERA:

I was asked to look at the disks. I processed it the same way I would as if I was looking at a criminal case.

MR. LOMBINO:

However, later on, you were looking for evidence of campaign documents and financial documents?

MS. SUPERA:

I was never told exactly what was supposed to be on the disks, just to find out what was on the disks.

MR. LOMBINO:

Using the forensic tools at hand, the Encase tools and other tools, you could not tell when the original files, the original documents, were created?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell who created the original documents?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell where they were created?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell if they were created on someone's home computer or at the office?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell whether someone put them on the disk at any given time or where they got the documents?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell the veracity of any of the documents? You could not tell if you saw a letter whether the information in the letter was actually true?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell what the dispositions of the documents were. If you saw a letter, you could not tell if the letter actually went out?

MS. SUPERA:

No.

MR. LOMBINO:

You could not tell what the uses of the documents were?

MS. SUPERA:
No.

MR. LOMBINO:
Those red binders I just referred to, were they available at the Assembly hearings?

MS. SUPERA:
Yes.

MR. LOMBINO:
The Assembly looked at those three red binders?

MS. SUPERA:
I would not be privy to that.

MR. LOMBINO:
However, they were standing out where the Assembly could see them.

MS. SUPERA:
Yes.

MR. LOMBINO:
You referred to those documents during the questioning. Did you not?

MS. SUPERA:
Refresh my memory.

MR. LOMBINO:
I am reading from your statement. "In examining all of these disks, I found dozens and dozens of documents that appear to be related to a campaign and reelection for State Controller Kathy Augustine." Did you make that comment concerning these disks?

MS. SUPERA:
Yes.

MR. LOMBINO:
In examining all of these disks, did you look for Brady material?

MS. SUPERA:
Yes.

MR. LOMBINO:
I have the disadvantage of being the only noncriminal specialist appearing before this Committee. I do not know what Brady material is. Could you explain that?

MS. SUPERA:
It would be anything that would be exculpatory. That would be anything on the disks that would explain something else. If you were dealing with a murder case, Brady material would be something that would say you were someplace else.

MR. LOMBINO:
The Prosecution has an obligation to make that material available to the Defense. Does it not?

MS. SUPERA:
Yes.

MR. LOMBINO:
Did you ever identify to the Defense team any specific Brady material?

MS. SUPERA:
No, everything that I had was in these documents.

MR. LOMBINO:

When you testified before the Assembly, you were not cross-examined. Were you?

MS. SUPERA:

No.

MR. LOMBINO:

It was a legislative-style hearing where you were asked questions.

MS. SUPERA:

Yes.

MR. LOMBINO:

Did you ever point out to the grand jury that there were Brady-type materials in these binders?

MS. SUPERA:

No.

MR. LOMBINO:

They just saw three huge binders full of material that you characterized as having many campaign documents.

MS. SUPERA:

Yes.

MR. LOMBINO:

These binders are huge and are not marked in the standard fashion. I am going to do my best to deal with them. Were these three red binders examined by the Ethics Commission?

MS. SUPERA:

I am not privy to that information.

MR. LOMBINO:

Let us look at the first binder, the material Ms. Normington provided as evidence of wrongdoing. Let us look where it says "Encase Report." From the first tab where it says "Encase Report" to the "CY2000," please tell me what that is?

MS. SUPERA:

It is a calendar for 2000.

MR. LOMBINO:

You are one document ahead. What is this?

MS. SUPERA:

This is a report for the disks I examined.

MR. LOMBINO:

This is not material that was on the disks?

MS. SUPERA:

No, it is not.

MR. LOMBINO:

This is created by the forensic process?

MS. SUPERA:

Yes, it is.

MR. LOMBINO:

How many pages is that report?

MS. SUPERA:
Twenty-two pages.

MR. LOMBINO:
There is a similar report like this before every one of Question 1 through 12. Is that correct?

MS. SUPERA:
No.

MR. LOMBINO:
Does an Encase report appear before every questioned document?

MS. SUPERA:
The actual Encase report does appear before the questioned documents, but this is the report I created.

MR. LOMBINO:
Who created the other Encase report?

MS. SUPERA:
I created those, but this is my writing. The other is just the Encase report off the program.

MR. LOMBINO:
These Encase reports have no evidentiary value. Correct?

MR. GRECO:
I object to that since the Defense offered them as an exhibit. I think they do have evidentiary value.

SENATOR AMODEI:
Mr. Lombino, you might want to proceed along the lines of did those reports come off the disk or did they come as a result of your examination.

MS. SUPERA:
The Encase reports came off when I was doing the examination and is exactly what Encase reported was on the disks. The front copy is the interpretation of those reports.

MR. LOMBINO:
However, they are not campaign materials. Are the Encase reports campaign materials?

MS. SUPERA:
No.

MR. LOMBINO:
They are just bulk in terms of campaign materials.

MS. SUPERA:
Yes.

MR. LOMBINO:
Let us look at the tab, "CY2000." Tell me what this document is.

MS. SUPERA:
It is a calendar for 2000.

MR. LOMBINO:
Other than the form of a calendar, are there any other notations on it?

MS. SUPERA:
No.

MR. LOMBINO:

Is it evidence of any kind of campaign material?

MS. SUPERA:

No.

MR. LOMBINO:

More bulk?

MS. SUPERA:

Yes.

MR. LOMBINO:

What is the next document?

MS. SUPERA:

Calendar year 2001.

MR. LOMBINO:

Any notations on it?

MS. SUPERA:

No.

MR. LOMBINO:

Is it campaign material?

MS. SUPERA:

No.

MR. LOMBINO:

Next document.

MS. SUPERA:

Calendar year 2002.

MR. LOMBINO:

Is it campaign material?

MS. SUPERA:

No.

MR. LOMBINO:

Next document.

MS. SUPERA:

Calendar year for 2003, two pages for January and February.

MR. LOMBINO:

Is it campaign material? Now we have reached Question 1. Is this the material that is in the front of Question 1?

MS. SUPERA:

The Encase report is after the next page.

MR. LOMBINO:

What is this document?

MS. SUPERA:

That is a document taken out of my Encase report.

MR. LOMBINO:

Is it campaign material?

MS. SUPERA:
No.

MR. LOMBINO:
Is it several pages in length?

MS. SUPERA:
This one is one page.

MR. LOMBINO:
What is the next page?

MS. SUPERA:
That is the Encase report from the Encase program.

MR. LOMBINO:
Is it two pages in length?

MS. SUPERA:
Yes.

MR. LOMBINO:
It is three pages. That is not campaign material?

MS. SUPERA:
No.

MR. LOMBINO:
What is this next document?

MS. SUPERA:
This is an explanation of what is to follow and which disk it came from.

MR. LOMBINO:
Is this prepared by the forensic process?

MS. SUPERA:
No, it is not.

MR. LOMBINO:
Who prepares this?

MS. SUPERA:
I prepared it.

MR. LOMBINO:
You prepared it. Is there one document for every file that was contained on the disks?

MS. SUPERA:
Yes.

MR. LOMBINO:
For every file that you showed us listed on the Encase report there is a blank page except for your notation?

MS. SUPERA:
Yes.

MR. LOMBINO:
That is not campaign material.

MS. SUPERA:
No.

MR. LOMBINO:

However, it was in the red binders when the Assembly saw it?

MS. SUPERA:

Yes.

MR. LOMBINO:

Let us move on to the next document. What is this?

MS. SUPERA:

This document says it is a report of campaign contributions for contributions over \$10,000. It is a form.

