

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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|-------------------------------------|---|----------------------------|
| DEBRALYNN THOMAS, |) | Civil No. 21-00087 JAO-KJM |
| Individually and in her capacity as |) | |
| personal representative of the |) | ORDER GRANTING PLAINTIFF’S |
| ESTATE OF KYLE THOMAS, |) | MOTION TO DISQUALIFY |
| |) | COUNSEL |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| CITY AND COUNTY OF |) | |
| HONOLULU; RONALD V. |) | |
| DUMLAO; CHANCE C. CORREA; |) | |
| JOSE J. VILLANUEVA; SUSAN |) | |
| BALLARD; and JOHN and/or JANE |) | |
| DOES 1-10, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

ORDER GRANTING PLAINTIFF’S MOTION TO DISQUALIFY COUNSEL

On November 26, 2021, Plaintiff Debralynn Thomas, individually and in her capacity as personal representative of the Estate of Kyle Thomas (“Plaintiff”), filed a Motion to Disqualify Counsel (“Motion”). ECF No. 28. On December 8, 2021, Defendants City and County of Honolulu (“the City”), Ronald V. Dumlao, Chance C. Correa, Jose J. Villanueva, and Susan Ballard (collectively, “Defendants”) filed a Memorandum in Opposition to the Motion (“Opposition”). ECF No. 33. On December 13, 2021, Plaintiff filed a Reply. ECF No. 34.

The Court held a hearing on the Motion on December 21, 2021. Eric A. Seitz, Esq. appeared on behalf of Plaintiff. Kyle K. Chang, Esq. appeared on behalf of Defendants. After carefully considering the memoranda, arguments, and record in this case, the Court GRANTS the Motion for the reasons set forth below.

BACKGROUND

I. Factual Background

This case concerns an incident between Plaintiff's son, Kyle Thomas ("Mr. Thomas"), and Honolulu Police Department ("HPD") officers. The Court takes the following alleged facts from Plaintiff's First Amended Complaint. On February 20, 2019, Mr. Thomas, Mr. Thomas' girlfriend, and Mr. Thomas' friend had finished shopping at a Walmart store and entered Mr. Thomas' vehicle ("the Vehicle") in the store parking lot. ECF No. 9 at 5 ¶¶ 11-12. The Vehicle was stopped at a traffic light as Mr. Thomas was attempting to exit the parking lot, "when a number of government-subsidized, unmarked cars surrounded and boxed-in" the Vehicle. *Id.* ¶ 13. At that point, Defendants Dumlao, Correa, and Villanueva (collectively "the Officer Defendants"), who were then allegedly on duty in plainclothes, exited their vehicles and approached the driver and passenger sides of the Vehicle. *Id.* ¶¶ 13, 15.

The Officer Defendants instructed Mr. Thomas and the two others in the Vehicle to put their hands in the air, and they immediately complied. *Id.* ¶ 18. As

they did so, Defendant Correa “used his fist to smash the driver-side window of Vehicle and fired a shot into Vehicle, killing Mr. Thomas.” *Id.* ¶ 19. The First Amended Complaint alleges that the Officer Defendants “did not announce or identify themselves as HPD officers when they approached Mr. Thomas, Girlfriend, or Friend nor did they do so at any other time during the incident.” *Id.* at 6 ¶ 16. In addition, “prior to shooting Mr. Thomas, none of the [Officer Defendants] issued a verbal warning that shots would be fired.” *Id.* ¶ 20.

The First Amended Complaint also alleges that an audit of HPD’s policies and procedures found that “HPD has a long-standing pattern and practice of knowingly retaining police officers who engage in criminal activity or other serious misconduct.” *Id.* at 9 ¶ 33. In addition, the City and Defendant Ballard, who was the HPD Chief at the time Mr. Thomas was killed, allegedly knew that training policies regarding plainclothes officers were deficient. *Id.* at 10 ¶ 36.

II. Procedural Background

On April 21, 2021, Plaintiff filed a First Amended Complaint. ECF No. 9. The First Amended Complaint asserts four claims pursuant to 42 U.S.C. § 1983, two against the Officer Defendants and two against the City and Defendant Ballard. The § 1983 claims against the Officer Defendants allege that the Officer Defendants violated Mr. Thomas’ constitutional rights based on excessive force and due process violations. The § 1983 claims against the City and Defendant

Ballard assert that the City is subject to municipal liability for alleged negligent retention, supervision, and control of the Officer Defendants, as well as failure to train the Officer Defendants. The First Amended Complaint also asserts two state law claims against Defendants.

