IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:	)	
ANITA KELLY	)	**Court of the Judiciary**
Circuit Judge,	)	**Case No.: 50**
15th Judicial Circuit	)	

BRIEF OF JUDGE ANITA KELLY IN SUPPORT OF MOTION TO DISMISS[1]

Judge Anita Kelly respectfully submits the following brief in support of her motion to dismiss the complaint in this action.

ARGUMENTS IN SUPPORT OF DISMISSAL

A. The lack of a verified complaint supporting the charges requires dismissal.

There is ***no*** substantive allegation in the Court of the Judiciary (COJ) complaint filed by the Judicial Inquiry Commission (JIC) herein – i.e., *no* allegation of an alleged unreasonable and unjustified delay in acting, or of any other conduct said to violate any Canon of Judicial Ethics – that is supported by a verified complaint that had been filed with JIC. As to any substantive allegation ***not*** supported by a verified complaint filed with JIC – here, the entire COJ complaint – dismissal is required, because of a lack of jurisdiction and because the lack of a verified complaint violates a mandatory Rule of Procedure of JIC.

[1] Judge Kelly does not waive, but instead expressly preserves, any and all grounds in her motion to dismiss that are not specifically addressed in this brief. Judge Kelly specifically does not waive, but instead expressly preserves, her argument that the complaint against her constitutes selective prosecution in violation of the United States Constitution. Judge Kelly has a good faith basis for moving to dismiss on that ground, but believes that argument cannot be decided on the pleadings, and some discovery (specifically including but not necessarily limited to non-party subpoenas duces tecum) will be required to flesh out its factual basis. Judge Kelly accordingly reserves, or alternatively seeks leave to postpone, assertion of that motion and briefing until after conducting limited discovery in support of such a motion.

1. Jurisdictional defect as basis for dismissal

Both the JIC and the COJ "are creations of the Alabama Constitution." *Steensland v. Ala. Jud. Inquiry Comm'n*, 87 So.3d 535, 540 (Ala. 2012). The jurisdiction of each is limited by the Alabama Constitution. JIC has "authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state," *id*. (quotation omitted); Amendment 581, §6.17(b), Const. of Ala. (1901), and to file a complaint with the COJ if certain conditions are met. *E.g.,* Amendment 581, §6.17(b), Const. of Ala. (1901); *see, e.g., Moore v. Ala. Jud. Inquiry Comm'n*, no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussion of scope of review). As "a constitutionally created court with limited jurisdiction," COJ "can decide only cases involving charges brought against judges by" JIC. *Moore,* no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussion of scope of review).

As noted, pursuant to Rule 6(a)[2] of the Rules of Procedure of JIC, JIC investigates complaints. JIC may initiate an investigation only upon the filing of a verified complaint, either by a member of the public, a member of JIC itself, or a member of JIC's staff. Rule 6(a). Stated differently, an investigation must meet three (3) requirements: (1) a complaint, (2) which has been filed by a member of the public, JIC, or JIC's staff, and 3) the complaint must be verified. *Id.*

A "veritable laundry list of mandatory, investigation-related duties cast upon the JIC by JIC Rule 6 follows upon, and results from, the filing of a verified complaint ..." *Steensland,* 87 So.3d at 541. "[I]t is the filing of a complaint with the JIC that invokes the JIC's jurisdiction." *Id.* at 541-42. The lack of a verified complaint before JIC as to certain allegations charged in the

[2] Rule 6(a) of the Rules of Procedure of JIC provides: "Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff."

COJ complaint – even when a verified complaint previously had been filed with JIC as to other allegations -- impacts JIC's jurisdiction to investigate the allegations, and by extension the jurisdiction or authority of the COJ to hear those allegations once charged in a formal complaint before the COJ. *See, e.g., Moore*, no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussion of Count VI).

Jurisdiction is not a unitary concept but is comprised of various parts. Jurisdiction to hear a cause is conferred and defined by the Alabama Constitution and the Code of Alabama. It has long been established that not only must a court or agency have jurisdiction over the subject matter of the dispute and the presence in court of the persons whose rights are being affected, in order to hear a dispute. *E.g., State v. Thomas*, 550 So.2d 1067, 1070 (Ala. 1989); *City of Dothan v. Holloway*, 501 So.2d 1136, 1137 (Ala. 1986). In addition, "even if a court has jurisdiction of the person and of the [subject matter], an accusation in the manner prescribed by law is a prerequisite to the court's power to exercise its jurisdiction." *Thomas*, 550 So.2d at 1070 (the failure first to file delinquency petition charging child with crime and to conduct preliminary inquiry, as required by Code, deprived court of jurisdiction to hold contempt proceeding arising out of charge); *accord, e.g., Ex parte Looney*, 797 So.2d 427, 429 (Ala. 2001) (guilty plea based on unsworn information, where Code required that information be sworn, failed to invoke trial court's jurisdiction and was void); *see, e.g., Ex parte W.T.K.*, 586 So.2d 850, 853 (Ala. 1991) (juvenile delinquency complaint need not be verified, but juvenile delinquency petition must be; juvenile court obtained jurisdiction only when verified petition was filed as required by the Code).

In *Looney* a criminal defendant entered a guilty plea to a felony based on an information that the district attorney had not signed under oath. 797 So.2d at 428. But, the applicable Code

section (Code §15-15-20.1(b)) required that the state make the information under oath; accordingly, the information on which Looney pleaded guilty did "not comply with the mandatory requirements of the statute" and thus was defective. *Id.* at 429. Rejecting the State's contention that Looney had waived the defect by not objecting before the trial court, the Supreme Court, in a 7-1 decision, held that "a formal accusation by indictment, or information, or complaint, made in the manner prescribed by law and supported by oath is a prerequisite to the trial court's jurisdiction and cannot be waived." *Id.* (quotations omitted). More specifically, the *Looney* Court further held that the defect of an unsworn accusation (where statute required accusation be under oath) could not be waived, *id.*, and that the lack of a sworn information deprived the trial court of jurisdiction to render judgment, making the acceptance of the plea "null and void and of no force and effect." *Id.* (quotation omitted).[3]

The holdings and analysis in *Looney* (unsworn information) and *Thomas* (failure first to file delinquency petition and conduct sworn inquiry) are not novel, but instead are consistent with numerous other recent or relatively recent Alabama cases finding that various failures to comply with requirements of the Code or procedural rules in the initiation of an action were non-waivable jurisdictional defects that prevented jurisdiction from attaching, and rendered any judgment entered void. For example, in *Kyle v. Kyle*, 128 So.3d 766 (Ala.Civ.App. 2013), the

[3] Even if lack of verification of a complaint were deemed a waivable defect, and thus "regarded as pertaining to a trial court's obtaining personal jurisdiction" of the accused, *City of Dothan*, 501 So.2d at 1139; *but see Looney*, 797 So.2d at 429 (finding lack of oath is non-waivable defect that leaves trial court without jurisdiction to render judgment; citing and following dissent in *City of Dothan*); *cf. Patton v. State*, 964 So.2d 1247, 1249 (Ala.Crim.App. 2007) (finding *Looney* implicitly overruled); *but cf. id.* at 1251-52 (Welch, J., concurring in result) (arguing why *Looney* still viable and not implicitly overruled), Judge Kelly here has timely raised her objection to the lack of verification, both during JIC's investigation and obviously now before this Court. *See* Letter to Hon. Billy C. Bedsole, Esq. from Mark Englehart dated January 5, 2017, at 3 and n. 2 (Ex. A to this Brief, to be filed under seal); Letter to Hon. Billy C. Bedsole, Esq. from Mark Englehart dated May 18, 2017, at 2 and n. 2 (previously submitted as Ex. 1 to Judge Kelly's answer, filed Sept. 15, 2017).

