

Before The
State Commission on Judicial Conduct

Inquiry Concerning a Judge
No. 96

**RESPONSE IN OPPOSITION TO JUDGE KELLER'S
MOTION TO STRIKE AND MOTION TO SHOW AUTHORITY**

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TO THE HONORABLE DAVID BERCHELMANN:

The Examiner responds as follows to Judge Keller's motion to strike the amended notice and to her motion to show authority. Judge Keller addressed her motion to the Commission but has set the motion for hearing before Your Honor. We address this response to Your Honor.

Overview

The five charges in the amended notice all relate to Judge Keller's conduct on September 25, 2007, concerning the execution of Michael Richard scheduled (and conducted) that evening. None of the five charges in the amended notice implicate any other episodes of any alleged misconduct in other cases on the Judge Keller's docket or on other dates. The Examiner's amended notice conforms to testimony given by Judge Keller in her June 2, 2009 deposition and other evidence developed during discovery. **Appendix A** describes the changes that were made from the original notice to the amended notice. Some of the amendments relate to details. Other amendments relate to the surprising deposition testimony by Judge Keller that – when she responded to an inquiry from her Court's general counsel who obviously had ignored the Court's important Execution Day Procedures – she frankly did not know whether the general counsel

was, or was not, aware of the Procedures. Judge Keller's testimony raises questions whether she violated responsibilities as to staff who were subject to her direction and control.

The amended notice is proper under Rule 63, Tex.R.Civ.P. Judge Keller's motion wholly ignores the repeated and consistent case law that determines the applicability of the Texas Rules of Civil Procedure where, as here, they do not conflict with the Rules for Removal or Retirement of Judges. Judge Keller's motion relies – on at least 4 occasions – on a mistaken reading of the Rules. She mistakenly contends no formal proceeding may be brought against her unless the charges against her were first submitted in a verified statement. Her contention is based on her faulty reading of Rule 3 of the Rules for Removal or Retirement of Judges and also ignores applicable case law.

The amended notice is also proper under the express provisions of Rule 10(f) of the Rules for Removal or Retirement of Judges.

Judge Keller does not, and cannot, show any unfair surprise or undue prejudice; nor is there any basis (nor any contention by Judge Keller) that she lacks reasonable time to defend against the amended notice.

Judge Keller has misunderstood Rule 12, Tex.R.Civ.P. It is not a vehicle to challenge a filing, but instead is a vehicle only for challenging whether attorneys have authority to appear in a proceeding.

Judge Keller also mistakenly claims that the Commissioners must themselves adopt any amended notice. This is not so. The Commissioners are the adjudicators of the issues in Rule 10 formal proceedings. They are not the accusers, prosecutors or advocates of the charges. The

Examiner, rather than the Commissioners, is responsible for preparing the notice and any amended notices, once the Commissioners have determined to institute formal proceedings.

Context of the amendment

A significant internal Court procedure in effect on September 25, 2007 was the Execution Day Procedures. By the Procedures, the Court required that "all communications regarding the scheduled execution shall be first referred to the assigned judge." The Procedures expressly extend to telephone calls regarding the scheduled execution. A criticism at issue in this proceeding is whether Judge Keller ignored the Procedures, when she received and disposed of a September 25, 2007 inquiry concerning a late filing to challenge the evening's scheduled execution. The assigned judge for that execution, Judge Cheryl Johnson, awaited an anticipated filing from counsel for Michael Richard, who was scheduled to be executed that evening. Judge Johnson never was apprised that Mr. Richard's legal team had asked, and been refused, an accommodation for a late filing to challenge the execution. Mr. Richard was executed without the assigned judge ever becoming aware of his effort to obtain a stay based upon a ruling by the United States Supreme Court that very morning – even though Judge Johnson had remained at Court that evening, prepared to receive and address such an application.

Judge Keller was deposed on June 2, 2009. In that deposition, the Examiner and Special Counsel learned that Judge Keller was unaware, when she had her September 25, 2007 conversation with General Counsel Edward Marty, whether Mr. Marty did, or did not, know of

the Execution Day Procedures.¹ It was clear that Mr. Marty was not following the Procedures. It is equally clear that Judge Keller took no steps to require his compliance and that she took no steps herself to relay the communication to the assigned judge.

¹ Judge Keller testified as follows in her deposition:

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Q. Similarly, you don't fault Mr. Marty for his failing to direct to the duty judge the inquiry that he received from Mr. Acosta?

A. No.

Q. And you don't fault him because you think the execution day practice did not apply?

A. I don't fault Mr. Marty because **I don't know whether he knew that this -- that he was aware of this.**

Q. That he was even aware of the execution day procedure?

A. Of this procedure.

Q. You've -- the written transcript won't pick it up but the video will. You emphasized the word this. What were you trying to emphasize with that word?

