STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

JAMES P. CURRAN,

a Justice of the Hebron Town Court,
Washington County.

DETERMINATION

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Joel Cohen, Esq.
Jodie Corngold
Honorable John A. Falk
Taa Grays, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedrotty,
Of Counsel) for the Commission

Honorable James P. Curran, *pro se*

The respondent, James P. Curran, a Justice of the Hebron Town Court, Washington County, was served with a Formal Written Complaint dated June 16, 2017,

containing one charge. The Formal Written Complaint alleged that in a 2015 case respondent engaged in, considered and failed to disclose improper *ex parte* communications and conveyed the appearance of bias. Respondent filed a Verified Answer dated September 5, 2017.

On October 17, 2017, the Administrator and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On October 26, 2017, the Commission accepted the Agreed Statement and made the following determination:

1. Respondent has been a Justice of the Hebron Town Court, Washington County, since January 1, 2012. His current term expires on December 31, 2019. Respondent was admitted to the practice of law in New York in 1992.

2. As set forth below, in 2015, in presiding over *People v Michael T. Eastman*, respondent failed to avoid impropriety and the appearance of impropriety; engaged in, considered and failed to report improper *ex parte* communications; and conveyed the appearance of bias against the defendant and/or the alleged victim in the case.

3. On February 25, 2015, Michael T. Eastman was charged with Criminal Obstruction of Breathing, in violation of Penal Law Section 121.11, Assault in

the Third Degree, in violation of Penal Law Section 120.00(1), and Criminal Mischief in the Fourth Degree, in violation of Penal Law Section 145.00(1). The alleged victim was S. M., with whom the defendant was or had been engaged in a personal relationship.

4. From August 2014 through September 2014, Ms. M. had been employed by Virginia Curran, respondent's wife, at the Bedlam Corners General Store in Hebron, New York. Respondent was aware that Ms. M. had been so employed.

5. Respondent's wife owns the Bedlam Corners General Store and also serves as respondent's court clerk.

6. On February 25, 2015, respondent arraigned Mr. Eastman and issued a temporary order of protection directing him to stay away from Ms. M.

7. By letter dated March 5, 2015, Senior Crime Victim Specialist Rebecca A. Evansky of the Washington County District Attorney's Office notified respondent that Ms. M. had made a written request to modify the order of protection, and she enclosed a copy of the request.

8. On March 30, 2015, Mr. Eastman appeared before respondent with his attorney, John K. Oswald. Assistant District Attorney ("ADA") Brandon Rathbun was also present. Mr. Oswald orally moved for respondent's recusal on the basis that Ms. M., who was present in court, had previously worked at a business owned by respondent. Respondent denied the motion, stating:

> "The person worked for my wife, not for me. I don't own the store. I have an office located upstairs. I had no contact with the person, didn't hire her, didn't interview her, and if I've seen her at the store twice and spoken to her twice, that was--that was a lot."

Mr. Oswald stated that, "[w]ith that understanding," he was withdrawing his motion at that time.

9. On April 20, 2015, Mr. Eastman appeared before respondent with Mr. Oswald. ADA Rathbun was also present. The following occurred:

A. Mr. Oswald stated that he had prepared a motion to dismiss based on the affirmative defense of mental defect, pursuant to Penal Law Section 40.15, but had not filed it because a plea agreement had been reached.

B. Mr. Oswald then listed the terms of the proposed plea agreement, which included, *inter alia*, a "non-violent" order of protection.

C. Respondent said he could not agree to a "non-violent" order of protection.

D. Mr. Oswald stated that the "non-violent" order of protection was the "principal reason" his client had been willing to plead guilty, and he summarized his argument to dismiss the charges.

E. Respondent set a schedule for the prosecution to file opposition papers and for Mr. Oswald to file a reply.

F. ADA Rathbun advised respondent that Ms. M. had requested that the charges be dropped, but that the prosecution was prepared to go forward.

G. Respondent replied that he had seen Ms. M.'s letter, and the proceeding concluded.

10. On April 20, 2015, several minutes after Mr. Eastman and Mr.

Oswald had left the court, respondent and ADA Rathbun joked about Mr. Oswald having inquired of ADA Rathbun about rumors that he and respondent went to dinner together. With respect to the motion to dismiss, respondent told ADA Rathbun, "Just get me your papers. You can give it to me when we go out to dinner, but it's going to be a pretty easy decision for me to write."

11. On May 4, 2015, ADA Rathbun filed his papers in opposition to the defendant's motion to dismiss.

12. By decision and order dated May 15, 2015, respondent denied the defendant's motion and scheduled the matter for a pre-trial conference.

