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February 24, 2017

VIA E-MAIL AND FIRST-CLASS MAIL

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Dear Counsel:

I write in response to your February 7, 2017 "Litigation Hold Letter" to Rick Williams, General Counsel for the Missouri Department of Corrections ("DOC"). *See* Feb. 7, 2017 Letter of Andy Hirth (attached). In that letter, you stated that you have been retained by a nurse working at the Jefferson City Correctional Center ("JCCC") to file "sexual harassment/retaliation and related claims" that "involve conduct by DOC employees at JCCC . . . during January and February 2017." *Id.* at 1. Your letter alleges in particular that two DOC officers engaged in actionable conduct against your client. *Id.* Prior to receipt of this letter, neither DOC nor our Office had any knowledge of your involvement in employment-related claims against DOC.

Your representation of a claimant asserting employment-related injuries adverse to DOC raises grave ethical concerns under the Missouri Rules of Professional Conduct. Until early January 2017, all three of you were employed as Assistant Attorneys General in the Missouri Attorney General's Office ("AGO"). In that role, Ms. Germinder defended DOC against numerous employment-related claims, serving both as DOC's principal point of contact for such cases and as Team Leader for the unit within the AGO that defended such cases. Ms. Trachtenberg was personally involved in defending DOC as well. And Mr. Hirth served in a sensitive position of trust on the executive staff of former Attorney General Chris Koster. He was undoubtedly briefed in detail about ongoing employment litigation against DOC, and he exercised direct or indirect supervisory authority over Ms. Trachtenberg and Ms. Germinder.

Ms. Germinder's involvement in this matter is particularly troubling. As you are aware, from 2008 to 2017, Ms. Germinder personally defended DOC in at least 35 cases, including at least 16 cases involving employment-related claims. She handled several cases arising from JCCC, including at least one employment-discrimination case involving JCCC. For years, Ms. Germinder served as DOC's principal contact within the AGO for defending employment litigation statewide. Moreover, as a Team Leader in the Jefferson City Office, Ms. Germinder directly supervised numerous other AGO attorneys who were defending similar employment-related claims against DOC. In these roles, Ms. Germinder personally investigated claims, interviewed witnesses, defended depositions of DOC witnesses, deposed plaintiffs' witnesses, conducted settlement negotiations, and first-chaired jury trials and appeals—all relating to employment litigation against DOC. She communicated freely with and provided direction to AGO attorneys engaged in the same conduct. She conducted privileged interviews of senior DOC staff and defended the depositions of senior DOC staff in employment cases.

In addition to personally handling—and personally supervising attorneys who were handling—numerous employment-related cases against DOC, Ms. Germinder also provided overarching and systemic advice to DOC on litigation strategy, settlement strategy, and risk management for such claims. For years, DOC's general counsel and staff communicated openly with Ms. Germinder, under the aegis of attorney-client privilege, regarding all sensitive and strategic questions relating to employment litigation. Ms. Germinder was therefore privy to a wealth of privileged and confidential information relating to these cases. In her role as Team Leader, she received detailed factual knowledge and provided critical input on settlement strategy for virtually every employment-discrimination case against DOC.

Ms. Trachtenberg, likewise, has extensively represented DOC. From 2010 to 2013, she handled at least 17 cases against DOC, including at least one employment-discrimination case. Similarly, Mr. Hirth, in his role on the executive staff of Attorney General Koster, exercised direct or indirect supervisory authority over Ms. Trachtenberg, Ms. Germinder, and all AGO attorneys involved in defending DOC. In that role, Mr. Hirth indubitably received extensive confidential and privileged information relating to employment litigation against DOC.

Based on these facts, your current representation raises serious ethical concerns under three separate provisions of the Missouri Rules of Professional Conduct. First, Rule 4-1.11(a) provides that a former government attorney "shall not . . . represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." Mo. Sup. Ct. R. 4-1.11(a)(2). In similar cases, courts have found that conduct indistinguishable from your current representation violates this rule. For example, in a pair of lawsuits against the Chicago Board of Education, a federal District Court disqualified two of the plaintiffs' attorneys who had previously represented the Board. *See Dugar v. Bd. of Educ.*, No. 92-C-1621, 1992 WL 142302 (N.D. Ill. June 18, 1992); *Porter v. Bd. of Educ.*, No. 92-C-0533, 1992 WL 166570 (N.D. Ill. July 9, 1992). The Court emphasized that one of the attorneys had represented the Board in similar lawsuits in the past, and that she had also advised the Board on broader policies and strategies relating to such lawsuits. *Dugar*, 1992 WL 142302, at *3-4. Much like Ms. Germinder in this case, the disqualified attorney in *Dugar* had represented the governmental defendant for almost ten years, had served as a supervisor of the unit that had handled similar

proceedings, and had personally handled similar proceedings on behalf of the Board. *Id.* at *1. The disqualified attorney "was also involved in policy matters," providing overarching and strategic advice about such proceedings. *Id.* The Court found that the attorney's prior representations constituted personal and substantial involvement in the same matter and thus disqualified her under Rule 1.11, even though the facts underlying that particular case "had not arisen at the time [the attorney] was employed by the Board." *Id.* at *3.

