

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

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Civil Action No. 5:25-cv-00244-H-BV

**PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT DARREN G.
GIBSON OR, IN THE ALTERNATIVE, TO REQUIRE SEPARATE
REPRESENTATION, AND BRIEF IN SUPPORT**

USE OF GENERATIVE ARTIFICIAL INTELLIGENCE

Plaintiff used generative artificial intelligence as a research and drafting aid in preparing this brief. All citations, assertions, and arguments have been independently verified. Plaintiff takes full responsibility for the content.

TO THE HONORABLE JAMES WESLEY HENDRIX, UNITED STATES DISTRICT JUDGE:

Plaintiff Kevin N. Bass respectfully moves this Court, pursuant to its inherent authority to regulate the conduct of attorneys appearing before it, to disqualify Assistant Attorney General Scott Daniel Smith from representing Defendant Darren G. Gibson in his individual capacity, or in the alternative, to require Defendant Gibson to retain independent counsel. In support, Plaintiff submits the following brief.

BRIEF IN SUPPORT

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I. INTRODUCTION

Darren G. Gibson is a private attorney who held \$393,000 in contracts with the institution that is also his co-defendant. The Attorney General now represents both of them — the institution and the contractor — through the same lawyer, in a case where a central claim is that the contractual relationship between them denied him due process. In 33 pages of defense briefing, AAG Smith never once addressed the contracts, never engaged the dual-role allegation, and never confronted the conflict-of-interest claim central to Plaintiff's case. A significant due

process factual allegation in the complaint received no response. That silence is not an accident. It is the conflict materializing now.

This motion presents two independent grounds for relief, either sufficient alone.

First, the Attorney General lacks statutory authority to represent Gibson. Gibson is not a state employee. He is an independent contractor whose own Outside Counsel Contract — a template promulgated by the AG's office — defines him as such. Chapter 104 of the Texas Civil Practice and Remedies Code enumerates the persons the AG must defend. Independent contractors are not among them. Chapter 108 explicitly excludes them. The AG's representation of Gibson is *ultra vires*.

Second, even if the AG had authority, the simultaneous representation of TTUHSC and Gibson creates an irreconcilable conflict. A zealous advocate for TTUHSC would distance the institution from Gibson's conduct. A zealous advocate for Gibson would implicate the institution that structured, approved, and directed the dual-role arrangement. AAG Smith can do neither. His briefing confirms it.

II. FACTUAL BACKGROUND

A. The Parties and Their Representation.

AAG Smith, of the Office of the Attorney General's General Litigation Division, represents all named Defendants who have appeared: TTUHSC; Amanda McSween (official and individual); Lauren Cobbs, M.D. (official and individual); Simon Williams, Ph.D. (official and individual); Tamara Mancini (official capacity); Mia Myers (official capacity); Lori Rice-Spearman, Ph.D. (official capacity); Darrin D'Agostino, D.O. (official capacity); Darren G. Gibson (individual capacity); Jennifer Wilson, M.D. (individual capacity); and Rachel Forbes, MBA (individual capacity). See Dkt. Nos. 27, 38.

B. Gibson's Contractual Relationship with TTUHSC.

Through Littler Mendelson, P.C. and later Michael Best & Friedrich LLP, Gibson held eight Outside Counsel Contracts with the Texas Tech University System spanning 2020 through 2027, totaling \$393,000 in authorized contract value:

OCC No. 2020-768-0641
OCC No. 2020-768-0674
OCC No. 2022-768-0123
OCC No. 2022-768-0124
OCC No. 2024-768-0010
OCC No. 2024-768-0018
OCC No. 2025-768-0071
OCC No. 2026-768-0034
See App. 3-6, 48-49.

Gibson's contract defines his status: "Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas." OCC No. 2024-768-0010, § 8.1 (App. 4); see also OCC No. 2025-768-0071, § 8.1 (containing identical language). He is "solely and entirely responsible for [his] acts and omissions." Id. § 8.1.1.

