

March 13, 2018

Missouri Ethics Commission
PO Box 1370
Jefferson City, MO 65102-1370

Re: Campaign Finance Disclosure Violations by Hawley for Missouri in 2016

This letter supplements the Official Complaint Form filed herewith and comprises the formal complaint against Attorney General Josh Hawley, Hawley for Missouri, and Doug Russell in his official capacity as treasurer (“Respondents”). It is undisputed that in 2016, then Attorney General candidate Josh Hawley accepted a free legal defense in a Sunshine Law lawsuit filed in the Circuit Court of Boone County (Case No. 16BA-CV01843) from the law firm of Cooper & Kirk PLLC (“Cooper”). Only after a media inquiry did Respondents and his United States Senate campaign confirm that Attorney General Hawley accepted this valuable benefit without disclosing it in either a campaign finance report or in a Personal Financial Disclosure. Either the legal services were campaign related and should have been disclosed as an in-kind campaign contribution or the “pro bono” services were a personal expense that should have been disclosed as a gift on the Attorney General’s Personal Financial Disclosure. Under no circumstances does Missouri law allow him to accept this donation without properly reporting it to the public. As such, the Missouri Ethics Commission (“MEC” or “Commission” herein) should immediately investigate the intentional refusal to disclose and take appropriate remedial action against Respondents for this clear violation of law.

FACTUAL BACKGROUND

In July of 2015, Josh Hawley launched his statewide campaign for Attorney General and registered his campaign committee, Hawley for Missouri, with the Commission.¹ At the time, Mr. Hawley worked as a professor of law at the University of Missouri.² According to publicly available news sources, Mr. Hawley initially requested a paid leave of absence from the University of Missouri to run for office, but when “it was determined that a paid leave of absence would be an illegal use of state funds...[Hawley subsequently] submitted a request for, and was granted, an unpaid leave of absence” from the University of Missouri.³

On May 25, 2018, about two months before the 2016 Attorney General primary election, former Missouri state representative Kevin Elmer filed a lawsuit against Josh Hawley,⁴ the University of Missouri and law school dean Gary Myers. Mr. Elmer accused all three of “violat[ing] the Missouri Sunshine Law to hide Hawley’s use of state resources as part of his campaign.”⁵ Mr. Elmer’s allegations stemmed from a public records request he filed in which sought access to “years-worth of emails and phone records from Hawley before he announced his candidacy for attorney general,”⁶ including “internal correspondence about the attorney

¹ Hawley for Missouri, MEC Statement of Committee Organization (filed Jul. 23, 2015), *available at* <https://www.mec.mo.gov/Scanned/PDF/2015/113758.pdf>.

² See About AG Hawley, Missouri Attorney General, *available at* <https://www.ago.mo.gov/about-us> (last accessed Mar. 13, 2018).

³ Tim Curtis, *Lawsuit Against Hawley, Mizzou Alleges Conspiracy to Hide Public Documents*, The Missouri Times (May 26, 2016), *available at* <https://themissouritimes.com/30132/lawsuit-against-hawley-mizzou-alleges-conspiracy-to-hide-public-documents/>.

⁴ *Id.*; see also Kurt Erickson, *Attorney General Candidate Sued Over Open Records Dispute*, St. Louis Post-Dispatch (May 26, 2016), *available at* http://www.stltoday.com/news/local/govt-and-politics/attorney-general-candidate-sued-over-open-records-dispute/article_abfac071-0043-500f-8918-f8cfbf73434f.html.

⁵ Alan Burdziak, *Lawsuit Alleges University of Missouri, Professor Conspired to Conceal Information*, Columbia Tribune (May 27, 2016), *available at* <http://www.columbiatribune.com/bf62e693-a8e1-5ed2-ba63-ff7292e5d5c0.html>.

⁶ Lucas Geisler, *MU Professor, AG Candidate Argues his Emails are Not Public Record*, ABC News (Aug. 27, 2016), *available at* <http://www.abc17news.com/news/mu-professor-ag-candidate-argues-his-emails-are-not-public-record-/80493513>.

general's race, his tenure status and documents created on his work computer.”⁷ When Mr. Elmer received only 25 percent of the documents he originally requested and was charged exorbitant fees, he filed suit, calling for an investigation into “Hawley’s improper comingling [sic] of University assets and...political activities” before the election.⁸ A primary object of the lawsuit was to determine whether Josh Hawley inappropriately used government University computer resources to benefit his political campaign. The lawsuit further alleged that Mr. Hawley was “improperly given paid leave [from the University of Missouri] while he raised more than \$150,000 for his campaign.”⁹ I was lead counsel for Mr. Elmer.

