

**BEFORE THE**  
**STATE COMMISSION ON JUDICIAL CONDUCT**

---

---

**INQUIRY CONCERNING A JUDGE,**  
**No. 96**

---

---

**EXAMINER'S RESPONSE TO MOTION FOR APPLICATION OF PROPER  
EVIDENTIARY STANDARD**

---

---

TO THE HONORABLE JUDGE BERCHELMANN:

The “proper evidentiary standard” to apply to this proceeding is the preponderance-of-the-evidence standard prescribed by the Texas Supreme Court in Rule 10(h)(1) of the Rules for the Removal or Retirement of Judges. Because Rule 10(h)(1) is consistent with the Texas Constitution and the federal Due Process Clause, the Special Master should deny Judge Keller’s motion to apply a clear-and-convincing standard.

**I. RULE 10(H)(1) DOES NOT VIOLATE THE TEXAS CONSTITUTION**

Despite purporting to compile the “relevant authority in every conceivable jurisdiction,” (Motion at 16), Judge Keller’s motion fails to acknowledge over thirty years of Texas case-law rejecting any attempts to impose a heightened burden of proof in judicial removal proceedings: “It is well settled law in the State that the legal standard for removal proceedings is a ‘preponderance of the evidence’ standard rather than a ‘clear and convincing evidence’ standard.” *In re Canales*, 113 S.W.3d 56, 67 (Tex. Rev. Trib. 2003, affirmed). Rule 10(h)(1) simply codifies this well-settled law, and certainly does not violate the Texas Constitution.

The constitutional provision specifying the due-process rights of judges in removal proceedings has been in effect since 1970.<sup>1</sup> In the Texas Supreme Court's first case to consider a removal proceeding under this constitutional provision, the Court held that the proper burden of proof was preponderance of the evidence:

This is not a criminal proceeding, since the function of the Judicial Qualifications Commission is not to punish but to maintain the high quality of the judiciary. Consequently, the charges against Judge Brown need not be established by proof beyond a reasonable doubt. Moreover, the decision is not one which is grounded upon substantial evidence which supports the Commission's recommendation. The burden to establish the charges against Judge Brown was upon the examiner, and those charges had to be established by a preponderance of the evidence.

*In re Brown*, 512 S.W.2d 317, 319-20 (Tex. 1974) (citations omitted). Judge Keller fails to cite, much less distinguish, this case.

In 1992, the Supreme Court adopted the Rules for Removal or Retirement of Judges, including Rule 10(h)(1) in its current form. The first seven-judge Review Tribunal convened under the new rules considered the burden-of-proof issue anew and reaffirmed *Brown's* holding that the preponderance-of-the-evidence standard is the proper burden for judicial review

---

<sup>1</sup> As amended by the voters in 1970, Section 11 of Article 5, § 1-a read:

The Supreme Court shall by rule provide for the procedure before the Commission, Masters and the Supreme Court. Such rule shall afford to any person holding an office named in Paragraph A of Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, due process of law for the procedure before the Commission, Masters and the Supreme Court in the same manner that any person whose property rights in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the person holding an office named in Paragraph A of Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed."

H.J. Res. 30, § 1, 61st Leg., R.S., 1969 Tex. Gen. Laws 3237 (adopted at election of Nov. 3, 1970). Subsequent constitutional amendments have added the Review Tribunal to the list of reviewing entities and provided for a right of discovery in formal proceedings, but the provision has otherwise remained unchanged.

proceedings:

While the Texas Code of Judicial Conduct and the Rules for the Removal or Retirement of Judges have both undergone numerous changes since *Brown*, we nonetheless adhere to the above holding and reaffirm the principle that judicial conduct proceedings are not criminal in nature, not simply because their purpose is not necessarily to punish, but also to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the citizens of Texas. In that regard, the burden was upon the Examiner for the Texas Commission on Judicial Conduct to establish, before the Special Master, the allegations against Respondent by a preponderance of the evidence.

*In re Thoma*, 873 S.W.2d 477, 484-85 (Tex. Rev. Trib. 1994, no appeal). Judge Keller fails to cite, much less distinguish, this case.

