

**No. 10-0001**

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**IN THE SPECIAL COURT OF REVIEW**

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**INQUIRY CONCERNING JUDGE NO. 96,  
THE HONORABLE SHARON KELLER**

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**THE EXAMINER'S RESPONSE TO MOTION TO DISMISS**

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September 14, 2010

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**SPECIAL COURT OF REVIEW**

**No. 10-0001**

**INQUIRY CONCERNING JUDGE NO. 96,  
THE HONORABLE SHARON KELLER**

**THE EXAMINER'S RESPONSE TO MOTION TO DISMISS**

**TO THE HONORABLE JUSTICES OF THE SPECIAL COURT OF REVIEW:**

The Examiner for the State Commission on Judicial Conduct (“Commission”) files this brief in response to Judge Keller’s motion to dismiss.

**STATEMENT OF FACTS**

**A. Judge Keller’s Testimony.**

The essential facts underlying the Commission’s order come principally from Judge Keller’s own testimony, and are largely ignored in her partial selection of facts:

Judge Keller knew that her Court’s Execution-Day Procedures required that “[a]ll communications regarding [that day’s] scheduled execution shall first be referred to the assigned judge” (3 RR 156)<sup>1</sup>;

She knew that September 25, 2007, was an execution date and that the execution was scheduled for 6:00 p.m. that day (3 RR 171, 174);

She knew that the United States Supreme Court had granted certiorari that very morning in a case known as *Baze* that would address whether the protocol for lethal injection was unconstitutional (3 RR 173; Examiner’s Ex. 4);<sup>2</sup>

She knew that a motion was expected to be filed that day on behalf of the person scheduled to be executed that day, and that the motion was expected to be based on the Supreme Court’s action of that morning in the *Baze* case (3 RR 176;

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<sup>1</sup> References to testimony (“RR,” *i.e.*, Reporter’s Record) can be found at Appendix 1.

<sup>2</sup> *Baze* addressed lethal injection in Kentucky. Judge Keller testified she knew that a merits decision in *Baze* could have impact on executions in Texas. (3 RR 173.)

Examiner's Ex. 6);

She knew that the 4:45 p.m. telephone call she received related to a communication concerning that day's scheduled execution (3 RR 178, 181, 186);

She knew that the caller wanted to file something but was not ready to file by 5:00 p.m. (3 RR 180-82; 4 RR 14, 28);

She knew that the caller had requested to file after 5:00 p.m. (Marty<sup>3</sup>: 4 RR 112, 146);

She knew the assigned judge for that day's scheduled execution remained available after hours, as required under the Execution-Day Procedures (3 RR 157);

She knew that she was not the assigned judge (3 RR 174, 178);

She knew that the matter was important, since it involved a life-or-death decision and "could not be undone" (3 RR 179);

She twice said "no"; she said, "We close at 5:00 p.m."; and she said there's no reason the clerk's office should stay open for these people who can't file on time (3 RR 184-85, 188; 4 RR 14; Marty: 4 RR 84-87, 137);

The assigned judge (whose identity was not known to the public, 3 RR 171), knew that a filing was expected and waited after hours – surprised that nothing was filed (Judge Johnson: 2 RR 76);

Instead of referring the communication to the assigned judge, as was required under her Court's Execution-Day Procedures,<sup>4</sup> Judge Keller addressed and disposed of the communication;

Judge Keller adamantly testified that, presented with the same circumstances again, she would do nothing different today (4 RR 28-29).

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<sup>3</sup> Mr. Marty was General Counsel to the Court of Criminal Appeals.

<sup>4</sup> Judge Keller complains that an "oral protocol" cannot be a duty of her office. (Motion, at page 16.) Her prior testimony, however, admits that the Execution-Day Procedures included the word "shall" (3 RR 158); that "the word shall to [her] has always meant a mandatory word" (*id.*; *see also* 4 RR 10); that the Execution-Day Procedures required "all communications" – whether "administrative, procedural, substantive or otherwise" – concerning that day's scheduled execution "first to be referred to the assigned judge" (3 RR 167); and she informally referred to the assigned judge under the Execution-Day Procedures as "the duty judge." (3 RR 195.)

Judge Keller's motion neither mentions, nor objects to the sufficiency of evidence concerning, any of these essential facts. She implies that the Commission failed to give deference to findings by the Special Master (Motion, at 13-14 & n.8), but none of the foregoing facts contradicts any finding by the Special Master.<sup>5</sup> Judge Keller also complains that the evidence was insufficient as to three findings by the Commission (Motion, at 14-15, complaining of Findings Nos. 43, 95 and 96), but she has overlooked the abundant factual support for each:

- i. **Finding 43.** Marty testified that he did not know whether the Execution-Day Procedures required all communications regarding the scheduled execution to be first referred to the assigned judge. 4 RR 88 ("You don't know what you don't know"). He had inaccurately believed that only "substantive" communications, rather than "all communications," were subject to the Procedures. *Id.* Judge Keller admitted that she did not know in September 2007 whether Marty did, or did not, know the applicable requirements under the Execution-day Procedures. 3 RR 159(24)-160(6); 3 RR 160(18-23); 4 RR 4(23-25); 4 RR 5(10)-6(1); 4 RR 8(3-5).

