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

DETERMINATION

PAUL M. LAMSON,

a Justice of the Fowler Town Court,
St. Lawrence County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission

Lekki Hill Duprey & Bhatt, PC (by Lloyd G. Grandy II) for the Respondent

The respondent, Paul M. Lamson, a Justice of the Fowler Town Court, St. Lawrence County, was served with a Formal Written Complaint dated November 3, 2011, containing two charges. The Formal Written Complaint alleged that in 2009 respondent

initiated, permitted and/or considered *ex parte* communications in connection with a criminal case notwithstanding that he had previously been cautioned by the Commission to avoid *ex parte* communications. Respondent filed a verified answer dated December 27, 2011.

On March 6, 2012, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 15, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Fowler Town Court, St. Lawrence County, since November 2005. His current term expires December 31, 2013. By administrative order in June 2011, respondent received a temporary appointment to serve as Justice for the Town of Hermon until December 31, 2011. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 12, 2009, Alan Bigwarfe was arrested by state troopers and the Gouverneur police and charged in the Town of Fowler with Criminal Contempt 1st Degree, Assault 3rd Degree, Unlawful Imprisonment 2nd Degree and Resisting Arrest, after allegedly assaulting his former girlfriend in the Town of Fowler and fleeing to the Town of Gouverneur.

3. On August 13, 2009, respondent arraigned Mr. Bigwarfe in the Town of Fowler on the above charges and remanded him to the St. Lawrence County Correctional Facility where he was held without bail. Respondent directed the Office of Indigent Defense to assign Mr. Bigwarfe counsel, issued an order of protection on behalf of the alleged victim, scheduled a preliminary hearing for August 17, 2009, and then adjourned the hearing until August 18, 2009.

4. The St. Lawrence County Public Defender's Office was assigned to represent Mr. Bigwarfe. On August 18, 2009, Mr. Bigwarfe and Assistant Public Defender Steven Ballan appeared for the preliminary hearing, ready to proceed. Assistant District Attorney (ADA) Jonathan Becker appeared on behalf of the People and advised respondent that he was not ready to proceed because he could not reach his witness.

5. Due to the People's inability to proceed and upon the request of ADA Becker, respondent dismissed the felony contempt charge, without prejudice. Respondent set bail at $2,500 cash or $10,000 bond on the other charges and adjourned the matter to September 2, 2009.

6. On September 2, 2009, St. Lawrence County Public Defender Mary Rain appeared in court on behalf of Mr. Bigwarfe, and ADA Becker appeared on behalf of the People. Mr. Bigwarfe, who remained incarcerated, was not produced in court. Respondent advised the parties that there was a warrant for Mr. Bigwarfe's arrest in the Town of Gouverneur for a charge of Assault 2nd Degree and adjourned the case until October 7, 2009.

7. On September 3, 2009, Mr. Bigwarfe was arraigned on the Assault 2nd Degree charge by Justice Stanley H. Young, Jr., in Gouverneur Town Court. Since the Gouverneur charge was related to the August 12, 2009 Fowler charges, the Gouverneur case was retained by respondent in the Fowler Town Court for disposition.

8. On September 24, 2009, respondent stopped at the St. Lawrence County Public Defender's office to visit an acquaintance. Respondent saw Mr. Ballan, who told him that he was attempting to get the district attorney to agree to time served in exchange for a guilty plea by Mr. Bigwarfe to Resisting Arrest in satisfaction of all the charges. Respondent told Mr. Ballan that he could not agree to time served, but would think about an appropriate sentence for Mr. Bigwarfe and would let Mr. Ballan know. Respondent did not disclose his *ex parte* conversation with Mr. Ballan to the prosecution.

9. Later that day, respondent sent Mr. Ballan an e-mail, in which he wrote with reference to *People v Bigwarfe*:

> I gave some thought to our conversation [about Mr. Bigwarfe] on the way home. If the DA offers the Resisting Arrest amd [sic] Harassment charge in Satisfaction, I would agree to a CD for 12 months. If the DA gives it to you in Writing, the Minute you get a copy to me I will release him. he would do no more time. With his history, I think a CD would be appropriate.

Respondent neither copied the district attorney's office on the e-mail nor disclosed to the district attorney's office that he sent the e-mail to Mr. Ballan.