Finally, in *In re Canales*, the Review Tribunal again rejected a respondent's argument that a clear-and-convincing burden of proof should govern removal proceedings. The *Canales* Review Tribunal:

- described and reaffirmed the validity of the holdings in *Brown* and *Thoma*;
- noted that two more Review Tribunals had since "both agreed with the *Brown* and *Thoma* decisions making the legal standard for review a 'preponderance of the evidence'"; and
- concluded "It is well settled law in the State that the legal standard for removal proceedings is a 'preponderance of the evidence' standard rather than a 'clear and convincing evidence' standard."

113 S.W.3d at 67 (citing *In re Lowery*, 999 S.W.2d 639, 647 (Tex. Rev. Trib. 1998, appeal denied) and *In re Barr*, 13 S.W.3d 525, 533 (Tex. Rev. Trib. 1998, no appeal)). On appeal, the Texas Supreme Court summarily affirmed the decision. *In re Canales*, No. 03-1044, Order of Sept. 24, 2004.<sup>2</sup> Judge Keller fails to cite *In re Canales*, much less distinguish the case.

---

2 Available at <http://www.supreme.courts.state.tx.us/historical/2004/sep/092404.htm>.

Even if the proper standard of review were still an open question under Texas law, there would be no doubt that preponderance of the evidence is the correct standard under the Texas Constitution. In Texas, “[n]o doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence.” *Sanders v. Harder*, 148 Tex. 593, 598, 227 S.W.2d 206, 209 (1950). “Only in extraordinary circumstances, such as when we have been mandated to impose a more onerous burden, has [the Texas Supreme] Court abandoned the well established preponderance of the evidence standard.” *Ellis Cty State Bank v. Keever*, 888 S.W.2d 790, 792 (Tex. 1994).

The Texas Constitution specifies that Judge Keller is entitled to due process of law “in the same manner that any person whose property rights in jeopardy in an adjudicatory proceeding is entitled to due process of law.” TEX. CONST. art. V-1a, § 11. Texas law applies the preponderance-of-the-evidence standard in “adjudicatory proceedings” where “property rights” analogous to Judge Keller’s are “in jeopardy.” In proceedings to remove an elected county official, for example, “the burden is proof by a preponderance of the evidence.” *In re Bazan*, 251 S.W.3d 39, 42 (2008). The preponderance-of-the-evidence standard applies in civil forfeiture proceedings, where the underlying question is effectively whether the property owner engaged in a criminal offense. *State v. Gray*, 141 Tex. 604, 175 S.W.2d 224 (1947). Texas courts have similarly rejected arguments that due process requires a clear-and-convincing standard of proof in proceedings to revoke a professional license to practice. *See, e.g., Granek v. Tex. State Bd. of Med. Exam’rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.) (medical license); *Pretzer v. Motor Vehicle Bd.*, 125 S.W.3d 23, 38-39 (Tex. App.—Austin 2003) (license to sell motor vehicles), *aff’d in part and rev’d in part on other grounds*, 138

S.W.3d 908 (Tex. 2004); *Drake v. State*, 488 S.W.2d 534, 538 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (disbarment of attorney).

Finally, Judge Keller is mistaken in arguing that a clear-and-convincing-evidence standard must be applied because one of the standards for judicial disqualification is “willful or persistent conduct that is *clearly inconsistent* with the proper performance of his duties.” (Motion at 12) (quoting TEX. CONST. art. V, § 1-a(6)) (emphasis added by Judge Keller). The Texas Supreme Court has held that phrases such as “clear and satisfactory” amount to “an admonition to exercise great caution in weighing the evidence,” but do “not supplant the usual standard of proof by a preponderance of the evidence.” *Ellis Cty State Bank*, 888 S.W.2d at 792 (quoting *Rhodes v. Cahill*, 802 S.W.2d 643, 645 n.2 (Tex. 1990)).

