

**BEFORE THE ALABAMA COURT OF THE JUDICIARY**

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**FILED**

AUG 11 2022

**ALABAMA COURT OF THE JUDICIARY**  
Nathan P. Wilson  
Secretary

**IN THE MATTER OF:**

STATE OF ALABAMA JUDICIAL INQUIRY COMMISSION

v.

THE HONORABLE TRACIE A. TODD  
CIRCUIT JUDGE, BIRMINGHAM DIVISION,  
CRIMINAL DIVISION, JEFFERSON COUNTY, ALABAMA

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**Case # 61**

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**REPLY TO OBJECTION TO MOTION TO CONTINUE**

Counsel for Judge Todd finds it necessary to file this short reply to the Commission's objection to her motion to continue.

*First*, counsel was not "dilatatory" – intentionally, wrongfully delaying – in filing the motion to continue. The motion to continue was filed at the Court's dispositive motions deadline. Further, as early as August 2, 2022, the Commission knew that a motion to continue might then be filed if trial preparations required it. If counsel had filed the motion to continue sooner, the Commission would have said it was too early and that there was time to conclude the needed tasks. The reasons for the motion to continue are clearly set out in it: fundamentally, counsel has had insufficient time to adequately prepare for the trial and more needs to be done. Period. If the Court wishes to hold a trial in which Judge Todd receives competent representation and in which the Court members hear a full, fair airing of facts related to the charges to render an informed judgment, a continuance is necessary. A trial continuance

benefits Judge Todd; it also benefits the Court and the Commission in ensuring a process that results in a fair, reliable, valid judgment.

In indicting counsel of dilatory conduct in the filing of the motion to continue, the Commission accuses counsel of filing a motion that is for illegitimate, contrived reasons. In accusing counsel of having ill purpose in seeking a continuance, the Commission goes so far as to ask the Court to issue a finding that the request is “dilatory.” The accusation is ludicrous and offensive. Counsel did not risk their law licenses in filing a motion that is intended to delay for delay’s sake (or some other improper sake) or to interfere wrongly with the judicial process. Dilatory practice is a violation of Alabama Rule of Professional Conduct 3.2. *See* Ala. R.P.C. 3.3, 3.4, & 3.5; *see also* Va. R.P.C.3.3(a)(1), 3.4(g), 3.5(f); D.C. R.P.C. 3.2-3.5. Counsel sought a continuance because it is necessary and appropriate. Perhaps counsel has gotten accustomed to the civility and professionalism of the Virginia courts, but it appears the Commission too easily resorts to allegations of professional misconduct. Counsel cannot help but take offense and exception to the Commission’s argument, which should be summarily rejected.

*Second*, the length of the continuance is short, consistent with prior practice of this Court. The inconvenience to the parties is minimal. Counsel for the Commission and for Judge Todd will use current efforts preparing for trial as we all prepare for the continued trial date. The Commission seems to speak for the witnesses, but counsel understands that the Commission’s representations as to the witness’ changing their schedules is imprecise. At least one judge on the Commission’s witness

list contacted counsel to ask to be placed on call because he is scheduled to start a trial on August 15<sup>th</sup>. Other witnesses employed in the Jefferson County court system have asked to be placed on call. The witnesses will appreciate not having to travel to Montgomery from Birmingham at this time. Counsel recognizes that the Court members have set aside these two days. The need for Judge Todd's defense to be prepared is great, necessitating new dates. To the extent that the Commission wishes to resolve this case, the number of witnesses and exhibits raises questions whether this trial can conclude in the two days set aside next week. More likely, the trial will be continued mid-way through to conclude it at a future time when the Court members and parties are all available, as this Court has done in other cases. And with due respect to the Commission, criminal cases *do* take priority over civil cases, including this one.

Judge Todd obtained local counsel in April. That counsel primarily focused on finding Mr. Ungvarsky to serve as lead counsel, as he has, and on reviewing the allegations in the Complaint and filing the very detailed Answer.<sup>1</sup> Mr. Ungvarsky conducted all the depositions and is anticipated to conduct the trial. In any event, even counting the time that Mr. Rice was on the case prior to Mr. Ungvarsky when he reviewed the Complaint and filed the Answer, the extra month still only means that there has been but 4 months to prepare for trial – time proven to be insufficient and inconsistently less than this Court has afforded in previous cases.