Second, your current representation also raises grave concerns under Rules 4-1.9(c) and 4-1.11(c), regarding the use of confidential information acquired during the course of a prior representation. Rule 4-1.9(c) provides that "[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules permit or require with respect to a client or when the information has become generally known." Mo. Sup. Ct. R. 4-1.9(c). This Rule applies to former government lawyers. Mo. Sup. Ct. R. 4-1.11(a)(1). Similarly, Rule 4-1.11(c) provides that "a lawyer having information that the lawyer knows is confidential information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." Mo. Sup. Ct. R. 4-1.11(c).

Taken together, these Rules prohibit a former government lawyer from bringing claims against the lawyer's former governmental client if the lawyer obtained any confidential information that is even "relevant to" the claims or defenses in the case. *See, e.g.*, Del. Bar Comm. of Professional Ethics Op. 1998-1, at 7 (April 21, 1998). For example, the cited Ethics Opinion from the Delaware Bar addressed a former employee of that State's Attorney General's Office who had represented the Department of Corrections while he was a government attorney. *Id.* at 1. After leaving public service, the attorney then represented a plaintiff in a case against the Department of Corrections that was similar in substance to the cases that the attorney had previously defended. *Id.* at 1, 7. The Ethics Opinion explained that Rule 1.11 "would impose a blanket prohibition against" this new representation if, during his government service, the attorney obtained any confidential information "relevant to the claims against the defendant" or "about the defendant or the defendant's defense." *Id.* at 7. In this case, the members of your firm have unquestionably received from DOC confidential and privileged information that is "relevant" to the current matter. Indeed, it is inconceivable that *none* of the intimate knowledge that Ms. Germinder has acquired of DOC's methods and strategy in defending employment cases during the past ten years is "relevant to" your current representation. Mr. Hirth, no doubt, has also had unfettered access to such relevant information.

Moreover, any individual conflict of interest of Ms. Germinder, Ms. Trachtenberg, and/or Mr. Hirth plainly disqualifies your entire firm. Rule 4-11(b) provides that "when a lawyer is disqualified from representation under Rule 4-1.11(a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule 4-1.11." Mo. Sup. Ct. R. 4-1.11(b). Your "litigation hold" letter indicates that your entire firm represents the potential plaintiff in this matter, not merely Mr. Hirth, and it provides no indication that Ms. Germinder and/or Ms.

Trachtenberg have been screened from participation in this matter. Quite the contrary, both their names and contact information appear plainly in the footer of the letter, indicating that they have lent their names to this representation. At a minimum, your firm plainly has not complied with the requirements of Rule 4-1.11(b)(2), and that failure in turn makes it impossible to determine whether you have complied with Rule 4-1.11(b)(1). Thus, Rule 4-1.11 disqualifies your entire firm from participating in this matter.

The Ethics Rules at issue here operate to preserve the public's trust in its government and to prevent former state officials from enriching themselves through a "revolving door" between public and private employment. If former government attorneys could use confidential information gained during public service against their former government clients, it would "encourage Government attorneys to conduct their offices with an eye toward future private employment," and those attorneys could profit by "gather[ing] valuable pertinent information while on the Government payroll." *United States v. Ostrer*, 597 F.2d 337, 340 (2d Cir. 1979). These considerations take on additional urgency when former government attorneys seek to recover large money judgments at a time when the State faces significant budgetary constraints. This Office takes seriously these public interests, and it expects its former employees to fully comply with the ethical requirements imposed by Missouri law.

For the reasons stated, attorneys from the Attorney General's Office have been instructed not to participate in any pre-litigation negotiations or settlement discussions with your firm regarding this matter or any similar matter. If this matter proceeds to litigation, this Office may seek to have your firm disqualified on grounds that include, but are not necessarily limited to, those stated in this letter, and this Office may pursue other action as well.

Finally, the Attorney General's Office demands that you ***immediately cease and desist*** from sharing or otherwise communicating with your current client(s) any information whatsoever, of any nature or format, that any of your attorney(s) obtained in the course of their representation of DOC or any other state agency.

Sincerely,

/s/ D. John Sauer

D. John Sauer
First Assistant and Solicitor
Missouri Attorney General's Office

Enclosure