Order Issued January 22, 2024

DOCKET NO. SCR 23-0002

SPECIAL COURT OF REVIEW

IN RE INQUIRY CONCERNING HONORABLE MARY CURNUTT
CJC NO. 21-1592

OPINION

This Special Court of Review[1] is assigned to conduct a trial de novo of two disciplinary sanctions, culminating in a private warning, issued by the State Commission on Judicial Conduct (Commission) against Respondent, the Honorable Mary Curnutt, Justice of the Peace, Precinct 2, in Arlington, Tarrant County, Texas (Respondent). *See* TEX. GOV'T CODE ANN. § 33.034 (providing the procedure for appealing the Commission's sanctions).

Based upon its charging document, the Commission alleges four acts by Respondent which it contends violate one or more of Canons 2A, 3B(2), and 3B(8), of the Code of Judicial Conduct[2]; the Texas Government Code Section 33.001(b)(5); and Article V, § 1-a(6)(A) of the Texas

[1] The Special Court of Review consists of The Honorable Bonnie Lee Goldstein, Justice of the Fifth Court of Appeals, presiding by appointment; The Honorable W. Bruce Williams, Justice of the Eleventh Court of Appeals, participating by appointment; and The Honorable Emily Miskel, Justice of the Fifth Court of Appeals, participating by appointment.

[2] Canon 2A requires: A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. TEX. CODE JUD. CONDUCT, Canon 2A. Canon 3B(2) provides: "A judge should be faithful to the law and shall maintain professional competence in it [i.e., the law], including by meeting all judicial-education requirements set forth in governing statutes or rules. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* at Canon 3B(2). Canon 3B(8) states, in relevant part: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." *Id.* at Canon 3B(8).

Constitution. Specifically, the Commission alleges Respondent (1) violated the above canons by failing to comply with, and maintain professional competence in, the law when she entered a post-answer default judgment against a defendant at a pretrial hearing, rather than setting the matter for trial pursuant to the applicable justice court rules, thus depriving the defendant of the right to be heard; and (2) violated the Texas Government Code and Texas Constitution by failing to timely cooperate with the Commission's investigation, constituting willful and persistent conduct that is clearly inconsistent with the proper performance of her duties.

Respondent avers that her decision to render two post-answer default judgments was not made contrary to clear and determined law about which there is no confusion or question as to its interpretation; that her decision was not egregious; and that her untimely response did not constitute "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties."

The Commission issued a private warning to Respondent from which she filed this de novo appeal. For the reasons set forth below we find that the Commission established by a preponderance of the evidence that Respondent violated one or more of Canons 2A, 3B(2), and 3B(8), of the Code of Judicial Conduct, the Texas Government Code Section 33.001(b)(5) and Article V, § 1-a(6)(A) of the Texas Constitution and, consistent with the *Deming* Factors,[3] issue a Public Warning and a Public Admonishment to the Honorable Judge Curnutt.

I. INTRODUCTION

Respondent has served as the Justice of the Peace for Precinct 2, Arlington, Texas since May 2013. Respondent is not a lawyer. Respondent has taken judicial education and has been educated on default judgments as part of her regular training, and if she has a question about the

[3] *In re Sharp*, 480 S.W.3d 829, 839 (Tex. Spec. Ct. Rev. 2013) (citing *In re Deming*, 736 P.2d 639, 659 (Wash. 1987) (en banc)).

law, she reaches out to the Texas Justice Court Training Center (Center) or the district attorney's office. The specific rules guiding justice courts were effective August 31, 2013. *See generally* TEX. R. CIV. P. 500–510 (adopted by Misc. Docket No. 13-9049 (Tex. Apr. 15, 2013), eff. Aug. 31, 2013) (the Rules). For purposes of this appeal, we consider only rules 500–507 which govern small claims cases. TEX. CIV. R. P. 500.3(a).

In 2021, Respondent presided over two small-claims lawsuits filed by Jose and Juan Torres Mejia against Jorge Midence (Midence Cases). The plaintiffs alleged that they loaned Midence money and he refused to pay them back. Midence filed answers in both lawsuits in which he denied "all of the Plaintiff's allegations and demand that the allegations be proven." Respondent set the Midence Cases for pretrial hearings to occur on August 4, 2021. Respondent's standard notice provided that a defendant's failure to appear at the pretrial hearing may result in entry of a default judgment. On the day of the hearings, Midence's criminal defense counsel's office emailed and called the justice court to inform Respondent that Midence was in jail.[4] Respondent entered a default judgment against Midence in both cases consistent with her standard practice when a defendant is a "no show" at time of pretrial.

