IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel. Attorney General Andrew Bailey, *et al.*,	)	
Relators/Plaintiffs,	)	
v.	)	Case No. 2316-CV33643
JACKSON COUNTY, MISSOURI, *et al.*,	)	
Respondents/Defendants.	)	

RELATOR'S/PLAINTIFF'S STATE OF MISSOURI'S MOTION TO SET ASIDE OR VACATE THIS COURT'S JULY 10, 2024 ORDER AND FOR A PROTECTIVE ORDER, OR IN THE ALTERNATIVE FOR RECONSIDERATION

On July 10, 2024, this Court entered an unprecedented order authorizing a party to depose a sitting attorney general, and finding that an attorney in the Attorney General's Office violated a Rule of Professional Conduct. The Court's Order is incorrect as to the facts and the law and should be set aside or vacated, and based on the law and new facts recently learned a protective order should be issued as to any deposition of the Attorney General.

This Court's Order requiring a deposition of Attorney General Andrew Bailey disregards the default rule against top-level executive depositions and renders meaningless the purpose of corporate representative depositions; the Order discusses none of these principles. The Jackson County Defendants have *already* deposed a corporate representative of the Attorney General's Office (AGO) who provided the

Jackson County Defendants with information about the subject at issue: a brief, casual meeting between two elected officials and their campaign staffs unrelated to the lawsuit but where, at most, a passing remark was made about the lawsuit. The Attorney General, acting through the AGO's corporate representative, has provided all material details concerning the passing remark about this lawsuit. The Jackson County Defendants did not present any evidence about why they need testimony from the Attorney General himself or why the absence of his testimony will prejudice their case. This case is in the middle of trial and the Attorney General is not on any party's witness list; his testimony is not relevant to any fact, defense, or claim in this lawsuit.

The Order chills the Attorney General's free-speech rights on the campaign trail and effectively imposes an unconstitutional prior restraint on his speech, as well as on the speech of others that talk to him which the Attorney General cannot control. Recently, someone who was in the room during the candidates' campaign meeting took it upon herself to contact the AGO after reading about this case. *See* **Ex. A**. This individual prepared an affidavit about her recollection of the meeting, which is consistent with the testimony of the AGO's corporate representative: that nothing of substance was discussed about this lawsuit. The fact that someone contacted the AGO on her own volition underscores why this Court should not break decades of precedent to order a sitting statewide official to be deposed: others can testify about the situation, as they already have. The Jackson County defendants have not once identified who else they have tried to contact.

The Court's order finding that an AGO attorney violated Rule 4-4.2 unduly prejudices a young attorney who did not learn any privileged information from Mr. Smith and who already voluntarily provided Jackson County all the relief they could possibly obtain under the Rule: disclosure about the substance of the communication and termination of future communication. This Court's order did not direct any other relief or remedies as to the AGO's attorney. The Court's finding of a violation of the Rule is thus not necessary to sustain the Court's order in any way.

Even so, the Court's Order as to the AGO attorney will stand as an outlier against a Missouri Office of Legal Ethics Counsel opinion in a similar context and numerous other jurisdictions that have issued advisory opinions on analogous issues. Those opinions strongly support that the AGO attorney's communications did not violate Rule 4-4.2, even if the Jackson County Defendants had sufficient evidence in the record to meet all of the elements of the Rule 4-4.2 Comment 7 test, which they do not. The Jackson County Defendants have not stated that Sean Smith is a client of the Jackson County Counselor's Office for all relevant purposes. There is no evidence that Mr. Smith "supervises, directs, or regularly consults with the organization's lawyer concerning the matter" or that Mr. Smith "has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" as the Rule requires. Mr. Smith, as a single member of the Legislature, cannot obligate the Jackson County Legislature with respect to this lawsuit.

Furthermore, it is abundantly clear that Mr. Smith is diametrically opposed to the positions being taken by most of the Jackson County Defendants (except the Legislature) and pushed by the Jackson County Counselor's Office. Given that Jackson County Counselor's Office does not represent him, this Court should not have entered an order of sanctions when Comment 8 to Rule 4-4.2 states that it applies only "where the lawyer knows that the person is in fact represented in the matter to be discussed."

For these reasons, the State of Missouri through the AGO requests this Court to vacate or set aside its Order, or in the alternative to reconsider its ruling in light of these facts and additional authorities, and issue a protective order as to any deposition of the Attorney General.