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<sup>5</sup> Deference to findings does not prevent opportunity to review findings. The Examiner's principal objections to the Special Master's findings were these: (i) that he devoted most of his findings to the conduct of others, whose conduct and decisions and choices were not known by Judge Keller at the time she chose to disregard her responsibilities under the Execution-Day Procedures, and therefore cannot be any basis for excusing her choices and her conduct; (ii) that he had not made findings one way or the other as to many factual issues presented by the parties; (iii) that he failed to give adequate effect to Judge Keller's remarkable and emphatic testimony that, presented with the same circumstances, she would do nothing differently today; and (iv) that he exceeded his role by making recommendations as to sanctions, if any. *See* Appendix 2, at pages 1-8.

ii. **Findings 95 and 96.** Judge Keller herself testified that Rule 9.2(a) of the TEXAS RULES OF APPELLATE PROCEDURE gives a person with a legal interest in a proceeding the right to be heard by the clerk or a judge as to the acceptance of a filing after hours. 3 RR 193.<sup>6</sup>

**B. The Special Master's Findings.**

It may be helpful to consider an overview of formal proceedings and of the Special Master's important but limited role in formal proceedings. Under the Texas Constitution, the governing statute and the Rules promulgated by the Texas Supreme Court, the Commission has discretion to direct formal proceedings. See TEX. CONST., art. V, §1-a(8); TEX. GOV'T CODE, § 33.022(g); RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(a). Rule 10 generally addresses procedures for formal proceedings. In formal proceedings, the Commission has the discretion to ask for appointment of a Special Master. Rule 10(c)(2). The hearing before a Special Master is "to hear and take evidence ... and to report thereon to the Commission." TEX. CONST., art. V, §1-a(8). The hearing does not have the finality of a trial, nor does the Special Master have a role for determining conclusions or consequences. His role is to make a report containing "a brief statement of the proceedings and his findings of fact based upon a preponderance of

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<sup>6</sup> Judge Keller's motion characterizes Rule 9.2, TEX. R. CIV. P., as if a document is deemed filed if delivered to a judge. (Motion, at page 19.) Rule 9.2 actually includes some restrictive language not mentioned by Judge Keller: "A document is filed in an appellate court by delivering it to ... a justice or judge of that court *who is willing to accept delivery.*" (Emphasis added.) Judge Keller acknowledged in her testimony that Rule 9.2 contemplates a limited right to attempt to persuade a judge to accept such a filing. Under her court's Execution-Day Procedures, the only authorized person for such a communication is the assigned judge for that day's execution – a person whose identity was not available to the public. For that reason, the Execution-Day Procedure required that communications related to the day's scheduled execution be immediately referred to the assigned judge.

the evidence.” Rule 10(h)(1). The formal proceedings, however, do not and cannot end with the Special Master’s report. Ultimately, the formal proceedings must involve a decision by the Commission. Rule 10(m). The Commission has the authority to “adopt,” to “modify” or to “reject” findings of the Special Master, either on objection by a party or at the Commission’s own initiative. Rule 10(j).

Nevertheless, Judge Keller has liberally characterized the Special Master’s findings as having “exonerated” Judge Keller “and absolved her of the stain of [the Commission’s] allegations.” (Motion, at 4.) Judge Keller’s characterizations are excessive. The Special Master’s Findings of Fact included the following findings of improper conduct by Presiding Judge Keller:

- (a) a finding that Presiding Judge Keller “certainly exhibited poor judgment [i] in not reminding [General Counsel] Marty of the TCCA’s execution day procedure and [ii] in failing to notify Judge Johnson of the TDS’s communication....”<sup>7</sup>
- (b) a finding that “Judge Keller certainly did not exhibit a model of open communication. She should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson of the TDS’s call. She also could have called Judge Johnson herself, for she knew that Judge Johnson was the assigned judge for the Richard matter that day.”<sup>8</sup>
- (c) a finding that “Judge Keller’s conduct ... was not exemplary of a public servant. She should have been more open and helpful about the way in which the TDS could present the lethal injection claim to the TCCA.”<sup>9</sup>
- (d) a finding that “[s]he should have directed the TDS’s communication to Judge Johnson.”<sup>10</sup>

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<sup>7</sup> Special Master’s Findings of Fact, Pages 9-10 (Movant’s Appendix F).

<sup>8</sup> *Id.*, page 11.

<sup>9</sup> *Id.*, page 15.

- (e) a finding that “her judgment in not keeping the clerk’s office open past 5:00 to allow the TDS to file was highly questionable.”<sup>11</sup>
- (f) a finding that “there is a valid reason why many in the legal community are not proud of Judge Keller’s actions.”<sup>12</sup>
- (g) a finding that “Judge Keller’s silence on several occasions conflicts with the ideal that courts should foster open communication among court staff and litigants.”<sup>13</sup>
- (h) a finding that the absence of a formal rule or statute “does not absolve her of her responsibility to ensure that the courts remain fair and just.”<sup>14</sup>
- (i) a finding that “[a]lthough she says that if she could do it all over again she would not change any of her actions, this cannot be true. Any reasonable person, having gone through this ordeal, surely would realize that open communication, particularly during the few hectic hours before an execution, would benefit the interests of justice.”<sup>15</sup>

**C. The Commission’s Findings.**

Although Judge Keller now tells this Special Court of Review that she was “exonerated” and that the Special Master “absolved her of the stain of [the Commission’s] allegations,” Judge Keller herself unsuccessfully objected to numerous portions of the Special Master’s findings. The Commission considered, but disagreed

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, pages 15-16.

