Opinion filed October 21, 2015.

DOCKET NO. 15-0002

BEFORE THE SPECIAL COURT OF REVIEW
APPOINTED BY THE SUPREME COURT OF TEXAS

IN RE THE HONORABLE ETTA MULLIN

O P I N I O N

In this *de novo* proceeding this special court of review considers six charges of judicial misconduct brought against a former trial judge by the Examiners of the State Commission on Judicial Conduct. The judge's conduct drew a public admonition from the Commission following an informal hearing. After examining the charges and evidence in a *de novo* trial, this special court of review finds the judge (1) failed to treat attorneys and defendants appearing in her courtroom with the requisite dignity, patience, and courtesy expected of a Texas judge, (2) interfered in recusals filed against the judge, and (3) improperly required some defendants to pay some portion of fines or costs before the judge would accept their plea bargains. Based on the evidence presented at the trial *de novo*, this special court of review finds the judge violated Canons 2A, 3B(2), and 3B(4) of

the Texas Code of Judicial Conduct and Article V, section 1-a(6)A of the Texas Constitution. To discipline these violations, the special court of review orders issuance of a public reprimand.

I. OVERVIEW

The respondent in this trial *de novo* is the Honorable Etta Mullin, a former judge of County Criminal Court Number Five in Dallas County, Texas. She took office on January 1, 2011, and served a single four-year term that ended on December 31, 2014. Over the course of the respondent's judicial service, the State Commission on Judicial Conduct received various complaints relating to the respondent's treatment of attorneys and defendants in her courtroom. The Commission notified the respondent of the attorney complaints and the respondent provided written responses. While investigating these matters the Commission concluded that the respondent improperly interfered in recusals filed against her and also improperly required some defendants, including indigent defendants, to pay all or some portion of fines or costs up-front before the respondent would accept their plea bargains. Both the conduct made the subject of the attorney complaints and the related actions that came to light during the Commission's investigation are at issue before this special court of review.

Before commencement of this *de novo* proceeding, the Commission conducted an informal hearing and thereafter issued a public admonition against the respondent concluding that the respondent violated Canons 2A and 3B(4) of the Texas Code of Judicial Conduct, as well as Article V, section 1-a(6)A of the Texas Constitution. *See* Tex. Const. art. V, § 1–a(6)A; Tex. Code Jud. Conduct, Canons, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B (West 2005 & Supp. 2012). The respondent sought a trial *de novo* pursuant to section 33.034 of the Texas Government Code. Tex. Govt. Code Ann. § 33.034 (West Supp. 2012). The Supreme Court of Texas duly appointed

this special court of review to preside over the matter and to conduct a trial *de novo*.

To initiate the proceedings, the Examiners filed a Charging Document,[1] later amending it after the panel granted in part and denied in part the respondent's motion to dismiss or strike certain allegations of misconduct.[2] The amended Charging Document contains six charges. *See* Tex. Gov't Code Ann. § 33.034(a)–(d); Tex. R. Rem'l/Ret Judg. R.. 9(a)–(b) (West 2015). In all charges the Examiners assert violations of the standards set forth in Article V, section 1-a(6)A of the Texas Constitution, and in each of the individual charges the Examiners assert violations of one or more canons of the Texas Code of Judicial Conduct. In the first two charges the Examiners assert violations of Canon 3B(4); in Charges III and IV, they assert violations of Canons 2A and 3B(4); and, in Charges V and VI, they assert violations of Canons 2A and 3B(2). The respondent denies that any misconduct occurred.

This special court of review timely convened a trial de *novo* at which both sides presented witnesses and documentary evidence. *See* Tex. Gov't Code Ann. § 33.034(e), (h); Tex. R. Rem'l/Ret. Judg. R. 9(c). After considering the testimony and other evidence, arguments of counsel, and briefing, we timely issue this decision and direct its publication. *See* Tex. Gov't Code Ann. § 33.034(h); Tex. R. Rem'l/Ret. Judg. 9(d), (e)(2).

II. RELEVANT STANDARDS AND BURDEN OF PROOF

Judges, like everyone else, are locked in the human condition. At times, even the best among us fall short. While all of us are vulnerable to failures, some judicial failures can lead to disciplinary action. The Texas Constitution provides that a judge may be disciplined for a willful violation of the Code of Judicial Conduct or for willful or persistent

[1] *See* Tex. Gov't Code Ann. § 33.034(a)–(d); Tex. R. Rem'l/Ret Judges. 9(a)–(b).

[2] The respondent moved the special court of review to dismiss or strike certain allegations of misconduct and related charges from the charging document. The special court of review granted in part and denied in part the relief sought.

conduct that is clearly inconsistent with the proper performance of the judge's duties or that casts public discredit upon the judiciary or the administration of justice. Tex. Const. art. V, § 1–a(6)A. For purposes of article V, section 1–a, willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties includes a willful violation of a provision of the Code of Judicial Conduct. Tex. Gov't Code Ann. § 33.001(b)(2) (West Supp. 2012). Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence. *In re Sharp*, —S.W.3d—,—, No. 12-003, 2013 WL 979361, at *2 (Tex. Spec. Ct. Rev. Mar. 13, 2013); *In re Davis*, 82 S.W.3d 140, 148 (Tex. Spec. Ct. Rev. 2002); *In re Bell*, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995). A judge need not have had specific intent to violate the Code of Judicial Conduct. A willful violation occurs if the judge intended to engage in the conduct for which the judge is disciplined. *In re Sharp*, 2013 WL 979361, at *2; *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006); *Davis*, 82 S.W.3d at 148; *In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998).

This review is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of a civil action. Tex. Gov't Code Ann. § 33.034(f). The Examiners bore the burden to prove the charges against the respondent by a preponderance of the evidence. *See id*; *In re Sharp*, 2013 WL 979361, at *2; *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006); *Davis*, 82 S.W.3d at 142.