ARGUMENT

A. The AGO's corporate representative deposition was sufficient, and the rule against top-level executive depositions applies with conclusive force here.

The Court's Order undercuts the purpose of a corporate representative deposition: to "testify as to matters known or reasonably available to the organization." Mo. Sup. Ct. R. 57.03(b)(4). That purpose supports the rule against top-level executive depositions, as the corporate representative deposition is the generally-agreed substitute for top-level executive testimony. "[D]epositions of high-ranking officials are not allowed 'absent extraordinary circumstances.'" *S.L. ex rel. Lenderman v. St. Louis Metro. Police Dep't Bd. of Comm'rs*, 2011 WL 1899211, at *2 (E.D. Mo. May 19, 2011) (quoting *Simplex Time Recorder Co. v. Secretary of Labor*,

766 F.2d 575, 586 (D.C.Cir.1985)). Deposing the Attorney General about a passing remark someone made to him at a campaign meeting, where that information is available from other sources and is not relevant to any fact, defense, or claim in this lawsuit, is not one of those "extraordinary circumstances."

In fact, the Missouri Supreme Court has concluded that "[a] top-level employee—like anyone else—should not be deposed unless the information sought is relevant, or reasonably calculated to lead to the discovery of admissible information." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002). "For top-level employee depositions, the court should consider: [1] whether other methods of discovery have been pursued; [2] the proponent's need for discovery by top-level deposition; and [3] the burden, expense, annoyance, and oppression to the organization and the proposed deponent." *Id.* (Brackets added). The reason for this rule is that "'top-level depositions' may cause unnecessary annoyance, burden, and expense where '[p]ersons lower in the organization may have the same or better information.'" *Wilkins v. Off. of the Missouri Att'y Gen.*, 464 S.W.3d 271, 276 (Mo. Ct. App. 2015) (quoting *Messina*, 71 S.W.3d at 606).

This Court's Order did not address these principles. A faithful application of them must lead to the conclusion that a deposition of the Attorney General in this case is unwarranted based on what the Jackson County Defendants want to know.[1]

[1] The AGO's response to the Jackson County Defendants' Motion for Sanctions addressed these factors, both in summary fashion as well as by incorporating the AGO's full arguments on the issues made in response to Tyler Technologies' previous effort to depose the Attorney General. The AGO expands upon them here.

1. Jackson County has already pursued some other methods of discovery which are sufficient, and they have not fully exhausted other efforts.

A corporate representative deposition of an AGO employee was sufficient for the Jackson County Defendants to learn about a fact that is patently immaterial to this case in the first place. The AGO's corporate representative testified that in April 2024, the Attorney General and Sean Smith were in the same room together for a meeting that was arranged (1) by campaign staff, (2) attended by candidates and their campaign staff, and (3) for campaign purposes. As the AGO's corporate representative testified: It was a "campaign-type meeting in relation to their respective elections, and -- and that was the core subject matter of that meeting." (Dep. Tr. at 66:12-16). The representative confirmed that the purpose of the meeting was not to discuss the lawsuit (Dep. Tr. 66:20), and there was a brief mention of the Jackson County assessments lawsuit that may have lasted at most a few minutes (Dep. Tr. 65:1-8). That discussion was innocuous and was to the effect of "The Jackson County assessment case is important. Great work on that. I hope it goes well," with a brief mention of a potential media statement later. (Dep. Tr. 31:1-32:3).

Nothing of substance was discussed, let alone anything material to the facts, claims, and defenses asserted in this lawsuit. As the AGO's designee testified: "This meeting is not seared into the Attorney General's memory." (Dep. Tr. 27:19-20). Again: "the reason for this is that the Attorney General has done, you know, many campaign activities." (Dep. Tr. 29:6-8). That is to be expected: it is commonly understood that the Attorney General, as any candidate, is running for office and

meets innumerable people. "The Attorney General doesn't remember exactly who it was that brought up the litigation. It wasn't the Attorney General that brought it up, though, to be clear. Was not." (Dep. Tr. 17-20). It is untenable to depose a sitting statewide elected official based on an offhand remark that someone else said to him. That is all the more true when the County Counselor's Office can speak to the individual who may have said the remark. They can, and should have, spoken with him. But the County Defendants have not said they have done so, and they even refused to ask him questions in open court.