<sup>12</sup> *Id.*, page 16.

<sup>13</sup> *Id.* “Further Judge Keller should have spoken up the next morning when, during a conference with the judges, some of her colleagues expressed surprise that Richard had not filed anything the night before. Indeed, many of the judges, including Judge Johnson, learned that the TDS had sought to file a lethal injection claim by reading the newspaper that weekend. Judge Keller’s silence at this meeting goes contrary to the ideals of judicial collegiality.” *Id.*, page 12.

<sup>14</sup> *Id.*, page 16.

<sup>15</sup> *Id.*

with, Judge Keller's objections and entered the Order that is the subject of her appeal. See Commission's Findings, Conclusions and Order of Public Warning, at pages 1-2, (Movant's Appendix A).

Judge Keller's complaint that, after she "prevailed" before the Commission, "[n]ow the SCJC [i.e., the Commission] wants to try this case a *third* time" is surprising. (Motion, at 8.) It is Judge Keller who is unhappy with the Commission's order and who has exercised her statutory right of review. Judge Keller, not the Examiner, initiated this review proceeding before this Special Court of Review.

#### **STANDARD OF REVIEW**

The Commission issued an Order of Public Warning. The Order is a "sanction" under the statutory definition in TEX. GOV'T CODE, § 33.001(a)(10). Accordingly, review "is by trial *de novo* as that term is used in the appeal of cases from justice to county courts." *Id.*, § 33.034(e)(2).

#### **SUMMARY OF THE ARGUMENT**

This Special Court of Review should deny the motion to dismiss. None of Judge Keller's complaints about the Commission has merit. But even if hypothetically the Commission erred, or abused its discretion, or imposed a consequence on Judge Keller that was inappropriate or unavailable, Judge Keller has available to her, and has already chosen to invoke, statutory review before this Special Court of Review. This Court's statutory *de novo* review of a sanction allows Judge Keller to defend herself, independently of any of the matters upon which she complains, before a tribunal that will not consist of any of the Commissioners whose qualifications she challenges.

In imposing a public warning after a formal proceeding, the Commission followed the rule the Texas Supreme Court adopted on the procedure for formal proceedings. RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(m).<sup>16</sup> The Supreme Court's rule and the Commission's order are consistent with and follow the Constitution's text, which authorizes the Commission to impose a public warning "[a]fter such investigation as it deems necessary." TEX. CONST. art. V, § 1-a(8).

The Commission acted lawfully in following the Texas Supreme Court's rule regarding the imposition of a public warning after the conclusion of formal proceedings. It afforded Judge Keller due process. It reached a decision well supported by the evidence before it. The Commission's membership is validly constituted. Each of Judge Keller's attacks lacks merit. Yet even if any were meritorious, (i) the Commission's order is not void, and (ii) the statutory review through a trial *de novo* before this Special Court of Review makes her complaints academic.

## ARGUMENT

### I. The Commission's Order of Public Warning Was Authorized by the Constitution and by the Texas Supreme Court's Rules Interpreting the Constitution.

The Texas Constitution provides that a judge "may be disciplined or censured, in

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<sup>16</sup> Rule 10(m) provides: "If, after hearing, upon considering the record and report of the special master, the commission finds good cause therefore, by affirmative vote of six of its members, it shall recommend to the review tribunal the removal, or retirement, as the case may be; **or in the alternative, the commission may** dismiss the case or **publicly order a** censure, reprimand, **warning**, or admonition." (Emphasis added.) Rule 10(m) was promulgated prior to 2005 amendments to the Texas Constitution, which changed the size of the Commission from 11 members to 13. The portion of Rule 10(m) directing decisions by 6 votes is outdated, as 7 votes are now required for a majority. The Texas Supreme Court has not yet amended that portion of Rule 10(m) to conform to the constitutional change in the number of commissioners. The constitutional amendment has no impact as to the portion of Rule 10(m) at issue here: a public warning continues to be an available outcome from a Rule 10 proceeding.

lieu of removal from office,” and gives the Commission the specific authority to issue a public warning “after such investigation as it deems necessary.” TEX. CONST. art. V, § 1-a(6), (8). Rule 10(m) of the Texas Supreme Court’s Rules for the Removal or Retirement of Judges states that “after hearing, upon considering the record and report of the special master, . . . the commission may publicly order a . . . warning.” These provisions refute Judge Keller’s argument that the Commission’s order is “void” because the Commission had “no jurisdiction” to issue a public warning. (Motion, at 10.)

Judge Keller’s argument is based on the mistaken premise that the Commission’s decision to initiate “formal proceedings” eliminates a public warning as a possible action by the Commission. A plain reading of the Constitution’s text and the Supreme Court’s rules implementing this provision confirms that a public warning may be imposed with or without formal proceedings.

“When interpreting our state Constitution, we rely heavily on its literal text and are to give effect to its plain language.” *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (citation omitted). The Texas Constitution provides that a judge engaging in misconduct or incompetence may be removed from office or “may be disciplined or censured, in lieu of removal from office, as provided by this section.” TEX. CONST. art. V, § 1-a(6).

