Filed: 08/25/2023 16:41:06
Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Deputy Clerk - Sims-Douglas, Linda

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RAÚL R. LABRADOR, in his official capacity as attorney general of the State of Idaho,

Plaintiff,

vs.

IDAHO STATE BOARD OF EDUCATION, an agency of the State of Idaho, in its capacity as the Board of Regents of the University of Idaho,

Defendant.

Case No. CV01-23-9996

ORDER ON MOTION TO DISQUALIFY

Plaintiff Raul R. Labrador, Idaho's Attorney General, seeks to nullify the approval given by Defendant Idaho State Board of Education, acting in its capacity as the Board of Regents of the University of Idaho, for the University of Idaho's planned acquisition of the University of Phoenix, a for-profit online university. Attorney General Labrador claims that the Board of Regents violated Idaho's Open Meetings Law, I.C. §§ 74-201 to -208, in considering and approving the University of Phoenix acquisition. The Board of Regents moves to disqualify Attorney General Labrador and the members of his office from serving as counsel in this action, citing an ostensible conflict of interest created by his office's representation of and other contacts with the Board of Regents in relation to the acquisition. After expedited briefing, the motion was argued and taken under advisement on August 24, 2023. For the reasons that follow, it is, in large part, granted.

The Court begins with the legal standard to be applied in deciding the Board of Regents' motion to disqualify. The movant "has the burden of establishing grounds for disqualification." *Hepworth Holzer, LLP v. Fourth Jud. Dist.*, 169 Idaho 387, 398, 496 P.3d 873, 884 (2021) (citing *Foster v. Traul*, 145 Idaho 24, 32, 175 P.3d 186, 194 (2007)). Motions to disqualify are "disfavored," *id.* (citing *Foster*, 145 Idaho at 33, 175 P.3d at 195), and "should be viewed with caution" when brought by an opponent, *Foster*, 145 Idaho at 32, 175 P.3d at 194 (citing *Weaver v. Millard*, 120 Idaho 692, 697, 819 P.2d 110, 115 (Ct. App. 1991)). That said, whether to disqualify counsel is decided in the trial court's discretion. *E.g.*, *Hepworth Holzer*, 169 Idaho at 398, 496 P.3d at 884 (citing *Weaver*, 120 Idaho at 697, 819 P.2d at 115). Four factors have commonly guided trial courts in exercising their discretion:

> (1) Whether the motion is being made for the purposes of harassing the opponent;
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> (2) Whether the party bringing the motion will be damaged in some way if the motion is not granted;
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> (3) Whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances; and
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> (4) Whether the possibility of public suspicion will outweigh any benefits that might accrue to continued representation.

Id. at 397–98, 496 P.3d at 883–84 (brackets omitted) (quoting *Foster*, 145 Idaho at 32–33, 175 P.3d at 194–95). In deciding a motion to disqualify, "[t]he goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process." *Id.* at 399, 496 P.3d at 885 (quoting *Foster*, 145 Idaho at 32, 175 P.3d at 194).

The ostensible conflict of interest cited by the Board of Regents as grounds for disqualifying Attorney General Labrador and the lawyers in his office from serving as counsel[1] in this action has two distinct origins.

The first is that Deputy Attorney General Jenifer Marcus advised the Board of Regents on open-meetings issues during the course of its consideration and approval of the University of Phoenix acquisition and, according to the Board of Regents, approved the very conduct that Attorney General Labrador now claims violated Idaho's Open Meetings Law. Attorney General Labrador hasn't disputed that before the Board of Regents engaged in the allegedly violative conduct, Deputy Attorney General Marcus advised it that the conduct would not violate Idaho's Open Meetings Law, nor has he disputed that, by filing this action, he is countermanding Deputy Attorney General Marcus's advice. Consequently, for present purposes, the Court takes as established that Deputy Attorney General Marcus indeed advised the Board of Regents that its conduct would be lawful.

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[1] Attorney General Labrador believes the Board of Regents also sought his disqualification as plaintiff. (Pl.'s Resp. Def.'s Mot. Disqualify 10.) Even if the Board of Regents sought that relief at first, it does so no longer, recently agreeing that if disqualification is ordered, Attorney General Labrador may engage conflict-free counsel, (Reply Further Supp. Mot. Disqualify 17), and disclaiming during the hearing that the ostensible conflict of interest is being advanced as grounds for dismissal. Attorney General Labrador has a "duty to enforce [Idaho's Open Meetings Law] in relation to public agencies of state government," I.C. § 74-208(5), among them the Board of Regents, *see* I.C. § 74-202(4)(a). This duty presumably encompasses taking legal action when necessary to stop or neutralize violative conduct. So, though Attorney General Labrador's disqualification as counsel is appropriate for the reasons explained below, he may pursue this action as plaintiff, represented by conflict-free counsel.

