

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

J. MARSHALL AYRES,

a Justice of the Conklin Town Court,
Broome County.

THE COMMISSION¹:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable John A. Falk
Taa Grays, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

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

Honorable J. Marshall Ayres, *pro se*

¹ The vote in this matter was taken on March 9, 2017. Mr. Emery resigned from the Commission effective March 15, 2017; Judge Klonick's term as a member of the Commission expired on March 31, 2017; Ms. Grays was appointed to the Commission effective March 16, 2017; and Judge Falk was appointed to the Commission on April 3, 2017.

The respondent, J. Marshall Ayres, a Justice of the Conklin Town Court, Broome County, was served with a Formal Written Complaint dated March 15, 2016, containing two charges. The Formal Written Complaint alleged that respondent lent the prestige of judicial office to advance his daughter's private interests with respect to a traffic ticket she was issued, attempted to influence the disposition of the ticket and was discourteous to the prosecutor (Charge I), and that in connection with the appeal of his orders of restitution, respondent sent eight letters to the County Court that contained factual and legal arguments and biased, discourteous statements about the defendant and his attorney. Respondent filed an Answer dated May 2, 2016.

By Order dated December 17, 2014, the Commission designated Michael J. Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 15 and 16, 2016, in Albany. The referee filed a report dated December 2, 2016.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's brief argued that removal was too harsh. On March 9, 2017, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Conklin Town Court, Broome County, since 2009. His current term expires in 2020. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On December 30, 2014, respondent's daughter Julie Ayres, who was then age 30, was issued a Uniform Traffic Ticket by State Trooper Matthew Pokigo, charging her with using a cell phone while operating a motor vehicle, a violation of Section 1225-d of the Vehicle and Traffic Law. Prior to issuing the ticket, Trooper Pokigo, who had observed Ms. Ayres holding a cell phone while driving, told Ms. Ayres why he had stopped her and asked what she was doing with her cell phone. Ms. Ayres, whose two young children were in the back seat of her vehicle, responded that she was going to "turn on music" for her children, and Trooper Pokigo told her that there was a general prohibition against using a cell phone while driving. The ticket was returnable in the Kirkwood Town Court on January 27, 2015, at 10:00 AM. After the trooper gave her the ticket, Ms. Ayres told him that she was "Judge Ayres' daughter." Trooper Pokigo informed Ms. Ayres that she would have to go to court to dispose of the ticket.

3. Later, Ms. Ayres showed the ticket to respondent and told him that the cell phone had been turned off and that she was passing it to her son. Respondent advised her to plead not guilty and to speak to the assistant district attorney ("ADA") who would be prosecuting the ticket. Ms. Ayres pled not guilty by mail and thereafter received a notice, issued by Kirkwood Town Justice Ward E. Coe, of a pre-trial conference scheduled for February 18, 2015.

4. Prior to the scheduled conference, respondent went to the Kirkwood Town Court. Judge Coe's court clerk, Carrie Aurelio, recognized respondent as the Conklin Town Justice and let him into the office. (The office is secured by a locked

door, and individuals cannot walk in without being admitted by court staff.) Respondent told Ms. Aurelio that his daughter had received a ticket and asked Ms. Aurelio to transfer the ticket from Judge Coe's docket to that of the other Kirkwood Town Justice, Benjamin Weingartner. Ms. Aurelio told respondent that she would "keep an eye out" for the ticket because, she testified, she felt "obligated to just go along" and did not think it was "[her] place" to tell a judge "that's not the way things are done." She did not transfer the ticket.

5. Before the pre-trial conference, respondent also telephoned Judge Weingartner. A secretary told Judge Weingartner that "Judge Ayres" was on the phone, and, after some small talk, respondent mentioned that his daughter had received a traffic ticket and asked how tickets were handled in the Kirkwood Town Court. Judge Weingartner explained that Judge Coe handled tickets that were returnable at 10:00 AM and he handled tickets that were returnable at 2:00 PM.

6. Respondent asked Judge Weingartner if he would handle the ticket because some years earlier, when Judge Coe's wife had been respondent's court clerk, he "had to let her go." (Judge Coe's wife had sued respondent unsuccessfully after she was terminated, and respondent testified that his relationship with Judge Coe is poor.) Judge Weingartner told respondent that a ticket is usually not moved from one judge to the other and that he would not handle Ms. Ayres' ticket.

7. Respondent began to talk about the facts of the case and told Judge Weingartner that he did not think his daughter deserved the ticket. Judge Weingartner said he did not want to hear about the matter and told respondent that his daughter should talk to the ADA handling the case. Respondent asked Judge Weingartner for the name of

the prosecuting attorney, which Judge Weingartner provided.

8. On February 18, 2015, Ms. Ayres, without counsel, attended the pre-trial conference at the Kirkwood Town Court and discussed the ticket with ADA Laura Parker. Ms. Ayres gave Ms. Parker cell phone records that showed her text, data and talk usage, and she told Ms. Parker that she had only been passing her phone to her son. She also mentioned that her father was “a judge across the river.” Ms. Parker, who had been an ADA for only a short time, did not know respondent.

9. According to Ms. Parker, the Broome County District Attorney’s office has a policy that cell phone tickets should not be reduced or dismissed since the offense is “very serious.” Based on that policy and Ms. Ayres’ admission that she was holding her cell phone while driving, Ms. Parker offered a plea to the charge with a minimum fine and the mandatory surcharge. Ms. Ayres did not accept the offer, and Judge Coe adjourned the case to March 18, 2015, for another conference.