III. ASSERTED VIOLATIONS OF CANON 3B(4) — CHARGES I-IV

Canon 3B(4) of the Texas Code of Judicial Conduct states, in part, "A judge shall be patient, dignified and courteous to litigants, … lawyers and others with whom the judge deals in an official capacity… ." Tex. Code Jud. Conduct, Canon 3B(4).

CHARGE I

In Charge I the Examiners allege that the respondent "failed to treat attorneys and defendants with the requisite patience, dignity, and courtesy consistent with the proper

performance of her duties as a judge, by repeatedly making counsel and their clients wait for extended periods of time without sufficient cause, by leaving the bench without explanation, and by refusing to provide information as to the anticipated time of return." In bringing this charge the Examiners assert that the respondent's conduct constituted willful violations of the Code of Judicial Conduct and/or willful or persistent conduct that is clearly inconsistent with the proper performance of her duties and/or willful or persistent conduct that casts public discredit upon the judiciary or the administration of justice.

Among the witnesses who testified at the trial *de novo* were the respondent and several attorneys who regularly practiced in the respondent's court. The attorneys who testified — prosecutors and defense counsel — were familiar with the respondent's courtroom practices and proclivities. The gist of their testimony was that the respondent would cause attorneys and defendants to spend inordinate amounts of time — hours, and sometimes days — in her courtroom to resolve matters that would take minutes in other courts. Witnesses described how the respondent would make attorneys "line up and wait" to be acknowledged, a process that was both tedious and time-consuming. The attorneys attributed the problems to this process and various other procedures the respondent utilized in her courtroom, as well as to the respondent's idiosyncratic tendency to leave the bench without informing those in attendance if or when she would return to the courtroom to complete the day's business. The respondent generally defended her practices and her record, pointing to evidence supporting her proper treatment of court-goers, docket management, and case disposition.[3]

Several attorneys who practiced in the respondent's court (John Giofreddi, Paul Blocker, Brady Wyatt, Nancy Ohan, Tom Hooton, Pamela Luther, and Stephanie Ernst)

[3]The respondent offered evidence from individuals who had favorable things to say about her courtroom demeanor, work ethic, and temperament. The respondent also offered evidence that she inherited a busy court, noting that when she took the bench, there were over 5,000 pending cases, with 500 set for jury trial. According to the respondent, the court over which she was elected to preside was in total disarray and she implemented new procedures to tackle the problem. The respondent also testified that she worked on a young offenders program to help ensure the success of young offenders on probation.

testified that the respondent would step off the bench and would not come back to conclude court business despite the presence of court-goers awaiting her return. Describing how this practice impacted the lawyers and defendants waiting to be heard, the attorney-witnesses explained that they would have no way of knowing on any given occasion whether the judge would reappear and resume hearing matters or whether the judge had left for the day. A public defender (Paul Blocker) testified that "if you didn't want to lose your place in line or have to start all over again, you would just have to wait." The resulting uncertainty and confusion was compounded by the lack of a court coordinator whose role typically includes informing court-goers of when their matters will be heard and when the judge can be expected to return to the bench.

After the respondent took office, she changed existing courtroom procedures and opted not to employ a court coordinator. Consequently, the respondent's court did not operate like comparable courts and lacked the functionality legal practitioners had come to expect in Dallas county criminal courts. The lack of a court coordinator made both scheduling and the dissemination of scheduling information difficult. Dockets were crowded, the process often seemed chaotic, and when the respondent left the bench with matters still to be heard, those remaining in the courtroom could not discern whether to go (as waiting would be futile) or stay (because the judge might return, though no one could say when). If the lawyers stayed, they would have to forgo attending to other matters and clients. If they left to attend to other courthouse business, they would risk not being in the courtroom if the respondent returned to the bench, in which case they would have to reschedule the matters in the respondent's court and return to face the same problem another day.

The lack of basic communication from the respondent and the respondent's courtroom staff thwarted the ability of court-goers to plan and forced uncertain and often lengthy waiting periods. The situation proved particularly vexing for attorneys because it frustrated their efforts to manage their clients' expectations, and the respondent's failure to

communicate information that would have allowed them to do so adversely impacted their ability to bring pending matters to conclusion.

Witnesses explained how the delays were aggravated not only by the respondent's decision to forgo a court coordinator to handle court settings, but also by the respondent's decision to remove the public defender's office from taking further assignments in the respondent's court. Attorneys who practiced in the respondent's court testified that both decisions created hardships on the defendants whose cases were assigned to the respondent's court. Expounding on the difficulties that arose as a result of the respondent's staffing decisions and the processes and procedures the respondent required of parties, one attorney (Lee Bright) testified as follows:

> It was impossible to get something that should take ten minutes done within three or four hours sometimes. There were times where it would be a simple announcement pass, and because she had such a hand on and control of her docket that you had to wait in lines inside the courtroom that fundamentally had no order whatsoever, merely to get a pass slip, merely to pass a case. Your clients would sit there for hours on end.

In addition to complaining of courtroom inefficiencies, some witnesses attributed improper motives to the respondent. Attorney Lee Bright testified that the respondent purposefully kept him waiting, recounting how on one occasion the respondent intentionally delayed allowing him to be excused from her courtroom to the point he was in danger of missing a scheduled hearing in federal court. Another attorney (John Giofreddi) described a similar incident in which he was the last remaining lawyer in the courtroom during a docket call and the respondent left the bench before calling his client's case, prompting the courtroom bailiff to ask, "What did you do to piss her off?" The respondent did not return to the courtroom that day, and the attorney had to return another day to attend to the matter.

Another attorney (Nancy Ohan) recounted an incident in which she spent hours with a client attempting to get a trial setting in the respondent's court. The attorney's

client had taken a day off of work to be present in court. But, according to Ohan, after the long wait, the respondent informed her that the client need not be present to obtain a trial setting. Ohan explained that she was not able to obtain the setting she needed that day, so she returned to court the following day. The respondent's staff informed Ohan that she would not be allowed to obtain the desired setting without her client being present. The client, Ohan explained, had not come with her to court that day in reliance upon what the respondent had said the day before. Ohan's client, under threat of a warrant for not appearing with Ohan in court, had to take another day off of work to attend to the matter.

