REPORT OF INVESTIGATION

Complaint Number 15-085

NOTICE CONCERNING CONFIDENTIALITY

This report of investigation concerns an alleged violation of Chapter 112, Part III, Florida Statutes, or other breach of public trust under provisions of Article II, Section 8, Florida Constitution. The Report and any exhibits may be confidential (exempt from the public records law) pursuant to Section 112.324, Florida Statutes, and Chapter 34-5, F.A.C., the rules of the Commission on Ethics. Unless the Respondent has waived the confidentiality in writing, this report will remain confidential until one of the following occurs: (1) the complaint is dismissed by the Commission; (2) the Commission finds sufficient evidence to order a public hearing; or (3) the Commission orders a public report as a final disposition of the matter.

STATE OF FLORIDA
COMMISSION ON ETHICS
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

REPORT OF INVESTIGATION

TITLE: COLLEEN REILLY
Former Interim
Orange County Clerk of Court
Orlando, Florida

COMPLAINT NO.: 15-085
Exhibits A through C

INVESTIGATED BY: Ronald D. Moalli

Distribution: Commission on Ethics
Respondent
Advocate
File

Releasing Authority: Executive Director

9/4/15
Date

* * * *

REPORT OF INVESTIGATION
COMPLAINT NO. 15-085

(1) The complaint in this matter was filed by the State Attorney for the Ninth Judicial District, Jeffrey Ashton, who alleges that Colleen Reilly, while serving as the Interim Clerk for the Orange County Clerk of Court, violated the Code of Ethics for Public Officers and Employees.

(2) Mr. Ashton alleges that Ms. Reilly obtained substantial funds from Orange County, which she claimed as a severance package, while still employed as Interim Clerk of Court.

(3) The Executive Director of the Commission on Ethics noted that based upon the information provided in the complaint, the allegations were sufficient to warrant a preliminary investigation to determine whether the Respondent's actions violated Section 112.313(6), Florida Statutes (Misuse of Public Position), and Section 112.313(7)(a), Florida Statutes, (Conflicting Employment or Contractual Relationship).

(4) Mr. Ashton reported that his office received the results of a Florida Department of Law Enforcement (FDLE) investigation into certain actions taken by former Interim Clerk for the Orange County Clerk of Court, Colleen Reilly, and her attempts to obtain substantial funds from that agency, allegedly due her as a severance package, while still employed. Mr. Ashton wrote that although his office could not find evidence sufficient to warrant the filing of criminal charges, "the conduct of Ms. Reilly appears to be rather self-serving and appropriate for examination by the [Ethics] Commission." Mr. Ashton included the FDLE investigative report in the complaint, which details the allegations against Ms. Reilly.

(5) According to the FDLE Investigative Summary for case number OR-14-0092, completed by Special Agent (SA) Julie Bressin and attached as pages 4 through 43 of the complaint, on April 16, 2014, FDLE received a request from the then-Orange County Clerk of Court Eddie Fernandez to investigate misconduct allegations against Ms. Reilly. (Due to the May 2013 death of Clerk Lydia Gardner, Governor Rick Scott appointed Mr. Fernandez in January 2014 to serve as the Orange County Clerk of Court until a special election could be held in November 2014.) The allegations pertained to the acceptance of a severance payout while Ms. Reilly continued to be employed at the Clerk's Office.

(6) SA Bressin's investigation found that on May 8, 2013, then-Clerk of Court Lydia Gardner died after an illness. As a result of Ms. Gardner's death, on the evening of May 8, 2013, Clerk's Office Chief Administrative Officer (CAO) Colleen Reilly, was sworn in as Interim Clerk of Court by then-Chief Judge Belvin Perry of the Ninth Judicial Circuit of Florida, and on May 9, 2013, an "Order Appointing Colleen Marie Reilly Clerk AD Interim for Orange County Pursuant to Section 28.09, Florida Statutes, and the Inherent Authority of the Court" was executed by Judge Perry. Ms. Reilly, although officially classified in the Clerk's Office records as on a leave of absence as CAO during her term as Interim Clerk, performed the duties of the Clerk and CAO for the duration of her tenure at the Clerk's Office. She served in this position until Mr. Fernandez's appointment as Clerk in January 2014.

(7) SA Bressin's report states that then-Clerk Fernandez, prior to contacting FDLE, retained a private law firm, Rumberger, Kirk & Caldwell, to review the Clerk's Office records pertaining to severance payouts to Ms. Reilly and Orange County Clerk of Court then-General Counsel Stephan Carter. At the recommendation of the law firm, and with the permission of Clerk Fernandez, Thomas Gonzalez, Esq., was hired as an outside party to conduct a neutral objective investigation of the Clerk's office records relating to the severance payouts. Mr. Gonzalez's report, which includes his "Identified Issues and Questions Raised" on the matter, is appended as Exhibit A. The result of Mr. Gonzalez's investigation prompted then-Clerk Fernandez's request that FDLE conduct a criminal investigation.

(8) During the course of her investigation, SA Bressin interviewed four Clerk's office employees, Tracy Gasinski, Payroll Administrator; Joann Gammichia, Director of Talent Management (Human Resources); Cathi Balboa, Director of Administrative Services; and Mike Murphy, Chief Financial Officer (CFO). Each of these witnesses agreed that their audio recorded statements to SA Bressin could be used as their statements of facts for this Commission on Ethics investigation

(9) A review of Payroll Administrator Gasinski's audio recorded sworn statement revealed that on May 9, 2013, then-General Counsel Carter visited her in her work area and called her into a spare office. According to Ms. Gasinski, Mr. Carter informed her that as a result of Ms. Gardner's death, his and Ms. Reilly's employment agreements with the Clerk's Office were terminated and they should receive the "payout" due to them according to the terms of their agreements.

(10) SA Bressin established that in December 2009, Ms. Reilly was hired by Clerk Gardner as the Clerk's Office CAO. As a result of her employment, Ms. Reilly entered into an "Employment Agreement" between "the Orange County Clerk of Courts (Clerk), a constitutional officer of Florida, and Colleen M. Reilly." The term of the agreement began on December 7, 2009, and shall "continue as long as Lydia Gardner remains Clerk." According to paragraph six, "Termination of Employment," of the agreement: "For the purposes of this paragraph, employment shall be considered terminated by the Clerk when employment with the Clerk's office ends for any reason other than voluntary resignation by the CAO." A copy of this agreement is appended as Exhibit B.

(11) Ms. Gasinski stated that Mr. Carter informed her that Ms. Reilly, as the Interim Clerk of Court, approved the payouts, and that he insisted numerous times that the payouts be direct deposited into their bank accounts. She said that he also informed her that the payout was a confidential matter, instructing her to keep it quiet. Ms. Gasinski noted that direct deposit of a "special payroll," something other than the normal payroll, is not the normal method of operation in the Clerk's Office. She explained that a special payroll is always administered through a paper check, not direct deposit. Ms. Gasinski stated that she processed the request within 24 hours and based on her interpretation of the employment contract, a copy of which she had in her files, she sent the funds directly to Ms. Reilly's bank account.

(12) Payroll documents reflect that on May 9, 2013, Ms. Reilly received, in a special payroll, a gross pay amount of $92,816.24, which included severance and bonus pay, and a

vacation hours buyout. After tax and investment deductions her net payout amount was $65,307.87.

(13) Ms. Gasinski reported that approximately two days after Ms. Reilly received her severance payout, Mr. Carter informed her that he and Ms. Reilly were not happy with the amount of money she deposited in their accounts, and that they believed they were due more. She explained that she based the payout amounts on her interpretation of their agreements. She related that she calculated Ms. Reilly's payout amount equal to six months of salary. Ms. Gasinski said Mr. Carter and Ms. Reilly wanted the time calculated by the days, 180 days, versus six months, which would increase their payout amounts. She said Mr. Carter also believed their sick leave payout was incorrectly calculated. Because of Mr. Carter's assertion that they deserved more money than what was originally paid to them, Ms. Gasinski said she voided the deductions from the original payouts, and within two days, Ms. Reilly had reimbursed the Clerk's Office for her payout amount of $65,307.87 through a personal check.

