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

EDWARD J. WILLIAMS,

a Justice of the Kinderhook Town and
Valatie Village Courts, Columbia County.

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THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission

Gerstanzang, O'Hern, Hickey & Gerstenzang (by Thomas J. O'Hern) for the Respondent

The respondent, Edward J. Williams, a Justice of the Kinderhook Town and Valatie Village Courts, Columbia County, was served with a Formal Written Complaint

dated April 19, 2006, containing four charges. The Formal Written Complaint alleged that respondent engaged in misconduct in connection with three cases notwithstanding that he had previously been disciplined by the Commission. Respondent filed a Verified Answer dated May 31, 2006.

By Order dated June 9, 2006, the Commission designated Robert J. Smith, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 18 and 20 and October 20, 2006, in Albany. The referee filed a report on March 20, 2007.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal. Respondent's counsel did not recommend a sanction. On September 20, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has held judicial office in the Village of Valatie since 1982 and in the Town of Kinderhook since 1984.

2. Respondent presided over *People v. Daniel Wloch*, in which Mr. Wloch was charged with one count of Harassment, Second Degree, filed in the Valatie Village Court. The charge resulted from a dispute between Mr. Wloch and his neighbor, Cynthia Engle, regarding her dog's barking.

3. On or about May 21, 2004, New York State Trooper Eric Leonard

served Mr. Wloch with a criminal summons, which required him to appear in the Valatie Village Court before respondent on June 3, 2004.

4. Mr. Wloch appeared in the Valatie Village Court on that date, without counsel, and pleaded not guilty to the charge. Respondent asked Mr. Wloch if he wished to be represented by an attorney, and Mr. Wloch replied that he would represent himself. The complaining witness, Ms. Engle, asked for an order of protection for herself and her daughter, claiming that she was afraid of Mr. Wloch and that he was stalking them. Respondent issued an Order of Protection, which required Mr. Wloch to stay 50 feet away from Ms. Engle and her daughter. On or about June 4, 2004, a State trooper served Mr. Wloch with the Order of Protection, which remained in effect until July 1, 2004.

5. Mr. Wloch hired Andrew Jacobs, Esq., to represent him at the trial, which was held on or about September 6, 2004.

6. At the trial, Mr. Wloch and Ms. Engle testified with respect to the alleged harassment. Mr. Wloch testified that he had spoken to a State trooper about the Harassment charge and that the trooper had said, "Don't worry about it. It would only be a $100 fine" and had stated further that it would be "like a speeding ticket." It is unclear whether in his testimony Mr. Wloch identified the trooper with whom he spoke; he had spoken to at least two other State troopers in addition to the one who served him with a summons. Mr. Wloch's testimony regarding that conversation was irrelevant to the alleged harassment. After the trial, respondent reserved decision and adjourned the

matter to October 7, 2004.

7. Sometime between the trial and the adjourned date, respondent saw Trooper Leonard at the County Fair. Respondent told Trooper Leonard that Mr. Wloch had testified that the trooper had told him that if he pleaded guilty, it would only be a $100 fine and "that would be the end of it." Trooper Leonard told respondent that he had had no such conversation with Mr. Wloch.

8. On or about October 6, 2004, Mr. Jacobs telephoned the court to request an adjournment and spoke to respondent, who agreed to the adjournment. During the conversation, respondent told Mr. Jacobs that he had reached a decision and asked Mr. Jacobs if he wanted to know what the decision was. Mr. Jacobs responded in the affirmative. Respondent stated that he was going to find Mr. Wloch guilty. Respondent also stated that he had spoken to Trooper Leonard and that the trooper either did not recall the conversation or did not believe it took place as Mr. Wloch had testified.

9. Mr. Jacobs was concerned about respondent having spoken with a trooper who had not been called as a witness at the trial, but he did not request respondent's recusal.

10. On or about November 4, 2004, Mr. Wloch appeared before respondent and was found guilty of Harassment, Second Degree. Respondent sentenced him to a conditional discharge with a $100 surcharge. After the verdict, respondent stated in court that he had spoken to the trooper about the alleged conversation with Mr. Wloch and that the trooper either did not recall the conversation or recalled it differently from

Mr. Wloch's testimony about it. According to Mr. Wloch and Mr. Jacobs, respondent said that he had been going to find Mr. Wloch not guilty but "because of that" conversation, he was finding Mr. Wloch guilty.