The contract also defines his role. Addendum A provides that Outside Counsel will assist TTUHSC with policy matters "including providing advice regarding Title IX law and regulations and potentially serving as a hearing officer in live hearings required by Title IX and/or the University." OCC No. 2024-768-0010, Addendum A (App. 6); see also OCC No. 2025-768-0071, Addendum A (containing substantially identical language). The dual role — outside counsel and hearing officer — was designed into the engagement.

On December 11, 2023, Gibson presided as the purportedly "independent" hearing officer in Plaintiff's student conduct proceedings while holding active contracts with the prosecuting institution. See App. 3-6.

C. The Divergence of Interests.

Plaintiff's central claim against Gibson is that his simultaneous roles as TTUHSC's paid counsel and hearing officer created a disqualifying conflict that denied Plaintiff due process. This claim places TTUHSC and Gibson on opposite sides of a fault line.

TTUHSC's interest is to distance itself from Gibson — to argue it relied on his independence, that Gibson should have disclosed the conflict, and that any error was his. Whether TTUHSC invokes sovereign immunity or argues Gibson's conduct was not "official policy or custom" under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the defense depends on separating institution from individual. Even a sovereign immunity defense requires TTUHSC to characterize Gibson as an independent contractor acting outside state authority — the very characterization that undermines Gibson's qualified immunity defense, which depends on showing he acted within the scope of an institutional engagement.

Gibson's interest is the opposite: to show TTUHSC knew about and approved the dual-role arrangement, that his contracts were publicly filed through the AG's office, and that he acted within the scope of his engagement. This is his strongest basis for qualified immunity and indemnification.

A zealous advocate for TTUHSC would distance the institution from Gibson. A zealous advocate for Gibson would implicate the institution. AAG Smith can do neither.

III. LEGAL STANDARD

Federal courts possess inherent authority to regulate attorneys appearing before them, including the power to disqualify counsel. *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). The court considers the local rules, the ABA Model Rules, and state disciplinary rules as "useful guides" but not controlling standards. *Id.* at 544; see also *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995).

Disqualification is warranted where a reasonable possibility of specifically identifiable impropriety exists and the interest in ethical practice outweighs the party's right to counsel of choice. *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *United States v. Kitchen*, 592 F.2d 900, 904 (5th Cir. 1979). The movant bears the burden. *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 266 (5th Cir. 2001). Under Texas Disciplinary Rule 1.06(b) (2), representation is prohibited where it "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client...." This standard requires a reasonable appearance of adverse limitation, not proof of actual prejudice.

Plaintiff has standing because the conflict prejudices him by suppressing the adversarial dynamic between co-defendants whose interests diverge on the central issue. See *In re American Airlines*, 972 F.2d at 610 ("[A] motion to disqualify counsel is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court."); ABA Model Rule 1.7, cmt. 15. The Court also has independent supervisory authority to address conflicts sua sponte. *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (5th Cir. 1976); *Wheat v. United States*, 486 U.S. 153, 160 (1988). This Court has exercised that authority, disqualifying counsel whose joint representation posed "an intolerable risk to both the

defendants' rights to effective counsel and the integrity of the judicial system." United States v. Valdez, No. 5:22-cr-00023-H, Doc. 134 (N.D. Tex. 2022).

IV. ARGUMENT

A. The Attorney General Lacks Statutory Authority to Represent Gibson in His Individual Capacity.

1. Chapter 104's Enumerated Coverage.

Chapter 104 of the Texas Civil Practice and Remedies Code establishes the AG's duty to defend persons sued for conduct within the scope of state service. Section 104.001 enumerates the covered persons:

- (1) Employees, board members, and officers of state agencies;
 - (2) Former employees, board members, and officers;
 - (3) Licensed physicians, psychiatrists, or racing officials performing services under contract;
 - (3-a) Licensed phlebotomists performing services under contract with TDCJ;
 - (4) Chaplains performing services under contract with TDCJ or TJJD;
 - (5) Persons on governing boards at a university's request;
 - (6) State contractors who signed waste manifests;
 - (7) Estates of covered persons.
- Tex. Civ. Prac. & Rem. Code § 104.001.

Section 104.004(a) makes the duty mandatory but bounded: "The attorney general shall defend a public servant or estate listed in Section 104.001." The AG's authority extends to persons "listed in Section 104.001" and no further.