A. This is a specific procedure and **I don't know if Mr. Marty was aware of every aspect of this procedure.**

Pages 44-45

Q. What was the court's method of familiarizing the general counsel with the execution day procedure?

A. **I think we did not.**

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Q. I think you told us earlier, there were no training for clerks. And you **didn't know if Mr. Marty and Mr. Acosta did or did not know the execution day practices?**

A. **That's right.**

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Q. So let's re-ask then a slightly different question. On September 25, 2007 at any time did you tell Mr. Marty to contact the designated judge?

A. No.

Q. The duty judge?

A. I did not ask.

Q. Anything to that effect?

A. No.

Q. And on September 25, 2007 you did not contact the duty judge?

A. That's right.

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Q. In September 2007, **did you know whether Ed Marty was familiar with the execution day procedure?**

A. **No.**

Q. You did not know?

A. **I did not.**

Q. Whether Abel Acosta was?

A. I do not know.

Judge Keller's ignorance as to whether the Court's General Counsel knew the Execution Day Procedures, coupled with her failure to insist that the September 25, 2007 communication be directed to the assigned judge, implicate a number of questions concerning her conduct, including this requirement of the Judicial Code: that "[a] judge shall require compliance with this subsection [B(8) of Canon 3] by court personnel subject to the judge's direction and control."

On the day designated in the agreed-upon Rule 166 scheduling order as the deadline for amending pleadings – June 15, 2009 – the Examiner and Special Counsel filed the amended notice. Among other things, the amended notice conformed the allegations to testimony given by Judge Keller in her deposition.² The amended notice, as the original notice, continues to charge Judge Keller with judicial misconduct as to her handling of the September 25, 2007 inquiry. The original notice charged a violation of Subsection B(8) of Canon 3. The amended notice includes, among other allegations, an emphasis that Judge Keller had also failed to require compliance with Subsection B(8) of Canon 3 by the Court's General Counsel and staff.

² As an example, Judge Keller had repeatedly sworn on earlier occasions that she knew Mr. Marty's call related to Mr. Richard, who was scheduled to be executed that evening. But her deposition gave somewhat different testimony. Her current version is that she did then not know the name Michael Richard, but she admits that she did know the call was about the evening's scheduled execution. At page 15 of the deposition:

Q. During the call with Mr. Marty, **did you at that point know that Mr. Richard was the person** who was scheduled for execution that evening?

A. **No.**

Q. Did you know that **someone** was scheduled for execution that evening?

A. Yes.

Q. And you knew and believed that the call from Mr. Marty was about that someone even though you didn't know the name Richard at the moment?

A. I knew that it was about that execution.

The amended notice conforms to the fact that Judge Keller has given inconsistent testimony as to whether she knew Mr. Richard was the person scheduled to be executed. ¶ 7.

What rules apply?

1. The Texas Rules of Civil Procedure apply to the extent that they do not conflict with the Rules for Removal or Retirement of Judges; and the amendment is proper under Rule 63, Tex.R.Civ.P.

Every reported decision that has spoken to the issue has concluded that, in a formal proceeding, the Texas Rules of Civil Procedure apply to the extent that they do not conflict with the Rules for Removal or Retirement of Judges.³ Judge Keller ignores the legal analysis of the 35 appellate justices who participated in the decisions cited in footnote 3, above.⁴

Judge Keller also ignores the square holding of *In re Thoma*. There, a notice of formal proceedings was served on December 16, 1992. Following extensive discovery, the Examiner

³ *In re Rose*, 144 S.W.3d 661, 676 (Tex.Rev.Trib. 2004) ("To the extent that they do not conflict with the Rules for Removal or Retirement of Judges, the civil rules of procedure, including the appellate rules, govern judicial conduct proceedings."); *In re Chacon*, 138 S.W.3d 86, 92 (Tex.Rev.Trib. 2004) ("The procedures established for the initial proceeding before the special master are to be conducted as nearly as practicable in accordance with the Texas Rules of Civil Procedure."); *In re Canales*, 113 S.W.3d 56, 66 (Tex.Rev.Trib. 2003) ("To the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES, the civil rules of procedure, both trial and appellate, are applicable."); *In re Barr*, 13 S.W.3d 525, 533 (Tex.Rev.Trib. 1998) ("to the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES, the civil rules of procedure, both trial and appellate, are applicable."); *In re Thoma*, 873 S.W.2d 477, 485 (Tex.Rev.Trib. 1994) ("The procedures established for the initial adjudication of the instant case, i.e., formal proceedings before a special master or the Commission, are to be conducted as nearly as practicable in accordance with established rules of civil procedure.").

