

# No. 10-0566

IN THE SUPREME COURT OF TEXAS

***IN RE THE HONORABLE SHARON KELLER,***  
*Relator*

Original Proceeding from  
*Inquiry Concerning Hon. Sharon Keller, Judge No. 96,*  
Before the State Commission on Judicial Conduct

## **RESPONSE TO EMERGENCY MOTION FOR TEMPORARY RELIEF**

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August 6, 2010

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Examiner, appointed by the State Commission on Judicial Conduct, files this response to Relator's Emergency Motion for Temporary Relief, and would respectfully show the Court the following:

**I. INTRODUCTION AND OVERVIEW**

Judge Keller seeks to stay the deadlines for her appeal from the Commission's Order of Public Warning issued on July 16, 2010. She asserts that the Commission's order is void and that no appellate remedy is available. Judge Keller complains that she "is without statutory guidance" as to which court might provide her appellate relief, that it is "possible" that she has no right of appeal, and that a trial *de novo* "may" not be available to her. She makes these assertions without even attempting to avail herself of the remedy outlined in her own motion. Judge Keller's emergency motion — in part, a request for legal advice on which remedy she should pursue — should be denied.

A response to the petition for mandamus has been filed contemporaneously with this pleading. As explained in that response, the Commission's order is within its constitutional authority. However, even if the Commission's order were unconstitutional (which it is not), the Texas Government Code explicitly provides that Judge Keller has a right to a *de novo* trial by a special court of review, which would be able to redress any alleged constitutional errors made by the Commission. Therefore Judge Keller has an adequate remedy at law and her motion for temporary relief (as well as her petition for mandamus) should be denied. Judge Keller faces no irreparable harm by pursuing her

statutory appellate remedy. In addition, Judge Keller’s motion for temporary relief solicits this Court for advice on how she should proceed should she choose to request an appeal. This is an inappropriate request for an advisory opinion. It is not a proper basis to stay a statutory appellate deadline.

## **II. BACKGROUND**

Pursuant to Tex. R. App. P. 9.7, the Examiner adopts by reference the “Statement of Facts” section of the “Response to Petition for Mandamus,” filed concurrently with this response. As set forth in greater detail in the Statement of Facts, the Commission found that Judge Keller knew but consciously disregarded her Court’s well-settled Execution-Day Procedures in connection with the handling of a matter on September 25, 2007. Judge Keller knew her actions involved a life-or-death decision — the stay of an inmate’s execution scheduled for later that evening — as to which the U.S. Supreme Court that morning had granted a stay in a similar case. Instead of referring the communication to the assigned judge, who had remained after hours for the very purpose of addressing any communications from counsel for the condemned inmate, Judge Keller chose to disregard the Execution-Day Procedures, and to address and dispose of the communication herself. Judge Keller – the public face of criminal justice in Texas – not only knowingly disregarded the important Execution-Day Procedures, but she also testified that, presented with the same circumstances again, she would do nothing differently today.

The Commission issued its findings of fact describing Judge Keller’s conduct, which are set out at pages 2-16 of the “Commission’s Findings, Conclusions and Order of

Public Warning.” The Commission determined that Judge Keller’s conduct, as detailed in that Order, violated Article 5, § 1-a(6)A of the Texas Constitution and Canon 3B(8) of the Texas Code of Judicial Conduct, and issued her a public warning.

Judge Keller has available, if she wishes, a statutory right of review. As discussed below, she is entitled to appointment of a special court of review, which she may exercise by taking the simple step of filing a written request.

### **III. ARGUMENT**

#### **A. Judge Keller Is Not Entitled to Temporary Relief Because She Has An Adequate Remedy At Law For Review**

Texas Government Code §33.034 explicitly provides that a judge who receives “from the commission any type of sanction ... is entitled to a review of the commission’s decision.” TEX. GOV’T CODE §33.034(a). A timely appeal is initiated by the judge’s filing with the Chief Justice of the Supreme Court a written request for appointment of a special court of review not later than the 30<sup>th</sup> day after the date on which the commission issues its decision. TEX. GOV’T CODE §33.034(b). No later than the 10<sup>th</sup> day after the chief justice receives the written request, the Chief Justice selects by lot the court of review, which is composed of three justices of Texas courts of appeals. TEX. GOV’T CODE §33.034(c). Within 15 days after the appointment of the court of review, the commission must file with the clerk a charging document that includes (i) a copy of the sanction order and (ii) any additional charges to be considered by the court of review. TEX. GOV’T CODE §33.034(d).

Each of the foregoing procedures and deadlines is identical whether the Commission had issued a censure or a public warning.