## **II. RULE 10(H)(1) DOES NOT VIOLATE THE FEDERAL DUE PROCESS CLAUSE**

“A preponderance-of-the-evidence standard allows both parties to ‘share the risk of error in roughly equal fashion.’ Any other standard expresses a preference for one side’s interests.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 691 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808 (1979)). The Texas Supreme Court’s decision that the risk of error in a judicial removal proceeding should be shared equally by the judge and the public – rather than to prefer one side over the other – is well within the bounds of the Due Process Clause.

### **A. The Public Interest Affected by a Judicial Removal Proceeding Justify Rule 10(h)(1)’s Preponderance-of-the-Evidence Standard**

“[T]he minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about

how the risk of error should be distributed between the litigants.” *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 1395 (1982). Judge Keller’s constitutional analysis improperly focuses only on her own private interests without regard for the public’s interest in removal proceedings.

The public’s interest in judicial removal proceedings is strong. Removal is certainly costly for a judge, but permitting an inappropriate person to sit as a judge is costly for the public and the administration of justice. This concern for the public interest lies at the heart of the Texas decisions applying the preponderance-of-the-evidence standard. *See, e.g., In re Brown*, 512 S.W.2d at 319 (the function of a removal proceeding “is not to punish but to maintain the high quality of the judiciary”); *In re Thoma*, 873 S.W.2d at 484-85 (describing the public’s interest in the “honor and dignity of the judiciary” and the need “to uphold the administration of justice for the benefit of the citizens of Texas.”).

The Due Process Clause does not require our State to balance these private and public interests differently. New York’s highest court, for example, has rejected a federal due process challenge to its preponderance-of-the-evidence standard for judicial removal proceedings for reasons that apply with equal force here: “[E]ven though removal from office is more serious than a ‘mere loss of money,’ since it inflicts a ‘stigma,’ the interest of the State and of the public in a competent judiciary is superior to the interest of the individual Judge to continue in office.” *In re Seiffert*, 480 N.E.2d 734, 736 (N.Y. 1985) (citing *Addington v. Texas*, 441 U.S. at 424, 426, 99 S. Ct. at 1808-09).

It is only when the risk of error to the private interest is significantly greater than the risk of error to the public interest that Due Process demands a heightened standard of proof: “The

individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” *Addington*, 441 U.S. at 427, 99 S. Ct. at 1810. Outside of a criminal case, the U.S. Supreme Court has struck down a state’s considered choice of the preponderance-of-the-evidence standard as a violation of the Due Process Clause in only two instances: the involuntary civil commitment of the mentally ill and the termination of a parent’s right to a natural child. *Id.* at 425-26, 99 S. Ct. at 1808-09; *Santosky*, 455 U.S. at 769-70, 102 S. Ct. at 1403. In those instances, the Court determined that the individual’s fundamental liberty interests at stake (the right to be free of custodial confinement and unwanted medical treatment; the bond between parent and child) so outweighed the interest of the State (in commitment or termination) that due process demanded a clear-and-convincing standard of proof.

In the absence of such a significant imbalance of private and public interests, however, the U.S. Supreme Court has consistently refused to hold that the Due Process Clause requires anything more than a preponderance-of-the-evidence standard. Even when an individual’s fundamental liberty interests may be in jeopardy, for example, the Court has rejected a clear-and-convincing standard when the countervailing public interest was sufficiently strong. Thus, the Court has rejected due-process challenges to a preponderance standard for the involuntary medication of a mentally ill inmate, *Washington v. Harper*, 494 U.S. 210, 235, 110 S. Ct. 1028, 1044 (1990); for the indefinite commitment of a defendant acquitted by reason of insanity, *Jones v. United States*, 463 U.S. 354, 366-68, 103 S. Ct. 3043 (1983); and for the establishment of paternity of a child, *Rivera v. Minnich*, 483 U.S. 574, 107 S. Ct. 3001 (1987).

