Public Admonition Reversed, Charges Dismissed, and Opinion filed June 11, 2018.

In The

Special Court of Review
Appointed by the Supreme Court of Texas

Docket No. 18-0001

IN RE INQUIRY CONCERNING HONORABLE CARL GINSBERG

CJC No. 17-0739-DI

O P I N I O N

Chapter 37 of the Texas Government Code governs the way in which most trial courts appoint guardians ad litem, attorneys ad litem, and mediators. *See* TEX. GOV'T CODE ANN. §§ 37.001–.005 (West Supp. 2017). The day before the law went into effect, the Honorable Carl Ginsberg, presiding judge of the 193rd District Court in Dallas County, Texas, issued a standing order stating that the statute violates the separation-of-powers clause of the Texas Constitution. *See* TEX. CONST. art. II, § 1. Judge Ginsberg concluded in the order that his oath of office to uphold the Constitution required him not to comply with Chapter 37. Seventeen months later,

an anonymous complaint was filed with the State Commission on Judicial Conduct, and after informal proceedings, the Commission concluded that Judge Ginsberg had violated Canon 2A of the Code of Judicial Conduct and publicly admonished him. Judge Ginsberg appealed the ruling by trial de novo before this Special Court of Review selected by lot by Chief Justice Nathan Hecht of the Supreme Court of Texas for that purpose.[1]

To dispose of this case, we are not required to, and do not, determine whether Chapter 37 violates the separation-of-powers clause as Judge Ginsberg maintains. We instead are called upon to decide whether Judge Ginsberg violated the Code of Judicial Conduct or the Texas Constitution by issuing the standing order. We hold that, under the facts of this case, he did not. We similarly hold that Judge Ginsberg's failure to comply with Chapter 37 also does not rise to the level of sanctionable judicial misconduct. And finally, we must determine whether, as the Commission alleges, "a demonstrable portion of Judge Ginsberg's appointments were neither impartial nor based on merit." We find that the Commission did not prove this charge by a preponderance of the evidence. We accordingly dismiss the charges without sanction.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

Although Chapter 37 governs certain appointments of attorneys ad litem, guardians ad litem, and mediators in counties with a population of at least 25,000, the Commission has focused only on the appointment of mediators, as do we. *See* TEX. GOV'T CODE ANN. § 37.001. The statute requires certain courts to maintain a

[1] *See* TEX. GOV'T CODE ANN. § 33.034 (West Supp. 2017). This special court of review consists of Justice Marialyn Barnard of the Fourth Court of Appeals, presiding by appointment; Justice Tracy Christopher of the Fourteenth Court of Appeals, participating by appointment; and Justice Cindy Olson Bourland of the Third Court of Appeals, participating by appointment.

[2] *See* TEX. RULES REM'L/RET. JUDG. R. 9(d) (West 2018).

list of mediators registered with the court and to publish the list of mediators on the court's website. *Id.* §§ 37.003, 37.005. When the court appoints a mediator, it must appoint the mediator whose name appears first on the list, then move that mediator's name to the bottom of the list. *Id*. § 37.004. There are several exceptions to this requirement. A court may appoint a mediator agreed upon by the parties, and in a complex case, the court for good cause, as statutorily defined, may appoint a mediator other than one whose name is the first on the list if that person has special training, education, certification, skill, language proficiency, prior involvement with the subject matter or the parties, or is in a relevant geographic area. *Id.* § 37.004. A mediation conducted by an alternative dispute resolution system established under Chapter 152 of the Texas Civil Practice and Remedies Code is not subject to Chapter 37 at all. *Id.* §37.002.

On August 31, 2015, Judge Ginsberg issued a standing order in which he addressed a conflict that he perceived between his obligation to comply with Texas Government Code Chapter 37 and his oath to uphold the Texas Constitution. He concluded that under *Davis v. Tarrant County*, 565 F.3d 214, 227 (5th Cir. 2009), the appointment of a mediator, attorney ad litem, or guardian ad litem is "an inherently judicial function" and "the Court must be free to exercise discretion in order to match the appropriate individual . . . to any given case to ensure the most efficacious handling of the matter." Based on his reading of *Davis*, Judge Ginsberg reasoned that the Texas legislature "may not invade and usurp this 'zone of judicial power' under the guise of establishing administrative rules." He concluded that Chapter 37 "is manifestly unconstitutional" in that it violates the Texas Constitution's separation-of-powers clause. He held that he had "no choice but to honor his oath of office to uphold the Constitution and not comply with Chapter 37

of the Texas Government Code concerning the appointment of Attorneys & Guardians ad Litem and Mediators."

Seventeen months later, a person who wished to remain anonymous[3] complained to the State Commission on Judicial Conduct that "[b]y issuing a standing order declining to rotate court appointments as required by Chapter 37, . . . a statute intended to safeguard public confidence in the judiciary, Judge Carl Ginsberg . . . is in violation of Canons 2(A) and 3 of the Texas Code of Judicial Conduct." After informal proceedings, the Commission concluded that Judge Ginsberg violated Canon 2A of the Texas Code of Judicial Conduct by failing to comply with Chapter 37, and the Commission issued a public admonition. *See* TEX. GOV'T CODE ANN. § 33.032(c) (West 2004).

Judge Ginsberg appealed the ruling by trial de novo before this special court of review. The Examiner appointed by the Commission to gather and present evidence[4] added additional charges to the charge that the Commission found Judge Ginsberg had committed. *See id.* § 33.034(d). At trial, the Commission, through its Examiner, bore the burden to prove its charges by a preponderance of the evidence. *See id.*; *In re Slaughter*, 480 S.W.3d 842, 845 (Tex. Spec. Ct. Rev. 2015) (per curiam).

Having considered the evidence, the arguments of counsel, and the pre- and post-trial briefing of the parties, we timely issue our decision disposing of the appeal.

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[3] *See* TEX. GOV'T CODE ANN. § 33.0321 (West 2004) ("On the request of a complainant, the commission may keep the complainant's identity confidential.").

[4] *See id.* § 33.001(a)(5) (West Supp. 2017) ("'Examiner' means an individual, including an employee or special counsel of the commission, appointed by the commission to gather and present evidence before a special master, the commission, a special court of review, or a review tribunal.").

II. CHARGES

In four charges, the Commission alleged that Judge Ginsberg

1. willfully and persistently failed to comply with sections 37.003 and 37.004 of the Texas Government Code, thereby violating Judicial Canon 2A's mandate that "[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";[5]
2. violated Judicial Canon 2A by using "an improper legal vehicle"—the standing order—to render an advisory opinion holding a statute unconstitutional;
3. violated article V, section 1-a(6)(A) of the Texas Constitution by engaging in the conduct described in Charge 2, which constitutes "willful or persistent conduct that is clearly inconsistent with the proper performance of his duties";[6] and
4. made "a demonstrable portion" of his judicial appointments in a manner that was neither impartial nor based on merit, thereby violating Judicial Canon 3C(4) ("A judge shall exercise the power of appointment impartially and on the basis of merit.").[7]

III. LEGAL ERROR

The Commission's first three charges are based on alleged legal error, both substantive and procedural. Before we can determine whether Judge Ginsberg's alleged legal errors are sanctionable, we must know whether Judge Ginsberg truly did commit an error of law and whether the legal error rises to the level of judicial

[5] TEX. CODE JUD. CONDUCT, Canon 2A, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013).

[6] TEX. CONST. art. V, § 1-a(6)(A).

[7] TEX. CODE JUD. CONDUCT, Canon 3C(4), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013).

misconduct. We begin with the second inquiry: at what point does a legal error cross the line into judicial misconduct?