10. On March 18, 2015, respondent arrived in the Kirkwood Town Court before his daughter and sat in the courtroom. Judge Coe asked him to approach the bench and asked why he was in court, and respondent said that he planned to watch his grandchildren while his daughter conferenced her case. (Respondent’s grandchildren never came to court that day; he testified that those plans changed.) Respondent asked for the prosecutor’s name, and Judge Coe gave him ADA Parker’s name and said she was new and was working out well.

11. From her sign-in sheet, ADA Parker called the names of three defendants, including Ms. Ayres, to come into her office for their conferences.

Respondent accompanied Ms. Ayres into the conference room. Ms. Parker testified that she did not know who respondent was but assumed he was Ms. Ayres' father, and she recalled Ms. Ayres' earlier comment that her father was a judge. Respondent testified that when the ADA called the cases, she looked at him and asked, "Are you the father?" Ms. Parker testified that she did not recall that but acknowledged that it was not uncommon for a parent to attend a conference with a defendant, especially if the defendant was very young.

12. After the two other defendants left, Ms. Parker began reviewing Ms. Ayres' cell phone records. When she asked Ms. Ayres what time the ticket was issued, respondent said, in a tone that Ms. Parker described as "authoritative" and "condescending," "Well, don't you have a copy of the ticket?" Ms. Parker replied that she meets with hundreds of defendants each week and does not retain a copy of every ticket. She left to get a copy of the ticket from the court file and returned to the conference room with it.

13. As Ms. Parker reviewed the phone records, she explained that the statute regulating cell phone use contained a rebuttable presumption that a cell phone in one's hand constituted "use." Respondent told the ADA that she had to prove the case beyond a reasonable doubt, and Ms. Parker responded that while she had to prove her case beyond a reasonable doubt at trial, they were presently only conferencing the case.

14. As Ms. Parker continued reviewing the records, respondent threw a stapled packet of papers on the table in her direction, "slamm[ing] it down," and in a "very condescending" and "controlling" tone, said, "Don't you know the law?" Ms.

Parker replied that there is probable cause to write a ticket if a person is driving with a cell phone in his or her hand.

15. Ms. Ayres, who had not spoken up to that point, told Ms. Parker, “My father’s a judge.” That was Ms. Ayres’ only comment during the conference.

16. Respondent then told Ms. Parker, “Well, I wasn’t going to bring that up, but since it was brought up, if this ticket was in my courtroom, I’d dismiss it”; he also said he had spoken to “several other judges” who “all agreed that this should be dismissed.” According to respondent, he then added, “You’ve got to make your own decision. You can’t let Judge Coe or myself influence you.”

17. Ms. Parker, who testified that she was feeling “extreme pressure” to dismiss the ticket, said that she wanted to speak with her supervisor. At that point, she was “distraught” and “on the brink of tears” because of respondent’s behavior and tone, which, she felt, conveyed that he thought she was a “young little girl who didn’t know anything and that he knew better.” Although she had previously encountered spouses and parents who accompanied a defendant into the pre-trial conference, Ms. Parker testified that she had never dealt with a defendant’s parent when the defendant was an adult; nor had she ever experienced a defendant’s parent speak to her in a controlling and condescending manner, “throwing papers at” her, and pressure her to dismiss a ticket.

18. Before leaving the room, Ms. Parker asked respondent if he represented his daughter, and he responded, “Not yet.”

19. Ms. Parker saw Judge Coe and Ms. Aurelio in the courtroom and told them about respondent’s behavior. Judge Coe, who was surprised to learn that

respondent was at the conference, suggested that Ms. Parker call her supervisor.

20. Ms. Parker called her supervisor and told her what had occurred. They discussed the case and, after reviewing the court and phone records, the supervisor directed her to dismiss the ticket. Ms. Parker returned to the conference room and announced that the ticket would be dismissed. According to Ms. Parker's testimony, respondent's demeanor then changed dramatically; he was very gracious and thanked her.

21. As they were leaving the conference room, respondent told Ms. Parker that she should not conference tickets with multiple defendants because it "breached confidentiality." Ms. Parker testified that she was "very shocked" by respondent's unsolicited advice.

22. On the record, Ms. Parker made a motion to dismiss. Judge Coe, who was surprised by the motion, did not accept it and said that he was going to adjourn the case in order "to give it some more thought." He testified that he did so in part because he was concerned that respondent's presence at the conference had influenced the outcome of the case.

23. At respondent's suggestion, Ms. Ayres then asked Judge Coe if he would recuse himself "because of history." Judge Coe said that he would recuse himself because, at the time, he thought it might be the best way to proceed.

24. After going off the record, Judge Coe, who felt that he "had been put in a real bad spot" by respondent's presence in the court, asked respondent to meet with him privately. In a back room, Judge Coe told respondent that as a judge he was "way out of line" to have attended his daughter's pre-trial conference.

25. After some research, Judge Coe later concluded that it was not necessary to recuse himself in the matter because there was “no history” between himself and respondent and he felt that he could “serve justice” in the case.

26. Judge Coe later adjourned the case again to give Ms. Parker more time to discuss the case with the trooper. By letter dated April 23, 2015, Ms. Parker moved to dismiss the charge, stating that after reviewing the telephone records and discussing the case with her supervisor and the trooper, it was the People’s position that the case “must be dismissed” as “the People would be unable to meet their burden” at trial. On April 28, 2015, Judge Coe dismissed the charge.

27. After the pre-trial conferences on March 18th, Judge Coe met with his co-judge to discuss what had occurred that day. Judge Weingartner told Judge Coe that respondent had called him earlier about his daughter’s ticket and asked him to handle the case. That same day, Ms. Aurelio told Judge Coe that respondent had asked her to transfer the ticket to Judge Weingartner. Judge Weingartner said he thought Judge Coe was obligated to report respondent’s conduct to the Commission.