The Constitution vests the Commission with the authority to impose a wide range of specific disciplinary actions against a judge – from requiring additional training to a recommendation of removal from office. For most of these actions, the Constitution leaves to the discretion of the Commission the extent and nature of the investigation

necessary: “*After such investigation as it deems necessary*, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education.” TEX. CONST. art. V, § 1-a(8) (emphasis added). For the most severe disciplinary actions (*i.e.*, public censure, removal, or retirement), the Constitution mandates certain additional specified procedures: a finding of “good cause” following the initiation of “formal proceedings,” and either a “formal hearing” before the Commission or an evidentiary hearing before a special master. *See id.* (“If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be, of the [judge].”).

Initiating the additional procedural protections required for censure, removal, or retirement does not foreclose the other disciplinary actions available to the Commission, and no authority holds that it does. In other words, under the Constitution, the initiation of formal proceedings makes possible censure, removal, or retirement, but does not preclude admonition, warning, reprimand, or the requirement that the person obtain additional training or education. In those circumstances where the Commission determines that an allegation of misconduct or incompetence requires further examination through a formal proceeding, but, after that more thorough examination, concludes that censure, removal, or retirement are not justified, the Commission retains the ability to impose appropriate disciplinary relief, including a public warning.

By promulgating Rule 10(m), the Supreme Court endorsed this common-sense

reading of the constitutional provision:

If, after hearing, upon considering the record and report of the special master, the commission finds good cause therefore, . . . it shall recommend to the review tribunal the removal, or retirement, as the case may be; or in the alternative, the commission may dismiss the case or publicly order a censure, reprimand, warning or admonition.

RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(m). In issuing a warning in this case, the Commission followed the Supreme Court's rule, and the Supreme Court's rule is consistent with the constitutional text.<sup>17</sup> Nothing in the text of the Constitution says that a public warning is unavailable after the initiation of formal proceedings or after receipt of a report from a Special Master. To the contrary, the Constitution says that a public warning may be imposed "after such investigation as [the Commission] deems necessary." TEX. CONST. art. V, § 1-a(8). Nothing in the text of the Constitution says that a failure to find "good cause" for public censure, removal, or retirement after a formal hearing prevents the Commission from issuing a warning. Indeed, it would be anomalous to allow the Commission to issue a warning to a judge without a formal hearing, but then, after a formal hearing to fully consider the evidence against the judge, prohibit the Commission from issuing a warning.

Judge Keller argues that, after a formal proceeding is initiated, the Constitution allows only three options: (i) dismissal, (ii) censure, or (iii) recommendation of removal or retirement. (Motion, at page 5.) In promulgating Rule 10(m) and allowing a warning

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<sup>17</sup> Judge Keller states, by citation to an article in *The Texas Lawyer*, that the Examiner "publicly admitted that 'the order . . . does not comport with the Texas Constitution.'" (Motion, at page 2 & n.2, and at page 9.) The words deleted by ellipsis in the Motion are "is based on a rule that." We suggest that constitutional review is better performed by studied analysis of text and precedent, than by selected snippets of unbriefed views that were quoted, or misquoted, from news reports.

“in the alternative,” the Supreme Court plainly disagrees. Moreover, Judge Keller’s construction of the last sentence of Article V, Section 1-a(8), suffers from several contextual problems. First, the text of the last sentence of Article V, Section 1-a(8), does not include any option to dismiss. Surely that is an option available to the Commission, though not specified; but its absence makes clear that the last sentence of Article V, Section 1-a(8), is not an exclusive list of options available following formal proceedings.

Second, the options to censure or to recommend removal/retirement are only available upon a finding “good cause therefor” – a phrase never italicized in Judge Keller’s lengthy quotations from the constitutional text. The last sentence of Article V, Section 1-a(8), does not purport to place any limitation on the Commission’s powers if it does *not* find good cause for censure or a recommendation of removal/retirement.

Third, nothing in the last sentence of Article V, Section 1-a(8), purports to remove the power of the Commission in the first sentence, which expressly authorizes the Commission to issue, among other outcomes, a public warning. The Supreme Court’s adoption of Rule 10(m) reflects a reasonable construction of Article V, Section 1-a(8). Judge Keller’s motion does not.

The Commission may issue a public warning “after such investigation as it deems necessary.” TEX. CONST. art. V, § 1-a(8). The Commission here deemed a formal hearing necessary, including appointment of a Special Master to hear and take evidence, and after such a process found that Judge Keller engaged in willful or persistent conduct clearly inconsistent with her duties of office and that cast public discredit on the judiciary or the administration of justice. As a result of her conduct, the Commission issued Judge

Keller a warning “in lieu of removal from office.” *Id.* § 1-a(6). The decision of the Commission to initiate formal proceedings does not take away the Commission’s authority to issue a lesser sanction. The Commission’s order in this case was authorized by the Constitution, and Judge Keller’s challenge to its constitutionality must fail.<sup>18</sup>

**II. None of Judge Keller’s Attacks on the Commission’s Process, Its Composition and Its Order Are Meritorious.**

Judge Keller has argued that she was denied due process, that the Commission’s findings were unsupported by the evidence, that an inadequate number of Commissioners voted, and that three Commissioners were disqualified. None of those attacks has merit.

**A. Abundant due process was afforded Judge Keller below.**

Judge Keller introduced her Motion with a fiery recitation of alleged shortcomings in judicial proceedings which, she alleges, “skirt the edges of due process.” (Motion, at pages 1-2.) Nearly all of her recitations, however, are contradicted by the record of this proceeding:

1. Was the Commission the prosecutor of this action? No. This was fully briefed in proceedings more than a year ago, and was addressed by an evidentiary hearing on July 10, 2009, in which the Special Master considered and denied Judge Keller’s Rule 12 “motion to show authority”:

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

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<sup>18</sup> Judge Keller also complains that the Order violates the Constitution because it did not include a finding of good cause she should be either removed from office or censured. (Motion, at 9, 13, 15.) That, of course, is because the Commission did not censure or remove her from office. The Constitution does not require that the Commission make any explicit finding of “good cause” for a warning.

proceedings should be instituted, will have a judicial role, rather than an 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.

