

THE CUMMINS LAW FIRM, P.C.

TRIAL LAWYERS
77 WEST WACKER DRIVE
SUITE 4800
CHICAGO, ILLINOIS 60601
TELEPHONE: (312) 578-0500
FACSIMILE: (312) 578-1234

ROBERT P. CUMMINS
rpc@cumminslawfirm.com

THOMAS C. CRONIN
OF COUNSEL

April 20, 2009

BY FEDERAL EXPRESS


**State of Texas
Commission on Judicial Conduct
Attn: Seana Willig
Executive Director
Suite 415
300 West 15th Street
Austin, Texas
78701**

**Re: Commission Inquiry No. 96
Judge Sharon Keller**

Dear Ms. Willig:

Enclosed is a declaration being filed with the Commission in connection with the pending Keller Inquiry.

The identified judicial ethicists submit this declaration in support of the Commission's mandate to promote confidence in the integrity, independence and impartiality of the judiciary.

Respectfully Submitted,

Robert P. Cummins

RPC/bn

**cc: Charles L. Babcock
John J. McKetta, III
Michelle Alcalá
Enclosure**

BEFORE THE
STATE COMMISSION OF JUDICIAL CONDUCT

INQUIRY CONCERNING A JUDGE,

NO. 96

ETHICS EXPERTS' DECLARATION

Introduction

1. The undersigned are recognized experts in the field of judicial ethics and disciplinary enforcement. Because of our deep concern about the allegations of serious violations of judicial ethics by Judge Sharon Keller, we are submitting this declaration pro bono and subject to penalties for perjury.

Factual Premises of This Opinion

2. We are not finders of fact. The matters relied on in this declaration are based upon allegations by the Texas State Commission on Judicial Conduct, on published reports in newspapers and reported decisions. The allegations and the reports have either been expressly admitted by Judge Keller or, to the best of our knowledge, have not been refuted by Judge Keller.

Opinion

3. In brief, our opinion is that Judge Sharon Keller has violated judicial ethics under the Texas Code of Judicial Conduct, which includes her obligation to provide litigants due process of law. These violations are sufficiently serious to require that Judge Keller be removed from the bench, pursuant to the Texas Constitution.¹ The violations relate to (A) Judge Keller's deciding cases despite her lack of impartiality and the appearance of impartiality, which required that she recuse herself; and (B) Judge Keller's dishonesty in her financial reporting and her dishonesty in her attempt to obtain money from the State of Texas.

A. Judge Keller's Lack of Impartiality

4. Judge Keller made a critical decision in Michael Wayne Richard's death-penalty case despite the fact that she had manifested bias against criminal defendants like Mr. Richard. Judge Keller thereby violated Mr. Richard's constitutional right to due process of law, and also violated Canon 2A of the

¹ The Texas Constitution, Art. 5, sec. 1-a(6)A provides for removal of a judge for "incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."

Texas Code of Judicial Conduct, which requires compliance with the law, impartiality, and the appearance of impartiality.²

5. In *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), the United States Supreme Court was unanimous in recognizing that a judge's lack of impartiality violates due process of law and applicable rules of judicial conduct. In defining "impartiality" in the majority opinion, Justice Scalia said:

One meaning of "impartiality" in the judicial context – and of course its root meaning – is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used.³

Dissenting on other grounds for himself and three other justices, Justice Stevens observed that under that definition:

[An election speech] that stress[es] a candidate's unbroken record of affirming convictions for rape, for example, impl[ies] a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).⁴

Justice Scalia agreed that the election speech suggested by Justice Stevens "may well exhibit a bias against parties," that is, against defendants in rape cases.⁵

6. Thus, all nine justices in the *White* case concurred that if a judge announces that she has an unbroken record of affirming rape convictions, an appropriate inference is that the judge favors the prosecution and is biased against defendants in rape cases.