(14) Ms. Gasinski related that when Mr. Carter returned and stated he and Ms. Reilly should have received more money, she began to feel uncomfortable with the matter. Ms. Gasinski stated that one reason she was uncomfortable was that she had never arranged a payout in the manner in which this payout occurred. She said there is always paperwork from Talent Management – an Employee Change Notice (ECN) – but there was no ECN for Ms. Reilly. Ms. Gasinski explained that she proceeded with the original payout without an ECN because the situation was presented to her through employees with the highest authority in the Clerk's Office. Because of her discomfort, Ms. Gasinski said she contacted the Director of Talent Management, Joann Gammichia, and asked her for assistance.

(15) Ms. Gasinski related that during her next contact with Mr. Carter, she informed him she had notified Ms. Gammichia of the special payout and she (Gasinski) was instructed by Ms. Gammichia not to proceed with the new payout without the proper documents from Talent Management. She said Mr. Carter became upset that Ms. Gammichia was involved and informed her that he would meet with Ms. Gammichia about the situation. Ms. Gasinski stated that approximately two weeks later, on or around May 23, 2013, after an ECN was signed, she processed new payout checks, but back-dated the checks to May 10, 2013. She explained by e-mail that she back-dated the checks to May 10, 2013, because that was when Mr. Carter originally requested the payout, soon after Clerk of Court Lydia Gardner's death. (In a May 24, 2013 e-mail to Ms. Reilly, Ms. Gasinski reported that because their payroll computers would not accept a May 9, 2013, date for the second payout check disbursements, she dated the second payout checks on May 10, 2013.) She stated that Mr. Carter requested that 56 hours be left in his vacation leave account and that he be paid for 100 percent of his sick leave, which is against Clerk's office policy. She explained that, according to policy, employees receive only a 25 percent sick leave payout upon ending employment with the Clerk's Office. She also reported that she originally had calculated the salary payout payment for six months of his salary. In the second payout, because they acquiesced to Mr. Carter's interpretation of his contract, he was paid an amount equal to what he would have received during the 180 days immediately following the date such termination took effect (Exhibit page B6, section six, "Termination of Employment," of Mr. Carter's contract). Ms. Gasinski reported that after she processed the payout checks to Mr. Carter and Ms. Reilly on May 23,

2013, her involvement in the matter ended. Ms. Gasinski reported that subsequent to Ms. Reilly receiving the funds related to the agreement, she continued working as the Interim Clerk, and was paid her normal salary.

(16) According to the Clerk's Office payroll documents, on May 10, 2013, Ms. Reilly received a gross amount for a severance and bonus payout of $115,329.60. She did not receive a payout for her vacation and sick leave balance. She received a net special payout of $82,152.08.

(17) Director of Talent Management Joann Gammichia's audio recorded statement to SA Bressin, and her personal notes from the time of the event, disclose that on or about May 21, 2013, Ms. Gasinski called her and asked for assistance with calculating termination payouts for Mr. Carter's and Ms. Reilly's agreements arranged by former Clerk Gardner. Ms. Gasinski explained to Ms. Gammichia that Mr. Carter was not satisfied with her calculation of the payout amounts and that he requested recalculation in a manner that would result in more being paid out to him and Ms. Reilly. Ms. Gasinski said she had questions about the transaction but Mr. Carter was pressuring her to get the paperwork completed by the end of day because Ms. Reilly wanted it completed before Mr. Carter left work that day. Ms. Gammichia said that she was "shocked" at the situation and instructed Ms. Gasinski not to write checks to Mr. Carter or Ms. Reilly. She explained that the payout request was unusual because all authorizations for payment are first reviewed by Talent Management through an ECN that requires several signatures prior to the matter being received in payroll. She stated that, in this case, Mr. Carter took their payout requests directly to payroll, bypassing Talent Management.

(18) Ms. Gammichia noted that, prior to contacting her, Ms. Gasinski contacted her department head, CFO Mike Murphy, to ask for his assistance. Mr. Murphy, Ms. Gammichia discovered, informed Ms. Gasinski that because there was an employment agreement in place, the matter was not payroll-related but rather an employment matter, and he advised Ms. Gasinski to call Talent Management. Ms. Gammichia added that when Ms. Gasinski first contacted her, she did not know Ms. Gasinski previously had administered payouts to Mr. Carter and Ms. Reilly and that those payouts had been voided. She said she did not learn of the first payout until much later.

(19) According to Ms. Gammichia, while Ms. Gasinski was communicating with her, Mr. Carter, through e-mail, was telling Ms. Gasinski how to calculate the payout and notifying her that Ms. Reilly wanted the matter completed by the end of that day. Ms. Gammichia reported that after Ms. Gasinski informed Mr. Carter that she had been instructed by Ms. Gammichia not to complete the transaction until she received further instruction from Talent Management, Mr. Carter came to her (Gammichia's) office and they had a "confrontation." She said he was "hostile and threatening to her" and informed her that she was in direct violation of an order from the Clerk and that she had no authority in a private matter. Ms. Gammichia said she informed Mr. Carter that no checks would be written without proper paperwork first being completed. She said Mr. Carter was upset and told her she had no right to interfere and demanded that she "get out of his personal business." He told her the matter

was not an employment issue, it was a separate personal issue and that the paperwork she (Gammichia) required was unnecessary.

(20) Ms. Gammichia stated that when Mr. Carter left her office she immediately contacted her supervisor, Cathi Balboa, who came to her office. She said she informed Ms. Balboa of the matter and of Mr. Carter's threatening temperament. Ms. Gammichia stated they discussed the situation, reviewed the agreements, and came to the conclusion that the payout request was "out of line." Because there was so much money involved, she continued, they decided to call Ms. Reilly, who was at home sick that day. According to Ms. Gammichia, Ms. Reilly was confrontational and upset that she and Ms. Balboa were involved in the matter, and told them to "butt out." Ms. Gammichia stated that after they ended their conversation with Ms. Reilly, they spent more time reviewing the agreements. She said that, because she and Ms. Balboa interpreted the agreements differently than Mr. Carter and Ms. Reilly, they were uncomfortable with the situation. They believed the contract was a termination of employment severance payout and not a contract termination payout. Ms. Reilly and Mr. Carter, she maintained, were not terminating their employment. Ms. Gammichia said that the next day she and Ms. Balboa decided to again approach Ms. Reilly with their concerns. On the morning of May 22, 2013, she continued, as they were preparing for that meeting, they were notified Ms. Reilly scheduled a meeting that would include Ms. Balboa, Mr. Murphy, and Mr. Carter.

(21) Ms. Gammichia reported that after that meeting, Ms. Balboa informed her that Ms. Reilly ended both contracts and because she (Reilly) determined that they should be paid out per the terms of the contract, they were to proceed with the payout as requested. Ms. Gammichia stated that in order to have documentation of the payout, she initiated ECNs because Ms. Reilly and Mr. Carter refused to do so. She reported that Ms. Reilly at first refused to sign an ECN that included the details of the payout. She related that she generated an ECN for Ms. Reilly, which stated an "action code 24 (termination), and included the following comment: "End of contract payout of $83,295.20 180 day salary per contract. Vacation and sick leave will remain intact." Ms. Gammichia maintains that the ECN was changed at Ms. Reilly's request to read: "action code 25 (other), with the comment, CAO on leave of absence while serving in court appointed position." Ms. Gammichia noted that Ms. Reilly signed this ECN.

(22) Ms. Gammichia stated that the ECN originally generated for Mr. Carter stated "action code 25 (other) with the comment, "End of contract payout of $106,449.01 ($23,980.50 vacation, $5,624.51 sick, $76,844.00 180 days salary per contract). Carried over 56 hour of vacation." She stated that Mr. Carter's ECN was changed at the request of Ms. Reilly to read "action code 25 (other)," with the comment, "Rate of pay now including deferred compensation."