A. The General Standard

As relevant to this case, the Texas Constitution provides that a judge or justice of a constitutional or statutory court may be disciplined "for willful or persistent violation of rules promulgated by the Supreme Court of Texas" or for "willful or persistent conduct that is clearly inconsistent with the proper performance of his duties." TEX. CONST. art. V, § 1-a(6)(A). The parties do not appear to dispute the meaning of the word "persistent." "Persistent" means "continuing firmly or obstinately in a course of action in spite of difficulty or opposition" or "continuing to exist or endure over a prolonged period." NEW OXFORD AMERICAN DICTIONARY 1307 (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010).[8] "Persistent"

[8] In *In re Thoma*, a Texas review tribunal defined "persistent" to mean "continuing or inclined to continue in a course without a change in function or structure," citing Webster's Ninth New Collegiate Dictionary. *See In re Thoma*, 873 S.W.2d 477, 500 (Tex. Rev. Trib. 1994) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 877 (1984)). That definition is both inapposite and incomplete. The cited dictionary defined "persistent" to mean

> **1:** *existing for a long or longer than usual time or continuously: as*
>
> **a:** retained beyond the usual period
>
> **b:** *continuing without change in function or structure*
>
> **c:** effective in the open for an appreciable time usu. through slow volatilizing
>
> **d:** degraded only slowly by the environment
>
> **e:** remaining infective for a relatively long time in a vector . . . .
>
> **2:** **a:** continuing or inclined to persist in a course
>
> **b:** continuing to exist in spite of interference or treatment.

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 877 (1984) (illustrative phrases omitted; emphasis, tabs, and returns added). As applied to judicial misconduct, the second definition of the word "persistent" is the more apt, and appears to be the one that courts actually applied, even when quoting the language, "continuing without change in function or structure." *See, e.g.*, *In re Rose*, 144 S.W.3d 661, 700–02, 737 (Tex. Rev. Trib. 2004) (special master found judge's failure to timely receipt, deposit, and account for money received by the court more than a thousand times over five years and his failure to process approximately 22,000 citations were acts of persistent

conduct also has been defined as conduct that "demonstrates a series of associated efforts and determination which is insistently repetitive or continuous." *In re Barr*, 13 S.W.3d 525, 558–59 (Tex. Spec. Ct. Rev. 1998).

The parties do, however, dispute the meaning of the word "willful." In judicial misconduct cases generally, "willful" means "the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct." *In re Barr*, 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998). A judge acts intentionally "when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct." *Id.* "Gross indifference is indifference that is flagrant, shameful and beyond all measure and allowance." *Id.* If a judge intentionally engaged in the conduct that violated a judicial canon, then the violation was willful. *Id.* at 534–35.

B. The Legal-Error Standard

The Commission focuses on this last statement, and urges us to hold that if a judge intended to engage in the conduct for which the judge is disciplined, then the judge's conduct was willful. In support of this position, the Commission cites *In re Slaughter*, 480 S.W.3d at 848, and *In re Sharp*, 480 S.W.3d 829, 833 (Tex. Spec. Ct. Rev. 2013). But, neither of these cases involved legal error. Judge Slaughter was accused of misconduct for posting certain comments on her Facebook page about an ongoing trial in her courtroom, *see Slaughter*, 480 S.W.3d at 845, and Justice Sharp

misconduct; review tribunal agreed); *In re Lowery*, 999 S.W.2d 639, 647, 660 (Tex. Rev. Trib. 1998) (special master found judge's use of rude and profane language to three people was persistent misconduct, but review tribunal found such language was used on only one occasion to one person, and thus, the conduct was not persistent); *In re Thoma*, 873 S.W.2d at 500 (judge engaged in persistent misconduct by meeting privately five times in three months with a probationer who was a criminal defendant in the judge's court); *id.* at 503 (judge engaged in persistent misconduct in favoring a friend by ordering *ex parte* that friend's driver's license not be suspended, that friend's probation fees be waived, and that friend's motion for new trial be granted).

was publicly reprimanded because he improperly used the prestige of his office in an attempt to obtain the release of an acquaintance's daughter from a juvenile detention center. *Sharp*, 480 S.W.3d at 832; *see also In re Casey*, No. SCR 17-0001, slip. op. at 8 (Tex. Spec. Ct. Rev. May 9, 2017), *available at* http://www.scjc.texas.gov/opinions/ (last visited June 8, 2018) (applying the same standard to a judge's misconduct consisting of multiple sexual encounters at the courthouse with his chief clerk); *In re Davis*, 82 S.W.3d 140, 148 (Tex. Spec. Ct. Rev. 2002) (applying the same standard to a judge's use of "the power of his office to retaliate against someone with whom he had a personal grudge"). This standard does sometimes appear in published cases involving both legal and non-legal error, but it is almost uniformly applied to non-legal error. For example, in *In re Barr*, a review tribunal cites this standard, but the case involved both legal and non-legal error, and the *Barr* court applied this standard only to non-legal error. *See Barr*, 13 S.W.3d at 539 (judge's statement to an attorney, "I feel like coming across the bench and slapping the crap out of you" was a willful violation of Canons 3B(3)and 3B(4) because the judge intended to engage in the conduct); *id.* at 540 (applying the same standard to judge's statement from the bench, in response to a motion to reset a hearing, that counsel for the movant "can go screw himself").

When determining whether legal error rises to the level of judicial misconduct, the test cannot be whether the judge intended to engage in the conduct. Absent scrivener's error or other such inadvertence, a judge's every ruling is intentional, and thus willful, so under this standard, *every* legal error would constitute judicial misconduct. But, it 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. *See In re Laughlin*, 153 Tex. 183, 188, 265 S.W.2d 805, 808 (1954) (orig. proceeding).

For legal error to rise to the level of judicial misconduct, a legal ruling or action must be "made contrary to clear and determined law about which there is no confusion or question as to its interpretation," and the complained-of legal error additionally must be (1) egregious, (2) made as part of a pattern or practice of legal error, or (3) made in bad faith. *Barr*, 13 S.W.3d at 545 (citing *In re Quirk*, 705 So.2d 172, 177–78 (La. 1997)).

"Egregious" means "[e]xtremely or remarkably bad; flagrant,"[9] or "shocking."[10] "Bad faith" means "[d]ishonesty of belief or purpose."[11] "A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority may in and of itself constitute bad faith." *Id.* at 534.

In judicial-misconduct cases, courts disagree about whether "willfulness" can be proved without a showing of bad faith or without showing that the judge had a specific intent to use the powers of judicial office for an unauthorized purpose. We have found two cases in which courts have held that "willfulness" "requires a showing, though not necessarily a finding, of bad faith," and that the specific intent to use the powers of the judicial office for an improper purpose *may* constitute bad faith. *See In re Jones*, 55 S.W.3d 243, 246–47 (Tex. Spec. Ct. Rev. 2000); *In re Thoma*, 873 S.W.2d 477, 489 (Tex. Rev. Trib. 1994). Two courts have gone further still, holding that "willfulness" requires a showing of bad faith *including* a specific

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[9] *Egregious*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[10] NEW OXFORD AMERICAN DICTIONARY 555 (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010).

[11] *Bad faith*, BLACK'S LAW DICTIONARY (9th ed. 2009).

intent to use the powers of office to accomplish an end which the judge knew or should have known was beyond the legitimate exercise of authority. *See In re Bell*, 894 S.W.2d 119, 130 (Tex. Spec. Ct. Rev. 1995); *accord*, *In re Mullin*, slip. op. at 18 (Tex. Spec. Ct. Rev. 2015), *available at* http://www.scjc.texas.gov/opinions/ (last visited June 8, 2018). We do not believe that a showing of bad faith is necessary in every case, however, for a judge may commit egregious legal error by omission or through incompetence rather than by an affirmative act of bad faith. Although Judge Ginsberg is not alleged to have erred by omission or incompetence, there should be but one standard for determining whether legal error rises to the level of judicial misconduct. The questions to be answered are whether the judge violated clear and determined law, and if so, whether the legal error was egregious, part of a pattern or practice, or made in bad faith.