28. Judge Coe asked the Advisory Committee on Judicial Ethics about his obligation to report respondent’s conduct. After receiving the Committee’s response advising that he “must report” to the Commission the allegations he described, Judge Coe sent a letter to the Commission about respondent’s conduct.

29. At the hearing and oral argument, respondent stated that he believed at the time, and still believes, that his actions with respect to his daughter’s ticket were consistent with the ethical standards since (i) he was acting “as a parent,” not as a judge,

and took care not to use his judicial title and (ii) he did not seek special treatment but only wanted his daughter's case to be handled fairly and was attempting to help her obtain the result she was entitled to by law. He denied that he was discourteous to the prosecutor and testified that "[i]f she was easily intimidated, that's not my problem."

As to Charge II of the Formal Written Complaint:

30. On June 28, 2009, Stephen Finch was charged with two counts of Petit Larceny and other offenses, arising from an incident in the Town of Windsor. On October 13, 2009, Windsor Town Justice Jon S. Bowman appointed Craig R. Fritzs, Esq. to represent the defendant because of a conflict of interest within the Office of the Public Defender. On February 1, 2010, at the request of the District Attorney, County Court Judge Joseph F. Cawley transferred the case to the Conklin Town Court.

31. On May 27, 2010, the defendant pled guilty to Petit Larceny and Disorderly Conduct. Respondent sentenced him to a one-year conditional discharge, an order of protection in favor of the complaining witness, and restitution, the amount of which was to be determined. On November 5, 2010, respondent held a restitution hearing and thereafter ordered Mr. Finch to pay the complaining witness \$2,949.42.

32. On November 15, 2010, Mr. Fritzs filed a Notice of Appeal from the restitution order, and on December 21, 2010, he filed an "Affirmation of Errors/Memorandum of Law" with the County Court. In his papers, Mr. Fritzs questioned whether the amount of restitution was proper since the complaining witness did not testify and the vehicle at issue had more than 130,000 miles. Respondent

received the Notice of Appeal on November 16, 2010, and the “Affirmation of Errors/Memorandum of Law” on January 3, 2011.

33. On October 6, 2011, Mr. Fritzsich filed a motion in County Court seeking an order directing respondent to file a return in the *Finch* case. On October 25, 2011, County Court Judge Martin E. Smith issued an order directing respondent to file a return in the above matter by November 8, 2011.

34. In a letter to Judge Smith dated December 20, 2011, which was copied to Mr. Fritzsich but not to the District Attorney’s office, respondent claimed that he was unaware of Judge Smith’s order until November 4, 2011, four days before the return was due, and that he had contacted Mr. Fritzsich to obtain clarification on “what he was requesting” but had received no response. Respondent requested that the “appeal be dismissed as it has not been perfected as required” and also argued that the appeal did not excuse the defendant from paying restitution.

35. Following receipt of respondent’s letter, Mr. Fritzsich filed another affirmation requesting that Judge Smith order respondent to file a return and stay of execution of the sentence. By order dated February 1, 2012, Judge Smith granted Mr. Fritzsich’s request for a stay and, on the same date, directed Mr. Fritzsich to file an affidavit of errors directly with respondent and advised respondent to file his return within 30 days of receiving it. Mr. Fritzsich faxed and mailed to respondent’s court an affirmation of errors dated February 1, 2012. (Unlike his “Affirmation of Errors/Memorandum of Law,” this affirmation was affirmed under penalty of perjury.)

36. On February 14, 2012, respondent sent Judge Smith an admittedly

“snarky” letter in response to the affirmation of errors. Respondent’s letter, which was not copied to Mr. Fritzsich or the District Attorney’s office, advanced a number of arguments in support of his contention that the appeal was “without merit” and should be denied, including that:

- A. Mr. Fritzsich’s “contention” that restitution was limited to the Disorderly Conduct charge was “baseless and inconsistent” with the plea agreement;
- B. Mr. Fritzsich “knew, or should have known” that restitution included damages to the complaining witness’ vehicle;
- C. The defense did not provide “any evidence” that the condition of the complaining witness’ vehicle was different on the day of inspection versus the date it was allegedly damaged (emphasis in original);
- D. The complaining witness’ failure to testify was not “an issue of sufficient importance”;
- E. It was “intuitively obvious to the casual observer” that the defense was “attempting to place inappropriate restrictions” on the collection of restitution;
- F. Any efforts by the defense to restrict restitution were “irresponsible,” “unwarranted” and “unjustified”;
- G. Respondent had “acted appropriately and within the parameters of the law.”

37. On July 9, 2012, Judge Smith issued a Decision and Order, finding “merit” in Mr. Fritzsich’s argument that the record did not support respondent’s restitution order and stating that “only the victim” could testify concerning certain factors that were necessary to determine the appropriate amount of restitution. Judge Smith modified the judgment and remitted the case to respondent for further proceedings.

38. Respondent held a second restitution hearing on November 8, 2012,

and, by memorandum dated November 29, 2012, he ordered the defendant to pay \$1,700 in restitution and issued a second order of protection.

39. On December 19, 2012, Mr. Fritzscht filed a Notice of Appeal and an affirmation of errors in County Court and with respondent.