On October 29, 2021, the City filed a Motion to Dismiss First Amended Complaint (“Motion to Dismiss”). ECF No. 25. That same day, the Officer Defendants and Defendant Ballard (collectively, “the HPD Defendants”) filed their Answer to the First Amended Complaint (“Answer”). ECF No. 26. Deputy Corporation Counsel Kyle K. Chang (“Mr. Chang”) represents Defendants in this matter and filed both the Motion to Dismiss and the Answer on behalf of the respective Defendants.

On November 26, 2021, Plaintiffs filed the instant Motion.¹ The Motion asserts that the City and the HPD Defendants have taken conflicting legal positions in the Motion to Dismiss and the Answer, respectively. On the one hand, the Motion to Dismiss argues that the City is not subject to municipal liability under § 1983 because the Officer Defendants were acting outside the scope of their employment as HPD officers. ECF No. 25-1 at 11-14. On the other hand, the

¹ The Motion states that “[c]ounsel for all parties have agreed to waive the seven-day [prefiling] requirement of LR7.8” Unless otherwise ordered by the court, however, parties practicing in this district are required to comply with all the Local Rules. Parties cannot simply waive Local Rules requirements for their convenience.

Answer asserts as a defense to Plaintiff's claims that the HPD Defendants are not individually liable under § 1983 because the Officer Defendants were acting within the scope of their employment as HPD officers. ECF No. 26 at 12, 14. Plaintiff argues that, given these conflicting legal positions in response to Plaintiff's claims, Mr. Chang's concurrent representation of the City and the Officer Defendants is a conflict of interest that violates Rule 1.7 of the Hawaii Rules of Professional Conduct ("HRPC"). Plaintiff thus asks the Court to disqualify Mr. Chang.

DISCUSSION

I. Standing

As an initial matter, the Court addresses whether Plaintiff has standing to raise the alleged conflict of interest. Disqualification of counsel is a drastic measure "because it takes away one party's ability to choose his own representation, and it is often a tactic used to create delay or harassment." *Sentry Select Ins. Co. v. Meyer*, No. 2:07-CV-01049-RLH, 2011 WL 1103333, at *7 (D. Nev. Mar. 23, 2011) (citing *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 721-22 (7th Cir. 1982); *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1258-59 (C.D. Cal. 2000)). Because disqualification motions are especially prone to tactical abuse, the Ninth Circuit has instructed courts to subject such motions to "particularly strict judicial scrutiny." *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985). Accordingly, courts should

hesitate to impose disqualification “‘except when absolutely necessary[.]’” *Meyer*, 2011 WL 1103333, at *7 (quoting *Freeman*, 689 F.2d at 721-22).

Because Plaintiff is not a current or former client of Mr. Chang, “the focus is on whether [she] can demonstrate injury in fact that the opposing party’s attorney has a conflict of interest.” *Agena v. Cleaver-Brooks, Inc.*, CIVIL NO. 19-00089 DKW-WRP, 2019 WL 11248588, at *1 (D. Haw. Oct. 17, 2019) (citing *Xcentric Ventures, LLC v. Stanley*, No. CV-07-00954-PHX-NVW, 2007 WL 2177323, at *3 (D. Ariz. July 27, 2007)). The Ninth Circuit has “indicated that it has ‘difficulty seeing how [an opposing party] has standing to complain about a possible conflict of interest . . . having nothing to do with her own representation.’” *Clark v. Goodwill Indus. of Haw.*, Civil No. 09-00184 DAE-LEK, 2009 WL 2877289, at *2 (D. Haw. Sept. 9, 2009) (brackets and ellipses in original) (quoting *Xcentric Ventures*, 2007 WL 2177323, at *3); *see also Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998). Thus, as a general rule, courts in this circuit “‘do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.’” *Clark*, 2009 WL 2877289, at *2 (quoting *Xcentric Ventures*, 2007 WL 2177323, at *3).

There are, however, narrow exceptions to the foregoing general rule. “When an ethical breach is ‘so severe that it obstructs the orderly administration of justice, the party who finds his claims obstructed has standing’ to bring a motion to

disqualify.” *Agena*, 2019 WL 11248588, at *2 (other internal quotation marks omitted) (quoting *Colyer v. Smith*, 50 F. Supp. 2d 966, 972 (C.D. Cal. 1999)). Stated differently, “where the ethical breach so infects the litigation . . . that it impacts the moving party’s interest in a just and lawful determination of her claims,” the moving party may have standing to bring a motion to disqualify. *Colyer*, 50 F. Supp. 2d at 971-72.