Court vacated a contempt judgment entered in a domestic relations case. The Court held that a motion for civil contempt, even filed regarding an existing action, was a new cause of action, requiring initiation of an independent action (specifically, a new point number under the existing domestic relations case), and thus payment of a new filing fee. *Id.* at 772-73. Because "the payment of a filing fee is a jurisdictional act," *id.* at 773, the lack of payment of any such fee deprived the trial court of subject matter jurisdiction to hear the emergency contempt motion, *id.*, rendering the trial court's contempt order void. *Id.*[4]

As noted above, "[p]roceedings may be instituted by [JIC] *only upon* a verified complaint …" Rule 6(A), Rules of Procedure of the Judicial Inquiry Commission (emphasis added). Allegations not "aris[ing] directly from the investigation" of the initial verified complaint, *Moore*, no. 1160002, slip op. at ___ (discussion of Count VI), constitute a new complaint. Those new allegations must be verified for JIC to have jurisdiction to investigate and for COJ to have jurisdiction over formal charges brought by JIC based on those allegations. Absence of the required verification -- i.e., failure to make a complaint in the manner prescribed by law, which

[4] *See also, e.g., L.H. v. L.S., Sr.*, 140 So.3d 946, 949-50 (Ala.Civ.App. 2013) (petition to modify custody in juvenile court was new action; failure of petitioner to pay new filing fee or to properly serve other party were both jurisdictional defects depriving trial court of jurisdiction, and rendering judgment void); *Burleson v. Burleson*, 19 So.3d 233, 238 n. 3 (Ala.Civ.App. 2013) (motion to modify final divorce judgment was separate action requiring payment of separate filing fee; because petitioner didn't pay filing fee, motion "did not properly invoke the jurisdiction of the trial court"); *M.M. v. B.L. and M.L.*, 926 So.2d 1038, 1042 (Ala.Civ.App. 2005) (petition to terminate parental rights is independent action requiring payment of new filing fee and new service; lack of strict compliance with Ala.R.Civ.P 4 in serving father deprived juvenile court of personal jurisdiction over him, rendering judgment terminating his rights void); *Estrada v. Redford*, 855 So.2d 551, 554 (Ala.Civ.App. 2003) (petition to modify child support is separate action, requiring a proper filing, payment of a filing fee, and service on the other party; because petitioner failed to pay the filing fee or serve other party, her request to modify child support "was not properly before the trial court"); *Farmer v. Farmer*, 842 So.2d 679, 680-81 (Ala.Civ.App. 2002) (petition to modify child custody is separate action, requiring a proper filing, payment of a filing fee, and service on the other party; failure to pay filing fee and to properly serve opposing party both are defects depriving trial court of jurisdiction, rendering trial court's judgment void).

here includes verification – prevents jurisdiction, whether deemed an issue of subject matter or personal jurisdiction, from attaching for JIC to investigate, and derivatively for COJ to hear charges arising from, that complaint. *E.g., Looney*, 797 So.2d at 429; *City of Dothan*, 501 So.2d at 1137 (personal jurisdiction); *id.* at 1143, 1146 (subject matter jurisdiction; "power to adjudge" must be "properly invoked" in the manner prescribed by law) (Beatty, J., dissenting in part and concurring in the result) (analysis adopted by *Thomas* and *Looney*).

Proof of the absence of any verified complaint supporting any of the substantive allegations of JIC's complaint in this Court, requires a review of all "complaints" – in whatever form, whether verified or unverified – that JIC served on or otherwise referenced to Judge Kelly during this investigation.

These "complaints" (i.e., documents containing any allegations critical of particular judicial acts or omissions on Judge Kelly's part) consist of the following:

1) May 9, 2016: By letter from JIC Chairman Bedsole to Judge Kelly dated May 9, 2016, JIC notified Judge Kelly of an individual complaint filed by an individual litigant over a child custody dispute in a domestic relations case in Judge Kelly's court. This complaint was sworn to by the complainant. Letter to Judge Kelly from Billy C. Bedsole, Chairman of JIC, dated May 9, 2016 (Ex. B to this brief, to be filed under seal). Judge Kelly responded to this complaint by letter to JIC Chairman Bedsole dated July 18, 2016. (Ex. C to this brief, to be filed under seal).

2) September 12, 2016: This letter to Judge Kelly from Chairman Bedsole informed her that the Commission intended to continue its investigation of the previously-specified allegations in the individual litigant's complaint. But, citing a particular ruling from the Alabama Supreme

Court[5], that letter also advised Judge Kelly that the Commission "is expanding its investigation to determine whether this is an isolated case or part of a pattern and practice of delays in hearings and rulings and of failure to rule." Notwithstanding such reference to this expansion of the investigation, however, the September 12th letter did not include any additional materials or even any explanation as to what constituted this possible "pattern and practice of delays." This letter was not sworn. (Ex. D to this brief, to be filed under seal).

3) December 5, 2016: The Commission's update letter to Judge Kelly dated December 5, 2016, contained identical language regarding the continuance of its investigation as that quoted in the preceding paragraph from its letter to her dated October 24th letter. But, accompanying the December 5th letter was a letter to the Commission dated November 30, 2016 from the general counsel of the Alabama Department of Human Resources, Sharon Ficquette. That November 30th letter from DHR consisted of a fourteen (14) page memorandum listing complaints against Judge Kelly along with 115 pages of supporting documents, all of which were then forwarded by the Commission to Judge Kelly presumably pursuant to Rule 6(d). Identifying events from many juvenile matters spanning approximately five (5) years[6], DHR grouped its complaints into seven (7) broad, multifarious categories of alleged failures or refusals to act, delays in acting, or improper acts on the part of Judge Kelly, all of them involving juvenile court dependency cases.

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[5] The specific citation in the September 12th letter is as follows: "*See, e.g., Ex parte Montgomery Cnty. Dep't Human Res. v. N.B.*, __ So.3d __, 2015 WL 7628662 (Nov. 25, 2015)." This opinion – actually a dissent by only 2 Justices from the Court's denial of DHR's petition for certiorari review – has since been reported at 196 So.3d 1217 (Ala. 2015).

[6] DHR counsel's unsworn November 30, 2016 letter raised complaints regarding over 20 "matters" (some of which included more than 1 child in a given family), involving more than 35 children and over 50 case numbers (i.e., given the rules concerning what constitutes an independent action in juvenile court, such as a petition for termination of parental arising out of an existing dependency action, some of the children had more than 1 case).

This memorandum was not verified.[7] (Ex. E to this brief, Bates nos. 000001 through 000129, to be filed under seal).

4) January 9, 2017: By e-mail from Mrs. Jenny Garrett, JIC Executive Director, to Judge Kelly's counsel Mark Englehart dated January 9, 2017, the Commission identified one additional opinion from the Court of Civil Appeals listing six (6) cases involving delays or failure by Judge Kelly to issue rulings. The e-mail also forwarded a) a memorandum sent to JIC by DHR general counsel Ficquette dated December 7, 2016, with supporting materials, with the subject line "Additional Submission of Documents Regarding Judge Kelly"; and b) another memorandum sent to JIC by DHR general counsel Ficquette dated January 5, 2017, subject line "Additional Information Regarding Judge Kelly," containing a recitation of allegations regarding an unidentified matter (i.e., no parties or case number provided) in Judge Kelly's court. The supporting materials from DHR general counsel Ficquette included a "List of Cases Where Motion to Be Relived [sic] of Reasonable Efforts Were Denied," identifying by the child's initials only (e.g., no juvenile court case numbers) five (5) such matters.[8] Neither of these memoranda was verified. (Ex. F to this brief, consisting of a) the e-mail, b) documents bearing Bates nos. 000130-000178, c) the appellate opinion, and d) the January 5, 2017 memorandum, all to be filed under seal).

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[7] This unverified November 30, 2016 memorandum was a recycled and slightly updated and expanded version of an apparently unsolicited complaint letter to JIC from DHR general counsel Ficquette dated August 1, 2014, which JIC had forwarded to Judge Kelly in the course of an earlier complaint (later closed without further action) but never requested a response. This August 1, 2014 complaint letter to JIC was not verified. (Ex. G to this brief, consisting of documents Bates numbered 001538 through 001573 in the *earlier* complaint, to be filed under seal).

[8] The initials for two (2) of the matters did not appear to match those of any case or matter identified in DHR's November 30, 2016 letter, and there was no way to determine whether the other three matters involving children who do have the same initials as some children identified in the earlier DHR letter were the matters identified previously (as opposed to being additional, new matters to be addressed).

5) January 25, 2017: By letter to JIC Chairman Bedsole dated January 5, 2017, Judge Kelly requested, among other things, clarification of the matters under investigation; and especially the specific matter(s) to be addressed at the Commission meeting at which Judge Kelly was then scheduled to appear. *See* Ex. A to this brief. In partial response to this request that the scope of the investigation be clarified, by letter from Chairman Bedsole to Judge Kelly's counsel dated January 25, 2017, the Commission identified four (4) published opinions, of which "Judge Kelly had to have been well aware," as "strongly suggestive of such a pattern and practice," i.e., a "pattern and practice of delays in hearing and rulings and of failure to rule." One (1) was a dissenting opinion of three Justices of the Alabama Supreme Court, and the other three (3) were opinions of the Court of Civil Appeals (one of them involving the same appeals addressed in the dissenting Supreme Court opinion).