40. On December 21, 2012, respondent sent a letter to the County Court, with copies to Mr. Fritzscht, the ADA and the Public Defender, after receiving “yet another” (respondent’s words) affirmation of errors from Mr. Fritzscht. In the letter, respondent noted that Mr. Fritzscht was assigned to handle Mr. Finch’s case due to a conflict of interest within the Public Defender’s office and argued that the matter should have reverted back to the Public Defender to determine whether the conflict still existed and that until that assessment was made, Mr. Fritzscht “no longer has any standing in this matter and therefore any actions taken by [him] are invalid.” Respondent’s letter concluded: “[I]t is the opinion of this Court that Mr. Fritzscht’s actions are unsustainable due to his lack of standing and this appeal should be summarily dismissed.”

41. In response, Mr. Fritzscht wrote to Judge Smith asking to be formally appointed to represent Mr. Finch, and he requested another stay. Judge Smith issued an order of assignment on January 7, 2013, and a stay on February 6, 2013.

42. On January 18, 2013, respondent sent Judge Smith a letter, with copies to the ADA, Mr. Fritzscht and the Public Defender, expressing disappointment with his decision appointing Mr. Fritzscht to represent Mr. Finch and asking that the appeal be denied. Respondent’s letter accused Judge Smith of “unilaterally usurp[ing] the authority” of the Conklin Town Court and “undermining our credibility,” and argued

that the case should have been reassigned to the Public Defender's office for "numerous" reasons including to determine whether "this is a legitimate reason for an appeal or possibility [sic] an effort for any attorney to pad their bill at the expense of the Broome County taxpayers." His letter stated that while he did not object to a "legitimate appeal" of his decisions, the "proper process on how these appeals are handled should have been protected" (emphasis in original). In what he concedes was a "snarky" tone, respondent also told Judge Smith that the Conklin Town Court did "not claim the power to heal the sick, walk on water, or raise the dead and while we do ask for Divine intervention in guiding our decisions, it is rarely granted." Respondent's letter also:

- A. repeated his argument that Mr. Fritzscht lacked "standing" and that "any actions taken by him prior to [his appointment on January 7, 2013] should be "dismissed";
- B. told Judge Smith that he had "no appeal to consider" until Mr. Fritzscht refiled the appeal;
- C. asserted that Mr. Fritzscht should pursue the appeal *pro bono* or that the defendant should pay because the Public Defender "cannot be expected to be responsible for this charge";
- D. attacked Mr. Fritzscht's legal arguments as "ludicrous at best," "totally beyond any rational thought process," and "defies logic";
- E. questioned whether Judge Smith wanted to establish a precedent of rewarding a defendant's refusal to pay restitution; and
- F. stated that the defendant "has issues regarding his self-control" and thus "presents a clear and present danger to the victim."

43. On February 6, 2013, Judge Smith sent respondent a letter stating that "it appears that you may misunderstand certain areas of the appellate process, and the respective roles of this Court, your court and counsel within the process." Judge Smith's

four-page letter, *inter alia*, described respondent's argument that Mr. Fritzsch had no standing to appeal as "misplaced," explained that "[i]n most instances" attorneys "must follow the very practice employed by Mr. Fritzsch in this case," advised respondent that there was no "particular procedure" in place for assigning counsel in cases where the Public Defender did not represent the defendant at trial, noted that the Public Defender was not responsible for charges incurred by assigned counsel in an appeal, and stated that County Court had "inherent authority to appoint an attorney to an indigent defendant" and did not "'unilaterally usurp' the Town of Conklin's authority to appoint Mr. Fritzsch." Judge Smith's letter noted that he found respondent's comments concerning the appeal's merit to be "the most troubling part of your letter," and he wrote: "Simply put, the Town of Conklin Court may not decide whether any appeal from its orders and judgments is legitimate." Judge Smith also instructed respondent that the return must be filed within ten days of receiving the affidavit of errors and cautioned that "[t]he failure to timely file the return may permit this Court to deem admitted the allegations contained in the affidavit of errors." Judge Smith concluded that he did not expect respondent to "heal the sick, walk on water, or raise the dead," but did expect him to abide by the federal and state constitutions, state statutes, the rules of the Chief Judge and the discretionary authority of the County Court, and that to the extent respondent "may have been unaware of the proper process, or had an incomplete understanding of the same, I hope you have found this letter instructive." Judge Smith's letter was copied to Mr. Fritzsch, the ADA and the Public Defender.

44. On April 22, 2013, Mr. Fritzsch filed a motion in County Court

seeking an order to compel respondent to file the return in *Finch*. On May 30, 2013, Judge Smith issued an order directing respondent to file the return by June 21, 2013. The order stated that the return must “set forth or summarize evidence, facts, occurrences in or adduced at the proceedings resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors’ (CPL §460.10[3][d]).”

45. In response, on June 3, 2013, respondent sent the County Court a copy of the second page of his January 18th letter, with a cover letter stating that his “position has not changed” since that letter was written. That page, from the same letter that Judge Smith had described as “troubling,” contained respondent’s assertions that Mr. Fritzsche’s arguments were “ludicrous at best,” were “totally beyond any rational thought process,” and “def[y] logic.” The letter included respondent’s opinion the defendant had “issues regarding his self-control” and presented “a clear and present danger to the victim.” Respondent did not send a copy of his response to Mr. Fritzsche or the ADA.

46. On July 30, 2013, Mr. Fritzsche sent a fax to Judge Smith notifying him that “no return has been received by me from the lower court in this matter.”

47. On October 3, 2013, at the request of Judge Smith’s law clerk, respondent re-sent his June 3, 2013 letter and copied Mr. Fritzsche and the ADA. Respondent’s cover letter commented that the case has been “dragging on for some time” and that “anything you can do to expedite it will be appreciated.”