Furthermore, “district courts have an ‘inherent obligation to manage the conduct of attorneys who appear before [them] and to ensure the fair administration of justice.’” *Agena*, 2019 WL 11248588, at *2 (brackets in *Agena*) (quoting *Colyer*, 50 F. Supp. 2d at 972). The Ninth Circuit has held that “[t]he courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession.” *Gas-A-Tron of Ariz. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1324 (9th Cir. 1976) (quoting *Richardson v. Hamilton Int’l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972)). It is consequently the duty of the district court to examine questions of professional ethics “[w]henver an allegation is made that an attorney has violated his moral and ethical responsibility” because “it is that court which is authorized to supervise the conduct of the members of its bar.” *Id.* (quoting *Richardson*, 469 F.2d at 1385). This duty overrides any “prudential barrier to litigating the rights and claims of third parties,” such as standing. *Coyer*, 50 F. Supp. 2d at 972.

This district court previously concluded that, in ruling on a defendant's motion to disqualify the plaintiffs' attorney, the court itself had standing to address the conflict of interest issues under HRPC 1.7. *Franson v. City & Cnty. of Honolulu*, CIVIL NO. 16-00096 DKW-KSC, 2017 WL 372976, at *8 n.5 (D. Haw. Jan. 25, 2017). In *Franson*, the district court relied on Comment 15 to HRPC 1.7, which provides that both the court and opposing counsel may raise questions of conflict of interest:

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is no reason to infer that the lawyer has neglected the responsibility Where the conflict is such that it clearly calls into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

HRPC 1.7 cmt. 15.

Pursuant to Comment 15, the Court views the Motion with caution. The Opposition asserts that the Motion "is not only frivolous, but it is also clearly intended to harass counsel for the City and the [Officer Defendants], and to increase litigation costs ultimately borne by City taxpayers." ECF No. 33 at 10. The Court disagrees. Plaintiff raises legitimate arguments about a potential conflict of interest as to Mr. Chang's concurrent representation of the City and the Officer Defendants. The irreconcilable legal positions on which the conflict is based, as set forth in the Motion to Dismiss and the Answer, have the potential to

impact Plaintiff's interest in a just and lawful determination of her claims. In addition, the Court notes that Plaintiff filed the Motion less than one month after Defendants filed the Motion to Dismiss and the Answer, the two documents from which Plaintiff first ascertained that a conflict might exist. Thus, other than the Opposition's conclusory assertions, the Court finds that nothing in the record indicates that Plaintiff filed the Motion as a "technique of harassment."

Based on the foregoing, and after carefully considering the parties arguments, the Court finds that Plaintiff has standing to challenge the alleged conflict of interest under the recognized, narrow exception for non-clients. The Court further finds that it has the authority to raise the issue pursuant to its inherent obligation to manage the conduct of the attorneys who appear before it and to ensure the fair administration of justice. *Agena*, 2019 WL 11248588, at *2 (quoting *Colyer*, 50 F. Supp. 2d at 972).

II. Conflict of Interest Under HRPC 1.7

A. Whether a Concurrent Conflict Exists

HRPC 1.7 prohibits an attorney from representing a client if there exists a concurrent conflict of interest:

. . . [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or

- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client

HRPC 1.7(a). The Court addresses the two types of concurrent conflicts below.

1. HRPC 1.7(a)(1) – Directly Adverse

Plaintiff argues that a concurrent conflict exists under HRPC 1.7(a)(1), such that Mr. Chang's representation of the City is directly adverse to the Officer Defendants. *See* ECF No. 28-1 at 5. Comment 6 to HRPC 1.7 guides the Court's determination of whether a "directly adverse conflict" exists. Comment 6 suggests that one client is directly adverse to another when they are opposing parties in litigation, such as a plaintiff and defendant, and even in matters that are wholly unrelated. *See* HRPC 1.7 cmt. 6 ("[A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."). Here, the City and the Officer Defendants are not opposing parties, as they are all defendants and have not asserted cross-claims.