⁴ Judge Keller argues from Rule 10(d) that the Texas Rules of Civil Procedure apply *only* at the evidentiary hearing. (Motion at p. 7; emphasis in original.) While the text of Rule 10(d)(1) is introduced by the phrase "At the time and place set for hearing," there is no suggestion in Rule 10(d) or elsewhere that there should be a void as to any source of procedure *prior* to the hearing. Judge Keller's own invocation of Rule 12, Tex.R.Civ.P., is her concession that the Texas Rules of Civil Procedure have a role prior to the time and place set for hearing. The Constitution provides that, if a Special Master is appointed, "[t]he Master shall have all the power of a District Judge in the enforcement of orders pertaining to witnesses, evidence, and procedure." Art. 5, § 1-a(8). The implementing statute invokes the Texas Rules of Civil Procedure when it provides that "discovery shall be conducted, to the extent practicable, in the manner provided by the rules applicable to civil cases generally." Gov't Code, § 33.027(a). The Supreme Court's Rule 10(d) directs the hearing to be conducted "as nearly as may be" according to the Texas Rules of Civil Procedure. Each of these sources supports the conclusion that the procedures for formal proceedings are, to the extent consistent with the Rules for Removal or Retirement of Judges, to be governed by the Texas Rules of Civil Procedure. They are the rules applicable to civil cases generally and the rules ordinarily governing District Judges in matters pertaining to procedure. The determination by the reported cases – that the rules of civil procedure govern to the extent that they do not conflict with the Rules for removal or retirement of Judges – has been consistent ever since the Supreme Court's adoption of the rules in 1992; and the Supreme Court has never chosen to amend the rules if, hypothetically, the Supreme Court believed the consistent judicial interpretation was at odds with the Supreme Court's intent.

served a First Amended Notice of Formal Proceedings on March 25, 1993, slightly more than two months before the hearing before the Special Master.⁵ The amended notice included approximately 30 additional allegations, including allegations of misconduct in 14 additional cases before Judge Thoma.⁶ None of the allegations of misconduct in the 14 additional cases had previously been alleged in the original notice. Judge Thoma complained that he "had no idea" how or whether these additional 30 allegations, related to 14 additional cases on his docket, would be pleaded and that he "had insufficient time to prepare a defense against these allegations once they were added."⁷ The Review Tribunal rejected Judge Thoma's point of error and held that the amended notice was proper. The *Thoma* court wrote:

The hearing on November 6, 1992 constituted a proceeding during the "informal" stages of the instant case. See Rules for the Removal or Retirement of Judges, Rule 6. As a result of this informal hearing, the Commission ordered that formal proceedings be instituted. *Id.*, Rule 10. These formal proceedings commenced when the Notice of Formal Proceedings was served on Respondent on December 16, 1992. These formal proceedings, which include the hearing before the Special Master, are wholly separate and independent from the informal investigation and preliminary disposition by the Commission. Nothing in the Rules for the Removal or Retirement of Judges serves to indicate that the charges and factual bases thereof leveled against the judge are limited to those brought before the Commission during the informal stage of the proceedings.[FN22] Given the fact that civil rules of procedure and evidence apply, we hold that the Rules do not prohibit subsequent, but timely, supplementation or amendment of pertinent pleadings.

⁵ 873 S.W.2d at 511.

⁶ *Id.* at 484.

⁷ *Id.* at 510.

charges against Judge Keller have been submitted in a verified statement.¹⁰ Judge Keller's reading of the Rules is faulty. Rule 3 does not limit the Commission to action upon a verified statement. Rule 3(a) provides: "The Commission may, [i] upon receipt of a verified statement, [ii] *upon its own motion*, or [iii] *otherwise*, make such preliminary investigation as is appropriate to the circumstances relating to an allegation *or appearance* of misconduct ..."¹¹

Following the Commission's investigation, and the judge's opportunity for informal appearance (Rule 6), the Commission may terminate proceedings or may proceed in one of two fashions: (i) Under Rule 9, the Commission may impose a "sanction,"¹² reviewable by a specially appointed 3-judge Special Court of Review; or (ii) under Rules 10 – as here – the

¹⁰ See Motion at 1 (the original notice "was filed following the *submission of a verified statement* alleging misconduct by respondent"); 4-5 ("The Rules require the Commission to bring charges *only after a verified statement has been submitted* and a full investigation has been conducted."); 6 ("A formal proceeding can be commenced, and charges brought, *only after a full investigation into the facts alleged in a verified statement.*"); 7 ("The Rules plainly do not permit the addition or alteration of substantive charges without a *verified statement ...*").