Given this standard, judicial disciplinary proceedings are inappropriate where the judge's complained-of action is made under law that "is arguably unclear or ambiguous." *Barr*, 13 S.W.3d at 545. "So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or judicial overreaching lies in appropriate appellate review." *Id*.

We turn now to the application of this standard to the legal errors that allegedly violated Canon 2A and the Texas Constitution. In the first charge, the Commission alleges that Judge Ginsberg willfully and persistently failed to comply with Texas Government Code Chapter 37, and in the second and third charges, the Commission challenges Judge Ginsberg's use of a standing order to conclude that Chapter 37 is unenforceable in that the statute violates the Texas Constitution. Because Judge Ginsberg's alleged failure to comply with Chapter 37 arose as a result

of the ruling contained in Judge Ginsberg's standing order, we begin our analysis with the charges attacking that ruling.

C. Charges 2 and 3: The Allegedly Improper Use of a Standing Order

The Commission argues that Judge Ginsberg's use of a standing order was improper because (1) under the constitutional-avoidance doctrine, Judge Ginsberg was obligated not to address the constitutionality of Chapter 37; (2) the order sidestepped important procedural mechanisms for giving the relevant stakeholders the opportunity to be heard and for "conventional appellate review"; and (3) the order was an advisory opinion, and "the giving of advisory opinions is not a judicial function."[12] We address each contention in turn.

1. Constitutional Avoidance

The Commission first maintains that Judge Ginsberg violated the Code of Judicial Conduct by reaching a constitutional issue *sua sponte* in violation of the principle of constitutional avoidance. According to the Commission, the constitutional-avoidance doctrine obligated Judge Ginsberg "not to address the constitutionality of Chapter 37 at all."

This characterization of constitutional avoidance is not quite accurate. Constitutional avoidance is a canon of statutory construction; it provides that, as a rule, courts decide constitutional questions only when the issue cannot be resolved on non-constitutional grounds. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). A court must begin statutory analysis with the presumption that the statute is constitutional, and the principle of constitutional avoidance dictates that the court construe the statute to avoid constitutional infirmities, if such a construction is possible. *See Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011); *Brooks v.*

[12] *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 859 (Tex. 1965).

Northglen Ass'n, 141 S.W.3d 158, 169 (Tex. 2004). The party attacking the presumption bears the burden of proof on that issue. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (2001).

But the only issue addressed in the standing order—and according to Judge Ginsberg's uncontroverted and credible testimony, his only motive for issuing the standing order—was the resolution of his contention that Chapter 37 violates the Texas Constitution's separation-of-powers clause. The Commission does not explain how this issue can be resolved on non-constitutional grounds. The Commission instead argues that the issue was not before Judge Ginsberg, and could not be before him unless raised by a party to a case pending in Judge Ginsberg's court. Thus, the Commission maintains that there was no need to rule upon a constitutionality challenge that had not been raised by any party to any case pending in Judge Ginsberg's court.[13]

We agree that a court generally should not address a constitutional issue *sua sponte*, and that Judge Ginsberg committed a legal error in doing so in this instance. We conclude, however, that the legal error did not rise to the level of judicial misconduct.

(a) The legal error was not egregious.

In determining whether Judge Ginsberg committed objectively egregious legal error by addressing the statute's constitutionality *sua sponte*, we note that there are exceptions to the rule against doing so. One such exception can be found in the doctrine of fundamental error, which permits a court to address an error that "directly

[13] Of course, a litigant would have standing to challenge the statute's constitutionality only if it had an adverse impact on that party's own rights. *See Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992) (quoting *Ulster Cty. Court v. Allen*, 442 U.S. 140, 154–155, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)); *In re C.M.D.*, 287 S.W.3d 510, 515 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

and adversely affects the interest of the public generally, as that interest is declared by the statutes or Constitution of our State." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006). In *Houston Chronicle Publishing Co. v. City of Houston*¸ 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam), the Fourteenth Court of Appeals drew on this principle in reviewing *sua sponte* the trial court's ruling that the Open Records Act is unconstitutional. *See id.* at 182. Not only did the appellate court do so, but the trial court also had ruled on the statute's constitutionality even though unconstitutionality had not been pleaded as an affirmative defense. *See id.* at 183. The reviewing court held that the trial court lacked authority to address the unpleaded issue; nevertheless, the appellate court held that, "[i]n view of the importance of the question," it would review the constitutionality ruling on the merits. *Id.*

After *Houston Chronicle* was decided, the Texas Supreme Court cited the case in support of its statement in *In re Doe 2* that, "in the absence of an appropriate pleading raising the issue of unconstitutionality, the trial court is *generally* without authority to reach the issue." 19 S.W.3d 278, 284 (Tex. 2000) (emphasis added). Pointing out the citation, the Fourteenth Court of Appeals applied the exception again in *In re C.M.D.*, 287 S.W.3d 510 (Tex. App.—Houston [14th Dist.] 2009, no pet.), ruling that "the trial court had authority in this case to consider the issue of constitutionality of the statute sua sponte," given "the importance of the State's interest in protecting the integrity of the adoption process and of resolving C.M.D.'s legal status as soon as possible." *Id.* at 514.

Moreover, there is precedent for a court to address constitutionality *sua sponte* independently of a pending case. In *In re House Bill No. 537 of the Thirty-Eighth*

Legislature, 113 Tex. 367, 256 S.W. 573 (1923), the Texas Supreme Court did exactly that.

House Bill No. 537 was a stand-alone opinion issued by the Texas Supreme Court independent of any case or any parties. The Thirty-Eighth Legislature had passed an act that, among other things, required the chief justice or an associate justice "to designate district judges to hold special terms of the district court in districts other than their own, when required in the public interest" and authorized the chief justice or an associate justice to require a judge to call a special term. *Id.* at 368, 256 S.W. at 573. The Texas Supreme Court wrote, "Without at least an implied determination of the validity of the act, . . . the Justices of the court could not with propriety proceed to discharge the functions which the act requires of them. We therefore feel impelled to consider whether the act is valid or invalid, and to announce our conclusion." *Id.* at 368, 256 S.W. at 573. The court held that certain provisions of the act were unconstitutional, and that without those provisions, the act was not capable of enforcement. The court concluded, "It therefore becomes the imperative duty of the court and of the Judges, under the obligation to uphold the Constitution as the supreme and paramount law of the state, to treat the act as repugnant to the Constitution and therefore void." *Id.* at 371, 256 S.W. at 575. While this action does not seem to have been repeated, neither has the case been overruled.

Given the precedent cited above, we conclude that Judge Ginsberg's legal error in addressing the constitutionality of Chapter 37 *sua sponte* through a standing order was not objectively egregious.

(b) The legal error was not part of a pattern or practice.

The Commission does not contend that Judge Ginsberg addressed constitutionality *sua sponte* in any other instance, before or after issuing the standing order. We find that the legal error was not part of a pattern or practice.

(c) The legal error was not made in bad faith.

There is no evidence that Judge Ginsberg committed this legal error for an ulterior motive, and we find his testimony regarding his motives and his reasoning to be credible. We instead conclude that Judge Ginsberg acted in good faith and in an effort to follow the law as he understood it.

Given our failure to find that Judge Ginsberg's legal error in addressing Chapter 37's constitutionality *sua sponte* was egregious, was made as part of a pattern or practice, or was made in bad faith, we conclude that the error was not willfully made.

(d) Judge Ginsberg's conduct was not persistent

We additionally find the legal error was not persistent. This is not a case in which a judge repeated a similar error after having been corrected by a higher court or after having been ordered to remedial training as a result of a prior complaint. *Cf. In re Mullin*, No. 15-0002, slip. op. at 20, *available at* http://www.scjc.texas.gov/opinions/ (last visited June 8, 2018) (after her attempt to influence the ruling on a recusal motion against her was the subject of a mandamus proceeding in which the reviewing court called her conduct "not just inappropriate but blatantly improper," the trial judge attempted to influence the ruling on another recusal motion); *In re Jones*, 55 S.W.3d at 249 (judge repeated legal errors for which he had previously undergone remedial training). Moreover, Judge Ginsberg vacated his standing order when the Commission issued a public admonishment.