Outside legal counsel is not listed. Across three decades of amendments (1987, 2007, 2015), the Legislature extended Chapter 104 to specific categories of state contractors — adding physicians, psychiatrists, racing officials, phlebotomists, and chaplains — each tied to a specific state agency contract. It never added outside legal counsel. *Expressio unius est exclusio alterius*.

2. Chapters 104 and 108 Exclude Independent Contractors.

Even for listed persons, Section 104.002 limits coverage to claims where the court does not find "bad faith, with conscious indifference or reckless disregard." Tex. Civ. Prac. & Rem. Code § 104.002(2). Gibson knowingly presided as an "independent" hearing officer while holding active contracts with the prosecuting institution. See App. 3-6. Even if Gibson were a listed person — which he is not — the nature of these claims may independently place them outside Chapter 104's coverage.

Chapter 108 removes any ambiguity. Section 108.001 defines "public servant" and explicitly excludes "an independent contractor, an agent or employee of an independent contractor, or another person who performs a contract for a unit of government." The exclusion is categorical.

3. Gibson's Contract and the AG's Own Rules Confirm the Exclusion.

Gibson's OCC — a template promulgated by the AG's office — provides at § 8.1: "Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas." App. 4. The AG cannot define Gibson as a non-employee in the contract it administers and then claim authority to defend him as one.

The AG's administrative rules confirm this. 1 Texas Administrative Code § 57.1(6) defines "Outside Counsel" as separate from "a full-time employee of the Agency or the Office of the Attorney General." App. 8. In Opinion DM-0409 (1996), the AG's own office held that an independent contractor — one "not subject to the center's right to control the details of the work" — is not an "employee" and is not entitled to state indemnification or defense. App. 11-19. Opinion DM-0457 (1997) extended this reasoning, concluding that even unpaid volunteers fall

outside Chapter 104 because they are not among the enumerated categories. App. 21-28. If unpaid volunteers are excluded, paid independent contractors are a fortiori excluded. Every piece of evidence that places Gibson outside the AG's protection — the contract template, the administrative rule, and the advisory opinions — was created by the AG's own office.

4. No Alternative Statutory Basis Exists.

The AG may argue that the representation rests not on Chapter 104 but on the AG's general authority under Texas Government Code § 402.021, which authorizes the AG in actions "in which the state is interested." This argument fails for three reasons.

First, a § 1983 individual-capacity claim against an independent contractor does not make the state a party. Article IV, § 22 of the Texas Constitution limits the AG to suits in which "the State may be a party." Gibson, sued individually, is not the State. The whole point of individual-capacity liability is to impose personal responsibility beyond the state's protection.

Second, reading § 402.021 to authorize defense of any person in any case where the state has some interest would render Chapter 104's careful enumeration meaningless. Across three decades of amendments, the Legislature extended Chapter 104 to cover specific categories of contractors — physicians, psychiatrists, racing officials, phlebotomists, and chaplains. If the AG could bypass the list entirely through § 402.021, those amendments would have been unnecessary. The AG's own opinions confirm this boundary: in GA-0523 (2007), the AG concluded that even a criminal district attorney — an elected constitutional officer — falls outside Chapter 104 because the jurisdiction is local. If a constitutionally created public officer is not covered, a private law firm is not covered either.

Third, Section 402.0212 gives the AG authority to approve OCCs and review invoices — not to represent outside counsel as a litigation client. And in MW-475 (1982), the AG concluded

that state universities lack authority to execute contractual indemnity agreements with their contractors. If TTUHSC itself cannot contractually indemnify Gibson, the AG cannot unilaterally provide him a defense.

The AG may also invoke *Filarsky v. Delia*, 566 U.S. 377 (2012), where the Supreme Court held that a private attorney retained by a municipality could assert qualified immunity. But *Filarsky* addressed whether a contractor may raise qualified immunity as a personal defense — not whether the government must furnish that contractor with counsel. Nothing in *Filarsky* suggests that a contractor's ability to assert immunity entitles him to representation by the sovereign's own lawyers. Gibson may assert qualified immunity. He must retain his own counsel to do so.

