

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

In the Matter of: The Idaho Attorney General's Investigation of the Community Partner Grant Program-Civil Investigative Demands for Dave Jeppesen, Jennifer Palagi, and Shane Leach

Case No. CV01-23-04832
MEMORANDUM DECISION AND
ORDER GRANTING IN PART MOTION
TO DISQUALIFY ATTORNEY
GENERAL'S OFFICE AND DENYING
MOTION TO DISQUALIFY
PETITIONERS' COUNSEL

The Attorney General's Motion to Disqualify Petitioners' Counsel, filed April 7, 2023, and the Petitioners' request to disqualify the Attorney General's Office made on pages 16 through 19 of the Petition to Set Aside Civil Investigative Demands, filed March 7, 2023, came before the Court for oral argument on May 24, 2023.

Appearances: Trudy Fouser and Eric Stokes for Petitioners
Lincoln Davis Wilson, Timothy Longfield and Rafael Droz for Respondents

I. CASE PROCEEDINGS

On May 23, 2023, Petitioners Dave Jeppesen, Jennifer Palagi, and Shane Leach, through counsel Trudy Fouser, filed a Petition to Set Aside Civil Investigative Demands ("CIDs")¹ served by the Idaho Attorney General's Office, Raúl Labrador Attorney General, that seek documents and other information about the Idaho Department of Health and Welfare's ("IDHW") administration of the Community Partner Grant funds. Jeppesen and Palagi were served with separate CIDs on March 6, 2023 and Leach was served on March 7, 2023.² The Petitioners filed a supporting declaration from Jeppesen as the Director of the IDHW.³ **At issue in this decision is the Petitioners' assertion that the Attorney General has created an inescapable conflict of interest by issuing the CIDs to his own clients and cannot be permitted to investigate his own**

¹ **Petition to Set Aside Civil Investigative Demands ("Petition"), filed Mar. 23, 2023.**

² **Declaration of Dave Jeppesen ("Jeppesen Dec"), filed Mar. 23, 2023, Exhibits B-D.**

³ **Declaration of Dave Jeppesen ("Jeppesen Dec"), filed Mar. 23, 2023.**



clients.⁴ The Attorney General responded⁵ with supporting declaration from declaration from Lincoln Davis Wilson⁶-- a Deputy Attorney General and the Division Chief of Civil Litigation and Constitutional Defense for the Office of the Attorney General for the State of Idaho. The Petitioners filed a reply⁷ with supporting supplemental declaration from Jeppesen.⁸ The Court set the Petition for hearing on May 24, 2023.

The Attorney General filed a Motion to Disqualify Petitioners' Counsel⁹ with supporting memorandum¹⁰ and declaration from Counsel Lincoln Davis Wilson¹¹ that requests the Court enter an order disqualifying Petitioner's counsel Trudy Fouser based on a conflict of interest. Petitioners responded to the Motion to Disqualify¹² with supporting declarations from each of the named parties (Dave Jeppesen,¹³ Jennifer Palagi,¹⁴ and Shane Leach¹⁵), a declaration from Chelsea Kidney¹⁶ who was employed as a Deputy Attorney General ("DAG") with the Office of Idaho Attorney General ("OAG") from 2011 to March 24, 2023; a declaration from Brady Hall¹⁷ who is General Counsel to Idaho Governor Brad Little and a member of Governor Little's Senior Staff; a

⁴ Petition, p. 5. The Petition also assert good cause exists to set aside the CIDs because: (1) "having already declared the grant program to have been lawfully administered, the Attorney General does not have the requisite probable cause to issue the CIDs[; (2)] the statutes cited by the Attorney General do not grant him the authority to investigate the allocation of federal grant funds...."

⁵ Response in Opposition to Petition ("Response"), filed Apr. 17, 2023.

⁶ Declaration of Lincoln Davis Wilson ("Wilson Dec"), filed Apr. 17, 2023.

⁷ Reply in Support of Motion to Set Aside Civil Investigative Demands ("Reply"), filed Apr. 28, 2023.

⁸ Supplemental Declaration of Dave Jeppesen in Support of Petition to Set Aside Civil Investigative Demands ("Jeppesen Supp Dec"), filed Apr. 28, 2023.

⁹ Motion to Disqualify Petitioners' Counsel, filed Apr.7, 2023.

¹⁰ Brief in Support of Attorney General's Motion to Disqualify Petitioners' Counsel ("Disqualify Memo"), filed Apr. 7, 2023.

¹¹ Declaration of Lincoln Davis Wilson ("Wilson Dec"), filed Apr. 17, 2023.

¹² Response to Motion to Disqualify ("Disqualify Response"), filed Apr. 28, 2023.

¹³ Declaration of Dave Jeppesen ("Jeppesen Dec"), filed Apr. 28, 2023.

¹⁴ Declaration of Jennifer Palagi ("Palagi Dec"), filed Apr. 28, 2023.

¹⁵ Declaration of Shane Leach ("Leach Dec"), filed Apr. 28, 2023.

¹⁶ Declaration of Chelsea Kidney ("Kidney Dec"), filed Apr. 28, 2023.



declaration from Kris Coffmann¹⁸ who is the Risk Management Program Claims Supervisor for the Division of Insurance and Internal Support of the Idaho Department of Administration; a declaration of Faith Cox¹⁹ who is the Risk Manager and Division Administrator for the Office of Insurance and Internal Support within the Idaho Department of Administration; and finally, a declaration from Trudy Fouser.²⁰ The Attorney General's Office replied²¹ with a supporting declaration from Wilson.²²

The Court determined at the May 24, 2023, hearing that it would take the Petitioner's motion to disqualify the Attorney General's Office under advisement prior to hearing any additional argument or reaching a decision on the remainder of the Petition.

On May 24, 2023, the Court only took under advisement the motion to disqualify Fouser as Petitioner's counsel and the Petitioners request to disqualify the Attorney General as stated in the Petition.

Following the hearing, the Respondents requested the Court take into consideration the slides presented during oral argument and a supplemental memorandum on the issue of appointing special counsel or a special prosecutor.

1. The Court Will Consider Only the Slides Presented by Respondent at the Hearing and Not the Filed Version

On June 25, 2023, the Respondent filed a "Notice of Lodging Presentation Slides from hearing on Motion to Disqualify Petitioners' Counsel," which included a copy of the powerpoint presentation that Respondent's counsel presented to the Court during the oral argument.²³ The Petitioners object, arguing the filing is "an inappropriate attempt at either a sur-reply, additional oral argument, or both" and also arguing the "Respondents'

¹⁷ Declaration of Brady Hall ("Hall Dec"), filed Apr. 28, 2023.

¹⁸ Declaration of Kris Coffman ("Coffman Dec"), filed Apr. 28, 2023.

¹⁹ Declaration of Faith Cox ("Cox Dec"), filed Apr. 28, 2023.

²⁰ Declaration of Trudy Hanson Fouser ("Fouser Dec"), filed Apr. 28, 2023.

²¹ Reply in Support of Attorney General's Motion to Disqualify Petitioner's Counsel ("Reply"), filed May 22, 2023.

²² Reply Declaration of Lincoln Wilson ("Wilson Reply Dec"), filed May 2, 2023.

²³ Notice of Lodging Presentation Slides from hearing on Motion to Disqualify Petitioners' Counsel, filed June 25, 2023.



argumentative slides were not served upon the Court or Petitioners prior to the hearing and, as such, are improper under Idaho Rule of Civil Procedure 7(b)(3)(C).²⁴

The Court agrees that the presentation as filed should not be included as part of the record and the Court will not consider the written version filed when reaching a decision. The Court will consider the presentation that was presented during the Respondent's oral argument to the extent the slides were relevant, actually presented to the Court since counsel did not present every argument on every slide during the hearing, and to the extent the presentation supported the oral argument made in court in the presence of opposing counsel.

2. The Court Will Not Consider Respondent's Supplemental Briefing

On June 22, 2023, the Respondent filed a Motion for Leave to File Supplemental Brief Regarding Special Prosecutor.²⁵ The Respondent argues "The Court first raised the possibility of appointing a special prosecutor or special counsel to address Petitioners' allegations of a purported conflict at the recent hearing on the matter of disqualification" but that this issue was not addressed by the parties in their briefing. The Attorney General asked that the Court "grant leave to file the attached supplemental brief to show that (1) a special prosecutor is not warranted where the Attorney General is executing his exclusive statutory duties; and (2) no Idaho authority exists for the Court to appoint one."²⁶ The Attorney General did not request oral argument and requested the Petitioners be given only one day to respond. The following day, the Petitioners filed an opposition to the Respondent's request to file supplemental briefing arguing the Court should not consider the supplement because (1) it is untimely, (2) it ignores the plain language of Idaho Code § 67-1409; and (3) the supplement addresses other substantive issues that should have been raised in the original briefing or at the hearing.²⁷

²⁴ Objection to Notice Lodging Presentation Slides, filed June 25, 2023.

²⁵ Motion for Leave to File Supplemental Brief ("Leave Memo"), filed June 22, 2023.

²⁶ Leave Memo, p. 2.

²⁷ Opposition to Motion for Leave to File Supplemental Brief Regarding Special Prosecutor, filed June 23, 2023.



The Court DENIES the Respondents' request for leave to supplement their briefing after the hearing has already been held. The Respondent had ample opportunity to argue the issue before the Court. The Respondent did not set the motion for hearing and one day is not a reasonable time for response if considered without additional oral argument. So, the Court will not consider the Respondents' proposed supplemental brief when reaching a decision on whether disqualification is appropriate.