Comment 6 also suggests, however, that "a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit." The nature of the contradictory legal positions the City and the Officer Defendants have asserted in response to the

Complaint would likely make this situation inevitable. At trial, Mr. Chang would be required to cross-examine the Officer Defendants, who, consistent with the defenses asserted in the Answer, would testify that they were acting within the scope of their employment. Such testimony would be damaging to the City's defense that it is not subject to municipal liability because the Officer Defendants were acting outside the scope of their employment. The same is true when it comes time for Mr. Chang to cross-examine witnesses for the City on this issue. The Court thus agrees with Plaintiff that a "directly adverse conflict" exists under HRPC 1.7(a)(1).

2. HRPC 1.7(a)(2) – Materially Limited

Although Plaintiff did not raise this argument in the Motion, the Court finds that there is also a significant risk that Mr. Chang's representation of the City will be materially limited by his responsibilities to the Officer Defendants, and vice versa, such that a concurrent conflict exists under HRPC 1.7(a)(2). Comment 8 to HRPC 1.7 provides: "[A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." A conflict exists when it "in effect forecloses alternatives that would otherwise be available to the client." HRPC 1.7 cmt. 8.

Comment 8 identifies the critical questions for determining whether a conflict exists under HRPC 1.7(a)(2):

The mere possibility of subsequent harm does not itself require disclosure and consent. The crucial questions are the likelihood that a difference in interests will arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Id.

After carefully examining the parties' arguments and the filings, the Court finds that this circumstance is beyond a "mere possibility of subsequent harm." *Id.* Given the contradictory legal positions regarding whether the Officer Defendants were acting within the scope of their employment, a difference in interests between the City and the Officer Defendants is already a reality. The Court further finds that this difference will materially interfere with Mr. Chang's "independent professional judgment in considering alternatives or foreclose courses of action that should reasonably be pursued on behalf of the client." *Id.*

Mr. Chang asserts that he does not consider the Motion to Dismiss, "regardless of its outcome, to constitute 'law of the case' so as to prohibit either the City or [the Officer Defendants] from arguing that [the Officer Defendants] were acting within their authority and employment." ECF No. 33-1 (Declaration of Kyle K. Chang ("Chang Decl.") at ¶ 12. Mr. Chang focuses on – albeit incorrectly – establishing that the City's defense does not prohibit Officer

Defendants from asserting their defense. Whether this is true, however, is not the issue. Also not at issue is whether the Office of Corporation Counsel can properly represent all Defendants. Rather, the crux of the Motion is whether *Mr. Chang* can represent both the City and the Officer Defendants while each asserts a defense of no liability based on whether the Officer Defendants were acting within the scope of their employment. The Court finds that Mr. Chang cannot reasonably do so without some degree of compromise to his duty of loyalty to either the City or the Officer Defendants.

The contentions in the Opposition, as well as the statements in Mr. Chang's declaration in support thereof, highlight the Court's concerns. The Opposition asserts that Mr. Chang filed the Motion to Dismiss because of the allegedly defective allegations in the First Amended Complaint. *See* ECF No. 33 at 6-7. Based on Mr. Chang's investigation of the facts, however, he believes that "the [Officer Defendants] acted reasonably and within the confines of the constitution and applicable law" *Id.* at 6 (citing Chang Decl. at ¶ 9). In other words, Mr. Chang's informed belief is that the Officer Defendants acted within the scope of their employment. Notwithstanding this belief, Mr. Chang filed the Motion to Dismiss, which asserts a legal position adverse to the Officer Defendants, to obtain a favorable result for the City, *i.e.*, dismissal. Doing so created a conflict of interest that falls squarely under HRPC 1.7(a)(2).

In addition, the Opposition contends that “[n]either counsel nor the City intend to assert, beyond the pleading stage, that individual officers were acting outside the course and scope of their employment.” ECF No. 33 at 8 (citing Chang Decl. at ¶ 13). While the Court does not question the genuineness of Mr. Chang’s contention, it is clear that Mr. Chang’s duty of loyalty to the City is already infringing on his duty of loyalty to the Officer Defendants. That Mr. Chang’s litigation strategy underlying the Motion to Dismiss (which he has revealed while opposing the Motion) is only temporary does not ameliorate the Court’s concerns.

A client is entitled to complete loyalty and independent judgment from the attorney at the outset of the attorney-client relationship. *See* HRPC 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”). Such loyalty and independent judgment cannot be suspended for another client involved in the same litigation, even if only temporarily. The Court thus finds that Mr. Chang’s representation of the City and the Officer Defendants creates a concurrent conflict of interest under HRPC 1.7(a)(2).

