

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

KEVIN N. BASS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5:25-cv-00244-H-BV
v.	§	
	§	
TEXAS TECH UNIVERSITY HEALTH	§	
SCIENCES CENTER, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**PLAINTIFF’S REPLY IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL FOR
DEFENDANT DARREN G. GIBSON OR, IN THE ALTERNATIVE, TO REQUIRE
SEPARATE REPRESENTATION**

Use of Generative Artificial Intelligence (N.D. Tex. LR 7.2(f))

Plaintiff used generative artificial intelligence as a research and drafting aid in preparing this reply. 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:

I. INTRODUCTION

Defendants’ Response confirms the conflict by what it does not say. The Motion identified a 33-page record in which AAG Smith never addressed Gibson’s \$393,000 in Outside Counsel Contracts with TTUHSC, never engaged the dual-role allegation, and never confronted the conflict-of-interest claim that is the central claim against Gibson. The Response does not explain that silence. It identifies no argument Smith advanced on Gibson’s behalf that would, if successful, distinguish Gibson’s defense from TTUHSC’s. It does not deny that the contracts exist, that Addendum A expressly

contemplated hearing-officer service, or that Gibson’s strongest individual-capacity defense — institutional ratification of the dual role — has not been made.

The Response also rests on three legal premises that do not survive controlling authority. It claims Plaintiff lacks standing — but *In re American Airlines* holds the opposite. It misstates Wheat’s standard. And it treats *Dunton v. County of Suffolk* as “out-of-circuit” while ignoring the Fifth Circuit panel analysis *Dunton* itself adopts — *Van Ooteghem v. Gray*, 628 F.2d 488, 495 n.7 (5th Cir. 1980), *aff’d in part and vacated in part on other grounds*, 654 F.2d 304 (5th Cir. 1981) (*en banc*) — which identified the Monell-versus-individual structural conflict at issue here.

II. PLAINTIFF HAS STANDING; THE COURT HAS INDEPENDENT AUTHORITY

A. American Airlines Authorizes Party-Litigants to Raise Conflicts.

Defendants assert that “[a] non-client movant must demonstrate a concrete, particularized risk that the alleged conflict will prejudice the fairness of the proceedings.” (Doc. 50 at 5.) Defendants cite no Fifth Circuit authority for that standard. In *In re American Airlines*, the court held: “[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.” 972 F.2d 605, 610 (5th Cir. 1992) (quoting *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980)). The court rejected the “taint” standard, reasoning that “unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all.” *Id.* at 611. The panel’s caution against “procedural weapons” (Doc. 50 at 5–6) qualifies rather than displaces that rule; the panel’s answer is “a careful and exacting application of the [ethical] rules in each case.” *Id.*

B. Pistikopoulos Is Inapposite.

Defendants’ only authority for their stricter standing rule is *Pistikopoulos v. Texas A&M University*, No. 10-16-00327-CV, 2017 WL 888379 (Tex. App.—Waco Mar. 1, 2017, no pet.). (Doc. 50 at 6.) *Pistikopoulos* is a Texas state-court decision in a Texas declaratory-judgment action under Tex. Civ. Prac. & Rem. Code § 37.004, brought collateral to a Tex. R. Civ. P. 202 pre-suit

deposition proceeding — not a federal motion to disqualify. Pistikopoulos applies neither federal disqualification standards nor the inherent-authority framework that governs this Court. See *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) (motions to disqualify are governed by federal law); *American Airlines*, 972 F.2d at 610.

C. The Court Has Independent Authority Regardless.

Even if Plaintiff’s standing were doubtful, this Court’s inherent authority to address conflicts is independent and ample. *Wheat*, 486 U.S. at 160 (“Federal courts have an independent interest in ensuring that . . . legal proceedings appear fair to all who observe them.”). The Fifth Circuit has emphasized the federal court’s “duty to clean its own house” and warned that “unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all.” *American Airlines*, 972 F.2d at 611. The cleanest disposition is a ruling on the merits — not a standing dismissal that leaves the underlying conflict unresolved.

III. WHEAT PERMITS DISQUALIFICATION ON POTENTIAL CONFLICT

Defendants’ central legal premise — that the Court may not disqualify absent an “actual, present conflict” (Doc. 50 at 4–5) — is directly contradicted by the Supreme Court authority Defendants themselves cite. In *Wheat*, the Court squarely held:

“[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where *a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.*”

486 U.S. at 163 (emphasis added). The Court added that the presumption favoring counsel of choice “may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.” *Id.* at 164.

