



IN THE ALABAMA COURT OF THE JUDICIARY

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

**JUDGE ANITA KELLY’S SECOND MOTION FOR CONTINUANCE**

Judge Anita Kelly respectfully moves to continue the trial of this matter from its current March 19, 2018 setting for a period of at least sixty (60) days, and in support shows the following:

1. Judge Kelly cannot adequately prepare to defend against the charges in the complaint filed against her by the Judicial Inquiry Commission (JIC ), and will be severely prejudiced in her defense against those charges (even more so as expanded just last week), if this action goes to trial on the currently scheduled trial date.

2. JIC filed its original 149-page COJ complaint on August 16, 2017. Growing like kudzu, the charges ballooned into a 198-page Amended Complaint on December 11, 2017<sup>1</sup>; and on February 14, 2018, further swelled into a 229-page Second Amended Complaint (more than 50 percent longer than the hefty original complaint). In the complaints JIC alleges Judge Kelly is guilty of “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 (Ex. 1), ¶4.

3. Judge Kelly moved to dismiss the complaint and filed her answer to the complaint on September 15, 2017; and filed a brief in support of her motion to dismiss on October 11, 2017.

<sup>1</sup> These latter two dates are the dates on which the Court allowed JIC to file its amended complaints.

4. By order entered October 25, 2017, this Court denied Judge Kelly's motion to dismiss and set this case for trial beginning January 8, 2018, i.e., less than two-and-one-half months later.

5. The section of the original complaint asserting unreasonable and unjustifiable delays in Alabama Department of Human Resources (DHR) dependency cases – roughly, section II of the complaint (except for II.B, which addresses delinquency cases) – alleges ethical violations in roughly 60 to 80 cases. The general subject matter of these cases, i.e., dependency cases, is the sole area of Judge Kelly's docket that JIC gave Judge Kelly notice during the investigative phase was under investigation.

6. But, the COJ complaint also alleged such a pattern-and-practice of delay in many more cases in several other areas of Judge Kelly's docket.<sup>2</sup> By including in the COJ complaint pattern-and-practice claims in new areas (i.e., other than dependency cases)<sup>3</sup>, JIC has identified and charged approximately 350 more cases originally (and now approximately 615+ cases, as of last week) in which JIC claims Judge Kelly unreasonably and unjustifiably delayed taking action.<sup>4</sup> All of these cases<sup>5</sup> are 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.

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<sup>2</sup> Roughly half of JIC's original COJ complaint (in terms of pages) consists of charges arising out of areas that Judge Kelly had no notice before being served with that complaint were even being investigated.

<sup>3</sup> See sections II.B (juvenile delinquency cases), III.A (uncontested divorces), III.B (joint petitions for modifications of divorce decrees), III.C. ("child-support, alimony, and visitation cases"), III.D. (PFA cases), and IV ("failure to timely rule on various motions and referee recommendation") of the COJ complaint.

<sup>4</sup> Indeed, section III.A (uncontested divorces) of the original complaint itself alleges failures to "issue a timely order in uncontested divorce proceedings" in approximately 321 cases (317 of which are identified in a summary chart).

<sup>5</sup> Except for 7 new matters with 15 cases, involving either delays in cases involving petitions to terminate parental rights (4 matters, 6 cases) or other delays in dependency cases (3 matters, 9 cases), that were alleged for the first time in the newly-filed second amended complaint. See ¶¶ 36, 41, 44-45, and 63-65 of 2<sup>nd</sup> Amended Complaint.

7. This action has been on an exceptionally fast track since JIC filed its original 149-page COJ complaint on August 16. Not only was the JIC investigation heavily document-intensive, but the breadth of JIC's complaint in the COJ – and the fact that it substantially expanded on the scope of the investigation of which Judge Kelly had previous notice -- have required extensive *additional* discovery *since* the complaint was filed.

8. First, through its filing of the COJ complaint (including a significant batch of documents turned over to her that week), JIC had produced to Judge Kelly in several installments approximately 13,000 pages of documents (mostly as non-electronically-searchable, non-indexed, batched PDFs) gathered during its investigation. Judge Kelly and/or her counsel had not been able to review a large percentage of those documents before the filing of the COJ complaint, and have had to continue trying to review those documents since then, while also initiating and otherwise participating in extensive additional discovery.

