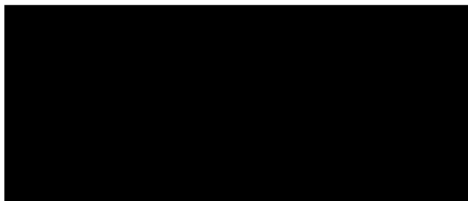


CONFIDENTIAL MEMO

To: Office of Bar Counsel
P.O. Box 895
Boise ID 83701
www.isb.idaho.gov

From: Dave Jeppesen
Director, Idaho Department of Health and Welfare



Date: June 27, 2023

RE: Bar Complaint for Attorney General Raul Labrador

=====

As bar counsel is likely aware, the Attorney General (AG) and his office have a statutory requirement to represent state agencies, officers and the employees in all legal matters. Further, statute provides that a state agency and its officers and employees must use the AG's office as their legal counsel. In this case, that means that the Idaho Department of Health and Welfare (DHW) and the employees, including me, are clients of the AG and his office and do not have an option to choose alternate counsel. As a state agency (the largest state agency) tasked with carrying out legislative direction to serve the people of Idaho, DHW has the need for competent and frequent legal advice and representation, especially because DHW frequently navigates issues involving child custody, federal programs, healthcare issues, and others.

The Idaho legislature has directed the DHW through statute and IDAPA rules, which the legislature approves, to provide services and programs to Idaho families, vulnerable adults and children. DHW is dedicated to strengthening the health, safety, and independence of Idahoans. DHW must carry out what the legislature has directed. Everything DHW does to serve the people of Idaho is a result of direction from the Idaho legislature. Further, DHW cannot provide any services or perform any functions except those that the Idaho legislature has directed DHW to provide via statute and legislatively authorized IDAPA rules. Based on current legislative direction, as the largest agency in the state, DHW will interact with between one third and one half of all Idahoans in a given year. Given that DHW must follow legislative direction coupled with the size and scope of DHW, it is foundational that DHW receive legal representation, analysis, and advice in order for DHW to serve Idaho families, vulnerable adults and children as the legislature has directed.

The duly elected Governor of Idaho appoints the Director of the Idaho Department of Health and Welfare. Subsequently, a majority of the duly elected Idaho Senate must vote to confirm the Director of the Idaho Department of Health and Welfare. This means that the state wide elected representatives of the people of Idaho from both the legislative branch and executive branch of government appoint and confirm the Director of the Idaho Department of Health and Welfare. In addition, the role of the Director is well described in statute and IDAPA rule. Essentially, the Director is charged with ensuring that DHW carries out its mission, functions and services to the people of Idaho as described in statute and IDAPA rule.

Recent actions taken by AG Labrador and the Office of Attorney General (OAG), working at his direction, demonstrate that AG Labrador does not view DHW as his client, is placing the his own policy priorities over DHW's needs for legal advice and representation, has created an unworkable conflict in representing the department, and has taken an adversarial position against DHW. This has placed DHW, its employees and me in the position of not receiving adequate legal representation in current and pending legal matters including active litigation, statutory interpretation, and legal advice. The actions of AG Labrador have created a severe lack of confidence and trust on the part of DHW and its employees in both the AG and the OAG. AG Labrador's actions have further created concerns that attorney-client privileged information will not be kept confidential, or worse, will be used against DHW and its employees. This concern around privileged confidential information extends to Deputy Attorneys General (DAG's) assigned to DHW since the AG now requires all advice and analysis to be run through the OAG for approval. It is difficult to describe the severe impact to the operations of DHW that have been created by AG Labrador, DHW's attorney, creating a hostile situation where trust and confidence has been destroyed.

This has also placed the DAGs assigned to and located with DHW in the untenable position of having to choose between their ethical requirement of representing and advocating for their client (DHW) or risking insubordination with AG Labrador for going against his wishes. At the beginning of March 2023 there were 31 attorneys, paralegals and support staff assigned by the AG's office to DHW. The DHW division chief and two lead DAGs have resigned or been forced out of their jobs as a result of this untenable situation. An additional three DAGs have resigned over the situation.

The first signs of this unworkable conflict emerged shortly after AG Labrador came to office. The AG asked for all the DHW files on a particular high-profile child protection case. Prior to his election, AG Labrador had shared with me that he was close personal friends with the baby's family and that he thought the case had been mishandled by multiple agencies including DHW. When the request for the child protection case records was made, I asserted that AG Labrador had a conflict, including that the family (who AG Labrador had informed me he was close personal friends with) had filed a tort claim against the state and that AG Labrador appeared to have prejudged the case. I requested to discuss solutions on how the conflict could be addressed. AG Labrador insisted he had no conflict and that I needed to send him the files. I have not provided the files due to the conflict nor has AG Labrador offered a solution to deal with the conflict. I will attach several emails on this topic. And here is a link to a news article: <https://idahocapitalsun.com/2023/04/03/idaho-ag-at-odds-with-health-and-welfare-again-this-time-its-over-child-protection/>