48. A month later, Mr. Fritzsche submitted a Memorandum to respondent arguing that the amount of restitution ordered was not proper and the judgment should be

vacated. In his Memorandum, Mr. Fritzsich commented that respondent had “attacked” him for “simply doing the job that defense counsel is required to do” and that respondent’s “return” contained “personal attacks and name calling,” expressed “venom for the defendant and his counsel,” amounted to a “near taunting” of the County Court, and was “much more in the style of an advocate than of unbiased impartial finder of fact.” In response, respondent sent Judge Smith an undated letter stating that he “hesitated” in responding to Mr. Fritzsich because “his case continues not to have any merit,” told Judge Smith that “the main question” before him was whether “substantial justice was performed,” opined that Mr. Fritzsich’s claim of his bias was an attempt to “deflect[] attention from the fact that there is simply no merit to his appeal” and asked Judge Smith to “confirm this appeal is without merit.” Respondent copied the letter to Mr. Fritzsich but not to the ADA.

49. On October 6, 2014, Judge Smith issued a Decision and Order finding that respondent had properly awarded \$1,700 in restitution and remitted the matter to the Conklin Town Court. On October 14, 2014, the defendant signed an order agreeing to pay \$1,700 plus a surcharge to the County Probation Department.

50. Subsequently, after the defendant found a CARFAX report that showed that the vehicle the complaining witness testified she had “junked or scrapped” was still on the road, Mr. Fritzsich filed an order to show cause requesting that the restitution order be vacated by County Court. On December 12, 2014, respondent sent a letter to Judge Smith concerning the motion to vacate and what respondent termed the “continuing saga” of the *Finch* case. Respondent did not send a copy of the letter to the

ADA. In his letter, respondent argued that the motion should be denied and that the report generated by Mr. Finch could not be given “much credence” because the defendant “clearly ... has a conflict of interest” and that it was “inherently obvious to the casual observer that this motion is without merit and should be denied immediately”; he called the motion “ludicrous,” stated that the defendant “was in fact guilty,” and requested “an immediate denial of this action.”

51. On January 29, 2015, the defendant paid restitution and a surcharge in the amount of \$1,785, fulfilling the terms of respondent’s restitution order. In February 2015 Mr. Fritzsch filed a third Notice of Appeal in *Finch*. On December 31, 2015, Judge Smith dismissed the appeal as abandoned.

52. At the hearing and oral argument, respondent stated that he was “biased against the appeal” in *Finch* because he thought it was meritless, but denied that he was biased against the defendant or his attorney. He conceded that some of his communications with County Court were ex parte, but stated that he believed it was Judge Smith’s responsibility to make sure that the copies were distributed properly. He testified that the *Finch* case was the “first and only appeal” he handled; that “[a]t the time, I didn’t know any better,” but “[w]ith hindsight” he now recognized that he did not “follow proper procedures” and “clearly” misunderstood the appellate process; that “mistakes were made by a variety of people in this process”; and that “I was trying to do this job to the best of my ability, with the training that I’ve received and I believe under these circumstances, I did the best I could with the knowledge that I had.”

Upon the foregoing findings of fact, the Commission concludes as a matter

of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 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 II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established.

When a judge’s family member is involved in a court proceeding, the judge’s involvement is constrained by his or her ethical responsibilities, including the duty to refrain from “lend[ing] the prestige of office to advance ...private interests” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and avoid even the appearance of impropriety (Rules, §§100.2[C], 100.2[A]). As the Court of Appeals has stated:

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved.... There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. [Citation omitted.]

Matter of Lonschein, 50 NY2d 569, 572 (1980). By intervening in a case involving a traffic ticket issued to his daughter and engaging in multiple efforts to influence the disposition of the ticket, respondent violated these ethical standards. While such

behavior is improper even in the absence of an overt assertion of special influence (*Id.*), the impropriety was exacerbated when respondent attempted to circumvent the normal judicial process in attempting to have the case transferred from a judge whom he viewed as biased and when he made pointed references to his judicial status while arguing with the prosecutor that the ticket should be dismissed. Viewed in their totality, these actions, coupled with respondent's continuing insistence that his actions were appropriate, "demonstrate[] an unacceptable degree of insensitivity to the demands of judicial ethics" (*Matter of Conti*, 70 NY2d 416, 419 [1987]).

As the record shows, after learning that his daughter had been issued a traffic ticket for using a cell phone while driving, respondent made two back-channel attempts to have the case transferred from the docket of the judge before whom it was returnable, Kirkwood Town Justice Ward E. Coe, because respondent believed Judge Coe could not handle the case fairly. Having been a judge for six years, respondent certainly knew or should have known that the proper procedure for a defendant who wanted her case heard by a different judge was to make a request for recusal that complied with statutory requirements. Instead, prior to the scheduled pre-trial conference, respondent visited the Kirkwood Town Court and asked a court clerk, whom he knew, to transfer the ticket to the docket of the other Kirkwood justice, Benjamin Weingartner. The clerk, who recognized immediately that "that's not the way things are done" but was hesitant to refuse a judge's request, told respondent that she "would keep an eye out" for the ticket. Respondent also contacted Judge Weingartner directly, ignoring the ethical implications of initiating an ex parte communication with a judge concerning a pending matter and

placing Judge Weingartner in a potentially compromising position (*see, e.g., Matter of Dixon*, 2017 NYSCJC Annual Report 100). In a telephone call to Judge Weingartner, respondent told him about his daughter's ticket and asked him to handle the matter in view of respondent's history with Judge Coe's spouse (whom he had fired when she was his court clerk); he also attempted to provide facts about the case before Judge Weingartner cut him off and refused his request. Respondent's requests to the court clerk and Judge Weingartner, who both knew respondent was a judge, were implicitly supported by his judicial status (*see Matter of Lonschein, supra*, 50 NY2d at 572-73, where the Court of Appeals noted that although a judge who asked a city official to expedite a friend's license application "never asserted his judicial office in seeking special consideration on [his friend's] behalf," the judge "was aware that [the official] knew of his position and should have realized that his requests would be accorded greater weight by an administrative official than they would have been had petitioner not been a judge."