That standard is met. The structural divergence between TTUHSC’s and Gibson’s interests is described in the Motion (Doc. 46 at 6, 11–12) and has already begun to manifest in the briefing record (*id.* at 12–13). The divergence sharpens, not narrows, at every later stage. The Second

Circuit applied the same principle in *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d Cir.), modified on other grounds, 748 F.2d 69 (2d Cir. 1984): “Because of the imminent threat of a serious conflict, disqualification would have been appropriate here even before any proceedings began.” Defendants would limit *Dunton* to its post-trial facts, but the cited holding is precisely a pre-trial holding.

IV. THE STRUCTURAL-CONFLICT RULE APPLIES IN THIS CIRCUIT

The “out-of-circuit” framing (Doc. 50 at 10–11) understates the rule’s force and provenance. *Dunton* adopted the analysis a Fifth Circuit panel set out in *Van Ooteghem v. Gray*, 628 F.2d 488, 495 n.7 (5th Cir. 1980), *aff’d* in part and vacated in part on other grounds, 654 F.2d 304 (5th Cir. 1981) (en banc) (per curiam), where the panel reasoned:

“Prior to the Supreme Court’s decision in *Monell*, local government entities were not considered ‘persons’ within 42 U.S.C. § 1983 and were not subject to liability under that statute. The interests of the employee, both individually and in his official capacity, completely coincided. Therefore, both the employee and the county benefitted from being jointly represented. However, the Supreme Court’s decision in *Monell* has caused these interests to be realigned into adversity. Adverse interests in litigation require adverse legal counsel.”

628 F.2d at 495 n.7 (citation omitted). The en banc decision vacated the panel opinion on First Amendment grounds without reaching the conflict-of-interest analysis. The Eastern District of Texas applied that reasoning four months later in *Shadid v. Jackson*, 521 F. Supp. 87, 89–90 (E.D. Tex. 1981) (Justice, C.J.), ordering separate counsel for joint representation of a Texas city and its police officer in a § 1983 action. Adopting *Van Ooteghem*’s “Adverse interests in litigation require adverse legal counsel” verbatim, the court held that “the potential for abuse is far too serious to permit joint representation to continue, *even in the face of an apparent waiver*.” *Id.* at 89–90. *Shadid* identified the structural divergence directly:

“It is in the interests of this individual defendant to contend that if the events alleged did in fact occur, he was acting at all times in good faith within the scope of his lawful, official duties. Conversely, the City of Clarksville might try to avoid liability

by proving that this police officer was acting without authority and outside the scope of his employment.”

Id. at 89. That is the structural divergence between TTUHSC and Gibson. The Second Circuit adopted the same analysis in *Dunton*, 729 F.2d at 907 (citing 628 F.2d at 495 n.7). The rule is recognized in this district (*Shadid*); the underlying Monell-versus-individual divergence is a doctrinal feature of § 1983 itself; and the rule is independent of the vacated portions of *Van Ooteghem*.

The only contrary in-circuit authority is *Surratt v. McClaran*, 234 F. Supp. 3d 815, 824 (E.D. Tex. 2016), distinguishable on three grounds: it was decided at the summary-judgment stage where defendants had maintained an aligned factual position; the court characterized the conflict as “theoretical,” *id.*; and it did not involve a private attorney holding \$393,000 in concurrent Outside Counsel Contracts whose Filarsky-pathway defense turns on facts implicating the institution. Here the conflict is documented in the briefing record (Doc. 46 at 12–13; Doc. 50 at 11), the suppressed defenses are specific (Doc. 46 at 12–13), and *Shadid* controls.

Will v. Michigan Department of State Police, 491 U.S. 58 (1989), does not eliminate the conflict here. TTUHSC’s sovereign-immunity and scope-of-engagement defenses depend on characterizing Gibson’s conduct as outside any institutional authorization, while Gibson’s qualified-immunity defense depends on the opposite characterization — that he acted under color of state law within the scope of a valid engagement. The conflict is doctrinal regardless of whether Monell is the precise vehicle.

V. THE CONFLICT HAS MATERIALIZED; DEFENDANTS DO NOT ENGAGE THE EVIDENCE

A. The Suppressed-Defenses Showing Is Unrebutted.

The Motion identified arguments a zealous advocate for Gibson would have made and that Smith did not: that Gibson’s Outside Counsel Contracts were publicly filed through the AG’s oversight system; that Addendum A expressly authorized hearing-officer service; that TTUHSC selected

Gibson knowing of the dual engagement; and that Gibson is entitled to qualified immunity on the specific Filarsky pathway. (Doc. 46 at 12–13.) Each requires Smith to attribute knowledge, ratification, or institutional design to TTUHSC; each is therefore unavailable to counsel who also represents TTUHSC.