Evidence showed that these and other troublesome conditions in the respondent's court grew so intolerable that some attorneys refused to accept new cases assigned to that court. Other attorneys began charging their clients more to compensate for the additional time needed to bring matters to conclusion in the respondent's court.

The respondent generally denied that she engaged in this conduct. As for leaving court-goers waiting, the respondent testified there were times she had to get off the bench to take a break or to speak with another judge or lawyer in chambers, or to greet jurors, and she recounted how she once had to leave during a jury trial when her ailing mother had to be rushed to the hospital. We do not fault the respondent for leaving the bench to take breaks, or to meet with staff members, judicial colleagues, or counsel, or to greet jurors, or to attend to pending matters, or to respond to family emergencies. Judges are permitted to leave the bench for all of these reasons and many more, as taking breaks is a matter within the judge's discretion. The problem stems not from the respondent's leaving the bench but from the respondent's failure to communicate with those present in the courtroom. Basic communication from the judge or the judge's staff would have enabled court-goers to plan their schedules and better manage their expectations, thus decreasing the inordinate waiting time and minimizing the inconvenience.

A preponderance of the evidence shows a pattern of the respondent leaving the bench yet failing to communicate with counsel and defendants waiting in the courtroom

concerning timing and scheduling, a failure that routinely left them in the dark with no reasonable expectation of when or whether the respondent would return to hear the matters for which they had come to court. The respondent offered no explanation or justification for the persistent lack of communication that was the core of the problem.

Canon 3B(4) requires a judge to be courteous. Tex. Code Jud. Conduct, Canon 3. The first principle of courtesy is consideration of others. Though a judge need not disclose why she is leaving the bench or what she will be doing while she is gone, common courtesy requires a judge to let those waiting to be heard know whether and when she anticipates returning. By persistently leaving the bench for extended periods of time without communicating this basic information to those in attendance, the respondent showed a lack of consideration for court-goers and thus failed to act with the courtesy expected of a judicial officer. *See* Tex. Code Jud. Conduct, Canon 3.

While effective communication helps prepare court-goers to deal with and plan around courtroom events that otherwise would result in lengthy waiting times, it does not eliminate the problem. Delays and inefficiencies are inherent in the everyday demands of busy court dockets and typically do not amount to judicial misconduct. Likewise, a judge's decision, made as part of courtroom or docket management, to implement a procedure that is viewed as less efficient or less desirable than other procedures typically does not amount to dereliction of judicial duty. A judge must balance an array of considerations and demands in selecting courtroom processes and procedures and so is vested with considerable discretion to adopt the ones the judge deems most appropriate in light of existing facts and circumstances. *See generally In re Brown*, 512 S.W.2d 317, 322 (Tex. 1974). The trial judge need not and cannot please all court-goers with the judge's selection of processes and procedures for court operation and docket management. *See id.* Even if the judge's choices produce delays and inefficiencies, the decision to choose one process or procedure over another generally does not constitute a dereliction of judicial duty that subjects the judge to discipline.

The respondent defended some of the delays and inefficiencies in her courtroom by explaining she was not "a rubber-stamp judge." The respondent testified that she required felony-level admonishments in misdemeanor cases, a practice she acknowledged resulted in longer proceedings and additional work for defendants and their counsel. While the respondent's admonition practice appears to have been motivated by a noble desire to ensure that defendants fully understood the proceedings, the respondent's practice, as implemented, led to significant delays and inefficiencies due in large measure to the respondent's failure to communicate effectively. Even after it became apparent that the respondent's unconventional admonition practice was creating longer waiting times and other difficulties, the respondent refused to make changes to address the problem. This failure, in turn, created particular hardships for defendants and their lawyers.

Our legal system is best served when the trial judge manages expectations by communicating with those who come before the court about the timing and scheduling of events that are under the judge's exclusive control, so that court-goers may plan accordingly. Taking this simple measure shows consideration for others and reflects the type of professional courtesy expected of a Texas judge.

The respondent testified that when she took office she inherited a busy court, took a hands-on approach, worked hard, and through her efforts was able to significantly reduce the number of pending cases. Assuming that the respondent's characterization of her record is accurate, it does not excuse the lack of consideration for court-goers, who, as a matter of course, were subjected to lengthy wait times, delays in resolution of pending matters, and multiple court appearances because of the respondent's failures. Lawyers need to be able to explain the legal process and proceedings to their clients and to advise them of the likely costs and timetables of the proceeding. Time estimates aid planning by helping court-goers to form realistic expectations about what is involved in a particular court appearance and about how long it should take so that they can make arrangements with employers,

childcare providers, schools, and the like, and ensure transportation to and from the courthouse. This information was not generally available in the respondent's court.

The respondent took the position that managing her courtroom and setting courtroom procedures were matters within her prerogative as the trial judge. While trial judges are vested with broad discretion to operate their courtrooms, a judge's discretion does not extend to compromising the administration of justice with persistent and unwarranted delays and wait times that could be diminished or eliminated with basic communication. *See id.* When a judge persistently fails to communicate, either directly or through staff (such as a court coordinator), and the failure leads to uncertainty and confusion, the public tends to lose confidence in the administration of justice. So, while a judge has wide discretion to manage her docket and operate her courtroom, the judge must do so in a manner that is compatible with the administration of justice. *See id.*

The Examiners presented credible evidence of the respondent's frequent and lengthy departures from the bench, unaccompanied by communications to waiting court-goers concerning when or if the respondent would return to hear their matters. A preponderance of the evidence also shows the respondent, at times, intentionally delayed hearing certain attorneys' matters and excusing certain attorneys from the courtroom. We find that this persistent and willful conduct violated the judge's duty under Canon 3B(4) to treat defendants and attorneys with dignity and courtesy and was inconsistent with the proper performance of the respondent's judicial duties, in violation of Article V, section 1-a(6)A of the Texas Constitution.

