

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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No. 5:25-CV-244-H-BV

ORDER DENYING MOTION TO DISQUALIFY COUNSEL

After a lengthy disciplinary hearing, pro se Plaintiff Kevin N. Bass was dismissed from Texas Tech University Health Sciences Center's (TTUHSC) medical school. His lawsuit arises from that dismissal. Defendants, including Darren Gibson, who acted as the disciplinary hearing officer, are represented by the Texas Office of the Attorney General (OAG). Bass now moves to disqualify the OAG from representing Gibson, asserting that the OAG does not have statutory authority to represent Gibson and that representing both TTUHSC and Gibson creates a conflict. Because Bass lacks standing to pursue disqualification of Gibson's counsel and because there is no actual or probable conflict of interest, the Court **DENIES** the motion.

1. Background

Bass sues TTUHSC and others for disability discrimination and civil-rights violations. Dkt. Nos. 1, 14. Many of the defendants are employed by TTUHSC. *See* Dkt. No. 14. Gibson, on the other hand, is an outside attorney who was apparently

retained by TTUHSC to preside over the disciplinary hearing. *Id.* at 5. The OAG has appeared and filed a responsive pleading on behalf of all Defendants, including Gibson. *See* Dkt. No. 27.

Bass asks the Court to disqualify the OAG from representing Gibson in his individual capacity because (1) Gibson is not a state employee, so the OAG lacks statutory authority to represent him, and (2) the OAG's joint representation of Gibson and TTUHSC creates a conflict of interest in violation of Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. Dkt. No. 46 at 4, 8–14. Defendants filed a response in opposition to Bass's motion, to which Bass filed an untimely reply. Dkt. Nos. 50, 51.

2. Legal Standard

A motion to disqualify counsel is the appropriate mechanism by which a party should bring unethical conduct or conflicts of interest to the attention of a court. *In re Am. Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992) (citation omitted). In the Fifth Circuit, disqualification cases are guided by, *inter alia*, state and national ethics rules, including the ABA's Model Rules and the Texas Rules. *Id.* at 610; *see In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) (applying Model Rules); *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995) (considering Texas Rules in addition to Model Rules).

Because motions to disqualify can deny a party counsel of its own choosing, courts must assess such motions with skepticism, particularly when filed by an opponent. *U.S. Fire*, 50 F.3d at 1316; *In re Am. Airlines*, 972 F.2d at 611. Disqualification “is a sanction that must not be imposed cavalierly.” *U.S. Fire*, 50 F.3d at 1316. In evaluating

a motion to disqualify, a court should consider “whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer’s continued participation in the case.” *Dresser*, 972 F.2d at 544. But these factors should not be applied mechanically. Instead, the court should “consider all of the facts particular to the case in the context of the relevant ethical criteria and with meticulous deference to the litigant’s rights.” *In re ProEducation Int’l, Inc.*, 587 F.3d 296, 300 (5th Cir. 2009) (internal quotation marks, alterations, and citation omitted). “[D]isqualification is unjustified without at least a reasonable possibility that some identifiable impropriety actually occurred.” *U.S. Fire*, 50 F.3d at 1316.

3. Analysis

A. Bass lacks standing to disqualify Gibson’s counsel.

Bass is not a current or former client of the OAG or of Assistant Attorney General (AAG) Scott Daniel Smith, who is the OAG counsel assigned to this case. Defendants therefore argue that Bass lacks standing to seek disqualification. Dkt. No. 50 at 6–7. The Court agrees.

The Fifth Circuit has issued conflicting panel decisions as to whether a party who is not a current or former client has standing to move for disqualification. In an April 1976 panel decision, the Fifth Circuit stated that, “[a]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former [or current] client moves for disqualification.” *In re Yarn Processing Pat. Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976); *see also Dresser*, 972 F.2d at 542, 544 (evaluating motion to

disqualify filed by current client). This principle recognizes that “[t]he underlying rules relating to attorney conflicts of interest are designed to allay any apprehension a client may have in frank discussion of confidential information with this attorney.” *In re Yarn Processing*, 530 F.2d at 90. “To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist.” *Id.* The panel recognized a narrow exception to the rule that applies where there is an “unethical change of sides [that is] manifest and glaring” or “open and obvious[.]” *Id.* at 89.