Those four published opinion cases collectively identified another six (6) appellate proceedings taken by DHR in cases assigned to Judge Kelly. Of those ten (10) total appellate proceedings, eight (8) involved particular matters that DHR had listed in its unverified November 30, 2016 "laundry list" (although two (2) of those eight referenced additional appellate proceedings concerning those matters that DHR had not identified). Two of the ten total appellate proceedings – i.e., Civil Appeals case nos. 2150016 and 2150017 – had not been listed by DHR.

In addition to identifying those four published opinions (and 10 matters) "strongly suggestive of such a pattern and practice," Chairman Bedsole's January 25, 2017 letter identified two specific previous formal complaints "about delay and/or failure to rule," both of which JIC had dismissed nearly two (2) years previously. The complaints were made by both parties to the same domestic relations (DR) matter, in which both complained of a delay in issuing orders on

the former wife's petition for modification and the former husband's answer and counterclaim for contempt after the matter had been taken under submission upon final hearing.

The Commission had served Judge Kelly with the former wife's complaint by letter dated November 6, 2014. Upon the Commission's request, which identified the specific allegation in the complaint that the Commission had decided to investigate, Judge Kelly responded to the former wife's complaint by letter to the Commission dated December 4, 2014. After serving the former husband's complaint (of the former husband) on Judge Kelly almost three (3) months later, by letter dated February 27, 2015, the Commission dismissed both complaints (without further response from Judge Kelly) on March 12, 2015. (The letter from JIC dated January 25, 2017 is submitted as Ex. H to this brief, to be filed under seal. The letters from JIC dated November 6, 2014 and February 27, 2015, with the accompanying complaints, and March 12, 2015, dismissing both complaints; and Judge Kelly's December 4, 2014 response to the former wife's complaint, are submitted as composite Ex. I to this brief, to be filed under seal.)

The "complaint" letter (as opposed to a transmittal letter) dated January 25, 2017 was not verified. The two previously-dismissed complaints were sworn to by the former wife and former husband.

6) March 30, 2017: Finally, by letter from Chairman Bedsole to Judge Kelly's counsel Mark Englehart dated March 30, 2017, the Commission forwarded yet another memorandum to JIC from DHR general counsel Ficquette dated March 17, 2017, subject line "Additional Information Regarding Judge Kelly." This complaint memorandum identified two more mandamus petitions DHR had filed a week earlier in cases assigned to Judge Kelly, and included DHR's attached "detailed description of the two cases"/"case bullets" and over 100 pages of materials relating to the mandamus petitions. There was no specific notification in Chairman

Bedsole's March 30th letter that the Commission deemed these matters worthy of further investigation. As with every other complaint memorandum she submitted to JIC, DHR general counsel Ficquette's March 17, 2017 complaint memorandum was not verified. (JIC's March 30, 2017 letter, with the accompanying March 17, 2017 DHR memorandum and supporting materials (Bates nos. 007716 through 007837), are submitted as Ex. J to this brief, to be filed under seal.)

To sum up: The JIC investigation leading to the filing of this COJ complaint was initiated by a verified complaint by an individual litigant in an individual domestic relations, child custody dispute. *See* Rule 6(a); *Steensland*, 87 So.3d at 541-42. Judge Kelly responded to that complaint by letter dated July 18, 2016. The separate complaints filed by the former wife and former husband arising out of a single case – which were both dismissed by JIC by letter dated March 12, 2015, *see* Ex. I, just shy of a full year before JIC received the complaint that initiated this investigation, *see* and which JIC seemingly resurrected in this matter by letter dated January 25, 2017, *see* Ex. H, at 4 – were both verified.

None of DHR's complaint memoranda – including but not limited to the laundry list of complaints dated November 30, 2016 and the memorandum dated March 17, 2017, which together comprise nearly half of the COJ complaint – are sworn under oath. No other member of the public, no member of JIC, and no member of JIC's staff made any verified complaint.

Based on a comparison of a) the parties' names and case numbers in their complaints (DR-2014-000529 for the initial complaint in this matter, and DR-08-900023 for the two previously-dismissed complaints) with b) the COJ complaint, JIC made no claims in the COJ complaint based on the only verified complaints submitted to it. Stated differently, ***all*** claims in the COJ complaint are based on and arose out of ***unsworn*** accusations.

And, nothing in the ***individual*** verified complaint that initiated this matter, or in Judge Kelly's July 2016 response, supports any good faith, plausible basis for JIC "expanding its investigation" into an unspecified possible "***pattern and practice*** of delays in hearings and rulings and of failure to rule" (emphasis added), as first identified to Judge Kelly in JIC's letter dated September 12, 2016.[9] *See* Ex. D.

In other words, an investigation into an unspecified possible "pattern and practice" of delays -- especially one focused (to Judge Kelly's knowledge at all times until JIC's filing of the COJ complaint) exclusively on ***dependency*** cases -- ***cannot*** reasonably be said to have "arise[n] directly from" the individual litigant's verified complaint about a single ***child custody*** dispute that initiated the investigation, *Moore,* no. 1160002 (Ala. April 19, 2017), slip op. at ____ (discussion of Count VI), as to be part of the initial investigation (as opposed to being a new complaint of "pattern and practice" of delays in Judge Kelly's dependency cases that must be separately verified for JIC's jurisdiction to attach). Indeed, to consider the "pattern and practice" investigation into Judge Kelly's dependency cases – and, as revealed for the first time by JIC's filing of the COJ complaint, into delinquency cases, uncontested divorces, and other areas[10] – as

[9] As noted above at n. 4, the sole support given for this expansion into an unspecified "pattern and practice of delays" was a "see" cite to a single Alabama appellate case decided November 25, 2015. That case too mentioned unexplained (to the appellate court) delays on Judge Kelly's part as to only a single matter, a juvenile dependency case involving termination of parental rights. Opening a "pattern and practice" investigation based on a second individual case, decided by the appellate court almost a year earlier, bears close resemblance to a fishing expedition.

[10] More specifically, none of the unsworn memoranda from DHR general counsel Ficquette included any complaints regarding delinquency cases [section II.B / ¶¶ 48-55 of the COJ complaint]; protection from abuse (PFA) cases [section III.D / ¶¶ 111-119 of the COJ complaint]; domestic relations cases, including uncontested divorces [section III.A / ¶¶ 69-75 of the COJ complaint], joint petitions for modifications of divorce decrees [section III.B / ¶¶ 78-80 of the COJ complaint], or child support, custody, alimony, and visitation cases [section III.C / ¶¶ 81-107 of the COJ complaint; or the alleged loss of Department of Youth Services grant funding for the Bridge / juvenile diversion program [section V / ¶¶ 124-130 of the COJ complaint]. Ms. Ficquette did raise in her *ex parte* deposition before JIC the alleged loss of DYS grant funding

"aris[ing] directly from" the investigation of the initial individual case, would stretch the concept of "aris[ing] directly from" beyond any recognizable meaning.

The lack of any verified complaint regarding the allegations that went beyond the complaint served on Judge Kelly by the letter dated May 9, 2016 – i.e., the lack of a complaint made in the manner prescribed by law – prevented the attachment of JIC's jurisdiction to investigate, and thus COJ's jurisdiction to hear, any allegations not so supported, *see, e.g., Steensland*, 87 So.3d at 541-42; and requires the dismissal of all such allegations, i.e., the entire COJ complaint. *E.g., Looney*, 797 So.2d at 429; *City of Dothan*, 501 So.2d at 1137 (personal jurisdiction); *id.* at 1143, 1146 (subject matter jurisdiction) (Beatty, J., dissenting in part and concurring in the result) (analysis adopted by *Thomas* and *Looney*).

2. Violation of JIC Rule 6(A) as basis for dismissal

Alternatively, lack of a sworn complaint supporting the substantive allegations of the complaint JIC filed in the COJ violates a mandatory provision in Rule 6(A). Again, "[p]roceedings may be instituted by [JIC] *only upon* a verified complaint …" Rule 6(A), Rules of Procedure of the Judicial Inquiry Commission (emphasis added). The Rules of Procedure for the JIC were promulgated by the Alabama Supreme Court pursuant to specific constitutional directive. Const. of Ala. (1901), Amendment 328, §6.18(c), Const. of Ala. (1901) (the Supreme Court "shall adopt rules governing the procedure of the commission"); *id*. Amendment 581, §6.18(c) (same). The Rules have the force of law, and JIC is bound by them. *See, e.g., United*

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and Judge Kelly's alleged role in the alleged funding loss, despite not having any personal knowledge regarding the situation.

In addition to being unsupported by any sworn complaint submitted to or by JIC, these allegations also suffer from the fatal defect that Judge Kelly was never given notice any of these were being investigated, i.e., her first notice of any kind that any these areas had been included in JIC's investigation was upon being served with JIC's COJ complaint. The issue of lack of notice as a basis for dismissal is discussed separately below.