The Response neither denies these arguments would benefit Gibson nor identifies any equivalent argument Smith advanced. It offers only that “the absence of a particular argument is not evidence of impaired representation.” (Doc. 50 at 8–9.) That misstates the Motion: the entire category of arguments specific to Gibson — the category requiring TTUHSC’s implication — has been omitted, and the only common explanation is the conflict.

The Filarsky example is illustrative. Defendants invoke Filarsky to support the AG’s representation of Gibson (Doc. 50 at 11). But Filarsky addresses only whether a private contractor may assert qualified immunity, not who must furnish counsel. 566 U.S. at 389–90. The Fifth Circuit applies Filarsky to private individuals who “work in a public institution and alongside government employees” but do so as “something other than full-time public employees.” *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018). Filarsky’s protection runs to individuals “retained, as an individual, to perform discrete government tasks,” not to private firms “systematically organized to assume a major lengthy administrative task.” *Sanchez v. Oliver*, 995 F.3d 461, 468 (5th Cir. 2021). Addendum A retained Gibson personally as a hearing officer for discrete TTUHSC matters — the Perniciaro pathway. Smith has never advanced that argument for Gibson in 33 pages of MTD briefing. He invokes Filarsky now to defeat disqualification but did not invoke it for Gibson when it would have helped. That is the conflict.

The pattern extends beyond omission. Plaintiff’s Response to Defendants’ Motion to Dismiss (Doc. 33) and its Appendix Tab G catalogue 30 separate misstatements in Smith’s MTD briefing (Doc. 27) — fabrications, phantom citations, mislabeled exhibits, and misstated pleadings — that advance TTUHSC’s institutional narrative while exposing Gibson individually to Rule 11 risk and credibility loss. The Response itself perpetuates that pattern: it cites “1 Tex. Admin. Code § 57.1(12)” (Doc. 50 at 13) to dismiss Plaintiff’s reliance on the administrative definition of “Outside

Counsel,” but subsection (12) does not exist; the regulation contains only subsections (1) through (10). The definition lives at subsection (6), confirming Plaintiff’s reading: “Outside Counsel” is “an attorney or law firm selected by an Agency to provide legal services” and “does not include a full-time employee of the Agency or the Office of the Attorney General” — the categorical distinction that places Gibson outside the AG’s full-time-employee defense framework under Chapter 104. The regulation is the AG’s own — promulgated by the Office of the Attorney General under Title 1, Part 3, in force since March 27, 2012 — and Texas Government Code § 402.0212 further requires AG approval of every state-agency outside-counsel contract. See *El Paso Elec. Co. v. Tex. Dep’t of Ins.*, 937 S.W.2d 432 (Tex. 1997). Gibson’s Outside Counsel Contracts therefore passed through Smith’s office, placing the dual-role pattern within the OAG’s documented institutional knowledge. Counsel whose written work consistently advances TTUHSC’s institutional narrative through documented misstatement, while leaving Gibson without his strongest individual-capacity defenses, is the structural conflict in operation.

B. Perillo’s Adverse-Effect Test Is Met.

Rule 1.06(b)(2) prohibits representation that “reasonably appears to be or become adversely limited” by duties to another client. Tex. Disciplinary R. Prof’l Conduct 1.06(b)(2). The Fifth Circuit has held that the Texas Disciplinary Rules “are drawn to allow concurrent representation as the exception and not the rule” and that “Texas rule 1.06’s prohibition of representation of potentially adverse interests” applies absent special circumstances. *In re Dresser Indus., Inc.*, 972 F.2d 540, 545 (5th Cir. 1992). Defendants identify no such circumstances. The Fifth Circuit has also articulated the adverse-effect inquiry functionally: “to show adverse effect, a [movant] must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest.” *Perillo v. Johnson*, 79 F.3d 441, 447–48 (5th Cir. 1996). Defendants would limit Perillo to criminal ineffective-assistance review (Doc. 50 at 9); the inquiry is context-neutral.

C. “Unified Defense” Is Not the Same as “No Conflict.”

Defendants’ principal factual response is that they have appeared with “unified counsel and asserted aligned defenses.” (Doc. 50 at 7.) That framing concedes the very omission the Motion identifies. A “unified” presentation by counsel who cannot make Gibson’s strongest arguments without harming TTUHSC is not an “aligned” defense; it is one client’s defense advanced at the other client’s expense — the Dunton conflict pattern. 729 F.2d at 907. Defendants’ own concession in this Court — that “TTUHSC has not argued that Gibson acted outside the scope of any engagement” (Doc. 50 at 11) — illustrates the asymmetry: the institution will not characterize Gibson’s role in a way that would expose it under § 1983, even though doing so might exonerate Gibson individually.