AG Labrador created an additional unworkable conflict when he, through DAG Lincoln Wilson, served three senior DHW leaders, including myself, in March with Civil Investigation Demands (CID) related to the DHW community partner grants (CPG) program. Neither AG Labrador, nor any of the DAGs working at his direction, engaged with DHW, me or any other DHW leader to share that there was a concern with the administration of the grants or even bother to check with the DAGs assigned to DHW to see if DHW had asked for legal advice on this matter, which DHW had done. DHW had received a legal opinion that DHW's implementation of the CPG was lawful. Yet, AG Labrador would later state that the first time he learned of these opinions was when they were filed in connection with the CID litigation. AG Labrador then said the legal analysis of his own DAG was flawed, implied that I had made misrepresentations, and stated I was a subject of the investigation (through DAG Theo Wold)¹ before attempting to claim in open court that I was not a subject of the investigation.

Rather, AG Labrador served all three employees without warning, and further instructed that the DAG's assigned to DHW to be "firewalled" from this matter, meaning they could not provide any advice, counsel or representation. This decision left DHW, myself, and the other two DHW employees served with the CIDs without any legal representation on this matter, which was confirmed by Chief Deputy David Dewhirst in email. Effectively, AG Labrador admitted that there was a conflict and further went on to deny DHW the legal resources necessary to manage the assault that AG Labrador perpetrated on his own client, causing DHW to hire a private attorney to represent the two employees and myself. Attached are several emails on this topic.

Subsequently, the two employees and I filed a petition to set aside the CIDs (Case No. CV01-04832). Included are the filings with declarations that we have made in the petition to set aside. I will also provide the transcript from the May 24th hearing with key portions highlighted when I receive it from the court. In particular, the filings in the petition to set aside from both DHW and from the OAG along with the transcript from the May 24th hearing do an excellent job of describing and highlighting the unworkable conflict that AG Labrador has created.

A practical implication of this adverse action against DHW by AG Labrador is that DHW needed legal guidance and advice on making the last CPG program payment in May. However, DHW was unable to get that advice from the DHW assigned DAGs who had the subject matter expertise and CPG program knowledge. AG Labrador, through Mr. Wilson, have further attempted to interfere with my choice of counsel by claiming that *my counsel* had a conflict of interest, despite Mr. Wilson admitting in open court that my counsel had no information that would harm the AG in the CID litigation. Mr. Wilson also stated in open court that the OAG would only allow my counsel to continue as counsel if I would withdraw a meritorious argument that the OAG had an impermissible conflict of interest.

The CID action not only creates an unworkable conflict but also creates an adversarial relationship that has destroyed DHW's and my trust and confidence that AG Labrador will advocate for DHW's best interest going forward. The CID action was particularly egregious since DHW had twice asked the DAGs assigned to DHW for a legal opinion on the community grants, and both opinions concluded that DHW had complied with the legislative intent language. Once AG Labrador became aware of these two

¹ Mr. Wold was not licensed to practice law in the State of Idaho at the time he wrote this email.

opinions via the petition to set aside the CIDs filed by DHW, he had both opinions withdrawn. AG Labrador also has insinuated that the legal opinions were created under suspicious and nefarious circumstances in an attempt to discredit his clients.

The fact that the OAG decided to investigate its own client after the OAG had provided opinions on two occasions that there was not an issue, opens up the possibility that at any given time legal advice or opinions that had been given to DHW can be withdrawn or worse, attorney client privileged information could be used against the department or its employees by the AG in the future. An example of this is when the then DHW DAG division chief resigned shortly after the petition to set aside was filed, the OAG went to great lengths to attempt to retrieve her cell phone with all the information it held such as text messages and emails containing attorney-client communications, despite having professed to have “firewalled” the DHW DAGs from the CID investigation team. The phone was reset pursuant to standard protocol, deleting all the data. However, a copy of all the information on the phone was retained since there was an active litigation. I was left to assume that the reason the OAG so desperately wanted the information on the cell phone was because they believed that it contained privileged attorney client information that the OAG could use in the CID case. This was further supported when the AG went to the press over the cell phone issue claiming that I had destroyed evidence in an active AG investigation. https://www.idahopress.com/news/local/an-idaho-attorney-generals-office-employee-resigned-then-her-phone-was-wiped-clean/article_3782bcb8-cd96-11ed-8995-5361135d442f.html Overall, these actions have destroyed trust and confidence that DHW and its employees will receive adequate legal representation.

