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July 9, 2009

Via E-mail

Mr. John J. (Mike) McKetta III
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Ms. Seana Willing
The State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711-2265

Re: *In re: The Honorable Sharon Keller*

Dear Counsel:

Enclosed is Respondent, the Honorable Sharon Keller's Reply Brief in Support of Her Motion to Strike and Motion to Show Authority.

By copy of this letter, the Reply Brief is being sent to Judge Berchelmann via fax.

Should you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,

Kurt Schwarz

KAS
Enclosure

cc: Hon. David A. Berchelmann (via fax: 210-335-0595)
Bexar County Courthouse
100 Dolorosa, Suite 209
San Antonio, Texas 78205

5524927v.2

INQUIRY CONCERNING JUDGE,
NO. 96

IN RE:	§	
	§	
THE HONORABLE SHARON KELLER,	§	BEFORE THE
PRESIDING JUDGE OF THE TEXAS COURT	§	COMMISSION ON
OF CRIMINAL APPEALS, AUSTIN, TRAVIS	§	JUDICIAL CONDUCT
COUNTY, TEXAS	§	
	§	

RESPONDENT, THE HONORABLE SHARON KELLER'S REPLY IN SUPPORT OF HER MOTION TO STRIKE FIRST AMENDED NOTICE OF FORMAL PROCEEDINGS AND MOTION TO SHOW AUTHORITY

The Honorable Sharon Keller ("Respondent") submits her Reply in Support of Her Motion to Strike the First Amended Notice of Formal Proceedings and Motion to Show Authority (the "Motion") as follows:

In her Motion, Respondent established that, under the applicable laws and rules – that is, under Article 5, Section 1-a of the Texas Constitution; Title 2, Chapter 33, of the Texas Government Code; and the Rules for the Removal or Retirement of Judges – the First Amended Notice of Formal Charges (the "Amended Notice") must be stricken because: (1) it was filed without leave, (2) it impermissibly adds standards of conduct, and adds and changes the charges against Respondent, and (3) it was filed without authority from the State Commission on Judicial Conduct ("Commission").

In Response, the Examiner and her Special Counsel argue that (1) the Texas Rules of Civil Procedure govern this issue, and their amendment is proper under those rules, (2) if the Rules for the Removal or Retirement of Judges do apply, the Amended Notice is still proper, and (3) Texas Rules of Civil Procedure 12 does not apply to pleadings and the Examiner and her Special Counsel can file whatever they like without the Commission's approval. Respondent will briefly address these arguments in turn

Reply in Support of Motion to Strike

The Examiner argues that the Texas Rules of Civil Procedure apply to this proceeding, except when they conflict with the Rules for the Removal or Retirement of Judges. Here, there is a conflict. Texas Rule of Civil Procedure 63 allows for amendments of pleading*s* and allows such amendments liberally.[1] By contrast, Rule 10(f) of the Rules for the Removal or Retirement of Judges expressly concerns notices of formal proceedings, not civil pleadings, and reads as follows:

> (f) AMENDMENTS TO NOTICE OR ANSWER
>
> The Special Master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. *The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing.* In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present [her] defense against the matters charged thereby. [emphasis added]

There plainly is a conflict between Rule 63 and Rule 10(f): Rule 10(f) does not allow amendments as of right, but requires leave; and Rule 10(f) only allows amendments of factual allegations, not new charges or new standards of conduct. The conflict with Rule 63 of the Texas Rules of Civil Procedure could not be more obvious; therefore, even by the Examiner's logic, Rule 10(f) of the Rules for the Removal or Retirement of Judges controls this matter.[2]

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[1] A notice of formal proceedings is not a pleading. Under the Texas Rules of Civil Procedure, a pleading is "a vehicle for alleging a cause of action or ground of defense." *In re L.A.M. & Assocs.*, 975 S.W.2d 80, 84 (Tex. App. – San Antonio1998, orig. proceeding). Here, the Examiner is not asserting any cause of action against Respondent, nor does the Examiner seek damages or other relief for her benefit; rather she brings charges against Respondent and asks that Respondent be sanctioned in some unspecified manner.