II. RELEVANT STANDARDS AND BURDEN OF PROOF

The function of the Commission "is not to punish; instead, its purpose is to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the citizens of Texas." *In re Lowery*, 999 S.W.2d 639, 648 (Tex. Rev. Trib. 1998, pet. denied).

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 conduct that is clearly inconsistent with

[4] The evidence conflicts as to what Respondent knew at the time of the pretrial hearings. However, Respondent's knowledge of Midence's incarceration has no ultimate bearing on the disposition of this matter as he was not present in court, defense counsel did not represent him in the justice court proceedings, and no motion for continuance was filed. The focus of this opinion is on the conduct of entering a default judgment at time of the pretrial.

the proper performance of his or her duties or that casts public discredit upon the judiciary or 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).

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 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 specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined. *In re Davis*, 82 S.W.3d at 148; *In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998).

As 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, the Commission had the burden to prove the charges against Respondent by a preponderance of the evidence. *See* TEX. GOV'T CODE ANN. § 33.034(f); *In Re Sharp*, 480 S.W.3d at 833; *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006); *In re Davis*, 82 S.W.3d at 142.

III. ANALYSIS – THE CHARGES

All four charges against Respondent are for willful misconduct. "[I]t has long been established that 'charges involving no more than mistakes of judgment honestly arrived at or the mere erroneous exercise of discretionary power entrusted by law to a district judge' do not constitute judicial misconduct." *In re Ginsberg*, 630 S.W.3d 1, 8 (Tex. 2018). Thus, to establish misconduct, the Commission was required to show, by a preponderance of the evidence, that (1) Respondent's legal ruling was contrary to clear and determined law about which there is no confusion or question as to its interpretation, and (2) the error was egregious, made as part of a

pattern or practice of legal error, or made in bad faith. *Id.*; *see also* TEX. GOV'T CODE ANN. § 33.034(f); *In re Hecht*, 213 S.W.3d at 560. As Charges I and II concern the same factual basis, we address them together.

A. Charges I and II: Granting of Default Judgment at Pretrial Conference – Violation of Canons 2A, 3B(2) and 3B(8)

As to Charge I,[5] the Commission argues that Respondent violated Canons 2A and 3B(2) by failing to comply with Rule 508.3(d), which requires that if a defendant files an answer before a default judgment is signed, "the judge must not enter a default judgment and the case must be set for trial." TEX. R. CIV. P. 508.3(d). Charge II[6] asserts a violation of Canon 3B(8) alleging a due process—right to be heard in accordance with law—violation by granting a post-answer default judgment at time of pretrial and failing to set the matter for trial. Respondent argues that she has discretion to enter default judgment against a defendant at a pretrial conference, despite Rule 508.3(d), provided that Respondent gives notice to the defendant that the defendant's failure to appear at the pretrial conference may result in default. Respondent also argues that the Midence Cases were small-claims cases, not debt-claim cases, and therefore Rule 508 does not apply.

[5] The express language of the Commission's charging instrument as to Charge I states:

> Charge I – Violation of Canons 2A & 3B(2)
>
> Judge Curnutt failed to comply with and maintain professional competence in the law by granting a default judgment in the Midence Cases at a pre-trial hearing after [Midence] filed an answer in the case.

[6] The express language of the Commission's charging instrument as to Charge II states:

> Charge II – Canon 3B(8)
>
> Judge Curnutt failed to accord Respondent an opportunity to be heard when she granted a default judgment at the pre-trial hearing in the Midence Cases when she was required to set the case for trial since [Midence] had filed an answer.

1. Rules regarding post-answer default judgment are substantially the same under Rules 508.3(d) and 503.3(b)–(c).

In her pretrial memorandum, for the first time in these proceedings, Respondent argues that she is not liable for misconduct because the rule she is alleged to have violated, Rule 508.3(d), a rule specific to debt claim cases, is inapplicable to small-claims cases.[7]

Rule 508.3(d) states:

> If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial.