In any event, a corporate representative deposition is not just a way station that a litigant must stop at before being automatically entitled to the top-level executive deposition. Under *Messina* and *Wilkins*, the party seeking discovery must still demonstrate that the high-ranking official still has personally discoverable (and relevant) information ***that cannot be found through other mechanisms***. Jackson County did not come anywhere close to proving these factors, and the Court's Order incongruously orders a deposition on topics that were already covered. Plus, based on new information learned in Exhibit A, a top-level deposition is even less supported than it was when the Court's Order was issued.

To that end, the corporate representative testified about <u>each item</u> in the Court's Order. The Court ordered that a deposition cover the following topics: "conversations and communications, made after the case was filed, between him and Jackson County Legislator Sean Smith that pertain to this case, and 2) Andrew Bailey shall address the nature of the contacts, who was present for the contacts, and

what was discussed during the contacts." The AGO's corporate representative testified about the conversation and communications, nature of the contacts, who was present, and what was discussed. He did a diligent job obtaining information. The designee stated who was present for the contacts: "campaign staff for the Attorney General and for Sean Smith" and "the Attorney General and Sean Smith were also present." (Dep. Tr. 29:25-30:2). If the Jackson County Defendants need an itemized list of each person in a room, for which there is no evidence to suggest one was created, they can contact those entities or the County Legislature (who they purportedly, but should not be, represent). But under *Messina* and *Wilkins*, the next stop cannot be the Attorney General himself.

The Jackson County Defendants asked many, many questions concerning this brief topic about a high-profile lawsuit. They have learned everything from the AGO and the Attorney General that they are entitled to learn. They have not exhausted other means of discovery or inquiry, and they have not presented evidence that the AGO's corporate representative testimony was inadequate. As *Messina* and the Supreme Court Rules recognize, *any party* can be deposed only if the information sought is relevant, or reasonably calculated to lead to the discovery of admissible information. The Jackson County Defendants never argued how any aspect of this conversation is relevant to the case. It is not. The Attorney General is not testifying at trial, and this case is already in the middle of trial. The AGO is not putting forward any information concerning the brief, passing mention of this lawsuit in the AGO's case in chief.

Discovery on the Attorney General in the middle of trial on an issue that the Jackson County Defendants have not sufficiently argued is relevant to this case is simply not warranted.

B. There is no need for the discovery by top-level deposition.

For similar reasons discussed above, there is no need for discovery by deposing the Attorney General. The Court's Order did not address what other efforts the Jackson County Defendants have pursued or can pursue. Again, they can and should have spoken with Mr. Smith, or engaged in at least some effort beyond an AGO corporate representative deposition to ascertain who else was in the room. There was sufficient information in the deposition for the Jackson County Defendants to pursue additional discovery (as irrelevant as it is to this case), such as by contacting Mr. Smith, campaigns, or volunteers.

Additional information recently received by the AGO confirms the irrelevancy of the information sought by the Jackson County Defendants and is consistent with the AGO designee's deposition testimony. A member of the public who is volunteering for Mr. Smith's congressional campaign contacted the AGO on her own volition. She prepared an affidavit based on her memory of the event. She stated that "There was mention of 'good luck on the trial' by someone in the room as Andrew Bailey was heading out the door, although [she does not] remember who made the remark." Ex. A, ¶ 15. She "personally can attest that [she] heard no discussion of the trial, or any

business related to Jackson County in the brief discussion that occurred." Ex. A, ¶ 16.

This affidavit is yet another data point about the fleeting mention about this lawsuit at a political event. It confirms that nothing of substance was discussed. It confirms who was present: campaign-related individuals and candidates themselves. It confirms that the meeting was short, and the mention of the lawsuit was innocuous.

The information in the Court's record should have been enough for Jackson County's mid-trial discovery expedition to cease. This new information only gives further support to the irrelevancy of their efforts to this case.

C. Deposing the Attorney General causes burden, expense, annoyance, and oppression to the AGO and the Attorney General in any situation, and those burdens far outweigh any benefit to the Jackson County Defendants in this case.

i. Strong public policy recognized by Missouri's courts and other state courts preclude deposing the Attorney General in this case.

The Jackson County Defendants did not sufficiently articulate why they need information from the Attorney General himself for their lawsuit. It is not relevant to any fact, defense, or claim in the case. This case is in the middle of trial, and Plaintiffs have not tried to use any information gleaned from the Attorney General's campaign-related meeting for this case. It has no bearing on the facts, defenses, and claims in this case for either Plaintiffs or Defendants. This Court's Order does not make any findings as to why this information is relevant to the case, especially given that the case is in the middle of trial. The benefit to Jackson County is absolutely zero.