¹¹ Although the Commission did in fact receive numerous sworn complaints concerning Judge Keller, the allegations and charges in the original notice reflect the Examiner's analysis of the applicable evidence and law. Judge Keller has not previously objected that the allegations, charges and analysis in the original notice are independent of, and different from, the complaints from the public that were brought to the Commission's attention.

¹² "Sanction" is a narrow term under the Rules, referring only to "any admonition, warning, reprimand, or requirement that the person obtain additional training or education"; and it refers only to Commission action that is issued prior to a Rule 10 formal proceeding. Rule 1(e). Thus, removal, retirement or "censure" are not "sanctions" as the term is used under the Rules. Rule 9 proceedings are significantly different from Rule 10 proceedings. A Rule 9 proceeding – not applicable here – relates to a specially appointed 3-judge Special Court of Review, when the Commission has imposed sanctions but has *not* instituted formal proceedings under Rule 10. A Rule 9 proceeding is an appellate review of a final Commission decision. (By contrast, the evidentiary hearing before a Special Master under Rule 10(d) is a step in the process that *precedes* a final Commission decision in Rule 10 formal proceedings.) In a Rule 9 proceeding, the sanctioned judge can obtain *de novo* review before the Special Court of Review. In a Rule 9 proceeding, the Commission – which has already made a final decision – is given 15 days to furnish "a charging document which shall include a copy of the sanction issued as well as any additional charges to be considered [by the Special Court of review] in the *de novo* proceeding...." The Special Court of Review must conduct its *de novo* hearing within 30 days after the charging document is filed. Because a Rule 9 proceeding follows (and reviews) a final Commission decision, and because the hearing is within a very finite time after the charging document is filed, at least one Special Court of Review has declined to allow any amendment to the charging document. *In re Hecht*, Docket No. A-2006-1, unpublished, (Special Court of Review, July 14, 2006). Those circumstances do not exist in a Rule 10 proceeding.

Commission may institute formal proceedings, which include an evidentiary hearing, a subsequent procedure for the Commission's adoption of findings, and a subsequent Commission vote as to removal, retirement, dismissal of the case, censure, reprimand, warning or admonition.¹³

Contrary to Judge Keller's emphatic, but mistaken, briefing, the Rule 10 formal proceedings are not limited by the contents, charges or allegations in any initial complaint brought to the Commission's attention or to the issues addressed by the Commission in its investigation or during the judge's informal appearance. Judge Keller cites no case supporting her view. Her position is squarely contradicted by *In re Thoma*:

Nothing in the Rules for the Removal or Retirement of Judges serves to indicate that the charges and factual bases thereof leveled against the judge are limited to those brought before the Commission during the informal stage of the proceedings. Given the fact that civil rules of procedure and evidence apply, we hold that the Rules do not prohibit subsequent, but timely, supplementation or amendment of pertinent pleadings.¹⁴

Rule 63, Tex.R.Civ.P., allows amended pleadings "at such time as not to operate as a surprise to the opposite party." According to Rule 63, such amendments may be made without leave of Court if done prior to the Rule 166 deadline ordered by the Court. The amended notice is proper under Rule 63. Judge Keller furnishes no evidence of any unfair surprise or prejudice by the timing of the amendment a bit more than two months before the evidentiary hearing.

2. Even if the Texas Rules of Civil Procedure hypothetically did not apply, the amendment is proper under Rule 10(f).

Rule 10(f) of the Rules for Removal or Retirement of Judges provides:

¹³ Certain Commission action in Rule 10 formal proceedings may result in a review and determination by a specially appointed 7-judge Review Tribunal under Rules 11-12.

¹⁴ Id. at 510 (footnote omitted).

judge to prepare his or her defense "against the matters charged thereby." That sentence does not suggest that amendments must be limited to initial charges. Instead, it assures opportunity to defend against matters newly charged. Third, Judge Keller's unfairly narrow reading cannot square with the decision in *In re Thoma*, where 30 new allegations involving alleged misconduct on 14 additional cases on Judge Thoma's docket were added by amendment¹⁷; nor with the decision in *In Re Barr*, where an amendment occurred after the evidentiary hearing in order to address additional alleged misconduct that occurred after the earlier hearing.¹⁸

In the event that the Special Master were to determine – contrary to all reported decisions – that the Texas Rules of Civil Procedure (and, in particular, Rule 63) do not apply, then leave is requested for amendment under Rule 10(f). The amendment is proper under Rule 10(f).

Does the amendment cause any unfair surprise or undue prejudice?