7. In Judge Keller's case, no such inference is necessary. She has admitted in so many words, "I'm a prosecution-oriented person."⁶ As she explained, "I guess what pro-prosecution means is seeing legal issues from the

² Texas Code of Judicial Conduct, Canon 2A: A judge shall "comply with the law" and act at all times in a manner that "promotes public confidence in the ... impartiality of the judiciary." Texas Code of Judicial Conduct, Canon 2: A judge must avoid "Impropriety and the Appearance of Impropriety in All of the Judge's Activities." See also *In re Murchison*, 75 S.Ct. 623, 625 (1955): As a matter of constitutional due process, "justice must satisfy the appearance of justice," and a judge must recuse herself for bias or the appearance of bias.

³ 122 S.Ct. at p. 2535 (emphasis in the original).

⁴ 122 S.Ct. At p. 2548.

⁵ 122 S.Ct. at p. 2536, n. 7

⁶ Jennifer Lenhart, "Texas Court of Criminal Appeals," *Houston Chronicle*, Oct. 30, 1994, at 16.

perspective of the state instead of the perspective of the defense.”⁷ These statements by Judge Keller are precisely the kind of “announcement” discussed by the Supreme Court.

8. Accordingly, because of her manifest lack of impartiality and of the appearance of impartiality, Judge Keller was required to recuse herself from participating in any decision in Michael Richard’s case, both by the United States Constitution and by the Texas Rules of Judicial Conduct.⁸ Her failure to do so manifests either willful misconduct of a duty of which she was aware, or incompetence for having been ignorant of an ethical obligation of which she should have been aware.

9. Michael Richard was scheduled to be executed in the evening of September 25, 2007. However, as the result of a Supreme Court decision that same day, Mr. Richard’s lawyers had grounds for an emergency appeal. Because of a computer breakdown they found it necessary to call the court clerk’s office to ask that the office be kept open after 5:00 p.m. so that they could file the appeal. As a result, the court’s general counsel called Judge Keller for a decision on that issue.

10. Judge Keller should have recused herself on grounds of a lack of impartiality. In addition, Judge Keller knew that she was not the duty judge who had been assigned to Mr. Richard’s case. Indeed, at the time of the call, Judge Keller had returned home for the remainder of the day, where she was attending to a private household chore. Yet, Judge Keller did not recuse herself.

11. Instead, Judge Keller reached out to decide the case in a “pro-prosecution” way. Despite the fact that Mr. Richard’s execution was imminent, and that his death would moot any appeal, Judge Keller made the perverse decision that the Clerk’s Office should not remain open beyond 5:00 p.m. to receive the emergency appeal. As a result, Mr. Richard’s lawyers were not able to file the appeal with the clerk’s office, and Mr. Richard was executed only a few hours later.

12. Moreover, Judge Keller has evidenced her “pro-prosecution” bias, or the appearance of bias, in numerous other criminal cases in which she was required to recuse herself, and in which she voted to affirm convictions. In one case she refused to reverse a conviction even after DNA evidence had confirmed that the appellant was factually innocent of the crime.⁹

⁷ Bruce Nichols, “Allegations Stir Up Appeals Court Races,” Dallas Morning News, Oct. 9, 1994, at 45A.

⁸ Texas Code of Judicial Conduct, Canon 2A requires that a judge “comply with the law” and act at all times in a manner that “promotes public confidence in the ... impartiality of the judiciary.” Canon 3B provides that a judge shall not decide matters “in which disqualification is required or recusal is appropriate.” See also Canon 2 itself, which requires a judge to avoid “Impropriety and the Appearance of Impropriety”. In addition, as a matter of constitutional due process, “justice must satisfy the appearance of justice,” and a judge must recuse herself for bias or the appearance of bias. *In re Murchison*, 75 S.Ct. 623, 625 (1955).

⁹Ex parte Criner, No. 36, 856-01, slip op., opinion at 3 (Tex. Crim. App. July 8, 1998).