That Deputy Attorney General Marcus, a member of Attorney General Labrador's office, advised the Board of Regents that its conduct would be lawful is not, by itself, justification enough for disqualifying Attorney General Labrador and all members of his office from serving as counsel in this action. Deputy Attorney General Marcus has a conflict of interest that, as a matter of professional ethics, prohibits her from representing Attorney General Labrador. *See* I.R.P.C. 1.11(d)(1) (providing that government lawyers are subject to I.R.P.C. 1.9); I.R.P.C. 1.9(a) (prohibiting a lawyer who formerly represented a client in a matter from representing a party adverse to the client in a substantially related matter). But her conflict of interest is not imputed to Attorney General Labrador and other members of his office. *See* I.R.P.C. 1.11 cmt. 2 ("Because of the special problems raised by imputation within a government agency, paragraph (d) [of Rule 1.11] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."). Though it is jarring for an attorney general to sue a client of his office for following the advice of one of his deputies, Attorney General Labrador and members of his office other than Deputy Attorney General Marcus are not ethically prohibited from serving as counsel simply because he is suing the Board of Regents for following her advice.

The second origin of the ostensible conflict of interest lies in a telephone call that occurred on June 20, 2023—the day this action was filed. Two distinctly different versions of the call are in evidence.

Executive Director Freeman testifies by declaration that Attorney General Labrador and Solicitor General Theodore J. Wold initiated the call to him and Deputy Attorney General Marcus to discuss whether open-meetings violations occurred. (Freeman Decl. ¶ 26.) Executive Director Freeman says he "shared information openly and candidly with Attorney General Labrador," (*id.*), in response to Attorney General Labrador's "several probing questions," (2d Freeman Decl. ¶ 4), only to learn at the end of the call that Attorney General Labrador would file that very day an action alleging open-meetings violations, (*id.*; Freeman Decl. ¶ 27).

By contrast, Solicitor General Wold testifies by declaration that Attorney General Labrador's disclosure of the impending filing of suit was made "[a]t the outset of the call." (Wold Decl. ¶¶ 12–13.) Solicitor General Wold says that Attorney General Labrador "[a]t no point . . . sought or obtained privileged or confidential information from the Board [of Regents]." (*Id.* ¶ 21.) But he acknowledges that Attorney General Labrador sought information from Executive Director Freeman that would be useful in determining whether open-meetings violations occurred. (*Id.* ¶ 12.) And he does not cast doubt on Executive Director Freeman claim to having spoken freely.

Notably, Attorney General Labrador has not himself testified in writing about the call. Nor has Deputy Attorney General Marcus, who would be in the unenviable position, were she to testify, of disputing either her client's version or the divergent one offered by her boss, Attorney General Labrador, through Solicitor General Wold. If the Court must decide whose version to believe based on this

paper record—neither side having sought permission to present live testimony, Attorney General Labrador offering no testimony of his own, and Deputy Attorney General Marcus presumably being reluctant to testify—the Court finds Executive Director Freeman's version more plausible. He says he spoke freely. A person in his position would be expected to clam up in response to an announced intention to file suit. Solicitor General Wold doesn't dispute that Executive Director Freeman spoke freely. And no one asserts that Deputy Attorney General Marcus advised Executive Director Freeman to clam up, as a (conflict-free) lawyer probably would have done once Attorney General Labrador raised the specter of filing suit. On this record, the Court considers it likelier than not that Attorney General Labrador's disclosure of the impending suit came at end of the call, not the outset. Consequently, during the call, Executive Director Freeman seems to have reasonably believed that he was speaking with the Board of Regents' lawyers, not with prospective litigation adversaries.