9. For example, before even filing her motion to dismiss and answer, Judge Kelly (through counsel) drafted and served, and engaged in motion practice relating to, a request to JIC for production of additional documents.

10. Then, since approximately the date of Judge Kelly's brief in support of her motion to dismiss (October 10):

a) JIC has served three (3) deposition subpoenas duces tecum (for both testimony and documents), and at least three (3) more non-party subpoenas duces tecum for production of documents alone, all of which have generated some documents (in some cases minimal, in others more extensive) for Judge Kelly and counsel to review;

b) the parties have taken five (5) depositions (3 noticed by JIC, 2 by Judge Kelly) and part of another (noticed by Judge Kelly);

c) Judge Kelly (through counsel) has drafted and served six (6) deposition subpoenas duces tecum (of which, in addition to the 2 depositions already taken and the third partially taken by Judge Kelly, Judge Kelly's counsel are taking a rescheduled deposition tomorrow, i.e., February 21; are scheduled to finish the partially-completed deposition and take another reset deposition on February 28; and are attempting to reschedule another one or two depositions from their original, earlier dates);

d) Judge Kelly (through counsel) has drafted and served ten (10) extensive non-party subpoenas duces tecum for documents<sup>6</sup> only – half of them after the October 25<sup>th</sup> order denying the motion to dismiss --, the responses to most of which were produced on a rolling basis and have required extensive follow-up (and in at least one instance, has involved motion practice)<sup>7</sup>; and those document subpoenas have generated substantial additional documents to be reviewed.

11. Compounding those burdens of discovery, the bulk of the first two (2) depositions taken by Judge Kelly and of at least five (5) of the non-party document subpoenas served by Judge Kelly related to the charge in section V of the original complaint, "Losing the Department of Youth Services Grant Funding." That charge alleged that because Judge Kelly "failed or refused to timely select a vendor and complete the contract application process, Montgomery County had no juvenile diversion program for more than four months." Complaint, at ¶129. But, after completion of nearly all that discovery, JIC on November 29 proposed that charge be dismissed (by a joint stipulation of dismissal) – meaning Judge Kelly had been forced to expend significant time defending against a charge now dismissed.

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<sup>6</sup> By the same order entered October 25 referenced above, the parties were required to complete all requests for written or document discovery by November 20, later extended to November 22.

<sup>7</sup> Judge Kelly has received no response at all to at least 1 document subpoena, and only minimal partial responses to a few others, all of which counsel are still following up on.

12. And perhaps most important, leading up to the original January 8, 2018 trial date, Judge Kelly and counsel had been preparing over the previous few months to address the over 400 individual cases identified in the *original* COJ complaint as comprising an alleged pattern-and-practice of delay in managing her docket. As noted above, these more than 400 cases included roughly 350 cases in parts of her docket that JIC had given Judge Kelly *no* notice at all were part of its investigation, instead springing those areas and matters on Judge Kelly for the first time in the COJ complaint itself.

13. Then, in the initial amended complaint, which this Court granted leave to file just four (4) weeks before the original January 8 trial date, JIC added another 160 individual cases for Judge Kelly to address. Forty-two (42) of these JIC identified in its motion for leave as “summaries of ... additional cases the Commission intends to use as evidence at trial.” The other 118 individual cases were included in a new count alleging violations of the 6-month report requirement of Canon 3A(5).<sup>8</sup> See Amended Complaint, at ¶¶ 75-81 (7 new cases), 88 (1 new case), 94-95 (2 new cases), 117-143 (27 new cases), 157-158 (2 new cases), 160-162 (3 new cases), and 186 (118 new cases). All of these cases too are outside the area of dependency cases that, to all appearances, had been the sole focus of JIC’s investigation – until JIC’s filing of the original COJ complaint.<sup>9</sup>

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<sup>8</sup> JIC’s motion for leave to amend obscured the fact that nearly 120 more new cases would be added as violations of the 6-month report requirement, stating only that the amended complaint “modifies Section VI.E by summarizing Judge Kelly’s lack of compliance with Canon 3A(5).” Motion for Leave to File Amended Complaint (filed Dec. 5, 2017), at 1.

<sup>9</sup> During Judge Kelly’s appearance before JIC on May 18, 2017, JIC counsel asked a short series of questions related to Judge Kelly’s filing of 6-month reports. But at *no* time before JIC’s filing of the original COJ complaint did JIC ever give notice to Judge Kelly of *any* individual instances of alleged violations of Canon 3A(5), much less afford her the opportunity to respond to any specific alleged violations.