MR. LOMBINO:

This would be financial documents?

MS. SUPERA:

I examined the disk, and this was a document that was found on Question 1 that was named contributions less than \$100.

MR. LOMBINO:

You reviewed these documents; did you not?

MS. SUPERA:

No.

MR. LOMBINO:

You did not spend two weeks reviewing these documents?

MS. SUPERA:

I spent two weeks copying the documents and putting them into report form.

MR. LOMBINO:

You did not analyze any of the documents?

MS. SUPERA:

No.

MR. LOMBINO:

Look at the last page of this document? Does it give a total number of pages?

MS. SUPERA:

Page 82 or 82.

MR. LOMBINO:

This is 82 pages of records of checks?

MS. SUPERA:

It appears to be.

MR. LOMBINO:

Campaign contributions?

MS. SUPERA:

It appears to be.

MR. LOMBINO:

You did not examine these documents. These are just as Ms. Normington presented them?

MS. SUPERA:

Yes.

MR. LOMBINO:

They were presented to the Assembly in those red books just as they are presented?

MS. SUPERA:

Yes.

MR. LOMBINO:

Senator Beers pointed this out earlier from page 42 to page 82, is there something special about those documents?

MS. SUPERA:

They are blank.

MR. LOMBINO:

This is just more bulk?

MS. SUPERA:

Yes.

MR. LOMBINO:

I am going to skip through here so it may be difficult to follow. After the tab, Question 2, what is the title of this document?

MS. SUPERA:

"State of Nevada Controller's Office Kathy Augustine Biography."

MR. LOMBINO:

Being familiar with computers, can you tell if this is a web document?

MS. SUPERA:

Yes.

MR. LOMBINO:

What tells you that?

MS. SUPERA:

At the bottom, it says HTM.

MR. LOMBINO:

Is there anything wrong with the Controller putting her biography on her web site?

MS. SUPERA:

Absolutely not.

MR. LOMBINO:

That is not a question campaign document?

MS. SUPERA:

No.

MR. LOMBINO:

This document is a few pages past what I had you look at. This is from the disks; is it not?

MS. SUPERA:

Yes.

MR. LOMBINO:

What is it titled?

MS. SUPERA:

"State Controller's Office Debt Collection Totals."

MR. LOMBINO:
Is this a campaign document?

MS. SUPERA:
Not as far as I know.

MR. LOMBINO:
In Question 2, several pages down is this document. It is the "Candidate's Platform." Can you find that?

MS. SUPERA:
Yes.

MR. LOMBINO:
In Question 2A, is this a document of what I just showed you?

MS. SUPERA:
The one I have says, "Candidate's Platform" is not the exact duplicate of the one you are showing.

MR. LOMBINO:
Please point out the difference.

MS. SUPERA:
The first paragraph I am looking at says, "Kathy Augustine is the first woman to be elected Nevada State Controller. A former State Senator she also served two years as an Assemblywoman." The one that is on the screen goes on to say, "The Controller holds a Bachelor Degree from Occidental College and a Masters in Public Administration from Cal State Long Beach." The one I am looking at does not say that.

MR. LOMBINO:
These are very confusing documents. You found another one that is very similar. The two I have in my hands do say that. Therefore, these are duplicates of the same documents?

MS. SUPERA:
Yes, they are.

MR. LOMBINO:
There are many versions and variations of almost the same document.

MS. SUPERA:
Yes.

MR. LOMBINO:
In fact, you found one as we were trying to do this.

MS. SUPERA:
Yes.

MR. LOMBINO:
Are there other documents that are duplicated in these binders?

MS. SUPERA:
Yes.

MR. LOMBINO:
Under the heading Question 2A, find this document. Does this appear to be a print out of a news article?

MS. SUPERA:
Yes.

MR. LOMBINO:
Is that a campaign document?

MS. SUPERA:
No.

MR. LOMBINO:
The next document appears to be another print out of a news article.

MS. SUPERA:
Yes.

MR. LOMBINO:
Is that a campaign document?

MS. SUPERA:
No.

MR. LOMBINO:
Next, let us look at tab Question 2B. This is the first page. Is this a campaign document?

MS. SUPERA:
No, this is from the Encase program.

MR. LOMBINO:
On the second page, is this a campaign document?

MS. SUPERA:
No, that is from the Encase program.

MR. LOMBINO:
Third page?

MS. SUPERA:
That is identifying the next documents and where they came from.

MR. LOMBINO:
Identify the next document.

MS. SUPERA:
It is a calendar labeled, "February Lincoln Day Events."

MR. LOMBINO:
Can you tell if this was generated in the Controller's Office?

MS. SUPERA:
No.

MR. LOMBINO:
Do you know if this is a campaign document?

MS. SUPERA:
No.

MR. LOMBINO:
To your knowledge, this could be anything?

MS. SUPERA:
Yes.

MR. LOMBINO:
This document has appeared several times. It is a letter to the Boulder City Republican Women. Can you tell if this is a campaign document?

MS. SUPERA:
Where is it?

MR. LOMBINO:
In order after the documents we were just looking at.

MS. SUPERA:
Yes.

MR. LOMBINO:
Can you tell if this is a campaign document?

MS. SUPERA:
I would have no idea.

MR. LOMBINO:
You would have to know what this meeting was about.

MS. SUPERA:
Yes.

MR. LOMBINO:
Past the marking document you created, is this document. Do you recognize this?

MS. SUPERA:
Yes.

MR. LOMBINO:
It appears to be a draft of the document we just looked at.

MS. SUPERA:
Yes.

MR. LOMBINO:
I am taking this section out of one of the binders, rather than making you search for this. Here is another document. Can you tell what this document is?

MS. SUPERA:
It appears to be a listing of libraries.

MR. LOMBINO:
Is that a campaign document?

MS. SUPERA:
I would not know.

MR. LOMBINO:
Yet, it was in the documents presented to the Assembly as evidentiary documents.

MS. SUPERA:
Yes.

SENATOR AMODEI:

Mr. Lombino, please do not interpret anything I am about to say as transgressing on your discretion to tell your story in any manner you see fit; however, I would remind you that Ms. Supera was called in a direct examination to testify regarding how she printed material off of the 12 disks.

I believe you have elicited from her that she is not someone who is qualified to judge whether it is campaign material or not, and the Committee has heard that. I believe you have established that much of the material in volume one is not of a nature that is relevant to the ultimate issues in this case. Would you proceed to the bottom line of what it is you are trying to convey to the Committee and do so without the benefit of going through this document-by-document. Could

you at least sum up what you think would be provided to the Committee in the way of how big the binder is when it started and how big it is when one does an examination such as you have apparently done. Unless that takes something away from the bottom line, I would encourage you to do so.

Mr. Greco has not objected to any of your questioning. On the assumption that it would continue on the lines it has started, I would encourage you to give us the bottom line, in terms of what you believe is going on with Volume 1 and the other volumes as a result of questioning similar to what you have engaged in with Ms. Supera to this point.

MR. LOMBINO:

You have summed up what I am trying to accomplish. I would like to point out that this is the witness who testified to the Assembly that these binders contained numerous campaign violations.

SENATOR AMODEI:

I understand that. I do not speak for the other committee members, but the decisions I make will be done as a result of what was done in this room and not what was done in the Assembly.

MR. LOMBINO:

Red Binder No. 3 is the zip drive.

MS. SUPERA:

Yes.

MR. LOMBINO:

These are all duplicate materials?

MS. SUPERA:

The majority of them, yes.