But, even if the disclosure came at the outset of the call, Solicitor General Wold's assertion that Attorney General Labrador sought no privileged information is of dubious accuracy because, by law, Attorney General Labrador was the Board of Regents' lawyer. I.C. § 67-1401(1). His office had made Deputy Attorney General Marcus available to advise the Board of Regents on open-meetings issues arising in connection with the University of Phoenix acquisition, Executive Director Freeman was acting as representative of the Board of Regents during the call, and, as a general rule, communications between a client representative and the client's

lawyers are privileged. I.R.E. 502(b). Executive Director Freeman's statements during the call were likely privileged attorney-client communications, even if the information he relayed to Attorney General Labrador was not itself privileged (though that information would be privileged if it included previous attorney-client communications between the Board of Regents and Deputy Attorney General Marcus). For at least that reason, no inquiry into whether the information Executive Director Freeman relayed was itself privileged is warranted. Further, even if Executive Director Freeman's statements during the call somehow fail to qualify themselves as privileged attorney-client communications, the inquiry undertaken by Attorney General Labrador practically invited disclosure of previous privileged attorney-client communications between the Board of Regents and Deputy Attorney General Marcus. It seems highly likely that privileged communications were disclosed when Executive Director Freeman spoke freely in response to that inquiry. The Court is disinclined to require the Board of Regents to identify particular privileged communications relayed during the call to prove as much. *Cf. United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Corp.*, 637 F. Supp. 1556, 1561 (W.D. Wash. 1986) ("The underlying concern is the possibility, or the appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought.") (quoting *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980)).

Attorney General Labrador does not explain how his disclosure of impending litigation extinguished the attorney-client relationship that then existed between his office and the Board of Regents on open-meetings issues arising in connection with the University of Phoenix acquisition, in which Deputy Attorney General Marcus was already involved. He did not disclose to Executive Director Freeman that his office was no longer representing the Board of Regents in that regard. He did not tell Executive Director Freeman that any information he provided during the call would not be considered privileged and could be used against the Board of Regents in court. And he did not inform Executive Director Freeman that Deputy Attorney General Marcus could not ethically represent the Board of Regents—during or after the call—concerning whether open-meetings violations had occurred because her loyalties were divided between the Board of Regents as her client and its anticipated litigation adversary Attorney General Labrador as her boss. By taking this approach, he gained access to privileged information, creating a conflict of interest that may necessitate his disqualification, the disqualification of Solicitor General Wold, and the disqualification of Deputy Attorney General Timothy Longfield.[2] This conflict of interest is illustrated by the evident difficulty the Board of Regents has in pressing its version of the call. Though Deputy Attorney General

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[2] Deputy Attorney General Longfield, though not part of the call, has presumed access to the information Executive Director Freeman provided during the call, as lawyers who work together are presumed to share this sort of information, *see United States ex rel. Lord Elec.*, 637 F. Supp. at 1564, and there is no evidence that it was kept from him or that measures were taken to keep it from him.

Marcus supposedly agrees with Executive Director Freeman's version, (2d Freeman Decl. ¶¶ 5–6), to so testify, she would have to publicly refute her boss's contrary version. This is deeply problematic, unfair to the Board of Regents, and a direct result of Attorney General Labrador's approach to the call.

Turning then to the question of disqualification, the Court already listed four factors that should guide its determination. Again, very briefly, they ask whether (1) the motion is brought for purposes of harassment, (2) the movant will be harmed if the motion is not granted, (3) there are less drastic solutions available, and (4) public suspicion will outweigh any benefits of continuing the representation. *E.g.*, *Hepworth Holzer*, 169 Idaho at 398, 496 P.3d at 884. All favor disqualification.

As to the first factor, nothing in the record suggests that the Board of Regents' motion to disqualify is brought for harassment purposes. Attorney General Labrador argues that the Board of Regents sat on its hands for two months before filing the motion, despite having been aware of the conflict since this litigation began, supposedly revealing its desire to delay proceedings. But the record does not support an inference that delay is an objective of the Board of Regents. The Board of Regents appears intent on completing the University of Phoenix acquisition. Litigation delay impedes that goal. It is in the Board of Regents' interest to resolve this matter as soon as possible, and it has acted accordingly. Indeed, just weeks after Attorney General Labrador's complaint was filed, the Board of Regents moved to dismiss it. Only after Attorney General Labrador filed an amended complaint to counter the arguments for dismissal did

the Board of Regents move to disqualify his counsel. It filed that motion within days of being served with the amended complaint and along with motions for summary judgment and for a speedy hearing on both its motion to disqualify and its motion for summary judgment. Plainly, the Board of Regents has not sought delay. Further, two months is a reasonable period in which to bring its motion. The cases cited by Attorney General Labrador don't suggest otherwise. *See, e.g.*, *Crown v. Hawkins Co.*, 128 Idaho 114, 123, 910 P.2d 786, 795 (Ct. App. 1996) (affirming denial of motion to disqualify when movant waited nearly five years to bring it); *Weaver*, 120 Idaho at 698, 819 P.2d at 116 (affirming denial of motion to disqualify when movant was aware of the conflict for over a year before filing that motion).