We conclude that Judge Ginsberg's conduct in addressing the constitutionality of the statute *sua sponte* does not constitute judicial misconduct.

2. The Alleged Avoidance of Certain Procedural Mechanisms

The Commission next argues that Judge Ginsberg's use of a standing order avoided certain procedural mechanisms intended to provide the relevant stakeholders—specifically, the Texas Attorney General—with an opportunity to be heard and to allow for "conventional appellate review." For the reasons explained below, we are not persuaded that Judge Ginsberg's acts or omissions rise to the level of judicial misconduct.

(a) Providing the relevant stakeholders with an opportunity to be heard

The Commission points out that Texas Government Code section 402.010 requires a party or the court to serve notice on the attorney general of a challenge to a statute's constitutionality, and that a court may not enter a final judgment holding a state statute unconstitutional before the 45th day after the notice is served. *See* TEX. GOV'T CODE ANN. § 402.010(a), (b) (West Supp. 2017). Judge Ginsberg failed to serve the required notice before issuing his standing order, although he later sent a copy of the order to the attorney general.[14]

A trial court abuses its discretion in holding a statute unconstitutional less than 45 days after providing the required notice to the attorney general. *See In re State*, No. 04-14-00282-CV, 2014 WL 2443910, *4 (Tex. App.—San Antonio May 28,

[14] Judge Ginsberg issued the standing order after the Texas Court of Criminal Appeals held that section 402.010 violates the Texas Constitution's separation-of-powers clause, and before the Texas Constitution was amended to require such notice. *Compare Ex parte Lo*, 424 S.W.3d 10, 28–30 (Tex. Crim. App. 2013) (per curiam op. on reh'g) (holding the statute unconstitutional) *with* TEX. CONST. art. V, § 32 (notwithstanding the separation-of-powers clause, the legislature may require notice to the attorney general of no more than 45 days before a court may render a judgment holding a statute unconstitutional) (eff. Nov. 30, 2017).

2014, orig. proceeding) (mem. op.) (conditionally granting the State's petition for writ of mandamus and directing the trial court to vacate its order rendered in violation of section 402.010). Thus, Judge Ginsberg committed a legal error by issuing his standing order without first serving notice on the attorney general. This error, however, was neither willful nor persistent.

i. The legal error was not egregious.

Judge Ginsberg testified that he failed to notify the attorney general of his challenge to Chapter 37's constitutionality because he was unaware of the notice requirements of section 402.010. He is neither the first nor the highest sitting judge to have overlooked that statute. For example, in the Texas Court of Criminal Appeals' original opinion in *Ex parte Lo*, the court unanimously held Texas Penal Code section 33.021(b) unconstitutional even though the court had not provided notice to the attorney general before so ruling. 424 S.W.3d 10, 19 (Tex. Crim. App. 2013). In its motion for rehearing, the State argued that the court erred in ruling without first providing the required notice. *Id.* at 27 (Tex. Crim. App. 2014) (per curiam op. on denial of reh'g). Once the statute was brought to the court's attention, the Texas Court of Criminal Appeals held that it was not required to comply with section 402.010 because the statute violates the Texas Constitution's separation-of-powers clause. *Id.* at 28–30 (discussing TEX. CONST. art. II, § 1).

We do not believe that the entire Court of Criminal Appeals violated Canon 2A by unanimously holding a statute unconstitutional without first either notifying the attorney general of the constitutional challenge or holding the notification statute itself unconstitutional. We instead conclude that overlooking the statute is not an egregious legal error. *Cf. In re State*, 489 S.W.3d 454, 455 n.9 (Tex. 2016) (orig. proceeding) (Willett, J., concurring in dismissal) ("Theoretically, a civil court could declare section 402.010 itself unconstitutional on separation-of-powers grounds, as

the Court of Criminal Appeals has done on the criminal-law side. That did not happen here. Section 402.010 was not overturned—it was overlooked.") (citation omitted); *Shearer v. Reister*, No. 05-12-01475-CV, 2014 WL 1690479, *1 n.3 (Tex. App.—Dallas Apr. 28, 2014, no pet.) (mem. op.) (noting that the trial court failed to serve the statutorily required notice on the attorney general).

ii. The legal error was not part of a pattern or practice.

The Commission does not contend that Judge Ginsberg's failure to provide notice to the attorney general of a challenge to a statute's constitutionality is part of a pattern or practice, and it produced no evidence on the subject. We therefore do not find that Judge Ginsberg repeatedly committed such a legal error.

iii. The legal error was not made in bad faith.

Finally, there is no evidence that Judge Ginsberg acted in bad faith in failing to provide the required notice. We instead credit his testimony that he simply overlooked the statute.

Because Judge Ginsberg's legal error in failing to comply with Texas Government Code section 402.010 was not egregious, part of a pattern or practice, or committed in bad faith, we conclude that the error was not willful.

iv. The legal error was not persistent.

We additionally find that the error was not persistent. This is the only instance in which Judge Ginsberg is alleged to have failed to notify the attorney general of a challenge to a statute's constitutionality. Although Judge Ginsberg did not alert the attorney general before the standing order was issued, he did send a copy to the attorney general before the attorney general's office issued its own opinion on the statute's constitutionality.

In sum, we do not find that Judge Ginsberg's issuance of the standing order without complying with section 402.010 rises to the level of judicial misconduct.

(b) Allowing for "conventional appellate review"

The Commission also contends that the Judge Ginsberg's issuance of the standing order violated Canon 2A because the order is not reviewable by an ordinary appeal and "it is unlikely that the Standing Order is even reviewable by mandamus." It appears to us, however, that although the standing order was unlikely to be reviewable by appeal, it likely was reviewable through a petition for mandamus.[15]

A writ of mandamus will issue to compel the performance of a ministerial duty or when the relator has no adequate appellate remedy for the trial court's clear abuse of discretion. *See In re Phillips*, 496 S.W.3d 769, 774 (Tex. 2016) (orig. proceeding) (ministerial duty); *In re M-I L.L.C.*, 505 S.W.3d 569, 574 (Tex. 2016) (orig. proceeding) (abuse of discretion without an adequate appellate remedy). The procedure is not limited to matters arising in a specific case. *See In re Williams*, 470 S.W.3d 819, 823 (Tex. 2015) (per curiam) (orig. proceeding) (compelling Houston City Council to submit an ordinance to voters in compliance with the City Charter). Mandamus is available to challenge a trial court's standing order independently from a case to which the order applies. *See, e.g.*, *In re State*, 162 S.W.3d 672, 674 (Tex. App.—El Paso 2005, orig. proceeding) (conditionally granting mandamus relief directing a district court to vacate its two orders "requiring the State to produce the District Attorney's Office screening sheets, El Paso Police Department supplement reports, and El Paso Detention Facility Arrest Supplements for every criminal case pending in the 346th District Court").

[15] While a mandamus is not a "conventional appeal," it is "[a]n original appellate proceeding." TEX. R. APP. P. 52.1.

A person who wished to be appointed as a mediator would be aggrieved by the standing order—and therefore would have a justiciable interest in challenging it—if the standing order resulted in the person being denied registration with the court as a mediator or being denied inclusion on, or appointment from, the court's list of mediators. *See Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) (stating that a person who is personally aggrieved has standing); *cf. Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (explaining that standing limits subject-matter jurisdiction to cases involving a distinct injury to the plaintiff and a live controversy between the parties that will be determined by the judicial declaration sought). Such a person could have filed a petition for a writ of mandamus in the Fifth Court of Appeals and argued, for example, that Chapter 37 imposes a ministerial duty on Judge Ginsberg to allow the relator to register with the 193rd District Court as a mediator, or that when appointing a mediator in a non-complex case to which no exemption applies[16] and in which the parties have not agreed upon a mediator,[17] Judge Ginsberg has a ministerial duty to appoint the mediator whose name is at the top of the list.