MR. LOMBINO:

Let us look at Exhibit P-46, putting the Encase materials into chronological order.

MS. SUPERA:

Yes.

MR. LOMBINO:

Let us look at the fourth page. In row marked 10, do you see a document with the abbreviation "JPC List Republican Men XLS."?

MS. SUPERA:

Yes.

MR. LOMBINO:

What is XLS?

MS. SUPERA:

It is an Excel program.

MR. LOMBINO:

What is the last written date for that document?

MS. SUPERA:

September 25, 1998.

MR. LOMBINO:

Is that prior to the election in which Kathy Augustine first became State Controller?

MS. SUPERA:

I have no idea. It was a deleted file.

MR. LOMBINO:

It was deleted, but it appears to be a list of Republican men; correct?

MS. SUPERA:

That would be the appearance.

MR. LOMBINO:

Item 12, is the "JPC List for Republican Women" with a last-written-to date as September 25, 1998.

MS. SUPERA:

Yes.

MR. LOMBINO:

Item 13, is the "JPC List for Young Republicans."

MS. SUPERA:

Yes.

MR. LOMBINO:

That has a last written-to date of September 25, 1998?

MS. SUPERA:

Yes.

MR. LOMBINO:

I have no further questions.

SENATOR AMODEI:

Mr. Greco.

MR. GRECO:

Ms. Supera, were you asked to print out all of the files on the disks?

MS. SUPERA:

Yes, I was.

MR. GRECO:

Is that what you did?

MS. SUPERA:

Yes.

MR. GRECO:

Some of the material in these seven or eight inches of paper appears to you to be campaign related; am I correct?

MS. SUPERA:

They appear to be campaign related.

MR. GRECO:

Some of the material appears not to be campaign related?

MS. SUPERA:

Yes.

MR. GRECO:

We did see a series of blank pages. Is there a reason for that?

MS. SUPERA:

The way the Encase program printed those out; I did it exactly as it came out of the program because I was asked to just find out what was on the disks. I left those in there.

MR. GRECO:

There were a few files with a lot of blank pages in them?

MS. SUPERA:

Yes.

MR. GRECO:

Could that be caused by a spreadsheet that had no data in it?

MS. SUPERA:

Yes.

MR. GRECO:

Did you see many pages that were almost entirely blank but they had small print on the side of the page? Were they file names by themselves on pages that were otherwise blank?

MS. SUPERA:

Yes.

MR. GRECO:

In front of each file document is there a file name on the corner of the page with the rest of the page being blank?

MS. SUPERA:

Are you talking about the labels I created?

MR. GRECO:

Yes, those little labels on the side of the pages that are otherwise blank are those to designate the name of the file?

MS. SUPERA:

Yes, I was dealing with such a volume of documents that I needed a way to separate the documents and know where each document came from.

MR. GRECO:

You wanted to match a file name with the corresponding file, which would be a letter, a memo or some other document, to assist whoever might be reviewing it.

MS. SUPERA:

Yes.

MR. GRECO:

Mr. Lombino went over what you did not provide to the Assembly. To your knowledge, have all these materials been provided to the Defense?

MS. SUPERA:

It is my understanding that they have.

MR. GRECO:

Long ago?

MS. SUPERA:

Yes.

MR. GRECO:

Long before I was on the case?

MS. SUPERA:

Yes.

MR. GRECO:

The Defense would be free to look through the materials to decide what is exculpatory or what is not. Correct?

MS. SUPERA:

Yes.

MR. GRECO:

That is all I have, Mr. Chair.

SENATOR AMODEI:

Mr. Lombino.

MR. LOMBINO:

No further questions.

SENATOR AMODEI:

Are there any questions of Ms. Supera from the Committee?

SENATOR COFFIN:

In examining your testimony that I witnessed in the Assembly Chamber, I remember it was explained that all three binders contained campaign material. You used the word "examine" seven times on the first page and again on the next, where it is an illustration that all three binders are campaign material. You say, "examined" but you said you simply copied them. You examined the disks; correct?

MS. SUPERA:

Yes, I examined what was going to be on the disks.

SENATOR COFFIN:

However, you did not examine every document; did you?

MS. SUPERA:

I did not analyze every document.

SENATOR COFFIN:

I will read your statement, "In all, there are approximately 65-work days on which campaign-related documents were worked on during state hours."

I watched the Assembly on this. I do not think they looked at these either. I do not think the Ethics Commission looked at any of this. I do not know who looked at it. I suspect everyone has seen these disks that came over from the employees of that office, and everyone thought they were good stuff. We have seen it and dissected it. How was the Defense able to get that done in the short period allotted; I do not know? I consider myself part of the Defense because I am wondering how I can defend myself for not reading these volumes. I can understand why no one did because it is a lot of fluff. How can we parcel out 65-work days, which sounds impressive because it sounds like 8 hours a day times 65 days, but those were just the dates the entries occurred.

MS. SUPERA:

Yes.

SENATOR COFFIN:

That would be a date you thought was campaign material.

MS. SUPERA:

I do not know that I looked at it as far as campaign material versus dates that were on the disks.

SENATOR COFFIN:

What you told the Assembly was that, basically, it was all campaign material. I bought it too. I was sitting in the audience. I was impressed until I got this explanation. What do you really

think this is? Sixty-five workdays equals how many man-hours spent on the entries. Decisions were made by the Assembly and the Ethics Commission by these numbers. They are buzz-numbers. What do you really think?

MS. SUPERA:

I do not have any idea. There were many spreadsheets in there that appeared to be related materials. I did not analyze all of the documents to know what they were. I was asked to look to see what was on the disks. That is what I did.

SENATOR COFFIN:

You do not have political experience?

MS. SUPERA:

No.

SENATOR COFFIN:

It would have taken someone with some political knowledge to separate this information quickly.

MS. SUPERA:

Yes.

SENATOR COFFIN:

Did the Ethics Commission, the Assembly or the Attorney General's Office suggest if we should find out what is really campaign and what is not?

MS. SUPERA:

No.

SENATOR BEERS:

How many documents did you catalogue?

MS. SUPERA:

I did not count them.

SENATOR BEERS:

Are all the documents you encountered in these books? Were there any documents you said, "No, they do not belong?"

MS. SUPERA:

No, I was asked to print out all of the documents, and that is exactly what I did.

SENATOR BEERS:

There was testimony earlier this week that at least one of these lists was kept on a floppy disk, and it was too big and was moved to a hard drive. Is it possible that since all of the files we see here span less than one floppy disk that they have never been on a hard drive?

MS. SUPERA:

I would have no knowledge of that.

SENATOR BEERS:

It is possible?

MS. SUPERA:

It is possible.

SENATOR WASHINGTON:

When you went through the disks provided to you, did you take under consideration or, as your colleague said, have compassion for and consider the person who made the alleged violations? Did you take under consideration when putting these binders together of this alleged

campaign material, did you have any compassion or consideration that this is someone's life, someone's career, someone's future at jeopardy before presenting this material?

MS. SUPERA:

I was asked to examine the disks. I was not told what the allegations were.

SENATOR WASHINGTON:

When doing forensic work whether of a criminal nature or not, do you consider the crime committed, the person that committed the crime, the victims? Do you consider the entire spectrum of what you are getting ready to present, and how you will present it?

MS. SUPERA:

As an investigator, yes, I do. As a forensic examiner asked to examine disks, it is not a consideration for me.

SENATOR HORSFORD:

When you testified in the Assembly, were you questioned by members of the Assembly?