(23) Ms. Gammichia stated that she was concerned about the transaction because both parties were still employed after the payout and both became confrontational when questioned about the agreements. She maintains that they, as employees, had no recourse because Mr. Carter was the Clerk's attorney and Ms. Reilly was the Clerk. She stated that staff did not

have the ability to consult with an "outside" attorney and because they were being advised by their own attorney (Carter), they felt "trapped."

(24) This Investigator asked Ms. Gammichia through e-mail whether there was a written policy in 2013, during the time of this event, dictating the use of the ECN or whether a procedure was in place without policy direction. Also, she was asked whether, if it was an office procedure not directed by policy, all managers were aware of the procedure. Ms. Gammichia responded:

> It is definitely our current practice, and has been our practice for years to use the Employment Change Notice (ECN) for all job assignments, salary changes, and employment status. It is our central and main form to document movement in people and pay. All managers were aware of this and always followed this practice. Talent Management would not change the file, salary, job title, reporting relationship, etc:, without it. In fact, when it was discovered that the CAO and the Attorney were receiving this unusual payment, I insisted an ECN be completed on each of them and signed by the CAO for documentation and the file. So even the CAO understood we needed an ECN completed as part of our process. You will see in the attached Compensation Manual from 2013, there is a reference to the ECN (Employment Change Notice) on page 21. In addition, in April 2013, we added the Addendum about communication regarding pay changes. While it does not specifically say use the ECN form, it was referring to that when it talks about the dates needing to be on the form.

(25) The section on page 21 of the Compensation Manual, in which Ms. Gammichia referred to concerning ECNs reflects, "Any salary increase outside the guidelines must be approved by the Clerk, CAO, or designee in the form of a signature on the Employee Change Notice (ECN) or Email accompanying the forms."

(26) Director of Administration Cathi Balboa's personal notes and interview with SA Bressin disclose that on or about May 21, 2013, during her lunch break, she received a telephone call from Ms. Gammichia reporting that Ms. Gasinski informed her that she was being coerced into something she believed was not right. Apparently, Mr. Carter told Ms. Gasinski to convert him to a regular employee, in place of the employment contract, and "pay him out." Ms. Balboa discovered (through Ms. Gammichia) that Mr. Carter told Ms. Gasinski that Ms. Reilly had authorized him and her to be "paid out" under the terms of their employment agreements. Ms. Balboa stated that her first thought was, "Are they both leaving?" She stated that she asked this because she had seen the contract and interpreted it as a severance contract. She explained that there were two points that led her to believe the agreements were severance contracts. If the person under contract wanted to leave for employment elsewhere, he or she was required to give 60 days notice, and, if dismissed, they would receive six months of salary as a severance. She also reported that Ms. Reilly's payout request of Ms. Gasinski was based on verbal orders, which is against Clerk's Office policy.

(27) Ms. Balboa stated that the main reason she became involved was because the situation was highly irregular, and the Clerk's Office has a policy against threatening or bullying employees, which was why Ms. Gasinski had contacted Ms. Gammichia. She said Ms. Gasinski apparently was being threatened and coerced by Mr. Carter to act against Clerk's Office policy. Ms. Balboa said it was reported to her because she is in the chain of command.

(28) Ms. Balboa stated that she and Ms. Gammichia decided to call Ms. Reilly, who was not at work that day, to ask if she was aware of the situation. She said that the first reaction of Ms. Reilly was to angrily ask how they became involved. Ms. Balboa related that Ms. Reilly informed them she had authorized the payout and instructed them to "stay out of it." She reported that she and Ms. Gammichia met again that day in an effort to make sense of the amount requested for the payout. She explained that they were concerned also about other irregularities, such as Mr. Carter request for a vacation buy out, which is not offered to employees who remained employed. Also, she continued, they do not pay out sick leave time in the manner Mr. Carter was requesting. Ms. Balboa explained that, upon termination of employment, an employee is compensated for 25 percent of the accumulated sick leave, not the 100 percent Mr. Carter was requesting. She related that although she did not know if what was occurring was illegal, she believed it was unethical and they had no one "to turn to" because it was being implemented by the two people at the highest level in the organization.

(29) Ms. Balboa recalled that the next day, May 22, 2013, Ms. Reilly called for a meeting that included her (Balboa), Ms. Reilly, Mr. Murphy, and Mr. Carter. She said Ms. Reilly was angry that she (Balboa), Mr. Murphy, and Ms. Gammichia were involved in the matter. Ms. Reilly started the meeting, she continued, by asking her and Mr. Murphy what they believed their role was in the organization, and then asked them where their loyalties lay. Ms. Balboa said she told Ms. Reilly that such matters are not completed without proper documentation and that employees would be disciplined, if not terminated, for something much less than the payout involved in this matter. She said she also suggested that they consult with the Clerk's Office contracted labor attorney. Ms. Balboa explained that the Clerk's Office contracted with an outside labor attorney because Mr. Carter had always stated that employment law is a segment of the law in which he has no expertise. She stated that matters such as this are always reviewed by the labor attorney. According to Ms. Balboa, Ms. Reilly told them they could not consult with the labor attorney because it was a "private" matter.

(30) In conclusion, Ms. Balboa stated that she believed the contract in question was a contract for termination and that neither Mr. Carter nor Ms. Reilly actually was terminating their employment with the Clerk's Office. She believes this transaction might have gone undetected if Mr. Carter had not gone back to Ms. Gasinski and pressured her for more money.

(31) Chief Financial Officer Mike Murphy's interview with SA Bressin reflects that he was first notified of this matter by Ms. Gasinski in May 2013, when she asked for his assistance. She told him Mr. Carter approached her about a payout relative to termination of a contract he and Ms. Reilly had with former Clerk Gardner. He said that Ms. Gasinski was uncomfortable because the normal documentation from Talent Management that usually accompanied payment matters was not present. Mr. Murphy reported that all movement and payment

matters within the Clerk's office are routed through Talent Management and are accompanied by an ECN.

(32) Mr. Murphy related that he had not seen the agreements in question until Ms. Gasinski gave him copies. He stated that he interpreted them as termination of employment contracts. He said he suggested to Ms. Gasinski that she contact Ms. Gammichia in Talent Management and also the Clerk's Office labor attorney. Mr. Murphy noted that he was not aware until much later that there had already been a payout and a voiding of that payout.

(33) Mr. Murphy reported that his next involvement was when Ms. Reilly called for a meeting with him, Ms. Balboa, and Mr. Carter. Although he could not recall the date of the meeting, he said it was not long after his meeting with Ms. Gasinski. Mr. Carter recalled that Ms. Reilly was not happy that other people in the Clerk's Office had become aware of the matter, relating that it should have been a "cut and dry" situation. He said she and Mr. Carter were upset that their authority was being questioned. He stated that he and Ms. Balboa brought their concerns to Ms. Reilly's attention, informing her that the matter should have gone through the proper channels. He reported that Ms. Reilly asked where their allegiances were within the Clerk of Court's Office. Mr. Murphy related that Ms. Reilly told them that when Ms. Gardner died, the agreement was terminated. Because there was a termination, she continued, they were allowed the payout and Mr. Carter informed them that this is how they were going to proceed. Mr. Murphy related that Mr. Carter also said that because he was an attorney they were not to contact an outside attorney for another opinion. After the meeting occurred, he continued, the employees acquiesced to Ms. Reilly and Mr. Carter's interpretation of the contract and Ms. Gasinski was instructed to process the checks. Mr. Murphy stated that his job was to make sure the funds were accounted for, not determine the validity of the contract.

(34) Mr. Murphy stated that he assisted Ms. Gasinski with the calculations and instead of calculating the payout for six months of severance, they calculated the payout for 180 days, as Mr. Carter instructed. He also stated that Mr. Carter received a vacation buy-out, but left 56 hours in his vacation leave bank, and received 100 percent of his sick leave, which is against the Clerk's Office policy of paying employees only 25 percent. Mr. Murphy reported that Mr. Carter continued working and receiving a normal paycheck after receiving his special payout, which he believed was a problem because he interpreted the agreement as a termination of employment contract.