3. The Court Will Not Consideration the Notice of Supplemental Authority

The Attorney General filed a Notice of Supplemental Authority on May 2, 2023 to provide notice that this Court in Case No. CV01-23-04242 (*Children's Home Network, et al., v. Labrador, et al.*), issued decisions relevant to the issue raised before the Court in the pending litigation. This Court is assigned as the presiding judge in that case, actually wrote the decisions, so is aware of the case proceedings in Ada County Case No. CV01-23-04242. However, the decisions in another district court case are not binding in this case and those decisions are currently on an interlocutory appeal. That case involved different parties, different briefing, and those issues are not *res judicata* or binding precedent at this point in this case. The Court has not yet gotten to the issue of whether the Attorney General has authority to issue CIDs in this case and the parties' briefing and facts differ from those in the *Children's Home, et al.* case. So, this Court will not consider any decisions from Case No. CV01-23-04242 (*Children's Home Network, et al., v. Labrador, et al.*) that are not final in this case.

Therefore, the Court considers the Motion to Disqualify the Attorney General's Office and/or Trudy Fouser as Petitioners' counsel based on the arguments raised in the briefing filed before May 24, 2023 and the oral arguments made in court at the May 24, 2023 hearing.²⁸

²⁸ The Court notes that Respondents requested to introduce expert testimony if expert testimony was provided by the Petitioners or if the Court believed it would be helpful. The Petitioners objected to the Respondents' request and did not include any expert testimony in response to the motion to disqualify. The Court finds that expert testimony would not aid in this Court's decision and would be an untimely supplement. So, the Court denies any request to provide expert testimony on these issues.



II. BACKGROUND

1. IDHW administration of the Community Partner Grant Program

Due to the COVID-19 pandemic's impact on childcare providers within the state, the State of Idaho enacted the Community Partner Grant Program. The Idaho Legislature established Idaho's Community Partner Grant Program through two House Bills that became law: HB 400 §2 (2021) and HB 764 §6 (2022). These were appropriations bills and are codified in Idaho's Session Laws: for HB 400 §2 (2021) is in 2021 Session Laws Chapter 353, for sections 1 and 2 that became effective May 10, 2021; and then HB 764 §6 (2022) is in 2022 Session Law Chapter 190 that became effective July 1, 2022. Both statutes state, "Community provider grants shall be used only for in-person educational and enrichment activities that focus on student needs and for providing behavioral health supports to address student needs. Grants shall be used for servicing school-aged participants ages 5 through 13 years, as allowable by federal guidance." The IDHW was responsible for awarding the funds to Idaho childcare providers.²⁹ Governor Little appointed Director Jeppesen in 2019 and he continues to serve in that position.³⁰

In September 2021, IDHW announced the first recipients of the grant and awarded Community Partner Grants to 61 facilities represented by 35 organizations. A second and final round of grants were announced in September 2022 which included many of the same recipients from the first round and some new recipients, for a total of 80 community partners who received grants under the program. The IDHW issued press releases that disclosed the names of all grant recipients.

In the Fall of 2022, John Foster, a lobbyist raised concerns about the grant program, arguing that the funds should be exclusively awarded to agencies serving

²⁹ The Court notes that on April 5, 2023, in part based on the investigation into IDHW's administration of the grant program, Senate Bill 1203, 67th Leg., Reg. Sess. (Idaho 2023), § 1, became law and rescinded \$14,394,000.00 in funds allocated to IDHW for the Community Partner Grant Program, removed authority from IDHW to administer remaining Community Partner Grant Program funds, and reassigned the responsibility for the Community Partner Grant Program to the Idaho Department of Labor. *Wilson Dec*, Exhibit 3. Governor Little's words in his transmittal for Senate Bill 1203 cautions that his signature on the bill is not be construed as an agreement or finding of any wrongdoing or that any ineligible payments were made but does note the legislative audit process has just begun and the courts have not concluded there was malfeasance. *Id.*

³⁰ Hall Dec, ¶ 4.



children ages five to thirteen and none of the funding should be used for children under the age of five.³¹ In October 2022, IDHW received a public records request from Foster requesting grantee applications and grant award letters. IDHW provided those records to Foster.³²

In response, the IDHW requested the Attorney General provide advice on the administration of the grant program under Idaho and Federal law.³³

On November 30, 2022, the Office of the Attorney General Health and Human Services Division sent a “Legal Memorandum” regarding “Self-Reliance Child Care Development fund (CCDF) community grant program administration’s statutory compliance” to Jennifer Palagi, Deputy Director at IDHW, and Shane Leach, the Self-Reliance Division Administrator at IDHW, with IDHW’s Director, Dave Jeppesen, copied on the memorandum (“2022 Legal Memorandum”).³⁴ Lawrence Wasden was Idaho’s Attorney General at the time the 2022 Legal Memorandum was written. The 2022 Legal Memorandum opines that the IDHW implementation of the community grant program is “consistent with federal and state guidelines” and that the Department “acted appropriately in ensuring no conflicts in the CCDF program’s administration.”³⁵

³¹ Jeppesen Dec, ¶ 5.

³² Jeppesen Dec, ¶ 4.

³³ Jeppesen Dec, ¶¶ 6-9; ¶ 6 (“Jennifer Palagi of IDHW requested a legal opinion from the Idaho Attorney General’s Office as to the propriety of IDHW’S administration of the Community Grant Program, as well as to address another of Mr. Foster’s concerns, which was that an employee of IDHW had a conflict of interest as to the administration of the Community Grant Program.”).

³⁴ Jeppesen Dec, Exhibit A.

³⁵ Jeppesen Dec, Exhibit A:

You asked for a legal analysis about the Self-Reliance Division’s implementation of community grant programs, and whether that implementation violates Idaho law. In particular, you asked about compliance with the 2022 legislature’s appropriations bill HB764, and Idaho Code § 67-6506.

In brief, Self-Reliance’s processing of community grants raises no concerns of statutory violations. The Idaho Department of Health & Welfare works with federal partners to implement federal grants under the American Rescue Plan Act (ARPA or ARP Act), and adheres to federal guidance, as recognized in HB764. Section 67-6506, Idaho Code, concerns conflicts of interest in local land use planning and is thus inapplicable here. However, as to a general question about conflict of interest, Self-Reliance’s process does not raise concerns.

...



At the beginning of January 2023, Lawrence Wasden left as Idaho’s Attorney General and Raul Labrador was sworn as the new Attorney General.

On January 25, 2023, the Office of the Attorney General Health and Human Services Division sent a second “Legal Memorandum” to the same recipients regarding the same subject matter (“2023 Legal Memorandum”). Raul Labrador was Idaho’s Attorney General when the 2023 Legal Memorandum was written, when the Petitioners in this case were served with their CIDs, and when this matter was filed in District Court. The 2023 Legal Memorandum states in relevant part:

You asked for a legal analysis about the Self-Reliance Division’s implementation of community grant programs, and whether that implementation violates Idaho law. In brief, Self-Reliance’s processing of community grants raises no concerns of statutory violations. The Idaho Department of Health & Welfare works with federal partners to implement federal grants under the American Rescue Plan Act (ARPA or ARP Act), and adheres to federal guidance.

...

Notably, federal guidelines emphasize enabling access to high-quality child care, without regard for age. State guidelines emphasize serving school-aged participants aged 5-13, “as allowable by federal guidance,” and also require the Department to ensure that applications comply “with grant guidelines.” Read together, the guidelines do not preclude serving children younger than five years of age – toward whom federal guidelines are arguably geared (as child care needs lean heavily toward younger children). Rather, the combined-guidelines indicate that applicants should include – and not exclude – serving children ages 5-13.

...

Federal and state guidelines and laws reflect an intent that federal CCDF and CCDBG funding be implemented in Idaho to assist Idaho families in receiving high-quality child care assistance for children aged 0-13, given hardships associated with COVID-19. The Department’s implementation of the CCDF program is consistent with federal and state guidelines.³⁶

Federal and state guidelines and laws reflect an intent that federal CCDF and CCDBG funding be implemented in Idaho to assist Idaho families in receiving high-quality child care assistance for children aged 0-13, given hardships associated with COVID-19. The Department’s implementation of the CCDF program is consistent with federal and state guidelines. The Department has acted appropriately in ensuring no conflicts in the CCDF program’s administration.

³⁶ Jeppesen Dec, Exhibit A.



Unlike the 2022 memorandum, the 2023 Legal Memorandum does not address possible internal IDHW conflicts of interest in administering the grant program. Still, both legal memoranda indicate that the guidelines do not preclude serving children under five years old but should include children ages five to thirteen.

The Respondents argue that the Attorney General only became aware of these legal memoranda when they were filed in this case.³⁷ The Attorney General's Office argues these two legal opinions "reinforce the need to investigate" because "these opinions were issued under suspicious circumstances, used flawed analysis."³⁸ The Respondents also argue the opinions do not address the "legal risks of future action", but instead merely "use flawed legal analysis to provide post-hoc justification for Health and Welfare's distribution of Community Partner grants."³⁹ Additionally, the Respondents argue "it is impossible to know who wrote them,"⁴⁰ but assert "[n]o Deputy Attorneys General in the Health & Human Services Division (the Division within the Office of Attorney General assigned to IDHW) informed the Attorney General or his Executive Office either about the requests for the November or January opinions or about the opinions themselves, whether in draft or final form."⁴¹

Raul Labrador, as the Attorney General, "rescinded and withdrew both opinions" in the 2022 and 2023 Legal Memoranda on March 24, 2023.⁴²

2. Investigation into IDHW Administering the Grant Program

On January 17, 2023, IDHW Director Jeppesen provided testimony to the Idaho Legislature related to the Community Grant Program which indicated an intent for the grants to not be dispersed to programs for children under five years of age.

In early 2023, Labrador and the Attorney General's Office began an investigation into the Community Partner Grant Program to determine if certain grants were given to

³⁷ Wilson Dec, Exhibit 16 ("Dewhirst Dec"), ¶ 5.