MS. SUPERA:

I had two questions.

SENATOR HORSFORD:

Did the Special Prosecutor provide any questions or ask any questions of you?

MR. GRECO:

Could I ask for a clarification? I believe the Senator was talking about the Assembly hearing and the Special Prosecutor. Please clarify that?

SENATOR AMODEI:

Please restate the question.

SENATOR HORSFORD:

It is my understanding the Special Prosecutor started the process the day the Assembly heard the case. Correct?

SENATOR AMODEI:

No, that would not be correct.

SENATOR HORSFORD:

Was it the Attorney General?

SENATOR AMODEI:

I would not speak for the Attorney General's Office. Mr. Greco was asked to become involved in this matter two and one-half weeks ago. I do not have personal knowledge of who was in charge other than what you heard in the testimony.

SENATOR HORSFORD:

Who presented the case on behalf of the State in the Assembly?

SENATOR AMODEI:

I cannot tell you.

SENATOR COFFIN:

I believe the Executive Director of the Ethics Commission might have testified. Mr. Gardner might have testified. I do not remember if he introduced this data. I do not know who takes responsibility for this.

MR. GRECO:

I watched the tape. The Assembly Speaker, Mr. Perkins, called every witness and started with Mr. Gardner.

SENATOR HORSFORD:

Ms. Supera, did the Controller's Counsel ask you any questions in the Assembly?

MS. SUPERA:

No.

SENATOR HORSFORD:

Were any of these documents or the contents of the binders challenged in the Assembly proceedings?

MS. SUPERA:

No.

SENATOR HORSFORD:

If you had access to the actual computers used to create or revise any of the documents provided to us, could you tell whether those computers were used for that purpose?

MS. SUPERA:

I could tell if the evidence was on the hard drive. That does not take away that it could have been put there.

SENATOR HORSFORD:

If items were created and saved on the hard drive or transferred to the hard drive, you could tell whether those documents were there.

MS. SUPERA:

Yes.

SENATOR HORSFORD:

Even if they were erased?

MS. SUPERA:

Yes.

SENATOR HORSFORD:

Or deleted?

MS. SUPERA:

Yes.

SENATOR HORSFORD:

Based on the severity of the allegations before us and the questioning of some of these documents, we should entertain being able to have Ms. Supera review both the personal computer of Ms. Normington as well as her state computer.

SENATOR AMODEI:

We will respond to that request after Counsel from both sides has an opportunity to provide comment for or against that request.

SENATOR NOLAN:

Ms. Supera, in your written statement you indicated Investigator Dale Liebherr asked you to examine the floppy disks. Who was it that instructed you to print out and compile the notebooks for your testimony?

MS. SUPERA:

Mr. Liebherr.

SENATOR NOLAN:

Did you inform Mr. Liebherr or anyone else with the Attorney General's Office of the number of blank pages? During your examination, did you inform anyone else that there was a large volume of material that may not be exculpatory or related to campaign work?

MS. SUPERA:

I did not analyze what was on all of the disks. I provided him with all three volumes.

SENATOR NOLAN:

At no time, did anyone ask you for your opinion from the Attorney General's Office about the content of that material?

MS. SUPERA:

No.

SENATOR NOLAN:

On your written testimony, did anyone from the Attorney General's Office counsel with you on your written testimony prior to you providing that testimony before the Assembly? Did anyone review your testimony prior to testifying?

MS. SUPERA:

Yes.

SENATOR NOLAN:

Who was that? Explain to what degree you were counseled on it.

MS. SUPERA:

Gerald Gardner.

SENATOR NOLAN:

He did what?

MS. SUPERA:

He read it, reviewed it and checked it for accuracy.

SENATOR NOLAN:

Did he make any corrections to your testimony?

MS. SUPERA:

No.

SENATOR BEERS:

At the end of your written statement, you read in front of the Assembly, the last paragraph before "thank you." You stated, "There were a number of days in which several campaign documents were written on the same day. In all there were approximately 65-work days on which campaign-related documents were worked on during state hours." Who came to that conclusion? Someone had to have gone through them to come up with these words. They had to have said, "This is a campaign document, and this is not."

MS. SUPERA:

That would have been between Gerald Gardner and Dale Liebherr.

SENATOR BEERS:

You did not make that conclusion?

MS. SUPERA:

No.

SENATOR COFFIN:

Is this the first time you are aware that these disks were converted to paper?

MS. SUPERA:

That I am aware of, yes.

SENATOR COFFIN:

Therefore, for the past two years, the kernel of this case is a stack of floppy disks that someone says something is on. Credence is attached to these disks as if they are the Holy Grail,

carried from place to place. Estimates were placed on the amount of days and hours it took to fill three volumes. A fine was judged and a criminal investigation was started over some of the allegations that were verbally stated and supposedly supported by this stack of floppy disks. This is the first time it has been made into paper?

MS. SUPERA:

Yes.

SENATOR COFFIN:

I suppose all that the Ethics Commission saw was 13 floppy disks. They did not see or examine paper?

MS. SUPERA:

I would not be aware of that.

MR. ARRASCADA:

The Ethics Commission was provided with the binders to my understanding.

SENATOR COFFIN:

Did you witness or see them look at these documents? Is this how they figured out how much time was spent on the campaign?

I withdraw the question.

SENATOR AMODEI:

Redirect, Mr. Greco?

MR. GRECO:

In Reno and in many murder cases, I have seized computers. In state computers, are the C-drives of the computers routinely cleaned by information technicians (IT) whenever a new employee is hired?

MS. SUPERA:

Yes, we do.

MR. GRECO:

Is that what happens in the Controller's Office?

MS. SUPERA:

I would not be aware of whether they did it there or not. That would be common practice.

MR. GRECO:

It is policy in the State in general to do that?

MS. SUPERA:

I would not know if it is an entire state policy. It is in my unit.

MR. GRECO:

It is done so that new employees are not looking at files of old employees.

MS. SUPERA:

Yes.

MR. GRECO:

Files that might contain personal or campaign-related activity they should not be looking at.

MS. SUPERA:

Yes.

MR. GRECO:

Is there a separate IT person assigned to the Controller's Office. Does each state office have an IT person?

MS. SUPERA:

I understand there is.

MR. GRECO:

Can you ask that person if Ms. Normington's computer, specifically her C-drive, would have been cleaned when the new employee took over?

MS. SUPERA:

I would be happy to do that.

MR. GRECO:

Mr. Chair, please issue an order to Controller Augustine and to the Controller's Office that no one is to touch that computer or attempt to access the C-drive of that computer for cleaning purposes until we have a resolution of the issue?

SENATOR AMODEI:

That is fine. Is there any objection to that Mr. Lombino?

MR. LOMBINO:

If we are going to go that far, perhaps, we can get the same order regarding Ms. Normington's home computer.

SENATOR AMODEI:

Before we attempt to reopen the investigation in other areas regarding C-drives, etc., let us hear from both Counsels concerning what they think of the request to the Legislative Counsel.

I will ask the Sergeant at Arms to indicate to the acting-State Controller, that until further notice, the appropriate computer equipment talked about today not be accessed or altered in any way in a forensic sense until we have input from both Counsels on whether or not we need to go into the computers for additional information.

I would remind both Counsels, in responding to the requests, and the members of the Committee that Ms. Supera's purpose in being here was to testify that she took the number of disks and printed them out and created the appropriate volumes.