(35) Mr. Murphy stated that he had no contact with Ms. Reilly or Mr. Carter concerning this matter other than the meeting he attended with them and Ms. Balboa.

(36) On August 22, 2014, SA Bressin received a signed statement from Ms. Reilly through an e-mail via attorney Amy Tingley. As reflected on page 37 of the complaint, Ms. Reilly wrote, in part:

> At the time of her [Gardner's] death, I believed the contract to be terminated. This was consistent with my understanding of Lydia's intent, and the advice of Lydia's staff legal counsel, Stephen Carter.

> Lydia placed complete trust in Mr. Carter, a former judge, and sought his counsel on all contract issues. She often instructed staff, in meetings, that Mr. Carter's word would always be her final position and the position of the office. I had no reason not to place the same trust in his legal advice, particularly at such a difficult time.
> In May 2013, I tragically lost my boss and friend. Upon her death, the contract with Lydia Gardner ended. I was appointed to the Interim Clerk of Court role. I understood I would, in all likelihood, be leaving the office as soon as the governor made an appointment.
> In my new role as Interim Clerk, I was without deferred compensation, benefits and salary attached to my contract as CAO with Lydia Gardner.

(37) SA Bressin reported that Ms. Reilly (as well as Mr. Carter) eventually reimbursed the Clerk's Office for the payouts, "as their actions came to light."

(38) According to Clerk's Office records, Ms. Reilly reimbursed the Clerk's Office through a cashier's check on April 9, 2014.

(39) Ms. Reilly, through her attorney Amy Tingley, declined to be interviewed for this investigation.

(40) In response to a request for an interview for the Commission on Ethics investigation, Mr. Carter related by e-mail that he would not provide a statement for this investigation. He wrote, "The best I can offer is the letter from Attorney Richard Rhodes to the State Attorney."

(41) On September 10, 2014, Mr. Rhodes submitted a letter to State Attorney Jeff Ashton on behalf of Mr. Carter as a response to the FDLE investigation. That letter is appended as Exhibit C.

(42) On March 26, 2014, Mr. Carter provided a statement to Mr. Gonzalez who conducted an investigation for then-Clerk Fernandez. A summary of that interview is included in Mr. Gonzalez's report starting on Exhibit A, page A8. During that interview, Mr. Carter addressed his and Ms. Reilly's decisions concerning their contracts with the Clerk's Office. Mr. Gonzalez summarized his conversation with Mr. Carter concerning this specific matter, which is reflected on Exhibit A, page A10.

END OF REPORT OF PRELIMINARY INVESTIGATION

EXHIBIT A

EXHIBIT A

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KIRK & CALDWELL

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April 1, 2014

Honorable Eddie Fernández
Orange County Clerk of Courts
Orange County Courthouse
425 North Orange Avenue
Orlando, Florida 32801

Re: Orange County Clerk of Courts
In re: Personnel Matters

Dear Clerk of Courts Fernández:

You asked our firm to independently review and evaluate payments made in 2013 to Colleen Reilly and Stephan Carter, employees of your office. You were made aware of these payments after your appointment as Clerk of the Circuit Court for Orange County. Our assignment was to review and evaluate the payments, using independent judgment about the propriety or impropriety of the payments, and to recommend further action, if necessary, without any prejudgment.

We initially reviewed documents you provided to us. We determined that an independent fact-finder would assist in our investigative efforts and provide a second level of review. We retained an experienced attorney in government personnel matters, Tom Gonzalez, for this task. Mr. Gonzalez' report is attached to this letter. We interviewed Mr. Gonzalez and reviewed the report he provided, researched the law in the areas raised by the issues, and provide the following report.

We will not repeat the facts described and discovered by Mr. Gonzalez here nor reiterate the statements contained in the documents reviewed. The intent of this letter is to provide our opinion about the propriety or impropriety of the actions taken by Ms. Reilly and Mr. Carter, and provide you with guidance and recommendations for action.

In City of Coral Gables v. Coral Gables, Inc., 160 So. 476 (1935), the Florida Supreme Court observed:

> No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and

> duty and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. Id. at 479.

The actions taken by Ms. Reilly and Mr. Carter violate this basic principle and others embodied in Florida law. See, for example, Section 112.312(8), Florida Statutes ("'Conflict' or 'conflict of interest' means a situation in which regard for a private interest tends to lead to disregard of a public duty or interest"). Even if the actions were undertaken negligently or through the exercise of mistake, rather than intent, the lack of judgment and the irresponsible deficiency in due diligence leads us to the conclusion that there are grounds to terminate these senior employees of your office.

We learned, importantly, that both Ms. Reilly and Mr. Carter had competent, long-term, outside counsel on retainer for employment matters. Neither Ms. Reilly nor Mr. Carter identified the conflict of interest issue in executing payments to themselves which, at a minimum, should have raised a question of whether the payments were proper or not. Ms. Reilly and Mr. Carter did not seek the advice of independent counsel to determine the propriety of the payments. Staff at the clerk's office confirmed that Mr. Carter asked for the payment one day after Ms. Gardner passed away.

Mr. Carter, as an attorney, had a duty to scrutinize the payment to Ms. Reilly as counsel for the Clerk's office and avoid the appearance of a conflict of interest by referring the matter of his own payment to outside counsel or by documenting the possible conflict of interest to Ms. Reilly and advising her about the right and ability to seek outside counsel. The Rules Regulating the Florida Bar include this conflict of interest rule:

> **Rule 4-1.7. Conflict of Interest; Current Clients**
>
> **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer shall not represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

At a minimum, the question of whether Mr. Carter could have represented the Clerk's office with regard to the interpretation of his own payment should have been the subject of an intentional waiver by Ms. Reilly.

The Clerk of Courts has a Professional Standards Code of Conduct. The Code is not intended to address every possible situation one could be faced with as an employee of the

office. See Code, Summary, ("As a summary of basic principles, this review does not include all the rules and regulations that apply to every situation"). Still, many of the Code provisions are implicated by the conduct of Ms. Reilly and Mr. Carter:

A. Conflict of Interest:

5. If any possible conflict of interest situation arises, it shall be discussed promptly with the division management team so that a determination may be made as to whether a conflict of interest exists and, if so, how best to eliminate it.

C. Unethical Use of Influence:

1. Employees may not use their positions as employees of the Clerk to obtain or attempt to obtain any special privileges for themselves or for others.
2. Employees who are in a position to influence business decisions by the Clerk should refrain from forming personal economic relationships that appear to affect independent judgment.

D. Use of Funds:

1. Employees are personally accountable for Clerk funds over which the employee has control. An employee spending the Clerk's funds, or who receives reimbursement for personal money that was spent, should always be sure that the Clerk receives good value in return. An employee approving or certifying the correctness of a voucher/bill should have appropriate documentation and have determined that the purchases and amounts are correct.
2. The Clerk of Courts will not tolerate the following actions:
a. The use of funds or assets from the Clerk's Office for illegal or improper purposes is strictly prohibited.
b. The establishment of unrecorded funds or assets for any purpose.
c. False entries in Clerk books, records, or reports for any purpose.
d. Payments on behalf of the Clerk that were not approved or made with the intention or understanding that any part of such payment is to be used for any purpose other than that described by documents supporting the payment.
e. Any employee having information or knowledge of any unrecorded fund or asset or any act prohibited by the policy failing to promptly report the matter to their management team.

E. Records:

7. Business records shall always be prepared accurately and reliably. All reports, vouchers, bills, employment and payroll records, service records, court records, measurement and performance records and other essential data shall be prepared with care and honesty. A false or misleading report or record of measurement data is

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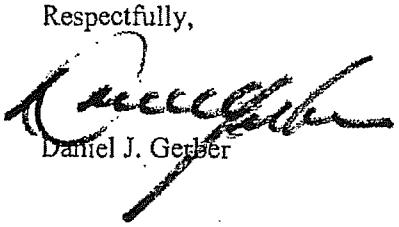
considered as serious as falsifying vouchers, financial data or records pertaining to the Clerk funds or property.