TEX. R. CIV. P. 508.3(d). It is not disputed that Rule 503, applicable to small-claim cases, contains similar default-judgment requirements:

> (b) Appearance. If a defendant files an answer or otherwise appears in a case before a default judgment is signed by the judge, the judge must not enter a default judgment and the case must be set for trial as described in Rule 503.3.
>
> (c) Post-Answer Default. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence on liability and damages and render judgment accordingly.

TEX. R. CIV. P. 503.1(b), (c). In turn, Rule 503.3 provides that "[a]fter the defendant answers, the case will be set on a trial docket at the discretion of the judge." TEX. R. CIV. P. 503.3(a). Critically, like Rule 508, Rule 503 also prohibits a justice court from entering post-answer default judgment against a defendant until the defendant has failed to appear for trial. To the extent Respondent violated Rule 508.3 by entering post-answer default judgment against a party, she would also have violated Rule 503.1. As neither the Commission nor the Respondent dispute the applicability of,

[7] Respondent averred in her response to the Letter of Inquiry that she "complied with Justice Court Rule 508.3 and rendered a default judgment detailed in Notice of Pretrial Hearing." The Commission in issuing its Private Warning relied upon Texas Rule of Civil Procedure 508.3(d) and (e) for the relevant standards. It does not appear from the record that this argument was made to the Commission and is being raised for the first time in this de novo proceeding. The petitions filed in this cause are entitled Small Claims Petition as is the designation on the docket sheet. The Answer and Checklist forms are for both small claims and debt claims. While small-claims cases are governed by Rules 500–507 of Part V of the Rules of Civil Procedure, debt-claim cases are governed by Rules 500–507 and 508 of Part V of the Rules of Civil Procedure. TEX. R. CIV. P. 500.3(a), (b). To the extent of any conflict between Rule 508 and the rest of Part V, Rule 508 applies. TEX. R. CIV. P. 500.3(b).

and the hearing addressed the general provisions applicable to, small-claims cases, in this trial de novo we apply Rules 500–507, and specifically Rule 503.1.

2. Respondent's Notice, Which Advised of the Potential of a Default Judgment for Failing to Appear at a Pretrial Hearing, is Contrary to the Express Language of the Rules.

Respondent admits the underlying procedural facts and conduct which form the basis of the complaint. She argues, however, that she had discretion to enter default judgment because she notified Midence about that possibility before the pretrial hearing. Respondent's standard pretrial notice, used throughout her tenure, provides:

> **IF YOU ARE THE DEFENDANT (THE PARTY BEING SUED IN THIS CIVIL SUIT) AND YOU (OR YOUR ATTORNEY) DO NOT APPEAR AT THIS HEARING, PLEASE UNDERSTAND THAT A DEFAULT JUDGMENT MAY BE ENTERED AGAINST YOU. (DEFAULT JUDGMENT IS A JUDGMENT ENTERED AGAINST A DEFENDANT WHO HAS FAILED TO DEFEND AGAINST THE PLAINTIFF'S CLAIM.)**

The judgments entered in the Midence Cases specifically state that:

> The Plaintiff appeared In Person and announced ready for trial, and the Defendant, though duly cited as required by law to appear and answer herein, came not, but wholly made default.

It is clear that Respondent conflates a no-answer default[8] with a post-answer default. "A post-answer default judgment occurs when a defendant who has answered fails to appear for trial." *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009) (per curiam). No-answer and post-answer default judgments are distinct. They differ in the issues a plaintiff is required to prove. *Dolgencorp*, 288 S.W.3d at 930. In cases of a no-answer default, a defaulting defendant admits all facts properly pled in the plaintiff's petition except for the amount of unliquidated damages. *Id.* Thus, the plaintiff is required to prove only the claim for unliquidated damages. *Id.* If, however, a

[8] The Rules define default judgment as "a judgment awarded to a plaintiff when the defendant fails to answer and dispute the plaintiff's claims in the lawsuit." TEX. R. CIV. P. 500.2(h). No-answer default judgments, which also may require a hearing, are addressed under TEX. R. CIV. P. 503.1(a).

defendant files an answer, a trial court may not render judgment on the pleadings, and the plaintiff is required to offer evidence and prove all aspects of the claim. *Id.*

As explained above, once a defendant in a small-claims case answers a lawsuit, the justice court may not enter default judgment against the defendant until after the defendant fails to appear at trial. *See* TEX. R. CIV. P. 503.1(b),(c). Respondent argues she was authorized to do so, relying on cases that predate the 2013 adoption of the Rules. *Koslow's v. Mackie*, 796 S.W.2d 700, 704 (Tex. 1990); *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist.] 1995, no writ). We requested but were not provided any cases specifically interpreting the small-claims Rules and we have found none.