Messina and *Wilkins* recognize that deposing a high-level official causes burden, expense, annoyance, and oppression in any situation. That is why *Messina* set forth a three-part test to determine the appropriateness of such a deposition. The Jackson County Defendants did not pass that test in the first place, especially where they have not articulated how they would benefit from a deposition of the Attorney General under these circumstances, how this case needs that information, and how that benefit outweighs the presumptive burden, expense, annoyance, and oppression placed on the AGO and the Attorney General.

Those factors are even more pronounced given that Missouri's primary election is less than three weeks away in which the Attorney General is publicly known to be

campaigning, and the November general election will be in full swing after that. This case is not about statements made on the campaign trail. It is about vindicating the rights of Jackson County taxpayers in the assessment process. Any candidate for statewide office meets innumerable individuals on the campaign trail, and ordering the Attorney General to sit for a deposition imposes unconstitutional censorship and prior restraint on his speech and the speech of others.

Similar to the Missouri Supreme Court, the Eighth Circuit has held that highly placed officials cannot be compelled to testify absent compelling circumstances. *See Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982); *Weir v. U.S.*, 310 F.2d 149, 154 (8th Cir. 1962). In *Sweeney*, the court held that Missouri Governor Kit Bond did not have to give a deposition because the "[p]laintiffs failed to show that [he] possessed information which was essential to plaintiffs' case and which could not be obtained from Director James or other staff members." 669 F.2d at 546; *see also Weir,* 310 F.2d at 154 (court quashed a subpoena for the deposition of the Arkansas Secretary of Agriculture because the party seeking to depose the Secretary showed no compelling reason "why the Secretary should be required to leave the seat of his duties as a cabinet officer to give th[e] deposition" and further noted that testimony sought was readily obtainable through other discovery methods).

In *Wilkins*, the Court of Appeals affirmed a lower court's protective order and quashing of a trial subpoena served on the attorney general in a case where the attorney general and the Attorney General's Office were both named defendants. The court in *Wilkins* recognized that there was no evidence that the attorney general was

"involved in any of the employee decisions related to Plaintiff" and did not "have any first-hand knowledge about the events in the Petition." *Id.* at 276. Discovery in the case confirmed this. And the plaintiff "failed to demonstrate prejudice suffered from the exclusion of" the attorney general's testimony. *Id.* at 277. The plaintiff had available less-intrusive means, and the court concluded that the attorney general's testimony would be of "limited probative value" on the questions presented in the case. *Id.*

There is no principled distinction between *Wilkins* and the Jackson County Defendants' efforts here. The information the Jackson County Defendants are seeking is of no—let alone limited—probative value to this case; they have failed to demonstrate prejudice if the Attorney General were not deposed given that the Attorney General is not a trial witness and Plaintiffs are not using information from his campaign meeting with Sean Smith's campaign; and they have failed to demonstrate that any of his first-hand information could not be gained from other sources. The deposition will only serve to harass, annoy, and oppress the AGO and the Attorney General. This Court's Order did not address the AGO's arguments to the contrary and made no findings under the applicable legal principles to grant Jackson County this discovery tactic mid-trial.

Public policy supports preventing state attorneys general from being required to testify by deposition or at trial in that "the time and energies of public officials [should] be conserved for the public's business as to great an extent as may be consistent with the ends of justices in particular cases." *See Monti v. State*, 151 Vt.

609, 631 (Vt. 1989) (quoting *Comm. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983)). This is especially true where there is no compelling need for the Attorney General's testimony.

Other state courts have likewise held that a state attorney general should not be required to give testimony absent first-hand knowledge, direct involvement, or other compelling circumstances. *See Hyland v. Smollok*, 137 N.J.Super. 456, 460 (N.J. App. Div. 1975). For example, in *State Board of Pharmacy v. Superior Court*, a California appellate court concluded that a state attorney general should not be required to give a deposition absent compelling reasons. 78 Cal.App.3d 641, 644-45 (Cal. Ct. App. 1978). The court reasoned that the state attorney general "holds an office created by the state's Constitution. Subject to the powers and duties of the Governor, he 'shall be the chief law officer of the State.' (Cal.Const., art. V, s 13.) . . . Among his other duties he 'shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; . . .'" (Gov.Code, s 12512.)" *Id.* at 644. For these reasons, the Court concluded that "It is patently in the public interest that the Attorney General be not unnecessarily hampered or distracted in the important duties cast upon him by law." *Id.*

So, too, here. The Missouri Constitution creates the role of the Attorney General. Mo. Const. art. 4, § 12. He is "the chief legal officer of the State." *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968). His office is vested "with all of the powers of the attorney general at common law." *State ex rel Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. 2000).