Mr. Lombino did an excellent job of pointing out what was and what was not of value to the Committee's consideration in this case. As to Ms. Supera's ability to forensically discuss machines she has never seen, I think she has indicated that she took the disks provided by the investigative staff and printed them out. I appreciate her attempts to respond to questions. In addition to that, I believe this is what this witness was called to do. Is that a fair statement, Mr. Greco?

MR. GRECO:

It is. It is a very good question by the Senator about something, that perhaps, should have been done a long time ago. It is my responsibility as a Prosecutor to get to the entire truth in the case.

SENATOR AMODEI:

That is why I have asked the Sergeant at Arms to comply with your request and have asked you both to respond informally to Ms. Erdoes regarding Senator Horsford's request.

MR. LOMBINO:

I hate to do so, but I must respectfully disagree with the characterization of the witness. She may have been called to the Senate to say she printed out the documents. Contrary to belief, I do recognize this is the Senate and not the Assembly, but she did testify in the Assembly that she could characterize these documents.

SENATOR AMODEI:

You have made that part of our record. That inconsistency is noted for the record. I did not mean to change that indication regarding the prior testimony and the testimony today before this Committee.

SENATOR CEGAVSKE:

Ms. Supera, was the statement you read in the Assembly prepared by you or someone else?

MS. SUPERA:

It was prepared by Gerald Gardner and me.

SENATOR CEGAVSKE:

They gave you the information. You did not question the numbers or the information they had put down?

MS. SUPERA:

Not the numbers of days, no.

SENATOR CEGAVSKE:

Why were the computers not seized originally?

SENATOR AMODEI:

Is Mr. Liebherr going to be called by the Special Prosecutor?

MR. GRECO:

He is not going to be called by me, but I have informed him it is possible Defense may call him. He is remaining available.

SENATOR AMODEI:

Mr. Gentile, Mr. Arrascada, do you have plans to call Mr. Liebherr as part of your case? If not, I will ask the Committee if they wish to call Mr. Liebherr for the limited purpose of responding to that question prior to the beginning of your case.

MR. GENTILE:

No.

SENATOR AMODEI:

Does the Committee wish Mr. Liebherr to appear prior to the beginning of the Defense case to respond to questions concerning whether or not the computers of the individuals who have testified about computer contact should have been seized? Should Mr. Liebherr testify at the conclusion of Mr. Greco's case? Is there objection to calling him on behalf of the Committee for limited purpose prior to the start of the Defense case?

SENATOR CARLTON:

The purpose for calling him would be for the computer part not for any other of the investigations done for this case?

SENATOR AMODEI:

If the Committee would like to talk to him beforehand and there are 11 people who feel that way, then it could be done.

The question pending is "for purposes of discussing why computers were or were not seized." If that scope of inquiry is expanded beyond that, it is fine. If the Committee calls a witness, those people who request the witness to be called need to be prepared with the initial questioning of that witness for the purpose that they requested that person be called.

SENATOR CARLTON:

A number of times we have had witnesses come before us and questions seem to lead to more questions. I would not want to limit anyone being able to ask a witness a question they had in their mind after other questions had been asked.

SENATOR AMODEI:

We can, as we have done with other witnesses such as Ms. Normington and Ms. Coward, make Mr. Liebherr subject to recall for purposes of rebuttal or impeachment or further clarification.

Would the Committee like Mr. Liebherr to appear before the Committee at the conclusion of Mr. Greco's case, prior to the beginning of the Controller's case to answer questions regarding the seizure of computer assets?

MR. GRECO:

We are at the conclusion of the Prosecution's case right now.

SENATOR TITUS:

If Mr. Liebherr is in the witness room so that we may deal with this quickly, then call him. However, if we have to wait to find him, then return tomorrow before we can start the Defense, I think there would be some other way to get that information and not wait to call him.

SENATOR AMODEI:

Is Mr. Liebherr on standby today?

MR. GRECO:

He is not in the building. He is on standby.

SENATOR AMODEI:

What building is he in?

MR. GRECO:

At work, wherever the Attorney General investigators work.

SENATOR HARDY:

Do we intend to reopen the investigation on this case? If not, then what is the purpose of determining that?

SENATOR AMODEI:

Mr. Liebherr will be called for the limited purpose of answering the questions Senator Cegavske has requested be answered. That is not reopening the investigation of the case. That issue would be dealt with after we hear from both Counsels informally reporting to the Legislative Counsel assuming Mr. Liebherr's testimony is that they were not seized and whether or not there is any value in trying to seize computer assets and have them forensically examined by whomever.

SENATOR COFFIN:

There has been some discussion about finding out about this process not just for the limited purpose of whose computer did what but what persuaded people to make certain decisions. What persuaded the Attorney General to pursue criminal investigations? What persuaded the Ethics Commission how much to fine the Controller? Much of that was based on numbers and volumes. Would you allow us to ask questions about the process that he observed from beginning to end?

SENATOR AMODEI:

If that is the prerogative of the Committee.

SENATOR COFFIN:

The public would learn a lot.

SENATOR MATHEWS:

Call for the question.

SENATOR RAGGIO:

Point of order. We have been liberal in allowing the questions and presentations of matters before this Senate body. I have listened to the discussion about this Senate asking for some additional information. The responsibility for presenting this case to the Senate lies with the Special Prosecutor. The responsibility for responding or answering to what is presented by the Special Prosecutor rests with the Defense Counsel. They should be allowed to present whatever

they feel is essential to the presentation of their case. That does not mean they cannot make other presentations or motions.

I feel it is inappropriate for us to ask for an additional investigation. That can come after the presentations have been made by either side in this case. The Special Prosecutor has presented what he feels should be presented. We have had every opportunity to ask questions of these witnesses. I do not know what the Defense plans to do. If they are ready to present their case, let them do so. If after hearing everything that is presented to us, we still feel as a Committee that some other information is necessary we can request it at that time. It is inappropriate to do so now.

SENATOR AMODEI:

Senator Mathews has called for the question. Is there anything anyone wishes to add before the question is called?

SENATOR BEERS:

We had testimony earlier today from Mr. Gardner that the computers were not seized. He felt even though it was only six to eight weeks after these disks were created that there was no forensic value in them that they may have already been wiped clean. After four years on a hard drive, the directory entry may remain that a file once lived in, but the actual storage space is most likely already overwritten by a newer file.

SENATOR AMODEI:

Because he is on hold and available to answer questions regarding the data availability still on the relevant computer, those in favor of having Mr. Liebherr appear within the next five minutes raise your hands. Seeing few or none, Mr. Liebherr will not be asked to appear.

Ms. Supera is released as a witness.

MR. LOMBINO:

No objection.

MR. GRECO:

No objection. I rest subject to reopening on a limited issue if we find something else. I will direct Ms. Supera to make inquiries. If the C-drives have not been cleaned in the last few years, a big "if," I will ask her to perform a forensic examination of that computer. I would like to be able to recall her and reopen on that limited purpose only and for no other purpose. It gets to the truth.

SENATOR AMODEI:

Fine. Any objections to those limitations, Mr. Lombino?

MR. LOMBINO:

No objection.

SENATOR AMODEI:

Is there any objection to admitting Special Prosecution Exhibit P-1 and Exhibit P-2?

MR. GRECO:

No objection.

MR. GENTILE:

No objection.

MR. GRECO:

That concludes the State's presentation of evidence.

SENATOR AMODEI:

The State's case is concluded subject to the provisions and stipulations entered into by the parties regarding the recalling of witnesses for the limited purposes indicated and also for purposes of rebuttal.

Mr. Gentile.