(The Examiner's Response in Opposition to Judge Keller's Motion to Strike and Motion to Show Authority, Appendix 3, at pages 16-17.)

2. Were the allegations against Judge Keller anonymous? No. The evidentiary record below contained the full text of each of 21 complaints, sponsored by numerous persons including legislators, local and national bar associations, and many individuals, offered and admitted into evidence. All had been furnished to Judge Keller in timely discovery after her March 24, 2009 written discovery requests.

3. Was discovery limited? No. Judge Keller issued more than a dozen

deposition notices (including individual witnesses and organizations from whom Judge Keller wished information), and the Examiner is unaware of any deposition or other discovery sought by Judge Keller that was denied. TEX. GOV'T CODE, § 33.027(a) gave Judge Keller the right to conduct discovery “to the extent practicable, in the manner provided by the rules applicable to civil cases generally.”

4. Was Judge Keller punished without a hearing? No. She had a full evidentiary hearing, and exercised her right to cross-examine witnesses called by the Examiner and her right to subpoena and call witnesses on her behalf.

5. Did Judge Keller have the right to confront her accuser? Judge Keller did not seek a deposition of any of the many persons who filed complaints. She did confront and cross-examine every witness called to give evidence against her.

6. Judge Keller is correct that she had no right to a jury trial. TEX. GOV'T CODE, §§ 33.022(k), 33.034(g). That legislative policy choice, of course, is not any denial of due process.<sup>19</sup> But she is mistaken in complaining of her “limited appellate rights.” The trial *de novo* before this Special Court of Review is a remarkably extensive appellate opportunity. And, of course, even if hypothetically she had no right to appeal from a Commission order, that would not violate any due process rights. This is a holding in the very case Judge Keller cites, *In re Jenevein*, 158 S.W.3d 116, 119 (Tex. Spec. Ct. Rev. 2003) (“the right to appeal is not of constitutional magnitude, but is derived entirely from statute.... That which the Legislature may withhold altogether, it

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<sup>19</sup> The Constitutional right to due process, set forth in art. V, § 1-a(11), does not include any right to jury trial.

may withhold in part.... Thus, our lawmakers may deny the right to appeal entirely, the right to appeal only some things, or the right to appeal all things only under some circumstances”; citing as authority a 2002 opinion by Judge Keller).<sup>20</sup>

7. Judge Keller is correct that deliberations of the Commission are secret, just as are the deliberations of this Special Court of Review, of the 14 courts of appeals, of the Texas Supreme Court, and of the court over which Judge Keller presides. Unanimous decisions routinely do not identify the votes by individual judges or, as here, Commissioners. That is not any denial of due process.

Judge Keller also complains that she “received no notice that the Commission would consider a public warning as possible punishment.” This is not so. The procedural rules adopted by the Texas Supreme Court expressly list “publicly order a ... warning” as one of the outcomes for the Rule 10 proceeding before the Commission. RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(m). Judge Keller has always had clear notice of Rule 10(m).

**B. Judge Keller’s Complaints About Individual Findings of Fact Are Not Appropriate for a Motion to Dismiss, Especially Where Review is by Trial *De Novo*.**

This Court’s review of the Commission’s sanction “is by trial *de novo* as that term is used in the appeal of cases from justice to county courts.” TEX. GOV’T CODE, § 33.034(e)(2). As noted above, the Commission’s findings were supported by the

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<sup>20</sup> The 2003 decision in *In re Jenevein* preceded the 2009 legislation which adopted TEX. GOV’T CODE, § 33.034(e)(1). See Acts 2009, 81st Leg., ch. 805, § 2. Under the new statute, a judge in the circumstances of the Judge Jenevein now has an appellate opportunity.

evidence. *See* pages 1-4, *supra*.<sup>21</sup> But even if hypothetically they were not, the statutory nature of this review – “by trial *de novo* as that term is used in the appeal of cases from justice to county courts” – makes it academic whether the Commission’s findings were, or were not, well-founded on the evidentiary record before it. *See, e.g., Stafford v. Stafford*, No. 07-04-0262-CV, 2004 WL 2029704, at 1 (Tex.App. – Amarillo Sept. 10, 2004, pet. dism’d) (not designated for publication) (“First, whether the justice court afforded Alex Ray opportunity to present oral argument and documentary evidence is moot, for he was accorded a trial *de novo* in the Dallam County Court. In short, it matters not what occurred in the justice court given the *de novo* trial conducted by the county court.”). This Special Court of Review will make its own findings *de novo* based on the evidentiary record before it.