B. The Joint Representation Creates an Actual, Irreconcilable Conflict of Interest.

Even if the AG's representation were authorized, the simultaneous representation of TTUHSC and Gibson creates an actual conflict requiring disqualification or separate representation.

1. The Structural Conflict.

When an institution and its agent are co-defendants in a § 1983 action, their liability theories structurally diverge. The institution's defense — whether grounded in sovereign immunity or *Monell*'s requirement that liability attach only to "official policy or custom," 436 U.S. at 694 — depends on distancing itself from the individual. The individual's defense depends on showing institutional knowledge and approval. See *Police Officers Fed'n of Minneapolis v. City of Minneapolis*, 488 N.W.2d 817, 819-20 (Minn. Ct. App. 1992) ("there is an inherent conflict of interest between a city and its police officer when both are defendants in a section 1983 action and the police officer is sued in the officer's individual capacity"). That court

reversed disqualification only because the city's indemnification agreement eliminated the officer's personal exposure — a distinction inapplicable here, where Gibson is an unindemnified independent contractor.

The most instructive case on this factual pattern is *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984). The county attorney represented both the county and an individual officer in a § 1983 action. During closing, the county attorney argued the officer was "acting as an irate husband rather than a police officer" — serving the county's Monell defense while destroying the officer's. The Second Circuit reversed, finding the dual representation "not only prejudiced [the individual defendant], it may also have resulted in an improper benefit to the municipal defendants." *Id.* at 910.

The parallel is direct. TTUHSC's interest is to show Gibson acted independently. Gibson's interest is to show TTUHSC structured, approved, and directed the arrangement — that his contracts were publicly filed, the engagement expressly contemplated hearing officer service, and the institution selected him with full knowledge. These positions cannot be simultaneously advanced by the same advocate.

2. The Conflict Has Materialized.

Texas Disciplinary Rule 1.06(b)(2) prohibits representation where it "reasonably appears to be or become adversely limited" by responsibilities to another client. That standard is met.

In 33 pages of defense briefing — a 22-page Motion to Dismiss (Dkt. 27) and an 11-page Reply (Dkt. 38) — AAG Smith never addresses Gibson's \$393,000 in OCC contracts, never engages the dual-role allegation, and never confronts the conflict-of-interest claim central to Plaintiff's case. One of the most significant due process factual allegations in the complaint receives no response — not in the Motion to Dismiss, and not in the Reply filed three weeks

later. This is not strategic silence on a peripheral issue at the pleading stage; it is the systematic avoidance of the factual allegation most damaging to the institution Smith also represents. Yet Smith's own exhibit — the Student Conduct Board's findings (Dkt. 27-8) — describes Gibson as "an outside attorney," confirming the contractor status that Smith's briefing never addresses.

Gibson's strongest defense is that TTUHSC knew about and ratified his dual role. A zealous advocate for Gibson would have argued that the contracts were publicly filed through the AG's own oversight system, that Addendum A expressly authorized the hearing officer role (App. 6), and that TTUHSC selected Gibson with full knowledge of the dual engagement — establishing institutional ratification as the basis for qualified immunity. A zealous advocate would also have made the Filarsky-specific argument that Gibson, as a private attorney retained by a government entity, is entitled to qualified immunity on different grounds than salaried employees — Gibson's strongest individual shield. Smith has raised none of these arguments. He cannot, because doing so would implicate his other client. Under *Perillo v. Johnson*, 79 F.3d 441, 447 (5th Cir. 1996), the adverse effect of a conflict is established where "some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest." That standard is met.

3. The Conflict Cannot Be Cured by Consent.

Under Rule 1.06(c), a conflict may be waived only if "the lawyer reasonably believes the representation of each client will not be materially affected." Comment 7 imposes an outer limit: "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement." Given the structural divergence on the central issue, no disinterested lawyer would advise either client to consent. There is no indication in the record that Gibson has been informed of the

conflict or that he has provided consent to joint representation. Gibson is himself a practicing attorney. If independently advised, he would likely recognize that his strongest defense — institutional ratification of the dual-role arrangement, supported by publicly filed OCC contracts and Addendum A's express authorization of hearing officer service — is precisely the defense AAG Smith has failed to raise. The conflict does not merely create a theoretical risk; it has already deprived Gibson of the arguments most favorable to his individual-capacity defense.