Because the Commission issued a public warning, the review by the special court of review “is by trial *de novo* as that term is used in the appeal of cases from justice to county court.” TEX. GOV’T CODE § 33.034(e)(2). If Judge Keller believes that some other nature of review is appropriate, despite the clear language of the statute, she can address that contention to the special court of review.

These provisions refute Judge Keller’s argument that she does not have an adequate right of appeal. She has an efficient appeal. Moreover, she presents no evidence that the *de novo* appeal will work any irreparable harm on her. She has not stated any reason why she could not defend efficiently and expeditiously by offering all or any portion of the prior evidentiary record, along with any additional testimony or exhibits that she may wish to present.

Judge Keller argues that she does not have an adequate remedy at law based on the incorrect premise that a *de novo* trial under Section 33.034 is “neither an appeal nor an adequate remedy.” (Motion at 7; *see also id.* at 6 (“a new trial is not an appeal”)) However, in *Grimm v. Garner*, 589 S.W.2d 955 (Tex. 1979), this Court specifically held that a trial *de novo* on appeal from justice court to county court is an adequate remedy precluding mandamus relief. *Id.* at 957. That holding applies directly to Judge Keller’s right of appeal, because the statute states that the special court’s review “of a sanction is by trial *de novo* as that term is used in the appeal of cases from justice to county court.” TEX. GOV’T CODE § 33.034(e). As with the relator in *Grimm*, Judge Keller has an

adequate remedy at law through a trial *de novo*.<sup>1</sup> Her motion for temporary relief (and petition for mandamus) should therefore be denied.

**B. Judge Keller Has Shown No Irreparable Harm that Would Be Caused by Denial of Her Motion**

Because an efficient remedy is available, Judge Keller has not shown any irreparable harm. No litigant could obtain an indefinite stay for filing a notice of appeal in the trial court, on the grounds that she was uncertain what standard of review the court of appeals would apply or what ruling the court of appeals would make. Judge Keller's request to stay the deadline for her to request review of the Commission's order is no different and should be denied.

**C. Judge Keller Is Not Entitled to Temporary Relief to Seek An Advisory Opinion**

Judge Keller suggests that the statutory deadline to request an appeal under Section 33.034 should be stayed because (she speculates) she might be denied review under section 33.034. Judge Keller asks this Court to assume that she has filed an appeal under Section 33.034 and has been denied review, and based on this hypothetical, to give "guidance" (Motion at 2) as to what she should do to seek relief from the hypothetical denial.

This request is improper because courts do not have jurisdiction to answer questions about what might happen in the future. As this Court has recognized, "the

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<sup>1</sup> Judge Keller speculates that perhaps she will be denied any review because, she says, a "sanction" under Section 33.034(a) might refer to the definition of "sanction" in Rule 1(e) of the Procedural Rules for the Removal and Retirement of Judges. (Motion at 6) That would be a most unusual construction. Any reasonable construction of Section 33.034 would refer to the definition of "sanction" in Section 33.001(10). Under the statutory definition, Judge Keller clearly received a sanction – a public warning – which is reviewable under Section 33.034.

judicial power does not embrace the giving of advisory opinions.” *Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990); *see also Centennial Ins. Co. v. Commercial Union Ins. Companies*, 803 S.W.2d 479, 481-82 (Tex. App.—Houston [14 Dist.] 1991, no pet.) (“Trial courts and attorneys should be mindful of the fact that this court has no jurisdiction to render an advisory opinion or determine questions not essential to the decision of an actual controversy, regardless of the fact that such questions may require adjudication in the future. We can well appreciate that the parties to this appeal would prefer a definite answer by this court to the interesting questions of law posed by this point of error, but the giving of legal advice is the function of the legal profession, not the courts.” (citations omitted)).

Similarly, Judge Keller suggests that this Court should stay the statutory deadline to appeal under Section 33.034 because there is no subsequent right of appeal after a new trial under Section 33.034. In other words, before she has even made an appeal under Section 33.034, Judge Keller is seeking temporary relief based on a question about what relief she should seek *after* the court of review has made a decision, and *if* Judge Keller desired to challenge that decision. For this question to become ripe, it would require an appeal to be filed under Section 33.034, *and* a decision to be made by the court of review, *and* Judge Keller would have to be dissatisfied with that result. None of these contingencies has yet occurred. Judge Keller’s motion for temporary relief should be denied.

**IV. CONCLUSION**

The Examiner respectfully requests that Judge Keller's Emergency Motion for Temporary Relief be denied.

Respectfully submitted,

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By: /s/ John J. McKetta, III  
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**CERTIFICATE OF SERVICE**

On August 6, 2010, a true and correct copy of the foregoing response was served by certified mail, return-receipt delivery, on counsel of record at the following addresses:

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