THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **League of Women Voters of New Hampshire, et al v William M Gardner, et al**
Case Number: **226-2017-CV-00433** ***226-2017-CV-00432***

Please be advised that on June 08, 2018 Judge Temple made the following order relative to:

ORDER OF THE COURT

May 14, 2018 "The defendants will file an objection to the plaintiffs' motion to strike (court index #84) by May 17, 2018. The plaintiffs will file a reply to this objection by May 18, 2018."

ORDER ON DISQUALIFICATION

June 8, 2018 "See copy of enclosed order."

June 08, 2018

Marshall A. Buttrick
Clerk of Court

(564)

C: Henry R. Klementowicz, ESQ; Steven J. Dutton, ESQ; Paul Joseph Twomey, ESQ; Bruce V Spiva, ESQ; John M Devaney, ESQ; Marc E Elias, ESQ; Anne M. Edwards, ESQ; Amanda R Callais, ESQ; Anthony J. Galdieri, ESQ; William E. Christie, ESQ; Suzanne Amy Spencer, ESQ; Bryan K. Gould, ESQ; Cooley Ann Arroyo, ESQ; Callan Elizabeth Maynard, ESQ; Uzoma Nkwonta, ESQ; Elisabeth Frost, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT

Docket No. 2017-CV-432

New Hampshire Democratic Party

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

Docket No. 2017-CV-433

League of Women Voters of New Hampshire;
Douglas Marino; Garrett Muscatel; and Adriana Lopera

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

ORDER ON DISQUALIFICATION

Procedural History

On April 26, 2008 Attorney Brian K. Gould filed his appearance for the defendants in this case. Subsequently, at a status hearing held on May 7, 2018, the Court made the following disclosure:

> "THE COURT: Good morning.
>
> All right. I had this status hearing immediately on Friday getting prepared and reviewing the file as I try to do almost on a weekly basis at this point. I noticed the appearance had come in from Cleveland, Waters and Bass and Attorney Gould specifically. I have to make a disclosure based on that appearance.
>
> I have what I would view as a very close, personal relationship with Attorney Gould. We basically raised our families together. His daughter is like a daughter to me. I just officiated her wedding last summer. It's a long-term relationship. I would say it began, oh, well over 20 years ago. My youngest daughter was cared for by Elizabeth Gould, who is a very

close friend of myself and my wife's. Certainly, Elizabeth had a profound impact on her life. My daughter, Riley, was on a series of softball teams that could never win the big game, and I primarily blame that on Coach Gould, not Coach Temple, over the course of I would say 15 years or so.

The bottom line, as it relates to that relationship in this case, is I don't think I can continue as the Judge in this case under Canon 2, Rule 2.11. I think it's a conflict that leaves me in a situation where I can't even have you waive the conflict. I'll get your input on that because I do respect all counsel in this case.

But this is just not a friendship on a professional level with one of you involved in this particular case. This is a personal relationship that goes well beyond that. It's a personal relationship which would affect a reasonable observer's perception of fairness in this case under Rule 2.11. I've reviewed several cases in New Hampshire, a Superior Court case and a Supreme Court case. The examples these cases use when there's a conflict that could be waivable run directly against my involvement with Attorney Gould.

So there's the McGuire case where they're using examples of what Judge McGuire did not do with this particular attorney, and each one of those examples is something that I have done over the course of the last 22 years with Attorney Gould.

I have spoken to Chief Justice Nadeau about this particular disqualification this morning because she is sitting here this week and she'll make a decision in terms of the transfer of this case. I expect, based on my initial discussions with her, that based on my conflict, the case will be transferred over to Judge Colburn and will remain in Hillsborough County. But in fairness to all of you, I want to give you the opportunity to address what I view as a disqualifying conflict under Rule 2.11..." (May 7, 2018 Status Conference Trancscript at p. 4-6.)

At the conclusion of the status conference, the Court set a briefing deadline of May 11, 2018. On May 11, 2018, the State filed its Memorandum Regarding Recusal (See Court Index #81). Senator Regina Birdsell filed a Statement Concerning Recusal (See Court Index #82). Additionally, Representatives Kathleen Hoelzel and Barbara Griffin filed a Statement Concerning Recusal (See Court Index #83). Finally, the League of Women Voters of New Hampshire filed a Motion to Strike Appearance and Disqualify Bryan K. Gould / Statement Concerning Recusal (See Court Index #84).