News reports attributed Mr. Elmer’s records request and subsequent lawsuit to his support of Hawley’s primary opponent in the Attorney General race.¹⁰ In fact, at the time the lawsuit was filed, Hawley’s state campaign committee issued a statement saying his primary opponent was behind the lawsuit.¹¹

On August 22, 2016, the Washington, D.C. based law firm Cooper & Kirk PLLC entered their appearance in the lawsuit representing Defendant Hawley.¹² Also on August 22, 2016, Cooper filed a Motion to Dismiss Elmer’s Petition. Cooper opened the Motion by pointing out that the lawsuit was filed in the midst of the primary for Attorney General by a Plaintiff who was supporting candidate other than Hawley.¹³ Cooper contended that the purpose of the lawsuit was politically motivated to undermine the campaign of Defendant Hawley.¹⁴ Interestingly

⁷ Erickson, *supra* note 4.

⁸ Geisler, *supra* note 6.

⁹ Burdziak, *supra* note 5.

¹⁰ Lindsay Wise & Jason Hancock, *Heavyweight D.C. Law Firm Represented Hawley for Free in 2016*, Kansas City Star (Mar. 9, 2018), available at <http://www.kansascity.com/news/politics-government/article204416434.html>.

¹¹ Erickson, *supra* note 4.

¹² Wise & Hancock, *supra* note 10. See also case documents for Case No. 16BA-CV01843 in the Circuit Court of Boone County at Missouri Casenet.

¹³ Missouri Casenet for 16BA-CV01843, “Defendant Joshua Hawley’s Motion to Dismiss and Suggestions in Support pages 1-2.

¹⁴ *Id.*

enough, Cooper failed to properly follow Missouri Supreme Court Rule 9.03 which enumerates the steps to follow and the conditions to be met to allow an attorney not licensed in the State of Missouri to represent a client in a Missouri Court.¹⁵ Cooper attorney Mr. Ohlendorf is not an attorney licensed to practice law in Missouri and he did not properly file the necessary pleading/certification and did not pay the entry fee.¹⁶

Upon information and belief, Cooper corresponded with the University on behalf of Hawley as well and demanded that the University utilize the production protocol advanced by Hawley. The protocol permitted Hawley to review all data on his computer, remove material he alone determined was not “University related,” provide remaining materials to the University for the University to review and determine what to produce to Mr. Elmer and/or his attorneys. This protocol was in fact followed by the University. Complainant is aware of no legal basis to allow this protocol to govern a proper Sunshine Law request. Given that the stated object of the pursuit of documents was to determine if Hawley used University resources for non-University purposes, namely his political campaign, this protocol specifically undermined that purpose.

After the primary, on September 6, 2016, Plaintiff Elmer dismissed his lawsuit without prejudice.¹⁷

However, “[t]here is no record of campaign payments to Cooper & Kirk PLLC in Hawley’s state campaign filings from 2016, nor is the firm’s work on Hawley’s behalf recorded as an in-kind donation.”¹⁸ A review of Hawley for Missouri’s 2015 and 2017 campaign finance reports similarly show zero expenditures to or in-kind contributions from Cooper & Kirk

¹⁵Supreme Court Rule 9.03 www.Courts.mo.gov

¹⁶ Missourilawyershelp.org; case documents for Case No. 16BA-CV01843

¹⁷ Case documents for Case No. 16BA-CV01843

¹⁸ Wise and Hancock, *Supra* Note 10.

PLLC.¹⁹ According to the latest news reports on this topic, Cooper & Kirk PLLC provided these legal services for free, representing Mr. Hawley in the Elmer suit pro bono.²⁰ Attorney General Hawley's Personal Financial Disclosure on file with the Commission covering 2016, however, does not include disclosure of the value of Cooper's legal services in section 12 where gifts are to be listed.

LEGAL ANALYSIS

The legal costs qualify as an in kind contribution that should have appeared on a campaign finance report

The legal costs incurred in connection with the Elmer lawsuit clearly qualify as contributions under state law and should have been reported as in-kind contributions on the campaign's disclosure reports. Under Missouri law, "contribution" is defined as "a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office... or for paying debts or obligations of any candidate or committee previously incurred for the above purposes."²¹ Additionally, any "direct or indirect payment by any person, other than a connected organization, of the costs of establishing, administering, or maintaining a committee, including legal, accounting and computer services" is included in the state's definition of contribution.²² The state further defines "in-kind contribution" simply as "a contribution...in a form other than money."²³

¹⁹ See October Quarterly Report, Hawley for Missouri (filed Oct. 15, 2015); October Quarterly Report, Hawley for Missouri (filed Oct. 16, 2017); July Quarterly Report, Hawley for Missouri (filed Jul. 17, 2017); April Quarterly Report, Hawley for Missouri (filed Apr. 17, 2017); January Quarterly Report, Hawley for Missouri (filed Jan. 17, 2017).