13. By motion dated June 11, 2015, Mr. Oswald renewed his request for respondent's recusal, based on a sworn affidavit by Ms. M. that *inter alia* (A) elaborated on her alleged relationship with respondent and respondent's wife while employed at Bedlam Corners General Store and (B) asserted that respondent and his wife had made denigrating comments to her about Mr. Eastman.

14. By letter dated June 29, 2015, ADA Rathbun wrote in response to Mr. Oswald's motion, "the People will defer to the discretion of [respondent] on this matter."

15. By decision and order dated June 29, 2015, respondent denied the motion, finding that Ms. M.'s affidavit was "inaccurate and clearly prepared to bolster the motion."

16. On July 11, 2015, a man who identified himself to respondent as Ms. M.'s husband and the father of her children approached respondent at a gas station and

claimed, in sum or substance, that Mr. Eastman and Ms. M. had been traveling to Vermont to engage in trysts and that the children had traveled with them. Respondent did not know the man and did not know whether the information he relayed was true. Respondent did not disclose this conversation to defense counsel or the prosecutor.

17. On July 17, 2015, respondent received a voicemail message on his cell phone from an anonymous female caller who repeated, in sum or substance, essentially the same allegation raised by the man who had approached respondent at the gas station. Respondent did not disclose to defense counsel or the prosecutor that he had received this voicemail.

18. On July 20, 2015, during a pre-trial conference in the *Eastman* case, the following occurred:

A. Respondent incorrectly accused Mr. Eastman of having violated the order of protection by impregnating Ms. M. after the order of protection had been issued.

B. When Mr. Oswald attempted to refute the accusation, respondent questioned whether the pregnancy was the result of "the immaculate conception" and asserted that "someone perjured themselves."

C. Although respondent subsequently acknowledged his error after both attorneys and Mr. Eastman corrected him as to the date of the issuance of the order of protection, respondent nevertheless continued to accuse Mr. Eastman of having violated the order of protection, stating: "I'm aware there's been multiple violations of the order of protection. Multiple." Respondent did not disclose how he was aware of these alleged "multiple violations," even after Mr. Oswald questioned the propriety of respondent

presiding over the case in light of such knowledge.

D. Subsequently, respondent twice directed Mr. Oswald to tell Mr. Eastman that he (respondent) was aware of multiple violations of the order of protection.

E. Respondent told Mr. Oswald, "I don't trust your client and I don't trust [Ms. M.], that's the problem, and I'm not letting them off the hook."

19. On July 20, 2015, after the pre-trial conference, respondent (A) accepted Mr. Eastman's guilty plea to the charge of Criminal Obstruction of Breathing, in satisfaction of all charges, (B) sentenced him to a conditional discharge with the conditions that he complete 50 hours of community service and anger management training and (C) imposed a fine of $800 and a surcharge of $205. Respondent also issued a six-month "stay-away" order of protection in favor of Ms. M., with leave for Mr. Eastman to apply for an 18-month "non-violent" order of protection upon the birth of Ms. M.'s and Mr. Eastman's child, and a "non-violent" order of protection in favor of Ms. M.'s sister.

20. On July 20, 2015, after pronouncing the sentence, respondent said the following to Mr. Eastman:

> "Let me tell you this, all right? And we're still on the record. I'm aware that you violated that order of protection on multiple occasions since it was issued."

21. When Mr. Oswald directed Mr. Eastman not to respond, respondent stated:

> "And I don't want you to say anything, but I'm aware that you violated it and I'm aware that [Ms. M.] knowingly violated it with you, so you can't-- just because you go to

> Vermont and you're not in New York when you do the violation, that doesn't mean it doesn't count. All right? So, don't violate it again, because if you come back here and you violated it again and you're found guilty after a hearing, you're going to get the maximum."

22. Respondent did not disclose how he was aware of the information he related in the preceding paragraph.

Additional Factors

23. Respondent acknowledges that he should have disclosed to the parties the sources and substance of the two unsolicited *ex parte* communications he received about the defendant's alleged violations of the order of protection. Respondent also acknowledges that he should not have repeatedly accused Mr. Eastman of having violated the order of protection based upon such unsubstantiated *ex parte* allegations.

24. Respondent acknowledges that, after disclosing the source and substance of the *ex parte* information to the parties, he should then have entertained objections regarding his continuing to preside over the case.

25. Respondent avers that his statements to the defendant were intended as a warning to Mr. Eastman against violating the order of protection in the future. Respondent nevertheless acknowledges that it was inappropriate to rely on such unsubstantiated and undisclosed *ex parte* information in this manner.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause,

pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent's handling of *People v Eastman* was contrary to the above-cited ethical standards and conveyed the appearance that he was biased against the defendant and/or the alleged victim based upon unsubstantiated, *ex parte* contacts.