14. Just over two weeks ago, on February 5, JIC moved for leave to amend the complaint a second time. Among other things, this second amendment expanded the charges against Judge Kelly even further, adding (as best as we can determine) approximately 107 new cases<sup>10</sup>, all but a handful of which likewise appear to be in the same areas of which JIC gave Judge Kelly *no* notice during the investigative phase. *See* Second Amended Complaint, at ¶¶ 36, 41, 44-45, 63-65, 89-90, 153-165, 209, 211-222.<sup>11</sup> The Court granted JIC leave to file the second amended complaint six (6) days ago, on February 14, before Judge Kelly was able to respond to oppose JIC's motion.

15. Judge Kelly can and will be prepared to address and offer evidence on defenses common to her docket as a whole – what Judge Kelly has characterized previously as structural issues. *See* Judge Anita Kelly's Answer and Defenses, at 2-7. These include but are not limited to soaring caseloads, large reductions in the judicial department budget, dramatic decreases in available staff to support the judicial system, scheduling practices, etc.

16. But, addressing individually the cases or matters being cited by JIC as comprising Judge Kelly's alleged pattern-and-practice of delay, requires being able to review individual case files, e.g., to determine whether there actually was a delay in that case, whether any delay was justifiable in whole or in part, and whether Judge Kelly or another actor (e.g., DHR) was responsible for or complicit in any such individual delay. *See id.* at 2.

17. And, even apart from the issues of searchability and difficulty of review (especially electronic review) of the documents produced by JIC during the course of its investigation (up to and through the week of the COJ complaint), as best we can determine, JIC did *not* obtain case

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<sup>10</sup> "Case" refers to a distinct case number.

<sup>11</sup> Paragraphs 211 through 222 include numerous cases (approximately 118) that were added in the initial amended complaint, but also add another approximately 64 new cases.

files for the originally 350+ (now 610+) cases in the areas of which Judge Kelly had no pre-COJ-complaint notice were under investigation -- either during the investigation or since the filing of the COJ complaint.

18. Accordingly, these case files can be accessed only through Alacourt or Alacourt Plus, for which Judge Kelly obtained access (by order of this Court), and only at the Administrative Office of Courts (AOC) during their normal business hours.

19. As a result of these and other factors, Judge Kelly, counsel, and counsel's administrative staff have not been able to review close to half the case files identified in the first amended complaint -- without even taking into account the 107 new cases added last week.

20. The initial order granting Judge Kelly and counsel digital access to Alacourt and Alacourt Plus was entered December 4, 2017. That order gave Judge Kelly, accompanied by counsel, digital read-only access to her Alacourt e-mail account and to her case files in Alacourt. As initially set up by AOC, that access allowed only one person at a time to do searches. Judge Kelly (with counsel) spent a number of days during December searching and reviewing her work e-mails for any potentially relevant to her defense.

21. In an attempt to speed up such review, counsel in approximately mid-December asked counsel for AOC whether AOC could set up at least one more station with the capability of allowing another person to do searches and review independently at the same time. On December 28, AOC counsel advised they would be able to set up another such station. Also on December 28, Judge Kelly filed a motion to expand digital access to include her counsel's administrative staff, which the Court granted on January 3.

22. Beginning that week, Judge Kelly has gone to AOC to review case files digitally through Alacourt nearly every weekday through the present, generally arriving by 9:00 a.m. and

not leaving until after 5:00 p.m. or close to 6:00 p.m. (an accommodation by AOC). To her best recollection, during those several weeks, she has only missed going to AOC one-and-a-half days because of illness (flu)<sup>12</sup>, two days to stay with her visiting disabled sister, and one other day (to meet with her counsel regarding case and trial preparation). In addition, one of counsel's staff has joined Judge Kelly at AOC to review case files in Alacourt for several days.