CHARGE II

In Charge II the Examiners assert the respondent failed to treat attorney Lee Bright with the requisite patience, dignity, and courtesy consistent with the proper performance of the respondent's duties as a judge, "by refusing to allow Attorney Bright to appear in her courtroom while he was attired in shorts due to a visible and obvious medical impairment."

At the time of the incident, Bright was handling a case involving an individual held in custody. The case was pending in the respondent's court during a time Bright had a medical need to wear a knee brace following surgery. Bright testified that the device prevented him from wearing long pants, so he sought permission to appear before the respondent in modified business attire — Bermuda shorts (extending almost to the knee) in lieu of suit pants. The Rules of Decorum for the Courts of Dallas County list shorts among the items of clothing that are "not appropriate in any circumstances." Bright explained to the respondent his medical need to wear shorts. Though aware of the attorney's visible disability, the respondent denied the request. A few days later, Bright appeared in the respondent's courtroom clad in a suit coat, dress shirt, and tie, but wearing Bermuda shorts in lieu of suit pants, due to the knee brace. The respondent stood firm on the rules of decorum and prohibited Bright from representing his client in her court solely because Bright's modified business dress violated the standard for proper courtroom attire.

Members of the media were present in the courtroom. Bright's law partner stepped forward to present the respondent with a motion to recuse and asked to make a record. The respondent did not permit it, stating she could not take any action on the case once the recusal motion was filed. Again, the law partner demanded that he be allowed to go on the record. The respondent's bailiff testified that the respondent signaled him that she wanted order in the court and so the bailiff intervened, escorting both Bright and his law partner from the courtroom. Thereafter, several media reports were published in Dallas County criticizing the respondent, then a candidate for re-election, for her poor treatment of certain attorneys.

At the trial *de novo*, the respondent acknowledged that she refused to allow Bright to wear shorts in her courtroom to accommodate his medical need, but she defended her treatment of him, saying Bright would have been in violation of the court's dress code and rules of decorum if he had remained in her courtroom wearing shorts. Bright, however, testified that another lawyer had practiced for weeks in the respondent's court while

wearing shorts. Bright believed the respondent's decision not to make the same allowance for him was motivated by the respondent's personal dislike of Bright. According to Bright, during the period he was required to wear the knee brace, he was permitted to appear in the modified business attire (wearing shorts instead of suit pants) before other criminal courts in the same building.

We find that Bright, having a medical need that prevented him from wearing long pants, made a reasonable request to be permitted to appear in the respondent's courtroom in modified business attire (wearing Bermuda shorts instead of long pants). In refusing to make this reasonable accommodation, the respondent failed to treat Bright with the requisite patience, dignity, and courtesy required by Canon 3B(4). The media coverage of the incident highlighted the respondent's inappropriate judicial conduct, and the conduct itself cast public discredit upon the judiciary in violation of Article V, section 1-a(6)A of the Texas Constitution. *See In re Sharp*, 2013 WL 979361, at *6–7.

CHARGE III

In Charge III the Examiners allege that the respondent failed to treat prosecutor Stephanie Ernst with the requisite patience, dignity, and courtesy consistent with the proper performance of the respondent's duties as a judge, "by ordering [the respondent's] bailiff to handcuff Ernst to a chair and by refusing to allow Ernst, who was eight months pregnant, an opportunity to take a break so she could eat." The Examiners assert that this conduct violated not only Canon 3B(4), as in Charges I and II, but also Canon 2A of the Texas Code of Judicial Conduct. Canon 2A states, in part, "A judge shall comply with the law." Tex. Code Jud. Conduct, Canon 2A.

Ernst testified that on the day of the incident, she was visibly pregnant. A Dallas County prosecutor at the time, Ernst had appeared before the respondent starting at approximately 8:30 a.m. for morning docket without a break until approximately 1:00 p.m., at which point the respondent informed Ernst that a case set on the 1:30 p.m. docket

would be called to trial. Ernst testified that, at the time, a key prosecution witness in that case was not available, so Ernst moved for a continuance on behalf of the State. The respondent denied the continuance. Ernst then sought to dismiss the case, but the respondent refused to sign the order of dismissal because it did not include language to her liking to the effect that the dismissal was "in the interest of justice." Ernst testified that she did not believe that the dismissal was in the interest of justice, and so she did not submit an order with that language. The respondent denied the State's motion to dismiss the case and indicated that trial would commence at 1:30 p.m. At that point, the respondent instructed Ernst to remain in the courtroom until that time.

Ernst testified that by this point, it was past the lunch hour and she needed a break so that she could eat and use the restroom. The respondent informed Ernst that she was not to leave the courtroom. According to Ernst, the respondent then instructed the bailiff "to hold me and handcuff me to a chair that was right, you know, at the prosecutor's table, basically, and hold me until 1:30. Until trial." When asked if she believed the respondent was serious about the order to have her handcuffed, Ernst testified, "Yeah. Absolutely." Upon hearing the respondent's directive to the bailiff, Ernst fled to the District Attorney's workroom, locked the door, and called her supervisors. Ernst ate her lunch in the locked room. She was never physically restrained or detained despite the respondent's directive.

The respondent denied that she threatened to have Ernst handcuffed and no other witnesses testified to hearing a threat of handcuffs. Still, it is apparent from the testimony of other witnesses that the respondent intended for Ernst to be restrained or detained to prevent Ernst's departure from the courtroom. Public defender Paul Blocker, who represented the defendant in the case that was to commence at 1:30 p.m., testified that the respondent ordered the bailiff to restrain Ernst and not to allow Ernst to leave. According to Blocker, "it was definitely a situation where Ms. Ernst was not free to go." The respondent admitted that she told the bailiff, "I said she's not to leave." After intervention

by Ernst's superiors, the respondent eventually granted the motion to dismiss and Ernst was permitted to leave. Thereafter, Ernst was moved to a different court.