After these attempts to have the ticket transferred proved unsuccessful, respondent attended the pre-trial conference with his daughter, where, though not an attorney, he acted as her advocate, attempted to intimidate the prosecutor and invoked his judicial position in arguing that the ticket should be dismissed. Regardless of whether he accompanied his daughter into the conference room on his own initiative or at the prosecutor's tacit invitation, there is little question that his behavior during the conference was inconsistent with ethical standards requiring every judge to act at all times in accordance with "standards of conduct more stringent than those acceptable for

others” (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]). Throughout the conference he addressed the prosecutor in a condescending manner, questioned whether she knew the law and was familiar with the facts, and, at one point, “threw” papers on the table in her direction to underscore his argument that the ticket should be dismissed. When his daughter, who until that point had not said a word, then attempted to assert respondent’s judicial office to bolster his arguments, her comment (“My father’s a judge”) should have placed him on high alert to avoid any appearance of using his judicial position to further his daughter’s interests and should have signaled to him that he should desist from his efforts on her behalf. Instead, respondent, who maintains that he was always careful not to use his judicial title in connection with the case, emphasized his judicial office, stating, “Well, I wasn’t going to bring that up, but since it’s been brought up, if this ticket was in my courtroom, I’d dismiss it.” He underscored that message by adding that he had spoken to “several other judges” about the ticket and that they “all agreed that this should be dismissed.” Standing alone, these references to his judicial status, implying that as a judge he had a superior knowledge of the law, conveyed the appearance that he was invoking his judicial office to bolster his arguments on his daughter’s behalf. *See, e.g., Matter of Magill*, 2005 NYSCJC Annual Report 177 (“It is not an excuse that respondent was simply trying to assist his wife in connection with [her] case, since any such ‘assistance’ is patently impermissible when the power and prestige of judicial office are invoked”). The fact that the ticket was ultimately dismissed based on the prosecutor’s motion does not excuse respondent’s egregious conduct.

Throughout the Commission’s proceedings, including at the oral argument,

respondent insisted that all of his actions in connection with his daughter's case were ethically permissible since he was acting "as a parent," not as a judge, and never asked for special treatment but was only attempting to help her obtain the result that she was entitled to by law. While the instinct to help a child is understandable, a judge's "paternal instincts" do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards*, 67 NY2d 153, 155 [1986]), and the referee properly rejected respondent's argument that he had "absolute immunity" to intervene as a parent on behalf of his daughter in an ongoing judicial proceeding. Respondent's daughter was not a minor, but a 30-year old adult with a traffic ticket, and there is no indication that she was incapable of handling the matter on her own or engaging an attorney to represent her. Before intervening and acting on her behalf, respondent had ample opportunity to reflect upon the propriety of doing so. The conclusion is inescapable that he either ignored or misunderstood his ethical obligations and intervened in the case simply because he believed that he had a better chance of getting the ticket dismissed than his daughter had on her own. In view of the significant body of Court of Appeals decisions and Commission determinations involving judges who have been disciplined for lending the prestige of judicial office to advance private interests, as well as numerous opinions of the Advisory Committee on Judicial Ethics addressing the subject, respondent had ample notice that such conduct was improper.²

² E.g., *Matter of LaBombard*, 11 NY3d 294, 299 (2008) (judge's invocation of his judicial status in connection with a motor vehicle accident and his ex parte contact with the judge handling his relative's criminal case "suggest a willingness to misuse his judicial office for personal advantage – a quality that is antithetical to the judicial role"); *Matter of Lonschein*, *supra*, 50 NY2d at 572-73

Also highly improper are respondent's eight unauthorized letters – five of which were ex parte – over a period of three years to the County Court Judge who was handling the appeal of respondent's restitution orders in *People v Finch*. Instead of submitting a return to the defendant's affidavit of errors that set forth the "evidence, facts or occurrences in or adduced at the proceedings" as required (CPL §460.10[3][d]), respondent abandoned his role as a neutral arbiter and became an advocate, repeatedly telling the court that the appeal lacked "merit" and should be dismissed and advancing factual and legal arguments in support of his claims while making biased, discourteous