The Court held a hearing regarding the disqualification issues on May 14, 2018. After this hearing, the defendants filed their Objection to Plaintiffs' Motion to Strike Appearance and Disqualify Bryan K. Gould on May 17, 2018. The plaintiffs filed their Reply in Support of Motion to Strike Appearance and Disqualify Bryan K. Gould on May 18, 2018.

It was the Court's intention after the May 14, 2018 hearing to issue a decision by the following Monday or Tuesday. However, the Court's order on this disqualification issue was delayed by its trial schedule and the extensive nature of the parties' filings. The Court has carefully considered the pleadings, the arguments of counsel, the hearing transcripts, and the applicable law as part of its decision-making process. After this exhaustive review, the Court disqualifies himself under Canon 2.11 (A)(1) of the Code of Judicial Conduct.

Legal Analysis

Disqualification of a judge from pending litigation is governed by the New Hampshire Code of Judicial Conduct as codified in Supreme Court Rule 38. Canon 2, Rule 2.11 directly applies to the present circumstances in this case. Rule 2.11 on disqualification specifically provides as follows:

> "(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the follow circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer…"

Importantly, Rule 2.11 must be balanced with Rule 2.7 which provides as follows:

> "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."

There is no doubt under existing law that "the Code of Judicial Conduct requires a judge to disqualify himself whenever 'the judge has a personal bias or prejudice concerning a party or a party's lawyer.' (Quoting Sup. Ct. R. 38, Canon 3 E (1)(a)-amended 2011, current version at Canon 2.11 (A)(1)). This rule requires the judge to examine whether or not he has a personal bias, which is a subjective standard, rather than an appearance of bias, which is an objective standard." In the Matter of Tapply and Zukatis, 162 N.H. 285, 302 (2011).

Additionally, the Code of Conduct "requires a judge to disqualify himself in a proceeding where the judge's impartiality might reasonably be questioned and to avoid even the appearance of impropriety." Id (citations omitted). "The existence of an appearance of impropriety is determined by an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the Court." See State v. Belyea, 160 N.H. 298, 303 (2010). "The objective standard is required in the interest of ensuring justice in the individual case and maintaining public confidence in the integrity of the judicial process which depends on a belief in the impersonality of judicial decision-making." Id. "The test for an appearance of impartiality is whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case." Id. (quotation omitted). See also, Taylor-Boren v. Isaac, 143 N.H. 261, 268 (1998).

This case involves a close, personal relationship between the Court and Attorney Gould. "It is inevitable that judges will have had contact with attorneys before appointment to the bench, and will continue to have some contact after they are

appointed. Judges are members of society and are not expected to live isolated and sheltered lives. Id. at 269. Whether or not disqualification is required in this case based on the Court's friendship with Attorney Gould hinges on how personal the relationship is between the Court and Attorney Gould. Id. at 268-269.

The Court has stated on the record that he has a "very close, personal relationship with Attorney Gould." (May 7, 2018 Status Conference Transcript at p. 5.) The Court's disclosure about this relationship speaks for itself. This personal relationship can be summarized as follows:

1. Judge Temple's wife, Kelly Temple, is a close friend of Attorney Gould's wife, Elizabeth Gould.
2. The Temple and Gould families have shared many community and family events together over the years.
3. Attorney Gould and Judge Temple coached minor league, little league and Babe Ruth softball together and against each other for nearly 15 years.
4. The Temple children and the Gould children continue to maintain their friendships. Attorney Gould's daughter, Lizzy Gould, accompanied the Temple family on multiple family vacations. She remains close friends with Judge Temple's daughters.
5. Judge Temple provided legal representation to members of the Gould family. He developed a professional and personal friendship with Attorney Gould's father.

6. Judge Temple was the officiant for Lizzy Gould's wedding in the fall of 2017. While he did not take a fee as an officiant, Judge Temple accepted a complimentary hotel room for one evening from Attorney Gould.

This summary is a more complete description of the Court's relationship with Attorney Gould. Under the Code of Judicial Conduct, the Court is required to disqualify himself based on a favorable personal bias towards Attorney Gould rooted in this long term personal relationship. Pursuant to Rule 2.11 (A)(1) the Court must examine whether or not he has a personal bias under a subjective standard rather than an objective standard. The Court was very clear to the parties at the hearing of May 7, 2018 that he viewed the relationship with Attorney Gould as a very close personal relationship. After pondering and thinking about the nature and extent of this particular relationship, the Court is convinced on a subjective basis that he has a personal bias concerning Attorney Gould that requires disqualification under Rule 2.11 (A)(1).