We find from a preponderance of evidence that the respondent failed to treat prosecutor Ernst in a patient, dignified, and courteous manner when the respondent ordered the bailiff to restrain and/or detain Ernst. The respondent's conduct in threatening Ernst with restraint or detention showed a lack of consideration, especially given Ernst's particular needs, and violated the judge's duty under Canon 3B(4) to be patient, dignified, and courteous toward Ernst. Furthermore, respondent's persistence that Ernst prosecute a case that the State already had sought to dismiss did not promote public confidence in the integrity and impartiality of the judiciary, and violated the judge's duty under Canon 2A. The respondent's conduct was inconsistent with the proper performance of the respondent's judicial duties, in violation of Article V, section 1- a(6)A of the Texas Constitution.

CHARGE IV

In Charge IV the Examiners allege that the respondent failed to treat Attorney Kirk Lechtenberger with the requisite patience, dignity, and courtesy consistent with the proper performance of the respondent's duties as a judge, by referring to Lechtenberger as a "liar" in open court and by ordering the bailiff to remove Lechtenberger from the courtroom. As with Charge III, the Examiners assert that this conduct violated Canon 2A as well as Canon 3B(4) of the Texas Code of Judicial Conduct.

In his testimony Lechtenberger recounted how during a hearing in December 2012, the respondent became angry when Lechtenberger asked her why she had refused to provide him with written findings of fact and conclusions of law in a case he was handling in the respondent's court. According to Lechtenberger, the respondent, in open court and in the presence of his client, mischaracterized what had transpired over the course of the case and made statements that suggested Lechtenberger was lying. The respondent denied that

she called anyone a "liar." Lechtenberger acknowledged that the respondent may not have used the word "liar" but he testified that her statements amounted to calling him a liar. John Monych, an investigator who had accompanied Lechtenberger to court, corroborated Lechtenberger's account. Witnesses disagree about what happened next but all agree the episode ended when the respondent ordered the bailiff to escort Lechtenberger from the courtroom. Lechtenberg testified that as a result of the incident, he lost the client.

Lechtenberger acknowledged that at the hearing he became irritated over the respondent's comments and may have raised his voice, but he stated that he did not speak to the respondent in an unprofessional tone, and Monych agreed with this characterization. One of the court's bailiffs (Raymond Davis) testified that Lechtenberger jumped up and "spoke in a loud tone" to the judge, while the judge remained calm and "did not express any anger" toward Lechtenberger. The bailiff described Lechtenberger's "display of emotion" and "yelling at the judge" as unprofessional and disrespectful. Under any witness's account, the episode does not reflect the type of conduct desired of professionals in a Texas courtroom. Assuming Lechtenberger acted inappropriately in reacting to the respondent's in-court statements, his conduct, though unacceptable, would not change what the respondent said from the bench.

Other witnesses gave accounts of other incidents in which the respondent stated or insinuated from the bench that attorneys were not being truthful. Some said the respondent used the word "liar;" some said she did not. Whatever the respondent said on these occasions, the hearers of the statements perceived her words as personal attacks. One attorney (Brady Wyatt) testified before the Commission about an incident at a September 2012 recusal hearing, stating, "I have never been treated the way that I have been treated in County Court Number 5 by presiding judge . . . Judge Etta Mullin . . . I have never been talked to where I was told to back away from the bench in a threatening manner . . . She tells [another judge] that basically I'm a liar." At the trial *de novo*, Wyatt

admitted that the respondent did not use the word "liar," but Wyatt believed that was the import of the respondent's statement. He described the experience as "embarrassing."

Public defender Paul Blocker testified that the respondent "had referred to one or two of our employees as 'liars,'" though he did not hear the respondent utter the word "liar" either. Prosecutor Ernst testified that the respondent gave similar treatment to other defense attorneys, stating:

> I definitely heard her on occasion call certain defense attorneys liar or outright say they are lying about something. Did she do that with everyone? No. But yes, I definitely witnessed that.

It is apparent from the testimony of these witnesses that the respondent's behavior during the Lechtenberger episode was not an isolated incident.

When judges act as fact finders, they must make credibility determinations. Whether a judge is assessing the credibility of a witness or an officer of the court, the process demands professionalism and civility. Because words spoken from the bench can have a special force and influence, no one sets the tone for courtroom discourse more surely than the judge. When a judge disagrees with what an attorney has said, the judge can state that the attorney is in error or mistaken in his facts without assaulting the attorney's character in rhetoric that offends the dignity and decorum of the proceedings.

We find from a preponderance of the evidence that the respondent's treatment of Lechtenberger violated Canon 3B(4) and that she treated other attorneys in similar fashion. Furthermore, the respondent's response and comments to Lectenberger did not promote public confidence in the integrity and impartiality of the judiciary, and violated the respondent's duty under Canon 2A. The respondent's actions constitute a willful or persistent course of conduct that casts public discredit upon the judiciary and the administration of justice, in violation of Article V, section 1-a(6)A of the Texas Constitution.

IV. ASSERTED VIOLATIONS OF CANON 3B(2) — CHARGES V-VI

Canon 3B(2) of the Texas Code of Judicial Conduct states, in part, "A judge should be faithful to the law and shall maintain professional competence in it." Tex. Code Jud. Conduct, Canon 3B(2). In Charges V and VI the Examiners assert violations of this canon as well as Canon 2A, which, as noted in the discussions of Charges III and IV, requires that a judge comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *See* Tex. Code Jud. Conduct, Canon 2A.