(judge's call to a city official to expedite a friend's license application was improper even though the judge "never asserted his judicial office in seeking special consideration"); *Matter of Dixon, supra* (judge initiated two prohibited, ex parte communications with the judge handling her lawsuit against an insurance company); *Matter of Sullivan*, 2016 NYSCJC Annual Report 209 (in two conversations with law enforcement officials, judge sought leniency as to impending charges against his son); *Matter of Smith*, 2014 NYSCJC Annual Report 208 (at the request of a friend of the judge's relative, judge sent unsolicited letter on judicial stationery to parole board in support of inmate's application for parole); *Matter of Hurley*, 2008 NYSCJC Annual Report 141 (judge called the police on behalf of a friend to report an alleged violation of an order of protection and identified himself as a judge); *Matter of Dumar*, 2005 NYSCJC Annual Report 151 (judge asserted his judicial office in a dispute with a dealership over repairs to a snowmobile, threatened a lawsuit and said he knew how "the system" worked); *Matter of Magill, supra* (after disqualifying himself from a case in which his wife was the complaining witness, judge asserted his judicial prestige by personally delivering the file to the transferee court and leaving his judicial business card on which he noted a request for an order of protection); *Matter of Pennington*, 2004 NYSCJC Annual Report 139 (judge met with the district attorney to discuss his son's case and asserted his judicial office when charged with infractions by a state park official); *Matter of Nesbitt*, 2003 NYSCJC Annual Report 152 (judge sent letter on judicial stationery to his son's school challenging an administrative determination); *Matter of Krauciunas*, 2003 NYSCJC Annual Report 132 (judge asserted his judicial status in his daughter's small claims case by referring to his judicial office while arguing with the presiding judge and "persisted in acting as his daughter's advocate" even after that judge told him that he could not speak for his daughter); *Matter of Whalen*, 2002 NYSCJC Annual Report 171 (judge made three phone calls to an attorney who was involved in a fee dispute with the judge's wife; though he did not explicitly invoke his judicial status, he "confirmed" he was a judge). See also, e.g., Advisory Ops 04-126, 07-178, 07-205, 10-197, 12-143, 13-113 (advising that a judge, as an observer, may attend court proceedings involving a relative or friend, but in doing so "should not draw attention to his/her presence or judicial status," "have any ex parte contact with the presiding judge" or "invoke his/her judicial office").

and undignified statements about the defendant and his attorney. These letters were ethically and procedurally improper. *See Matter of Gumo*, 2015 NYSCJC Annual Report 98; *Matter of Van Woeart*, 2013 NYSCJC Annual Report 316.

Advising the County Court Judge, for example, that the appeal did not excuse non-payment of restitution and should “be dismissed as it has not been perfected as required,” that his own actions were “within the parameters of the law,” that the defendant’s attorney “lack[ed] standing” and that his claims were “baseless and inconsistent” with the plea agreement was impermissible advocacy before the court that would consider the matter. Respondent not only criticized the defense attorney’s arguments in highly disparaging terms (describing his claims as “ludicrous,” “defies logic” and “totally beyond any rational thought process”), but suggested that the attorney was attempting to “pad [his] bill” at taxpayer expense; respondent even accused the County Court of “unilaterally usurp[ing] the authority” of the town court and “undermining our credibility” by reappointing the attorney to represent the defendant. Even if respondent was unfamiliar with appellate procedures in handling his first appeal and misunderstood his proper role in that process, it is inexcusable that his improper behavior continued even after the County Court Judge sent him a detailed letter advising him of the proper procedures and admonishing him for his “troubling” statements about the merits of the appeal. Although respondent testified that he “backed off some” after receiving the County Court Judge’s “instructive” letter, the evidence demonstrates that in four subsequent letters he continued to make factual and legal arguments addressing the merits of the case and to disparage the defendant and his attorney. These subsequent

letters stated, for example, that “the main question” was “whether substantial justice had been performed,” that the attorney’s claim accusing him of bias was an attempt to “deflect[] attention from the fact that there is simply no merit to his appeal,” that the attorney’s motion was “ludicrous,” “without merit and should be denied immediately,” and that the defendant’s evidence should not be given “much credence” because he “has a conflict of interest” and “was in fact guilty.”

We also note that despite multiple orders and directives from the County Court, respondent repeatedly failed to submit the court’s return in a timely manner. Regardless of his personal views concerning the merits of the appeal and regardless of any questions, legitimate or otherwise, that might have been raised regarding the procedures that were followed, respondent was obligated to comply with the County Court’s directives.

There is a direct connection between respondent’s impermissible, ex parte advocacy in County Court, which preceded his involvement in his daughter’s case, and his actions in connection with his daughter’s ticket. In *Finch* he continued to address the merits of the appeal in ex parte letters even after the County Court admonished him for his “troubling” comments. Thereafter, in his daughter’s case, he attempted to have the ticket transferred through ex parte contacts with the court clerk and Judge Weingartner and also attempted to discuss the case privately with Judge Weingartner, which raises concern about his failure to recognize a core principle in our courts. If a judge initiates ex parte communications, the public would have reason to doubt whether the judge would reject such private discussions in his own court. Notwithstanding that Judge Weingartner

rebuffed his attempt to act as his daughter's advocate, he continued to act as her advocate, and in the pre-trial conference, after his daughter in his presence said he was a judge, he grasped at that opportunity to state what he would do if the case were before him and even added the professed, private opinions of other judges who, he said, had told him they would also dismiss the charge. That is not how a judge should behave, and respondent has shown numerous signs that he appears to have no understanding of his role as a judge in avoiding unauthorized communications and advocacy.

In considering the appropriate sanction, we are mindful that the Court of Appeals has indicated that for many types of misconduct the severity of the sanction “depends upon the presence or absence of mitigating and aggravating circumstances” (*Matter of Rater*, 69 NY2d 208, 209 [1987] [“in the absence of any mitigating factors, (such conduct) might very well lead to removal ... On the other hand, if a judge can demonstrate that mitigating circumstances accounted for such failings, such a severe sanction may be unwarranted”]; *see also Matter of Edwards, supra*, 67 NY2d at 155 [“as a general rule, intervention in a proceeding in another court should result in removal,” but this does not “preclud[e] consideration of mitigating factors”]). Indeed, in cases involving judges who intervened in proceedings in other courts or otherwise misused judicial prestige, removal has generally been limited to instances where there were significant aggravating circumstances, such as additional misconduct or prior discipline for similar conduct (*supra* at pp 23-24; *see also Matter of Reedy*, 64 NY2d 299 [1985]).