A few months after arraigning the defendant on charges of Assault and other offenses and issuing an order of protection, respondent received unsolicited *ex parte* information from two sources (an individual who approached him out of court and an anonymous voicemail message) claiming that the defendant had violated the order of protection by taking trips with the complaining witness. Respondent was obligated to disclose these out-of-court communications to the prosecutor and defense counsel and to provide the defendant with an opportunity to rebut the information in court. Instead, at a pre-trial conference a few days later, he not only failed to disclose the communications but compounded the impropriety by repeating the information he had received as fact ("I'm aware there's been multiple violations of the order of protection"), notwithstanding that the defendant had not been charged with violating the order. He reiterated the accusations when he accepted a plea agreement, sentenced the defendant and issued a six-month order of protection, warning the defendant that he would "get the maximum" if he violated the order "again." These unsubstantiated accusations conveyed the appearance

that respondent had received and was influenced by undisclosed, unauthorized information that the defendant, unaware of its source, was unable to refute. Even after defense counsel interjected that if respondent had such information he should not be handling the case, respondent did not disclose the communications.

The requirement to disclose *ex parte* communications is inherent in a judge's obligation to "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" (Rules, §100.3[B][6]). A party who is unaware of *ex parte* information a judge has received is unable to address or rebut it. To the extent such communications include information that may be relevant to the merits of a pending case, they must be disclosed to the parties and their attorneys even if the communications were unsolicited. *See Matter of Marshall*, 2008 NYSCJC Annual Report 161 (judge was obligated to report unauthorized information she received "[e]ven if the *ex parte* communications were ... brief and unsolicited"), *accepted*, 8 NY3d 741 (2007); *Matter of Feeder*, 2010 NYSCJC Annual Report 143 (judge failed to disclose *ex parte* conversation with a defendant's mother, who had approached him after a court session and asked him not to sentence her daughter to jail); NY Jud. Adv. Op. 07-192.

As respondent has stipulated, his handling of the *Eastman* case conveyed the appearance of bias against the defendant and/or the alleged victim in the case.[1] After

[1] There was no charge that respondent was biased, which would have required disqualification (*see* Rule 100.3[E][1][a][i], requiring disqualification in a proceeding in which the judge "has a personal bias or prejudice concerning a party").

being told *ex parte* of their alleged travel together, respondent repeatedly accused the defendant of violating the order of protection, warned him of the serious consequences of violating the order "again," and told the defendant's attorney, "I don't trust your client and I don't trust [Ms. M.], that's the problem, and I'm not letting them off the hook." Respondent's comments, which conveyed the appearance that he considered the defendant guilty of violating the order and the alleged victim complicit in the violations, were inconsistent with his obligation to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to avoid even the appearance of impropriety (Rules, §100.2[A]). Every person with a legal interest in a case has a right to have the matter heard before a judge who both is, and appears to be, impartial (*Matter of Herder*, 2005 NYSCJC Annual Report 169 [totality of judge's conduct, including causing defendant's arrest based on *ex parte* information, conveyed the appearance of bias]; *Matter of Rock*, 2002 NYSCJC Annual Report 149 [judge relied on *ex parte* information to the detriment of defendants, which "created an appearance of bias"]).

As the Commission has stated, "We reject the contention... that the concept of *ex parte* communications is 'esoteric' and that it is unrealistic to expect lay justices to be fully familiar with the ethical and procedural rules" (*Matter of Gori*, 2002 NYSCJC Annual Report 101 [judge solicited *ex parte* information from defendants in a small claims case and conveyed the appearance that he prejudged the case based upon the inappropriate, *ex parte* contacts]). All judges must be mindful of this important ethical mandate.

In accepting the stipulated sanction, we note that despite these *ex parte*

communications and his troubling statements indicating that he accepted the information he received as true, respondent did not take any punitive action against the defendant for violating the order of protection. He accepted a plea agreement, and his insistence on a "stay-away" order of protection as part of the agreement was consistent with his position throughout the case, predating the two communications. We also note that respondent has acknowledged that his failure to disclose the communications and his reliance on the undisclosed, unsubstantiated information he received were inconsistent with his ethical obligations.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Belluck, Mr. Harding, Mr. Cohen, Ms. Corngold, Judge Falk, Ms. Grays, Judge Leach, Judge Mazzarelli, Mr. Stoloff, Judge Weinstein and Ms. Yeboah concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 14, 2017

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct