

IN THE CIRCUIT OF PULASKI COUNTY, ARKANSAS

FIFTH DIVISION

**COMMITTEE TO RESTORE
ARKANSANS' RIGHTS**

PETITIONER

v.

60CV-18-2834

**LESLIE RUTLEDGE,
In her official capacity as
Attorney General for the
State of Arkansas**

DEFENDANT

MEMORANDUM ORDER

Before the Court is Attorney General Leslie Rutledge's Emergency Motion for Protective Order and/or Motion to Quash filed May 9, 2018 in response to the May 3, 2018 subpoena served upon the Attorney General.

This matter was set for hearing by the Court on Committee to Restore Arkansans' Rights' Motion for Declaratory Judgment, Temporary Restraining Order and Preliminary Injunction. The Petitioner Committee to Restore Arkansans' Rights has subpoenaed the Attorney General Leslie Rutledge to testify at the May 18, 2018 hearing. In her Motion, Defendant Rutledge requested Petitioner's expedited response by May 10, 2018 and further demanded that the Court rule by noon May 14, 2018 (this date).

On May 10, 2018, Petitioner emailed the Attorney General's office requesting a copy of the proposed protective order for consideration and further requested a meeting with the Attorney General's office to discuss the subpoena and if there were any ways to resolve that issue. *See Exhibit 1 and 2 to Petitioner's Supplemental Response to the Attorney General's Emergency Motion.* The Attorney General's office notified Petitioner that it refused to meet to discuss ways to resolve the subpoena. On May 11, 2018, Petitioner again emailed the Attorney General's office requesting a copy of the proposed protective order and to meet to discuss ways to resolve the subpoena issues. *See Exhibit 2 to Petitioner's Supplemental Response to the*

Attorney General's Emergency Motion. To this date, the Attorney General's office has failed and/or refused to provide the Petitioner with a proposed protective order and has further failed or refused to meet to resolve subpoena issues. ¶ 7 of *Petitioner's Supplemental Response to the Attorney General's Emergency Motion.*

The Court has reviewed the Emergency Motion for Protective Order and/or Motion to Quash. Rutledge contends that she is entitled to a protective order barring the subpoena or otherwise quashing the subpoena and seeks to preclude the petitioner from obtaining her testimony by subpoena at the May 18, 2018 hearing contending (1) that the petitioner does not seek relevant evidence, (2) that the subpoena is barred by "deliberative process" privilege based on the decisions in *U.S. v. Morgan*, 313 US 409 (1941) and *In re United States (Holder)*, 197 F.3d 310 (8th Cir 1999), and (3) further contending that the subpoena should be quashed pursuant to an Apex Witness Rule whereby a high ranking officer who possesses superior or unique information relevant to issues being litigated is relieved of the burden to testify where the information can be obtained by a less intrusive method, such as obtaining testimony of lower ranking employees.

Based upon the court's review of the subject pleadings and arguments by the opposing party, the Court concludes as follows:

First, there is no basis for quashing the subpoena of any witness based upon a contention by the subpoenaed party that the information desired from that witness testimony is not relevant. It is an elementary principle of law that relevancy of evidence is determined based on the subject matter of litigation and the specific inquiry directed to that witness. The subject matter of this litigation is defined by the pleadings before the Court. However the Court does not know—and the Attorney General does not assert—any knowledge as to what question or questions are to be directed to her. As

such, the Court has no factual basis upon which to rule that any question is not relevant. That is a decision that the Court must make after the witness is sworn and questions are propounded. Hence, the Attorney General's objection based on relevance is **OVERRULED**.

Concerning the assertion of a "deliberative process" privilege, the Arkansas Rules of Evidence contain no such privilege. The Court has found no such privilege in Arkansas statutes. The Attorney General does not cite to any Arkansas statute that conveys such privilege.

To the contrary, and instructively, the issue of privilege is prescribed clearly in Rule 501 of the Arkansas Rules of Evidence, as follows: "except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme court of this State, *no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any mater or producing any object or writing.*"

(emphasis added) Specifically the Arkansas Rules of Evidence delineates the following privileges: lawyer-client privilege, physician and psychotherapist-patient privilege, husband-wife privilege, religious privilege, political vote privilege, and trade secrets privilege. See *Ark. R. of Evidence 502-507*. The Attorney General does not assert any of the privileges previously mentioned. Arkansas Rule of Evidence 508 provides that: "[i]f the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States, (b) [n]o other governmental privilege is recognized except as created by the Constitution or statutes of this State."

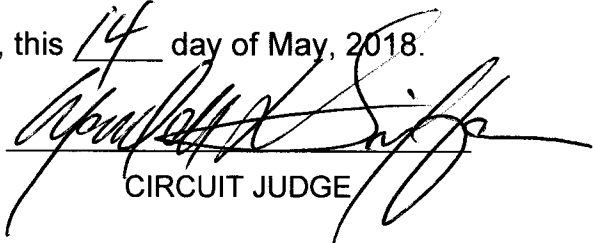
The Court finds no basis for concluding that Arkansas Rule of Evidence 508 envisions the “deliberative process privilege” asserted by the Attorney General in this instance. Arkansas Rule of Evidence 509, Identity of Informer does not apply. As previously mentioned, these are the prescribed privileges set forth in the Arkansas Rules of Evidence. The “deliberative process” privilege asserted by the Attorney General is not included. The Court notes that although the assertion is based upon a court opinion of some age, the Arkansas Supreme Court has not included it in the Arkansas Rules of Evidence (nor has the Arkansas Legislature enacted any law) suggesting that this privilege would be included. As such, the objection by the Attorney General based on her reliance on a “deliberative process” privilege is hereby OVERRULED.

Finally, the Attorney General’s reliance on the Apex Witness Rule must also be overruled. According to that argument, before the Court can compel the testimony of the high ranking governmental officer, the petitioner must demonstrate both that the governmental official possesses superior or unique information relevant to issues being litigated and that the information cannot be obtained by a less intrusive method, such as obtaining testimony of lower ranking employees. The Attorney General of Arkansas is—according to the explicit provisions of the Constitution of Arkansas—vested with a non-delegable duty to certify proposed ballot initiatives before they can be submitted to the voters for decision. The Attorney General does not dispute that authority. Indeed, it would appear unlikely that the Attorney General could delegate that authority consistent with her duties. As such, the Court finds that there is no lower ranking employee whose testimony would be relevant concerning questions regarding ballot decisions for the

purposes of the Apex Witness Rule. Consequently, the Attorney General's objection based on her reliance on the Apex Witness Rule is hereby OVERRULED.

The Petitioner argues in its Response that it has attempted to meet with the Attorney General and determine whether there were ways to resolve the discovery issues regarding her testimony. The Attorney General has failed to identify anyone other than herself authorized to give testimony at the May 18, 2018 hearing. The Court raises these points because the Attorney General's reliance on the Apex Witness Rule is based on the contention that the information might be obtained from a lower ranking employee. If the Attorney General indeed believed that information might be obtained from a lower ranking employee, it was incumbent on the Attorney General to at least identify that person and suggest when or whether that person might be available to be interviewed. Rather it appears that the Attorney General did not do so. The Court finds that conduct inconsistent with the spirit of discovery and unsupported by any rule of law cited by the Attorney General or otherwise known to the Court.

Accordingly, the Motion for Protective Order and/or Motion to Quash is hereby DENIED. IT IS SO ORDERED, this 14 day of May, 2018.


CIRCUIT JUDGE