The *Koslow's* and *Murphree* courts reviewed rulings by district judges under different sections of the Texas Rules of Civil Procedure. The portion of the rules of civil procedure that apply to district courts do not contain a limitation similar to Rule 508.3(d) or 503.1. Accordingly, a district or county court has discretion to enter a post-answer default as a sanction for a party's failure to appear at a pretrial hearing. *See Koslow's*, 796 S.W.2d at 704. A justice court, however, has no such discretion, because a post-answer default is expressly prohibited by Rule 503.1 except at time of trial. *See* TEX. R. CIV. P. 503.1(b), (c). In light of the express language in the Rules, we find *Koslow's* and *Murphree* critically distinguishable and inapplicable to support Respondent's conduct.

Even if there were no difference in the rules, *Koslow's* is procedurally distinguishable. The defendants in *Koslow's* did not simply receive notice of a pretrial hearing. Rather, the trial court scheduled a pretrial status conference and notified the parties that failure to appear would result in the case being "set for disposition hearing, at which time cause will have to be shown why dismissal, default, or other sanctions should not be imposed." *See Koslow's*, 796 S.W.2d at 701–02. After the defendants failed to appear at the status conference, the trial court scheduled the

disposition hearing and notified the parties about the setting. *See id.* at 702. The trial court entered default judgment against the defendants only after they also failed to appear at the disposition hearing. *Id.* The supreme court held that the trial court did not abuse its discretion, explaining that "[i]t is an abuse of discretion for the trial court to impose sanctions when the defaulting party has inadequate notice or no notice *of the sanctions hearing*." *Id.* at 704 (emphasis added).

We read *Koslow's* to stand for the proposition that a trial court cannot impose default judgment as a sanction against a defendant until the defendant has violated a court order, been notified of the violation, and given an opportunity to be heard regarding the violation. Thus, even if *Koslow's* applied here, it still would not authorize Respondent's conduct.

Respondent alternatively argues that she was authorized to enter post-answer default judgment at time of pretrial under Rule 503.4(a)(11) ("any other issue that the court deems appropriate"). Respondent argues that Rule 503.1(b) and (c), in conjunction with Rules 503.3 and 503.4, permits the judge to send a notice of a mandatory pretrial hearing with 45 days' notice, which equates to the requisite forty-five day notice for trial. She suggests the pretrial hearing became the trial because of 503.4(11), which permits the court at the time of the pretrial conference to address "any other issues that the court deems appropriate." Respondent contends that "anyone that does not show up for that pretrial is put on notice of very clearly what will happen."

However, Rule 503.4 governs the pretrial conference, and subpart (a) describes what issues may be addressed in said conference. TEX. R. CIV. P. 503.4(a). None of the matters pertinent to pretrial proceedings listed in Rule 503.4 expressly permit the justice court to convert a pretrial conference into a trial setting. It is a basic rule of statutory interpretation that a catch-all provision at the end of a list includes only items similar to those listed. *See Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 52 (Tex. 2015) (explaining that *ejusdem generis* is a "familiar canon of statutory construction, which provides that general terms and phrases should be limited to matters

similar in type to those specifically enumerated."). Rule 503.4 lists several topics that may be discussed at a pretrial conference, all of which relate to pretrial issues or matters regarding how trial will be conducted. *See* TEX. R. CIV. P. 503.4(a). The "catch-all" provision of Rule 503.4(a)(11) does not negate the express requirement for a separate trial setting TEX. R. CIV. P. 503.3(a) ("After the defendant answers, the case will be set on a trial docket . . . . The court must send a notice . . . no less than 45 days before the setting . . . ."); TEX. R. CIV. P. 503.6 (providing, under the heading "Trial", that the court "must" call all the cases set for trial on the trial date, and that, if defendant fails to appear, the court may proceed to take evidence.). The record is clear, and Respondent admits, that the Midence Cases were never set on Respondent's trial docket.