Although Judge Keller furnished an affidavit with her motion to strike, neither her affidavit nor her motion identify any facts suggesting that her defense is prejudiced by the amendment. Her sole reference to prejudice is the conclusory allegation in her motion that the adding of new charges that were not within any "verified statement nor supported by the full investigation of the Commission" results in her "severe prejudice."¹⁹ A conclusory allegation of prejudice is no evidence. *USAA County Mutual Ins. Co. v. Cook*, 241 S.W.3d 93, 102 (Tex.App.-Houston [1st Dist.] 2007, no pet.).

¹⁷ 873 S.W.2d at 484, 510-11.

¹⁸ 13 S.W.3d at 532. A second evidentiary hearing was then conducted, allowing Judge Barr an opportunity to defend against the new and additional charges. (His defense was unsuccessful.)

¹⁹ Motion, at page 5.

Since the date of the amended notice, Judge Keller has not requested any deposition that she has been refused. She has not identified any additional discovery that she wishes to conduct but has not conducted. Indeed, in a subsequent deposition of Judge Johnson on June 26, 2009, Judge Keller's counsel specially interrogated as to supervision of Mr. Marty – for the apparent purpose of preparing Judge Keller's defense to the allegations and charges in the amended notice.

In the absence of persuasive evidence by Judge Keller that the amendment operates as unfair surprise to her (Rule 63, Tex.R.Civ.P.) or that she fails to have reasonable time to prepare her defense (Rule 10(f)), her motion to strike should be overruled. If Judge Keller hypothetically were to present persuasive evidence that she needs greater time to prepare her defense in light of the amendment – which she has nowhere suggested in her affidavit or her motion – then her remedy should be a request for a continuance of the hearing. Her failure to do so is sensible. She does not need any greater time to prepare following service of the amended notice than she needed prior to its service. This formal proceeding is on track for the August 17, 2009 evidentiary hearing.

Do the Examiner and Special Counsel have proper authority to file the amended notice?

1. Judge Keller misapplies Rule 12, and her motion should be overruled.

Judge Keller's Rule 12 motion should be overruled.

Rule 12, Tex.R.Civ.P. ("Attorney to Show Authority"), tests an attorney's authority to prosecute or defend a suit. It does not test whether a particular filing should, or should not, be

stricken. Because Rule 12 tests authority to prosecute or defend, the mandatory remedy is to disallow the attorney from appearing in the suit.²⁰

Judge Keller seeks to misapply Rule 12. Her facial argument is that a pleading – the amended notice – allegedly requires pre-approval by the Commissioners. But Rule 12 does not test a pleading. Rule 12 tests whether the Examiner and Special Counsel have authority to appear and prosecute.

At the hearing, (i) the Examiner will show her authority to appear in this proceeding and (ii) Special Counsel will show their authority to appear in this proceeding. Upon such showing, the Rule 12 motion should be overruled.

2. The Commissioners are neither the author nor the sponsor of a notice or an amended notice; they are the adjudicator of the issues raised by the notice or amended notice.

More fundamentally, Judge Keller misperceives the role of the Commissioners and of the Examiner and Special Counsel. When formal proceedings have been commenced under Rule 10, the Commissioners are the adjudicator of the formal proceedings. They are not the prosecutor of the formal proceedings.

Rule 10 does not direct that the Commissioners draft, review or ratify the notice (or any amendment to the notice). Once the Commissioners concludes that formal proceedings should be instituted, a docketed item is created. The docketed proceeding is not styled "The Commission vs. the Judge." It is styled "Inquiry Concerning a Judge." Rule 10 requires that the proceeding be docketed as a case "*Before* the State Commission on Judicial Conduct." This is because the Commissioners become an adjudicatory body deciding – pursuant to rules of civil

²⁰ "Upon [the challenged attorney's] failure to show such authority, the court **shall refuse to permit the attorney to appear in the case**, and shall strike the pleadings if no person who is authorized to prosecute or defend appears." Rule 12 (fourth sentence; emphasis added).

procedure and rules of evidence – (i) the findings of fact supported by the preponderance of the evidence and (ii) the disposition of the proceeding supported by the evidence.

The rules concerning the notice (and any amended notice) are written in the passive: "written notice of the institution of formal proceedings shall be issued to the judge without delay"²¹; "The notice may be amended to conform to proof or to set forth additional facts..."²² Nowhere do the rules contemplate or require that the Commissioners will draft, review or ratify the notice (or any amendments). Indeed, in formal proceedings without a Special Master, the language of Rule 10(f) would be difficult to square with Judge Keller's thesis that the Commissioners must themselves draft, sponsor and adopt any amended notice as their own: "...[T]he Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings." It is clear that someone else – the Examiner, acting as the prosecutor of the allegations and charges – is the person who prepares and amends the notice.

²¹ Rule 10(a)(1).

²² Rule 10(f).