> The attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors and those cases in which the name of the state is used as nominal plaintiff in the trial court.

§ 27.050, RSMo. And he,

> shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

§ 27.060, RSMo.

These underpinnings mirror those in the California *State Board of Pharmacy* case. And this Court should have reached, and can still reach, the same conclusion as the court in that case: "It is patently in the public interest that the Attorney General be not unnecessarily hampered or distracted in the important duties cast upon him by law." 78 Cal.App.3d at 644.

Requiring the Attorney General to sit for a deposition will hamper or distract from his duties as the chief legal officer of the State of Missouri. As a statewide official seeking office, litigants should presumptively be stopped from seeking testimony from the attorney general—as with any other statewide official—when the information is not relevant to the case, the information has already been disclosed, and any additional information is available from other sources. This Court's Order did not address any of these important interests or exceptions to them. Applying those

principles should lead to the Order being set aside and vacated, and a protective order being issued for a deposition.

ii. The Court's Order will likely have unintended effects on the free-speech rights of Missourians and the Attorney General.

This Court's Order ignores important free-speech principles and how it may effectively function as a prior restraint on speech. Would Missourians refrain from speaking with the Attorney General or the AGO about the office's matters if they if they knew that either they, or the Attorney General himself, may be deposed? What about sharing with the Attorney General vague sentimentalities such as "good luck on a lawsuit"? It is not a logical leap to conclude that they would think twice.

The United States Supreme Court has noted that "in a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating . . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530,

537–38 (1980). In the case of ongoing litigation, "cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991), and "an attorney's speech about ongoing proceedings [receives] . . . traditional First Amendment protections," *id.* at 1055.

These principles are relevant here, because the Jackson County Defendants' mid-trial discovery efforts concern on a campaign meeting based on core political speech where there was only a passing remark about this case. If any fleeting comment to the Attorney General alluding to an AGO case requires the Attorney General to sit for a deposition regardless of the setting in which it was made, the Attorney General would be unable to carry out the duties of his office and it would chill citizens' speech. A court order requiring a deposition in the circumstances present here would inevitably stop the Attorney General and Missourians from speaking, as the Jackson County Defendants are seeking discovery in the middle of trial on something that has no bearing on the facts, defenses, and claims in this case, and to which others have already provided information. In that sense, the Court's Order may operate as an unconstitutional prior restraint on speech that is subject to strict scrutiny, which it cannot meet.

For these reasons, this Court should set aside or vacate its Order requiring the Attorney General to submit a deposition, reconsider its Order, or issue a protective order against a deposition of the Attorney General.

B. The comments to Rule 4-4.2 and analogous authorities in other states confirm that the AGO's attorney did not violate the Rule

when speaking to Sean Smith, and in any event the Jackson County Defendants did not provide sufficient evidence of a Rule 4-4.2 violation.

i. The Court's Order finding a Rule violation is disproportionate and not necessary to sustain the relief ordered.

This Court's Order finds that an AGO attorney violated Rule 4-4.2 when communicating with Sean Smith. The Court's Order may impose serious collateral consequences on a young attorney, even though the Court's Order itself issues no actual relief based on the finding. These collateral consequences are disproportionate to the interactions identified by the Jackson County Defendants. This Court should set aside and vacate its order because the AGO's attorney has already provided all relief that the Rules would allow: disclosing the limited communication that took place and ceasing all further communication.

Even after reviewing *in camera* the attorney's notes of the interaction with Mr. Smith the Court concluded there was no privileged communications in the notes and the Court then deleted the notes. After the Court did so, at most the Court then could have issued only an Order affirming the Special Master's previous ruling on this issue: that the AGO "is required to produce any written or recorded communications relating to communications Andrew Bailey or his office through its employees and agents has had with Sean Smith commencing with when the litigation was contemplated through the present."

ii. The Court incorrectly interpreted Rule 4-4.2 as confirmed by a plain-text reading of the Rule and analogous rules in other states.