In that regard, conduct characterized as a failure to follow the law implicating a "willful violation of the Code of Judicial Conduct or willful or persistent conduct that is clearly inconsistent with the proper performance of [a judge's] duties" is more than a mere mistaken understanding of the law — it is conscious indifference to the law. The term "willful," as applied in article V, section 1-a (6), of the Texas Constitution, is the improper or wrongful use of judicial authority by intentional conduct, or by conduct with gross indifference to the legal rights of others. *In re Thoma*, 873 S.W.2d 477, 489–90 (Tex. Rev. Trib. 1994). As noted in *Thoma,* willfulness involves more than an error of judgment or a mere lack of diligence; it implicates conduct involving dishonesty, misuse of power, or an element of bad faith. Sanctionable conduct is conduct that is inconsistent with the law and committed with the specific intent to accomplish a purpose which the judge knew or should have known was beyond the exercise of legitimate judicial authority. *Barr*, 13 S.W.3d at 534. Gross indifference to the legal rights of others is indifference that is flagrant, shameful, and beyond all measure and allowance. It is conduct that is not to be excused, particularly when committed by members of the judiciary. *See id.* Therefore, when a judge fails to follow rules of law and legal principles that a judge of reasonable competence knows or should have known, and does so with the specific intent to accomplish a purpose that is inconsistent with the standards of judicial integrity, that judge

commits a violation of the Texas Code of Judicial Conduct. *See generally In re Thoma*, 873 S.W.2d at 510. When a judge does so persistently, she exposes herself to disciplinary action.

Because an independent judiciary is so important, we do not take lightly the imposition of disciplinary action upon a judge based upon a mere incorrect legal ruling. *Barr*, 13 S.W.3d at 544. In *Barr*, the court clearly set forth this principle, stating:

> While mere legal error should best be left to the appellate courts of this State, rather than to the disciplinary process, that does not mean that legal error can **never** constitute judicial misconduct. Generally, there are three circumstances in which legal error may be found violative of one or more of the Canons. These circumstances are:
>
> 1) Commission of egregious legal error;
> 2) The commission of a continuing pattern of legal error; or
> 3) The commission of legal error which is founded on bad faith.

Id. at 544 (emphasis in original) (citing *In re Quirk*, 705 So. 2d 172 (La.1997)). So long as a judge's discretionary rulings are made in good faith, in an effort to follow the law as the judge understands it, without an ulterior malevolent motive, the usual safeguard against error or judicial overreaching lies in appropriate appellate review. *Id.* at 545.

CHARGE V

In Charge V the Examiners assert that the respondent's conduct "in attempting to intervene and assert her 'rights' in pending recusal proceedings, and more specifically, her actions on or about October 23, 2012, in connection with the filing of the 'Court's Motion for Reconsideration of Order of Recusal,' constituted a willful or persistent failure to follow the law and demonstrated incompetence in performing the duties of the office." At a September 2012 recusal hearing, a prosecutor (Stephanie Ernst) testified that the respondent could not be fair and impartial in the case due to the judge's dislike of attorney Brady Wyatt, who was serving as counsel to the defendant. The recusal judge ordered the respondent removed from the case, with a finding that "the appearance of impropriety, the

appearance of prejudice is also sufficient in this case."

Upon learning that she had been recused, the respondent sought to have the recusal judge revisit the recusal ruling and filed a motion for reconsideration of the recusal order for that purpose. The recusal judge (The Honorable Sue Pirtle)[4] granted the motion for reconsideration.

Attorney Wyatt, on behalf of his client, petitioned the Fifth Court of Appeals in Dallas to issue a writ of mandamus to prevent or obviate the recusal judge's reconsideration of the recusal order. The Fifth Court of Appeals granted mandamus relief, finding that the respondent's motion for reconsideration was "wholly improper and without authority." *In Re Heidi Amos*, 397 S.W.3d 309 (Tex. App.—Dallas 2013). The *Amos* court specifically held:

> [T]his process contemplates the resolution of the motion through the exercise of the independent judgment of the assigned judge absent any outside pressure. It would defeat the purpose of the "refer rule" to permit the challenged judge to insert herself in her official capacity as judge in order to exert pressure upon and influence the assigned judge's judgment. It is not just inappropriate but blatantly improper for a challenged judge to take action designed to influence the outcome of the matter at issue. To hold otherwise would seriously compromise the independence of the assigned judge and undermine the integrity of the judicial recusal.

Id. at 313.

Canon 2A provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and Canons 2A and 3B(2) provide that a judge shall "comply with the law" and "be faithful to the law." Tex. Code Jud. Conduct, Canons 2A, 3B(2). Recusal motions in criminal cases are governed by Texas Rules of Civil Procedure 18a and 18b. Tex. R. Civ. P. 18a, 18b; *see also In re*

[4] Judge Sue Pirtle is not related to the Honorable Pat Pirtle, a member of this special court of review.

Slaughter, No. 15-001, slip. op. at 20 (Tex. Spec. Ct. Rev. Sept. 30, 2015). When a motion to recuse is filed, the trial judge is not a party to the motion and thus is not represented at the recusal hearing nor allowed an opportunity to appear and defend against the motion. Tex. R. Civ. P. 18a; *In re Slaughter*, No. 15-001, slip. op. at 20. Though the respondent sought to distance herself from personal responsibility concerning her decision to intervene in the recusal proceeding,[5] the Texas Rules of Civil Procedure, which set forth the procedures that govern recusal motions and hearings, clearly state that the "judge whose recusal or disqualification is sought should not file a response to the motion." Tex. R. Civ. P. 18a(c)(2).

A preponderance of the evidence shows the respondent attempted to assert her "rights" via a motion for reconsideration in a case in which the respondent had been ordered recused. The respondent testified before the Commission that it remained her opinion that her conduct in challenging the recusal was appropriate because her "due process rights" were violated when she was not provided with notice of the recusal hearing and, as a result, she was prevented from presenting evidence in support of her position in opposition of the recusal at the hearing. At the trial *de novo*, the respondent testified that though she now understands that a judge is not a party to a recusal, she did not know that at the time she filed the motion for reconsideration.