D. The Prejudice Is to the Court’s Fact-Finding Function.

The harm is not abstract and not confined to Plaintiff. The Court itself receives degraded briefing when Gibson’s strongest individual-capacity defenses are not advanced because advancing them would implicate counsel’s other client. The Supreme Court has emphasized that the integrity of the proceeding is a court interest, not merely a party interest. *Wheat*, 486 U.S. at 160; *American Airlines*, 972 F.2d at 611. The court that resolves this case on a deficient record bears the cost of the conflict.

E. The Record Contains No Evidence of Gibson’s Informed Consent.

The Motion observed that “[t]here is no indication in the record that Gibson has been informed of the conflict or that he has provided consent to joint representation.” (Doc. 46 at 13–14.) The Response had three weeks and eighteen pages to cure that omission, and did not. Defendants submit no affidavit from Gibson disclosing the dual-role allegation, no acknowledgment of the \$393,000 in Outside Counsel Contracts, and no representation that Gibson was advised of — let alone consented to — Smith’s omission of the Filarsky qualified-immunity pathway available only to him.

The standard response is a co-defendant affidavit confirming disclosure and informed consent. Smith provided none. *Tex. Disciplinary R. Prof’l Conduct 1.06(c)* (consent only after “full

disclosure of the existence, nature, implications, and possible adverse consequences” of the dual representation); *id.* cmt. 8. The Court should not infer consent from silence. And the conflict is not consentable in any event: Comment 7 directs that “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,” and Wheat permits the Court to “decline a proffer of waiver, and insist that defendants be separately represented.” 486 U.S. at 162.

VI. THE STATUTORY-AUTHORITY GROUND IS NOT AN INDEMNIFICATION ARGUMENT

Defendants recharacterize Plaintiff’s first ground, asserting Chapter 104 concerns only “the State’s indemnification and defense obligations, not whether counsel may appear in federal court.” (Doc. 50 at 1–2.) The text says otherwise: “[t]he attorney general *shall defend* a public servant or estate listed in Section 104.001.” Tex. Civ. Prac. & Rem. Code § 104.004(a) (emphasis added). The duty to “defend” is a litigation authority. Defendants do not address Chapter 108’s categorical exclusion of independent contractors, Tex. Const. art. IV, § 22, or that the reading they urge of § 402.021 would render Chapter 104’s three-decade history of contractor-specific amendments unnecessary. (See Doc. 46 at 8–10.) Defendants’ own cited authority — AG Opinion DM-0409 (1996) — supports Plaintiff’s reading by classifying an independent contractor “not subject to the [agency’s] right to control the details of the work” as outside the statutory defense framework.

VII. THE MOTION IS NOT A TACTICAL DEVICE

Defendants close by suggesting the Motion is a “procedural weapon.” (Doc. 50 at 14–15.) The record refutes that framing. The Motion was filed before any scheduling order has issued, before any trial date has been set, and while the MTD remains pending — that is, before any merits adjudication that disqualification could disturb. The structural conflict could not be diagnosed before the briefing record reflected what Smith chose to advance and what he omitted; the omissions are the conflict’s signature. The factual basis was developed through FERPA inspection, TPIA

productions, and Legislative Budget Board records during and after the MTD briefing. (Doc. 46 at 14.) The requested 30-day cure window does not disrupt any pending deadline, and Gibson can substitute conflict-free counsel without delay. These are markers of a curative motion, not a procedural weapon.

VIII. CONCLUSION AND PRAYER

Plaintiff has standing under American Airlines; the Court has independent authority regardless. The standard is not “actual, present conflict” but the Wheat formulation of “potential for conflict” that may burgeon. The Fifth Circuit has recognized the Monell-versus-individual structural conflict in Van Ooteghem, and the conflict has already begun to manifest through the systematic absence from Smith’s briefing of Gibson’s strongest individual-capacity arguments.

The relief is narrow. Granting the Motion costs nothing. Denying it leaves a conflict that risks an adverse-counsel collateral attack on any adverse judgment against Gibson. For the reasons stated in the Motion and herein, Plaintiff respectfully requests that the Court grant the Motion and order the relief specified at Doc. 46 at 15–16.

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 reply are true and correct to the best of my knowledge, information, and belief.

Executed on May 12, 2026.

/s/ Kevin N. Bass
Kevin N. Bass

Respectfully submitted,

/s/ Kevin N. Bass

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CERTIFICATE OF SERVICE

I certify that on May 12, 2026, a true and correct copy of this reply 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