Finally, Respondent argues that her standard practice complies with Rule 503.1 because she takes evidence before entering a default judgment. We disagree. Under Rule 503.1(c), a justice court may take evidence on liability and damages and render default judgment only if the defendant fails to appear "for trial." *See* TEX. R. CIV. P. 503.1(c). There is no provision authorizing a justice court to take such evidence in a pretrial hearing after the defendant has answered. As discussed above, there is no authority to convert a pretrial hearing into a trial setting under the Rules.

3. Conclusion

We conclude that Respondent's failure to set the Midence Cases on the trial docket, as required by the Rules, constituted a failure to comply with and maintain professional competence in the law and a deprivation of the right to be heard according to law.[9] *See* TEX. CODE JUD. CONDUCT, Canons 2A, 3B(2), and 3(B)(8).

[9] We note, without further discussion, that as to the issue of whether a continuance should have been granted, we affirm that the court has discretion to determine whether a continuance should be granted and does not form the basis for a determination of judicial misconduct on this record. In this instance, it is not whether a continuance of the pretrial conference should have been granted; rather, whether the matter should have been set for trial.

Respondent, for the entirety of her tenure on the bench, and even continuing after her private sanction from the Commission,[10] has followed this pretrial procedure to "get these cases through my court in a timely fashion." Respondent's pattern and practice, which she avers is within her discretion under the Rules, is to conduct pretrial hearings and issue a no-show judgment by default if a defendant does not appear at a pretrial conference.[11]

While Respondent attempts to justify her process of converting a pretrial into a trial setting, she does not establish how Rule 503(b) is subject to confusion or question in its interpretation as opposed to clear and determined. Despite Respondent's rationalizations for her practice, the failure to set the matter for trial constitutes legal error that under the Rules is clear, unambiguous, and not subject to confusion in its interpretation.

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[10] Q Since receiving the sanction from the Commission, have you changed anything about the practices regarding default judgments in your court?

A No.

[11] At time of the hearing, Respondent endeavored to distinguish the judgment entered but ultimately agreed it was a default judgment:

Q The conduct the Commission is alleging that you engaged in occurred in the courtroom; correct?

A Restate your question, please.

Q Yeah. You finding a default judgment against [Midence] occurred in your courtroom; correct?

A Yes.

Q And it --

A Well, it was not a default judgment. It was a no-show judgment for the plaintiff because of failure to appear for required pretrial, so yes.

[Commission's Counsel]: Can I approach?

Q I'm showing you Examiner's Exhibit 6. Can you read the last sentence for me of the top paragraph.

A Defendant, though duly cited, is required to appear -- by law to appear and answer herein, [came not] but wholly made default.

Q So the judgment that you have and issued to [Midence] said he may default?

A Yes, but it was not a no-answer default.

Q But it is a default judgment; correct?

A Yes.

The only other default judgment under the Rules is a post-answer default judgment which requires a trial setting.

Of concern is Respondent's wholesale refusal to investigate or acknowledge that she may be incorrect on the law. In her delayed response to the Commission, after the Commission issued a private reprimand, and at all times before this Special Court, Respondent has steadfastly maintained her position. Rather than contact the Center or the assigned district attorney for information or advice, she emphatically refused to reconsider her own interpretation of the law. Of equal concern is Respondent's assertion that this procedure is a widespread practice, which began before 2013 and was not revisited after the new Rules took effect, in justice courts in Tarrant County and throughout the state.[12]

Respondent's intentional routine of depriving a litigant of due process by entering a post-answer default judgment at time of pretrial, despite the clear and unambiguous rule requiring a trial setting, combined with her refusal to investigate or inquire into available resources as to the legality of the practice, constitutes a willful violation of the Canons and therefore necessitates the issuance of a public sanction.

B. Charge III – Tex. Gov't Code 33.001(b)(5)

The third charge in the charging instrument alleges that Respondent's failure to cooperate with the Commission's investigation into this matter constituted "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" in violation of § 33.001(b)(5) of the Government Code.[13] Respondent argues that an untimely response to the

[12] We have no direct evidence of the practices in other justice courts but this opinion should provide the necessary guidance to discontinue the practice.