As for the second factor, whether the Board of Regents will be harmed if its motion is denied, the answer is clearly yes. As just described, Executive Director Freeman engaged in a candid conversation with Attorney General Labrador and Solicitor General Wold about whether open-meetings violations occurred while under the (understandable) impression that they were the Board of Regents' counsel. So, as things stand, the Board of Regents is now in the awkward position of being sued by someone who previously engaged it in a privileged conversation regarding the very subject of this litigation. The harms are both obvious and difficult to quantify, considering that the Board of Regents can't very well disclose the content of the conversation without exacerbating the problem. And, for much the same reason, allowing Attorney General Labrador to pursue this litigation without restriction risks arousing legitimate public suspicion, causing the fourth

factor to favor disqualification as well. The prospect that the Attorney General's office could or would use client confidences in litigation against a client undermines the trust placed in the office by government agencies and the public alike.

Finally, as for the third factor, the Court finds that disqualification is the least damaging solution in these problematic circumstances. The conflict at issue is weighty—Attorney General Labrador and Solicitor General Wold engaged Executive Director Freeman in an open dialogue about whether the Board of Regents violated Idaho's Open Meetings Law. Whatever was said during that phone call can't be unsaid, and the Court can't reasonably expect Attorney General Labrador and his team to wipe those words and the impressions they created from their minds as this case moves forward. Also important, this litigation remains in its infancy, meaning the burden on Attorney General Labrador in switching counsel is relatively low. Generally speaking, disqualification becomes increasingly disfavored the older a case is and the more intensively it has been litigated. *See Weaver*, 120 Idaho at 698, 819 P.2d at 116; *United Nuclear Corp. v. Gen. Atomic Co.,* 629 P.2d 231, 244–46 (N.M. 1980). Little has occurred in this case thus far. There is not yet a scheduling order. The burden of disqualification is modest.

Taking all four factors into account, the Court concludes that disqualification of Attorney General Labrador, Solicitor General Wold, and Deputy Attorney General Longfield is warranted. That said, the Court does not find it necessary to disqualify all members of Attorney General Labrador's office. The disqualification of Attorney General Labrador, Solicitor General Wold, and Deputy Attorney

General Longfield is necessitated by their actual or presumptive access to privileged information. It is not imputed to all members of Attorney General Labrador's office. *See* I.R.P.C. 1.11 cmt. 2. So, Attorney General Labrador may look in-house for new counsel if he wishes, so long as he takes all steps necessary to deny new counsel access to the information obtained during the call. The steps the Court expects to be taken in that regard are outlined below.

Accordingly,

IT IS ORDERED that the Board of Regents' motion to disqualify is granted in part and denied in part. The motion is granted in that Attorney General Labrador, Solicitor General Wold, and Deputy Attorney General Longfield are disqualified from serving as counsel in this action. But it is denied insofar as it seeks the blanket disqualification of all lawyers working in Attorney General Labrador's office; subject to the constraints outlined below, other members of Attorney General Labrador's office may serve as his counsel in this action.

IT IS FURTHER ORDERED that Attorney General Labrador has until September 5, 2023, to appear in this action through new counsel. This action will be dismissed with prejudice if he fails to do so.

IT IS FURTHER ORDERED that Attorney General Labrador's new counsel may come from his office or outside his office, but in the former case may not be Deputy Attorney General Marcus or anyone with supervisory authority over her. Further, whether new counsel comes from Attorney General Labrador's office or outside his office, Attorney General Labrador, Solicitor General Wold, and Deputy

Attorney General Longfield must not lawyer the case from behind the scenes, must not disclose to new counsel any information obtained during the telephone call discussed above, and must ensure that new counsel is not given access to any file materials describing or otherwise revealing the information obtained during that call. Attorney General Labrador must ensure that Deputy Attorney General Marcus is screened from any involvement in this action, and neither he nor new counsel may have any contact with her concerning this action except in the presence of, or as agreed by, the Board of Regents' counsel.

IT IS FURTHER ORDERED that, upon new counsel's appearance, both Attorney General Labrador and new counsel must file sworn statements that they are aware of, have heeded, and will continue to heed the requirements of this order for so long as it remains in effect.

Jason D. Scott 8/25/2023 4:38:09 PM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on August 25, 2023, I served a copy of this document as follows:

Raúl R. Labrador, Attorney General
Theodore J. Wold, Solicitor General
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TRENT TRIPPLE
Clerk of the District Court

8/25/2023 4:42:03 PM

By: _____
Deputy Court Clerk

CLERK OF THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT
ADA COUNTY, IDAHO