It must be stressed that the County Counselor's Office has never claimed that they represent Sean Smith, or that there is any privileged attorney-client communication between Mr. Smith and the County Counselor's Office regarding this case (to the extent any exists) that was ever shared with the AGO. Mr. Smith's position is also diametrically opposed to that of the Jackson County Defendants and the Jackson County Counselor's Office. In fact, the limited trial testimony from Mr. Smith that the Court allowed about his views on the matter confirms that he fundamentally disagrees with the positions being taken by the County Counselor's Office:

> Q. So do you view the assessment department's position on this matter as in conflict with yours?
> A. Yes.
> Q. And are you generally aware of the positions taken in this case by the assessment department and other defendants?
> A. I would say that it doesn't appear that they believe that things went wrong. Just based on the fact that they're mounting a defense instead of trying to solve the problem.
> Q. And is that in conflict with your views?
> A. Yes.

(Trial Tr. 84:5-16). And as he testified at trial, he introduced or voted on resolutions that are manifestly adverse to the rest of the County's position in this case. (*See generally* Trial Tr. at 60-80). Just this week, Sean Smith has moved to intervene in the case and filed his own motion for reconsideration of this Court's Order. Mr. Smith's motion states that "He views the County Counselor as working against his

position and the interests of his constituents, and he has no desire to inform them of any meetings he may have." (Mot. to Intervene at p.9).

The Jackson County Legislature has been sued through its members in their official capacity, so it is that entity that is the party, not the individuals. *See, e.g., Supreme Court in Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 201–02 (Mo. 1993) ("Unlike an individual party, an organization can act only through its employees, agents, et cetera."). "Civil actions against public officials in their official capacity are treated as suits against the state." *Vescovo v. Kingsland*, 628 S.W.3d 645, 658 (Mo. App. W.D. 2020) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("the real party in interest in an official-capacity suit is in the governmental entity and not the named official")).

To the extent Rule 4-4.2 applies at all to the AGO attorney's communications with Mr. Smith, it does so only if an elected representative of a multi-member deliberative body is a qualifying constituent, under Comment 7, for purposes of these communications. He is not. There is no evidence that he "supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."[2]

[2] A previous Missouri Chief Disciplinary Counsel Advisory Opinion prior to changes to the Comment in 2007 states that certain, but not all, *ex parte* contact with former organizational employees may be barred by Rule 4–4.2 based on the individual's status. Adv. Op. 970214 ("If the employee is one whose acts can be imputed to the employer or who can make admissions which will be binding on the employer, Attorney may not make contact with that employee without going through the employer's attorney or another attorney who

The AGO employee's communication with Mr. Smith does not fall in those categories because Mr. Smith, as single legislator, is not "one whose acts can be imputed" to the entirety of Jackson County for the purposes of this litigation. The Missouri Court of Appeals cited this opinion in *Smith v. Kansas City S. Ry. Co.*, 87 S.W.3d 266, 269 (Mo. App. W.D. 2002) when concluding that Rule 4-4.2 did not prohibit contact between employee's counsel and former field supervisor of a company. That applies even more persuasively here, as in many situations an elected representative is not an "employee" in the same sense as salaried individuals who are hired and fired by an employer and may individually take actions that bind an employer. *See Hawkins v. City of Fayette*, 604 S.W.2d 716, 723 (Mo. App. W.D. 1980). Mr. Smith is not an employee of Jackson County in that sense, and Rule 4-4.2 was not designed to prohibit all communications between one elected representative and another party's attorneys in litigation, especially where privileged information is not elicited and the elected official is diametrically opposed to the government's positions.

In Missouri Office of Legal Ethics Counsel Informal Opinion No. 2020-10, the Office opined that a "witness's status as a former constituent of the organization does not place the witness within a category of individuals with whom communications is prohibited without consent of the organization's lawyer, per the guidance in Comment [7] to Rule 4-4.2."[3] The opinion further stressed the "actual knowledge" requirement

represents the employee in that matter."). That opinion, if in force, should lead to the result here that Mr. Smith's status as one voting member of the Legislature does not bind the Legislature.

[3] Available at: https://mo-legal-ethics.org/informal-opinion/2020-10/.

of Rule 4-4.2 that an attorney must know, in fact, that the party in question is represented by question. The opinion stresses the *witness's* representation status; the opinion reasons that "Whether a client-lawyer relationship exists between counsel for the association and the witness is a question of fact and law and outside the scope of the Rules of Professional Conduct." The organization in question in this opinion letter was a multi-member board of directors. That is similar in principle to the County Legislature here; and this interpretation of Rule 4-4.2 should apply with even more force when the organization in question is a multi-member deliberative body composed of elected individuals given the unique concerns of a democracy and speaking to an individual member, who by themselves cannot bind the organization. There is no relevant dentition to be made between this opinion letter and current members of an organization, especially given the facts and circumstances of this case.