Thus, when Judge Thoma complained of an amended notice, his complaint was not that the *Commissioners* had untimely amended the notice, but the circumstances under which the *Examiner* had amended the notice.²³

Similarly, when Judge Rose's removal from office was determined by a Review Tribunal, it consistently (and properly) referred to the notice and the amended notice as the *Examiner's* notice – not the Commission's notice.²⁴ That Review Tribunal also referred to a prior judicial proceeding, comparing (i) *the Examiner's* charges, (ii) the Special Master's findings, and (iii) the Commission's findings and determination.²⁵

The role of the Examiner and Special Counsel, and the Commission's authority to employ them, are statutory.²⁶ In the case of formal proceedings, it is appropriate that the Commissioners and the Examiner respect a separateness of responsibility: the Commissioners, having determined that formal proceedings should be instituted, will have a judicial role, rather than an

²³ 873 S.W.2d at 510 ("Respondent argues that although the Examiner was fully aware at that time of the thirty additional allegations leveled against him during the later stages of these proceedings, *the Examiner* did not include these allegations in the original notice of formal proceedings." Emphasis added.)

²⁴ *E.g.*, 144 S.W.3d at 672 ("The investigation of Judge Rose by the Commission began on March 1, 2001. The formal proceedings against Judge Rose were initiated on May 17, 2002, when *the Examiner* filed *his* original Notice of Formal Proceedings with the Commission." Emphasis added); *id.* at 691 ("On May 17, 2002, *the Examiner* filed the original Notice of Formal Proceedings against Judge Rose." Emphasis added.); *id.* at 693 ("On September 17, 2002, *the Examiner* filed the First Amended Notice of Formal Proceedings, the live pleading." Emphasis added.); *id.* at 730 (comparing the *Examiner's* charges in the amended notice with the *Commission's* conclusions concerning the alleged charge.

²⁵ *Id.* at 704 (referring to *In re Hilton*, the Review Tribunal wrote: "*the examiner* charged a justice of the peace with, among other misconduct")

²⁶ *See In re Rose*, 144 S.W.3d at 669 n.3:

“‘Examiner’ means an individual, including an employee or special counsel of the commission, appointed by the commission to gather and present evidence before a special master, the commission, ... or a review tribunal.” Tex. Gov't Code Ann. § 33.001(a)(5) (Vernon 2004); see Tex.R. Rem'l/Ret. Judg. 1(j) (West 2004). The Commission has the power to “employ persons that it considers necessary to carry out [its] duties and powers,” and to “employ special counsel as it considers necessary.” Tex. Gov't Code Ann. § 33.021(1)-(2) (Vernon 2004).

advocacy role; and the Examiner and any Special Counsel will have an advocacy role. One can imagine that Judge Keller would assert a due process claim of a different sort if she believed that the Commissioners were both her accuser, her prosecutor and her judge once formal proceedings had been commenced.

The Commission's respect for separation between the Commissioners, as adjudicator, and the Examiner and Special Counsel, as advocates, is consistent with longstanding statutory and due-process concerns against *ex parte* communications. Once the Commissioners have determined that formal proceedings should be instituted, the Examiner ceases any substantive communication with the Commissioners concerning the allegations and charges in the formal proceeding. The Examiner prepares the notice, based on information that is then available and based on the Examiner's judgment as to the application of legal principles to the anticipated evidence. The Examiner conducts discovery. The Examiner determines whether to amend the notice. The Examiner determines which witnesses and experts to call. The Examiner decides whether to assert objections to findings by the Special Master, if any. The Examiner is given opportunity to be heard orally before the Commission, as is the judge. The Commissioners' role in formal proceedings is not to advocate or to allege misconduct, but to determine under applicable rules of procedure and evidence whether the Examiner has proved facts that would support a sanction, removal, retirement, censure, or other disposition.

This separation of functions helps understand why the charges in the formal proceedings are "wholly separate and independent from the informal investigation and preliminary disposition by the Commission" and why the charges need not be the same as those considered

by the Commission during the informal stage of proceedings.²⁷ When formal proceedings have been instituted, abundant due process is furnished the judge. The independence of the Commission from the drafting of the notice is consistent with that due process: the Commission is the adjudicator in formal proceedings, rather than the accuser or the advocate against the judge.