MR. GENTILE:

Whatever an impeachment is, it is clearly an adversarial proceeding. At this stage, it would be common in both federal and state criminal and civil cases for the trier to entertain a motion for a directed verdict, a directed finding or a judgment of acquittal. It is called many things but they all have the same affect and that is to judge the evidence as it is now and dismiss the case. I recognize this is the Committee of the Whole. You must meet on the floor of the Senate to have a formal vote. I would ask if the Chair would take a vote of the Committee for a motion for a directed verdict in dismissing these charges.

SENATOR AMODEI:

You are correct that any ultimate disposition of the case must be voted on in the Senate and not in the Committee, but if it is your desire to make whatever appropriate motion you deem at this point before the beginning of your case, feel free to do so.

MR. GENTILE:

I move to dismiss the charges against Controller Augustine as presented in the Articles of Impeachment.

SENATOR AMODEI:

Is the motion for dismissal of charges for Articles I, II and III?

MR. GENTILE:

Yes, it is.

SENATOR AMODEI:

Mr. Greco, it would be my inclination to recess for a short period for the purposes of allowing Mr. Gentile to prepare his oral presentation in support of that and to allow you an equal amount of time to respond to that. Each response will be 20 minutes.

SENATOR COFFIN:

When there is a motion to dismiss, can the judge modify the terms of the motion? Does the maker of the motion have a form they follow?

SENATOR AMODEI:

My intention would be to hear the specifics of the motion by the maker. The Committee would take the matter under submission. It is possible to grant a motion in part and deny it in part in regular court proceedings. Everything is available to us from "motion granted" to "motion denied" or to something in between.

SENATOR AMODEI:

Mr. Gentile, you will begin your oral argument.

MR. GENTILE:

Ordinarily at this stage, you must address what is the standard before you make a determination if it has been met. The Constitution sets the standard in this case. You have taken an oath to do justice according to law and evidence. It is not contested. Mr. Gardner said this morning the purpose of an impeachment trial is to make a decision as to whether or not you need to do something to protect the public trust.

The Legislative Counsel's legal opinion clarifying some of the law came out during the middle of this proceeding. The law they addressed has been a big part of why we are here.

The only evidence in this case that is truly negative to Kathy Augustine's case was the stipulation before the Ethics Commission. Of what value is that? What did she stipulate to? She stipulated that she "reasonably should have known." That is what the Articles of Impeachment charge. The standard is higher here. It has to be because if it were not higher the purpose of the impeachment trial would be moot. This would become a clemency trial as opposed to what it is.

This trial is not about punishment. It has to be higher than the standard applied at the Ethics Commission. The lawyers among you know and Legislative Counsel will advise you that "reasonably should have known" is a concept that grows out of the law involving fiduciary duties. What it means is that if you have a duty, and every elected official does, and if something

happens on your watch, that is where the "buck" stops. That is what Controller Augustine stipulated to and admitted to months ago. She has been fined \$15,000 because of it.

The threat of criminal prosecution is why we are here and why it went to the Ethics Commission. Even with that threat, the State Controller did not and still will not admit that she actually knew, but she reasonably should have known.

That threat of prosecution did not come from Mr. Greco. I would not want to be in his shoes. He has presented on two and one-half weeks notice a fantastic case. Some of you know I teach trial advocacy at our law school. I know what it takes for a lawyer to get ready for a case like this. He has done a magnificent job. He has performed in the highest standards of the legal profession in doing what he has done. This case was not started by him. He inherited it. This case was started by Mr. Gardner. It stopped with Mr. Gardner.

Mr. Gardner is the highest person in that office who has any criminal-law background. You heard Mr. Gardner say that he never interviewed a witness. You heard him say that he never tested their veracity. He did nothing to do that. He threw hundreds of irrelevant documents into these binders. One entire binder was trashed today. He prepared the statements of these witnesses when they appeared before the Assembly. I have issues with the Assembly's process, but we are here now.

What is shocking is that he ignored a statement that was clear as could be. It was Jeannine Coward's statement, "We have to stop her. She is going to run for Congress." What did Jennifer Normington say? "It is a start." He ignored the bias and the motive to falsify of these witnesses. You heard Jeannine Coward say that she waited two months before deciding what to do in terms of bringing this case. She is the one who started this case. I do not know how many people in the State of Nevada who could walk into the Attorney General's Office with a complaint like this. My guess is, not many. She has been in this city for a long time. She knows doors open for her.

There was an abuse in this case. It was Ms. Coward's abuse not the Attorney General's. How many times have you contemplated something for two months before taking action on it? What you saw was premeditated political assassination. In the criminal law, we call this malice aforethought. Everything that happened until this case got to this body has been discredited. The process has been discredited. Mr. Gardner ignored the rehearsals of these witnesses with each other. There is question whether there was collusion among them. It was Mr. Wells, an accountant, who decided he was going to be a lawyer and tell these people what the law is. That is what started this ball rolling. They were looking for an excuse.

This is really a personnel matter. Mr. Gardner ignored the inconsistencies in the precharge statements. These people made multiple statements before the charges even at the Ethics Commission. They were inconsistent, and they were all brought out here. There are few people I know who would not do things, who would admit to things and agree to do things that they ordinarily would not do in order to avoid being charged with a criminal offense. It is a dicey system. It is scary.

High-profile people, particularly elected officials, do not fare well in criminal cases with juries. Controller Augustine went to the Ethics Commission kicking and screaming but went anyway and has been punished. This should not be about punishment. Your focus has to be on the question of does the public need protection and has the evidence reached a level at this point where you can say you can do justice based on the law and the evidence and that this case needs to proceed.

You have not heard evidence of any complaints from anyone since these people have left that office. That is significant because if that type of behavior were still going on, you would have heard about it. It is significant because when you take into consideration what you have heard, there have been admissions, and you have all run for office so you know it is true, that in those last six months before a statewide race you are not in your office. You are working for election. When did Ms. Normington say that whatever the amount of work she did, "when the cat is away, the mice will play." That is what happened here.

What is clear? There is a benefit by this coming out. All of you have been educated, certainly more so than you otherwise would have been. I say this with great respect. I have never been before anything like this in terms of the collective wisdom of this group. Some of the questions asked were ones I wished I had asked.

We have to get back to the why are we here? There have been great benefits. The public has been educated. You have seen how the processes took place before this case came to you. Unless you are lawyers, you do not have the opportunity to get the view of this proceeding as you have. There is always a cost-benefit analysis that has to be applied. This is costing a lot. I suggest to you that when you take a look at the evidence in this case, there is no way at this time that you could say that justice is served by returning on this evidence a verdict of impeachment. That is the standard. If you look at it in the best view, most favorable to the Prosecutor's case, you cannot do it.

I do not know what justice is. That sounds odd coming from someone who has been involved in the criminal-justice system for 33 years, but I think each one of us has our own idea of what justice is. Whatever it is and whatever it may be to you, you separate yourself from your emotions and your passions and look just at the evidence. You must say to yourself, "it does not rise to something upon which we could, in good conscience, return a verdict of guilty and not have concerns about it."

I ask that the motion be granted.

MR. GRECO:

I agree with one thing said by Mr. Gentile. The sentiment was expressed by a number of the Senators in their questioning that it would have been better for this case to be tried in the criminal form from the beginning. A lay jury would have been a better body to present this case to than the Senate.

The reality is we are here. The Nevada Constitution provides that if the Nevada Assembly returns a bill of impeachment on one or more Articles of Impeachment, then, the Senate shall conduct a trial not half a trial.