Mr. Smith's motion filed earlier this week cites a variety of interpretative guidance from other states analyzing similar rules. A few of those authorities should be stressed. The New York State Bar Association's Committee on Professional Ethics opines that their state's equivalent rule *allows* "an attorney representing a petitioner" to "contact the minority members of the board in connection with such proceedings without the consent of the board's attorney." New York State Bar Ass'n Comm. On Pro. Ethics, Formal Op. No. 404 (1975). The Alabama State Bar Association's Office of General Counsel opined that an attorney *can communicate* directly with board of education members without consulting attorney representing the board. *See* Alabama State Bar Ass'n Office of Gen. Couns., Formal Op. 2003-03.

An article in the Kansas Bar Association's Journal confirms that "The mere fact that a lawyer generally represents the government does not make him/her counsel to each and every person employed by the government, in each and every matter." J. Nick Badgerow, *Authorized by Law: Ex Parte Contact With Government Officials Represented by Counsel*, 89-Aug J. Kan. B.A. 47 (July/Aug. 2020). The article emphasizes Kansas Ethics Opinion 2000-6, which reasons that,

> Contacts by attorneys with government agencies have been held to be 'authorized by law.' The rules of professional conduct state that a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter[.]

The backdrop for these authorities is a recognition that multi-member deliberative bodies do not act by one member, that citizens have a right to petition the government, and the individual's specific representation status (and the other party's knowledge of it) is critical. Constitutional freedom-of-speech and government-petitioning rights would be seriously jeopardized if the rules were interpreted any other way. *See Camden v. State of Maryland*, 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996) ("Insofar as a party's right to speak with government officials about a controversy is concerned, [Maryland Rule 4.2] has been uniformly interpreted to be inapplicable.") The *Camden* court recognized that "[e]ven so, there is no doubt that governmental agencies may avail themselves of the attorney-client and work-product privileges . . . and whatever rules a court might fashion to protect and preserve them." *Id.* (internal citation omitted).

Here, the Jackson County Legislature is not sued as a "corporate-like stance as an employer" where applying Rule 4-4.2 might otherwise make sense, as the *Camden* court reasoned. *Id.* The AGO's attorney was not prohibited from responding to his outreach to the AGO and having one virtual meeting with him.

iii. Even if Rule 4-4.2 applies, the Court's Order is not supported by sufficient facts that a violation occurred.

The plain text of Rule 4-4.2 requires that a party claiming improper ex parte communication occurred to demonstrate several factors. This Court's Order is not supported by sufficient evidence on any of these factors. Rule 4-4.2 states, in full:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

First, the Rule requires that the lawyer must communicate with a person "the lawyer knows to be represented by another lawyer." Comment 8 to the Rule fleshes out how this factor should be analyzed: "[t]he prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances." Thus, there is an "actual knowledge" and "in fact" requirement for representation status under Comment 8. For several reasons, there is insufficient evidence that the AGO attorney knew that Mr. Smith was represented:

- To this day, the County Counselor's Office has not stated that they represent him;
- Mr. Smith has introduced and voted on resolutions against the positions taken in this litigation by the County Counselor's Office;
- Mr. Smith has made public statements adverse to the County Counselor's positions;
- Mr. Smith contacted the Attorney General's Office;
- Mr. Smith is an elected official, not an employee;
- Mr. Smith is not a party to this case; and
- The Jackson County Defendants have not introduced any evidence about the AGO attorney's knowledge or state of mind, even after having an opportunity to question him in a deposition.

These facts also defeat any argument that Mr. Smith's representation status could be "inferred from the circumstances." The Kansas Bar Journal article noted that "Even if the communicating lawyer 'knows' that a government generally has counsel, the lawyer must have actual knowledge that the particular government agency being contacted specifically is represented by that counsel or some other lawyer." Badgerow, *supra* p. 21, at 47, 48 (citing *Schmidt v. State*, 695 N.Y.S.2d 225, 232, (N.Y. Ct. Claims 1999) (noting the history of relevant disciplinary rules, and concluding that "Neither rule expressly forbids such contact, however, where the attorney "reasonably should know" that the witness was represented.")). The article also cites to an Ohio Ethics Advisory Opinion concluding that,

> Corporate counsel's assertion of blanket representation of the corporation and all its corporate employees is bluster. It is inappropriate. First, a unilateral declaration by a corporation's

> counsel that he or she represents all current and former employees does not make it so. Second, such blanket representation of a corporation and all its current and former employees would in many instances be fraught with impermissible conflicts of interest for the corporate lawyer.