Just two weeks later, a different panel of the Fifth Circuit determined that a third party *could* move to disqualify opposing counsel. *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976). In *Gopman*, the panel considered and rejected a disqualified attorney’s argument that the government—which had never been a client of the attorney—lacked standing to challenge the propriety of his representation of multiple parties during a grand jury investigation. *Id.* at 264–65. The panel reasoned that “[w]hen an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court’s attention.” *Id.* at 265. Indeed, “a lawyer’s adversary will often be in the best position to discover unethical behavior,” and the trial court has “jurisdiction to act upon this claim of unethical conduct.” *Id.* at 266 (explaining “it is beyond dispute that lawyers are officers of the court and that the courts have the inherent authority to regulate their professional conduct”).

The Fifth Circuit has echoed the general sentiment that a court must guard against unethical conduct occurring in a proceeding before it in subsequent cases. *See, e.g., Am.*

Airlines, 972 F.2d at 611 (“[A] district court is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it.” (internal quotation marks, brackets, and citation omitted)); *ProEducation*, 587 F.3d at 299–300 (same). But in those cases, the movants were former clients of the attorney or firm against whom they sought disqualification. *Am. Airlines*, 972 F.2d at 607–08; *ProEducation*, 587 F.3d at 297–98. Thus, standing was not at issue. *But see Brown & Williamson Tobacco Corp. v. Daniel Int’l Corp.*, 563 F.2d 671, 673 (5th Cir. 1977) (per curiam) (relying on *Gopman* and explaining that “appellant has standing to seek disqualification even though it is not an aggrieved client because its attorneys are authorized to report any ethical violations committed in the case”).

Because the *Yarn Processing* panel decision was issued first, it controls. *Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 542 (5th Cir. 2007) (“When there are conflicting panel decisions, the earliest panel decision controls.”), *abrogated on other grounds by Bunner v. Dearborn Nat’l Life Ins. Co.*, 37 F.4th 267 (5th Cir. 2022). The Court therefore relies on the holding in *Yarn Processing* to evaluate Bass’s standing. *See Clemens v. McNamee*, No. 4:08-CV-00471, 2008 WL 1969315, at *3 (S.D. Tex. May 6, 2008) (same).

Bass is not a current or former client of the OAG or AAG. As a result, he has standing to challenge the propriety of the OAG’s representation only if the purported ethical violation is “open and obvious.” *In re Yarn Processing*, 530 F.2d at 88. Bass asserts that it is. Dkt. Nos. 46 at 12–13; 51 at 5–8. He is mistaken.

There is no evidence that the OAG has unethically changed sides during the litigation, nor is there evidence of an actual conflict of interest, as discussed further below. Thus, the *Yarn Processing* exception does not apply, and Bass lacks standing to move for the OAG's disqualification based on the alleged conflict of interest. *In re Yarn Processing*, 530 F.2d at 88–90; *see also Schneider v. Cnty. of Will*, 123 F. App'x 715, 716–17 (7th Cir. 2005) (observing that “regardless of whether Will County followed the proper state procedures for appointing [firm], [plaintiffs] do not have standing to disqualify the firm in the context of this federal lawsuit” because the representation did not harm them); *Areizaga v. ADW Corp.*, No. 3:14-CV-2899-P, 2015 WL 13567554, at *4 (N.D. Tex. May 19, 2015) (denying plaintiff's motion to disqualify defendant's counsel where plaintiff was not a former client and there was no change of sides).