10. In September 2009, at the Gouverneur municipal building, respondent and Gouverneur Village Police Chief David Whitton engaged in a

conversation regarding restitution for damages to officers uniforms. Respondent did not immediately comprehend that the Police Chief was seeking restitution in the *People v. Alan Bigwarfe* cases pending before him.

11. Upon returning to his office at the courthouse, respondent realized that the restitution the Police Chief was seeking was in regard to the charges pending before him. Despite this awareness, respondent did not disclose his conversation with Chief Whitton to the prosecutor or defense counsel.

12. On September 25, 2009, respondent sent Mr. Ballan a second e-mail, in which he wrote concerning the *Bigwarfe* case:

> One issue not addressed is restitution for the officers (sic) uniforms. I beleive [sic] there was damage to the police uniforms, not positive though. If there was and restitution and its [sic] paid prior to sentencing then I will waive surcharge.

Again, respondent neither copied the district attorney's office on the e-mail nor disclosed to the district attorney's office that he sent the e-mail to Mr. Ballan.

13. Prior to respondent's email of September 25, 2009, to Mr. Ballan, the issue of restitution or damage to police officers' uniforms had not been raised by defense counsel or the prosecutor.

14. On or about October 4, 2009, Chief Whitton sent a letter, by facsimile and regular mail, to respondent requesting that Mr. Bigwarfe pay restitution in the amount of $241.01. Chief Whitton did not send the letter to, or discuss the matter with, the probation department, the district attorney or the public defender. Respondent

had intended to forward the letter to the prosecution and defense attorneys, but neglected to do so.

15. On October 7, 2009, Ms. Rain, ADA Becker and Mr. Bigwarfe appeared in court. Respondent accepted Mr. Bigwarfe's plea of guilty to Resisting Arrest and Harassment 2nd Degree in full satisfaction of all the charges pending in both the Fowler and Gouverneur courts, ordered a pre-sentence investigation (PSI) by the probation department and adjourned sentencing to December 2, 2009. At the time Mr. Bigwarfe entered his guilty plea, he affirmed that no promises had been made with respect to sentencing. Prior to taking judicial action, respondent did not disclose his communications with Mr. Ballan and Chief Whitton and did not offer to disqualify himself.

16. On December 2, 2009, Ms. Rain, ADA Becker and Mr. Bigwarfe appeared in court for sentencing. After discussing the PSI, which recommended a "substantial period of incarceration," respondent sentenced Mr. Bigwarfe to consecutive jail terms of 365 days incarceration on the Resisting Arrest charge and 15 days on the Harassment charge, and ordered restitution of $241.01 plus administrative surcharges. Prior to taking judicial action, respondent did not disclose his communications with Mr. Ballan and Chief Whitton and did not offer to disqualify himself.

17. The probation department, the district attorney and the public defender never received a copy of Chief Whitton's letter and did not know a written request for restitution had been made to respondent by Chief Whitton. The PSI included

no indication of a request or recommendation for restitution, nor were there any details regarding a police officer's damaged uniform. Both sides agreed, however, that restitution was appropriate.

18. Thereafter, the public defender's office filed a CPL §440.20 motion to vacate the sentence imposed on Mr. Bigwarfe, alleging that respondent's September 24, 2010 *ex parte* e-mail to Mr. Ballan was a commitment to a sentence of time served. The district attorney opposed the motion on the ground that there had been no sentencing promise. After submissions by both parties, respondent denied the motion in a written decision dated February 1, 2010.

19. The public defender appealed respondent's determination to County Court Judge Jerome J. Richards, who in an October 6, 2010 decision, affirmed respondent's determination, finding that the sentence imposed was legal. Judge Richards concluded, *inter alia,* that respondent's preliminary discussions with defense counsel were *"ex parte* and improper," but were not a commitment to a particular sentence.

20. Respondent acknowledges that he should not have engaged in *ex parte* communications with either Steven Ballan or Chief David Whitton.

As to Charge II of the Formal Written Complaint:

21. By Letter of Dismissal and Caution dated October 2, 2008, the Commission cautioned respondent, *inter alia*, to avoid *ex parte* communications, after he acknowledged having made numerous *ex parte* phone calls to a represented defendant. At the time the letter was issued, respondent understood that he was not to engage in any

ex parte communications, including those with counsel for a party. Notwithstanding his receipt of this letter, respondent engaged in *ex parte* communications in the matter of *People v. Alan Bigwarfe*, as stipulated above.