23. Nonetheless, even with Judge Kelly reviewing case files on Alacourt all day nearly every day AOC has been open over the past six (6) weeks<sup>13</sup>, and being joined in reviewing files by staff on a number of those days, Judge Kelly has not come close to completing review of the Alacourt case files of even those cases listed in the *first* amended complaint. More specifically, although Judge Kelly has been able to review the approximately 320 uncontested divorces listed in paragraph 83 of the first amended complaint (with which she started and which are relatively easy files to review), she otherwise has only finished reviewing those cases listed through paragraph 40 of that complaint. In contrast, nearly each paragraph from 40 through 166 identifies another individual case (in some paragraphs, more than one) involving alleged delay on Judge Kelly's part; and paragraph 187, which identifies alleged violations by Judge Kelly of the Canon 3A(5) six-month reporting requirement, lists 118 more such individual cases.<sup>14</sup>

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<sup>12</sup> Judge Kelly was housebound for 3 days, but the state government (including AOC) was closed because of hazardous winter weather for 1 ½ of those days. Also, there have been 2 state holidays, on which AOC also was closed, during these past several weeks.

<sup>13</sup> On January 23, Judge Kelly's counsel asked AOC counsel whether it was possible to arrange remote access to Alacourt, to allow Judge Kelly and counsel to review case files during evenings and weekends or otherwise without being required to go to AOC. On January 29, AOC counsel, citing a variety of security concerns, especially with confidential records at issue, advised they were unable to approve our request.

<sup>14</sup> Individual file review is necessary also for the 180+ cases listed in the second amended complaint (up from approximately 120 such cases in the first amended complaint) as involving alleged violations of the Canon 3A(5) six-month reporting requirement. As just one example, Judge Kelly and former staff are aware of various examples of Clerk's office errors in entering or failing to enter information in Alacourt, e.g., closing a case or matter that was still open, or

24. Stated differently, despite working assiduously at AOC to review case files all day, nearly every weekday, the past six weeks, Judge Kelly has not been able to review the individual case files in roughly 240 cases listed in the *first* amended complaint – not to mention the 107 new individual cases added in the *second* amended complaint last week. And, review of these individual case files is necessary for Judge Kelly and counsel to determine whether JIC's allegations regarding those cases are accurate, whether there was delay in a given case (or, as to the 6-month reports, whether there was an omission), and whether any delay or omission was justifiable – in short, to frame a defense (or to concede an allegation, if no defense is available).

25. In sum, it is apparent that, even with our best and most diligent efforts, Judge Kelly and counsel will be unable to review – and thus to prepare a defense for -- a significant chunk of the approximately 670 individual cases<sup>15</sup> now included in the formal charges, by the time of trial just under four (4) weeks from now. Indeed, the available time is probably even more constrained than that, as the deadline for identifying and producing exhibits is February 28, i.e., 8 days from today.

26. Furthermore, with all the tasks that must or need to be done -- which only expanded with the addition last week of another 107 new cases to address -- it is difficult at best to have time to address logistical and other matters that ideally could streamline and shorten the presentation of this case at trial (e.g., attempting to reach agreement with JIC counsel regarding the authenticity and admissibility of exhibits, and seeking to resolve objections).

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failing to note a matter as closed -- which could create errors or omissions in the information Judge Kelly and her staff searched in Alacourt in order to prepare the six-month reports.

<sup>15</sup> Calculated by adding the approximately 410 total individual cases identified in the original complaint, plus approximately 160 more individual cases in the first amended complaint, plus another approximately 107 individual cases in the second amended complaint.

27. In short, given the large number of individual cases (more than 670) identified in the original complaint and the two amended complaints as making up Judge Kelly's alleged pattern-and-practice of delays in acting or refusing to act, it will be exceptionally difficult, if not impossible, for Judge Kelly and counsel to prepare adequately to defend against all -- or many -- the charges asserted against her in those complaints under the current scheduled **March 19, 2018** trial date -- so much so that requiring Judge Kelly to go to trial on the complaint in that matter, whether the original or the second amended version, would violate her rights to due process.

28. Even with Judge Kelly and counsel having made their best good faith efforts -- indeed, having expended exceptional time and effort -- during the compressed pretrial schedule in this matter to respond to and defend against the charges and prepare for trial, Judge Kelly and her counsel believe that it will require at least an additional sixty (60) days under the best circumstances to adequately prepare to defend against the charges at trial.

WHEREFORE, PREMISES CONSIDERED, Judge Kelly respectfully requests that the Court grant this motion, and enter an order continuing the trial of this case from its current March 19, 2018 setting and resetting this case for trial not less than sixty (60) days thereafter.

Respectfully submitted this 20th day of February, 2018.

/s/H. Lewis Gillis  
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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 20th day of February, 2018, as follows:

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