The Examiners also fault the respondent for actions she took after the Fifth Court of Appeals issued its *Amos* opinion. Specifically, the Examiners complain that, after *Amos*, the respondent spoke with the new administrative judge (The Honorable Mary Murphy) about a subsequent recusal motion that had been granted against the respondent. The basis of that motion involved events that occurred during a recorded hearing. The respondent testified that she did not speak with any recusal judge about the merits of any pending recusal motion, but the respondent acknowledged that she did speak with the presiding

[5] The respondent testified that she took action to intervene in the recusal after discussing the matter with the then-presiding administrative judge and on the advice and approval of her counsel.

administrative judge. According to the respondent, the purpose of this contact was to determine how the administrative judge intended to handle recusal motions. Yet, the respondent acknowledged that during the exchange, the respondent volunteered information about the pending recusal, calling the administrative judge's attention to the record of the hearing.

The respondent was not asked to participate in either of the recusal decisions, yet she took action in both. A judge need not have had specific intent to violate the Code of Judicial Conduct. A willful violation occurs if the judge intended to engage in the conduct for which the judge is disciplined. *In re Sharp*, 2013 WL 979361, at *2; *In re Hecht*, 213 S.W.3d at 560; *Davis*, 82 S.W.3d at 148. Even though the respondent knew from the *Amos* opinion that she was not to engage in the recusal process, she approached the administrative judge in connection with a subsequent recusal. At the time the respondent contacted the presiding administrative judge, it should have been clear to the respondent that a judge subject to a recusal motion must not participate or otherwise intervene in a pending recusal motion. *See In re Slaughter*, No. 15-001, slip. op. at 20.

We find the respondent knew or should have known not to intervene in a pending recusal proceeding. The respondent's conduct in filing a motion for reconsideration of her recusal and in asserting her "rights" in the *Amos* case constitutes a violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct. We also find that by engaging in communications with the presiding administrative judge in connection with a subsequent recusal, the respondent demonstrated a persistent course of improper conduct and that her actions, particularly in the face of the *Amos* opinion, violate these canons and Article V, section 1-a(6)A of the Texas Constitution.

CHARGE VI

In the final charge the Examiners assert the respondent's conduct in requiring certain defendants to pay upfront costs or fees before accepting their pleas constitutes a

willful or persistent failure to follow the law and demonstrates incompetence in performing the duties of the office. According to the Examiners, the respondent's actions were "clearly inconsistent with the proper performance of her duties and/or willful or persistent conduct that casts public discredit upon the judiciary or administration of justice."

Testimony showed that on many occasions the respondent required certain defendants to prepay a portion of their fines and court costs before she would consider their pleas. Attorney Ohan testified that "when [the respondent] will not — would not take pleas without them paying a certain percentage of the court costs and fines, then they…would have to come back. ... And people who had money could just pay it, but people who didn't have the money couldn't pay it." Attorney Lee Bright testified that on one occasion he informed the respondent that his indigent client had no money to prepay his fines and court costs in order to get his plea accepted and if the respondent required payment of the upfront fee, it would have to come directly out of Bright's pocket. Bright further testified that he considered the respondent's indifferent reaction to his client's plight to be the result of her personal animus towards him, having nothing to do with the client or the merits of the case. According to the testimony of various other attorneys, the respondent appeared indifferent to the disproportionate hardship her pre-payment requirement placed on low-income and indigent defendants — causing them to either (1) remain incarcerated for longer periods of time, (2) suffer financial hardships due to having to make large up-front lump sum payments versus being able to work out a payment plan, or (3) waste time and the concomitant costs associated with having to repeatedly reschedule plea hearings.

In addressing these accusations, the respondent did not deny the practice but instead defended it by testifying that, although she never refused to accept a plea because a fine was not paid in full before the plea, occasionally she did insist that a substantial portion of the fines and costs be paid in advance to "insure the success" of the defendant. The

respondent explained that she wanted to make sure that a defendant was not burdened with financial obligations that could not be met.

According to the Examiners, however, the respondent's pre-payment policy failed to comply with the law as it generally relates to a judge's role in accepting or rejecting a plea bargain. While the respondent's explanation of her practice of requiring criminal defendants to pay their fines and court costs in advance of the court accepting a plea bargain might be a reasonable and admirable goal, it is not the proper role of a judge to negotiate the terms of a plea bargain or personally supervise enforcement of collections. *See Ex parte Williams*, 704 S.W.2d 773, 777, n.6 (Tex. Crim. App. 1991) (holding a trial judge should not participate in plea discussions or negotiations); *see also Ex parte Shuflin*, 528 S.W.2d 610, 616-17 (Tex. Crim. App. 1975) (finding standards adopted by the American Bar Association (not adopted by this State) that a "trial judge should not participate in plea discussions" were adopted, in part, for the purpose of avoiding a violation of the Texas Code of Judicial Conduct to "avoid impropriety and the appearance of impropriety" in all activities, and to "neither initiate nor consider *ex parte* or private communications concerning a pending or impending proceeding.").

Accordingly, we find from a preponderance of the evidence that the respondent's practice of requiring certain defendants to make an upfront payment of fines and court costs before accepting a plea and entering judgment violated Canons 2A and 3B(2), and was inconsistent with the proper performance of her judicial duties in violation of Article V, section 1-a(6)A of the Texas Constitution. Specifically, the respondent's practice transformed her role from that of a neutral judicial officer into that of a prosecutor or collection agent for the State.

Because the respondent's decision to require prepayment of court costs and fines was disproportionately and discriminately applied in some situations involving an element of animosity between the respondent and certain defense counsel, we find it to be willful

conduct, committed in bad faith. As such, the questioned conduct was an intentional or grossly indifferent misuse of judicial office that imposed a serious hardship on criminal defendants and their attorneys. This conduct was inconsistent with the proper performance of the respondent's duties as a neutral arbiter, casting public discredit upon the integrity and impartiality of the judiciary, thereby constituting a violation of Article V, section 1-a(6)A of the Texas Constitution and Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.