States v. Nixon, 418 U.S. 683, 694-95 (1974) (regulation promulgated by Attorney General has force of law, and Attorney General bound by it); *Nelson v. Megginson*, 165 So.3d 567, 572-74 (Ala. 2014) (school board bound by policies it adopted); *Belcher v. Jefferson County Board of Education*, 474 So.2d 1063, 1067-68 (Ala. 1985) (same).[11]

Verification is not merely a formal requirement, but instead is a substantive protection to the accused. In the JIC context, it ensures the complaint is initiated by a person having personal, first-hand knowledge of information reasonably believed to support a violation of a Canon of Judicial Ethics. The oath is a safeguard against unfounded, false, or malicious complaints, or complaints based not on personal knowledge but instead on hearsay, rumors, or speculation, in a context where sanctions if a violation is found range up to and including removal from office. Const. of Ala. (1901), Amendment 581, §6.18(a). The verification requirement represents a determination by the Supreme Court that "the public welfare is best promoted by saving the individual [judge] from … prosecution unless the accusation rests on sworn testimony…" City of Dothan, 501 So.2d at 1145 (Beatty, J., dissenting) (quoting *Pease v. State*, 129 N.E.2d 337, 339 (Ind.App. 1921)).

Verification of a complaint is mandatory. *See* Rule 6(A). Unlike the laundry list of mandatory investigative duties that follow on and result from the filing of a verified complaint, *Steensland*, 87 So.3d at 541, the verification is a mandatory condition precedent to the investigation's initiation itself. *See, e.g., City of Anniston v. Rosser*, 158 So.2d 99, 101 (Ala. 1963) (municipal notice of claim statute; sworn notice of claim is mandatory condition precedent to right to sue a municipality). An unsworn complaint does not satisfy the mandatory condition precedent required under Rule 6(a). *See, e.g., Herston v. Whitesell*, 348 So.2d 1054, 1058 (Ala.

[11] If a public agency or official is bound by policies it adopts, a fortiori they are bound by rules having the force of law.

1977) (municipal notice of claim statute). Accordingly, noncompliance with this mandatory condition precedent to investigation – here, as to all allegations not "aris[ing] directly from the investigation of" the initial verified complaint, i.e., all the substantive allegations in the COJ complaint, *Moore*, no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussing Count VI) -- requires dismissal of the COJ complaint.[12] *See, e.g., City of Birmingham v. Davis*, 613 So.2d 1222, 1224 (Ala. 1992) (failure to satisfy notice of municipal claim requirement as requiring dismissal of suit against city).

B. Lack of proper notice of the matters being investigated requires dismissal

JIC's failure to provide proper notice of the allegations it was investigating is of two types: 1) failing to provide notice, or sufficient notice, of the aspects of the "complaint" during the ongoing investigation that the Commission "then deems worthy of some investigation," as required under JIC Rules 6(C) and (D) for JIC's consideration; and 2) failing to provide any notice that large parts of the formal charges in the COJ complaint were even under investigation.[13]

[12] Properly viewing the verification requirement as a mandatory condition precedent to investigation, and thereby to the filing of charges, distinguishes verification from a procedural requirement during the investigation, for which "prejudice" arguably would be required for relief from a violation. *See Moore*, no. 1160002 (Ala. April 19, 2017), slip op. at ____ (discussing Count VI) (noting that defendant had offered no legal argument in rebuttal of JIC's argument that a prejudice standard applied to violations of JIC Rule 6 relating to notice). Relief would be automatic from a violation of a mandatory condition precedent, with no prejudice (actual or other) required.

[13] Rules 6(C), in full, and 6(D), in pertinent part, provide as follows:

C. If a complaint is not dismissed on preliminary review pursuant to Rule 6.B., the commission, within 14 days of its decision to conduct some investigation of the complaint, and in no event more than 84 days after a complaint is filed, shall serve upon the judge who is the subject of the complaint copies of the complaint and all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint, or accumulated by the commission before such service upon the judge. Further, the commission shall advise the judge of those aspects of the complaint that it then considers worthy of some investigation.

As to the former (lack of or insufficient specification of the aspects of known written "complaints" – verified or unverified – that had been served on Judge Kelly), JIC complied with Rule 6(C) fully only with respect to the verified complaint served on Judge Kelly by letter dated May 9, 2016, i.e., by identifying four (4) specific allegations in the complaint that JIC deemed worthy of investigation.

As suggested above, that verified complaint was broadened by letter to Judge Kelly dated September 12, 2016; implicitly expanded even further (by the forwarding of many new allegations from DHR) by letter to Judge Kelly dated December 5, 2016; possibly enlarged by more allegations from DHR forwarded by JIC Executive Director Garrett by e-mail to Judge Kelly's counsel Mark Englehart dated January 9, 2017; elaborated upon by letter to counsel Englehart dated January 25, 2017; and implicitly expanded even more by Ms. Garrett's letter to counsel Englehart dated March 30, 2017 (by forwarding more allegations from DHR concerning two more cases).

Even taking into account the January 25, 2017 letter as described above – clearly the high-water mark for notice by JIC regarding the parts of any complaint it "then deem[ed] worthy of some investigation" –, at ***no*** time after its initial May 9, 2016 letter did JIC identify specific allegations of any "complaint" – especially the unsworn complaint memoranda sent to JIC by DHR dated November 30, 2016, December 7, 2016, and March 17, 2017 – it deemed worthy of investigation. Indeed, in addressing the November 30, 2016 laundry list of complaints, even the

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D. Every six weeks after serving the judge pursuant to Rule 6.C., the commission shall serve on the judge being investigated copies of all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate, and shall serve upon the judge a full statement of whether the commission intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation.
…

January 25, 2017 letter referenced only "cases … relevant to the determination of *pattern and practice of delays in hearings and rulings and of failure to rule,*" Ex. H, at 6 (emphasis in original), but without identifying allegations in that laundry list that fit that description.[14] Judge Kelly contends that collectively JIC's letters to her, other than the May 9, 2016 letter that served her with the individual verified complaint, failed to provide the specification of "the aspects of the complaint that [JIC] then deems worthy of investigation" required by Rule 6(D).

JIC's much more significant failure of notice – failing to provide ***any*** notice that large parts of the formal charges in the COJ complaint were even under investigation – violates both Judge Kelly's due process right to notice during the investigative phase and JIC Rule 6.

In *Moore*, with respect to the Chief Justice's argument that he lacked sufficient notice during the investigatory phase of one of the charges (Count VI) against him, the special Supreme Court quoted *Hannah v. Larche*, 363 U.S. 420, 442 (1960), regarding the distinction between investigatory and adjudicative proceedings and the due process rights afforded to subjects in each type of proceeding. *Moore*, no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussing Count VI). Without expressly categorizing the investigatory phase, or deciding what level of process, if any, was due, the Court found that the Chief Justice had adequate – in fact, actual -- notice during the JIC investigation that the conduct that gave rise to Count VI was under

[14] In addition to the letters from JIC identified above, JIC also sent Judge Kelly 42-day update letters dated as follows: August 1, 2016; October 26, 2016; January 10, 2017; April 10, 2017; May 22, 2017; May 23, 2017; June [sic] (actually July) 5, 2017; and August 14, 2017. With one exception (August 1, 2016), each of these letters advises Judge Kelly only that "the Commission intends at this time to continue its investigation of the allegations made against Judge Kelly by [the initial individual complaint served with the May 9, 2016 letter], and specified in the Commission's investigation letters dated May 9, 2016 and September 12, 2016" (which added only the general "pattern and practice of delay" allegation and the cite to the Nov. 25, 2015 appellate opinion concerning 1 individual case). These letters are submitted with this brief as Exhibits K through R, respectively, to be filed under seal.

investigation, and alternatively that he failed to show prejudice that would warrant relief for the alleged violation of JIC Rules 6(C) and (D). *Id*.

As noted by U.S. District Judge Albritton in *Hunt v. Anderson*, in which Governor Guy Hunt contended that proceedings before the state Ethics Commission denied him procedural due process:

> In a separate concurring opinion in *Hannah,* Justice Frankfurter expressed concern over the harm that could be done to individuals by hearings and a public investigation. He would have extended "adjudicatory" standards to any proceedings which made findings of violations of law and also to proceedings which served an "accusatory" function.

794 F.Supp. 1557, 1565 (M.D.Ala. 1992)

As Justice Frankfurter noted in *Hannah*:

> Were the Commission [U.S. Commission on Civil Rights] exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the starting point for assessing the protection which the commission's procedure provides.

Hannah, 363 U.S. at 488.

Elaborating, Justice Frankfurter explained:

> When official pronouncements on individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting, of course, grand jury investigations.