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<sup>1</sup> Mr. Rice entered his appearance on April 6, 2022 and filed the Answer on April 22, 2022.

The Commission correctly points out that the Alabama Supreme Court denied the petition for mandamus and the motion for stay. Judge Todd's counsel had not realized that occurred and deeply regrets and apologizes for the error in the motion. The oversight exemplifies the vast amounts of work that have had to be conducted in a very short period of time. In the pressure of haste, mistakes occur.<sup>2</sup> The continuance request is made to avoid omissions in the production of evidence and other mistakes that prejudice Judge Todd's trial defense because of reasons associated with counsel and counsel's ability to investigate, digest, and marshal all investigation and discovery.

The Commission is mistaken when it posits that Judge Todd cites not authority for a continuance. She cited to prior decisions of this Court. And surely the Court does not see as an "analogous circumstance" in the two cases cited by the Commission, *Moody v. State*, 888 So. 2d 532, 553 (Ala. Crim. App. 2003) and *Flowers v. State*, 799 So. 2d 966 (Ala. Crim. App. 1999). The denial of the continuance motion in *Moody* was premised on the facts that (a) Moody had been represented by 2 lawyers for over 2 years; (b) Moody went *pro se* for an extended period of time; (c) *in the middle of the trial*, after jury selection had begun, Moody requested appointment of counsel and a continuance; (d) Moody requested a 12-18 months continuance; and (e) the trial court had already continued the case at least twice before. 888 So. Wd at 557-58. In *Flowers*, the motion to continue was filed on behalf of recently appointed second-chair counsel,

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<sup>2</sup> Similarly, given more time in the day and more time between appearance and trial, Judge Todd's counsel would have filed a more detailed motion to dismiss or in the alternative for summary judgment.

but lead counsel had been on the case since the defendant's arrest for almost two years and "lead counsel was prepared for trial and [] had investigated the case." 799 So. 2d at 990-91.

Judge Todd, through her counsel as officers of the court, seeks a continuance of 2 months for good faith, valid, and necessary reasons to be prepared for trial. Before holding a trial on the Commission's complaint to remove Judge Todd from elected service, this Court should grant her reasonable request.

Respectfully submitted,

/s/ Richard A. Rice (RIC086)

Richard A. Rice  
The Rice Firm, LLC  
115 RICHARD ARRINGTON JR. North,  
Birmingham, AL 35203  
Post Office Box 453  
Birmingham, AL 35201  
(205) 618-8733 ext 101  
(256)529-0462 cellular  
888.391.7193 facsimile

/s/ Edward J. Ungvarsky

Edward J. Ungvarsky, Esq.  
VSB No. 83014; DC Bar 45934  
*Pro Hac Vice*  
Ungvarsky Law, PLLC  
421 King Street, Suite 505  
Alexandria, VA 22314  
Office: (571) 207-9710  
Cellular: (202) 409-2084  
Fax (571) 777-9933  
ed@ungvarskylaw.com  
Counsel for Judge Tracie A. Todd

CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of August, 2022 electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy by sending the same via email, and properly addressed as follows:

Elizabeth Bern  
Attorney for the Commission  
Alabama Judicial Inquiry Commission  
P. O. Box 303400  
Montgomery, Alabama 36130-3400  
elizabeth.bern@jic.alabama.gov

John Selden  
Attorney for the Commission  
Alabama Judicial Inquiry Commission  
P. O. Box 303400  
john.selden@jic.alabama.gov

Jacob Jackson  
Attorney for the Commission  
Alabama Judicial Inquiry Commission  
P. O. Box 303400  
Montgomery, Alabama 36130-3400  
jacob.jackson@jic.alabama.gov

*/s/ Edward J. Ungvarsky*  
Edward J. Ungvarsky, Esq.  
VSB No. 83014; DC Bar 45934  
*Pro Hac Vice*  
Ungvarsky Law, PLLC  
421 King Street, Suite 505  
Alexandria, VA 22314  
Office: (571) 207-9710  
Cellular: (202) 409-2084  
Fax (571) 777-9933  
ed@ungvarskylaw.com  
Counsel for Judge Tracie A. Todd