We express no opinion on the probable outcome of such a hypothetical proceeding because none was filed. We point out only that a proceeding was available to obtain a higher court's review of the standing order, had anyone chosen to do so. We accordingly disagree with the suggestion that in issuing a standing order, Judge Ginsberg used a procedural mechanism that evaded appellate review.

[16] *See* TEX. GOV'T CODE ANN. § 37.002.

[17] *See id.* § 37.004.

3. The Allegedly Advisory Nature of the Standing Order

The Commission argues that Judge Ginsberg's legal error was egregious because it is well-established that courts lack jurisdiction to render advisory opinions. According to the Commission, Judge Ginsberg's standing order was advisory because it decided the constitutionality of Chapter 37 outside of a case or controversy pending in his court.

An advisory opinion is one that "decides an abstract question of law without binding the parties." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). But a standing order is, by definition, a "forward-looking order that applies to all cases pending before a court." *Order, standing order*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("Some individual judges issue a standing order on a subject when there is no local rule bearing on it, often because a rule would not be acceptable to other judges on the court."). A court's standing orders accordingly are binding on the parties to the cases before it. *See, e.g.*, TEX. FAM. CODE ANN. § 157.001 (West Supp. 2017) (stating that a court may enforce by contempt a provision of a standing order); *In re Guardianship of Phillips*, No. 01-14-01004-CV, 2016 WL 3391249, at *9 (Tex. App.—Houston [1st Dist.] June 16, 2016, no pet.) (mem. op.) ("A petition for appointee fees must be objected to during the time period set in a trial court's standing order or rules or the issue is not preserved for appeal."); *In re Empire Scaffold, LLC*, No. 09-16-00052-CV, 2016 WL 1469185, at *2 (Tex. App.—Beaumont Apr. 14, 2016, no pet.) (orig. proceeding) (mem. op.) (denying intervention that would avoid the county's district courts' standing order). Judge Ginsberg's standing order additionally affects administrative matters outside of any case. For example, the standing order determined that Judge Ginsberg was not required to comply with section 37.003(3), which requires a court to prepare a list of all persons who are registered with the court to serve as mediators. *See* TEX.

GOV'T CODE ANN. § 37.003(3). The standing order also excused Judge Ginsberg from the requirement to post the court's list of registered mediators on the court's website. *See id.* § 37.005.[18]

Although we disagree that the standing order is advisory, we also note that merely rendering an advisory opinion would not necessarily constitute judicial misconduct. Were it otherwise, a trial judge would be subject to sanctions every time an appellate court reversed one of the judge's rulings on the ground that the issue ruled upon was not ripe, or that the issue had been rendered moot before the trial court ruled, or that the claimant lacked standing. *Cf. Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) ("The constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers doctrine.").

In sum, we find that the Commission failed to meet its burden to show that Judge Ginsberg violated Canon 2A or the Texas Constitution by issuing the standing order as alleged in Charge 2 and Charge 3.

D. Charge 1: Failure to Comply with Texas Government Code sections 37.003 and 37.004

As stated by the Commission, its first charge is that "Judge Ginsberg has, by his own admission, willfully and persistently failed to comply with Section[s] 37.003 and 37.004 of the Texas Government Code, which constitutes a violation of Canon 2A." We do not agree that Chapter 37 constituted "clear and determined law about which there is no confusion or question as to its interpretation" at the time of the

[18] We express no opinion as to whether the standing order was correct on the merits.

standing order—or indeed, even now. Therefore, we find that Judge Ginsberg's failure to follow the statute does not rise to the level of judicial misconduct.

1. The Law is Not "Clear."

There is a great deal of confusion about whether and how Chapter 37 allows a judge to consider a potential mediator's merit. The Commission takes the position that the appointing judge must consider a mediator's merit. Indeed, the Commission has charged Judge Ginsberg with violating Canon 3C(4), which states that "[a] judge shall exercise the power of appointment impartially and on the basis of merit." But Chapter 37 does not mention merit, and judges have reached varying conclusions about whether, and how, they can consider a prospective mediator's merit while still complying with Chapter 37.

Trial judges also appear to struggle with the apparent conflict between Chapter 37 and Texas Civil Practice and Remedies Code section 154.052. Section 154.052 states that to be qualified for an appointment as a mediator, a person must have completed forty hours of training in dispute resolution techniques, although the statute allows a trial court discretion to appoint someone without such training "if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes." TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (West Supp. 2017). But although Texas Government Code section 37.003 says attorneys ad litem, guardians ad litem, private professional guardians, and attorney guardians must be both "registered with the court" and "qualified" to be included in the lists for appointment, mediators need only be "registered with the court" to be included on the list. *Compare* TEX. GOV'T CODE ANN. § 37.003(a)(1), (a)(2), and (a)(4) with *id.* § 37.003(a)(3). On its face, Chapter 37 requires a trial court to appoint a mediator whose name is on the top of the list, *see id.* § 37.004—

even if that person is not qualified under Civil Practice and Remedies Code Chapter 154.

Even a cursory sampling of district courts' websites shows that trial judges have varied widely in determining how to comply with Chapter 37, given the apparent tension between that statute, Canon 3C(4), and Texas Civil Practice and Remedies Code section 154.052.[19] The websites of many courts to which the statute applies do not contain a list of mediators as required by section 37.005, perhaps out of confusion about whether the publication requirement applies if the court makes no appointments pursuant to section 37.004. For example, the Honorable Jeff Shadwick, presiding judge of the 55th District Court in Harris County, does not publish a list of registered mediators, but states on the court's website, "The Court does not select mediators, and appoints them only upon request when the parties have agreed upon a mediator."[20] Some judges, like the Honorable Tanya Parker, presiding judge of the 116th Civil District Court in Dallas County, publish a list of mediators without comment.[21]

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[19] Whether the law is "clear" is itself a question of law. *Cf. Harris County v. Nagel*, 349 S.W.3d 769, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) ("Identification of the clearly established law is not a question of fact to be established by evidence. . . . Judges, not witnesses, determine the state of the clearly established law."). This question can be answered by looking at a variety of sources. *Cf. Hope v. Pelzer*, 536 U.S. 730, 741–42, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) (determining whether the law was "clearly established" by looking at the constitutional provision at issue, case law, an Alabama Department of Corrections regulation, and a DOJ report). Given that there is no binding precedent interpreting Chapter 37, we consider other judges' interpretation of the law, just as we would consider other courts' interpretation of a statute in any other case.

[20] Harris County District Courts, Judge Jeff Shadwick, Mediators and Guardians Ad Litem, *available at* https://www.justex.net/Courts/Civil/CourtSection.aspx?crt=2&sid=599 (last visited June 8, 2018).

[21] *See* Dallas County, 116th Civil District Court, Mediator Lists, Guardian Ad Litem List, and Attorney Ad Litem Lists, *available at* https://www.dallascounty.org/government/courts/civil_district/116th/download.php (last visited June 8, 2018).