Mitigating Factors

22. Respondent recognized and admitted wrongdoing at the earliest available opportunity. He is remorseful and assures the Commission that lapses such as occurred here will not recur.

23. Each of the improper *ex parte* communications occurred during a single criminal case that resulted in multiple charges in different jurisdictions. Respondent's conduct did not result in any actual favoritism or bias. At the time Mr. Bigwarfe entered his guilty plea, he acknowledged that no promises had been made as to sentencing. The sentence and restitution imposed by respondent were affirmed on appeal.

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)(6) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Prior to imposing the sentence in a criminal matter, respondent engaged in a series of *ex parte* communications about the impending sentence with the defendant's

attorney and the Police Chief. These out-of-court communications, without the knowledge or consent of all the parties, were contrary to well-established ethical and legal principles.

Section 100.3(B)(6) of the Rules prohibits a judge from initiating or considering unauthorized *ex parte* communications with respect to a pending or impending matter. Engaging in such conduct deprives the parties of the full right to be heard according to law and to have their cases decided based upon a proper record of submissions to the court. *See, e.g.*, *Matter of Bishop*, 2010 Annual Report 104 (judge ruled against the defendant in a summary eviction proceeding based on an *ex parte* communication); *Matter of Williams,* 2008 Annual Report 101 (after reserving decision in a Harassment case, judge spoke to the arresting officer concerning a matter affecting the defendant's credibility); *Matter of More*, 1996 Annual Report 99 (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications); *Matter of Racicot*, 1982 Annual Report 99 (judge contacted a defendant's employer, co-workers, neighbors and others to obtain information about disputed evidentiary issues).

Here the record reveals that prior to imposing sentence in the *Bigwarfe* case, respondent discussed the sentence with the defendant's attorney and later sent the attorney two emails about sentencing, without disclosing these communications to the District Attorney. Respondent's emails stated that he had considered the substance of the attorney's *ex parte* proposals as to the sentence, and laid out the sentencing parameters he

would accept. Respondent also engaged in an *ex parte* conversation with the Gouverneur Police Chief concerning the issue of restitution and later received a letter from the Police Chief requesting restitution in the case; respondent never disclosed these communications to the defendant's attorney notwithstanding that, in imposing the sentence, respondent clearly relied on the *ex parte* information he had received. Respondent should have recognized that such unauthorized communications would compromise his impartiality and create an appearance of impropriety (Rules, §§100.1 and 100.2[A]). Indeed, in a subsequent motion to vacate the sentence, the defendant's attorney argued that respondent's undisclosed, out-of-court statements to him were a commitment as to the sentence. Although the County Court upheld the sentence, the court criticized respondent's "*ex parte* and improper" communications, which undermine public confidence in the integrity and independence of the judiciary.

In imposing sanction, we note respondent's prior Letter of Dismissal and Caution in 2008 for making numerous *ex parte* telephone calls to a defendant. Having been cautioned less than a year earlier about such conduct, respondent should have been particularly sensitive to the impropriety of engaging in any *ex parte* communications. Prior discipline is an aggravating factor militating in favor of a strict sanction, especially where the prior discipline was based on similar misconduct. *Matter of Rater*, 69 NY2d 208, 209-10 (1987).

Although respondent's conduct was contrary to fundamental principles of law, several additional factors must be noted. It appears that respondent did not seek out

the defendant's attorney to discuss the sentence, but spoke to him initially in a chance encounter. It has been stipulated that respondent's *ex parte* communications did not result in actual favoritism or bias. We also note that his misconduct was limited to a single criminal case. Thus, this case can be distinguished from cases involving judges who have been disciplined for repeatedly conducting *ex parte* investigations out of court. *E.g.*, *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge routinely made telephone calls outside of court in order to determine the facts in pending matters, and engaged in significant additional misconduct) (removal); *Matter of Racicot* (censure), *supra; Matter of More* (admonition), *supra*. Further, we note that respondent has acknowledged the impropriety of his conduct and has pledged to avoid such misconduct in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: March 20, 2012

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