As Ms. Reilly and Mr. Carter are at-will employees, we do not need to conclude that any one of these principles was violated in order to recommend that termination is warranted. We bring these principles to your attention to point out that both Ms. Reilly and Mr. Carter had additional notice that the issues raised by their payments warranted heightened awareness of their obligations to your office and the public at-large before pursuing payment.

We recommend that your office notify the Florida Department of Law Enforcement to review this matter. We do not offer any opinion as to whether these events are properly subjects of FDLE review. FDLE is in the best position to make that decision. We are continuing to evaluate whether we must notify The Florida Bar with respect to Mr. Carter's actions.

Should you elect to do so, there are sufficient ground to terminate both employees. You should also demand full reimbursement of the payments made, separately from any severance obligations imposed upon your office by the employees' departure.

Respectfully,



Daniel J. Gerber

DJG:pac
Attachment

6715775.1

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MEMORANDUM OF INTERVIEW

DATE OF MEMORANDUM: March 28, 2014

SUBJECT: Payments to Colleen M. Reilly and Stephan W. Carter pursuant to Contracts between Reilly and Carter

PERSONS INTERVIEWED:

1. Colleen M. Reilly

2. Stephan W. Carter

DOCUMENTS REVIEWED:

1. Memorandum dated December 30, 2004, transmitting contracts (apparently for Stephan Carter and the then-Chief-Administrative-Officer, Howard Tipton, from Lydia Gardner to the COC HR and Financial Services Directors. Contains the statement, "These particular contracts are very similar in nature to those that Orange County has with their County Administrator and County Attorney and as with the County, do not change Howard[Tipton's] or Steve's status as permanent full-time employees."

2. "Orange County Clerk of Courts General Counsel to the Clerk Employment Agreement," between "the Orange County Clerk of Courts (Clerk), a constitutional officer of Florida," and "Stephan W. Carter, General Counsel to the Clerk," signed by Lydia Gardner, Orange County Clerk of the Courts (January 13, 2005) and Stephan W. Carter (January 10, 2005) ("GC Agreement").

> **Notes:** The agreement recites Carter's having served as Legal Counsel since June 24, 2003. The sixth "whereas" clause provides, "This contract of employment should expire on a date that provides flexibility and discretion for the next Clerk." The term of the agreement (Section 2) is described as beginning, "the first day of the first pay period of 2005 and shall continue until January 6, 2009."
>
> Section 6 of the Agreement provides:
>
> "Termination of Employment. This agreement may be terminated prior to its expiration as follows:
>
> The Clerk may declare this agreement terminated at any time, and such termination shall take effect immediately or on such later date as the Clerk may specify. The Clerk shall promptly pay to the General Counsel a sum equal to i) the salary and deferred compensation that is accrued but unpaid as of the date of the termination, plus ii) an amount equal to the pro rata portion of his salary for all accrued but unused leave time, plus, iii) and amount equal to the salary and deferred compensation that the General

Counsel would have received during the 180 days immediately following the date such termination takes effect, as if this agreement had not been terminated."

3. Untitled Document, Dated January 7, 2009, signed by Lydia Carter, Clerk of Courts and Stephan W. Carter, General Counsel. Although not titled, the document refers to the 2005 employment agreement.

Notes: The document expressly acknowledges that the 2005 contract "expired on January 5, 2009." It recites that the Clerk had intended to approve a new contract for Carter "with appropriate adjustments," refers to difficult economic circumstances making those adjustments inappropriate and concludes, "Therefore, we will continue operating under the same terms as before. The term of the contract will be extended indefinitely."

4. Undated "Orange County Clerk of Courts Chief Administrative Officer Employment Agreement," between "the Orange County Clerk of Courts (Clerk), a constitutional officer of Florida, and Colleen M. Reilly," signed by Lydia Gardner, Orange County Clerk of Courts, and Colleen M. Reilly, Chief Administrative Officer ("CAO Agreement").

Notes: There are no "whereas" clauses, but the agreement clearly is based on the General Counsel's agreement of 2005, with similar provisions being contained in like-numbered paragraphs.

The term of the agreement (Section 2) is stated as follows: "Term. The term of this agreement shall begin December 7, 2009, and shall continue as long as Lydia Gardner remains Clerk."

The agreement provides for "Termination of Employment" in Section 6, which contains the same language as Section 6 of the GC Agreement, with the exception that the CAO Agreement does not contain the words, "This agreement may be terminated prior to its expiration as follows:," which is included in the GC agreement, and the CAO Agreement which contains the additional provision, "For purposes of this paragraph, employment shall be considered terminated by the Clerk when employment with the Clerk's office ends for any reason other than voluntary resignation by the CAO."

5. Untitled Document signed by Stephan W. Carter, General Counsel, and Lydia Gardner, Clerk of Courts, on February 5, 2013 (the 2012 date by Carter's signature is apparently a typo).

Notes: The document begins with the statement, "Clarification of terms in General Counsel's Employment contract of January 13, 2005." It provided that an $11,000 payment provided for in the original contract will be considered compensation under F.A.C. 60s-6.001(15) [relating to pensions], not a fringe benefit, and also provided:

"As to the definition of termination in paragraph 6, for purposes of the contract, termination by the Clerk includes the ending of the employment relationship for any reason other than General Counsel's voluntary resignation."

6. Email dated May 28, 2013, from Reilly to Joann Gammichia, requesting "new ECNS [Employee Change Notices] for Steve Carter and [Reilly]." "Steve's should incorporate his deferred comp of $11,000 annually into his regular pay." "Mine should state that I'm on a leave of absence while I serve as Clerk ad Interim."

7. Employee Change Notice Form for Reilly, dated May 28, 2013, but made effective May 8, 2013, noting, "CAO is on leave of absence while serving in Court position. Court appointment attached." Signed by Reilly and moving Reilly from CAO to Clerk Ad Interim-Court Appointed and placing her on "legislative salary while interim."

8. Employee Change Notice Form for Carter, dated May 28, 2013, but made effective 5/13/13 (by strike through of printed date 5/20/13), noting, "Rate of pay now including deferred compensation," moving the hourly rate for GC from $68.60 to $73.88. Signed by Reilly.

9. Various typed documents reflecting the computation of payouts for Reilly and Carter. As to Reilly: Total Payout of $115,329.60 ($151,590.40 annual salary, $15,000 compensation pay, totaling $166,590.40 and producing an hourly rate of $80.09, which multiplied times 8 hours times 180 days produces a total payout of the sum described). As to Carter: Total Payout of $156,443.11 ($142,688.00 annual salary, $11,000 compensation pay, totaling $153,688 and producing an hourly rate of $73.88, which multiplied times 8 hours times 180 days produces a total of $106,387.20, plus $25,826.23 for unused vacation hours and $24,229.68 for unused sick hours, amounting to the sum described). The computations note that GC is leaving 56 hours in the sick leave bank. No payout of unused leave balances was made for Reilly.

10. Various typed documents reflecting computation of payouts to Reilly and Carter with different amounts, some made by handwriting. As to Reilly, a total payout of $83,295.20 (resulting from reduction in salary and compensation figures. As to Carter, a total payout of $106,449.01 (resulting from reductions to the payments for unused vacation and sick hours and the salary and compensation figures).

11. Employee Change Notice relating to Carter, undated and unsigned, effective 5/20/2013, showing "Term of contract + payout vacation sick 180 days salary compensation per contract terms. Carried over 56 hours of vacation" (struck out "End of contract payout of $106,449.01 (23,980.50) vacation, $5,624.51 sick, $76,844.00 180 days salary per contract").