[13] The express language of the Commission's charging instrument as to Charge III states:

> Judge Curnutt's refusal to cooperate in the Commission's investigation into this matter, specifically by not responding to certain emails sent to her by Commission Staff and not timely responding to the Letter of Inquiry, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties which is considered a violation of Article V, Section 1-a(6)A of the Texas Constitution.

Commission's "arbitrary deadline," when she wasn't expressly informed about a possible sanction, does not rise to the level of willful and persistent conduct.

Article V, § 1-a(8) of the Texas Constitution authorizes the Commission to "issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education" for a judge's "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties." TEX. CONST. art. V, § 1-a(8). For the purposes of § 1-a, "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" includes:

> (1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;
>
> (2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;
>
> (3) persistent or wilful violation of the rules promulgated by the supreme court;
>
> (4) incompetence in the performance of the duties of the office;
>
> (5) failure to cooperate with the commission; or
>
> (6) violation of any provision of a voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission.

TEX. GOV'T CODE ANN. § 33.001(b).

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 Davis*, 82 S.W.3d at 148; *In re Bell*, 894 S.W.2d at 126. A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined. *In re Davis*, 82 S.W.3d at 148; *In re Barr*, 13 S.W.3d at 539.

We have found no instructive cases analyzing a failure to cooperate with the Commission, other than a failure to respond, and we have been provided none. The chronology of events informs this analysis. On November 7, 2022, the Commission sent a Letter of Inquiry to Respondent giving

her until November 23, 2022 to respond. The deadline passed without a response or communication from Respondent. Commission Counsel called Respondent and asked if she needed more time and they agreed to December 9 as the new response date.

On January 10, 2023, the Commission Counsel sent an email following up on a phone call. Respondent thereafter spoke to Commission Counsel on January 10 and was again asked if she wanted more time. Respondent said "I'm working on it. I'm getting to it." On January 17, after not receiving a response, Commission Counsel once more emailed Respondent. Respondent submitted her response on January 20, 2023.[14]

Respondent knew she had to cooperate with the Commission but contends that the Letter of Inquiry does not state that "if you don't respond by the date provided, you will be sanctioned." Respondent testified in response to the question, "why [did she] believe [she] did not need to respond to the requested response date that the Commission gave [her]?"

> When I received this request for -- to assist in the information -- the investigation on November 7th, I honestly put it aside and thought, I'll get to this soon. I briefly went back and looked at what this could have been and saw that it was from 2021, looked at the complaint, if you will, and realized the Commission had had it for 15 months. I actually did not get this on November 7th; I got it days later via interoffice mail and had one of the busiest dockets any court could ever imagine and honestly after briefly looking at what this was about, I did not see the urgency of responding immediately to this and I apologize for that.
>
> . . .
>
> I honestly didn't think this was something that could possibly have any other outcome other than to dismiss it.

As Respondent admitted the facts underlying the conduct—specifically, her failure to meet the deadlines from the initial response date to the agreed-upon extensions—we find that she

[14] We note without additional discussion that in response to the Commission's 11 items of inquiry, 8 of which asked her to "explain," "respond," or "discuss," and provided the opportunity to submit additional information, Respondent's verified response, in fewer than 150 words, merely stated she had no knowledge, denied having ex parte communications, affirmed she complied with Justice Court Rule 508.3, disagreed with allegations and stated there were no other documents or information related to the matter.

willfully engaged in the conduct. The record is clear Respondent did not initiate any communications with the Commission; rather, she responded to the Commission only when it followed up on her failure to comply with response deadlines. Respondent failed to contact the Commission when she knew she would not meet a deadline, even when the Commission gave her an extension. Respondent wholly failed to communicate with the Commission, unless the Commission first made the effort to determine the reason for her non-responsiveness and offer an extension. Respondent asserts that because she ultimately responded, she cooperated with the Commission. She further acknowledges that the Commission gave her three opportunities to be heard: her responses, her appearance before the Commission, and even a thirty-day extension for additional written arguments.

Respondent agreed that

> By seeking and accepting the responsibilities of the office of judge, regardless of the level of office, a judge undertakes to conduct herself or himself both officially and personally in accordance with the highest standards that the citizens of Texas can expect.