The Court retains independent authority to reject waivers. *Wheat*, 486 U.S. at 162 ("[W]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented."). Under the Texas Disciplinary Rules, a government legal office constitutes a single "firm" for conflict purposes. See *Tex. Disciplinary R. Prof. Conduct, Terminology* ("Firm" or "Law firm" includes lawyers "in a unit of government"); *Tex. Ethics Op. 579* (2007) (holding that all lawyers in a government legal office are subject to imputed conflict rules under Rule 1.06(f)). Any conflict affecting AAG Smith is imputed across the AG's office.

C. Timeliness and Scope.

This motion is filed at the earliest stage — before discovery, before a scheduling order, before any trial date. Addressing the conflict now avoids the far greater disruption of mid-litigation disqualification. The full scope of the conflict became apparent through FERPA inspection, TPIA productions, and a Legislative Budget Board database search conducted during and after the MTD briefing. See *Kevlik v. Goldstein*, 724 F.2d 844, 848-49 (1st Cir. 1984) (the need for upholding high ethical standards "far outweighs the problems caused by the delay in filing the disqualification motion").

This motion is grounded in documented, verifiable facts — \$393,000 in OCC contracts available in the Legislative Budget Board database (App. 48-49) and reproduced in the Appendix (App. 3-6). Plaintiff brings it to the Court's attention as both a right and an obligation. In re Gopman, 531 F.2d 262, 263 (5th Cir. 1976) (an attorney who discovers a possible ethical violation "is not only authorized but is in fact obligated to bring the problem to that court's attention").

This motion does not seek to disqualify the AG from representing the State. The AG may continue to represent TTUHSC and all other Defendants. Plaintiff asks only that Gibson — a practicing attorney with access to the resources of his law firm — retain independent counsel for his individual-capacity defense. The relief requested does not seek a continuance, does not delay any pending deadline, and does not disrupt any other Defendant's representation. Gibson's retention of independent counsel can proceed in parallel with the existing litigation schedule. Conversely, if the conflict continues and Gibson receives an adverse judgment, he will have a built-in basis to challenge that judgment — arguing that conflicted counsel failed to advance his strongest defense. Addressing the conflict now protects Gibson's rights, protects the integrity of the proceedings, and protects the record from collateral attack. Granting this motion costs nothing. Denying it risks everything.

V. RELIEF REQUESTED

Plaintiff respectfully requests that the Court:

- (1) Disqualify AAG Smith from representing Defendant Darren G. Gibson in his individual capacity, and require Gibson to retain independent counsel within 30 days;

(2) Find that Defendant Gibson, as an independent contractor not listed in Texas Civil Practice and Remedies Code § 104.001, falls outside the scope of the Attorney General's statutory authority to represent; and

(3) In the alternative, order AAG Smith to demonstrate the statutory basis for the Attorney General's representation of Gibson and to certify that Gibson has provided informed consent to joint representation after full disclosure of the conflict described herein, as required by Texas Disciplinary Rule 1.06(c).

Respectfully submitted,
Kevin N. Bass, PhD, MS
Plaintiff, Pro Se

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VERIFICATION

I, Kevin N. Bass, declare under penalty of perjury under the laws of the United States of America that the factual statements in the foregoing motion and brief are true and correct to the best of my knowledge, information, and belief, and that the documents included in the accompanying appendix are true and correct copies of the originals.

Executed on April 7, 2026.

/s/ Kevin N. Bass
Kevin N. Bass

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(b), on March 5, 2026, Plaintiff Kevin N. Bass contacted Assistant Attorney General Scott Daniel Smith (counsel for all Defendants) by email to confer

regarding this motion. On March 9, 2026, AAG Smith responded that the motion is opposed. The parties were unable to reach agreement. This motion is opposed.

CERTIFICATE OF SERVICE

I certify that on April 7, 2026, a true and correct copy of this motion and brief was filed with the Clerk of Court for the U.S. District Court, Northern District of Texas, and served on all counsel of record via the Court's CM/ECF system.

/s/ Kevin N. Bass
Kevin N. Bass
Plaintiff, Pro Se