²⁰ Lindsay Wise & Ben Wiedner, *Hawley Blames McCaskill for Campaign's High Legal Spending*, McClatchy (Feb. 22, 2018), available at <http://www.mcclatchydc.com/news/nation-world/national/article201653654.html>.

²¹ Mo. Ann. Stat. § 130.011(12).

²² *Id.* § 130.011(12)(h).

²³ *Id.* § 130.011(19).

While there is no statutory definition of what does or does not qualify as a “cost[] of establishing, administering, or maintaining a committee” the statute specifically includes “legal” services and the Commission itself has recognized legal expenses as an example of an in-kind contribution.²⁴ Under state law, a campaign committee’s disclosure reports must list the “[t]otal dollar value of all in-kind contributions received” during the relevant reporting period.²⁵

In the past, the Commission has been asked to answer the somewhat related question of whether campaign funds may be used to pay certain legal costs incurred by a candidate or officeholder.²⁶ While the question at issue here is slightly different, the analysis is identical: both questions turn on whether a sufficient nexus exists between the legal costs incurred and the campaign.²⁷ For example, in MEC Advisory Opinion 2008.04.CF.002, the Commission considered whether funds expended “for the purpose of influencing the outcome of post-election litigation (including election contest and recount proceedings)” qualified as “contributions” or “expenditures” under state law.²⁸ Because the definitions of “contribution” and “expenditure” are both limited to supporting or opposing the *nomination or election* of a candidate for public office, and because “election contests and recount proceedings are by their very nature post-nomination and post-election proceedings” the Commission concluded that such costs “do not fall within the definition of contributions and expenditures.”²⁹

²⁴ See Campaign Finance Q&A at 10, Miss. Ethics Comm’n, *available at* <https://mec.mo.gov/WebDocs/PDF/CampaignFinance/CF%20Questions%20and%20Answers%20-%20formerly%20Hot%20Topics1-2017.pdf> (last accessed Mar. 13, 2018).

²⁵ Mo. Ann. Stat. § 130.041(1)(d).

²⁶ See, e.g., MEC Adv. Op. 1997.11.107 (finding that defense costs in a recall petition related to officeholder misconduct was not an “ordinary and necessary expense” and thus could not be paid for with campaign funds); MEC Adv. Op. 2008.04.CF.002 (finding that funds donated or expended solely for the purpose of influencing the outcome of postelection litigation do not fall within the definition of contributions and may not be paid for with committee funds); MEC Adv. Op. 2011.06.CF.004 (finding that a candidate committee’s funds may be used to pay legal fees in litigation challenging the Missouri Secretary of State’s disqualification of a candidate following the candidate’s failure to file a personal financial disclosure form as required by law).

²⁷ *Supra* note 22.

²⁸ MEC Adv. Op. 2008.04.CF.002.

²⁹ *Id.*

Here, one cannot deny the nexus between defending against the Elmer lawsuit and the nomination and election of Josh Hawley to public office. One need look no further than the characterization made by Hawley through this lawyers in his Motion to Dismissed filed that this case was entirely about the Attorney General primary.³⁰ As Hawley alleged, the initial public records request was filed by a supporter of Mr. Hawley’s primary opponent just two months before the primary, and explicitly sought “internal correspondence about the attorney general’s race.”³¹ As alleged in his lawsuit, Mr. Elmer further sought confirmation of Mr. Hawley’s status at the university, to determine whether he continued to receive compensation during his leave of absence. The obvious goal in requesting these documents was to determine if Hawley was impermissibly using state resources in support of his campaign — a violation of state law that would not only render Mr. Hawley unfit to serve in the eyes of most, but would also implicate his campaign committee in the impermissible use of state resources for a political activity.³² When Mr. Elmer was denied access to a majority of the requested documents, he filed a lawsuit against Mr. Hawley and the University of Missouri, blaming both for conspiring to withhold public records that would reveal Mr. Hawley’s violations. The timing, context, and subject-matter of the lawsuit confirm that these legal costs were sufficiently related to supporting Hawley’s nomination and election and qualify as an in-kind contribution that pursuant to Missouri law should have been disclosed in a campaign finance report but was not.

³⁰ Missouri Casenet for 16BA-CV01843, “Defendant Joshua Hawley’s Motion to Dismiss and Suggestions in Support pages 1-2.

³¹ Erickson, *supra* note 4.