³⁸ Response, pp. 18-20.

³⁹ Response, pp. 18, 9.

⁴⁰ Response, p. 22.

⁴¹ Wilson Dec, Exhibit 16 ("Dewhirst Dec"), ¶ 6.

⁴² Wilson Dec, Exhibit 16 ("Dewhirst Dec"), ¶ 7 ("Given the lack of any supervision or oversight on these opinions and the manifest flaws in their legal analyses on such important questions, the Attorney General rescinded and withdrew both opinions on Friday, March 24, 2023.").



entities “that may not have been eligible to receive the funds.”⁴³ On March 3, 2023, Division Chief Lincoln Wilson signed the CIDs that demanded the recipients produce documents in connection with the Attorney General’s investigation.⁴⁴ CIDs were also served on many Community Partner Grant recipients and on Ericka Rupp, the former Program Manager for Child Care at IDHW who was involved in administering the Community Partner Grant Program before she left her employment at IDHW in late 2022.

The CIDs at issue in this case were individually served on each Petitioner on March 6 and 7, 2023, and they each request, in part, information on how IDHW administered the Community Partner Grant Program.⁴⁵ The Attorney General’s Office did not make an informal inquiry or inform IDHW employees that they would be served with CIDs before the CIDs were actually served.⁴⁶ The Attorney General informed Jeppesen that the Attorney General’s Office (including Deputy Attorney Generals assigned to IDHW) would not represent IDHW employees related to the CIDs and investigation.⁴⁷ Approximately thirty Deputy Attorneys General (“DAGs”) are currently assigned to provide legal representation to IDHW.⁴⁸ In early March of 2023, Chelsea Kidney was employed as a DAG and was the IDHW Division Chief. Kidney left this position on March 24, 2023.

On March 3, 2023, Dewhirst sent an e-mail to Chelsea Kidney, a DAG, in her capacity as IDHW Division Chief, that stated the Attorney General’s Office was going to serve CIDs on the Petitioners and that the Attorney General’s Office would not provide legal representation to any recipients of the CIDs.⁴⁹

The Attorney General argues this office instituted conflict-avoidance measures related to the CIDs. On March 3, 2023, David Dewhirst, as the Chief Deputy Attorney

⁴³ Wilson Dec, ¶ 9.

⁴⁴ Wilson Dec, ¶ 11.

⁴⁵ Jeppesen Dec, Exhibits B-D.

⁴⁶ Jeppesen Dec, ¶ 11.

⁴⁷ Jeppesen Dec, ¶ 12.

⁴⁸ Hall Dec, ¶ 4.

⁴⁹ Kidney Dec, ¶¶ 2- 3.



General, emailed related to the Civil Investigation into IDHW that stated a firewall had been erected.⁵⁰ Dewhirst ordered that DAGs for the IDHW and DAGs working on the Community Partner Grant Program investigation not communicate with one another about the investigation without his advance approval.⁵¹ “Dewhirst also ordered that IDHW DAGs not give advice to the CID recipients regarding the Investigation and their responses required by law.”⁵²

On March 6, 2023, Jeppesen emailed Dewhirst stating he had been served with the CIDs from the Attorney General’s Office. Jeppesen provided:

Since the service was from the AG’s office and the DHW DAG’s have been firewalled for this issue, that leads me to conclude that there will not be legal representation provided by the AG’s office.

Therefore, I wanted to make you aware that I plan to hire outside legal counsel to provide legal services to DHW for this CID and any related issues. Given the 20 day timeline in the attached, I plan to make this hiring decision in the next 24 hours or so.⁵³

Dewhirst responded that same day that Jeppesen’s understanding of the firewall was correct.⁵⁴

⁵⁰ Wilson Dec, Exhibit 4:

Attached you will find CIDs served (or being served) today on a handful of current (and one former) DHW officials by our Civil & Constitutional Defense Division. Pursuant to legislative requests, the division took a preliminary look and determined that an investigation should ensue to determine whether certain charitable organizations received—and Department officials awarded—grants that violate appropriations law. CIDs have also been issued to charitable organizations who are grantees of the relevant funding program.

Management of real or perceived conflicts: as of today, DAGs in your division should refrain from providing advice to individual departmental CID recipients on the topic of this investigation and their responses required by law. You may—to the extent it arises—advise other DHW personnel or the Department, generally, of the existence of this investigation and the concomitant obligation to preserve all relevant records, information, and data. On all other topics and subjects, the attorneys in your division may and should continue providing normal legal services to DHW.

I’ve instructed Lincoln [Wilson] that his division should not communicate with yours about this investigation unless approved, in advance, by me. I now provide you the same instruction. Your two divisions work closely together on a host of other issues and matters—that work should continue unabated.

⁵¹ Wilson Dec, ¶ 17.

⁵² Wilson Dec, ¶ 18.

⁵³ Wilson Dec, Exhibit 5.

⁵⁴ Wilson dec, Exhibit 6.



Director Jeppesen, Ms. Palagi, and Mr. Leach requested the assistance of legal counsel from the Governor’s Office to analyze the CIDs, review the purported authority under which the CIDs were issued, and assist in responding to the CIDs within the 20-day period required by the CIDs.⁵⁵ On March 8, 2023, Brady Hall, General Counsel for the Governor, sent an email to Dewhirst that discussed retaining outside counsel for the Petitioners.⁵⁶ On March 9, 2023, Theodore Wold, Solicitor General for the Office of the Attorney General, sent an email to Hall. Wold stated the Attorney General’s Office interpreted Idaho Code section 67-1406 as follows:

The statute, therefore, authorizes the Governor to obtain outside counsel to defend executive officials during an investigation. This also appears to be the only ethically appropriate approach.

Rather than have the AG select and fund counsel for the subjects of an AG investigation (which would raise separate ethical concerns), the Governor can unilaterally obtain and fund such counsel for his executive agency employees.⁵⁷

Essentially, the OAG indicated its understanding that the Governor had the authority to obtain counsel for the Petitioners in this case. The Governor’s Office interpreted this email to say “it was the OAG’s position that a conflict prevented the OAG from representing Director Jeppesen, Ms. Palagi, and Mr. Leach regarding the CIDs, but that the OAG would neither appoint nor fund outside counsel to represent them.”⁵⁸ This position was not further addressed or clarified by the Attorney General’s Office,⁵⁹ but the OAG appears to have taken a position that they are not required to represent the Petitioners and the Governor’s appointment of counsel for them addressed any potential conflict in representation.

After a request from the Petitioners who had prior experiences working with Trudy Fouser,⁶⁰ the Governor then appointed Fouser as Petitioner’s counsel pursuant to

⁵⁵ Hall dec, ¶ 5.

⁵⁶ Hall dec, ¶ 7.

⁵⁷ Wilson Dec, Exhibit 7.

⁵⁸ Hall Dec, ¶ 8.

⁵⁹ Hall Dec, ¶ 8.

⁶⁰ Hal Dec, ¶ 10.



Idaho Code section 67-1406.⁶¹ Fouser’s appointment was not immediately disclosed to the OAG but Petitioners became aware immediately following the filing of this case.⁶²

3. Fouser’s Experience with the Attorney General’s Office

Faith Cox has been the Risk Manager and Division Administrator for the Officer of Insurance and Internal Support within the Idaho Department of Administration and since 2019 has been “responsible for hiring, assigning, and monitoring legal counsel of the Attorney General’s Office to represent and defend state officers and agencies on monetary claims”.⁶³ Trudy Fouser was appointed by Lawrence Wasden, as Attorney General, as a Special Deputy Attorney General (“SDAG”) on October 20, 2022.⁶⁴ Fouser was provided a memorandum dated December 13, 2021, regarding “SDAG Procedures, requirements, and Billing.”⁶⁵ Fouser has not worked directly as counsel for the Attorney General in his individual capacity.⁶⁶

Fouser asserts the Attorney General was in the process of removing her from representing under the authority of the Attorney General’s Office before the CIDs at issue in this case were issued.⁶⁷ Respondent Wilson had communicated to other

⁶¹ Idaho Code § 67-1406 states in relevant part:

Notwithstanding any other provision of law to the contrary, no department, agency, office, officers, board, commission, institution or other state entity shall be represented by or obtain its legal advice from an attorney at law other than the attorney general except as follows:

(1) The legislative and judicial branches of government and the governor may employ attorneys other than those under the supervision of the attorney general, and such attorneys may appear in any court. However, such entities may, upon request, utilize the attorney general’s legal services.

...

(5) Any separate counsel employed pursuant to the foregoing exceptions shall be compensated with funds appropriated to such state entity, unless such separate counsel shall have been employed at the request or convenience of the attorney general or because of a conflict in representation by the attorney general.

⁶² Wilson Dec, ¶ 23.

⁶³ Cox Dec, ¶ 2.

⁶⁴ Wilson Dec, Exhibit 1.

⁶⁵ Wilson Dec, Exhibit 2.

⁶⁶ See Cox Dec, ¶ 3 (“Ms. Fouser is not a lawyer with the Attorney General’s Office but has been appointed as a Special Deputy Attorney General (“SDAG”) as part of her representation of state officers and agencies.”).



attorneys in the Risk Management Office⁶⁸ and to certain clients that Fouser would not receive future appointments from the Attorney General's Office. Fouser testifies that in January 2023, the Attorney General's Office did not approve appointments for Fouser on two new cases referred to her, despite Risk Management seeking approval.⁶⁹ Further, the Attorney General's Office had contacted Risk Management to ask for transcripts of a certain depositions taken by Fouser as an SDGA in *Big City Coffee v. Boise State University*.⁷⁰ Fouser then began to discuss withdrawing from the case.⁷¹ Fouser subsequently learned that during a meeting held on February 21, 2023, Wilson announced that Fouser would be removed as counsel in the *Big City Coffee* case and from the list of approved SDAGs.⁷² Finally, Fouser asserts that Wilson met with Centurion, one of her SDAG clients, and told Centurion Fouser was being removed from all future SDAG appointments and they should find new counsel.⁷³ Wilson acknowledged this was the only time he had contact with this client and that he did communicate that Fouser would not be assigned any further SDAG appointments.⁷⁴

See also *Wilson Dec*, ¶ 36 (“Mr. Dewhirst responded by email to Ms. Fouser that he agreed the Attorney General was not her client....”).