[2] The Examiner's reliance on *In re Thoma*, 873 S.W.2d 477, 510-11 (Tex. Rev. Trib. 1994), is misplaced. Although the amended notice in *Thoma* added new factual allegations, the tribunal did not even mention Rule 10(f), much less rule that amendments of the sort filed by the Examiner, adding standards and charges, are permissible.

Under Rule 10(f), the Amended Notice is plainly impermissible and must be stricken. Rule 10(f) requires leave to be granted before Rule 10(f) does not permit new standards of conduct to be added, nor does it allow for new or changed charges to be brought. In this regard, Rule 10(f) is much more like Texas Rule of Criminal Procedure 28.10 – which prohibits the amendment of indictments that add or change offenses – than it is to Texas Rule of Civil Procedure 63's liberal amendment procedure. The Amended Notice was filed without obtaining leave, and impermissibly adds and changes the charges against Respondent. It therefore must be stricken.

In addition, the new factual allegations in the Amended Notice do not conform to the proof in this case; indeed, the Amended Notice's new allegations contradict the undisputed facts in this case. The fact of the matter is that, even though the Examiner has been aware of the truth for many months, she waited until the last possible moment to try to square the facts with a theory under which Judge Keller could be pilloried for the misconduct of others. As the Amended Notice suggests, but does not directly acknowledge, this is what happened on September 25, 2007:

Counsel for Mr. Richard never attempted to contact the Court of Criminal Appeals; instead, Richard's lawyers had a runner, Ms. Fox, who was at her doctor's office, contact the Court. Ms. Fox chose to call an assistant in the clerk's office, Mr. Acosta, to see if the clerk's office would stay open after 5:00 p.m. that day. Mr. Acosta did not contact the judge assigned to handle Mr. Richard's case, Judge Cheryl Johnson; he instead called the Court's General Counsel, Mr. Marty. Mr. Marty – who appointed Judge Johnson as the assigned Judge for Mr. Richard's case, and therefore knew she was responsible for handling any communications regarding the case – did not refer the

runner's query to Judge Johnson, either (although – as the Commission, the Examiner, and her Special Counsel know – Mr. Marty claims to have subsequently notified Judge Johnson of Fox's call later that day before 6:00 p.m. when Judge Johnson left the courthouse). Instead, Mr. Marty called Respondent, who was at home. Respondent, who (in contrast to Mr. Richard's lawyers) knew that Mr. Richard could file any document after 5:00 p.m. simply by delivering it to a Judge of the Court of Criminal Appeals, *see* Tex. R. App. P. 9.2, declined to keep the clerk's office open late when it was utterly unnecessary to do so in order to receive anything Mr. Richard's lawyers wanted to file. When Mr. Marty told Mr. Acosta, who told the runner, who told Mr. Richard's counsel, that the clerk's office would close at 5:00 p.m. as scheduled, Richard's counsel decided to not attempt to file anything with the Court of Criminal Appeals. Richard's counsel made that decision notwithstanding the fact that Rule 9.2 of the Texas Rules of Appellate Procedure allowed the late filing, and notwithstanding the fact that Judge Johnson (and two other judges) were available to receive a late filing.

The Examiner, now finally forced to concede that Mr. Marty, Mr. Acosta, Mr. Richard's counsel, and their runner, were responsible for nothing being filed with the Court of Criminal Appeals, has decided to try to hold Respondent responsible for their failures on the theory that Respondent did not properly train or supervise Marty or Acosta. The Examiner's new theory does not "conform to proof," as required by Rule 10(f), nor conform to the truth – the Examiner's novel theory contradicts the undisputed facts. According to the Examiner's Response, her reason for filing the fatally defective Amended Notice is as follows:

> 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*."

Response, p. 5 (emphasis added).

Contrary to the Examiner's belief that Mr. Marty and Mr. Acosta were subject to Respondent's "direction and control," the undisputed facts, fully known to the Examiner and her Special Counsel, are otherwise. Mr. Marty and Mr. Acosta were employees of the Court of Criminal Appeals, and the *entire Court* was responsible for their performance. Thus, Judge Johnson – the assigned Judge on September 25, 2007 – testified as follows:

> Q. All right. And as I understand it – but tell me if I'm wrong -- the Personnel Committee which Judge Price heads is responsible for the employees of the court, which include the General Counsel and then everybody else. Correct?
>
> A. That's correct.