11. Mr. Wloch filed a Notice of Appeal but did not pursue the appeal.

As to Charge II of the Formal Written Complaint:

12. The charge is not sustained and therefore is dismissed.

As to Charge III of the Formal Written Complaint:

13. The charge is not sustained and therefore is dismissed.

As To Charge IV of the Formal Written Complaint:

14. Respondent engaged in an improper *ex parte* communication as set forth in the above findings notwithstanding that in 2002 he was censured for making an improper *ex parte* request of another judge for favorable treatment in a friend's case. In 1993 respondent was issued a Letter of Dismissal and Caution for discourtesy to an attorney, and in 2001 respondent was admonished for engaging in improper political activity, publicly criticizing a prosecutor, excluding an attorney from his court, and signing a judgment in a summary proceeding without following the required procedures.

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 New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charges II and III are not sustained and therefore are dismissed.

Respondent engaged in a prohibited *ex parte* communication in a pending matter notwithstanding his previous discipline for *ex parte* activity and other misconduct. Such conduct compromised his impartiality and is inimical to the role of a judge.

It is undisputed that after respondent had reserved decision in a Harassment case, he spoke to the arresting officer concerning a matter affecting the defendant's credibility. The defendant, Daniel Wloch, had testified at the trial that a trooper had told him that the pending charge was "like a speeding ticket" and would result in a $100 fine. Despite respondent's testimony that his purpose in speaking to the trooper was not to obtain *ex parte* information but to advise the trooper not to tell defendants about the potential outcome of a charge, it was improper for respondent to have that conversation while the case was pending; if he believed it was necessary to impart that advice, he should have done so after the case was concluded. Moreover, although Mr. Wloch's testimony about his conversation with the trooper was irrelevant to the pending charge, the trooper's response to respondent's communication – either that he did not recall the conversation or that it did not take place as Mr. Wloch had testified – clearly affected respondent's determination as to the defendant's credibility. Indeed, both Mr. Wloch and

his attorney testified that respondent, in disclosing his conversation with the trooper, explicitly linked the conversation with his determination of the defendant's guilt. At the very least, respondent's conversation with the trooper created the appearance that he had obtained, and relied upon, out-of-court unsworn information in making his decision in the case, thereby depriving the defendant of the fundamental right to confront and respond to the evidence against him. Such *ex parte* communications are contrary to well-established ethical standards (Rules Governing Judicial Conduct, §100.3[B][6]).

Respondent's insistence that the out-of-court conversation did not influence his decision as to the defendant's credibility is unconvincing. It is difficult to imagine how it would not influence his decision, since respondent has acknowledged that he concluded from the trooper's statements that the defendant had lied under oath. The uncontroverted testimony that he told Mr. Wloch, after finding him guilty, of his conversation with the trooper supports the conclusion that it influenced his decision, since it is unclear why he would have referred to that conversation except to bolster his conclusion that the defendant was not credible. The patent unfairness of his reliance on the trooper's statements is underscored by the fact that respondent may have spoken to the wrong trooper, since it is unclear whether Mr. Wloch had identified the trooper in his testimony. Most importantly, the *ex parte* conversation was improper regardless of whether respondent relied on it to convict the defendant.

We reject respondent's argument that his "disclosure" of the *ex parte* communication on two occasions in any way minimizes the effects of his misconduct.

Although respondent appropriately recognized that he was obliged to disclose the communication, it was plainly inadequate to make this disclosure by telephone while informing the defendant's attorney that he had already decided to find the defendant guilty. Such a disclosure should have been made in court, prior to announcing his verdict, in the context of seeking the defendant's views as to whether respondent should be disqualified because of his improper conduct. It seems clear that respondent had no intention of disqualifying himself, and the fact that the attorney did not seek his recusal in no way inures to respondent's benefit. (Respondent's out-of-court disclosure of his verdict raises further concern as to his understanding of the importance of avoiding *ex parte*, substantive communications in a pending matter.) Respondent's subsequent in-court "disclosure" of the conversation, after he had rendered his verdict, obviously had nothing to do with protecting the fairness of the proceedings, but rather appears to have been a self-serving attempt to bolster his verdict by announcing why the defendant was unworthy of belief. Clearly such disclosure does not cure the adverse effects of the improper *ex parte* communication that he initiated.

We conclude, however, that respondent's misconduct, although serious, does not rise to the level of "truly egregious" misbehavior requiring the sanction of removal. As the Court of Appeals has stated, "Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances..." *Matter of Cunningham*, 57 NY2d 270, 275 (1982); *see also, e.g., Matter of Going*, 97 NY2d 121, 127 (2001). The evidence is uncontroverted that respondent did not seek out the trooper

to investigate the defendant's credibility, but spoke to him in a chance encounter out of court for the purpose of advising him not to tell defendants the potential outcome of a charge. 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); *see also*, *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) (censure); *Matter of More*, 1996 Annual Report 99 (judge initiated *ex parte* communications in several cases to discuss the pending matters) (admonition). Moreover, respondent's disclosure of the conversation to the defendant's attorney indicates that he recognized the impropriety of his *ex parte* communication and may have been an attempt to "cure" his misconduct. But for that disclosure, the episode would likely not have come to light. We also note that respondent has acknowledged the impropriety of his conduct and has pledged to avoid such misconduct in the future.[1]

This is the fourth time in a 25-year judicial career that respondent has faced disciplinary proceedings. The Court of Appeals has held that 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

[1] We are compelled to note that, in reaching its conclusions, the concurrence inappropriately relies on matters not in the record regarding Judge Williams' personal life.

(1987). In 2002 respondent was censured for making an improper *ex parte* request to another judge to rescind an order of protection issued against respondent's friend (*Matter of Williams*, 2003 Annual Report 200 [Comm on Judicial Conduct]). In addition, in 1993 respondent was issued a Letter of Dismissal and Caution for discourtesy to an attorney, and in 2001 he was admonished for improper political activity and other misbehavior. In view of this disciplinary history, this decision places respondent on notice that any future ethical lapses will be viewed with appropriate severity.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur except as follows.

Judge Klonick, Judge Peters and Judge Ruderman dissent only as to Charge III and vote to sustain the charge.

Mr. Emery dissents only as to the sanction and votes that respondent be removed from office.

CERTIFICATION

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

Dated: November 13, 2007

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

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CONCURRING
OPINION BY MR.
FELDER

- -

I concur in the majority's sanction, but arrive there at a less traveled route – one that should certainly, in my opinion, be visited more often in our Commission's journeys.

Given the respondent's position that he sought a censure – when, in my mind, the appropriate sanction in this case hovered between censure and something less – censure it is. In explanation of the foregoing conclusion, the fact is that only one of three substantive charges was sustained, and even censure could arguably be too severe in view of the fact that single sustained charge basically involved an off-hand comment at a local fair. As the majority notes, it is undisputed that the respondent did not seek out the trooper to investigate the defendant's credibility, but spoke to him in a chance encounter for the understandable purpose of advising him not to tell defendants the potential outcome of a charge. I certainly disagree with the dissenter who would impose an even stronger punishment.

I am taken aback that missing from the Commission's rationale (and certainly that of the dissenter) is a significant consideration: life has already penalized this judge far more than our ability to do so.

The respondent has been a judge for 25 years, having been elected by his community multiple times. For his duties as a Town Court Justice, he receives $5,400 a year, and additionally, receives $4,200 a year for serving as a Village Justice.

For the last 39 years, the respondent has been a quadriplegic. A large portion of his life has effectively been taken away. He cannot dress himself, get out of bed without help, attend to his grooming, embrace a loved one, pick up a child, arrive at court, make his own notes when hearing cases, etc. For this individual, each day is surely filled with physical challenges – often insurmountable, sometimes humiliating – which most of us can scarcely imagine. Respondent was consigned to ride in the freight elevator of the building to arrive and leave the Commission hearing. Under the facts as presented, it troubles me that a serious effort was made by the Commission in its prosecutorial role (and endorsed by the dissenter) to take away another large portion of the respondent's life, his judicial position, based on what now appears to be no more than a single inappropriate *ex parte* comment.

It is difficult for me to accept that – in my view – in our rulings and prosecutions we do not fully allow the panoply of the human condition (other than those often rehearsed easy-to-fake emotions of remorse or contrition) to play a more prominent role in our considerations and actions as a Commission. We cannot claim to be a

civilized and caring society, and yet, in our actions, not enfold into our judgments, where pertinent, the terrible burdens that others must bear in order to traverse the landscape of life.

The respondent did not seek special treatment from the Commission because of his personal hardships. No doubt he would be the first to say that he should receive no special consideration or accommodation from us, nor, indeed, has he received such treatment. But it is our obligation to be mindful that in rendering our judgments, we are dealing with far more than abstract legal concepts. We are affecting the lives of human beings and, in this case, an individual whose life gives testimony to his personal courage.