⁶⁷ Disqualify Response, p. 2.

⁶⁸ The Petitioners submitted an affidavit from Kris Coffman—employed as the Risk Management Program Claim Supervisor for the Division of Insurance and Internal Support of the Idaho Department of Administration (“Risk Department”), which provided at the OAG stated Fouser would not be appointed on future cases. See *Coffman Dec*, ¶¶16-18 (“Mr. Wilson stated that Ms. Fouser would be removed from the Big City Coffee case and would not be granted any further SDAG appointments going forward. Mr. Wilson described the Attorney General’s decision to remove Ms. Fouser from the Big City Coffee case as being the Attorney General’s “political prerogative.” Mr. Wilson further stated that Ms. Fouser had overstepped and asked inappropriate questions during [a] deposition... During the call with Centurion [the client], Mr. Wilson stated that the Attorney General would not be issuing an SDAG appointment in the IDOC/Centurion matter and that Ms. Fouser would not be receiving any SDAG appointments in the future.”). The same information was relayed to Faith Cox. See *Cox Dec*, ¶¶8-10 (“Mr. Wilson stated that Ms. Fouser would be removed from the Big City Coffee case and that Ms. Fouser would not be approved as an SDAG in any future cases. Mr. Wilson described the Attorney General’s decision to remove Ms. Fouser from the Big City Coffee case as being the Attorney General’s ‘political prerogative.’”).

⁶⁹ Fouser Dec, ¶ 11.

⁷⁰ Fouser Dec, ¶¶ 12-17.

⁷¹ Fouser Dec, ¶ 17.

⁷² Fouser Dec, ¶ 19.

⁷³ Fouser Dec, ¶ 23.



In February 2023, Fouser decided to withdraw from her SDAG appointments and on February 24, 2023, Fouser signed her first notice of substitution on a SDAG case.⁷⁵ On March 6, 2023, Fouser sought to withdraw from all SDAG matters (approximately nine matters at the time) by notifying Wilson and requesting the Office of the Attorney General find replacement counsel. Fouser stated in an email to Wilson dated March 6, 2023:

I understand the decision has been made to remove me from the list of counsel for the State in future cases. If at all possible, I would appreciate talking with you today about the cases I am currently working on and how best to transfer them. Of course, I will assist in working toward a seamless transition.

At the time of this communication, Fouser did not know about the CIDs.⁷⁶ There is some dispute⁷⁷ but Fouser appears to have voluntarily withdrawn as a SDAG on all cases based on the “administration of Attorney General Raul Labrador”⁷⁸ and the decision that she would not receive future cases.⁷⁹

Fouser coordinated the transfer of her cases. On March 8, 2023, Wilson granted Fouser leave to withdraw, asserting it was “on the condition that she did so in a manner that was protective of the State’s legal interests and consistent with her ethical duties.”⁸⁰ Fouser did not inform Wilson that she had been retained by the Petitioners related to the CIDs/Investigation.⁸¹

⁷⁴ Lincoln Reply Dec, ¶¶ 7-9.

⁷⁵ Fouser Dec, ¶ 24, Exhibit B.

⁷⁶ Fouser Dec, ¶ 26.

⁷⁷ The Attorney General’s Office implies Fouser withdrew because of knowledge of her upcoming conflict with filing the pending Petition. Fouser asserts she withdrew based on communications from those within the Attorney General’s Office to a certain SDAG appointment clients indicating she would not be appointed on future cases and making it impossible to maintain an effective attorney-client relationship. *Wilson Dec*, Exhibit 14.

⁷⁸ Cox Dec, ¶ 11.

⁷⁹ Fouser Dec, ¶ 28. Fouser also alleges she was treated poorly (in “a rude and condescending manner.”). *Id.*

⁸⁰ Wilson Dec, ¶ 25.

⁸¹ Wilson Dec, ¶ 27.



Fouser was contacted by the Petitioners related to the CIDs on March 9, 2023 and met to discuss representation on March 10, 2023.⁸² Fouser conducted a conflict analysis, noting the Attorney General had never been a client, and she had represented the Idaho Department of Correction, the Idaho State Department of Education, Boise State University, and the University of Idaho as a SDAG.⁸³ Fouser determined her representation of the Petitioners would not put her in a position directly in conflict with her two remaining SDAG clients, the University of Idaho or the Idaho Department of Correction.⁸⁴ Fouser also determined she had "always represented the interests of the IDHW and ha[d] never taken an adverse position against the Department."⁸⁵ Based on this review, Fouser determined she did not have a conflict in representing the Petitioners.

The Respondents allege that at the time this Petition was filed, Fouser was a SDAG for "a state agency" in a "highly sensitive [and] confidential" case⁸⁶ ("Sensitive case") and that she still reported to Lincoln Davis Wilson as the Deputy Attorney General and the Division Chief of Civil Litigation and Constitutional Defense for the Office of the Attorney General for the State of Idaho.⁸⁷ Fouser emailed Wilson on March 22, 2023 to indicate she would be withdrawing from her SDAG responsibilities and it would conclude her involvement.⁸⁸ Kris Coffman indicated there would be time to find a replacement attorney for certain pending cases.⁸⁹ Wilson responded to Coffman stating that Coffman should "stop defending" Fouser and that Fouser "would be staying on the matter."⁹⁰

⁸² Fouser Dec, ¶ 29.

⁸³ Fouser Dec, ¶ 32.

⁸⁴ Fouser Dec, ¶ 34.

⁸⁵ Fouser Dec, ¶ 33.

⁸⁶ Wilson Dec, ¶ 5.

⁸⁷ Wilson Dec, ¶¶ 1, 6.

⁸⁸ Wilson Dec, Exhibit 8 ("In addition to the _____ cases, I told Kris Coffman__ that I would be withdrawing from the _____ matter that is before _____. As soon as new lawyers are appointed, that will conclude my involvement. Everything is ready to send, so just let me know when. Thanks. Trudy.").

⁸⁹ Coffman Dec, ¶ 26.

⁹⁰ Coffman Dec, ¶ 26. See *a/so*, Cox Dec, ¶ 13.



The Petition in this case was filed March 23, 2023.

Wilson emailed Fouser on March 24, 2023 to inform her that he believed her representation of the Petitioners created “ethical problems of initiating litigation directly adverse to the State while at the same time she was working as an SDAG” and he demanded she withdraw her representation.⁹¹ The email states in part:

First, you are suing a current client without informed consent. You represent the State of Idaho in your work as an SDAG, and that work is not over. ...

Second, you don’t have authority to sue anyone—much less the Attorney General—on behalf of governmental employees in their official capacity. Your action purports to represent the official interests of a state agency and to sue on behalf of three IDHW employees who you say are clients of the Attorney General. In one respect, that’s exactly right—**they are the Attorney General’s clients, not yours**. Idaho law makes it the statutory duty of the Attorney General to represent all state officers and agencies. Idaho Code 67-1401(1). And for that reason, counsel other than the Attorney General may be appointed only if the governor “after consultation with the attorney general ... determines in his sole judgment” that it is warranted. 67-1406(4). The governor has not consulted with the Attorney General on the matter, and he certainly hasn’t made that determination. And that means your purported representation of the Attorney General’s clients is invalid and void ab initio. It is a nullity.⁹²

Dewhirst also emailed Fouser the same day to inform her she was required to seek a waiver as an acting SDAG.⁹³

Fouser then contacted Joe Pirtle, Bar Counsel for the Idaho State Bar, to request an informal opinion on whether she had a conflict of interest. Fouser asserts that her conversation with Pirtle “confirmed [her] understanding that [she] did not create a conflict of interest in agreeing to represent [Petitioners].”⁹⁴

Fouser responded to Dewhirst’s email on March 27, 2023 by stating the Attorney General had not been a client and she was confident there was no conflict with her representing the Petitioners.⁹⁵ Dewhirst responded and agreed the Attorney General

⁹¹ Wilson Dec, ¶ 32, Exhibit 9.

⁹² Fouser Dec, Exhibit E.

⁹³ Wilson Dec, Exhibit 10.

⁹⁴ Fouser Dec, ¶ 47.

⁹⁵ Wilson Dec, Exhibit 11.



was not her client but stated she still needed a contact waiver because the State was her client when she was a SDAG.⁹⁶ Fouser did not respond. Dewhirst followed up with Fouser about the Attorney General's opinion of a conflict,⁹⁷ and Fouser replied the conflict was only part of the Attorney General's internal policy that provided only that she could be terminated as an SDAG.⁹⁸

On April 4, 2023, Fouser and Wilson discussed a pending case where Fouser was the SDAG where the state agency requested Fouser continue as counsel, indicating Fouser's additional detailed knowledge and notes were necessary for any subsequently-appointed SDAG. Fouser agreed to provide additional review and comments.⁹⁹ On April 12, 2023, Wilson, Hall and Fouser had a conversation regarding her representation. Hall testifies he is "familiar with the legal matters in which Ms. Fouser has represented executive branch officers and agencies as clients" and is unaware of "Fouser or her law firm having any conflict of interest that would disqualify her from representing Director Jeppesen, Ms. Palagi, or Mr. Leach regarding the CIDs, Petition, or purported investigation of the CPG program."¹⁰⁰ After additional communications with the Attorney General's Office, Fouser stated she would not withdraw as counsel in this case.¹⁰¹

On April 18, 2023, after the Respondents filed the motion to disqualify, Fouser filed a Notice of Substitution of Counsel on the remaining sensitive case.¹⁰²

It is established that Fouser has "represented IDHW and IDHW employees in previous cases" and "achieved great results."¹⁰³ The Petitioners "strongly prefer that Ms. Fouser and her firm remain ...counsel" and "have zero concerns that Ms. Fouser or

⁹⁶ Wilson Dec, Exhibit 12.