Alternatively, the Court notes that under the applicable objective standard a disqualification is warranted in this case. The relationship and contact between the Court and Attorney Gould over the course of over two decades affects a reasonable observer's perception of fairness. Taylor-Boren, 143 N.H. at 269. The Court's impartiality under these circumstances is subject to reasonable questioning and a disqualification avoids even the appearance of impropriety. Tapply, 162 N.H. at 302. Under the objective standard, this Court must ensure justice and maintain public confidence in the integrity of the judicial process. Id. An objective, disinterested observer, fully informed of the relationship between the Court and Attorney Gould, would entertain significant doubt that justice would be done in this case. Id.

The Court's priority in this case is to protect the litigants' right to a fair and impartial determination. He is obligated to preserve public confidence in the impartiality, independence and integrity of the Court, especially in a case like this which is of great public importance. While the Court has a strong desire to see this case to a conclusion, compliance with Rule 2.11 is mandatory. This Judge must place the need for impartial justice over his own preferences.

As part of its ultimate decision on the disqualification issue, the Court considers its obligation to hear and decide this matter under Canon 2, Rule 2.7. The parties have briefed this particular issue in an exhaustive manner. The Court is not inclined to engage in a lengthy review of the Federal and State authorities relied upon by the parties. Suffice it to say, the Court has considered these extensive authorities in a meaningful manner.

"A defendant's right to counsel of his choice…is not absolute; it is 'circumscribed in several important respects.'" State v. Gonzalez, 170 N.H. 398, 404 (2017). (Citations Omitted). "A defendant's right to chosen counsel is limited by the trial court's 'independent interest in ensuring that [ ] trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" Id. (citations omitted). "A trial court's interest in the ethical, fair, and orderly administration of justice may outweigh a defendant's right to chosen counsel when, for example, the trial court determines that a defendant has asserted his right to dismiss counsel as a dilatory tactic." Id. "Similarly, '[w]hen circumstances exist involving the selection of counsel with the sole or primary purpose of causing the recusal of the

judge…the right to counsel of choice can be overridden.'" Id. at 405; In re BellSouth Corp., 334 F.3d 941, 956 (11th Cir. 2003).

The presumptive entitlement to counsel of a party's choice "may be overridden only if 'compelling reasons' exist." In re BellSouth Corp., 334 F.3d at 961. The burden of proving the grounds for disqualification rests upon the party moving for disqualification of counsel. Id. The plaintiffs' task in seeking a removal of Attorney Gould in this case is a heavy burden. Id.; Evans v. Artek Sys. Corp., 715 F.2d 788, 794 (2nd Cir. 1983).

In their pleadings, as well as at the hearing of May 14, 2018, the plaintiffs concede that Attorney Gould's appearance is not a dilatory tactic or filed to cause the recusal of the Court. Attorney Spiva summed up the plaintiffs' view of Attorney Gould at the hearing of May 14, 2018, by stating as follows:

> "No one is questioning Mr. Gould's motives, and no one is questioning that he is a high caliber lawyer, and you know, is held in high regard I think by both sides. I haven't had the pleasure of knowing him but having talked to my co-counsel, you know, people…you know, he's well-liked and well-regarded. So this is not about that, Your Honor…" (May 14, 2018 Hearing Transcript at p. 5).

The Court also finds that the defendants hired Attorney Gould because of his expertise and experience on voting laws, SB3, and complex litigation. He and his associates are well qualified to handle this litigation. The State has made an informed choice to retain him as counsel to address the pre-trial and trial issues presented by this case. The retention of Attorney Gould is appropriate and necessary under these circumstances. As stated above, this retention is not a dilatory tactic and its purpose is not to cause the recusal of the Court.

Again, this Court is cognizant of its responsibility to hear and decide cases under Rule 2.7 of Canon 2. While the parties have a presumptive right to select their own counsel, it is not an absolute right. In re BellSouth Corp., 334 F.3d at 961; also see Gonzalez, 170 N.H. at 404. This Court deeply appreciates the right of each party to be represented by counsel of their own choice. This Court will only strike counsel in circumstances that interfere with the orderly administration of justice. At this stage of the proceedings, the Court has completed case structuring, issued two orders on standing, and addressed significant discovery issues on an on-going basis. The case is presently scheduled for a bench trial beginning on August 20, 2018. At this point in time, the primary focus of the Court is completion of discovery in a timely and efficient manner.