The interests of a judge in a removal proceeding do not rise to the level of the

fundamental liberty interests at stake in an involuntary commitment or parental termination proceeding. See *In re Seiffert*, 480 N.E.2d at 736 (“[T]he right of a judge to continue in office [is] more akin to a property, rather than a personal or liberty, interest.”). When these liberty interests are not threatened, “imposition of even severe civil sanctions . . . has been permitted after proof by a preponderance of the evidence.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90, 103 S. Ct. 683, 691 (1983). In *Huddleston*, for example, the Court held that the preponderance standard was appropriate for civil securities fraud claims, “even though the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct.” *Id.*; see also *Grogan v. Garner*, 498 U.S. 279, 288-89, 111 S. Ct. 654, 660 (1991) (collecting fraud statutes that premise liability on preponderance standard). The Court has also long held that proof by a preponderance of the evidence suffices in civil enforcement suits, even those that impose a penalty and involve proof of acts that expose a party to a criminal prosecution. *United States v. Regan*, 232 U.S. 37, 48-49, 34 S. Ct. 213, 217 (1914).

In perhaps the situation most analogous to a judicial removal proceeding that has come before the U.S. Supreme Court, the Court approved a preponderance-of-the-evidence standard in SEC disciplinary proceedings, proceedings that include such severe consequences as permanently barring an individual from practicing his or her profession. *Steadman v. SEC*, 450 U.S. 91, 96, 101 S. Ct. 999, 1005 (1981). The Court ruled that in light of Congress’s traditional powers to prescribe burdens of proof, the Court’s only task was to determine the intent of Congress that such proceedings be determined by a preponderance of the evidence. In the face of this congressional choice, the Court labeled as “simply inapposite” the argument that “the potentially severe consequences to a respondent in a Commission proceeding involving

allegations of fraud demand that his burden of risk of erroneous factfinding should be reduced by requiring the Commission to prove violations of the antifraud provisions of the securities laws by clear and convincing evidence.” *Id.*

The same is true here. Pursuant to the rule-making authority expressly granted by Texas Constitution Article V, § 1-a(11), our Supreme Court has made a considered policy choice that the preponderance-of-the-evidence standard strikes the proper balance between the competing interests at stake in a judicial removal proceeding. Judge Keller’s arguments that the potentially severe consequences to her warrant a different standard of proof are “simply inapposite.”

**B. Most of the Authorities Cited by Judge Keller Do Not Apply**

Most of the authorities cited by Judge Keller applying the clear-and-convincing standard do not involve procedural due process at all. These authorities from unrelated contexts instead only reinforce the conclusion that Rule 10(h)(1) does not violate the Due Process Clause.

1. *Statutory Standards.* Judge Keller points to the clear-and-convincing standard of proof required for punitive damage awards, TEX. CIV. PRAC. & REM. CODE § 41.003(a), claiming that it is “self-evident” that her interests here are as significant. (Motion at 13) But both the Texas Supreme Court and the U.S. Supreme Court have held that the Due Process Clause does not require a clear-and-convincing standard of proof for punitive damage awards and that a preponderance-of-the-evidence standard is constitutionally adequate. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 32 (Tex. 1994); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991). The Texas Legislature decided to adopt such a clear-and-convincing standard as part of its tort reform legislation, but that public-policy choice was not required by the Due Process Clause. Here, the voters could amend the Constitution to choose a rule requiring a clear-and-

convincing burden of proof in a judicial removal proceeding, but the Due Process Clause does not require such a burden or invalidate the choice that the Supreme Court has made under the current constitutional standard. *See* TEX. CONST. art. V, § 1-a(11) (directing due process “in the same manner [as for] any person whose property rights [are] in jeopardy in an adjudicatory proceeding”).

Similarly, the Texas Legislature may choose to require clear-and-convincing evidence to overcome the presumption of community property in a divorce, TEX. FAM. CODE § 3.003(b) (Motion at 13), but that isolated policy decision in an unrelated area of the law has no bearing on what Due Process Clause requires in a judicial removal proceeding.