In re Barr, 13 S.W. 3d at 536. When asked specifically if she believes she held herself to the same standard that she holds litigants that appear before her, she responded:

> Yes, because of the timeline of how this happened, the time in which they got the complaint, the day after the no-show at the pretrial …and the fact that it took 15 months to even get to me, I believe that I responded -- yes, it took me however many days they say, but in retrospect, I don't think -- I don't think it was so much of a delay that it boarded -- it went into willful disobedience or what was -

Further when asked "[I]f a litigant waited 2 years -- or 15 months to sue, would that mean the defendant could assume that they had as long as they needed to answer, that it wasn't urgent if the plaintiff waited 15 months to file the lawsuit?" Respondent answered:

> No. But then again, I don't see those very clear notices of what could potentially happen if I do not respond within this time frame in this letter; unlike my pretrial notices which give everyone clear notice of what will happen.

Holding herself to a different standard than she would afford a litigant in her court, intentionally not communicating with the Commission, and missing every extended deadline, was not cooperation and on this record constitutes willful and persistent behavior.

C. Charge IV – Art. V, § 1-a(6)A

In the fourth and final charge,[15] the Commission alleges that Respondent's conduct, both in granting default judgment in violation of the Rules and in failing to cooperate with the Commission, constituted a violation of Article V, Section 1-a(6)(A) of the Texas Constitution, which provides, in pertinent part:

> Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, 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. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section.

TEX. CONST. art. V, § 1-a(6)A. Accordingly, a judge may be disciplined for a willful violation of the Code of Judicial Conduct or for willful or persistent conduct that is clearly inconsistent with the proper performance of his or her duties or that casts public discredit upon the judiciary or administration of justice. *In Re Sharp*, 480 S.W.3d at 837 (citing TEX. CONST. art. V, § 1–a(6)A). The facts we have discussed under the previous three charges inform the basis of our determination on Charge IV.

The question before us, in the aggregate, is whether Respondent's actions in this matter rise to the level of willful or persistent violation of the Code of Judicial Conduct, or willful or

[15] The express language of the Commission's charging instrument as to Charge IV states:

> Judge Curnutt's behavior, namely granting a default judgment at a pre-trial hearing after Respondent filed an answer and subsequently refusing to cooperate with the Commission's investigation of same, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties and that cast public discredit upon the judiciary and the administration of justice, in violation of Article V, Section 1-a(6)A of the Texas Constitution.

persistent conduct that is clearly inconsistent with the proper performance of her duties or casts public discredit upon the judiciary or administration of justice. Respondent's improper grant of a default judgment was done publicly in open court. Respondent, at no time, investigated or researched the law in responding to the Letter of Inquiry or in her defense before the Commission or this Special Court. Rather than availing herself of known resources, Respondent repeatedly justified her reliance on a form that was created before the enactment of applicable rules, rather than on the express language of the Rules. She clung to a tortured interpretation of selected Rules, while ignoring others, bolstered by a belief that the pattern and practice was widespread therefore correct. Respondent has otherwise served the citizens well, managed a very heavy docket, involving some of the most vulnerable in our society–self-represented litigants–for over ten years. But she has made clear that her pattern and practice of defaulting defendants at pretrial hearings will continue unless we advise her not to do it. We do so by this opinion and the public sanction in the continuing effort to protect the public and promote public confidence in the judicial system and the administration of justice.

This opinion should not be read to minimize the practice of using mandatory pretrial conferences to facilitate resolution of disputes, educate the litigants on the process, and clarify the issues to be tried. But the small-claims rule for post-answer default judgments is clear and unambiguous and requires a trial setting prior to default.