12. Employee Change Notice relating to Reilly, undated and unsigned, effective 5/8/2013, showing termination, with comment, "Term of contract + payout of salary per contract terms). Vacation and Sick Hours will remain intact" (struck out End of contract payout of $83,295.20 180 day salary per contract).

13. Check stub for check dated May 10, 2013, payable to Carter, in amount of $99,125.45.

14. Check stub for check dated May 10, 2013, payable to Reilly, in amount of $82,152.08.

INTERVIEWS:

I interviewed Steven W. Carter and Colleen M. Reilly. Both interviews were conducted on Wednesday, March 26, 2014, between 4:30 p.m. and 6:30 p.m., in the Orange County Courthouse, Clerk of Court Room B.

Stephan W. Carter

I introduced myself and described myself as an outside counsel who had been asked to look into the specific matter of the payments by the Clerk of Court (Reilly) to him and herself. I informed Mr. Carter that I was not a law enforcement officer or official and had no official status other than as an attorney retained for the stated purpose. Mr. Carter agreed to proceed and asked if he could begin with a description of his professional history and employment by the COC and the circumstances of the termination/payout. I told him he could. He began with 1990. What follows is the result of Carter's statement, with questions interjected by me.

Carter's Employment by the Clerk of Court

Mr. Carter was a county court judge beginning in 1990. Prior to that he was a lawyer with Akerman Senterfitt and "had worked with Mel Martinez and Skip Dalton." He was a judge when he first met Lydia Gardner. She was on the School Board at the time and he remained friends with her thereafter. Mr. Carter ran for re-election in 1998 but lost. He returned to private practice. In 1998, Ms. Gardner told Carter that she was thinking of running to be the COC. She was elected, and was reelected in 1993. In that last year, Ms. Gardner asked Mr. Carter if he would consider becoming her GC (then titled "Legal Counsel") because there was a vacancy and she had some concerns about securing quality representation. Carter agreed to consider the position, but had several concerns/conditions for his acceptance. First, he wanted to be paid fairly and that was accomplished. Second, he was only willing to work for Ms. Gardner, not her replacement or any other person who might become Clerk of Court. Third, having given up his private appellate practice, which was starting to do well, he wanted to be protected against being let go or losing his position.

The GC Agreement

There were in his opinion two primary ways the last concern, protection against termination, could be addressed: a provision requiring six months notice before termination, or a contractual severance payment. This and his other concerns were ultimately addressed by the GC Agreement, which he entered into in 2005. The agreement was signed approximately a year and one-half after Mr. Carter had begun his employment (in June of 2003). Carter does not remember if Ms. Gardner had separate counsel advising her in connection with the agreement. He feels certain that she did, because that was her way of working, but does not remember who it was or if he or she was involved in the preparation of the contract. Asked if he prepared the agreement, Carter said he did not think he did, because he was not inclined by practice to use "whereas clauses" in contracts, and this one obviously had them. He did, however, obtain from somewhere a contract and "he filled in the blanks." That is, it was not a form but rather a contract that already had been used by someone else (See Document 1 above, the memorandum

from Ms. Gardner referring to the fact that the County used this same type of agreement for its administrator and general counsel). The essence of the GC Agreement, Carter feels, was that he would work for Lydia Gardner, COC, and not the office of the COC, that is his employment would last as long, but only as long as, Ms. Gardner was the Clerk and he would be paid severance if his employment ended for any reason other than his own voluntary resignation. When it was pointed out to Carter that the contract does in fact refer to the COC as the contracting party, not Lydia Gardner, that it was in this way different from the CAO agreement, which did reference Ms. Gardner in defining the contract's term, he acknowledged the distinction but repeated that his agreement to work for the COC was specific to Ms. Gardner.

The 2009 Memorandum

Carter continued in his employment beyond the end of the term of the GC Agreement, which was January of 2009. In that month, Carter and Gardner signed a document memorializing the Clerk's intention to have approved a new contract for Carter, with "upward adjustments," but because of the difficult economic times, that was not practicable so they would continue operating under the terms of the expired agreement, which would be "extended indefinitely." (Document 3). Having just been asked by the interviewer about the lack of the mention of Gardner as the only COC for whom he would work, Carter noted that in 2009 he realized that the GC Agreement was not clear in tying his employment specifically to her, or in providing for payment if he lost his position for any reason besides resignation. He wanted to change the contract to make these points more clear, but Gardner would not agree to do so, because of the economic circumstances and her resultant determination to hold the line on employment.

Carter did not remember who prepared the memorandum or whether an independent attorney was representing the Clerk in the discussion about the memorandum. He does not consider the memorandum an amendment of the GC Agreement, because it was the same contract.

Reilly's Employment by the Clerk and the CAO Agreement

Reilly came to the COC Office in late 2009. She was leaving a good job in Chicago and she too wanted security. Carter did create the contract she signed. (Document 4). It is essentially the same contract as the GC Agreement, but it does have some differences. These differences included a term for the contract that was in fact specifically associated with Gardner, the term being for "as long as Lydia Gardner remains Clerk." Additionally, Reilly's contract expressly provided that the agreement would terminate when Reilly's employment with the Clerk's office, "ended for any reason" except her resignation.

Carter's 2013 Memorandum

In 2013, Carter and Gardner signed another memorandum. (Document 5). This document treated that part of the GC Agreement which provided Carter with deferred compensation. The Florida Retirement System determined that those payments would not be included as compensation for determining an employee's pension benefit. "Lydia did not want

that," Carter said, and so she asked the FRS to reconsider. When it would not, Carter "asked [Gardner] to prepare a memorandum" characterizing the deferred income payments to be compensation and not a fringe benefit. Additionally, because of Carter's concern that Gardner "might not be there" the memorandum redefined termination of the agreement, to expressly include termination of the "employment relationship" as an event that would precipitate the payment of the severance.

COC Gardner's Death

After Lydia Gardner died, on May 8, 2013, Reilly became the interim clerk, on May 9, 2013. Carter said in his opening statement that the contract expired as of the date of Gardner's death, because his employment was specific to her and therefore, the agreement was "terminated." He volunteered the observation that the Clerk, and Reilly held the office at the time of which he spoke, was essentially a "sovereign" and was empowered to take such actions as she deemed appropriate, particularly in the area of procurement, subject to only the periodic vote of the people. Reilly and Carter discussed the matter. They considered a number of possibilities. Since the great majority of the Office comprised of persons associated with Gardner, they felt they might not be retained by the new Clerk. They considered taking the position that their contracts did not expire at Gardner's death and to ask the new Clerk to honor the agreement. But they realized that the part of the agreement which might authorize severance in the context of a change of administration was not clear. It was, Carter conceded, "debatable" whether severance would be owed if the new COC terminated Reilly's and Carter's employment. They concluded that they both worked for Gardner and that her death terminated the agreement. They therefore were entitled to the severance and, to remove the question from the control of the incoming COC, Reilly would terminate both of them while she, Reilly, was in office.

Reilly and Carter did not, however, terminate their employment relationship with the COC. To the contrary, Carter said that both Reilly and Carter continued to be at-will employees of the COC, even after their employment contracts were terminated. And as Gardner had expressly said in her memorandum of 2004 concerning Carter's contract, and as Carter reiterated in his interview, notwithstanding the agreements held by him and Reilly, they remained permanent full-time (at-will) employees of the COC.

Carter did not have the power to terminate his agreement, or to effect the payout. In fact, notes made by COC workers reflect Carter describing the payout as what "Colleen wanted." In fact, Reilly took both of the actions, the termination and the payout. Carter took the lead in obtaining the payout's computation and having the checks written.

Colleen M. Reilly

Ms. Reilly's interview was short. She previously had asked for time to arrange for legal representation for the interview. She changed her mind and agreed to appear without counsel. Following several questions, she declined questions that she considered to call for legal interpretation. She did confirm that when she made the decision to terminate the agreements it was with Carter's legal advice and she did not have or seek any other opinion on the appropriateness of that action.

Identified Issues and Questions Raised

Having reviewed the documents noted above and interviewed Reilly and Carter, I believe the following issues require consideration.