⁹⁷ Wilson Dec, Exhibit 13.

⁹⁸ Wilson Dec, Exhibit 14.

⁹⁹ Wilson Dec, ¶¶ 38-42.

¹⁰⁰ Hall Dec, ¶ 12.

¹⁰¹ Wilson Dec, ¶¶ 49-53, Exhibit 15 (quoting an email dated April 15, 2023, Fouser states: "It would be too time-consuming and a waste of attorney fees to have to start over and go through another selection process for my clients. My clients want to remain with Gjording Fouser.").

¹⁰² Lincoln Reply Dec, ¶ 3.

¹⁰³ Jeppesen Second Dec, ¶ 11; Palagi Dec, ¶ 2; Leach Dec, ¶ 2.



her team somehow have a conflict of interest in this matter.”¹⁰⁴ The Petitioners assert that “[o]btaining new counsel would deprive [them] of the counsel of [their] choice, delay the resolution of this matter, and cause significant additional costs...”¹⁰⁵

III. LEGAL STANDARDS

1. Motion to Disqualify

The decision to grant or deny a motion to disqualify counsel is within the discretion of the trial court. *Weaver v. Millard*, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct.App.1991). However, motions to disqualify are general disfavored. *Foster v. Traul*, 145 Idaho 24, 32–33, 175 P.3d 186, 194–95 (2007). The Idaho Court of Appeals established a four-part test to determine whether an appearance of impropriety alone will give a party standing to interfere with an adverse party's choice of counsel:

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

Hepworth Holzer, LLP v. Fourth Jud. Dist. of State, 169 Idaho 387, 398, 496 P.3d 873, 884 (2021). “[T]he moving party has the burden of establishing grounds for disqualification.” *Id.* 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. Whenever possible, courts should endeavor to reach a solution that is least burdensome to the client.” *Foster v. Traul*, 145 Idaho 24, 32, 175 P.3d 186, 194 (2007).

2. Statutory Duties of the Attorney General

Idaho Code § 67-1401 sets forth duties of the Attorney General, and provides in relevant part:

¹⁰⁴ Jeppesen Second Dec, ¶ 13; Palagi Dec, ¶ 4; Leach Dec, ¶ 4.

¹⁰⁵ Jeppesen Second Dec, ¶ 14; Palagi Dec, ¶ 5; Leach Dec, ¶ 5.



Except as otherwise provided in this chapter, it is the duty of the attorney general:

(1) To perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards, commissions, institutions and other state entities in all courts and before all administrative tribunals or bodies of any nature. Representation shall be provided to those entities exempted pursuant to the provisions of section 67-1406, Idaho Code. Whenever required to attend upon any court or administrative tribunal, the attorney general shall be allowed necessary and actual expenses, all claims for which shall be audited by the state board of examiners.

(2) To advise all departments, agencies, offices, officers, boards, commissions, institutions and other state entities in all matters involving questions of law....

...

(5) To enforce the Idaho charitable solicitation act, chapter 12, title 48, Idaho Code; the Idaho nonprofit hospital sale or conversion act, chapter 15, title 48, Idaho Code; to supervise charitable organizations, as such term is defined in section 48-1903(4), Idaho Code; and to enforce whenever necessary any noncompliance or departure from the charitable purpose of such charitable organizations as set forth and provided in chapter 19, title 48, Idaho Code.

....

(13) To appoint deputy attorneys general and special deputy attorneys general and other necessary staff to assist in the performance of the duties of the office.

“The attorney general, in rendering assistance to ... state entities, shall charge for all costs of such assistance as determined pursuant to section 67-1407, Idaho Code.”

IDAHO CODE § 67-1408.

3. Legislative Oversight of State Funds

Idaho Code § 67-702 provides:

(1) The legislative services office at the direction of the legislative council has authority to:

...

(f) Perform an audit of any local governmental entity, as defined in section 67-1076, Idaho Code, at the request of the legislative council or the committee on uniform accounting and transparency for local governmental entities established in section 67-448, Idaho Code; and...



(2) The legislative council reserves the right to audit or examine any and every fund in the state treasury and any institution, association, board, or other defined entity created by, or that receives an appropriation from, the legislature.¹⁰⁶

4. Relevant Idaho Rules of Professional Conduct

Idaho Rule of Professional Conduct 1.6 addresses “Confidentiality of Information” and provides: “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). There is no allegation that the exemptions in subsection (b) apply in this case.

Idaho Rules of Professional Conduct 1.7 and 1.9 address duties to current and former clients. Idaho Rule of Professional Conduct 1.7 addresses “Conflict of Interest: current clients” and states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

¹⁰⁶ At the time the CIDs were filed, no one within Governor’s Office had knowledge of the Legislative Council directing the Legislative Services Office to request the OAG to investigate the program as required by Idaho Code 67-702(1)(e). *Hall Dec*, ¶ 6, FN 1.



Idaho Rule of Professional Conduct 1.9 address “Duties to Former Clients,” stating in relevant part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

...

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm 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 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

IV. MOTION TO DISQUALIFY THE ATTORNEY GENERAL’S OFFICE

There is no dispute that the Petitioners are currently officers of an agency of the State of Idaho and that the Attorney General has a duty to advise them in matters involving questions of law. See IDAHO CODE § 67-1401.

The Petitioners’ arguments that the Attorney General’s Office should be disqualified as counsel for Respondent are found on pages 16 through 19 of the Petition. The Petitioners argue that “the Attorney General does not have the authority to maintain an adverse action against Petitioners on a matter that the Attorney General’s Office has previously advised Petitioners upon; and ... the Attorney General has created an impermissible conflict of interest by seeking to investigate his own clients.”¹⁰⁷ The Petitioners note that this is “not a case in which the Attorney General is obligated to represent two adverse Idaho agencies” but rather the Attorney General made the decision and instituted adversarial proceedings against clients on the same matter to which the Attorney General previously provided legal counsel.¹⁰⁸

¹⁰⁷ Petition, p. 9.

¹⁰⁸ Petition, p. 17.



The Petitioners argue that most of the documents and information requested through the CIDs were provided in response to a public records request and are readily available for review by the Attorney General’s Office through other means. Therefore, the issue is not with the overall production of the documents, but is with the service of civil investigative demands by the Attorney General’s Office to obtain information in this case.¹⁰⁹

The Respondent argues the Petitioners’ request to disqualify the Attorney General’s Office is “frivolous.”¹¹⁰ The Attorney General argues that the motion to disqualify should be denied because (1) the investigation is part of his statutory duties; (2) a CID is not an adversarial proceeding; (3) the decision to litigate through independent counsel precludes any argument that the Attorney General’s Office was required to represent them; and (4) even if there was a conflict, the Attorney General’s Office took measures to set up a firewall and ensure there was no communication between attorneys involved in the investigation and those representing IDHW.¹¹¹

The relationship between the attorney general and the state officials and agencies that the attorney general represents, as imposed by statute, is akin to the traditional attorney-client relationship, and therefore the attorney general owes those officials and agencies a duty of undivided loyalty and must exercise the utmost good faith to protect their interests. Thus, when the attorney general advises or represents another official, agency, or department, an attorney-client relationship is thereby formed and the rules regarding professional conduct apply.

7 AM. JUR. 2d *Attorney General* § 17 (May 2023 Update). The Legal Memoranda were requested by the IDHW and specifically addressed the legality of the Department’s action in administering the community partner grants. The administration of the community partner grants is also the subject matter of the Attorney General’s investigation and the civil investigative demands served in this case. So, there can be no argument that the investigation into whether IDHW violated the law by administering the grants is in direct opposition to the Attorney General’s opinions in the Legal Memoranda that IDHW’s actions were lawful. The Court finds that the Attorney General

¹⁰⁹ Petition, p. 2.

¹¹⁰ Response, p. 22.

¹¹¹ Response, pp. 21-22.



formed a client relationship with the IDHW and its officials when it provided the IDHW with legal analysis and opinions in the Legal Memoranda. The Court further finds this client relationship created a duty to act in protection of IDHW's interests.

The Respondents also argue the issuing of the CIDS is not an adversarial proceeding.¹¹² The Court disagrees. The Petitioners argue the Attorney General “has created an adversarial relationship against his own clients, which has generated and will generate entirely unnecessary costs that will ultimately be borne by the people of the State of Idaho, in violation of his statutory obligation to represent and advise Petitioners.”¹¹³ The Court finds the Respondents have clearly taken the position that the CIDs are warranted because they have a reason to believe IDHW violated the law in its administration of the community partner grant program.¹¹⁴ So, the purpose of the CIDs served in this case is to investigate to prove or disprove that the IDHW was in violation of the law, despite the Attorney General's Office issuing prior opinions that IDHW acted in conformity with the law. “Adversarial” means “[i]nvolving or characterized by dispute or a clash of interests.” BLACK'S LAW DICTIONARY, *Adversarial* (11th ed. 2019). While the CIDs are seeking information and not themselves instigating civil or criminal action, it is the purpose of the request that makes the CIDs adversarial. Further, the Petitioners point out that there are potential issues of attorney fees and also personal privacy concerns for IDHW employees about certain of the CID requests.¹¹⁵ The Court finds the Attorney General's interest in serving the CIDs to investigate IDHW and its officers is directly adversarial to IDHW's and the also the interests of the IDHW employees that filed this litigation.