IX. DISCIPLINE

Having found violations of the Texas Code of Judicial Conduct and Article V, section 1-a(6)A of the Texas Constitution, this special court of review is now tasked with determining an appropriate degree of discipline to impose on the respondent judge. *See* Tex. R. Rem'l/Ret. Judg. R. 9(d). In cases of judicial discipline, the purpose of sanctions is both to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline imposed by the special court of review is to serve as public recognition of the respondent judge's misconduct, sufficient to deter the respondent from engaging in such conduct again, and also serve to discourage others from engaging in the same type of conduct in the future. *In re Sharp*, 2013 WL 979361, at *7; *Barr*, 13 S.W.3d at 560. Because the discipline determination is multi-faceted and fact-intensive, we consider a number of factors in making the decision.[6]

According to the Texas Code of Judicial Conduct, discipline imposed "should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity[,] and the effect of the improper activity on others or on the judicial system." Tex. Code Jud. Conduct, Canon 8A. For guidance in determining an appropriate sanction, we also look to the following considerations, known as the *Deming* factors:

[6] During the trial *de novo*, various witnesses testified as to their views of the appropriate discipline to impose on the respondent. The special court of review did not consider this testimony in determining the appropriate discipline.

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct;

(b) the nature, extent and frequency of occurrence of the acts of misconduct;

(c) whether the misconduct occurred in or out of the courtroom;

(d) whether the misconduct occurred in the judge's official capacity or in the judge's private life;

(e) whether the judge has acknowledged or recognized that the acts occurred;

(f) whether the judge has demonstrated an effort to change or modify the judge's conduct;

(g) the length of the judge's service on the bench;

(h) whether there have been prior complaints about the judge;

(i) the effect the misconduct has upon the integrity of and respect for the judiciary; and

(j) the extent to which the judge exploited the judge's position to satisfy the judge's personal desires.

Matter of Deming, 108 Wash.2d 82, 736 P.2d 639, 659 (1987); *see In re Sharp*, 2013 WL 979361, at *7; *In re Rose*, 144 S.W.3d 661, 733 (Tex. Rev. Trib. 2004). (quoting certain of the *Deming* factors). In addition, other factors may inform the discipline decision, such as the number of persons affected by the misconduct. *See generally In re Sharp*, 2013 WL 979361, at *10. Misconduct that is part of a pattern or practice is usually considered more serious than isolated instances of inappropriate behavior. *Id.* (quoting *In re Brown*, 464 Mich. 135, 626 N.W.2d 403, 405 (Mich. 2001) (per curiam)). Likewise, misconduct on the bench is often viewed as more serious than the same misconduct off the bench. *Id.* In determining the appropriate discipline, we note that "the primary purpose of the Texas Code of Judicial Conduct, and all its ancillary rules, is to protect the citizens of Texas,

rather than to discipline judges." *In re Canales*, 113 S.W.3d 56, 73 (Tex. Rev. Trib. 2003).

The options available to a special court of review following a trial *de novo* include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or an order to the Commission to file formal proceedings. Tex. R. Rem'l/Ret Judg. R.. 9(d). The Examiners urge this special court of review to issue a public reprimand, a sanction greater than the discipline of public admonition imposed by the Commission following the informal hearing on the complaints (and evidence) made the subject of that proceeding. The respondent urges the dismissal of all charges. In determining the appropriate discipline, we find that, on balance, the *Deming* factors weigh heavily in favor of imposing a public reprimand. While lesser sanctions would appropriately address any of the individual violations standing alone, the cumulative impact of the violations point to the greater sanction.

Both Canon 8A and *Deming* factor (a) expressly speak of patterns of misconduct or improper activity. *See* Tex. Code Jud. Conduct, Canon 8A; *Deming*, 736 P.2d at 659. The respondent's actions show recurring behavior with respect to her (1) failure to treat attorneys with the requisite patience, dignity, and courtesy expected of a Texas judge, (2) improper interference in recusal proceedings, and (3) improper handling of plea bargain cases, as detailed above. The number of incidents establish a persistent course of conduct in each of these areas that is fundamentally inconsistent with the high standards by which a Texas judge is expected to behave. The violations, when considered in the aggregate, warrant the greater sanction. Therefore, to preserve the integrity and independence of the judiciary, to restore and reaffirm public confidence in the administration of justice, and in recognition that Texas judges must honor and respect the judicial office as a public trust, we conclude that a public reprimand is appropriate for the respondent's violations of the Code of Judicial Conduct and the Texas Constitution.

In issuing this ruling, this special court of review adopts the reasoning and language advanced by the Supreme Court of Nebraska in *In re Kneifl*, wherein the court stated,

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the citizens of [this state] that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.

In re Kneifl, 351 N.W.2d 693, 700 (Neb. 1984). With these aspirational principles in mind, after careful consideration of the evidence and arguments of counsel, the special court of review finds that pursuant to the authority contained in Article V, section 1-a(8) of the Texas Constitution, the respondent's misconduct shall be disciplined by public reprimand.

X. JUDGMENT AND PUBLIC REPRIMAND

In condemnation of the respondent's conduct found to have violated Canons 2A, 3B(2), and 3B(4) of the Texas Code of Judicial Conduct and Article V, section 1-a(6) of the Texas Constitution, it is the judgment of this special court of review to issue this **Public Reprimand** to the Honorable Etta Mullin, Former Judge of the County Criminal Court Number 5, Dallas, Dallas County, Texas, for these violations. The special court of review takes this action to protect and promote public confidence in our judicial system.

Issued this 21st day of October, 2015.

/s/_____
Kem Thompson Frost
Chief Justice

/s/_____
Patrick A. Pirtle
Justice

/s/_____
Nelda V. Rodriguez
Justice

Publish.

Panel consists of Kem Thompson Frost, Chief Justice of the Fourteenth Court of Appeals, presiding by appointment, The Honorable Patrick A. Pirtle, Justice of the Seventh Court of Appeals, participating by appointment, and The Honorable Nelda V. Rodriguez, Justice of the Thirteenth Court of Appeals, participating by appointment.