I wish this case had proceeded differently from the beginning, but we are here, now, and the choice of forum should not be held against the State or the Special Prosecutor.

I do not believe the motion for acquittal is an appropriate analogy because that would only apply once you have returned a guilty verdict. You could consider a motion for acquittal, but that does not apply because we are not at that point. The closest thing in the law that applies here would be a civil case with a directed verdict. The standard is and has long been for a directed verdict to be granted at this phase is that there has to be insufficient evidence and you have to view the evidence in the light most favorable to the party against whom the motion is made. That includes all inferences. In other words, on a directed-verdict application you have to assume the truth of the State's evidence and decide if there is sufficient evidence presented so that the count or the conviction is sustained.

You do not get into credibility battles at this point. You do that at the verdict, at the end of the trial. It is clear to me from the questions that there are some serious concerns about several witnesses' credibility. The Defense attorneys did a good job cross-examining those few witnesses. That is something you would deliberate at the end of the trial once all the evidence is in. At this phase, you assume the truth of the evidence and draw all inferences in favor of the non-moving party which is the State. Based upon that standard, it is clear the motion should not be granted.

SENATOR AMODEI:

I think I speak for the Committee. Mr. Lombino, Mr. Arrascada, Mr. Gentile and your staffs are to be commended on your preparation and presentation. I appreciate the spirit of Counsel in terms of recognizing the skill at which both have proceeded. Mr. Greco, you and your able assistant are to be commended equally for the job you have done. We appreciate the manner in which you have conducted yourselves.

As a result of the motion by Mr. Gentile, I am going to request the Committee dissolve itself since any deliberation and vote must be taken in the Senate. This will allow the individual members of the Committee to consider the arguments that have been made and to reflect on the evidence presented.

Senator Wiener moved the Committee of the Whole rise and return to the Senate Chamber at an appropriate time for the consideration of the pending motion.

SENATOR RAGGIO:

I would like to clarify the motion. The motion should be that the Committee of the Whole rise and return to the Senate. If the motion is granted, I would request everyone to return immediately to the Senate. In any event, the Senate will convene at 8:30 a.m. We will work no later than 3:00 p.m.

On the motion of Senator Wiener, the Committee did rise and return to the Senate Chamber.

SENATE IN SESSION

At 5:48 p.m.

President Hunt presiding.

Quorum present.

REMARKS FROM THE FLOOR

Senator Raggio requested that the following legal opinion be entered in the Journal.

LEGAL OPINIONS

December 2, 2004

SENATOR WILLIAM J. RAGGIO

Senate Chamber

Dear SENATOR RAGGIO:

During the meeting of the Committee of the Whole on December 2, 2004, you asked this office two questions relating to the political activities of state employees. First, you have asked this office whether state law prohibits state employees from engaging in political activities during hours of state employment or at any other time. Second, you have asked this office whether a state employee may prepare forms for reporting campaign contributions and expenses or expenditures for the public officer who employs him and who is running for reelection.

I. Statutory Provisions Concerning Political Activities by State Employees

You have asked this office whether state law prohibits state employees from engaging in political activities during hours of state employment or at any other time. To answer your question, we must examine several statutory provisions that govern the conduct of public officers and employees. First, we must examine chapter 284 of NRS, which establishes the state personnel system and regulates certain activities of state employees. Second, we must examine subsection 7 of NRS 281.481, which generally prohibits a public officer or employee from using governmental time, property, equipment or other facility to benefit his personal or financial interest. Finally, we must examine NRS 197.110, which prohibits certain misconduct by a public officer or employee.

The provisions of chapter 284 of NRS establish the state personnel system for certain state employees who are part of the Executive Department of State Government. Under the state personnel system, the standards governing the political activities of classified state employees differ from the standards governing the political activities of unclassified state employees. We begin by examining the standards governing the political activities of classified state employees.

The provisions of chapter 284 of NRS are administered by the Department of Personnel with the advice and assistance of the Personnel Commission. NRS 284.025 and 284.065. The Personnel Commission is required by statute to adopt a code of regulations for classified state employees and a system for administering disciplinary measures against classified state employees. NRS 284.155 and 284.383.

The code of regulations for classified state employees provides that disciplinary measures may be taken against a classified state employee who engages in prohibited political activities. NAC 284.650. Prohibited political activities are defined in NAC 284.770 as follows:

Employees may vote as they choose and express their political opinions on all subjects without recourse, except that no employee may:

1. Directly or indirectly solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, monetary, or nonmonetary contribution for a political purpose from anyone who is in the same department and who is a subordinate of the solicitor.
2. Engage in political activity during the hours of his state employment to improve the chances of a political party or a person seeking office, or at any time engage in political activity to secure a preference for a promotion, transfer or increase in pay.

Under NAC 284.770, a classified state employee is prohibited from engaging in political activities during the hours of his state employment to improve the chances of a political party or a person seeking office. In addition, a classified state employee is prohibited, at any time, from engaging in political activities to secure a preference for a promotion, transfer or increase in pay. Lastly, a classified state employee is prohibited, at any time, from directly or indirectly soliciting or receiving political contributions from subordinates who are in the same department. Although these prohibitions bar many political activities by a classified state employee during the hours of his state employment, the prohibitions provide only minimal restrictions on the political activities that a classified state employee may undertake on his own time. This dichotomy exists because state employees, like other citizens, have certain constitutional rights which generally permit them to engage in, on their own time, political activities that are protected by the First Amendment to the United States Constitution. *See, e.g., Castle v. Colonial Sch. Dist.*, 933 F. Supp. 458 (E.D. Pa. 1996); *Goodman v. City of Kansas City*, 906 F. Supp. 537 (W.D. Mo. 1995); *Ruff v. City of Leavenworth*, 858 F. Supp. 1546 (D. Kan. 1994).

Thus, under the state personnel system, a classified state employee is prohibited from engaging in many political activities during the hours of his state employment. However, on his own time, no such prohibition exists, and the classified state employee may engage in whatever political activities he chooses so long as he is not using such political activities to secure a preference for a promotion, transfer or increase in pay and is not directly or indirectly soliciting or receiving political contributions from subordinates who are in the same department.

Although the Personnel Commission has been given the statutory authority to adopt a code of regulations for classified state employees pursuant to NRS 284.155, no such statutory authority exists for unclassified state employees. According to information provided to this office, in the absence of such statutory authority, the Personnel Commission and the Department of Personnel do not regulate the political activities of unclassified state employees. Thus, as a general rule under the state personnel system, an unclassified state employee may engage in political activities during hours of state employment or at any other time, unless those political activities are otherwise prohibited by another statutory provision.

Under the Nevada Ethics in Government Law, a public officer or employee is generally prohibited from using governmental time, property, equipment or other facility to benefit his personal or financial interest. NRS 281.481(7). The prohibition in subsection 7 of NRS 281.481 contains an exception for certain limited uses of governmental property, equipment or other facility for personal purposes. As used in the Nevada Ethics in Government Law, the term "public employee" includes a classified or unclassified state employee. NRS 281.436. Thus, under the Nevada Ethics in Government Law, a state employee may not engage in political activities during hours of state employment or at any other time if those political activities involve using governmental time, property, equipment or other facility to benefit his personal or financial interest and do not otherwise qualify for the limited use exception codified in subsection 7 of NRS 281.481.