B. Even if Bass had standing, disqualification is not warranted.

Even if Bass had standing, the Court would deny his motion because he has not demonstrated adequate grounds to warrant such. First, Bass's argument regarding the OAG's lack of statutory authority to represent Gibson is not grounds for disqualification. Bass argues that outside legal counsel or independent contractors are not listed in Chapter 104 of the Texas Civil Practice and Remedies Code as someone who the OAG must represent. Dkt. No. 46 at 8 (citing Tex. Civ. Prac. & Rem. Code §§ 104.001, 104.004(a)). However, Chapter 104 concerns “State Liability for Conduct of Public Servants.” That is, it addresses indemnification and state liability. *See* §§ 104.001, .002, .004. “[T]he state is liable for indemnification” for certain types of conduct, and in those cases, the state must represent the employees involved. *Id.* But Chapter 104 does not prohibit the

state from representing persons not listed in § 104.001—it merely lists the persons the OAG *must* represent. § 104.004(a) (requiring that “[t]he attorney general shall defend a public servant or estate listed in Section 104.001 in a cause of action covered by this chapter”).

Bass also points to Chapter 108 to support his argument that independent contractors such as Gibson are excluded from the definition of a public servant, so the OAG cannot represent Gibson. Dkt. No. 46 at 9. But again, this chapter relates to limitations on liability and says nothing about whether the OAG is prevented from representing an independent contractor or outside counsel such as Gibson. The Court concludes that the purported lack of statutory authority provides no basis for disqualification here, particularly given Bass’s lack of standing and personal injury.

Further, Bass fails to show a reasonable probability that any actual or possible conflict will occur. Rule 1.06 prohibits a lawyer from representing a person when the representation “reasonably appears to be or become adversely limited by the lawyers or law firm’s responsibilities to another client or to a third person.” Tex. Rules Disciplinary P. R. 1.06(b)(2), *reprinted in* Tex. Gov’t Code Ann., tit. 2, subtit. G, app. A-1.

Bass maintains that TTUHSC and Gibson have an actual conflict, so the OAG cannot represent both parties without violating Rule 1.06. Dkt. No. 46 at 11. Bass has sued TTUHSC under the Americans with Disabilities Act (ADA) and Rehabilitation Act of 1973 (RA) for disability discrimination. Dkt. No. 14. He also sues Gibson individually under 42 U.S.C. § 1983 for violations his due process rights and retaliation. *Id.* TTUHSC seeks dismissal of the ADA and RA claims based on sovereign immunity

and for failure to state a claim, and Gibson asserts the defense of qualified immunity as to the § 1983 claims. Dkt. No. 27.

Bass argues that there is an actual conflict because “TTUHSC’s interest is to show Gibson acted independently. Gibson’s interest is to show TTUHSC structured, approved, and directed the arrangement[.]” Dkt. No. 46 at 12. Bass reaches this conclusion based on cases where the same attorney represented a municipal entity in defense of a *Monell* claim and the individual officers in defense of constitutional violations. *See id.* at 11–12; Dkt. No. 51 at 4–7. In Bass’s view, the AAG failed to raise Gibson’s strongest defense in Defendants’ motion to dismiss: “that TTUHSC knew about and ratified his dual role” as hearing officer and legal advisor on certain issues. Dkt. No. 46 at 6, 13. Bass implies this must have been because TTUHSC has incentive to show that Gibson acted independently. *See id.* at 12; *see* Dkt. No. 51 at 5.

This is a speculative risk of conflict. The assertion of sovereign and qualified immunities do not require TTUHSC or Gibson to take adverse positions. Nor is there a significant risk that Gibson’s representation will be materially limited by the OAG’s responsibility to TTUHSC. Bass has not sued TTUHSC under § 1983. Dkt. No. 14. And as Bass repeatedly emphasizes, Gibson is an independent contractor whom the state apparently will not indemnify regardless of whether he was acting in the scope of the contract. Dkt. No. 46 at 8–10. Whether Gibson acted within or outside the scope of employment does not resolve the qualified immunity defense, which requires the Court to evaluate whether (1) Gibson violated Bass’s First Amendment or due process rights, and

(2) whether those rights were clearly established at the time of the violations.¹ Thus, unlike a case where a municipal liability claim is asserted alongside a § 1983 claim against an individual officer, and the parties' defenses may diverge to avoid liability, there is no inherent risk here. *See Dunton v. Suffolk Cnty.*, 729 F.2d 903, 907 (2d Cir. 1984) (observing that “[a] municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy[,]” while an employee may avoid liability by showing that he acted “pursuant to an official policy,” so “he can at least shift part of his liability to the municipality”).