June 26, 2009, Deposition of Judge Cheryl Johnson, at 58:22-59:2. And in her statement to the Commission, Judge Johnson stated as follows:

> MS. WILLING: And how -- what is the relationship between Edward Marty and Judge Keller? How would you describe that relationship?
>
> JUDGE JOHNSON: . . . We have had some difficulties with general counsel both Mr. Marty and his predecessor, Mr. [Wetzel], behaving as if they believe that they work for the presiding judge. . . . And I have been told that he's been repeatedly counseled that he does not work for the presiding judge. *He works for the court and he must behave in that manner*. . . . We are independently elected. We are responsible ourselves. *We are nine of us the court. And we all have a hand in running the clerk's office.*

July 17, 2008, Statement of Judge Cheryl Johnson, at 28:21-29:21 (emphasis added).

And Judge Price testified to the Commission as follows:

MS. WILLING: Who supervises the general counsel?

JUDGE PRICE: I'm the head of personnel. And general counsel, since I've been head of personnel, has mainly been supervised by me.

Statement of Judge Tom Price, at 5:19-23. So, it is undisputed that neither Mr. Marty nor Mr. Acosta was subject to the "direction and control" of Respondent.

Despite the Examiner's knowledge that Respondent did not direct or control Mr. Marty or Mr. Acosta, she has filed an Amended Notice alleging that Respondent did direct and control Marty and Acosta. That is, in order to penalize Respondent for others' mistakes, the Examiner: filed the Amended Notice without leave, in violation of Rule 10(f); added standards and charges to the Amended Notice, in violation of Rule 10(f); and added "factual" allegations which are demonstrably incorrect, also in violation of Rule 10(f). Fundamental strictures of fairness and justice, not to mention the Rules for the Removal or Retirement of Judges, require that the Amended Notice be stricken.

Reply in Support of Motion to Show Authority

The Examiner and her Special Counsel argue that they, and not the Commission, can bring charges against Respondent – and amend them at will, regardless of what the governing rules provide. In so arguing, the Examiner and her Special Counsel studiously avoid addressing the inconvenient fact that Section 33.022 of the Texas Government Code authorizes the Commission, and *only* the Commission, to bring charges against Respondent. Nor do the Examiner or her Special Counsel address the fact that Rule 1(j) of the Procedural Rules for the Removal or Retirement of Judges limits the role of the Examiner and Special Counsel to merely gathering and presenting evidence; neither of them is endowed with any greater authority. The Examiner and her Special Counsel have far exceeded their limited roles by usurping the Commission's authority and filing the

Amended Petition. The Rules speak for themselves, and nothing the Examiner and her Special Counsel has argued can change their plain meaning. Not having authority to file the Amended Notice, the Amended Notice should be stricken.

The Examiner and her Special Counsel also aver that Respondent doesn't know the purpose or function of Rule 12 of the Texas Rules of Civil Procedure, arguing that Rule 12 can only be employed to disqualify counsel, not challenge a pleading. Putting aside the abstract question of whether the Amended Notice is a pleading or something else (and it certainly seems to be something other than a pleading, *see supra* footnote 1), it is well settled that the purpose of Rule 12 is to "discourage and *cause the dismissal of suits* brought without authority," and not simply disqualify counsel who act without authority. *Mobile Homes of Am., Inc. v. Easy Living, Inc.*, 527 S.W.2d 847, 848 (Tex. Civ. App. – Fort Worth 1975, no writ) (emphasis added). Since it appears that the Examiner and her Special Counsel filed the Amended Notice without the authorization of the Commission, the Amended Notice should be stricken, and the Special Counsel should be barred from further participation in this proceeding.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: _____

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ATTORNEYS FOR RESPONDENT THE HONORABLE SHARON KELLER

CERTIFICATE OF SERVICE

This is to certify that on this 9th day of July, 2009, a true and correct copy of the foregoing document was served via electronic transmission upon:

Ms. Seana Willing
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