Many judges, like the Honorable Randy Wilson of the 157th District Court in Harris County, interpret Chapter 37 to mean that a judge cannot consider the merit or qualifications of registered mediators; thus, Judge Wilson prefaces his list of mediators with the disclaimer, "There is no criteria for inclusion on this list. Neither the Court nor anyone on behalf of the Court has reviewed the qualifications or experience of those included on the list and inclusion on the list is neither an endorsement nor recommendation."[22] Many other Harris County district judges have included the same or similar language on their websites. The Honorable Michael Landrum, presiding judge of the 113th District Court in Harris County, includes a similar statement, adding, "The list furnished below comprises all persons who have registered with the court as mediators by providing their names and contact information. There is no other criteria for inclusion on this list."[23]

Other judges appear to have concluded that they can make "qualification" a requirement for inclusion on the court's list of mediators. For example, Bexar County's civil district courts do not publish a list of mediators, but their local rules state that if mediation is ordered, and the parties have not agreed otherwise, "the court will . . . select a mediator *at random* from a list of *qualified* mediators."[24] The Travis County Family Law Advocates, a group that describes itself as an association of more than seventy board-certified family-law attorneys in Travis County, also

[22] Harris County District Courts, Judge Randy Wilson, 157th District Court, Information Regarding Mediator and Ad Litem Appointments, *available at* https://www.justex.net/Courts/Civil/CourtSection.aspx?crt=12&sid=621 (last visited June 8, 2018).

[23] Harris County District Courts, Judge Michael Landrum, 113th District Court, Registered Mediators, *available at* https://www.justex.net/Courts/Civil/CourtSection.aspx?crt=5&sid=596 (last visited June 8, 2018).

[24] BEXAR COUNTY (TEX.) CIV. DIST. CT. LOC. R. 8(A), (emphasis added), *available at* http://home.bexar.org/dc/localrules.html (last updated March 22, 2016).

reads Chapter 37 to require the inclusion only of "qualified" attorneys on a court's list of registered mediators, but maintains that the statute unconstitutionally interferes with a judge's ethical obligation to make appointments on the basis of merit.[25]

It is not uncommon for trial judges to require not only that a prospective mediator be "qualified," but that the mediator meet additional requirements; these additions may be an attempt to comply with Canon 3C(4)'s requirement to make judicial appointments on the basis of "merit." For example, the Honorable Ronald Pope, presiding judge of the 328th District Court in Fort Bend County, requires a prospective mediator not only to have completed the statutory requirements to be appointed as a mediator,[26] but also to have completed a certain amount of continuing legal education in alternative dispute resolution.[27] Judge Pope "reserves the right to remove a person from the list for good cause," which is undefined.[28] In Travis County, the civil district courts similarly require a person who wishes to be appointed as a mediator to have completed the training required by Texas Civil

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[25] *See In re K.L.*, No. 14-16-01022-CV, Br. of Amicus Curiae Travis Cty. Family Law Advocates, filed Oct. 16, 2017, at 1–2, *available at* http://www.search.txcourts.gov/Case.aspx?cn=14-16-01022-CV&coa=coa14 (last visited June 8, 2018).

[26] *See* Guidelines for Appointments of Attorneys Ad Litem, Guardians Ad Litem, Mediators, and Guardians, 328th Judicial District Court, Section III.A.1, *available at* https://www.fortbendcountytx.gov/government/departments/administration-of-justice/district-courts/328th-district-court/court-appointments/court-appointments, then click "Guidelines for Appointments," which links to https://www.fortbendcountytx.gov/Home/ShowDocument?id=36790 (last updated Sept. 1, 2016).

[27] *See id*. at Section III.A.2.

[28] Procedures for Appointment/Removal of Attorneys Ad Litem, Guardians Ad Litem, Mediators, and Guardians, 328th Judicial District Court, Section III, *available at* https://www.fortbendcountytx.gov/government/departments/administration-of-justice/district-courts/328th-district-court/court-appointments/court-appointments, , then click "Procedures for Appointments," which links to https://www.fortbendcountytx.gov/Home/ShowDocument?id=36789 (last updated Sept. 1, 2016).

Practice and Remedies Code Chapter 154, and additionally require the prospective mediator to certify that he or she has completed a minimum of five mediations involving Travis County cases.[29] The Honorable W. Edwin Denman of the 412th District Court in Brazoria County goes further still, requiring an attorney mediator to be a member of the Brazoria County Bar Association,[30] to maintain a primary residence or practice in Brazoria County,[31] to be of good moral character,[32] and to have served as a guardian ad litem, attorney ad litem, or mediator for the 412th District Court at least three times in the preceding ten years, unless the person is a senior, former, or retired district court judge with at least ten years' experience on the bench.[33] Judge Denman states that he will remove an attorney mediator from the list for reasons as specific as the failure to pay the Brazoria County Bar Association's dues within three months of coming due,[34] and as general as removal "[f]or good cause at the discretion of the Court."[35] The Honorable Martin Hoffman, presiding judge of the 68th District Court in Dallas County, appears to follow a system much like the one employed by Judge Ginsberg. *See* Section IV, *infra*. Judge Hoffman

[29] Travis County – Civil District Courts, Attorney Ad Litem, Guardian Ad Litem, Mediator, and Competency Evaluator Appointment Application, at 4, *available at* https://www.traviscountytx.gov/courts/files/civil-district, then click "New Appointment Application for Attorney Ad Litem, Guardian Ad Litem, Mediator, and Competency Evaluator," which links to https://www.traviscountytx.gov/images/courts/Docs/application-civil-district-appointment.pdf (last updated Mar. 5, 2018).

[30] Standards and Procedures Related to Appointments of Attorneys Ad Litem, Guardians Ad Litem, and Mediators for the 412th District Court, Brazoria County, Texas, Rule 3.3(a), second bullet point, *available at* http://brazoriacountytx.gov/departments/all-courts/district-court/412th-district-court/forms, then click "Standard Procedures for Ad Litem, Guardians Mediators," which links to https://brazoriacountytx.gov/home/showdocument?id=808 (last updated Jan. 1, 2016).

[31] *Id.* at Rule 3.5, second "(a)"(1), (2).

[32] *Id.* at Rule 3.3(a) (third bullet point).

[33] *Id.* at Rule 3.5, second "(a)" (3).

[34] *Id.* at Rule 3.3(a) (second bullet point).

[35] *Id.* at Rule 5.2(a)(7).

states that his list contains the names of mediators "with whom the Court has personal experience or knowledge of their aptitude for handling certain types of cases and effectiveness at bringing timely closure to the disputes before the Court."[36]

In sum, more than two-and-a-half years have passed since Chapter 37 was enacted, and judges continue to struggle with questions of whether Chapter 37 can or does modify their statutory obligation to appoint qualified mediators or their ethical obligation to consider "merit" when making an appointment, and with the difficulty in determining "merit" when the statute itself does not require even that a registered mediator be "qualified."

What is true today was even more true when Judge Ginsberg issued his standing order on August 31, 2015. Because the way in which a judge is to comply with Chapter 37 not only was unclear when enacted, but remains unclear to the present day, we do not find that Judge Ginsberg willfully or persistently failed to comply with a law that was "clear."

2. The Law is Not "Determined."

No court has yet interpreted Chapter 37, and at the time Judge Ginsberg issued his standing order, no court had addressed its constitutionality; however, a second trial court subsequently determined that Chapter 37, as applied to the appointment of an attorney ad litem, is unconstitutional. The appeal of that case is currently pending before the Fourteenth Court of Appeals. *See In re K.L.*, No. 14-16-01022-

[36] Dallas County, 68th Civil District Court, Note about Mediator, Guardian Ad Litem, and Attorney Ad Litem Lists, *available at* https://www.dallascounty.org/government/courts/civil_district/68th/lists.php (last visited June 8, 2018). The basis on which Judge Hoffman adds mediators to the list is unclear, for he states, "If you are interested in being added to either of the lists, please stop-by the Court to visit with Judge Hoffman and/or the Court Coordinator about your experience and qualifications." *Id.*

CV, submitted Oct. 11, 2017.[37] The interpretation of Chapter 37 has not yet been "determined."

Because we do not find that Judge Ginsberg willfully or persistently failed to comply with a clear, determined, unambiguous law, we conclude that the Commission failed to meet its burden regarding Charge 1.