13. With particular regard to death penalty cases, Judge Keller dissented 16 times in 19 cases (84% of the time) in which the majority of her court voted against the prosecution and for the defendant.¹⁰ The three cases in which she voted with the majority were unique in their facts. In one of those cases, four police officers testified in the habeas corpus hearing that the prosecution's sole eye witness was a liar and could not be trusted.¹¹ In another, a juror had been improperly excluded because of her religious beliefs without further inquiry.¹² In the third, the state did not even respond on appeal regarding the trial court's erroneous inclusion of prejudicial evidence.¹³

B. Judge Keller's Dishonesty

14. Judge Keller lied in her official, sworn financial statements, and she lied about her financial status in an attempt to obtain money from the State of Texas. Judge Keller thereby violated the bedrock ethic of all lawyers and judges by "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."¹⁴ She also violated Canon 2A of the Texas Code of Judicial Conduct, which requires that a judge act at all times in a manner that "promotes public confidence in the integrity ... of the judiciary."

15. Texas judges, as state officeholders, are required to file annual, sworn financial disclosure statements with the Texas Ethics Commission.¹⁵ Failure to file accurate statements can result in civil and criminal penalties.

16. In her financial disclosure statements, Judge Keller repeatedly omitted reference to her ownership interest in several residential and commercial properties that could be valued at close to \$2,000,000.¹⁶

¹⁰ Miles v. State, 918 S.W.2d 511 (1996); Tigner v. State, 928 S.W.2d 540 (1996); Cook v. State, 940 S.W.2d 623 (1996); Ex Parte Robison 12,952 1999 Tex. Crim. App., Lexis 90 (1999) (unpublished); Cobb v. State, 93 S.W.3d 1 (2000); Ovalle v. State, 13 S.W.3d 774 (2000); Ex Parte Vareles, 45 S.W.3d 627 (2001); Rousseau v. State, 171 S.W.3d 871 (2005); Vodochodsky v. State, 158 S.W.3d 503 (2005); Renteria v. State, 206 S.W.3d 689 (2006); Springsteen v. State, No. AP-73,223 Tex Crim. App. Lexis 2340 (2006) (unpublished); Rubio v. State, 241 S.W.3d 1 (2007); Davis v. State, No. AP-74,393 2007 Tex. Crim. App. Lexis 303 (unpublished); Ex Parte VanAlstyne, 239 S.W.3d 815 (2007); Ex Parte Henderson, 246 S.W.3d 690 (2007); Penrey v. State, 178 S.W.3d 782 (2008). (Research by Loyola University of Chicago Law School student Christopher Blum, under the supervision of Robert Cummins, Esquire.)

¹¹ Ex Parte Richardson, 70 S.W.3d 865 (2002).

¹² Clark v. State, 929 S.W.2d 5 (1996).

¹³ Johnson v. State, 967 S.W.2d 410 (1998).

¹⁴ Texas Rules of Professional Conduct, Rule 8.4(). See also Texas Code of Judicial Conduct, Canon 2 (requiring that a judge avoid "Impropriety and the Appearance of Impropriety").

¹⁵ See Texas Code of Judicial Conduct Canon, 4I(2).

¹⁶ Steve McGonigle, "Judge Keller's Disclosures Omit Nearly \$2 Million in Real Estate,

17. Judge Keller has requested that the State pay her lawyer's fees, and has falsely claimed that the State's failure to pay the fees would be "financially ruinous" to her.

18. Judge Keller has also contended that the State's refusal to pay her lawyer's fees justifies dismissal of the charges on the ground of denial of her right to counsel. This contention is disingenuous in view of her substantial financial resources, a major part of which had been omitted in her disclosure statements.

Conclusion

19. Judge Sharon Keller has committed serious violations of the Texas Code of Judicial Conduct, including violations of constitutional due process of law. These violations relate to (A) her deciding cases despite her lack of impartiality, and (B) her dishonesty in her financial reporting and her dishonesty in her attempt to obtain money from the State.

20. These violations are sufficiently serious to require that Judge Keller be removed from office. In the words of the Texas Constitution relating to removal of judges, Judge Keller is guilty of "incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, [and] willful [and] persistent conduct that is clearly inconsistent with the proper performance of [her] duties." In addition, her egregious misconduct "casts public discredit upon the judiciary [and upon the] administration of justice."¹⁷

Respectfully submitted on behalf of,¹⁸

(Affiliations are for identification purposes only)

James Ellis Arden, Attorney at Law; Member, Association of Professional Responsibility Lawyers (APRL); Member, Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA)

Robert P. Cummins, Former Chairman of the Illinois Judicial Inquiry Board; Advisor to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct; Trial Lawyer

Dean S. Eveland, Attorney, Walter Reed Army Institute of Research, Maryland; Former member of Indianapolis Bar Association Ethics Committee

Public Records Show," The Dallas Morning News, March 30, 2009.