The Attorney General argues that the Attorney General's Office is investigating by serving the CIDs rather than representing a client, and the investigation complies with the Attorney General's duty to supervise charitable organizations.¹¹⁶ Although the Attorney General states it is not representing IDHW or its employees in this litigation,

¹¹² Response, p. 23.

¹¹³ Petition, p. 5.

¹¹⁴ See Response, p. 20.

¹¹⁵ Reply, p. 13.

¹¹⁶ Response, p. 23.



there is a clear inference that the Attorney General is acting on behalf of the Legislature. The Court finds the Attorney General's authority to issue the CIDs is not determinative of whether serving CIDs on IDHW officials created a conflict that should disqualify the Attorney General from being the investigating party and also the office that provides legal advice to IDHW. Rather, the question is whether there is a conflict created by the Attorney General's duty to IDHW based upon the prior opinions also issued by the Attorney General's Office.

The Petitioners outline applicable Rules of Professional Conduct¹¹⁷ and the Attorney General's statutory duties related to advising IDHW and its officers, and the Petitioners also cite to out-of-state cases in support of their position that the Attorney General's Office has a conflict of interest that prevents it from initiating adversarial proceedings against a client.¹¹⁸ Specifically, the Petitioners quote from *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 154–55, 624 P.2d 1206, 1207 (1981), which states:

There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

The Deukmejian Court went on to state:

We have acknowledged the Attorney General's dual role as representative of a state agency and guardian of the public interest.... We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.

¹¹⁷ Reply, p. 13.

¹¹⁸ Petition, p. 17.



Deukmejian, 29 Cal. 3d at 157 (internal quotations omitted). The Court finds this opinion persuasive as it addresses the weighing of public concerns against the conflict of advising an agency and then taking an adversarial action in opposition to the interests and opinions provided to the agency. In short, the facts in *Deukmejian* are substantially similar to this case.

Further, the Petitioners argue that the Attorney General's position that he "has initiated this investigation in service of the public interest" was a unilateral determination made by the Attorney General's Office and was not made at the request of a client.¹¹⁹ The Petitioners argue this is only the Attorney General's concept of what is in the public interest.¹²⁰

This Court acknowledges that the Attorney General is statutorily mandated to perform legal representation for multiple parties and, at times, even those with adversarial interests. But that statutory mandate is not completely unbridled just by saying it is in the public interest.

Even when the attorney general's vision of the state's legal interests is at variance with that of his or her statutory client, once the state officer or instrumentality whom the attorney general represents has determined a course he or she desires litigation to take, it is the duty of the attorney general to zealously advocate the public policy positions of his or her client in pleadings, in negotiations, and in the courtroom and to avoid even the appearance of impropriety by appearing to be in conflict with the desires of his or her client.

7 AM. JUR. 2d *Attorney General* § 17 (May 2023 Update). Therefore, the Court finds that the Attorney General is precluded from investigating actions that the Attorney General's Office previously opined, as part of its statutory duties, was lawful, regardless of the recognized legal basis for such action. It does not matter if the legal opinions were subsequently disavowed or withdrawn. What matters is that the legal advice was provided to IDHW as the client. While the Court considers the Rules of Professional Conduct related to conflicts of interest in reaching this decision, this Court finds there is a notable conflict in the Attorney General pursuing an action adverse to the IDHW's interests by serving the CIDs at issue in this case.

¹¹⁹ Petition, p. 18.

¹²⁰ Petition, p. 18.



The Attorney General argues that the Petitioners' reliance on outside counsel precludes an assertion that they are the Attorney General's clients.¹²¹ This Court disagrees. While it is clear that the Attorney General's Office is not currently representing these Petitioners in this matter, as the court determined above, the Attorney General took on an attorney-client relationship and duties of legal representation to IDHW and its officials when it issued the Legal Memoranda. The fact that the Attorney General declined to represent these three IDHW officials to avoid a conflict¹²² is not determinative of whether that actually did prevent such conflict. The Court finds the conflict existed at the time the Attorney General served the CIDs on Mr. Jeppesen, Ms. Palagi, and Mr. Leach so a subsequent decision to provide them outside counsel does not control whether a conflict exists on the part of the Attorney General related to the investigation of the community partner grant program.

The Attorney General also argues it put a "firewall" in place so there is no conflict. The Petitioners argue the "Respondents purported attempts to avoid the conflict are neither genuine nor sufficient to excuse their conflict of interest."¹²³ The Petitioners note that the Attorney General's Office attempted to seize IDHW property¹²⁴ from the IDHW DAGs as part of its investigation despite the firewall. The Respondents' brief is clear that the Attorney General's Office requested Daphne Huang, the Acting Chief Deputy Attorney General for the Department, provide Chelsea Kidney's work phone to the Attorney General's Office before any data could be deleted from the phone.¹²⁵ The Court finds this attempted removal of an item to be investigated from IDHW through an assigned IDHW DAG shows the Attorney General's Office did not actually keep the acting DAGs and the community partner grant program investigation team wholly separate. At least in this instance, the Attorney General's Office treated this

¹²¹ Response, p. 24

¹²² Response, p. 24 ("After Petitioners received CIDs, the Governor asked the Attorney General to appoint an SDAG to represent them under Idaho Code § 67-1406(4)–(5). But the Attorney General declined for the specific purpose of *preventing* a conflict.") (citations omitted).

¹²³ Reply, p. 16.

¹²⁴ Reply p. 16 (referencing Response pp. 20-21 (addressing the OAG's request for Kidney's work phone after she resigned and that it was wiped prior to being turned over was "suspicious" and supports further investigation)).

¹²⁵ Response, p. 19.



IDHW DAG as part of the investigation team. So, the Court finds that this “firewall” is insufficient to prevent legal conflicts of interest and it also cannot cure the already established conflict of interest created when the Legal Memoranda were written and provided to IDHW and then the Attorney General’s Office has since served CIDs on Jeppesen, Palagi and Leach to investigate the community partner grant program.

Therefore, this Court finds, for purposes of this motion, that the IDHW and IDHW officials were justified in relying on the opinions and evaluations of the administration of the grants that were provided by the Attorney General’s Office. Based on the specific facts, the Court finds the Attorney General’s Office was provided information in confidence in search of guidance and the Attorney General cannot now seek to investigate IDHW and its employees’ actions since the IDHW request for a legal opinion made the IDHW a client of the Attorney General on this same issue. More importantly, the Attorney General provided an opinion to a client and cannot now seek to investigate whether that the client violated the law on the same issue. The Court finds there is a notable conflict of interest in the Attorney General’s Office by serving the CIDs on these Petitioners.

Here, the Court finds that the Petitioners’ motion to disqualify was not made for the purposes of harassing the Respondents and there are genuine issues of law and fact related to the motion to disqualify. The Court also finds that the Petitioners could be damaged based on their prior statements and/or information provided to the Attorney General’s Office when IDHW sought guidance on the administration of the grant program. This Court also finds there are alternative means for seeking the CIDs and/or investigating IDHW’s administration of the grant program. Finally, this Court finds the conflict creates sufficient issues with the continued investigation to outweigh the benefit of allowing the Attorney General to continue to represent the Respondents in this litigation that is directly against IDHW employees.

While the Attorney General’s Office argues there is no authority for the Court to order the appointment of a special prosecutor, the Court does not intend to find conflict counsel or appoint conflict counsel for the Attorney General. The Court finds that the Attorney General did not argue that the Attorney General’s Office cannot appoint a special prosecutor in this case. Therefore, appointment of a special prosecutor for this



litigation remains a viable option for the Attorney General's Office to defend this litigation in District Court although a conflict exists between the Respondents and the Petitioners here. Therefore, this Court finds that the Attorney General appointing an independent, special prosecutor is an alternative solution that would be less damaging to the Respondents than just granting the motion to disqualify in its entirety.

The facts cited above support disqualifying the Attorney General's Office from enforcing the March 6 and 7, 2023 CIDs that were served on Petitioners as current employees and officers of IDHW and that relate to the administration of the Community Partner Grant Program. However, the conflict in this case may be resolved by the Attorney General in a less damaging way if the Attorney General will substitute a special prosecutor to litigate this case. The Petitioners' request to disqualify the Attorney General's Office made on pages 16 through 19 of the Petition to Set Aside Civil Investigative Demands, filed March 7, 2023, is granted in part and this court will stay this proceeding for twenty-one days from the issuance of this Order to permit the Attorney General to consider appointing a special prosecutor to litigate this case.

V. MOTION TO DISQUALIFY PETITIONERS' COUNSEL

The Respondents assert that Fouser's representation of Petitioners creates "an actual, directly adverse conflict of interest" that puts the Attorney General's Office on both sides of this litigation since she has also served as a SDAG.¹²⁶ The Respondents do not dispute that Petitioners can retain separate counsel in this litigation that objects to the CIDs that were served.¹²⁷ However, Respondents argue that Ms. Fouser must be disqualified as Petitioners' counsel "to protect the State's right not to be sued by its own attorneys."¹²⁸

The Petitioners argue there is no conflict of interest because Fouser has not represented the Office of the Attorney General or the Attorney General specifically, but rather only represented other state agencies on behalf of the Attorney General when appointed as a SDAG so there is no actual conflict of interest.

¹²⁶ Disqualify Memo, p. 9.

¹²⁷ Disqualify Memo, p. 13.

¹²⁸ Disqualify Memo, p. 2.



The Court finds that the parties briefing on these motions indicates no dispute that the Office of the Attorney General and the IDHW are state agencies that the Attorney Generals' Office is statutorily obligated to defend.