IV. NON-LEGAL ERROR

In Charge 4, the Commission contends that Judge Ginsberg violated Canon 3C(4), which provides in pertinent part, "A judge shall exercise the power of appointment impartially and on the basis of merit." We disagree.[38]

The charge that Judge Ginsberg's mediator appointments were made on the basis of partiality rather than merit is based entirely on statistical evidence that in the preceding three years, 35% of his appointments were made to Burdin Mediation or to one of its affiliated mediators, 18% of his appointments were made to Cynthia Stolls, 6% of his appointments were made to Robert Smith, and nineteen other mediators were appointed fewer than ten times each.

Judge Ginsberg testified that he appointed mediators on the basis of merit based on his experience with the mediator or mediation group while he was in private practice. He stated that he has never worked or socialized with any of the mediators. As further evidence of the meritorious nature of his appointments, Judge Ginsberg pointed to his docket clearance rate, which exceeded that of the other Dallas County

[37] *See* http://www.search.txcourts.gov/Case.aspx?cn=14-16-01022-CV&coa=coa14 (last visited June 8, 2018).

[38] Judge Ginsberg also "challenge[s] the Examiner's authority under Texas Rule of Civil Procedure 12 to bring an additional charge which was not part of the original public admonition and which was not authorized by the Commission." Because it does not affect the outcome of the case, we assume, without deciding, that the Examiner had the authority to add this charge without a vote by the Commission.

civil district courts. The Commission introduced no evidence that any of the appointed mediators lack merit.

We find Judge Ginsberg's uncontroverted testimony credible, and we conclude that the Commission failed to meet its burden to prove that Judge Ginsberg's appointments were neither impartial nor based on merit, as the Commission alleged.

V. CONCLUSION

Having failed to find that Judge Ginsberg violated the Code of Judicial Conduct or the Texas Constitution as alleged, we reverse the Commission's public admonition of the Honorable Carl Ginsberg and dismiss the charges against him without sanction.

/s/
Tracy Christopher
Justice

Panel consists of Justices Barnard, Christopher, and Bourland (Bourland, J., concurring and dissenting).

PUBLISH—TEX. RULES REM'L/RET. JUDG. R. 9(e).

In The

Special Court of Review
Appointed by the Supreme Court of Texas

Docket No. 18-0001

IN RE INQUIRY CONCERNING HONORABLE CARL GINSBERG

CJC No. 17-0739-DI

C O N C U R R I N G A N D D I S S E N T I N G O P I N I O N

Members of the judiciary are entrusted with extraordinary power. With that power comes extraordinary responsibility, chief among which is recognizing and respecting the limits of that power. This case involves a member of the judiciary who failed to recognize or respect the limits of that power. Because the majority concludes otherwise, I respectfully dissent from the majority's determination that respondent did not violate Canon 2A of the Texas Code of Judicial Conduct and Article V, Section 1-a of the Texas Constitution. I concur in the majority's determination that he did not violate Canon 3C(4).

The relevant facts of this case are undisputed: (1) respondent issued a standing order, outside of any controversy or dispute, purporting to declare the entirety of Chapter 37 of the Texas Government Code unconstitutional and stating his intention to refuse to comply with it, and (2) he subsequently refused to comply with Chapter 37 for over two years in cases in which he made appointments governed by those provisions. The Commission contends that, by intentionally engaging in such conduct, respondent violated Canon 2A, which requires that "[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," and Texas Constitution Article V, Section 1-a, which prohibits a "willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties."

The majority concludes that respondent's conduct constitutes mere legal error and not "willful" misconduct. I respectfully disagree. Willful misconduct, as used in Article V, Section 1-a, is "the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct." *In re Barr*, 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998) (quoting *In re Thoma*, 873 S.W.2d 477, 489-90 (Tex. Rev. Trib. 1994)). Willfulness encompasses conduct involving bad faith generally, regardless of motive, and "with respect to judicial disciplinary proceedings, a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority constitutes 'bad faith' as a matter of law." *Id.* at 545; *Thoma*, 873 S.W.2d at 489-90. I conclude that respondent knew or should have known that his conduct exceeded the legitimate exercise of his authority and, thus, that he acted willfully in issuing his standing order.[1]

[1] Respondent devoted much of his argument to demonstrating the soundness of his

At a minimum, respondent should have known that his actions exceeded his authority because the law prohibiting his actions is plain. A trial court's authority to issue standing orders is governed by Texas Rule of Civil Procedure 3a, which provides that a "court may make and amend local rules governing practice before such courts," but that a proposed local rule "shall not become effective until it is submitted and approved by the Supreme Court of Texas." Tex. R. Civ. P. 3a(3). It is undisputed that respondent never submitted his standing order to the Supreme Court for approval and, thus, never attempted to comply with Rule 3a.[2] Respondent testified that he considered various ways to challenge Chapter 37 and make public his intention not to follow it and that he ultimately chose to do so through the use of a standing order.

Beyond the fact that respondent should have known his conduct was improper because of the certain prohibition against it, I further conclude that respondent intentionally used his limited authority to issue standing orders to improperly circumvent the well-established controversy requirement necessary to decide the constitutionality of Chapter 37. That requirement—and the concomitant prohibition against advisory opinions—is a central limitation on the power of the judiciary. *Camarena v. Texas Empl't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) ("It is fundamental that a court has no jurisdiction to render an advisory opinion on

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conclusion regarding the constitutionality of Chapter 37. But the issue in this case is not the reasonableness or correctness of his analysis regarding the constitutionality of the enactment; rather, it is respondent's specific intent to engage in that analysis outside of any controversy under the auspices of his authority to issue standing orders and his failure to comply with the law.

[2] Moreover, "no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter." Tex. R. Civ. P. 3a(6). A standing order that strikes down an act of the legislature as unconstitutional would seem to determine "the merits of a matter." Respondent testified that he did not believe his standing order addressed "the merits that are before me in a case" while also asserting that the controversy requirement was met because the standing order "applies to every case I have."

a controversy that is not yet ripe."); *see also Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442-43 (Tex. 1998) ("Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented.") (cleaned up). Respondent's expert witness—a professor of constitutional law—agreed that the live-controversy requirement is taught in introductory constitutional-law classes, and respondent agreed during his testimony that every judge knows or should know to refrain from issuing advisory opinions. Consequently, I conclude that respondent knew or should have known that deciding Chapter 37's constitutionality *sua sponte* and outside of any live controversy was improper.[3]

Other facts also tend to show that respondent—a licensed lawyer since 1995, holder of an LLM degree, and district judge for nine years—was aware that deciding the constitutionality of legislative enactments by way of a standing order was an impermissible use of his authority. The evidence presented at the trial demonstrated that he did not seek an opinion from the attorney general regarding the constitutionality of Chapter 37, *see Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996) (attorney general opinions are not controlling on courts but are persuasive); he did not notify the attorney general when he implemented his order, as legally

[3] Ironically, in striking down Chapter 37 as an unlawful encroachment on the power of the judiciary, respondent encroached on the power of the legislature to enact statutes that are to be considered valid and enforceable until successfully challenged in the context of an justiciable controversy. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) (case-and-controversy requirement limits judicial adjudication "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and defines judiciary's role "in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government"); Tex. Gov't Code § 311.021 (statute is presumed to be constitutional); *EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, No. 15-0683, __ S.W.3d __, 2018 WL 1122363, at *2 (Tex. Mar. 2, 2018) (courts always start with presumption that legislation is constitutional (quoting *In re Nestle USA, Inc.*, 387 S.W.3d 610, 623 (Tex. 2012)).

required, *see* Tex. Const. art. V, § 32, Tex. Gov't Code § 402.010 (requiring courts to notify Texas Attorney General of state constitutional challenges and forbidding courts from declaring statute unconstitutional within forty-five days of giving such notice); he did not seek input from colleagues, the state, or the public before issuing his order; and he did not submit his order to the Supreme Court for approval as required under Rule 3a, *see* Tex. R. Civ. P. 3a(3). Most importantly, he testified that he understood the difference between a facial challenge and an "as applied" challenge to the constitutionality of a statute and yet conceded that Chapter 37 might not be unconstitutional as applied in every case. Respondent testified that his main problem was with the constitutionality of the "wheel aspect" of the statute, but he made a blanket declaration that Chapter 37 was unconstitutional in its entirety. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014) (facial challenge argues that "a statute, by its terms, always operates unconstitutionally" while as-applied challenge "asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her particular circumstances"); *In re C.M.D.*, 287 S.W.3d 510, 514-15 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("A facial constitutional challenge requires a showing that a statute is always unconstitutional in every application."). Finally, he did not attempt to raise his challenge to Chapter 37 through traditional legal channels and subject them to appeal, as is required of every other litigant who is not a judge.[4]

[4] Respondent contends that Chapter 37 created a "Catch 22 situation" for trial judges because "the Constitution takes precedence over statutes," and that he therefore could not "just wait for someone to challenge it because then I'll be acting unconstitutionally in the meantime." By this argument, he seems to advocate for an exception to the ripeness doctrine. Indeed, Texas law recognizes various exceptions to controversy requirements, *see Riner v. City of Hunters Creek*, 403 S.W.3d 919, 924-25 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (discussing exception to ripeness), *Texas Dep't of Pub. Safety v. LaFleur*, 32 S.W.3d 911, 913 (Tex. App.—Texarkana 2000, no pet.) (discussing exceptions to mootness); *Olson v. Commission for Lawyer Discipline*, 901 S.W.2d 520, 522 & n.2 (Tex. App.—El Paso 1995, no writ) (discussing exceptions to

Nor do I find persuasive respondent's argument that, because his decision was made by way of a standing order, it was entered in every one of his cases and, therefore, rendered during a live controversy. It is undisputed that respondent conducted his analysis outside of any controversy—that is, without the context of any facts, parties, or dispute of any kind. However, the circumstances under which a trial court may *sua sponte* take up the constitutionality of a statute, even in the context of an actual controversy, are highly circumscribed.[5] *See Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944))). "[T]he necessity for the timely development of the facts underlying the dispute is especially important where a party is challenging the constitutionality of a statute. A court cannot pass on the constitutionality of a statute unless the facts have matured, forming the concrete basis against which the statute may be applied." *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 857 (Tex. App.—Austin 2004, no pet.). Ripeness, which is one aspect of jurisdiction and justiciability, is "an essential element of subject matter jurisdiction and a party is not relieved of establishing an actual or threatened injury by bringing a 'facial' challenge to the constitutionality of the statute." *Id*. As explained in that case,

> In addition to its constitutional roots, the prohibition against issuing advisory opinions has a pragmatic, prudential aspect based on the desire to conserve judicial time and resources for real and current

mootness), and respondent could have advocated for such an exception in the context of a declaratory-judgment action had he been so inclined.

[5] The court in *In re C.M.D.* emphasized the importance of the controversy prerequisite to judicial review, explaining that "[c]ourts are to presume that a statute is constitutional and should not reach a constitutional issue unless absolutely required" and "should decide constitutional issues narrowly based on the precise facts of the case, not speculative or hypothetical injuries." 287 S.W.3d 510, 515 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

> controversies, rather than abstract, hypothetical, or remote disputes and to avoid making bad law. This prudential aspect of the ripeness doctrine is particularly important in cases raising constitutional issues because courts should avoid passing on the constitutionality of statutes, even where jurisdiction arguably exists, until the issues are presented with clarity, precision and certainty, in clean-cut and concrete form.

Id. (cleaned up).

Respondent testified that he understood that courts must refrain from deciding questions of constitutionality unnecessarily but made no argument that the adjudication of the constitutionality of Chapter 37 was unavoidable in any case in which his standing order was entered. He simply decided on his own initiative, before Chapter 37 even took effect, that it encroached upon his judicial authority and declared his intention to not comply. I cannot conclude that the passive entry of a standing order into any or every case, without more, could satisfy the actual-controversy requirement.

Respondent also argues that the Commission has produced no evidence showing an erosion of public confidence in the judiciary as a result of his actions. However, nothing in the text of the Canon 2A requires a showing of harm. It is well-settled that a showing of harm is not required to find a violation of the ethical rules governing attorneys,[6] and I would not hold judges to a lower standard. Further, respondent testified to his belief that this case presents unique circumstances because Chapter 37 does not merely affect parties but "is a direct unconstitutional mandate on the court," and therefore he was within his right to declare it unconstitutional.

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[6] *See Acevedo v. Commission For Lawyer Discipline*, 131 S.W.3d 99, 107 (Tex. App.—San Antonio 2004, pet. denied) ("The predicate for a disciplinary sanction does not require a showing of intentional wrongdoing, a fraudulent breach of fiduciary duty, or injury to a client; it requires only 'Professional Misconduct.'"); *Commission for Lawyer Discipline v. A Tex. Attorney*, No. 555619, 2015 WL 5130876, at *3 (Tex. Bd. Disp. App., Aug. 27, 2015) ("Harm to the client . . . is not a consideration in determination of a violation of the Disciplinary Rules of Professional Conduct.").

Contrary to respondent's assertions, the legislative codes are filled with statutes that place constrictions or directives on members of the judiciary. For example, the Texas Code of Criminal Procedure and the Texas Family Code contain countless statutes that regulate judicial functions, and many that are far more "core" to the judiciary than the appointment of mediators. I decline to invite judges to take up the constitutionality of any of those statutes *sua sponte* and outside of any controversy. Such a precedent would have profoundly deleterious effects: shifting the burden to the public to compel enforcement of those statutes, destabilizing a bedrock safeguard of the separation of powers, and eroding public confidence in the integrity of the judiciary. In my view, respondent's conduct created a precedent that imperils the stability of a system that cannot function properly without it.

Respondent and the majority rely heavily on *In re House Bill No. 537 of the Thirty–Eighth Legislature*, 256 S.W. 573 (1923), a case that provided no context or authority for its extra-controversy decision. However, respondent admitted that he was unaware of that case at the time he issued his standing order and makes no argument that he relied on that case in determining his authority to take such action. No other court, in the nearly one hundred years since its issuance, has relied on *House Bill No. 537* for the proposition that the Texas Constitution permits trial courts to issue advisory opinions such as respondent's standing order, and indeed that case has been described as an "embarrassing chapter in Texas jurisprudence." *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 503 (Tex. 1991) (Doggett, J., concurring). In a more recent case, the Supreme Court unequivocally held that a trial court erred in addressing the constitutionality of a statute *sua sponte*, even within the context of an existing controversy. *See In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000); *id.* at 299 (Hecht, J., dissenting).

The majority in part reasons that respondent simply made a legal error, and that subjecting him to discipline on that basis would transform every legal error by a member of the judiciary into an instance of judicial misconduct. I disagree and believe this reasoning misses the point. It is not that respondent made a legal error that should allow for discipline. It is that he made that legal error in a vacuum, apart from the context of a live controversy as is required by the most basic principles of our legal system and thus in violation of the Code of Judicial Conduct. Further, the fact that most discipline cases involve egregious instances of misconduct does not mean that conduct such as that of respondent cannot also be grounds for admonition. I do not base my conclusion on a belief that respondent had a malicious or corrupt motive in resolving his complaint against Chapter 37 in the manner in which he did. However, the canons proscribe conduct involving "misuse of office, or bad faith generally, whatever the motive," and as I have noted, bad faith may be shown by demonstrating an intentional use of the powers of the judicial office when the judge knew or should have known such an action was beyond the "legitimate exercise of his authority." *In re Barr*, 13 S.W.3d at 534. That is what the Commission proved in this case, and because the majority reaches a different conclusion, I respectfully dissent. I concur in the majority's determination related to Canon 3C(4).

/s/

Cindy Olson Bourland, Justice

Before Justices Barnard, Christopher, and Bourland

Date: June 11, 2018