Id. at 489-90.

Then, in *Jenkins v. McKeithen*, 395 U.S. 411 (1969), the lead opinion (and narrowest opinion in the majority result) adopted the first quoted passage of Justice Frankfurter's concurrence in Hannah, and applied the "rigorous protections relevant to criminal prosecutions"

as the presumptive starting point for assessing due process rights available to subjects of proceedings serving an accusatory function. *See id.* at 428.

The *Jenkins* Court specifically noted that because of its constitutional history, a grand jury is exempted from providing all the procedural protections applicable to other bodies that have an accusatory function. *Id*. at 430. Distinguishing the Louisiana Labor-Management Commission of Inquiry from a grand jury, the Court pointedly noted that "investigative bodies such as the Commission have no claim to specific constitutional sanction."[15] *Id*. at 430-31.

The cases reflect, as Judge Albritton noted in *Hunt*, "[j]ust what would make a proceeding one of such an accusatory nature as to require due process and whether something less than all the procedural protections afforded a defendant in a criminal prosecution would be sufficient are matters to be considered under the facts of an individual case." *Hunt*, 794 F.Supp. at 1565; *see, e.g., Jenkins*, 395 U.S. at 430.

While not clearly an adjudicative body, JIC has an accusatory function. It investigates complaints of possible violations of judicial ethics, holds confidential hearings, exercises subpoena power to compel both testimony (ex parte as to the subject judge) and production of documents, affords a privilege against compelled self-incrimination to the accused judge, JIC Rule 6(F), and files formal charges with the COJ, which the Attorney General assigned to the Commission prosecutes.[16] JIC Rule 15.

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[15] The Louisiana Commission holds hearings to investigate and find facts relating to violations of state or federal criminal labor laws. It is required to make public findings whether there is probable cause to believe that criminal violations have occurred, report such findings to law enforcement, and request the governor to refer matters to the state attorney general for prosecution. *Id*. at 416-17.

[16] By analogy to bar disciplinary proceedings and impeachments (which seek removal of the official from office, as the COJ is empowered to do regarding a convicted judge), COJ prosecutions are properly considered adversarial proceedings of a quasi-criminal or at minimum

In *Hunt*, after examining both the statutory provisions regarding the Alabama Ethics Commission – similar to the Supreme Court-adopted rules governing JIC here -- and the Commission's conduct in the particular case (particularly making public its finding of probable cause to believe Governor Hunt had violated the Ethics Law, with attendant media coverage and effect on the reputation of the subject of the finding), Judge Albritton found the Ethics Commission's manner of operation "sufficiently 'accusatory' in nature to require some form of due process protection under the *Jenkins* decision, in addition to the due process being required by the Ethics Law itself." 794 F.Supp. at 1565-66. The strong similarity of the provisions governing the Ethics Commission to those governing JIC, coupled with the filing and public release (in accordance with COJ procedure) of the formal COJ complaint against Judge Kelly – the damning allegations of which were reported in local and state media almost immediately – warrant treating the proceeding before JIC as accusatory and thus requiring due process protections under *Jenkins*. *See* 395 U.S. at 428.

As suggested above, JIC's filing of the formal complaint with the COJ was the first notice Judge Kelly received that charges comprising roughly half of the 149-page complaint were even being investigated: these include at least any complaints regarding delinquency cases [section II.B / ¶¶ 48-55 of the COJ complaint]; protection from abuse (PFA) cases [section III.D / ¶¶ 111-119 of the COJ complaint]; domestic relations cases, including uncontested divorces [section III.A / ¶¶ 69-75 of the COJ complaint], joint petitions for modifications of divorce decrees [section III.B / ¶¶ 78-80 of the COJ complaint], or child support, custody, alimony, and

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hybrid civil-criminal nature. *See, e.g., In re Ruffalo*, 390 U.S. 544, 551 (1968) (disbarment proceeding as quasi-criminal); *Nelson v. State ex rel. Blackwell*, 62 So. 189, 190 (Ala. 1913) ("Impeachment proceedings are highly penal in their nature"); *Lewis v. State ex rel. Evans*, 387 So.2d 795, 800 (Ala. 1980) (impeachment proceedings are "unique hermaphroditic creatures," "partak[ing] of the nature of both civil and criminal actions").

visitation cases [section III.C / ¶¶ 81-107 of the COJ complaint; or the alleged loss of Department of Youth Services grant funding for the Bridge / juvenile diversion program [section V / ¶¶ 124-130 of the COJ complaint].

Instead of being notified in confidential JIC proceedings that those aspects of some complaint were deemed worthy of investigation – where indeed, to our knowledge, no complaint raising allegations in these areas (as opposed to dependency cases, which formed the overwhelming focus of the "complaints" and related materials provided to Judge Kelly) was provided to her before the filing of the COJ complaint – Judge Kelly learned of them as part of the formal charges that she now must defend against in a public adversarial proceeding (with potential sanctions ranging up to and including removal from office); and then saw, heard, and read them trumpeted in the media.

Jenkins indicates that the starting point for determining what process is due – and should have been afforded -- in an accusatory proceeding, as the JIC investigation here is properly characterized, is "the rigorous protections relevant to criminal prosecutions." 395 U.S. at 428 (quotation omitted). Although the particulars of the process due vary with the type of proceeding and interests at stake, the ***minimum*** requisites of due process are notice and an opportunity to respond. This means here that Judge Kelly minimally was entitled to 1) notice of all areas that JIC deemed worthy of investigation – not simply a vague "pattern and practice of delays," but all areas in which JIC was investigating for such delays –, as already required under JIC Rule 6; and 2) some opportunity to respond to complaints or allegations in all such areas -- with both the notice and the opportunity to respond being afforded her ***during the JIC investigation***, *see, e.g., Hunt,* 794 F.Supp. at 1566, and not just during the formal adjudication phase in front of the COJ.

Here Judge Kelly was deprived of notice and opportunity to respond ***during the JIC investigation and before the COJ complaint was filed*** to a huge chunk of the allegations now making up the formal COJ complaint. Having already been denied minimal due process during the now-closed JIC investigation as to those areas (as identified on the previous page), Judge Kelly's only meaningful remedy as a matter of due process is dismissal of the charges arising out of those allegations, i.e., including at minimum the charges in sections II.B, III (A through D), IV, and V.

Before including them in and filing the COJ complaint, JIC presumably was investigating[17] the charges of "pattern and practice of delays" in the areas identified in this section – i.e., including at least charges relating to delinquency cases; protection from abuse (PFA) cases; domestic relations cases, including uncontested divorces; joint petitions for modifications of divorce decrees; or child support, custody, alimony, and visitation cases; and the alleged loss of Department of Youth Services grant funding for the Bridge / juvenile diversion program (purportedly because of Judge Kelly's delay in making relevant decisions). So. alternatively, even if Judge Kelly were not entitled to due process protections during the JIC investigation beyond the JIC rules, JIC's failure to notify Judge Kelly of allegations it was investigating related to those areas violated JIC's continuing obligation under Rule 6(D), every six weeks, to modify any "previous advice as to aspects of the complaint that [JIC] then deems worthy of some investigation."

As a threshold matter, a generic notice that JIC is investigating a "pattern and practice of delays in rulings and in failing to rule" is insufficient to meet JIC's obligation to advise as to

[17] JIC's ***actual*** investigation of those areas would at least imply or support an inference that it "deem[ed those areas] worthy of some investigation." Rule 6(D).

"aspects of [any] complaint that it then deems worthy of some investigation," for several reasons. Not to put too fine a point on it, but the different types of cases are, well, different. For example, as JIC knows from its investigation, and indeed as the COJ complaint reflects, some types of cases (or some matters within a class of cases) have statutory time standards, while other types don't. Different types of cases have different priority by statute. Some types of cases may be handled initially by a referee, subject to ratification by the family court judge; other cases (e.g., petitions for termination of parental rights) may not. Even among types of cases a referee may handle, the availability of referee assistance in Montgomery County varies from type to type. Scheduling is handled differently, by different actors, for different types of cases in the Montgomery County Family Court. Cases are assigned to judges differently (e.g., the adoption of a "one family, one judge" policy for juvenile cases) depending on the type of case. The need for and availability of court staff (e.g., deputy clerks) for court proceedings may vary among case types.

As a result of these differences (and others) in the handling of different types of cases on a judge's docket, different considerations must be taken into account and balanced, for different types of cases, in determining whether a ruling in an individual case or rulings in a particular class of cases are "unreasonably and unjustifiably delayed" (as alleged throughout the COJ complaint) or can even be considered "delayed" at all.

Further, among the voluminous materials (roughly 14,000 pages) served on Judge Kelly by JIC on a rolling basis before JIC filed the COJ complaint, as best as Judge Kelly and counsel can tell, virtually all or the overwhelming majority of those materials that relate to potential issues of delay (i.e., nearly all of the total materials produced) pertain to dependency cases involving DHR. And, unsurprisingly, the DHR complaint correspondence to JIC – which, apart

from the individual verified complaint that initiated this investigation, comprises nearly all of the grievances asserted against Judge Kelly that she's been apprised of – pertains entirely or almost entirely to dependency cases in which DHR is or has been involved.

Accordingly, given the near total concentration of grievances and materials on DHR dependency cases and delays in those cases, a generic notice that JIC is investigating a "pattern and practice of delays in rulings or failing to rule" does ***not*** give Judge Kelly notice that JIC was investigating possible delays in cases ***other than dependency cases***. More particularly, such a generic notice does ***not*** give Judge Kelly that JIC, at any time during its investigation, ***ever*** deemed worthy of investigation – much less was actually looking into – potential delays in ***specific*** areas, such as delinquency cases, PFA cases, uncontested divorces, etc.

As even a cursory review of JIC's 42-day update letters will reflect, ***none*** of JIC's required updates ever specified that its investigation into a potential "pattern and practice of delay" included, e.g., delinquency cases; protection from abuse (PFA) cases; domestic relations cases, including uncontested divorces; joint petitions for modifications of divorce decrees; or child support, custody, alimony, and visitation cases. Further, even in JIC's letter dated January 25, 2017, with one exception[18], all the individual examples JIC cited as providing more-detailed notice of a potential "pattern and practice of delay" were Alabama appellate opinions involving DHR dependency (specifically, termination of parental rights) cases.

[18] As noted above, the verified individual complaint that started JIC's investigation in this matter involved a single domestic relations, child custody dispute. Although the January 25, 2017 letter also identified as notice of a possible pattern and practice the separate verified complaints of a former husband and former wife arising out of their domestic relations dispute, JIC had dismissed both those complaints nearly 2 years earlier, without even waiting for Judge Kelly to respond to the later-served complaint. *See* Ex. I.

In short, nothing in any of JIC's correspondence ever "advised" Judge Kelly that the "pattern and practice of delay" "aspects of the complaint that it then deem[ed] worthy of some investigation," Rule 6(D), included anything other than (by implication) dependency cases involving DHR. Likewise, nothing in any of JIC's correspondence ever "advised" Judge Kelly that the "pattern and practice of delay" "aspects of the complaint that it then deem[ed] worthy of some investigation" included specifically, e.g., delinquency cases; protection from abuse (PFA) cases; domestic relations cases, including uncontested divorces; joint petitions for modifications of divorce decrees; or child support, custody, alimony, and visitation cases – even though alleged ethical violations concerning those areas comprise roughly half of the substantive allegations in the COJ complaint – all in violation of Rule 6(D). Whatever notice JIC provided in its required Rule 6(D) updates did not adequately identify, and properly viewed did not identify at all, the aspects it deemed worthy of investigation, thereby violating Rule 6(D).

Under a proper construction of the Rules of Procedure for JIC, JIC's clear-cut violation of Rule 6(D) would warrant relief without any further showing. As argued above, the JIC Rules as promulgated by the Alabama Supreme Court under its constitutional authority have the force of law, and JIC is bound by them. *See, e.g., Nixon*, 418 U.S. at 694-95 (regulation promulgated by Attorney General has force of law, and Attorney General bound by it); *Nelson*, 165 So.3d at 572-74 (school board bound by policies it adopted); *Belcher*, 474 So.2d at 1067-68 (same). And, the investigation-related duties imposed on JIC by Rule 6, including the notice requirements of Rules 6(C) and 6(D), are mandatory. *Steensland*, 87 So.3d at 541. Requiring a showing of prejudice from a violation of a mandatory duty only incentivizes the holder of the duty to skirt it.

Alternatively, without conceding that a violation of Rule 6 requires a showing of prejudice for relief, *but see Moore*, no. 1160002 (Ala. April 19, 2007), slip op. at ____

(addressing Count VI) (finding persuasive JIC's unrebutted argument that defendant must show prejudice for relief based on an alleged lack of notice), Judge Kelly suffered actual prejudice in being denied notice, written or otherwise, during JIC's investigation that JIC deemed worthy of investigation a possible pattern of delays in areas other than dependency cases involving DHR. Generally speaking, JIC's inclusion in the COJ complaint of claims of a pattern and practice of delay in types of cases other than DHR dependency cases massively expanded the types of cases and especially the number of individual cases that Judge Kelly must address in the formal charges – much of it for the first time in the COJ.

More specifically, although JIC's compliance with Rule 6(D) even as to DHR dependency cases was deficient, Judge Kelly was at least aware that JIC was investigating some unspecified "pattern and practice of delays" with respect to such cases. As shown above, she had ***no*** notice that DHR was investigating a potential pattern and practice of delays in the other areas identified above.

Raw numbers show graphically the massive ballooning of the formal charges in the COJ complaint by inclusion of the additional areas. The section of the complaint asserting unreasonable and unjustifiable delays in DHR dependency cases – roughly, section II of the complaint (except for II.B, which addresses delinquency cases) – alleges violations in roughly 60 to 80 cases. In the course of the JIC investigation, Judge Kelly had regained some familiarity (in light of the more-than-2200 new cases assigned to her in ***each*** of the 4 years covered by the COJ complaint) with at least some (although probably still a minority) of these dependency cases. From all appearances, this area was the focus of JIC's investigation.

But, section III.A (regarding uncontested divorces) alleges failures to "issue a timely order in uncontested divorce proceedings" in approximately 321 listed cases (317 of which are

identified in a summary chart). Section III.B. lists 2 examples of alleged delays in ruling on joint petitions for modification of divorce decrees; section III.C. ("child-support, alimony, and visitation cases") identifies 22 cases reflecting alleged delays in completing hearings and issuing final orders; section III.D. (protection from abuse cases) summarizes 8 cases in which Judge Kelly allegedly delayed hearing and issuing final orders in PFA cases; section IV ("failure to timely rule on various motions and referee recommendations") identifies 3 actions reflecting alleged delay "in what is typically straightforward motion practice"; and section II.B. (juvenile delinquency) lists 3 cases of alleged delay in handling such cases. Collectively, these sections of the COJ complaint identify approximately **350** cases in which JIC claims Judge Kelly unreasonably and unjustifiably delayed taking action – all in areas in which Judge Kelly's first and only notice that those areas were part of JIC's investigation, was upon being served with the COJ complaint.[19]

Not only does the inclusion of cases from previously-unidentified areas quintuple (or more) the already-significant number of cases listed in the "known" area of dependency cases. It adds hundreds of more cases in which Judge Kelly and/or her counsel will need (ideally) to review files, learn (or re-learn) files, check JIC's specific factual allegations for that case, create timelines (in many cases), determine whether there actually was delay and (if so) the cause(s), identify justifications for delay, determine what else was occurring on Judge Kelly's docket (given that an individual case cannot be viewed in isolation from the rapidly-churning hundreds of other cases pending on her docket at any given time), and necessarily prepare to defend

[19] As shown above, JIC has not identified these areas in any correspondence as areas of investigation. ***If*** JIC has produced any documents relating to any of these 350 additional cases, they were not specifically identified as such, and instead would have been produced as part of one of multiple productions of non-electronically-searchable batch PDFs (part of the roughly 14,000 pages of documents JIC has produced on a rolling basis since December 2016).

against a pattern and practice complaint by addressing cases individually – all this within the next 3 months before the January 8, 2018 trial date, and in areas Judge Kelly and counsel had no notice would be included.

In addition to the practical prejudice now, during the trial preparation phase, the failure of JIC to give any – much less adequate – notice during the investigative phase that it was investigating claims in these areas denied Judge Kelly notice and any opportunity during the investigative phase to offer testimony and written evidence during her appearance before JIC in May 2017, or at another time during the investigation, that may have prevented JIC from filing formal charges regarding all or some of these hundreds of cases in the COJ complaint. *See Moore*, no. 1160002 (Ala. April 19, 2017), slip op. at ____ (discussing Count VI) (identifying that as prejudice Chief Justice Moore did not allege from his alleged lack of notice regarding one count of the complaint) Clearly, even if only partly successful, that could have lessened Judge Kelly's potential risk of liability, possible sanctions, and the burdens of trial preparation.

In light of such prejudice Judge Kelly has already experienced from the lack of notice during the JIC investigation that these aspects were "worthy of some investigation" – and apparently were being investigated --, and the loss of the opportunity to try to prevent the filing of formal charges regarding these aspects, *see id.,* the only viable remedy for JIC's violation of Rule 6(D) is dismissal of the charges included in sections II.B, III (A through D), IV, and V of the COJ complaint.