1. Whether Petitioners' Action is Against the Attorney General and/or State of Idaho

The Petitioners argue the Petition in this case is “similar to a Motion to Quash a subpoena” so it is not a civil action that requests money from the State of Idaho¹²⁹ or an action against the State of Idaho.¹³⁰

The issues presented from the service of the CIDs and the Petitioners' objections are relevant to this Court's determination of the Attorney General's statutory duties and powers. The Attorney General does have a substantial interest in the litigation of this case and its outcome since it relates to whether there was legally authorization to serve the CIDs on Petitioners who are IDHW employees and whether those CIDs are valid, should be modified, or should be terminated. Further, Petitioners' are requesting attorney fees from the State related to their Petition. While the requests in the Petition is similar to a motion to quash a subpoena, there are substantive issues involved in this litigation related to the Attorney General's power to investigate these matters that makes this Petition a claim against the Attorney General's Office. Additionally, this Court finds it is insincere for the OAG to argue this is an adversarial proceeding against the Petitioners in the Motion to Disqualify discussed above and now argue in the motion brought by the Respondents that this action is not an adversarial proceeding. Finally, the Court finds the Attorney General has a valid argument that this Petition is against the Attorney General's interests. So, this Court considers whether Fouser representing the Petitioners against the Attorney General's interest supports this Court finding a disqualifying conflict of interest.

2. Attorney General's SDAG Policy on Conflict of Interest

The Attorney General cites to a Memorandum provided to “All Attorneys Appointed Special Deputy Attorneys General Providing Legal Representation to the State of Idaho, Department of Administration, Risk Management Program” dated

¹²⁹ Disqualify Response, p. 2.

¹³⁰ Disqualify Response, p. 2.



December 13, 2021, as evidence that Fouser’s representation violates the SDAG policies (“AG policy”). There is no dispute that Fouser received the AG Policy as part of her appointment as a SDAG. However, no evidence of a signed agreement that contains or references these terms was presented to this Court in support of this motion.

The Petitioners argue the “Attorney General’s SDAG policy is nothing more than ... an internal policy” and is not a law or regulation that is binding or controlling.¹³¹ Petitioners argue the OAG policy is only relevant to address “those matters in which counsel is appointed as an SDAG and therefore does not apply in this case.”¹³²

The Memorandum policy states in relevant part:

Conflicts of Interest

The policy of the OAG and Risk with regard to conflicts of interest is as follows:

Any attorney selected for this appointment will be precluded from representing any client in any matter against the State of Idaho, its officers, or agencies **UNLESS A WRITTEN WAIVER IS FIRST OBTAINED FROM THE ATTORNEY GENERAL.** This prohibition extends to any member of the attorney’s firm.

...

Risk, the agencies for which Risk manages claims, and the OAG have the *option*, but not the *obligation*, to waive any conflict of interest which might arise by virtue of an SDAG (or any member of the SDAG’s firm) representing Risk and, at the same time instituting a legal action against any entity of the State, which is inclusive of any state department, division, office, program, board, commission, official, employee, or other state entity. Depending on the facts, many such conflicts of interest are waived by the State. However, some are not. In any event, it is incumbent upon the SDAG and the firm with which the SDAG is associated to clear any and all such conflicts in advance of accepting the representation of any individual or entity in an action adverse to the State. This includes not only tort claims against state entities, but also matters such as contract claims, personnel or employment claims, etc., in which the State would or could be an adverse party.

.... Failure to comply with this conflicts of interest policy may result in the revocation of your SDAG appointment.

¹³¹ Disqualify Response, p. 11.

¹³² Disqualify Response, p. 11.



(emphasis in original).¹³³

The Attorney General's Office argues this policy "makes it abundantly clear that the State is a single entity for purposes of determining a conflict."¹³⁴ Further, the Attorney General's Office argues "The longstanding policy of... SDAG appointing authority... has been that the State is a single entity for conflict purposes. And only the Attorney General can waive those conflicts."¹³⁵

While this internal policy addresses conflicts of interests and how the Attorney General expects an SDAG to handle representation concerns, this policy is not binding on this Court's decision whether an actual conflict exists. The OAG policy states failure to comply could result in revocation of the SDAG appointments. Fouser is unconcerned with any revocation of her SDAG appointments and has actually now withdrawn from them.¹³⁶ There is no dispute that the OAG is within its rights to remove Fouser from any SDAG appointments.

The Respondents cite *Kelso v. Lance*, 134 Idaho 373, 3 P.3d 51 (2000), to support their position that Fouser's representation of Petitioners is a conflict of interest with the Respondents. In *Kelso*, the district court granted summary judgment for the Attorney General's Office against the attorneys' claims for breach of contract and wrongful termination upon a showing that the SDAG attorneys had refused to choose between representing their private clients in tort claims against a state agency while also representing a state agency as a SDAG. *Id.* 134 Idaho at 374. The breach of contract and wrongful termination claims of Kelso and Irwin arose when the Attorney General withdrew his appointments as SDAGS for those Plaintiffs. In *Kelso*, SDAGs that represented the State's Industrial Special Indemnity Fund (ISIF) then filed notice of tort claim against the State Insurance Fund (SIF). The Idaho Supreme Court found this was a conflict of interest under the language of the agreement with the OAG appointing

¹³³ Wilson Dec, Exhibit 2, p. 2.

¹³⁴ Disqualify Memo, p. 4.

¹³⁵ See Wilson Dec, Exhibit 12.

¹³⁶ Wilson Dec, Exhibit 14.



the SDAGs.¹³⁷ After determining the SIF was a state agency, the Supreme Court determined there was a conflict of interest because the attorneys acted as SDAGs at the same time they were acting against a state agency's interests so the SDAGs created a conflict of interest "by putting the Attorney General's office on both sides of the litigation" in opposition to the disclaimer in their appointments. *Id.* 134 Idaho at 376. In conclusion, the *Kelso* court determined that "Kelso and Irwin breached their contracts with the Attorney General by filing a notice of tort claim against the SIF." *Id.* 134 Idaho at 377. The *Kelso* Court determined there was a conflict of interest only by applying the conflict restriction language in attorneys' SDAG applications but did not address the rules of professional conduct or if there is an actual conflict that would preclude an attorney from withdrawing as an SDAG to represent a client on an matter adverse to any state official or department. The issue in *Kelso* was that the attorneys refused to withdraw as SDAGs when the conflict arose.

In this case, the Respondents cite to Idaho Professional Rule of Conduct 1.11 in support of their argument that there is a conflict of interest based on the Attorney General's policy. The Petitioners did not address the applicability of Rule 1.11.¹³⁸ Rule 1.11 addresses "Special Conflicts of interest for former and current government officers and employees" and provides in relevant part:

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

...

¹³⁷ The proposal for SDAG appointment in the *Kelso* case provided in relevant part quoted by the court; "Any offeror selected for this appointment will be precluded from representing any client in any matter against the State of Idaho, its officers, or agencies unless a written waiver is first obtained from the Attorney General."

¹³⁸ See *generally* Disqualify Response.



(e) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Paragraph (d) “do[es] not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.” IDAHO R. PROF. CONDUCT 1.11, Comment 9. This Court finds that in this case Rule 1.11(d) does not apply since the Attorney General does not argue that Fouser was involved in “a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment.” Rather, the Attorney General argues that Fouser’s conflict is caused by her actions as a representative of the Attorney General, a governmental office. This Court finds Rule 1.11 does not create a defined conflict of interest of Fouser under the Attorney General’s policy.

“The regulation of the practice of law is an inherent power of the judiciary” including the determination of whether there is a potential or actual conflict of interest. *Litster Frost Inj. Laws., PLLC v. Idaho Inj. L. Grp., PLLC*, 171 Idaho 1, 6, 518 P.3d 1, 19 (2022), *as amended* (Sept. 2, 2022), *reh'g denied* (Oct. 14, 2022). So, the Court finds the ethical rules—specifically Rules of Professional Conduct 1.7 and 1.9—and rules for disqualification are controlling so this Court will not further consider the AG’s policy that was given to Fouser as a controlling standard for whether there is a conflict of interest in this case. Instead, this Court addresses whether there is a conflict using other established law.

3. Whether Fouser Has a Conflict of Interest

The Respondents argue Fouser has a “concurrent, directly adverse conflict” because the State is to be considered one client for purposes of conflict of interest and Fouser spent forty-four days in conflict while she remained an SDAG. The Court does not find the entirety of the State is one client for purposes of determining a conflict of interest under Idaho Rules of Professional Conduct 1.7 or 1.9 or under any cited Idaho case law. The State entities represented by the Attorney General’s Office—including all



departments, agencies, offices, officers, boards, commissions, institutions, etc.—is so large and diverse that it is wholly unrealistic to assume there is a free flow of information between all agencies and their legal counsel. See *Gray v. Rhode Island Dep't of Child., Youth & Fams.*, 937 F. Supp. 153, 159–60 (D.R.I. 1996) (addressing “the absurdity that can result from treating the entire government as the client of an agency lawyer” and noting “if the governmental entity as a whole is the client, anytime one agency of government sues another an irreconcilable conflict would arise.”). See also 63C AM. JUR. 2D *Prosecuting Attorneys* § 44 (May 2023 Update) (providing “the fact that while a free flow of information may be assumed to exist within a private law partnership, the size and diversity of many government agencies make similar assumptions about agencies wholly unrealistic...”). Without an assumed transfer of confidential information, the Court finds it is unreasonable to assume that all represented State entities are just one large entity for purposes of determining whether a conflict of interest exists.

The pertinent issue is whether there is an identifiable conflict between the state entities that Fouser represented in her assignment as a SDAG (whether that representation was for a current client or former client) and her current representation of the Petitioners in this litigation.