B. Whether Mr. Chang Can Continue Representation Notwithstanding the Conflict

HRPC 1.7(b) provides that, notwithstanding the existence of a concurrent conflict, an attorney may continue to represent the client under certain circumstances:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives consent after consultation confirmed in writing.

HRPC 1.7(b). Furthermore, HRPC 1.7(c) states: “When representation of multiple clients in a single matter is contemplated, the consultation shall include explanation of the implications of the common representations, including both the advantages and the risks involved.”

1. Whether Mr. Chang Obtained Valid Consent in Writing from Each Affected Client

Mr. Chang admits in his declaration that he “did not immediately obtain signed consent” from the Officer Defendants. Chang Decl. at ¶ 15. Mr. Chang asserts, however, that he “recently obtained such signed consent to represent forms from each of [the Officer Defendants].” Chang Decl. at ¶ 15. HRPC 1.7(b)(4), however, requires consultation and written consent from “*each* affected client.” (Emphasis added.) Neither the Opposition nor Mr. Chang’s declaration indicates that Mr. Chang consulted with and obtained written consent from the City, which

is also an affected client.² The Court thus finds that Mr. Chang has failed to comply with HRPC 1.7(b)(4).

Furthermore, the Court notes that Mr. Chang's declaration leaves unclear whether Mr. Chang obtained valid consent from the Officer Defendants. "Valid client consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." HRPC 1.7 cmt. 18. "When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the client-lawyer privilege and the advantages and risks involved." *Id.*

Mr. Chang asserts that he discussed with the Officer Defendants the Motion, "the possibility of a conflict of interest arising with them[,] and the "facts of the case." Chang Decl. at ¶¶ 16-17. Mr. Chang also admits that he did not consult with the Officer Defendants until after Plaintiff's counsel notified him of Plaintiff's intent to file the Motion, *i.e.*, after Mr. Chang filed the Motion to Dismiss and the Answer. *Id.* at ¶¶ 15-16. Mr. Chang's vague assertions fail to convince the Court that Mr. Chang's consultation impressed upon the Officer Defendants the

² The parties do not discuss, and the Court makes no finding as to, whether Mr. Ching's representation of Defendant Ballard creates a conflict of interest.

“seriousness of the decision [they were being] asked to make” HRPC 1.7 cmt. 20. Mr. Chang thus fails to persuade the Court that he obtained the Officer Defendants’ valid consent under HRPC 1.7(b)(4).

2. Whether Mr. Chang Reasonably Believes He Can Provide Competent and Diligent Representation to Each Affected Client

In any case, the Court finds that it is not reasonable for Mr. Chang to believe that he could adequately fulfill his professional responsibilities to each affected client. HRPC 1.7(b)(1); *see also id.* cmt. 15 (“Under paragraph (b)(1), the representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”). Mr. Chang states that he does not intend to assert beyond the pleadings stage that the Officer Defendants were acting outside the scope of employment. This defense, though, is one that the City is entitled to assert and one that its attorney should reasonably pursue on its behalf. Mr. Chang cannot do that without taking action that is directly adverse to, or at the very least would materially limit his ability to be a zealous advocate for, the Officer Defendants.

Mr. Chang divided his loyalties when he asserted conflicting legal positions on behalf of his clients. The Court thus finds that Mr. Chang cannot reasonably believe that he can provide competent and diligent representation to the City and the Officer Defendants under the particular circumstances of this case. HRPC 1.7(b)(1), thus, prohibits Mr. Chang from seeking client consent to continue

representation. *See* HRPC 1.7 cmt. 15 (“When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”).

CONCLUSION

Based upon the foregoing, the Court GRANTS the Motion to Disqualify Counsel (ECF No. 28). Mr. Chang is DISQUALIFIED from representing any defendant in this case. Any action the Office of Corporation Counsel takes to appoint new counsel for Defendants must be consistent with the terms of this Order. In light of this Order, the Court STAYS the unexpired deadlines in the Rule 16 Scheduling Order entered on June 29, 2021, pending appearance of new counsel or other order of the court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 21, 2021.



A handwritten signature in blue ink, appearing to read "K. Mansfield".

Kenneth J. Mansfield
United States Magistrate Judge

Thomas v. City & Cnty. of Honolulu, et al., Civil No. 21-00087 JAO-KJM; Order Granting Plaintiff’s Motion to Disqualify Counsel