Apparently, Judge Keller also withheld this information from her lawyer, who said that he had not known about her real estate holdings when he made the claims on her behalf.

¹⁷ Texas Constitution, Art. 5, sec. 1-a(6)A.

¹⁸ The drafters gratefully acknowledge the contributions of Ms. Erica Greene, Ms. Elizabeth Cebula and Messrs. Michael Baniak, Christopher Blum and Nicholas Morjal, students at Loyola University Chicago School of Law, under the supervision of Robert Cummins, Esquire.

Lawrence Fox, I. Grant Irey, Jr. Adjunct Professor of Law at University of Pennsylvania and Lecturer of Law at Harvard University; Former Chair of the ABA Committee on Ethics and Professional Responsibility

Monroe Freedman, Professor of Law, Hofstra University; ABA Michael Franck Award for Professionalism; Author of numerous books and articles on judicial and legal ethics

Donald K. Joseph, Visiting Associate Professor, Rutgers School of Law – Camden; Of Counsel, Wolf Block; Serves on the Ethics and Professional Responsibility Committee and the Professional Liability Committees of the Pennsylvania Bar Association

Carol M. Langford, Adjunct professor of ethics, U.C. Hastings College of the Law; Past Chair, California Committee on Professional Responsibility and Conduct; Co-author Legal Ethics in the Practice of Law, Lexis, 3rd Edition, 2008

Howard Lesnick, Jefferson B. Fordham Professor of Law, University of Pennsylvania

Susan Martyn, Stoepler Professor of Law and Values, University of Toledo College of Law; Former advisor to the American Law Institute’s Restatement of the Law Governing Lawyers and member of the ABA’s Ethics 2000 Commission

Judith L. Maute, William J. Alley Professor of Law, University of Oklahoma College of Law

Kurt Melchior, General counsel, Nossaman LLP; Former chair, Committee on Ethics, Board of Governors of State Bar of California; Member, Commission on Revision of the Rules of Professional Conduct, State Bar of California

Ronald Minkoff, Adjunct Professor of Professional Responsibility, Fordham University School of Law; Past President, APRL; Past Chair, New York City Bar Association Committee on Model Code of Judicial Conduct; Member, New York State Bar Association Committee to Evaluate Code of Judicial Conduct

Sharisse O’Carroll, Attorney, Legal Ethics Expert, Adjunct Professor of Law, University of Tulsa College of Law; Member Oklahoma Bar Association Bench & Bar Committee, redrafted the Oklahoma Judicial Code in accordance with the new ABA Model Judicial Code

Deborah Rhode, Director, Center on the Legal Profession, and E.W. McFarland Professor of Law, Stanford Law School

Seth Rosner, Past President of APRL and Chairman Emeritus of the Board of Governors of the Josephson Institute of Ethics

Robert Schuwerk, Professor of Law, University of Houston Law Center; Co-Author of Handbook of Texas Lawyer and Judicial Ethics 2006-2007

Mitchell M. Simon, Professor, Franklin Pierce Law Center; Former Chair of the New Hampshire Bar Association's Ethics Committee

Abbe Smith, Professor of Law and Co-Director of Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program, Georgetown University Law Center

Steve Smoot, Member of APRL and Texas Center for Legal Ethics and Responsibility

Keith Swisher, Adjunct Professor of Law, Arizona State University; Author of numerous scholarly articles on legal and judicial ethics

Michael E. Tigar, Professor of the Practice of Law, Duke Law School

Jim Towery, Adjunct Faculty, Santa Clara University Law School and Lincoln Law School – San Jose

Ellen Yaroshefsky, Professor and Director of the Jacob Burns Ethics Center, Benjamin N. Cardozo School of Law

Richard Zitrin, Adjunct Professor of Legal Ethics, University of California, Hastings College of Law and Founding Director, Center for Applied legal Ethics, University of San Francisco School of Law