**C. Judge Keller’s Argument Regarding the Commission’s Vote Consists Entirely of Impermissible Speculation.**

Judge Keller asks this Special Court of Review to assume that only six members voted against her, and based on that speculation, to declare the Commission’s decision “unconstitutional” and void. (Motion, at 6-7, 13, 22-23.) No evidence supports Judge Keller’s inference that the decision was less than the unanimous act of all the Commissioners who participated in the hearing. The order was issued by the Commission, was signed by its Chair, and gives no suggestion of even a single dissenting

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<sup>21</sup> The record amply supports the Commission’s findings, as reflected by record citations in the Examiner’s Objections and Responses to Special Master’s Findings of Fact (Appendix 2). Judge Keller also complains of a legal rulings as to the permissibility of the examiner’s amendment of the Notice of Formal Proceedings. (Motion, at 4, 14.) Judge Keller did not include in her appendix the materials that supported this legal ruling. They are available in Appendix 3.

vote.

Judge Keller’s attempt to substitute speculation for proof falls far short of the exacting standards traditionally applied in considering the *bona fides* of public officials. *Gabert v. Olcott*, 23 S.W. 985, 987 (Tex. 1893) (“The presumption is that public officers do as the law and their duty require them.”); *Bexar County v. Hatley*, 136 Tex. 354, 150 S.W.2d 980, 988 (Tex. 1941) (“Certainly it would be unfair to assume against the members of the court, who are presumed to have acted lawfully in the discharge of their duties, that they intended to act unlawfully.”).

But even if hypothetically there were evidence that undisclosed dissenters existed, the statutory nature of this review – “by trial *de novo* as that term is used in the appeal of cases from justice to county courts” – makes it academic. *See, e.g., Kaminetzky v. Dosohs I, Ltd.*, No. 14-03-00567-CV, 2004 WL 1116960, at 4 (Tex.App. – Houston [14<sup>th</sup> Dist.] May 20, 2004, no pet.) (not designated for publication) (“Avni also complains that the justice court should have sustained Kaminetzky’s objection to Judge Hobson, the presiding judge of the justice court. That complaint was rendered moot by the trial *de novo* in the county court.”). Instead, this Special Court of Review will make its own decision *de novo* based on the proceedings and the evidentiary record before it.

**D. No Commissioner Was Disqualified from Service.**

**1. The Qualifications of the Commission’s Members May Be Challenged Only by *Quo Warranto*, Not by Motion to Dismiss on an Unpreserved Objection.**

Judge Keller’s attacks on the residency requirements of certain Commission members and the term of office of another cannot be challenged in this proceeding.

Instead, *quo warranto* is the “exclusive remedy” to challenge the qualifications of these public officeholders. “When a judge is holding office under the color of law and discharging his duties of office, his acts are conclusive as to all parties and cannot be attacked in an appeal, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office. ... An appeal is not the proper procedure to challenge the authority of a judge to hold office and perform his duties. ... The recognized procedure for determining whether an elected judge or other public official has done any act that by law works a forfeiture of his office is through a *quo warranto* proceeding brought in the name of the State of Texas by the Attorney General or the district or county attorney of the proper district or county.” *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 651 (Tex. App.—Dallas 2002, pet. denied). “The principle is of great public importance. Public officers should be free to perform their duties without having their authority questioned incidentally in litigation between other parties. They should not be called on to defend their authority unless a proper legal officer of the State has determined that the question raised is serious and deserves judicial consideration....” *Lewis v. Drake*, 641 S.W.2d 392, 395 (Tex. App.—Dallas 1982, no writ).

The only case relied on by Judge Keller – *In re Union Pac. Resources Co.*, 969 S.W.2d 427 (Tex. 1998) – deals with the constitutional disqualification of a judge to sit *in a particular case* because of a conflict of interest, not the judge’s general qualifications to hold office. Under the Texas Constitution, “No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by

affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.” TEX. CONST. art. V, § 11. Any order in a case entered by a judge disqualified from that case under this conflict-of-interest constitutional provision is void and can be attacked by the litigant. *In re Union Pac. Resources Co.*, 969 S.W.2d at 428.

But the rule regarding a judge’s disqualification to sit in a particular case because she or he has a constitutional conflict of interest does not extend to the judge’s right to hold office. *Rosell*, 89 S.W.3d at 651 (discussing and contrasting *In re Union Pac. Resources Co.*). Instead, a party challenging a judge’s qualifications to hold office “must bring a direct action through a *quo warranto* proceeding.” *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 854 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, writ ref’d n.r.e.). Further, a judge’s failure to meet the qualifications in office is not grounds for attacking his or her prior orders: “While he is in possession of the office under color of title, discharging its ordinary functions, a judge’s official acts are conclusive as to all persons interested and cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office.” *Ex parte Lefors*, 171 Tex. Crim. 229, 347 S.W.2d 254, 254-55 (1961). Similarly, *quo warranto* is the proper vehicle for challenging whether a former judge has improperly continued to serve in office after expiration of his or her assignment. *Wilson v. State*, 977 S.W.2d 379, 380-81 (Tex. Crim. App. 1998).

## **2. Each Commissioner Is Qualified.**

Judge Keller argues that the Commission was unconstitutionally composed

because (i) more than one commissioner lives in the same appellate court district, and (ii) another commissioner's term on the Commission had expired. Judge Keller's arguments misread the governing constitutional requirements.

The Commission's members are drawn from eight classes of membership: class (i) to (viii). TEX. CONST. art. V, § 1-a(2). For five of those eight classes, the Constitution specifies that none of the members in *those* five classes may reside in the same court of appeals' district:

provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this state, or who shall have ceased to retain the qualifications above specified for that person's respective class of membership, and provided that a Commissioner of *class (i), (ii), (iii), (vii), or (viii)* may not reside or hold a judgeship in the same court of appeals district as another member of the Commission.