In this case, the Attorney General’s Office has provided no evidence that Fouser was privy to confidential information related to the CIDs or any investigation into the Community Partner Grant program; or that she has ever represented the Attorney General’s Office or the Attorney General; or that she has taken a position adverse to any of her clients when she was appointed as a SDAG to represent them. Additionally, there is no evidence that Fouser has ever, as a SDAG, represented those state agencies on matters for which the Attorney General now claims as a basis for serving the CIDs which includes Idaho Code §§ 48-1908(1)(in the Idaho Charitable Assets Protection Act), 48-1204(1)(in the Idaho Charitable Solicitation Act), and 48-611(1)(in the Idaho Consumer Protection Act). Instead, the Attorney General’s argues that because Fouser has represented a State Agency as a SDAG, she is precluded from representing any client against any officer, department, or agency to which the Attorney General is statutorily obligated to provide legal representation. The Court finds the Attorney General’s argument unpersuasive. The Court finds that the



Attorney General has failed to identify any specific conflict of interest of Fouser with either a current or former client from her SDAG assignments. So, the Court finds Fouser's actions and representation as a SDAG do not serve as any basis for this Court to disqualify her from representing the Petitioners in this matter.

The Attorney General's second argument is that Fouser was appointed as a SDAG at the time she began representing the Petitioners. Therefore, Fouser and the Attorney General must still work together "with a fatal breach of trust," essentially alleging the filing of the Petition in this case will impede her ability to represent current Attorney General clients.¹³⁹ In support of this argument, the Attorney General cites to comment 6 of the Idaho Professional Rule of Conduct 1.7, which states in part, "The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively."

First, the Court notes that Fouser had made a request to withdraw from representing any clients as a SDAG and was, in fact, in the process of withdrawing as counsel in her SDAG assignments before the start of her representation of the Petitioners. While this is not controlling, it does address the reasonable expectations the Attorney General had that Fouser would no longer be a SDAG and that those clients should have substitute counsel. Additionally, relationships between attorneys, whether collaborative or adversarial, change based on cases and issues presented. The Court does not find that an alleged inability to work together on a separate and distinct matter is sufficient to establish a conflict of interest that is disqualifying in this litigation. To the extent the Attorney General argues that the Attorney General or the Attorney General's Office was a client of Fouser, the Court finds there is no evidence that Fouser ever represented either. There is only evidence that Fouser reported to Wilson for one particular case, but there is no evidence that Wilson was either co-counsel or a party to the litigation. Therefore, the Court finds the Attorney General cannot claim the protection of Idaho Professional Rule of Conduct 1.7 personally or for his office.

¹³⁹ Disqualify Memo, p. 12.



4. Whether There are Sufficient Factors to Interfere with the Petitioners' Choice in Counsel

“Except for compelling reasons, such as necessary bar admissions, clients should be permitted to have the counsel of their choice.” *Hepworth Holzer*, 169 Idaho at 396 (citations omitted). Idaho courts established a four-part test to determine whether interference with chosen counsel is appropriate. *Id.* The Respondents argue Fouser’s actions disqualify her under the four-factor test because it establishes the appearance of impropriety. The Petitioners argue “[e]ach of the four parts weighs against permitting Respondents to interfere with Petitioners’ choice of counsel.”¹⁴⁰

First, while the parties debate whether the motion to disqualify is justified, this Court finds the Attorney General presented a sufficient basis to file the motion to disqualify based on the supporting arguments and facts presented and his interest in treating all clients represented by the Attorney General’s Office as one entity. Therefore, this Court does not find the motion to disqualify was filed to harass the Petitioners.

However, the Attorney General has failed to articulate how Fouser’s continued representation of the Petitioners will damage the Respondents or their interests. The mere fact that Fouser objects to the CIDs on her clients’ behalf by alleging the Attorney General lacks statutory authority to issue the CIDs is itself insufficient to establish such damage. The Court finds this legal argument could be raised by another attorney. Further, the “supervision” of Fouser as a SDAG is insufficient to show the Attorney General’s Office’s interests would be damages since she has now withdrawn completely as a SDAG. More importantly, the Attorney General’s Office has indicated that Fouser would not be given any more SDAG appointments and it has accepted her withdrawal on all cases so the OAG cannot now argue continued prejudice when it was the OAG’s office that refused to allow Fouser’s unequivocal removal from all SDAG appointments. See *City of Middleton v. Coleman Homes, LLC*, 163 Idaho 716, 727, 418 P.3d 1225 (2018) (“[A] party cannot successfully complain of errors the party has acquiesced in or invited.”).

As to the third factor, assuming a conflict, the Respondents argue there is no alternative remedy so the only solution is disqualification. The Petitioners argue an

¹⁴⁰ Disqualify Response, p. 14.



alternative solution is revocation of all Fouser's existing SDAG appointments which would then remove any alleged conflict that may arise from Fouser continuing to be supervised by the Attorney General's Office. This Court agrees that removal of Fouser as an SDAG is certainly an alternative and less drastic remedy than disqualifying the Petitioners' chosen counsel in this case. That would remove any continued oversight of Fouser by the Attorney General's Office and also end the necessity to the Attorney General's Office to communicate with Fouser.

The Respondents argue in part that "the public should rightly suspect Petitioners and their counsel of attempting to subvert the Attorney General's investigation of the potential illegal disbursement and receipt of millions of dollars of taxpayer funds should the representation be allowed to continue." This argument certainly overstates this litigation. It seems Petitioners would have still filed this Petition claiming the Attorney General exceeded his authority by serving the CIDS in this case regardless what lawyer represented the Petitioners. The public interest as stated by the Attorney General is overstated and is irrelevant to whether disqualification is appropriate in this case. There is not a substantial public interest regarding Fouser's representation of the Petitioners since the Respondents failed to specifically demonstrate any actual conflict of interest. Fouser, as SDAG, represented employees and agencies of the State of Idaho. In this case, she continues to represent state employees in part in their official capacities. And these Petitioners strongly request Fouser be permitted to remain as their counsel and argues 1) further delay would be caused if they have to find new counsel, 2) disqualification would cause a burdensome increase in costs, and 3) Fouser has invested significant time and resources into representing the Petitioners. The Court finds any argument of a possibility of public suspicion does not outweigh the benefits that might accrue to the Petitioners by Fouser's continued representation.

Therefore, the Court does not find the four-factor test as articulated in *Hepworth Holzer* supports disqualifying Fouser as the Petitioners' attorney in this case. So, the Court declines to disqualify Fouser as Petitioners' counsel and also finds there is no basis to disqualify Gjording Fouser PLLC.¹⁴¹

¹⁴¹ Disqualify Memo, pp. 16-17.



VI. ATTORNEY FEES

The Respondents request attorney fees on their motion to disqualify pursuant to (1) Fouser’s breach of her contractual duties; (2) “as the just remedy to prevent harm from an attorney’s breach of the ethical rules,” (3) pursuant to Idaho Code 48-614(2); and (4) pursuant to Idaho Code 48-1910(1)(h). The Petitioners respond that the request for fees is “frivolous.”¹⁴²

Attorney’s fees in favor of Respondents are denied. First, the Respondents are actually not the prevailing party on either motion. Second, the Respondents failed to provide any contract to support its claim for fees, but even if they had, Fouser is actually not a party to this litigation so any claim of attorney fees for any alleged breach of contract is simply inappropriate in this litigation. This Court will not order piecemeal fees based on a collateral issue that is not the subject of the Petition.

Next, the Court finds fees are not awardable as punishment under Idaho law for moving for disqualification. Idaho Code § 48-614 states in relevant part:

(1) If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a district court of the county...

(2) The court shall award the prevailing party reasonable expenses and attorney fees incurred in obtaining an order under the provisions of this section if the court finds that the attorney general's request for an order under this section or a person's resistance to filing any statement or report, or obeying any subpoena or investigative demand, was without a reasonable basis in fact or law.

This Court has only determined a small part of the Petition so there is still no prevailing party determination. Since this seems to be an issue of first impression in Idaho, the parties’ filings in this matter and responses are not actually frivolous. These are important matters and both parties have supported their positions with caselaw and other legal citations.

Idaho Code 48-1910(1)(h), states: “Whenever the attorney general has reason to believe that a person violated or is violating the provisions of section 48-1906, Idaho Code, the attorney general, acting in the public interest, may bring an action in the

¹⁴² Disqualify Response, p. 17.



name of the state against such person:...(h) To recover from the alleged violator the attorney general's reasonable expenses, investigative costs, and attorney's fees." The Court also finds this provision relates to the overall claims and whether the Attorney General is the prevailing party on all claims. So this statutory provision also would not apply to a singular motion to disqualify.

So, the Court DENIES the Respondents' request for fees related to the filing and response on the motions to disqualify.

VII. CONCLUSION

The Petitioners' request to disqualify the Attorney General's Office made on pages 16 through 19 of the Petition to Set Aside Civil Investigative Demands, filed March 7, 2023, is GRANTED IN PART. While the Attorney General can still oversee its investigation in the Community Partner Grant Program, the specific conflict between the Attorney General's Office and the IDHW related to the administration of the grant program precludes the Attorney General or any Deputy Attorney General from pursuing the civil investigative demands served on this Petitioners in this litigation unless the Attorney General appoints an independent special prosecutor. This court will stay this proceeding for twenty-one days from the issuance of this Order to permit the Attorney General to consider appointing a special prosecutor to litigate this case and to see whether a Special Prosecutor enters a notice of appearance in this case.

The Attorney General's Motion to Disqualify Petitioners' Counsel, filed April 7, 2023, is DENIED.

Respondents' request for attorney fees for these motions is DENIED.

IT IS ORDERED

Dated: 8/8/2023 9:52:56 PM



Lynn Norton
District Judge



CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Trudy Hanson Fouser	gfcases@gfidaholaw.com	[X] E-mail
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Trent Tripple
Clerk of the Court

Dated: 8/10/2023 3:02:10 PM

By: 
Deputy Clerk