1. Reilly terminated the CAO and GC agreements. They were not declared to have expired. No other person or official caused the termination.

2. Reilly did not terminate her own or Carter's employment with the COC. After Reilly terminated the agreements, both she and Carter remained employed by the COC. Reilly was on a leave of absence. Carter was an active employee. Reilly and Carter took several actions consistent with continued employment and inconsistent with the end of employment. Reilly changed (increased) Carter's compensation by adding to his salary the annual amount that previously had been paid to him as a deferred compensation fringe benefit. That amount, $11,000.00, was provided not by COC policy or benefit program but as a product of the GC Agreement. It could not be paid without the contract and without the addition of its amount to Carter's salary, the value of it would not have been paid to him after "the termination." Additionally, when he took his leave payout that was part of his severance, he left some vacation hours (for which he could have been paid) in his leave bank. Neither vacation leave nor a salary increase would be of any use to Carter had his employment ended. Parenthetically, Carter's new salary rate ($73.88 per hour vs. the old rate of $68.60) was used to determine his payout figure. To this amount was added the $11,000.00 (prorated for the six month severance period) for deferred compensation that also was part of the payout figure. Thus it would appear that the $11,000.00 (prorated to the six month severance payment period) was paid twice to Carter. But Reilly certainly had the authority to raise his compensation. Unlike Carter, Reilly did not take her leave balance cash equivalences, even though they were part of her severance package under the agreement. This action was not consistent with termination but was consistent with continued employment. And in fact both were employed and are employed by the COC, confirming their common intentions to continue employment. In fact, after the "termination," no new paper work was created (other than the change notices described above). There was no hiring or rehiring. There was nothing to show a break in service. In fact, Reilly acted to retroactively create a leave of absence, apparently to confirm continued employment.

3. Because they remained employed, neither Reilly nor Carter can justify the payout of severance on any of the grounds for termination of the agreement provided for in their respective agreements. In the original and only CAO agreement, Section 6 provided that "For purposes of this paragraph, employment shall be considered terminated by the Clerk when employment with the Clerk's office ends for any reason other than voluntary resignation." Carter's GC Agreement did not contain a similar provision until 2013, when the memorandum of February 5, 2013 added, "As to the definition of termination in paragraph 6, termination by the Clerk includes the ending of the employment relationship for any reasons other than General Counsel's voluntary resignation." Both agreements provide that, "The Clerk may declare this agreement terminated at any time, and such termination shall take effect immediately or on such later date as the Clerk may specify." The additional language always included in the CAO Agreement and that similar language added to the GC Agreement, defining termination as the

ending of the employment relationship, eliminated the need for the Clerk to declare the contract terminated, that result occurring by virtue of an ending of employment for any reason other than resignation. But an end of employment would still be required, because otherwise there would be no termination and no basis for paying severance, because there would be no loss of pay.

4. Reilly's agreement, which included a specific durational term expressly tied to Lydia Gardner's tenure as Clerk, expired on Gardner's death. Therefore, by the time Reilly became the Interim Clerk, her agreement was no longer in effect. It could not be terminated, as it had expired. Moreover, the severance pay provided by the agreement, the payment of 180 days of compensation and deferred compensation that "would have been paid in the absence of the agreement's termination," would in the case of an expired contract, amount to zero, because there would have been no payments following the expiration of the contract's term.

5. Although Reilly's contract provided that the ending of her "employment with the Clerk's office," for any reason, would constitute a termination of the agreement requiring the payment of severance, that employment did in fact not end. Carter did not end his "employment relationship." As he noted, before, during and after his agreement he was and remained an at-will employee of the COC.

6. In his interview, Carter initially took the position that his contract, like Reilly's, expired upon the death of Clerk Gardner. This was given as one of the reasons for him and Reilly to act, namely the concern that because the contracts ended on Gardner's death, the new Clerk might not honor the agreement. In fact, he appears correct. The GC Agreement specifically stated as one of its intentions the provision of an expiration date that would protect the discretion and flexibility of the "future" Clerk with respect to employment of subordinates. The original agreement was to expire upon the end of Gardner's term in 2009. That agreement did in fact expire, as was noted in the 2009 memorandum signed by Reilly and Carter. The memorandum provided that the parties would operate under the expired contract's "same terms" and the term of the contract would be "extended indefinitely." But there was no demonstration that they also intended to have the contract survive the end of Gardner's tenure as Clerk. Moreover, the GC Agreement provided for severance pay only upon termination "prior to expiration." That provision was not changed by the 2009, or the subsequent 2013, amendment. Moreover, the fact that Reilly acted is evidence of a realization that the contracts expired. Had they not believed this to be the case, Reilly and Carter could have remained in the employment of the Clerk, as they in fact did, confident that the contract would protect them from loss of their positions, which was the exact peril that was sought to be avoided by having the agreements in the first place. That they felt compelled to act before the end of Reilly's term is proof of the intention of the agreements, namely that they were co-terminus with Gardner's tenure.

7. Neither agreement would provide severance payments if the agreement were terminated by resignation. In the case of Reilly, her termination of her own contract seems to be the equivalent of a voluntary resignation. Similarly, the termination of Carter's agreement with his consent, and at his suggestion and/or request is much more a voluntary act than a forced ending of employment or contract justifying severance. These conclusions would be especially strong if one took either contract as extending beyond Gardner's term and therefore providing a

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basis for continued employment that would have been available at the time they terminated their agreements.

8. Florida law, section 215.425(1) prohibits the payment of additional compensation to public employees "after the service has been rendered or the contract made." In the cases of both Reilly and Carter, they were employees at will of the COC and remained so after the termination of their agreements. They held that relationship before and after the termination of their agreements. The severance payout of the agreement was to pay them that which they "would have received" had they not been terminated. In fact they were paid what they would have received (increased in Carter's case by adding to his salary the amount of deferred compensation he had received under the GC Agreement) and in addition actually were paid for the same time period, in the same amounts, by virtue of their pre-existing at-will employment contract.

9. Additionally, the 2012 memorandum between Gardner and Carter took effect after the 2011 amendment to F.S. section 215.425(4)(a), which limits severance payments to an amount no greater than "twenty weeks of compensation" in any contract that was renewed or renegotiated after July 1, 2011. The payment of six months' severance would violate that prohibition as it would provide for severance in excess of that allowed under the amendment.

10. There appears to be no contractual basis for the payment to Reilly or Carter of severance payments paid while they remained employed.

11. Reilly's contract expired when Gardner died. There was therefore no contract which would bind the new COC or require the COC to pay the severance called for in the CAO Agreement. Carter's GC Agreement did not mention Gardner as the COC. But as noted, given the whereas clause stating the intention that "this contract of employment should *expire* on a date that provides flexibility and discretion for the next Clerk," and the establishment of that expiration date coincident with COC Gardner's term, it seems clear that the intention of the parties was that the agreement would not survive Gardner's tenure as Clerk of Courts. (Emphasis added).

12. Both agreements allow the Clerk to terminate the agreement "at any time." But not in the context of declaring the agreement terminated while employment is continued under the same terms and conditions as before and not after the contract has expired.

13. If the GC Agreement, based on the absence of express language tying its term to Gardner were read as being in effect until the end of the term of the COC, and therefore in effect after Gardner's death, it still could not be terminated by Carter's voluntary resignation or under circumstances in which he remained employed.

14. Given the several issues involved in the decision to terminate the agreements, the COC should have obtained independent advice on the legality and appropriateness of the actions.

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EXHIBIT B

EXHIBIT B

ORANGE COUNTY CLERK OF COURTS
CHIEF ADMINISTRATIVE OFFICER
EMPLOYMENT AGREEMENT

This agreement is made and entered into by and between the Orange County Clerk of Courts (Clerk), a constitutional officer of Florida, and Colleen M. Reilly. In consideration of the mutual covenants and promises that the parties set forth below, the parties agree as follows:

1. ***Employment of Chief Administrative Officer.*** The Clerk hereby employs Colleen M. Reilly as her Chief Administrative Officer (CAO), and Colleen M. Reilly hereby accepts such employment upon the terms and conditions hereinafter set forth.