TEX. CONST. art. V, § 1-a(2) (emphasis added). Classes (iv)-(vi) are not included within the above limitation on residency. Members of those three classes are therefore not barred from "resid[ing] ... in the same court of appeals district as another member."

Judge Keller attempts to rewrite this provision to state that *no member* may be from the same court of appeals district as any other. Building on that mistaken premise, Judge Keller argues that the following three Commission members live in the Austin Court of Appeals' district, and therefore violate Section 1-a(2)'s restriction:

Member	Class
Hon. Jan Patterson	(i) Court of Appeals Justice
Comr. Patti H. Johnson	(iv) Public member
Comr. Karry K. Matson	(iv) Public member

Commissioners Johnson and Matson are not in “class (i), (ii), (iii), (vii), or (viii).” Those two public members of the Commission are therefore not prevented from residing in the same district as Justice Patterson.

Judge Keller also complains that the Hon. Michael R. Fields and Commissioner Tom Cunningham reside in the same district because they are both from Houston. Houston, of course, has *two* court of appeals districts, composed of the same counties. TEX. GOV’T CODE § 22.201(b) & (o). Nothing in the Constitution prevents appointment of a commissioner from each of the two overlapping Houston court of appeals’ districts. Judge Keller cites no authority to suggest otherwise.

Finally, Judge Keller complains that Judge Field’s regular term on the Commission ended November 19, 2009. But under the “holdover” provision of the Texas Constitution, “[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.” TEX. CONST. art. XVI, § 17. The constitutional authorization for officers to “hold over after the expiration of their

terms until their successors are elected or appointed” prevents the public inconvenience that would result from vacancies in office. TEX. CONST. art. XVI, § 17 “Interpretative Commentary.” Judge Fields is still the sitting judge of Harris County Criminal Court at Law No. 14 and thus has not “ceased to retain the qualifications above specified for his respective class of membership” under Section 1-a(2)’s class (vii). At the time of the Commission’s July 16, 2010 Order, no successor had been appointed to take his place on the Commission. At the time of the Commission’s decision, he therefore continued to lawfully perform his duties as a Commissioner, regardless of whether his term had expired.

**3. With Full Knowledge of the Facts, Judge Keller Chose Not to Challenge Any Commissioner Prior to Its Final Hearing, and Thus Waived Any Challenge.**

Judge Keller squarely addressed her issues concerning three commissioners informally to Bob Warnecke<sup>22</sup> on June 13, 2010. (Movant’s Appendix T.) On June 14, 2010, Mr. Warnecke promptly replied.<sup>23</sup> He furnished Judge Keller’s counsel two exchanges of correspondence between the Commission and the Attorney General (from 2004 and 2006), in which the Attorney General contradicted the viewpoint then, and now, asserted by Judge Keller. Judge Keller’s June 13, 2010 letter to Mr. Warnecke said that she was asking for Mr. Warnecke’s “reaction to this by [June 15] if possible so we may decide whether to file a formal motion.” (Movant’s Appendix T, at pages 1-2.) After

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<sup>22</sup> Mr. Warnecke, rather than the Executive Director, served as advisor to the Commission in connection with this proceeding. This was to assure a separation of functions between the Executive Director, who served as the Examiner in this proceeding, and the Commissioners, who served as adjudicators in this proceeding. See pages 13-14 above.

<sup>23</sup> Appendix 4.

receiving Mr. Warnecke's next-day reply, and the two Attorney General letters inconsistent with Judge Keller's viewpoint, she chose not to file any motion challenging any of the commissioners.

Having received an unwelcome order from the Commission, Judge Keller subsequently complains that three commissioners were "disqualified from serving." (Motion, at pages 9-10, 20.) Even if the alleged disqualification ordinarily were available as a challenge by a litigant rather than by a *quo warranto* proceeding, Judge Keller waived any right to assert any such challenge by failing to make it timely before the Commission's decision in this case. *See, e.g., Wilson v. State, supra*, 977 S.W.2d at 381 (Keller, J, concurring) (authority of the judge may not be challenged for the first time on appeal).

### **III. The Commission's Order Is Not "Void."**

Even if any of Judge Keller's attacks were accurate (and they are not), the Order would not be void. "[T]he mere fact that an action by a court . . . is contrary to a statute, constitutional provision or rule of civil or appellate procedure makes it [not void but] 'voidable' or erroneous." *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (quoting *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990)). "A judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Mapco, Inc.*, 795 S.W.2d at 703.<sup>24</sup>

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<sup>24</sup> The Texas Supreme Court has given two examples of what is meant by a court lacking jurisdictional power to render judgment: where a county court renders a divorce decree and where a county court enters

Even if all of the errors alleged by Judge Keller are true (and none of them are), the Commission’s order in this case cannot be “void.” The Commission has jurisdiction over Judge Keller; jurisdiction over allegations of judicial misconduct; subject matter jurisdiction to impose discipline on a judge; and the capacity to act as a Commission. Although constitutional disqualification of an individual trial judge for a conflict of interest may render his or her orders void, *In re Union Pac. Resources Co.*, 969 S.W.2d at 428, that rule does not extend to multi-member bodies such as the Commission, where disqualification of some members will not render the court’s judgment “void.” *Tesco Am., Inc. v. Strong Indus.*, 221 S.W.3d 550, 555-57 (Tex. 2006).<sup>25</sup>