In all the papers, including the referee's Report presented to us, there is but one passing mention of respondent's condition which appears in the Memorandum of Law by his attorney. Aside from this, it is totally lacking in our analysis. Surely it, and respondent's accomplishments in the face of it, deserve recognition. If missing from our considerations is the spark of empathy that sets us apart from all others of God's creatures, our decisions are as nothing.

Respondent has acknowledged that he should not have spoken to the trooper out of court about the defendant, and his misconduct is appropriately subject to discipline. It should be noted, however, that any suggestion that he repeatedly engaged in the same misconduct and repeatedly ignored our prior disciplinary warnings is simply not supported by the record. The judge was privately cautioned in 1993 and was admonished

in 2001. The following year he was censured for misconduct that predated his previous discipline. This record does not establish that he has disregarded our disciplinary warnings, especially since his misconduct in this case, in my view, is significantly different from the misconduct for which he was previously disciplined. In the earlier case, he asked another judge to rescind an order of protection after both the complaining witness and the defendant (a couple who were respondent's friends) asked him to do so. Although both matters involve a form of *ex parte* activity, in my view it is inaccurate, or certainly very misleading, to characterize it as "the same" misconduct. I also note that in this case, it appears that respondent was genuinely attempting to do the right thing when he disclosed his conversation to the defendant's attorney, which suggests that he has learned from his previous discipline. Indeed, had he not disclosed the conversation, it is likely it would never have come to light since the trooper did not even recall the conversation when questioned about it at the hearing.

I vote to censure, and present my rationale – for better or worse – as it may be received by my colleagues, in the hope that the thoughts engendered will impact on their future deliberations and considerations.

Dated: November 13, 2007

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct

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OPINION BY MR. EMERY DISSENTING AS TO SANCTION

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INTRODUCTION

The problem with the majority's decision to censure Judge Williams rather than remove him is that he has engaged in serious misconduct sanctioned by this Commission on three prior occasions, covering a wide variety of misbehavior including, just two years earlier, improper *ex parte* communications – the same transgression as in this case. On this, the latest occasion of his breach of judicial ethics, Judge Williams engaged in an *ex parte* conversation with a state trooper that, even though he contends otherwise, appears to have directly influenced his decision in a case that resulted in the conviction of a defendant who may well have been innocent.

In its attempt to excuse this misconduct, the majority decision oddly minimizes the seriousness of the abuse by crediting the judge for recognizing his misconduct and reporting it to defense counsel ("respondent's disclosure of the

conversation to the defendant's attorney indicates that he recognized the impropriety of his *ex parte* communication") (Determination, p. 9). But the majority, virtually in the same breath, states that it "reject[s] respondent's argument that his 'disclosure' of the *ex parte* communication on two occasions in any way minimizes the effects of his misconduct" because the judge did not recuse and, instead, relied on the trooper's *ex parte* information to convict the defendant (Determination, pp. 7-8).

In fact, as the majority recognizes, it is difficult to imagine how this particular *ex parte* conversation, flatly contradicting the defendant's sworn testimony at trial, would not affect the judge's decision. As such, our unanimous conclusion that Judge Williams knew that he was engaging in judicial misconduct and that, at the very least, it appeared to affect his decision hardly mitigates his malfeasance; rather, it aggravates it dramatically.

Finally, in my view, and apparently in the majority's view (Determination, p. 7), Judge Williams plainly lied to the hearing officer and to the Commission when he addressed us in claiming that the *ex parte* conversation did not make a difference in reaching his guilty verdict. Because of these three aspects of this case, Judge Williams should be removed.

DISCUSSION

The sequence of events is accurately and specifically set forth in the majority's decision. The notable point is that Judge Williams' resolution of the

underlying Harassment charge against Mr. Wloch turned on a credibility determination between him and his neighbor, the complaining witness. Obviously, this was not something the judge could decide without thinking about it carefully; after the trial he reserved decision rather than simply ruling. In the interim he "ran into" a State trooper who he believed was involved in Mr. Wloch's arrest and questioned him about what the judge plainly thought was a pertinent aspect of the case. The judge asked the trooper whether he had told Mr. Wloch, at the time of his arrest, that the charge "would only be a $100 fine" and would be "like a speeding ticket," something Mr. Wloch had testified to at trial. The trooper responded to the judge's *ex parte* question by denying that any such conversation had taken place, thereby contradicting Mr. Wloch's sworn testimony and in essence calling his credibility starkly into question. Although the judge claims that his intent in speaking to the trooper was not to test Mr. Wloch's credibility but simply to advise the trooper not to make such statements to defendants, he must have realized that the trooper's response would either support or undermine the credibility of the defendant.