Judge Keller never complained that the original notice was not adopted by the Commissioners. If her theory were correct, then she would have had the right to notice and opportunity to be heard at a meeting of the Commissioners at which the original notice was presented for consideration and adopted.²⁸ No such meeting occurred. The original notice was prepared by the Examiner and Special Counsel following the Commission's determination to institute formal proceedings. The Commission having elected to request appointment of a Special Master to conduct the evidentiary hearing, the Commission is not expected to have any role in the drafting of the allegations of misconduct and the charges, the discovery, any amended notice, the choice of witnesses and experts, the conduct of the hearing, the choice of objections (if any) to the Special Master's findings – until this formal proceeding returns to the Commission for its consideration following the report of the Special Master.²⁹

²⁷ *In re Thoma*, 873 S.W.2d at 510 ("These formal proceedings, which include the hearing before the Special Master, are wholly separate and independent from the informal investigation and preliminary disposition by the Commission. Nothing in the Rules for the Removal or Retirement of Judges serves to indicate that the charges and factual bases thereof leveled against the judge are limited to those brought before the Commission during the informal stage of the proceedings. Given the fact that civil rules of procedure and evidence apply, we hold that the Rules do not prohibit subsequent, but timely, supplementation or amendment of pertinent pleadings." Footnote omitted.)

²⁸ See Affidavit of Judge Keller, at pages 1-2 ("If the Commission met to consider the Amended Notice, it did so without providing Respondent with notice of the proceeding or an opportunity to be heard at any such proceeding.")

²⁹ One Commissioner does have one non-adjudicative role ordinarily: the Chair selects the person to serve process. Rule 10(a)(3). Here, however, Judge Keller (through her counsel) waived formal service on Judge Keller.

Just as Judge Keller could not properly object to the Examiner's and Special Counsel's preparation of the filing of the original notice, she similarly has no proper objection based on the Examiner's choice to amend the notice. Her motion should be overruled.

Respectfully submitted,

EXAMINERS:

Seana Willing
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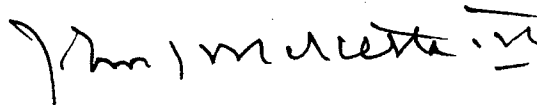
By:



John J. McKetta, III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded (i) by email, (ii) by facsimile and (iii) by certified mail, return receipt requested, to Charles ("Chip") L. Babcock, Esq., Jackson Walker, LLP, 1401 McKinney Street, Suite 1900, Houston, Texas 77010, on this the 7th day of July, 2009.



John J. McKetta, III

APPENDIX A

1. The title of the instrument was changed to "First Amended Notice of Formal Proceedings."

2. New ¶¶ 5 and 6 address Texas Rule of Appellate Procedure 9.2(a). The allegations (i) respond to ¶¶ 9, 14.R. and 14.X. of Judge Keller's verified answer, which make allegations concerning Rule 9.2, and (ii) reflect testimony concerning Rule 9.2 given by Judge Keller in her June 2 deposition.

3. New ¶ 7 tracks original ¶ 5. Original ¶ 5, however, alleged that Judge Keller knew Michael Richard was scheduled to be executed at 6:00 p.m., September 25, 2009. New ¶ 7 alleges: "Although Judge Keller has testified inconsistently whether she did or did not know that Mr. Richard was the person scheduled to be executed that evening, she knew that a person was scheduled to be executed at 6 p.m. that evening." This amendment reflects Judge Keller's deposition testimony that she did not know Mr. Richard's name at the time of her communications at issue, although she knew a man was scheduled to be executed that evening.³⁰

4. New ¶ 9 reflects a re-ordering of allegations. It is verbatim the same as original ¶ 6.

5. New ¶ 10 reflects a fact that was discovered through email discovery in this formal proceeding: that Judge Keller actually had received a copy of the *Baze* petition for certiorari (and of the underlying Kentucky decision in *Baze*). The email shows her receipt at

³⁰ Judge Keller erroneously asserts that new ¶ 8 has been "added in [its] entirety." Motion, at page 2. It has not. It is verbatim the same as original ¶ 7.

11:12 a.m. on September 25, 2007, and another email reflects her contemporaneous acknowledgment of receipt.

6. New ¶ 12 is the same as original ¶ 9, except that new ¶ 12 changes "forwarded ... the internet link..." to "informed ... of an internet link..." The change responds to Judge Keller's explanation (during her June 2 deposition) of her denial of a request for admission.

7. New ¶ 14 is the same as original ¶ 11, except that new ¶ 14 changes "petition" to "filing," to conform to the nature of a drafted item.

8. New ¶ 15 is the same as original ¶ 12, except that new ¶ 15 changes "appeal" to "filing," and changes "in anticipation of Mr. Richard's appeal" to "in the event Mr. Richard's request for stay was denied." The word changes – relating to Mr. Marty's draft of a proposed order for the denial of an anticipated *Baze* filing by Mr. Richard and to Judge Price's drafting of a dissenting opinion – are intended to more accurately describe the events.

9. New ¶ 18 is the same as original ¶ 5, except that new ¶ 18 deletes "the pleading"; corrects an allegation concerning the time of a phone call (from 4:45 p.m. to 4:40 p.m., based on telephone records exchanged during discovery); changes "that it accept their filing" to "their filing be accepted" and inserts "(or the Court)" – in each case to better reflect the Examiner's understanding of the evidence in light of discovery.