Ohio Ethics Opinion BCGD 2005-03 (2005); *see also* MO Informal Advisory Opinion 2020-10. That warning is especially apt here where Mr. Smith appears to be adverse to the positions advocated by the County Counselor.

Second, Rule 4-4.2 requires that the person must be known to be represented by another lawyer "in the matter." Mr. Smith is not a defendant in this case, and the County Counselor's Office has not stated that they are representing him in *this* matter. Even if Mr. Smith receives privileged communications from the County Counselor's Office generally as a member of the Legislature, that does not mean that he has received any such communications with respect to this case. There is no evidence in the record that he has. To the contrary, Mr. Smith testified at trial that "you know, I'd get updates periodically, say from Mr. Covinsky, the County Counselor, on generally the fact that the case was proceeding. But that was about it." (Tr. 56:17-20). And, of course, no privileged communications were disclosed to the AGO's attorney.

Comment 1 to Rule 4-4.2 emphasizes both the scope of its application ("a person who has chosen to be represented by a lawyer in a matter") and a principal purpose of the Rule (preventing "possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation."). As far as the AGO knows, Mr. Smith has not chosen to be represented by the County

Counselor's Office. The AGO's attorney was not attempting to overreach, did not interfere with any privileged relationship between Mr. Smith and the County Counselor's Office, and did not receive privileged information relating to any such representation concerning this matter.

iv. A finding of a Rule 4-4.2 violation is moot or not necessary, as the AGO has given all potential relief authorized by the Rules.

Even if this Court concludes again that the AGO's attorney should not have communicated with Mr. Smith without the County Counselor's Office present, the Court's Order finding a violation of Rule 4-4.2 is moot or not necessary for this case. Comment 3 to Rule 4-4.2 prescribe exactly what should happen even if a particular communication is covered by the Rule: "A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2." That is exactly what happened after the Jackson County Defendants notified the AGO that they believed it was inappropriate for an AGO attorney to communicate with Mr. Smith, although the AGO believes the contact is permitted.

That is not all the AGO did. After Defendants notified the AGO that it believed the AGO improperly communicated with Mr. Smith, the AGO engaged in a good-faith conversation about the matter, expressed its position on why the communication did not contravene the rules, and terminated all future communication with Mr. Smith to be safe. Defendants requested that the AGO identify all communication the AGO had with Mr. Smith, which the AGO did. That communication was extremely limited: an email chain relating to the trial subpoena, a question from Mr. Smith concerning

whether he'd be able to sit through the trial, arranging the Webex meeting, and holding a Webex meeting. Later, Mr. Smith sent one attorney in the Attorney General's Office an email, to which the attorney did not respond. The Attorney General's Office told Jackson County this. It was discussed in greater detail in the AGO's corporate representative deposition.

Finally, the Jackson County Defendants were unable to articulate any specific prejudice from this communication, and this Court's Order did not find any prejudice. The best that Defendants did to demonstrate prejudice is to state in conclusory fashion that "what is known today has prejudiced Jackson County." (Def. Mot. at 11). That boilerplate statement was not enough to carry Defendants' request for relief or support a moot and unnecessary finding that a Rule 4-4.2 violation occurred (which it did not for the reasons explained in this motion).

Even if this Court does not agree that the Rule permitted the communication here, there is enough of a good-faith argument based on various authorities that it is not necessary to find a violation of the Rule. The Court's finding could have far-reaching collateral implications for the individual AAG with regulatory authorities, and that finding is not necessary to support this Court's order for relief in discovery.

CONCLUSION

For these reasons, this Court should set aside or vacate its Order, or in the alternative reconsider it, and issue a protective order as to a deposition of the Attorney General.

Respectfully submitted,

ANDREW BAILEY
Attorney General

/s/ Jason K. Lewis
Jason K. Lewis, #66725
General Counsel
Missouri Attorney General's Office
P.O. Box 861
St. Louis, MO 63188
(314) 340-7832

ATTORNEYS FOR
RELATORS/PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of July, 2024, a true and correct copy of the foregoing was filed electronically with the Court, and also emailed to counsel of record for the parties.

/s/ *Jason K. Lewis*