2. *Immigration Decisions.* Citing to the U.S. Supreme Court’s decisions requiring a clear-and-convincing burden of proof for deportation and denaturalization proceedings, Judge Keller asserts that “the sanction of a sitting judge demands no less process than is due in a deportation or denaturalization case.” (Motion at 11) (citing *Woodby v. INS*, 385 U.S. 276, 285, 87 S. Ct. 483, 487 (1966) (deportation); *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S. Ct. 1333, 1336 (1943) (denaturalization)). These immigration decisions were *not* based on the Due Process Clause, and a close examination shows the importance of judicial deference to a validly enacted rule or statute prescribing the burden of proof, such as Rule 10(h)(1) here.

In *Nishikawa v. Dulles*, 356 U.S. 129, 133, 78 S. Ct. 612, 615 (1958), the U.S. Supreme Court determined that a clear-and-convincing burden should apply to an expatriation proceeding, a proceeding to impose the undoubtedly severe sanction of stripping a person of his U.S. citizenship. In response, Congress passed a law that the burden in an expatriation proceeding was preponderance of the evidence. In *Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540 (1980),

the Court rejected a due process challenge to this law, stressing that the Due Process Clause does not require a clear-and-convincing standard in immigration proceedings:

We are unable to conclude that the specific evidentiary standard provided by Congress in § 1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975); *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804 (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby v. INS*, 385 U.S. 276, 285, 87 S. Ct. 483, 487 (1966) (deportation); *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S. Ct. 1333, 1336 (1943) (denaturalization). None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship.

*Id.* at 266-67, 100 S. Ct. at 548. Just as in *Vance*, the Due Process Clause does not trump the Supreme Court's considered judgment that a preponderance-of-the-evidence standard is sufficient to protect Judge Keller's interests in a judicial removal proceeding.

3. *Attorney Discipline and Sanctions.* Judge Keller cites federal decisions requiring clear-and-convincing proof for sanctions to be imposed on an attorney in federal courts (Motion at 9-11), but she ignores the fact that Texas requires only a preponderance of the evidence in attorney disciplinary proceedings. *See* TEX. R. OF DISCIPLINARY P. 2.17 ("The burden of proof is upon the Commission for Lawyer Discipline to prove the material allegations of the Evidentiary Petition by a preponderance of the evidence."); *Id.* 3.08(C) ("Disciplinary Actions must be proved by a preponderance of the evidence."). The Fifth Circuit has held that Texas's choice to apply a preponderance-of-the-evidence standard does not violate the Due Process Clause: "[N]o

due process violation results when a state court finds misconduct by a preponderance of the evidence.” *In re Watson*, No. 00-46, 2000 WL 34507666, \*5 (5th Cir. Oct. 4, 2000).

The sanctions decisions cited by Judge Keller stand for nothing more than a federal court can decide that a clear-and-convincing standard applies in its own court – not that due process prohibits a state from applying a preponderance-of-the-evidence standard. *In re Medrano*, 956 F.2d 101 (5th Cir. 1992), for example, holds that disbarment of an attorney *in that circuit* must be supported by clear-and-convincing evidence, but not, as Judge Keller asserts, that due process requires all attorney disbarment proceedings to be based on clear-and-convincing evidence. (Motion at 11). In rejecting a similar argument to Judge Keller’s, the First Circuit held that “[*Medrano*] does not implicate constitutional principles but, rather, hinges on the fact that disciplinary proceedings in federal courts in the Fifth Circuit require findings based on clear and convincing evidence.” *In re Barach*, 540 F.3d 82, 86 (1st Cir. 2008). The Fifth Circuit has held the same. *See In re Watson*, 2000 WL 34507666, \*6 (“The Fifth Circuit cases cited by Mr. Watson for the proposition that federal discipline orders must be supported by clear and convincing evidence of misconduct involved appeals of discipline imposed by federal district courts and did not address the burden of proof to be applied in a state proceeding.”).

4. *Defamation.* Judge Keller’s reliance on *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) is particularly misplaced. The decision was not based on procedural due process, but instead on the special First Amendment concerns of freedom of expression and freedom of the press when the media reports on public officials. *Id.* at 284-86, 84 S. Ct. at 728-29. Judge Keller also misreads this case’s holding when she argues that “due process requires that a charge of defamation against Respondent be proved by clear and convincing evidence.”