10. New ¶ 19 is the same as original ¶ 16, except that new ¶ 19 deletes "immediately" and inserts "at about 4:45 p.m."; inserts "looking for direction; and inserts "(or the Court)" – in each case to better reflect the Examiner's understanding of the evidence in light of discovery.

11. New ¶ 20 is the same as original ¶ 17, except that new ¶ 20 changes "directed that Mr. Acosta not accept" to "told Mr. Acosta not to accept..."; inserts "(or the Court)"; changes "e-

mail or fax something" to "e-mail the filing"; and changes "pleading" to "filing" – in each case to better reflect the Examiner's understanding of the evidence in light of discovery.

12. New ¶ 21 is the same as original ¶ 21, except that new ¶ 21 changes "5:00 p.m." to "4:59 p.m."; changes "Mr. Richard's lawyers" to "the lawyers" and inserts "concerning the scheduled execution" – in each case to better reflect the Examiner's understanding of the evidence in light of discovery, and in part to respond to Judge Keller's new testimony that she did not know the name Michael Richards at the time.³¹

13. New ¶¶ 24-26 are a re-ordering of original ¶¶ 18-20. Also, these changes are made within the re-ordered paragraphs: (i) new ¶ 24 changes each reference to Mr. Richard to a reference about the execution that was that evening (in light of Judge Keller's new testimony that she did not know the name Michael Richard at the time); changes "had been anticipated" to "was likely to occur"; changes "pleadings" to "filings"; (ii) new ¶ 25 changes two references to Mr. Richard to references about that evening's scheduled execution; and changes two references to Judge Johnson to references to the designated judge (because Judge Keller testified in her deposition that she did not know who the designated judge was). These changes are intended to better reflect the Examiner's understanding of the evidence in light of discovery, and in part to respond to Judge Keller's new testimony that she did not know (i) the name Michael Richards at the time or (ii) the identity of the designated judge.

³¹ Judge Keller mistakenly complains that new ¶ 21 is added. Motion, at page 2. It is not. It is a revision of original ¶ 21, correcting the time by 1 minute and referring to the scheduled execution instead of referring to Mr. Richard by name (since Judge Keller now claims that she did not know Mr. Richard's name at the time). Judge Keller also mistakenly complains that new ¶ 22 is added. Motion, at page 2. It is not. It is identical to original ¶ 22.

14. New ¶ 27 is the same as original ¶ 24, except that new ¶ 27 changes "met for their weekly conference" to "met for a conference." The change responds to Judge Keller's explanation (during her June 2 deposition) of her denial of a request for admission.

15. New ¶ 31 is the same as original ¶ 28, except that new ¶ 31 adds the phrase "Examples include:"

16. New Relevant Standard 2 quotes from Section 33.001(b) of the Texas Government Code. Consistent with the authority in the Constitution to "promulgate laws in furtherance of this Section that are not inconsistent with its provisions," the Legislature set forth a partial list of conduct that is deemed to be "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties." The inclusion of Section 33.001(b) has the effect of giving notice to Judge Keller of applicable definitions of terms with which she had been charged in the original notice.

17. New Relevant Standard 5 (i) tracks original Relevant Standard 4, which partially quoted Canon 3B(8) of the Texas Code of Judicial Conduct; and (ii) quotes additional language from Canon 3B(8) as follows: "A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control." This addition were prompted by Judge Keller's June 2 deposition testimony that she was ignorant as to whether the Court's general counsel and staff were, or were not, aware of the Execution-Day Procedures.

18. New Relevant Standards 6 and 7 set forth provisions of two other subsections of Canon 3 which relate to (i) a judge's responsibilities as to staff subject to the judge's direction and control and (ii) competence in judicial administration. These additions were prompted by

Judge Keller's June 2 deposition testimony that she was ignorant as to whether the Court's general counsel and staff were, or were not, aware of the Execution-Day Procedures.

19. As in the original notice, there continue to be five charges, each addressing Judge Keller's conduct on September 25, 2007, in connection with the events preceding the execution of Mr. Richard. Each of the five charges has been amended to include a reference to the newly alleged Relevant Standards (Section 33.001(b) of the Government Code, and Subsections 3C(1) and (2) of the Judicial Code). Charges I, II and V³² include "and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard." These additions were prompted by Judge Keller's June 2 deposition testimony that she was ignorant as to whether the Court's general counsel and staff were, or were not, aware of the Execution-Day Procedures.

³² Judge Keller's motion to strike mistakenly states that Charges I, II and III were changed in this respect. Motion, at pages 3-4.