C. Alleged violations based on failure to strictly comply with specific time standards fail to state a claim and must be dismissed.

1. The relevant time provisions are directory, not mandatory

To the extent that the complaint claims a violation of any Canon of the Alabama Canons of Judicial Ethics for unreasonable and unjustifiable delay based on Judge Kelly's failure to strictly comply with a specific statutory or procedural rule time standard, the complaint fails to state grounds upon which a violation may be found and must be dismissed.

There are only a few time standards relevant to this complaint as imposed by Alabama statutes: e.g., a) Code sections in dependency cases directing the court to make (i) a "reasonable efforts" determination (i.e., whether reasonable efforts have been made to prevent removal from the home, or whether such efforts are not required) within 60 days after a child's initial removal from his or her home, and (ii) a separate "reasonable efforts" determination (as to whether reasonable efforts have been be made to finalize the existing permanency plan) within 12 months after removal, and within every 12 months thereafter during continuation of out-of-home case, *see* Code of Alabama §§12-15-312(a)(2),(3); section II.C. of the COJ complaint; b) Code sections regarding petitions to terminate parental rights directing the court to complete a trial on a TPR petition "within 90 days after service of process has been perfected," and to enter a final order within 30 days of the completion of the trial," Code of Alabama §12-15-320(a); *see* section II.A. of the COJ complaint; and c) a Code provision in protection-from-abuse cases that directs the court to rule on a temporary ex parte protection order within three (3) business days of the filing of the petition, and to hold a final hearing upon the request of the defendant or within 10 days of perfection of service. Code of Alabama §30-5-6(a) & (b); *see* section III.D. of COJ complaint.

But, even as to these few specific time standards, JIC commits an error of law in treating them as mandatory, "strict liability" provisions, under which exceeding the prescribed time (a) is an automatic violation of the statute and/or (b) a per se judicial ethics violation, with no exceptions, extensions, or discretion allowed.

No Alabama case appears to have addressed this particular point as to these particular time directives. But, based on Alabama cases construing the effect of *similar* statutory time prescriptions, notwithstanding the use of "shall" (e.g., "the trial …shall be completed" and "the trial court shall enter"), these statutes are not mandatory, but directory. The statutes specify only the required performance, but not the result obtained or consequence applied if performance is not done. *E.g., Ex parte Hood*, 404 So.2d 717, 718 (Ala. 1981). Moreover, provisions requiring a public officer to perform an official act within a specified time generally are construed as directory, particularly where reasonable delays beyond the specified time may often be necessary to carry out the purposes of the statute. *E.g., MCI Telecommunications, Inc. v. Alabama Public Service Comm'n*, 485 So.2d 700, 703-04 (Ala. 1986); *Key v. Alabama State Tenure Comm'n*, 407 So.2d 133, 135 (Ala.Civ.App. 1981).

Stated differently, not only does failure to adhere strictly to the time period specified in these statutes ***not*** violate the statutes, but indeed it may instead serve the purpose(s) for which the statute was intended. Accordingly, lack of strict compliance with a specified time period, without more, cannot be the basis to support an alleged violation of one or more of the Canons of Judicial Ethics.

2. Violation of separation of powers

Each of these relevant statutory time limits purports legislatively to direct certain judicial acts be done within a fixed time period. But, almost without exception, state supreme courts

have concluded that "the timing of a judicial decision is a core judicial function, protected from legislative encroachment." *Briggs v. Brown*, no. S238309 (Cal. Aug. 24, 2017), slip op. at ___ (Cuellar, J., concurring and dissenting). "[T]he question of when cases shall be decided and the manner in which they shall be decided, is a matter solely for the judicial branch of government." *Coate v. Omholt*, 662 P.2d 591, 593 (Mont. 1983).

Accordingly, almost uniformly statutes that impose time limits on judicial decision-making have been invalidated as violating constitutional separation of powers. *E.g., Briggs*, no. S238309 (Cal. Aug. 24, 2017), slip op. at ___ (majority opinion); *id*., slip op. at ___ (Liu, J. concurring); *id*., slip op. at ___ (Cuellar, J., concurring and dissenting) (5-year limit on completion of capital appellate and initial habeas corpus review processes; 1-year limit for trial court to resolve initial capital habeas petition, unless a substantial claim of actual innocence requires delay; 2-year limit for completion of every initial capital habeas proceeding) (all justices finding mandatory time limits unconstitutional); *Coate*, 662 P.2d at 593 (imposition of sanctions, including in some circumstances withholding of pay, if decision not reached within 90 days of submission); *Sands v. Albert Pike Motor Hotel,* 434 S.W.2d 288, 291-292 (Ark. 1968) (requiring trial court to affirm workers' compensation decision after it had been on file 60 days); *State ex rel. Watson v. Merialdo*, 268 P.2d 922, 926 (Nev. 1954) (requiring each trial judge, before receiving a monthly salary, to file affidavit to effect that judge had no cases assigned for decision older than 90 days); *Waite v. Burgess*, 245 P.2d 994, 996 (Nev. 1952) (requiring judicial action within fixed time period); *State ex rel. Kostas v. Johnson,* 69 N.E.2d 592, 595 (Ind. 1946) (statute forbidding trial court to hold an issue under advisement for more than 60 days and depriving court of jurisdiction if no decision reached within 90 days); *Atchison, T. & S. F. Ry. Co. v. Long,* 251 P. 486, 489 (Okla. 1926) (requiring trial court to try certain classes of cases

within 10 days after defendant answered); *Schario v. State,* 138 N.E. 63, 64 (Ohio 1922) (requiring court to hear or determine cause within 30 days from its filing); *see also, e.g., Resolute Ins. Co. v. Seventh Jud. Dist. Ct. of Okla. Co., Okla.,* 336 F.Supp. 497, 503 (W.D.Okla. 1971) (requiring judge hear motion to set aside a bail bond forfeiture. within 30 days of the filing of the motion)

As noted by the Ohio Supreme Court nearly a century ago regarding the competing considerations affecting the timing of judicial decisions:

> Manifestly, when a case can be heard and determined by a court must necessarily depend very largely upon the court docket, the quantity of business submitted to the court, the nature, the importance, and the difficulties attending the just and legal solution of matters involved. It would be obviously unfair to the court, as well as unfair to other parties likewise interested in the early and expeditious determination of their causes, to require a court to suspend or delay equally important matters theretofore submitted to the court for its consideration and determination in order to give preference to the hearing and determination of some particular case or character of cases. At least that is a matter that should be most properly and wisely left to the sound discretion of the court.

Schario, 138 N.E. at 64.

As mandatory time limits imposed on Alabama judges to perform certain judicial acts, e.g., completing a hearing on a petition for termination of parental rights or issuing a decision on such a petition after completion of trial, the Code provisions setting specific time periods for particular acts all violate constitutional separation of powers.

Such unconstitutional statutes cannot validly be used as the standard to judge whether Judge Kelly unreasonably and unjustifiably delayed ruling in a particular case or whether she engaged in a pattern and practice of unreasonably and unjustifiably delayed rulings; nor can such Code provisions be used to judge whether she violated any of the Canons and/or should be subject to possible sanctions, without such use violating separation of powers. Accordingly, any

claim that Judge Kelly violated any Canon by exceeding a statutory time period per se must be dismissed.

Furthermore, by focusing (in those claims with applicable statutory time periods) solely on whether Judge Kelly exceeded the prescribed time, JIC has failed to allege facts that would violate a statute deemed directory, i.e., that Judge Kelly so grossly and without justification abused her judicial discretion in the time taken to make judicial decisions as to violate one or more Canons. *See, e.g., In re Sheffield*, 465 So.2d 350, 358 (Ala. 1984) ("mere errors of law or simple abuses of discretion should not be subject of discipline") (quotation omitted).

D. In the absence of allegations of facts showing bad faith, the complaint states no violation of any Canon

According to the complaint JIC brought in the COJ, the complaint arises from Judge Kelly's alleged "repeated violations of the Alabama Canons of Judicial Ethics by her pattern and practice of unreasonable and unjustifiable delay in handling her docket in Family Court." Complaint, at ¶ 4. The complaint alleges that Judge Kelly "failed to manage court business in a timely manner," Complaint, at ¶ 4(a) (with seven sub-parts)[20]; "failed to manage court business in an efficient manner," *id.* at ¶ 4(b) (with four sub-parts); and "failed to timely complete a vendor contracting process so as to maintain a successful and oft-utilized diversionary program for Montgomery County juvenile offenders." *Id.* at ¶ 4(c).