(Motion at 13). The case means the opposite: *Judge Keller* would bear a clear-and-convincing evidence burden if *she* were to bring a defamation claim; she would enjoy no such protection in a defamation case against her. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974) (holding the constitution does not require any heightened burden of proof in defamation cases brought by private citizen). But of course this is not even a defamation case, and the special First Amendment concerns underlying *Sullivan* are completely absent in this proceeding. By attempting to equate the burden of proof here with the actual malice standard of *New York Times v. Sullivan*, Judge Keller's argument stretches beyond any fair reading of the case law.

**C. The Decisions of Other States to Apply a Different Standard of Proof Does Not Mean That Texas's Rule Violates Due Process**

Finally, Judge Keller canvasses the judicial-removal laws of the other forty-nine states. It is true that most other states have chosen to apply a clear-and-convincing standard to their judicial removal proceedings. The Texas voters could certainly choose to adopt a different constitutional rule in the future and require a clear-and-convincing standard. But the Due Process Clause does not require Texas to apply such a burden, and certainly does not invalidate the Texas Supreme Court's considered decision that a preponderance standard should apply under the current constitutional provision. None of the judicial removal cases from other states cited by Judge Keller holds otherwise.

The primary rationale given by most state courts for assigning the burden of proof in a judicial removal proceeding is that the standard should be the same as used in that state's attorney disciplinary proceedings. The most frequently cited decision, for example, is California's: "We believe the burden of proof imposed upon the examiners in such an inquiry [to

remove a judge] should be analogous to that employed in State Bar disciplinary proceedings.” *Geiler v. Commission on Judicial Qualifications*, 515 P.2d 1, 4 (Cal. 1973). In California, because the standard for attorney discipline was clear-and-convincing evidence, that was the standard adopted in judicial disciplinary proceedings as well. *Id.* The ABA also cites this reason in support of its Model Rule. See ABA Model Rules for Judicial Disciplinary Enforcement Rule 7, cmt (“The same [clear and convincing] standard is applied in lawyer disciplinary proceedings.”).<sup>3</sup> In none of those states has any court done what Judge Keller asks to do here: strike down a rule prescribing a preponderance-of-the-evidence standard.

Texas, as already noted, applies a preponderance-of-the-evidence standard to attorney disciplinary proceedings, not a clear-and-convincing standard. TEX. R. OF DISCIPLINARY P. 2.17, 3.08(C). Thus, even following the principal rationale used by other states, the preponderance-of-the-evidence standard is the proper standard to apply in Texas.

Utah has reached precisely this conclusion in following Texas case-law that the preponderance-of-the-evidence standard should apply to judicial discipline proceedings. As the Utah Supreme Court noted, “[m]ost other courts have followed the California court’s lead [in *Geiler*] and have adopted the clear and convincing standard, although with little or no analysis.” *In re Worthen*, 926 P.2d 853, 865 (Utah 1996). Because Utah uses the preponderance-of-the-evidence standard in attorney disciplinary proceedings, the court held that was the proper standard to apply in Utah’s judicial discipline proceedings:

We agree with the *Geiler* reasoning that the burden of proof required in attorney discipline proceedings is also appropriate for judicial discipline proceedings because this court has unique responsibility for determining an appropriate

---

3 Available at: <http://www.abanet.org/cpr/juddis/rule7.html>.

sanction in both proceedings. However, in Utah, unlike California, that standard is only a preponderance of the evidence. This leads us to agree with the Texas court's rationale that judicial misconduct proceedings are not substantially different from other administrative proceedings where a preponderance standard is usual. Therefore, we require the Commission to prove its case against a Utah judge by a preponderance of the evidence.

*Id.* at 866.

Other courts that have adopted the preponderance-of-the-evidence standard have similarly turned to the burden applied in their state's attorney disciplinary proceedings. "In Missouri . . . disciplinary proceedings for lawyers require the charges be sustained by a preponderance of the evidence and not beyond a reasonable doubt or by clear and convincing evidence. Using the logic of the California courts and realizing the similarity between the disciplining of lawyers and judges, we find that the amount of proof necessary to sustain a charge is the preponderance of the evidence." *In re Duncan*, 541 S.W.2d 564, 569 (Mo. 1976) (citations omitted). The New York Court of Appeals also relied on the preponderance-of-the-evidence standard in attorney disciplinary proceedings in rejecting an argument that the Due Process Clause required a clear-and-convincing standard. *In re Seiffert*, 480 N.E.2d at 735.