³² See Mo. Ann. Stat. § 36.157 (prohibiting state employees from engaging in political activity “(1) While on duty; (2) In any room or building occupied in the discharge of official duties; (3) By utilizing any state resources or facilities; (4) While wearing a uniform or official insignia identifying the office or position of the employee; or (5) When using any vehicle owned or leased by the state or any agency or instrumentality of the state.”).

If it is determined that the legal fees and costs were not campaign related than the “pro bono” services constitute a personal expense that should have been disclosed as a gift on Hawley’s Personal Financial Disclosure

Candidates for elective office in Missouri must file a financial interest statement with this Commission. Section 105.483. Mo. Rev. Stat. section 105.485.2(8) requires that under the penalties of perjury that Hawley disclose:

The name and address of each source from which such person received a gift or gifts, or honorarium or honoraria in excess of two hundred dollars in value per source during the year covered by the statement other than gifts from persons within the third degree of consanguinity or affinity of the person filing the financial interest statement. For the purposes of this section, a "gift" shall not be construed to mean political contributions otherwise required to be reported by law or hospitality such as food, beverages or admissions to social, art, or sporting events or the like, or informational material. For the purposes of this section, a "gift" shall include gifts to or by creditors of the individual for the purpose of cancelling, reducing or otherwise forgiving the indebtedness of the individual to that creditor;

In recent press accounts, the Hawley U.S. Senate campaign claims the donation of legal services was pro bono and that the costs would not be allowable campaign expenses allowable under Missouri law (while acknowledging he is currently paying the same law firm for sunshine law response services is reportable under federal law). ““Ford, Hawley’s Senate campaign spokeswoman, told The Kansas City Star that Cooper & Kirk represented Hawley in the lawsuit pro bono, or at no charge. Asked why, she said, ‘He went with Cooper & Kirk because they’re good lawyers.’”³³ Hawley cannot have it both ways. The donation was either campaign related and constitutes a campaign donation. On the other hand, if the legal defense costs were not a campaign expense then they qualify as a personal expense---a gift pursuant to section 105.485.2(8) that should have been disclosed under section 12 of the required Personal Financial

³³ Lindsay Wise & Jason Hancock, *Heavyweight D.C. Law Firm Represented Hawley for Free in 2016*, Kansas City Star (Mar. 9, 2018), available at <http://www.kansascity.com/news/politics-government/article204416434.html>.

Disclosure. The Personal Financial Disclosure Statements of Hawley on file with the Commission covering 2016 do not disclose the gift of a free legal defense in the Elmer Sunshine lawsuit.

The Circuit Court of Cole County dealt with this issue in the case *Paul Wieland v. Missouri Ethics Commission*, Case No. 15AC-CC00407.³⁴ In that case, the Court determined that because attorneys for Senator Wieland were representing him and expected to recovery fees within the lawsuit filed on his behalf and there was NO agreement that services would be rendered “pro bono,” the legal costs were not disclosable as a gift on his Personal Financial Disclosure. The Court stated:

Representing your uncle in a DWI or your sister in her divorce without expectation of payment is a gift. Representing an indigent client without expectation of payment is *pro bono* because of the public benefit. Petitioner’s arrangement with his attorneys is neither unless there was evidence that his attorneys did not expect any remuneration. The record does not reflect any such evidence or intent.

The Hawley campaign specifically told the Kansas City Star on March 9, 2018 that the representation by Cooper of Hawley was “pro bono” or “at no charge.”³⁵

There can be no doubt that Respondents intentionally hid this significant valuable donation from the public for political purposes. The problem became that when they tried to rationalize the secrecy after they were caught by the media by raising the dubious claim that this expense was not campaign related, they walked themselves into a different Ethics violation...that Hawley’s 2016 Personal Financial Disclosures were false. Either way this obvious violation of Missouri’s Ethics laws needs to be addressed by this Commission.

³⁴ *Paul Wieland v. Missouri Ethics Commission*, Case No. 15AC-CC00407 Circuit Court Cole County Missouri, Judgment dated August 31, 2016.

³⁵ Lindsay Wise & Jason Hancock, *Heavyweight D.C. Law Firm Represented Hawley for Free in 2016*, Kansas City Star (Mar. 9, 2018), available at <http://www.kansascity.com/news/politics-government/article204416434.html>.

REQUESTED ACTION

As we have shown, Respondents have violated state law by failing to report either an in-kind campaign contribution or a gift from Cooper & Kirk PLLC for the legal services provided in the Elmer lawsuit. Pursuant to Missouri's campaign finance rules, the public has a right to know who provided Mr. Hawley and his campaign with valuable legal services in the lead up to his election as Attorney General. We respectfully request that the Commission investigate these violations and that Respondents be fined the maximum amount permitted by law.