Bass also alleges that the OAG did not acknowledge Gibson's “dual role”—that he serves as outside legal counsel for TTUHSC and as a disciplinary hearing officer in the instant case—which allegedly demonstrates a conflict. Dkt. No. 46 at 12–13; 51 at 5–6. But even assuming Gibson has a “dual role,” as Bass claims, he fails to explain why or how that has or will lead to divergent interests. Dkt. No. 46 at 12–13; 51 at 5–6. And the Court can discern none, and certainly none that are so plain and obvious as to require disqualification.

¹ Bass argues that the OAG did not “invoke” *Filarsky v. Delia* on Gibson's behalf in asserting the defense of qualified immunity. Dkt. Nos. 46 at 11; 51 at 6. *Filarsky* held that individuals hired by a government to do its work are entitled to qualified immunity, even if they do not perform that work full-time. 566 U.S. 377, 393–94 (2012). Thus, regardless of whether Gibson is an independent contractor or state employee, he may assert the defense of qualified immunity, as he did. *See* Dkt. No. 27 at 12–19. The absence of a citation to *Filarsky* does not evince a conflict, especially since Bass does not dispute that Gibson may raise the defense. *See* Dkt. No. 33; *see also* Dkt. No. 46 at 11 (acknowledging that “Gibson may assert qualified immunity” but wrongly claiming that “[h]e must retain his own counsel to do so”).

Neither is TTUHSC and Gibson's unified defense evidence that the dual representation has limited the AAG's ability to defend Gibson. *See Surratt v. McClaran*, 234 F. Supp. 3d 815, 822 (E.D. Tex. 2016) (observing that "the [d]efendants are capable of arguing an alternative position that would pit the [c]ity against its officers is not evidence of a conflict of interest"); *Muniz v. Re Spec Corp.*, 230 F. Supp. 3d 147, 155 (S.D.N.Y. 2017) (acknowledging that "the mere possibility of a legally cognizable claim between or among a group of jointly represented clients does not require disqualification of their counsel"). Finally, Bass's contention that there is an obvious conflict because the AAG's briefing was inaccurate or contained errors is frivolous. Dkt. No. 51 at 6–7. Imperfect briefing does not import a conflict of interest.

Bass has failed to show an actual or probable conflict. *See* Dkt. No. 46 at 12–13. Disqualification of the OAG or AAG is not warranted.

C. The Court declines to disqualify the OAG and AAG.

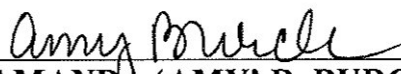
Regardless of whether Bass has standing, the Court retains inherent authority to control the proceedings before it, which includes regulating attorneys' professional conduct. *E.g.*, *Gopman*, 531 F.2d at 266 (explaining that "lawyers are officers of the court" and "the courts have the inherent authority to regulate their professional conduct"); *Martin v. Affordable Care, LLC*, NO. 21-0585, 2023 WL 4875878, at *4 (W.D. La. July 31, 2023) (observing that "the Fifth Circuit permits standing for third parties to raise conflicts premised on the well-settled principle that district courts have the inherent duty and responsibility to supervise the conduct of attorneys who appear before them." (citing *Brown & Williamson*, 563 F.2d at 674 and *Gopman*, 531 F.2d at 264)).

The Court declines to disqualify Defendants' counsel based on its inherent authority. There is no actual conflict. Requiring "the withdrawal of [Gibson's] counsel of choice" based on unsupported conjecture is more likely to undermine the public's confidence in the legal system rather than bolster it. *U.S. Fire*, 50 F.3d at 1317. The Court will not divest Gibson of his counsel of choice. Should any conflict become apparent, the Court trusts that the attorneys within the OAG and AAG, as officers of the Court, will act in accordance with the rules of professional conduct.

4. Conclusion

For the reasons discussed above, the Court **DENIES** Bass's motion. Dkt. No. 46.

SO ORDERED on July 14, 2026.



AMANDA 'AMY' R. BURCH
UNITED STATES MAGISTRATE JUDGE