But for this matter being set for a public proceeding before us, Respondent's untimely response to the Commission's inquiry would not in and of itself cast public discredit upon the judiciary.[16] However, the inquiry process before the Commission is not toothless and may not be

[16] The text of the constitutional provision at issue here provides that a judge may be disciplined for "willful or persistent conduct that . . . casts public discredit upon the judiciary or administration of justice." TEX. CONST. art. V, § 1–a(6)A. Thus, the constitution's textual focus is on condemning a particular form of willful or persistent judicial conduct—that which casts public discredit upon the judiciary or administration of justice. It does not elaborate about the manner or means by which the conduct becomes public. Article V, section 1–a(6)A's text therefore implicates not

ignored. Communication with the Commission, just as Respondent required responses from litigants in her court, is the foundation to preserve the integrity of, and maintain confidence in, the judiciary. The ongoing obligation to keep abreast of changes in the law through continuing legal education is but one aspect of a judge's duties. Those who have sworn an oath to preserve and protect the constitution, among the most fundamental principles of which are the due process considerations of notice and an opportunity to be heard, cannot sacrifice these principles for judicial efficiency in managing our dockets.

DISCIPLINE – *DEMING* FACTORS

Texas courts consider and apply the "*Deming* Factors" in determining the appropriate sanction for a judge's conduct that has been found to violate the Code of Judicial Conduct or constitutional standards. Those factors, which are non-exclusive, are:

(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 her private life;

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

(f) whether the judge has evidenced an effort to change or modify her conduct;

(g) the length of service on the bench;

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

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only complained-of conduct made public by a judge, like in *Davis*, but also complained-of conduct made public by someone other than the judge, as occurred here. *See, e.g.*, *In re Canales*, 113 S.W.3d 56, 62–63, 69–70 (Tex. Rev. Trib. 2003, pet. denied) (holding that the evidence was legally and factually sufficient to support the Commission's finding that judge's misconduct cast public discredit upon the judiciary or administration of justice but not articulating that judge himself brought the misconduct to the attention of the public); *In re Carrillo*, 542 S.W.2d 105, 110 (Tex. 1976) (finding that misconduct constituted willful conduct that cast public discredit upon the judiciary but not articulating that judge himself brought the misconduct to the attention of the public)." *In Re Sharp*, at 838.

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

(j) the extent to which the judge exploited her position to satisfy his personal desires.

In re Sharp, 480 S.W.3d at 839 (citing *In re Deming*, 736 P.2d at 659). In the course of our analysis of the charges, we have addressed many of the *Deming* Factors which we summarize here.

Respondent is a seasoned, hardworking jurist, serving in this capacity since 2013, the same year as the adoption of the Rules. Relying on a pre-2013 boilerplate pretrial notice form, Respondent rendered a post-answer default judgement at a pretrial hearing, as part of her regular routine standard practice, that occurs with frequency, and in open court. Respondent acknowledges that such actions continue to occur and has evidenced no effort to change or modify her conduct. Despite the complaint and the private sanction, Respondent has steadfastly maintained the propriety of her actions, neither questioning the practice nor seeking guidance from the Center or the assigned district attorney. This failure to provide the requisite notice and opportunity to be heard at the mandated trial setting, consistent with constitutional principles, is not in keeping with the high standards expected of the judiciary. The failure to timely respond to the Commission, disregarding deadlines including agreed extensions, also fails to maintain that high standard necessary to ensure the public confidence in the integrity of the judiciary.[17]

JUDGMENT: PUBLIC WARNING AND PUBLIC ADMONITION

The Special Court of Review has considered the pleadings, the applicable law, all of the evidence, the arguments of counsel, and the parties' post-trial briefing and finds that the Honorable Mary Curnutt: willfully violated Canons 2A, 3B(2), and 3B(8), of the Code of Judicial Conduct, the Texas Government Code Section 33.001(b)(5) and Article V, § 1-a(6)(A) of the Texas constitution.

[17] There is no evidence that the Respondent has had prior complaints or exploited her position for personal gains.

Accordingly, the Special Court of Review issues a Public Warning to the Honorable Mary Curnutt for failing to comply with the law and failing to maintaining professional competence in the law by entering a post-answer default judgment at a pretrial hearing and failing to set the matter for trial, thus depriving a defendant of the right to be heard in violation of Canons 2A, 3B(2), and 3B(8) of the Code of Judicial Conduct.

The Special Court of Review further issues a Public Admonition for violating the Texas Government Code Section 33.001(b)(5); and Article V, § 1-a(6)(A) of the Texas Constitution Texas by failing to cooperate with the Commission's investigation, constituting willful and persistent conduct that is clearly inconsistent with the proper performance of her duties.

BONNIE LEE GOLDSTEIN
JUSTICE