Importantly, the New Hampshire Supreme Court has recently accepted the Defendants' Petition for Original Jurisdiction on May 23, 2018, because it raises a privilege issue. (Case No. 2018-02008). Specifically, the Court has accepted original jurisdiction over the following question:

> "**Question Presented**: Did the trial court err in ruling in its April 13, 2018 Order that the Defendants had to produce the Statewide Voter Registration Database and the sensitive, personally identifiable information in it about all New Hampshire registered voters to the plaintiffs in response to civil discovery requests, where RSA 654:45 does not authorize such disclosure and thus criminalizes such disclosure?"

Along with the pending New Hampshire Supreme Court proceeding, this Court is currently faced with discovery issues regarding the Protective Order, Motions to Quash Subpoenas, a Motion to Stay, a Motion to Compel Discovery, a Motion for a Protective

Order to Prohibit Depositions of Opposing Counsel, and Motions in Limine to Exclude Expert Testimony.

At this juncture of the proceedings, especially in view of the acceptance of the Petition for Original Jurisdiction, a disqualification will not interfere with the orderly administration of justice. The orderly administration of justice in this case can be ensured through the Supreme Court's jurisdiction and another Superior Court Judge's supervision of the pre-trial process. Another Superior Court Judge can properly supervise the case in a manner that leads to the efficient administration of justice. The pending motions regarding discovery, a stay and experts are capable of resolution by another judge in a timely fashion. Rather than setting a troubling precedence, this ruling emphasizes the need to preserve public confidence in the impartiality of the Court. The constitutional magnitude of the ultimate decision in this case requires that the Court's integrity and independence be protected at all costs.

The Court agrees with the plaintiffs that the right to select counsel in a civil case is not a constitutional right. See Town of Bartlett v. Furlong, 168 N.H. 171, 177 (2015). However, there is a "general policy favoring a party's right to representation by counsel of choice" in New Hampshire. See Goodrich v. Goodrich, 158 N.H. 130, 136 (2008). In this case, the Court is exercising its discretion to deny the Motion to Strike Attorney Gould based on the present procedural status of this case, the lack of any impropriety as it relates to the retention of Attorney Gould, and the ability of another Superior Court Justice to properly supervise, control, and monitor the pre-trial process to ensure the orderly administration of justice. In view of the Court's prior rulings on standing and discovery issues, the Court does not see any significant obstacles for a newly assigned

judge to come up to speed on the pending motions and familiarize himself or herself with the case in an efficient manner. The only significant potential for delay is the pending Petition for Original Jurisdiction in the New Hampshire Supreme Court.[1] The ongoing pre-trial process in the Superior Court is one that can be managed in a meaningful, informed and efficient manner by another Superior Court Judge.

The Court truly appreciates the significance and constitutional magnitude of this case. The disqualification has not been lightly entertained in this matter. Ultimately, a recusal is mandated and necessary to preserve the integrity of the judicial system. While there are certainly valid concerns raised by the plaintiffs because of the timing of Attorney Gould's appearance and the requisite disqualification, the Court is not convinced that these concerns constitute compelling reasons to override the defendants' choice of counsel. In the Court's view, the plaintiffs have not met the heavy burden of proving compelling grounds for the disqualification of Attorney Gould. In re BellSouth Corp., 334 F.3d at 961.

Conclusion

After a review of the Federal and State authorities cited by both parties, this Court rests its determination in this case on Gonzalez and In re BellSouth Corp.. These two cases were relied upon by both parties in their respective arguments. This Court simply cannot find that there are compelling reasons to disqualify Attorney Gould where his appearance is clearly not a dilatory tactic or one used for the primary purpose of causing a disqualification. Gonzalez, 170 N.H. at 405; In re BellSouth, 334 F.3d at 961.

[1] The newly assigned Superior Court Judge will have to address the Motion to Stay on an immediate basis.

The Court will not entertain the harsh remedy of disqualifying counsel where the case in its present procedural status is capable of transfer to another Superior Court Judge with the corresponding ability to ensure the orderly administration of justice. A disqualification under Canon 2, Rule 2.11 (A)(1) is ordered in this case.

So ordered.

June 8, 2018
Date

Charles S. Temple
Presiding Justice

CST/trn