Judge Keller seeks to distinguish these states' decisions by asserting that "the few states that do allow for the removal of justices based on a preponderance of the evidence standard (Missouri, New York, and Utah) do not elect those justices, so those judges have less of a property interest in their positions." (Motion at 16) Judge Keller does not explain why appointed judges would have "less of a property interest in their positions" than elected judges, and she cites no authority for this dubious legal proposition. None of these states, moreover, has ever suggested that an appointed judge has "less of a property interest" in his or her position than

an elected judge, much less offered it as a rationale for applying the preponderance-of-the-evidence standard. And Judge Keller is, in the end, wrong in asserting that these states do not elect judges. In New York, while the seven members of its highest court are appointed, N.Y. CONST. art. VI, § 2, the vast majority of judges in New York are elected in partisan elections. *See* SARAH F. LIEBSCHUTZ, *ET AL.*, *NEW YORK POLITICS AND GOVERNMENT* 131 (1998) (“New York is one of only thirteen states that use partisan elections for the regular selection of judges.”); N.Y. CONST. art. VI, §§ 6(c), 10(a), 13(a), 15(a), 16(h), 17(d) (all providing for the election of judges at various levels of the New York judiciary). In Missouri, most trial-court-level judges are elected, and all appointed judges are subject to retention elections. MO. CONST. art. V, § 25. All judges in Utah are subject to periodic retention elections. UTAH CONST. art. VIII, § 9. Whether appointed or elected, the judges in those states are subject to the same preponderance-of-the-evidence standard in removal proceedings. For example, the removed judges in the New York and Missouri cases adopting the preponderance-of-the-evidence standard held elected positions. *See In re Duncan*, 541 S.W.2d at 566 (Missouri probate judge “had been “reelected . . . to the four-year term which he is presently serving.”); *In re Seiffert*, 480 N.E.2d at 735 (removed judge sat on the District Court of Nassau County); N.Y. CONST. art. VI, § 16(h) (district court judges in Nassau County are chosen by election).

### III. CONCLUSION

The procedure for the removal of judges affords Judge Keller a number of due-process rights to ensure that the result of this proceeding is fair: notice of the charges against her; an evidentiary hearing before a neutral factfinder; the right to employ counsel of her choice; the right to discovery; the right to confront her accusers; the right to subpoena witnesses; the right to

cross-examine witnesses; and the right of review by a tribunal of seven justices of the courts of appeals. TEX. CONST. art. V, § 1-a(11). Requiring the Examiner to establish facts by a preponderance of the evidence in such a proceeding does not violate the Texas Constitution of the federal Due Process Clause.

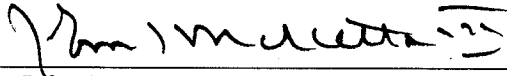
Respectfully submitted,

**EXAMINERS:**

Seana Willing  
Executive Director  
Texas Bar No. 00787056

**SPECIAL COUNSEL:**

John J. McKetta, III  
State Bar Number 13711500  
Michelle Alcalá  
State Bar Number 24040403  
GRAVES DOUGHERTY HEARON & MOODY, P.C.  
401 Congress Avenue, Suite 2200  
Austin, Texas 78701  
(512) 480-5616 Telephone  
(512) 480-5816 Telecopier

By:   
\_\_\_\_\_  
John J. McKetta, III

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been sent via the method indicated below to the persons listed below on this the 10<sup>th</sup> day of August, 2009:

Mr. Charles ("Chip") L. Babcock  
Jackson Walker, LLP  
1401 McKinney Street, Suite 1900  
Houston, Texas 77010  
*Via Facsimile Transmission + Email*



---

John J. McKetta, III