JIC's complaint alleges Judge Kelly, by her "pattern and practice of unreasonable and unjustifiable delays" violated Canons 1, 2, 2A, 2B, 3, 3A(1), 3A(5), 3B(1), and 3(B)(2).[21] With

[20] The 7 sub-parts include alleged "unreasonable delays" in 5 practices (e.g., "ruling on standard motions"), "failure or refusal to meet statutory time requirements in numerous cases," and "regularly continuing dockets." Complaint, at ¶4(a).

[21] The Canons provide in pertinent part:

(1) **Canon 1**:

Canon 1. *A judge should uphold the integrity and independence of the judiciary*.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

(2) **Canon 2**:

Canon 2. *A judge should avoid impropriety and the appearance of impropriety in all his activities.*

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

C. A judge should not allow his family, social, political, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness at any hearing before any court, or judicial or governmental commission.

(3) **Canon 2(A)**:

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(4) **Canon 2(B)**:

B. A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

(5) **Canon 3 (relevant excerpts of 3(A) and (B) only)**:

Canon 3. *A judge should perform the duties of his office impartially and diligently*.

The judicial activities of a judge take precedence over his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES:

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(6) **Canon 3(A)(1)**:

(A)(1): A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(7) **Canon 3(A)(5)**:

(A)(5): A judge should dispose promptly of the business of the court, being ever mindful of matters taken under submission. On the first day of January and the first day of July of each year, each judge shall file a report which shall show the cases and/or matters which have been under submission or advisement for a period of six months or longer, and if there has been no case or matter under submission or advisement for a period of six months or longer the report shall so state. Where a matter or case has been under submission or advisement for six months or longer, the report shall give the date that the matter or case was taken under submission or advisement and the reasons for the failure of the judge to decide such matters or cases. Trial judges shall file their lists with the administrative office of courts, and appellate judges shall file their lists with the clerk of their appellate court.

(8) **Canon 3(B)(1)**:

(B)(1): A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(9) **Canon 3(B)(2)**:

(B)(2): A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

the possible exception of the statutory time provisions, which as just shown are unenforceable if treated as mandatory, all other conduct complained of falls squarely within the category of discretionary judicial acts. And, apart from the specific TPR and protection-from-abuse time directives, there are no specific time standards to determine what constitutes "delay," "excessive delay," or a "pattern and practice" in all the other areas alleged in the complaint.

In *Sheffield* the Alabama Supreme Court discussed at some length the danger to the independence of the judiciary and the public's right to an independent judiciary from substituting judicial discipline for appellate review – particularly regarding errors of law or discretionary judicial decisions. 465 So.2d at 357-58. From the premise that "mere errors of law or simple abuses of judicial discretion should not be subject of discipline," *id.* at 358 (quotation omitted), the Court held there would be no discipline under Canons 2A and 2B "absent bad faith (i.e., absent proof of malice, ill will or improper conduct)." *Id.* Although the holding related to erroneous legal rulings, the rationale applies more broadly to other discretionary acts, and not strictly limited to Canons 2A and 2B.

JIC's complaint does not allege any facts that, if true, would show bad faith, in the sense of malice or ill will, by Judge Kelly in any of the discretionary acts alleged in the complaint. Without the presence of allegations tending bad faith, as necessary to cross from the protected zone of erroneous and even abused judicial discretion into the territory of discipline, JIC has not stated a violation of any of the several Canons identified by JIC.

E. Because Judge Kelly lacked advance fair warning that the conduct alleged could violate any of the Canons identified, all charges must be dismissed.

As noted, other than the unenforceable (if deemed mandatory) statutory time periods addressed above, there are no specific time standards that define "delay," "excessive delay," or a "pattern and practice" in all the other areas alleged in the complaint – in short, no standard that gives a judge such as Judge Kelly fair notice as to when a lapse of time (whether in setting or re-setting a hearing, completing a trial, or issuing an order) gives rise to potential discipline.

As to the DR cases in particular (including the approximately 320 uncontested divorces in which Judge Kelly allegedly delayed unreasonably in signing final orders), there is no time period prescribed for ruling, not even any aspirational guideline as to what is a reasonable as opposed to unreasonable time to enter order. Thus, "unreasonable" delay is based on unknown, arbitrary criteria selected by JIC. Both the arbitrary and capricious selection, and the lack of advance fair warning as to what time period would be deemed unreasonable (subject to justification), violate Judge Kelly's due process rights.

To the extent that the complaint claims a violation of any Canon of the Alabama Canons of Judicial Ethics for unreasonable and unjustifiable delay by Judge Kelly where there is ***no*** specific applicable statutory or procedural rule, any proposed definition of unreasonable and unjustifiable delay would be arbitrary and capricious and void for vagueness; and Judge Kelly would be deprived of fair warning as to what conduct constitutes unreasonable and unjustifiable delay so as to support judicial discipline, in violation of her due process rights.

Judge Kelly has a "right to fair warning of that conduct which will give rise" to penalties that is "protected against judicial action" by due process. *E.g., Marks v. United States*, 430 U.S. 188, 191-92 (1977). Due process prohibits holding one "responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964); *accord, e.g., United States v. Lanier*, 520 U.S. 259, 265 (1997); *In re Finkelstein*, 901

F.2d 1560, 1564 (11th Cir. 1990) (attorney disciplinary proceeding) ("the relevant inquiry is whether the attorney can be deemed to have been on notice that the courts would condemn the conduct for which he was sanctioned") (citing *Ruffalo*, 390 U.S. at 554 (White, J., concurring)). The right to fair warning requires that a person be given advance notice of what conduct is prohibited or may give rise to sanctions or discipline so the person may conform his or her conduct accordingly. *E.g., Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And, because of the likely quasi-criminal character of this proceeding, the ethical rules used to impose any sanction must be strictly construed, with any ambiguity resolved in favor of Judge Kelly as the person charged. *E.g., United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341-42 (5th Cir. 1993); *see also, e.g., Grievance Comm. for S.D.N.Y. v. Simels*, 48 F.3d 640, 650-51 (2nd Cir. 1995) (rule construed narrowly to "provid[e] fair notice to those affected by the Rule"; censure reversed).

In each application of the fair warning requirement, the touchstone is whether the enactment, on its face or as construed, made it reasonably clear at the relevant time that the actor's conduct was prohibited. *Lanier*, 520 U.S. at 267. Due process bars courts from retroactively expanding punitive liability by applying a novel, unforeseen judicial construction. *E.g., id.* at 266; *Marks*, 430 U.S. at 192; *Bouie*, 378 U.S. at 352-53. Stated differently, a court may not "make[] an action done before the passing of the law, and which was *innocent* when done, [illegal,] and punish[] such action," without violating due process. *Bouie*, 378 U.S. at 353-54 (emphasis in original) (quotation omitted). Such a retroactive judicial application of a novel and unforeseeable interpretation of law that expands liability for punitive or other disciplinary sanctions is a due process violation. *E.g., Bouie*, 378 U.S. at 352-53, 362; *see, e.g., Lanier*, 520 U.S. at 266-67; *Marks*, 430 U.S. at 192.

The "fair warning" argument requires evaluating the Canons as interpreted ***as of the time of Judge Kelly's conduct at issue, i.e., approximately 2012 to 2016.*** *See, e.g., Lanier*, 520 U.S. at 267; *Bouie*, 378 U.S. at 353, 355. As of 2012, and also now, there was ***no*** Alabama authority (judicial, statutory, or even apparently non-binding advisory opinions) of which we are aware that Judge Kelly's management of her docket, under all the attendant circumstances, a) could constitute unreasonable and unjustifiable delays and b) would violate one or more of the Canons alleged by JIC.

Even if this Court were to find for the first time that Judge Kelly's discretionary conduct in the management of her docket, in the absence of bad faith and any enforceable specific standards, could constitute unreasonable and unjustifiable delays and could violate one or more of the Canons alleged, that construction can validly be applied to future conduct only. *Bouie*, 378 U.S. at 362. To apply that interpretation retroactively to Judge Kelly's conduct here, i.e., by either punishing her for violating any of these Canons at issue, or even finding that she had violated one or more Canons, would effectively impose quasi-criminal punishment for conduct for which she lacked fair warning that it would violate any Canon. Either form of retroactive application would violate due process; thus, the charges in the complaint must be dismissed.

Conclusion

For all the foregoing reasons, Judge Kelly's motion to dismiss the complaint herein is due to be granted.

Respectfully submitted this 11th day of October, 2017.

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Certificate of Service

I hereby certify that a copy of the foregoing has been FILED electronically with the Court of the Judiciary and a copy of the same emailed and/or hand delivered to the person(s) shown below on this 11th day of October, 2017, as follows:

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