In addition, the filings, statements and press releases that the AG and OAG are making both about DHW and myself related to the CID and CPG program makes it impossible to imagine how the AG and attorneys in the OAG civil litigation unit will be able to reverse their representations and views to defend DHW in other current and future litigation matters. For example, on May 2nd there was a hearing in federal court on a motion to dismiss a lawsuit (Case No. 1:22-cv-00409-REP) in which DHW and I are named as defendants. Division chief Mr. Wilson presented the oral arguments for DHW and me. Mr. Wilson was the one who signed the CID served to me. At the May 24 initial hearing on the petition to set aside the CIDs (Case No. CV01-04832), Mr. Wilson presented the oral arguments against me.

There was no indication from AG Labrador or his office that there was an inherent conflict in having the same attorney defend and then oppose DHW and myself, nor any attempt to get permission from me, his client, to waive this conflict. In fact, when I inquired about who would be making the oral arguments on May 2nd, I was told “Since you are named only in your official capacity for this challenge to state law, the OAG does not believe that the Attorney General must seek your advance approval to make any legal argument.” In a reply brief dated May 22, 2023 in the CID case (Case No. CV01-04832), the AG included an analysis which appears to be from him (but which is unsigned) in which he presents his argument that there is not a conflict in representing me in some legal cases, while also being opposing counsel in the CID case. This analysis does not cite any legal or ethical rules to back up his claim and seems to only further illustrate that there is a conflict that the AG is trying to explain away rather than address with his client.

There are many examples that AG Labrador intends to pursue his own policy agenda for the people of Idaho at the expense of the best interest and needs of his clients, DHW and myself, as we carry out our duties to the people of Idaho as laid out in statute and IDAPA rules. Here is just one. The KW lawsuit (Case No. 1:12-cv-00022-BLW) is long standing (over 10 years). In this lawsuit, the civil litigation unit within the OAG has taken independent action explicitly against the interests of the client (DHW). Specifically, DHW denied the OAG's request to send a letter to the Centers for Medicare and Medicaid Services (CMS), a federal regulator of DHW. DHW shared that sending the letter to CMS could jeopardize a long-standing positive relationship with CMS and did nothing to further the legal action or strategy in the KW lawsuit. The OAG insisted that the communication must be sent to preserve the OAG's reputation, and the OAG decided on their own that they would send the letter anyway, despite explicit instruction from DHW, as the clients, not to do so. The OAG did not even include DHW as a cc on that communication.

Further, the civil litigation unit of the OAG met with DHW to inform the department that the OAG wanted to take the KW litigation a different direction and indicated that they may or may not involve DHW in deciding on that new direction. The OAG had not consulted with DHW and DHW reminded them that DHW is the named defendant and client in this case. A change in strategy for this complex, lengthy litigation at this late stage is unacceptable, and AG Labrador is expressly ignoring his statutory obligation to represent myself and DHW and is instead substituting his own policy objectives over those of his clients.

The impact of this adversarial relationship and the conflict it has created is far reaching, particularly where DHW is not like other clients who can seek alternative attorneys. Many, many specific examples can be provided if needed. The actions of AG Labrador and his office have taken have created an atmosphere of broken trust and outright fear at DHW. As a state agency, DHW must have legal advice, counsel and representation from statutory interpretation, to litigation, to operational issues. The current environment where AG Labrador is driving his own policy agenda and prioritizing it over the needs of his client, including taking adverse action against his own client, has left DHW in an impossible situation.

While I understand the bar counsel is best positioned to see if the things I have described violate the Idaho professional conduct rules, I believe that they violate the following Idaho professional conduct rules: 1.4, 1.6, 1.7, 1.8, 1.9.

In closing, I quote from Am. Jur. 2d Attorney General § 17:

"...the attorney general is not authorized to place himself in the position of litigant so as to represent his concept of public interest."

And

"Even when the attorney general's vision of the state's legal interests is at variance with that of his or her statutory client, one the state office 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, 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.”

“An attorney general representing state agencies or officers, or institutions, is engaged in an attorney-client relationship with the represented party and is bound by the normal constraints of that relationship, precluding, for example, the unauthorized release of confidential information, the waiver or surrender of a client's substantial legal rights without express authority, the entry of a consent judgment without the client's consent, or the making of a settlement or compromise agreement without the client's consent.”

7A C.J.S. Attorney General § 33.

“When the Attorney General appears in litigation in this capacity, he does so as a lawyer and an officer of the court. His primary responsibility is to provide proper representation and competent counsel to the officer or agency on whose behalf he appears. The Attorney General's role in this capacity is not to make public policy in his own right on behalf of the state. It is presumed, in the absence of a contrary showing, that the officer made a party to the suit has, in the performance of his official duties, acted in contemplation of the constitution and in the best interests of the state. The Attorney General's role and duty is to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation.”

Gilmore, Michael S., *Who Is the Public Attorney's Client?; How Do the Public Attorney's Rule for Conflict of Interest Differ from the Private Attorney's?*, 45 Advocate 10, 11 (2002) (quoting *Manchin v. Browning*, 296 S.E.2d 909, 918-19 (W.Va. 1982) (overruled on other grounds).