

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)



JUDGE ANITA KELLY’S MOTION FOR CONTINUANCE

Judge Anita Kelly respectfully moves to continue the trial of this matter from its current January 8, 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 this 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. In that complaint 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.

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 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.¹ By including in the COJ complaint pattern-and-practice claims in new areas (i.e., other than dependency cases)², JIC has identified and charged approximately 350 more cases originally (and now over 390 cases, as of this week) in which JIC claims Judge Kelly unreasonably and unjustifiably delayed taking action.³ All of these 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.

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.

¹ 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.

² 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.

³ Indeed, section III.A (uncontested divorces) 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). And, the Court on December 11, 2017, before Judge Kelly was able to respond to oppose it, granted JIC leave to file an amended complaint adding 42 more such cases.

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 scheduled to finish that partially-completed deposition and take another tomorrow; 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 documents⁴ only – half of them after the October 25th order denying the motion to dismiss --, the responses to most of which have been produced on a rolling basis and have required extensive follow-up (and in at least one instance, has involved motion practice)⁵; 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 of that discovery, JIC only recently (i.e., 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 (as of last week).

12. Coupled with those facts, Judge Kelly’s lead counsel (Lewis Gillis) was in trial on a medical negligence case for ten (10) trial days right before and after Thanksgiving; and has been in trial in a criminal case over the course of three (3) days just this week.

⁴ 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.

⁵ 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.

13. And perhaps most important, Judge Kelly and counsel have been preparing over the last few months to address the over 400 individual cases (of the more than 9000 new case filings assigned to Judge Kelly during the same time period) 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 include 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.

14. As the Court is aware, in a further effort to dispose of this case before trial, or alternatively to reduce and make much more manageable the case against her for trial preparation and trial, Judge Kelly last week (i.e., on December 7) filed a petition for writ of mandamus with the Alabama Supreme Court. That petition sought to address with the Supreme Court before trial two critical arguments that Judge Kelly raised in her motion to dismiss and this Court denied, both having the potential to affect significantly the scope of this trial.

15. The petition addressed first the jurisdiction of this Court to hear the charges (in the absence of a verified complaint supporting any of the charges, *see Moore v. Ala. Jud. Inquiry Comm'n*, no. 1160002 (Ala. April 19, 2017), slip op. at ___ (discussion of Count VI), which if successful would have resulted in dismissal of all (or nearly all) of the complaint.

16. The petition then addressed, alternatively, the lack of notice to Judge Kelly from JIC during the investigative phase that various matters (claims of a pattern and practice of delay in areas of her docket other than dependency cases), resulting in charges comprising approximately half of the COJ complaint, were even under investigation. As noted in Judge Kelly's brief in support of her motion to dismiss, this resulted in the quintupling of the number of cases that Judge Kelly had notice she would have to address (60 to 80 individual cases in the area of

dependency cases of which she had notice before the filing of the COJ complaint, plus approximately 350 more individual cases in other areas).⁶ If successful, this argument likely would have resulted in dismissal of all those charges from the complaint, substantially reducing the matters to be tried.

16. That petition for writ of mandamus has already been dismissed.

17. In the meantime, as noted above, the day before Judge Kelly filed her petition (i.e., on December 6) and just eight (8) days before the final pretrial hearing (today, December 14), JIC moved for leave to amend the complaint. Among other things, this amendment added 42 new cases, all of which appear to be in the same areas of which JIC gave Judge Kelly no notice during the investigative phase. As also noted above, the Court has already granted (three days ago, on December 11) JIC leave to amend the complaint to expand the charge against Judge Kelly even further, before Judge Kelly was able to respond to oppose JIC's motion.

18. 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.

19. 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

⁶ Even so, this is still only a small fraction of the more than over 9200 new case assignments Judge Kelly received during the period covered by the complaint (roughly 2013 through 2016), *see Exhibit 53 to Judge Kelly's Answer*, or the very-nearly-as-many cases she disposed of during roughly the same period.

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.

20. 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 files for the 350 (now 390+) 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.

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

22. Furthermore, with all the tasks that must or need to be done -- which only expanded with the addition one (1) week before final pretrial hearing of yet another 42 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).

23. In short, given the large number of individual cases (nearly 400) identified in the original complaint and last week's amended complaint 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 the charges asserted against her in those complaints under the current scheduled January 8, 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 amended version, would violate her rights to due process.

24. 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 January 8, 2018 setting and resetting this case for trial not less than sixty (60) days thereafter.

Respectfully submitted this 14th day of December, 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 14th day of December, 2017, as follows:

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