Finally, NRS 197.110, in pertinent part, provides that "[e]very public officer who ... [e]mploys or uses any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another ... is guilty of a category E felony and shall be punished as provided in NRS 193.130." (Emphasis added.) On its face, NRS 197.110 appears to be limited in application to public officers. However, as used in NRS 197.110, the term "public officer" is defined to include all public officers and employees of the State of Nevada. NRS 193.019. Based on this definition, the Nevada Supreme Court has held

that the prohibition in NRS 197.110 applies to public employees. State v. Thompson, 89 Nev. 320, 322-24 (1973); see also Walker v. State, 102 Nev. 290, 294 (1986).

Thus, under NRS 197.110, a state employee may not engage in political activities during hours of state employment or at any other time if those political activities involve employing or using any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another.

II. Preparation of Campaign Reporting Forms

You have also asked this office specifically whether a state employee may prepare forms for reporting campaign contributions and expenses or expenditures (hereafter “campaign reporting forms”) for the public officer who employs him and who is running for reelection.

As noted previously, there are several provisions that limit the engagement of a state employee in political activities. First, subsection 7 of NRS 281.481 provides that, with certain limited exceptions, “[a] public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest.” (Emphasis added.) Public officers do not file campaign reporting forms to benefit their own personal or financial interest, but instead to comply with a statutory requirement. See NRS 294A.120, 294A.200 and 294A.360. The purpose of these statutorily required filings is to further the important state interest of preventing corruption or the appearance of corruption in the political process. See, e.g., California Medical Ass’n v. Fed. Elections Comm’n, 101 S. Ct. 2712, 2723 (1981); Op. Nev. Att’y Gen. No. 1998-29 (Nov. 5, 1998) (“Adequate protection against corruption and bias is afforded through the disclosure statutes found in chapter 294A of NRS.”). Thus, it is the opinion of this office that subsection 7 of NRS 281.481 does not prohibit a state employee from preparing campaign reporting forms for the public officer who employs him and who is running for reelection because the interest served by the filing of the forms is the State’s interest in preventing corruption or the appearance of corruption in the political process and not the personal or financial interest of the public officer or the state employee.

As discussed earlier, another provision that may limit the engagement of a state employee in political activities is subsection 2 of NRS 197.110. This statute provides that a public officer or employee “who ... [e]mploys or uses any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another ... is guilty of a category E felony and shall be punished as provided in NRS 193.130.” (Emphasis added.) As noted previously with respect to subsection 7 of NRS 281.481, the filing of campaign reporting forms is required by statute and is for the benefit or gain of the State in preventing corruption or the appearance of corruption in the political process. Therefore, it is the opinion of this office that it is not unlawful under subsection 2 of NRS 197.110 for a state employee to prepare campaign reporting forms for the public officer who employs him and who is running for reelection because the benefit from the filing of the forms accrues to the State in furthering its interest in preventing corruption or the appearance of corruption in the political process and not to the public officer or the state employee.

As noted previously in this opinion, classified state employees are also subject to the specific limitations on political activity set forth in NAC 284.770. This provision, in relevant part, prohibits a classified employee from “[e]ngag[ing] in political activity during the hours of his state employment to improve the chances of a political party or a person seeking office” The term “political activity” is not defined for the purposes of this regulation. However, this regulation and other similar laws across the country, such as the Hatch Political Activity Act, 5 U.S.C.A. §§ 1501-1508 (West 1996), were enacted based on a determination that the partisan political activities of public employees must be limited for public institutions to function fairly and effectively. See, e.g., Bauers v. Cornett, 865 F.2d 1517, 1520-21 (8th Cir. 1989) (stating that Congress enacted the Hatch Act in 1940 to remedy political party corruption and coercion that was prevalent in federally-funded programs); Oklahoma v. United States Civil Serv. Comm’n, 67 S. Ct. 544, 553 (1947) (observing that “[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship”). As noted previously, the filing of campaign reporting forms, which is required by statute, is not for a partisan political purpose. Instead, the filing of those forms is for the purpose of furthering the State’s interest in preventing corruption or the

appearance of corruption in the political process. Therefore, it is the opinion of this office that NAC 284.770 does not prohibit a classified state employee from preparing campaign reporting forms for the public officer who employs him and who is running for reelection because the purpose for the filing of the forms is to further the State's interest in preventing corruption or the appearance of corruption in the political process, which is not a partisan political purpose.

The code of regulations for classified state employees allows each appointing authority, with the approval of the Personnel Commission, to prohibit its classified employees from engaging in activities that are "inconsistent, incompatible, or in conflict with their duties as employees, or with the duties, functions, or responsibilities of their appointing authorities or agencies by which they are employed." NAC 284.738. For example, the policy adopted by the State Controller on political activity by employees of the Office of the State Controller provides that "[n]o employee shall engage in political activity in or about the State Controller's Office during the hours of state employment." Nevada State Controller: Office Policies and Procedures, at p. 1 (2001). By providing a blanket prohibition on political activity during hours of employment, the policy of the State Controller is more restrictive than NAC 284.770, which only, in pertinent part, prohibits such political activity when it improves the chances of a political party or a person seeking office. However, because it is the opinion of this office that the preparation of campaign reporting forms by a public employee for the public officer who employs him does not constitute "political activity" for the purposes of NAC 284.770, it follows that such conduct also does not constitute "political activity" under a more restrictive policy.

CONCLUSION

There are several provisions of state law that, depending on the circumstances, may prohibit a state employee from engaging in political activities during hours of state employment or at other times. First, under the state personnel system, a classified state employee is prohibited from engaging in many political activities during the hours of his state employment. However, on his own time, no such prohibition exists, and the classified state employee may engage in whatever political activities he chooses so long as he is not using such political activities to secure a preference for a promotion, transfer or increase in pay and is not directly or indirectly soliciting or receiving political contributions from subordinates who are in the same department. In contrast, under the state personnel system, an unclassified state employee may engage in political activities during hours of state employment or at any other time, unless those political activities are otherwise prohibited by another statutory provision.

Under the Nevada Ethics in Government Law, a state employee may not engage in political activities during hours of state employment or at any other time if those political activities involve using governmental time, property, equipment or other facility to benefit his personal or financial interest and do not otherwise qualify for the limited use exception codified in subsection 7 of NRS 281.481. In addition, under subsection 2 of NRS 197.110, a state employee may not engage in political activities during hours of state employment or at any other time if those political activities involve employing or using any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another.

Finally, it is the opinion of this office that subsection 7 of NRS 281.481, and subsection 2 of NRS 197.110 do not prohibit a state employee from preparing campaign reporting forms for the public officer who employs him and who is running for reelection because the interest or benefit served by the filing of the forms is the State's interest in preventing corruption or the appearance of corruption in the political process and not the personal or financial interest of or private benefit to the public officer or the state employee. In addition, it is the further opinion of this office that such activity by a public employee does not violate NAC 284.770 or a more restrictive policy on political activity by state employees, such as the policy adopted by the Office of the State Controller, because the purpose for the filing of the campaign reporting forms is to further the State's interest in preventing corruption or the appearance of corruption in the political process, which is not a partisan political purpose.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,
BRENDA J. ERDOES
Legislative Counsel
SCOTT G. WASSERMAN
Chief Deputy Legislative Counsel
By KEVIN C. POWERS
Principal Deputy Legislative Counsel
By EILEEN O'GRADY
Principal Deputy Legislative Counsel

Senator Raggio moved that the Senate adjourn until Saturday, December 4, 2004, at 8:30 a.m.

Motion carried.

Senate adjourned at 5:49 p.m.

Approved:

LORRAINE T. HUNT
President of the Senate

Attest: CLAIRE J. CLIFT
Secretary of the Senate