#### **IV. Judge Keller Is Now Entitled To Statutory *De Novo* Review.**

##### **A. The nature of review is by trial *de novo*.**

Judge Keller initiated this review, as is her right. She urges that this review should not be *de novo*. (Motion, at page 3 & n.3, and at page 7.) In her briefing, she makes a fundamental mistake by confusing two definitions: (i) “sanction” as defined by the Supreme Court for purposes of the Rules for Removal or Retirement of Judges, and (ii) “sanction” as defined by the Legislature for purposes of Chapter 34 of the Texas Government Code. (See Motion at page 8 n.5, in which Judge Keller erroneously urges

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a judgment regarding title to land. *McEwen v. Harrison*, 345 S.W.2d 709, 710 (Tex. 1961). In each of these examples, the county court lacked jurisdiction over these classes of cases. See TEX. GOV’T CODE ANN. § 26.043 (Vernon 2004).

<sup>25</sup> As discussed earlier, moreover, even if Judge Keller’s challenges to the qualifications of certain Commissioners to hold office had merit, the actions taken by those Commissioner would still be effective. See page 20, *supra*; *Ex parte Lefors*, 171 Tex. Crim. 229, 347 S.W.2d 254, 254-55 (1961) (“While he is in possession of the office under color of title, discharging its ordinary functions, a judge’s official acts are conclusive as to all persons interested and cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office.”).

this Court to apply the definition from the Rules in the Court's construction of the statute.) When the proper statutory definition is considered, it is clear that the Legislature's choice for statutory review of a public warning is trial *de novo*.

The statutory definition of "sanction" does not limit itself to outcomes that are issued prior to the institution of formal proceedings. Instead, Section 33.001(a)(10) defines "sanction" as "an order issued by the commission under Section 1-a(8), Article V, Texas Constitution, providing for a private or public admonition, warning or reprimand or requiring that a person obtain additional training or education." The Commission's July 16, 2010 Order of Public Warning is a "sanction" under the statutory definition.

When this Court considers Judge Keller's request that it determine whether its review of the Commission's Order Of Public Warning is reviewed by trial *de novo* or otherwise, the construction of Section 33.034(e)(2) of the statute should consider the definition in Section 33.001(a)(10). The Commission ordered a "public warning." A public warning is a "sanction" under the statutory definition. Because it is a "sanction" under the statutory terminology, review is clearly *de novo* pursuant to Section 33.034(e)(2).

In the context of the Rules, the term "sanction" is used to apply only to outcomes that are "issued prior to the institution of formal proceedings." RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 1(e). It encompasses a "warning" issued *prior* to formal proceedings. The Rules use the term consistently with that meaning, and provide for an

appellate process for review of a “sanction” as so defined.<sup>26</sup> Rule 9(a). Thus, Rule 9 (adopted in 1992) is available when review is sought of decisions issued prior to institution of formal proceedings. For that reason, the instant review is *not* governed by Rule 9, but by the broader statutory provisions for review.

**B. Abundant due process is afforded in this statutory *de novo* review.**

As is her statutory right, Judge Keller has chosen review of the Commission’s decision. The Legislature has afforded her a procedure that allows her abundant due process safeguards. She is assured of the independence of a panel comprised of three independent justices from the courts of appeals, chosen by lot. TEX. GOV’T CODE, § 33.034(c). She is given advance notice of allegations against her through “a charging document.” *Id.*, § 33.034(d). She is given the opportunity of “trial *de novo* as that term is used in the appeal of cases from justice to county court.” *Id.*, § 33.034(e)(2). Except as otherwise provided in the statute, she is assured the safeguards available “by the rules of law, evidence, and procedure that apply to the trial of civil actions generally.” *Id.*, § 33.034(f). She is assured a timely hearing and a timely decision. *Id.*, § 33.034(h). Even if, hypothetically, Judge Keller had suffered any inadequacies of due process in the proceedings that led to the Commission’s decision, she has full protection under the statute by the proceedings before this Special Court of Review.

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<sup>26</sup> By contrast, when the Rules refer to a “warning” *after* institution of formal proceedings, the Rules do not use the defined term “sanction.” Instead, when referring to the Commission’s issuing a warning as an outcome after formal proceedings, as here, the Rules expressly use the word “warning.” *See* Rule 10(m). The Supreme Court did not use the word “sanction” in Rule 10(m) because “sanction” under the Rules refers to a pre-formal-proceeding outcome; and thus the Supreme Court used the words “censure, reprimand, warning, or admonition” to refer to post-formal-proceeding outcomes in Rule 10(m).

**CONCLUSION AND PRAYER**

The Examiner respectfully prays that this Special Court of Review deny Judge Keller's motion to dismiss and that this proceeding be heard under the statutory *de novo* standard. The Examiner further prays for such other and further relief to which the Examiner may be justly entitled.

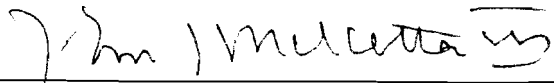
Respectfully submitted,

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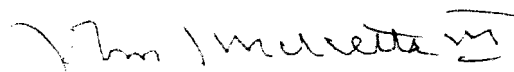
By:   
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John J. McKetta, III

**CERTIFICATE OF SERVICE**

On September 14, 2010, a true and correct copy of the foregoing response and a copy of the associated Appendix were served via electronic mail and by U.S. certified mail, return-receipt requested, on the following:

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