Any judge, let alone this one disciplined once before for an improper *ex parte* communication, knows that gathering *ex parte* evidence which pertains to a litigant's credibility deprives the accused of his right to cross-examine the person asserting contradictory evidence. In this case it was especially important not only because the whole case hinged on the credibility contest between the accused and the complaining witness, but also because the judge may have questioned the wrong trooper,

thereby eliciting incorrect information. Moreover, there is evidence in this case that the judge stated to defense counsel and the defendant after the verdict that he would have dismissed the charges against Mr. Wloch but for his *ex parte* conversation with the trooper.

Whether this last point is true or not, the judge's insistence that he would have found Mr. Wloch guilty even if he had not talked to the trooper rings false. When I asked him at the oral argument how he could claim that his conversation with the trooper made no difference in a case that turned strictly on the credibility of the defendant especially in the circumstances here, where he had reserved decision at the time he heard the evidence, he had no rational answer. He simply insisted that the conversation "had nothing to do with" his decision "because the people had proved beyond a reasonable doubt in my mind that Mr. Wloch committed a crime of Harassment" (Oral argument, p. 51). Yet he conceded that he had reserved his decision because "I like to think...over what was said at trial" (p. 52).

Nonetheless, apparently, some of my fellow commissioners have been swayed in the judge's favor at least partly by the failure of defense counsel to seek recusal of the judge. There is no dispute that the judge related to defense counsel – in a separate uncharged *ex parte* telephone conversation before the verdict was announced – his version of the conversation with the trooper. How the fact that defense counsel did not seek the judge's recusal after this conversation mitigates the judge's misconduct in

any way eludes me. Defense counsel may not have served his client effectively by not making a motion for recusal, perhaps because he feared the wrath of a judge he practiced before regularly. But nothing about his failure to act mitigates the judge's prejudicial resort to *ex parte* evidence and his own failure to recuse, especially after being disciplined for similar misconduct just two years earlier. As the majority concedes, the judge's "disclosure" was plainly not to alert defense counsel to seek the judge's disqualification since, in the same conversation, the judge told the attorney that he intended to find the defendant guilty. Thus, the fact that the judge "appropriately recognized that he was obliged to disclose the communication" (Determination, p. 8) is meaningless. This point, recognized by the majority, brings into sharp focus that this judge does not learn. The failure of a defense attorney to teach him is no excuse.

The judicial robes are not a right; they are perhaps the ultimate privilege that the voters and the state bestow on an exalted class of men and women whose judgment and integrity should be beyond reproach. This is not baseball where, even if it were, three strikes would send you back to the dugout. The behavior of this judge in this case is inexcusable, and it is grossly exacerbated in the context of his persistent prior discipline. Put simply, he does not understand his responsibilities and the limits on his authority. In colloquial terms, he "doesn't get it" and he never will. As a repeat offender who has demonstrated that he is unable or unwilling to recognize and avoid misconduct, he is a danger to the public who trusts us "to safeguard the Bench from unfit incumbent[ ]

[judges]" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [111] [Ct. on the Judiciary 1975]). Regrettably, we have not warranted that trust in this case.[1]

Dated: November 13, 2007

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

[1] I agree with the majority's footnote pointing out that Mr. Felder's concurrence, which attempts to mitigate Judge Williams' misconduct because of his disability, has no basis in the record before us (Determination, p. 9). The problem with Mr. Felder's sympathetic exposition on the daily life of Judge Williams is that, apparently, Judge Williams either does not view his life in the same way as Mr. Felder or, more to the point, does not consider his disability an appropriate basis for mitigation in his case. I assume that if he did, his able counsel would have offered evidence to support such a claim.

We are required to limit our review of mitigation evidence to those factors that are probative of a judge's proclivity to repeat misconduct. Nothing that I can think of about Judge Williams' disability informs us on that point. If he is to be credited in this case, it should be for not playing that card. Regrettably, Mr. Felder has inappropriately chosen to play that card for him.