2. ***Term.*** The term of this agreement shall begin December 7, 2009, and shall continue as long as Lydia Gardner remains Clerk.

3. ***Duties.*** The CAO shall perform all duties normal and customary to the position of CAO, plus all duties imposed on him/her by applicable laws, plus all such other and proper permissible duties as he/she may be directed to perform by the Clerk. The CAO agrees that he/she will reside in Orange County during his/her employment and that he/she will perform the functions of his/her office in a competent and professional manner.

4. ***Compensation.*** The CAO shall receive an initial salary of $135,000, which shall be paid in equal bi-weekly installments as employee checks are issued by the Clerk. The additional amount of $15,000 shall be paid likewise by the Clerk each year in equal bi-weekly installments (or otherwise as the Clerk issues her employees pay checks), and such payments shall be deposited into the deferred compensation plan selected by the CAO. As of June 7, 2010, the salary shall be $ 143,000.

The Clerk will evaluate the performance of the CAO beginning in 2010 and each year thereafter, in the same manner as other Clerk employees. Commencing October 1, 2010, and to the extent consistent with the Clerk's pay policies, the CAO shall receive an annual increase in his/her compensation, which is not less than the percentage increase granted to Clerk employees generally, unless the Clerk has found his/her work to be unsatisfactory, in which case he/she may be given either no increase for that year or an increase smaller than the percentage increase given to Clerk employees generally, as the Clerk may elect.

5. ***Benefits.*** Except as hereinafter provided, the CAO shall receive, immediately upon employment as the CAO, the same benefits as all Clerk employees, including but not limited to, paid vacation and sick leave, workers' compensation, Florida State Retirement, life insurance, and health insurance. All vacation, sick leave, and administrative leave shall accrue in accordance with the then-existing Clerk policy for all employees. Upon termination or expiration of this agreement for any reason the Clerk agrees to pay the CAO for all accumulated leave, if any, at the salary level existing at the time of termination or expiration. Notwithstanding any contrary provisions of the Clerk's vacation benefits or policies, the CAO shall be entitled to accrue, in each year of service, two weeks vacation, which may be exchanged at or after each anniversary of the commencement of this agreement for cash compensation in the prorated amount of the CAO's then-base salary. The Clerk agrees to pay dues for the CAO's membership in appropriate organizations approved by the Clerk where such memberships would be beneficial to the Clerk.

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6. ***Termination of Employment.*** The Clerk may declare this agreement terminated at any time, and such termination shall take effect immediately or on such later date as the Clerk may specify. The Clerk shall promptly pay to the CAO a sum equal to i) the salary and deferred compensation that is accrued but unpaid as of the date of the termination, plus ii) an amount equal to the pro rata portion of her salary for all accrued but unused leave time, plus, and iii) an amount equal to the salary and deferred compensation that the CAO would have received during the 180 days immediately following the date such termination takes effect, as if this agreement had not been terminated. For purposes of this paragraph, employment shall be considered terminated by the Clerk when employment with the Clerk's office ends for any reason other than voluntary resignation by the CAO.

The CAO may terminate this agreement any time, but only after providing written notice to the Clerk of his/her intent to terminate, and such notice shall be delivered not less than 90 days before the date of termination.

In the event the CAO is charged by indictment of information with a felony, or a crime of moral turpitude, he/she may, at the discretion of the Clerk, be suspended from his/her duties without pay. Upon his/her conviction of any such charge, this agreement, at the option of the Clerk, may be terminated and the CEO discharged from his duties. Upon the dismissal of such charges or upon an acquittal, the CAO shall be reinstated and entitled to full back pay and other accrued benefits.

7. ***Other Employment.*** The CAO recognizes and understands that the position of CAO shall require his/her full attention and accordingly agrees to devote all time necessary to fully discharge his/her duties. The CAO shall refrain from accepting any engagement as hereinafter described that would interfere in any way with the faithful performance of his/her duties. However, nothing in this agreement will be construed as to prevent the CAO from accepting honoraria or fees for services that are not in conflict with the CAO's responsibilities as long as prior approval from the Clerk is received.

8. ***Complete Agreement in Written Document.*** This written agreement embodies the whole agreement between the parties and there are no inducements, promises, terms, conditions or obligations made or entered into by either the Clerk or CAO other than contained herein. This agreement shall inure to the benefit of the estate of the CAO. Except as otherwise provided herein, this agreement may not be modified or waived unless in writing and duly executed by both parties.

IN WITNESS WHEREOF, the parties have made and executed this agreement on the respective dates under each signature.

LYDIA GARDNER
ORANGE COUNTY
CLERK OF THE COURTS

Dated:

COLLEEN M. REILLY
CHIEF ADMINISTRATIVE OFFICER

Dated:

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EXHIBIT C

EXHIBIT C

RICHARD S. RHODES PA

Attorney at Law
126 East Jefferson Street
Orlando, FL 32801
407-843-4310

2014 SEP 11 AM 8:46

September 10, 2014

Mr. Jeffrey Ashton
State Attorney
415 North Orange Avenue
Orlando, FL 32801

Re: Stephen Carter

Dear Jeff:

Mr. Carter entered into an employment contract which contained a severance clause in June of 2005. The contract was structured to coincide with the term of Lydia Gardner and further provided that the Clerk could terminate the contract at will.

This agreement was renewed with essentially the same understanding that Mr. Carter serve at the pleasure of Lydia.

In 2013 a memorandum was signed between Mr. Carter and Mrs. Gardner further interpreting the termination clause of his contract to be effective for any other reason than his voluntary resignation.

When it became apparent that Lydia Gardner was not going to complete her term and died, Mr. Carter believed that the new Clerk would be appointed promptly, and in all probability, bringing in a new team. This lead to the new arrangement with the Interim Clerk to serve basically on a day to day basis, terminating Mr. Carter's employment pursuant to the contract.

If the new Clerk had decided to renew Mr. Carter's contract, Mr. Carter intended to refund the severance and continue as legal counsel.

Rather than a prompt appointment by the Governor, the new Clerk was appointed approximately five months after the death of Lydia Gardner.

Immediately after the new Clerk took office, within two days, he discovered an anonymous envelope informing him of Mr. Carter's and the Interim Clerk's respective contracts and payouts.

After consulting with his attorney, not Mr. Carter, he was instructed to not discuss Mr. Carter's employment with Mr. Carter. At the attorney's direction, an attorney from Tampa,

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specializing in labor issues, was brought in to advise the Clerk and to discuss the history with Mr. Carter. Mr. Carter gave a complete interview with this attorney.

None of the decisions and acts which occurred after the death of Mrs. Gardener were hidden or done in a covert or secretive manner. Rightly or mistakenly, the actions taken by Mr. Carter were in his mind pursuant to the contract and his interpretation of that contract. Had Mr. Carter continued his employment under the contract, after the death of Mrs. Gardner, and the new Clerk, Mr. Fernandez, terminated his employment, Mr. Carter would have received the severance and essentially the result would have been the same.

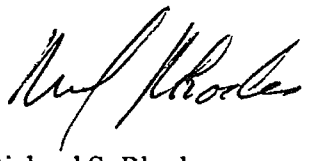
We believe these facts involve contract interpretation and not criminal intent. Had the activity taken place in a hidden or covert manner a different interpretation certainly would be a reasonable consideration.

Both, the Clerk, Mr. Fernandez, and Mr. Carter received legal opinions as to the interpretation of the employment agreement and surrounding facts. These opinions differ, but neither suggested criminal activity. A settlement with the Clerk's office has been reached to the apparent satisfaction of the Clerk.

We would ask that you review the cited case, Berry v. State, 116 So.3d 394

Very truly yours,

Harrison T. Slaughter, Jr.



Richard S. Rhodes

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