Compounding respondent's misconduct in this case is his insistence throughout the Commission's proceedings that all of his activities in connection with his

daughter's case were permissible. Although both the court clerk and Judge Weingartner recognized that respondent's informal attempts to have the case transferred were improper, respondent, even after hearing their testimony, testified that his requests to both individuals were "appropriate" in light of his concern that the judge assigned to the case could not be fair. He believed that it was proper "as a father" to advocate at the pre-trial conference that his daughter's ticket should be dismissed, and he argued to the referee that he had "absolute immunity" as a parent for his actions on her behalf. Rather than concede that his treatment of the prosecutor was discourteous, he testified that if she was "oversensitive" and "easily intimidated" she "may want to take another job." At the oral argument, having had an opportunity to reflect on the referee's report and to review the cases cited in the briefs, respondent conceded, for the first time, that "now I can see where there's a problem" and said that if the situation recurred he would not be involved, but when asked what he did wrong, he said that the problem was that his actions, including his statements during the pre-trial conference, caused "misunderstandings" and "could have been misinterpreted." It thus appears that respondent still lacks an understanding of why his conduct was improper. We also note that in connection with the appeal in *Finch*, he persisted in his advocacy and disparaging comments even after the County Court's effort to instruct him. Respondent's failure to recognize the impropriety of his actions and to modify his behavior when ethical concerns were brought to his attention exacerbates the underlying misconduct and "strongly suggests that, if he is allowed to continue on the

bench, we may expect more of the same” (*Matter of Bauer*, 3 NY3d 158, 165 [2004]).³

While we recognize that removal from office is an “extreme sanction” that “should be imposed only in the event of truly egregious circumstances” (*Matter of Cunningham*, 57 NY2d 270, 275 [1982]), in our view respondent’s multiple efforts to influence the disposition of his daughter’s ticket, coupled with his additional misconduct and the aggravating factors presented here, demonstrate that he “is not fit for judicial office” (*Matter of Robert*, 89 NY2d 745, 747 [1997]) and thus that the sanction of removal is warranted.

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

Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Judge Klonick, Judge Leach, Mr. Stoloff, Judge Weinstein and Ms. Yeboah concur.

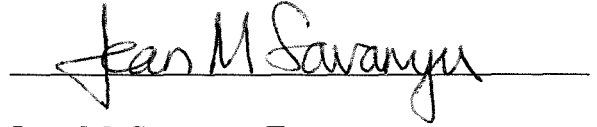
Mr. Belluck and Mr. Emery were not present.

³ See also *Matter of Hart*, 7 NY3d 1, 10 (2006) (judge’s “adamant assertion that no misconduct occurred” and his “fail[ure] to this day ‘to recognize that the awesome contempt power should be exercised only with appropriate restraint and within the carefully mandated safeguards’” were “troubling,” and a “judge’s ‘fail[ure] to recognize the inappropriateness of his actions ...’ is a significant aggravating factor on the issue of sanctions” [quoting *Matter of Aldrich*, 58 NY2d 279, 283 (1983)]); *Matter of Sims*, 61 NY2d 349, 357 (1984) (where judge signed release orders for defendants who were represented by judge’s husband, her “failure to acknowledge any appearance of wrong ... compound[s] her misconduct”); *Matter of Shilling*, 51 NY2d 397, 404 (1980) (“Compounding those four separate instances of impropriety ... is petitioner’s continued insistence that his actions involved neither impropriety nor the appearance of impropriety”).

CERTIFICATION

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

Dated: May 4, 2017

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

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

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

J. MARSHALL AYRES,

a Justice of the Conklin Town Court,
Broome County.

CONCURRING OPINION
BY MR. STOLOFF

While I agree that the record supports the findings of misconduct with respect to Charges I and II of the Formal Written Complaint, I am constrained to write this concurring opinion in order to address what I view as the procedural errors involving the defendant's appeal to the County Court in *People v. Finch*, the subject of Charge II, and to underscore that the finding of misconduct with respect to that charge is based solely on the tone of respondent's letters to the County Court and not, as alleged in the Formal Written Complaint, on his failure to file a timely return to the affidavit of errors. Since the record indicates that the appeal was not perfected in a timely manner and since the appeal should have been dismissed at an early stage as this was a jurisdictional defect, the exacerbation of respondent's misconduct might have been avoided if the proper procedures had been followed.

It is my opinion that the appeal in *Finch* cannot be deemed to have been taken on December 21, 2010, contrary to the County Court's determination, because the

so-called “Affirmation of Errors/Memorandum of Law” by defendant’s counsel dated December 21, 2010 (i) was not sworn to or affirmed under penalty of perjury, (ii) was not copied to the Justice Court of the Town of Conklin, and (iii) was not received by the Justice Court until January 3, 2011, which was more than 30 days after the notice of appeal had been filed (on or about November 12, 2010), all of which were inconsistent with the statutory requirements.

Criminal Procedure Law section 460.10(3)(a) provides:

“An appeal taken as of right to a county court ...from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer is taken as follows: (a) Within thirty days after entry or imposition in such local criminal court of the judgment, sentence or order being appealed, the appellant must file with such court either (i) an affidavit of errors, setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal. Where a notice of appeal is filed, the appellant must serve a copy thereof upon the respondent in the manner provided in paragraphs (b) and (c) of subdivision one, and, within thirty days after the filing thereof, must file with such court an affidavit of errors.”

Section 460.10(3)(b) of the statute provides in relevant part that “[n]ot more than three days after the filing of the affidavit of errors,... [i]f the defendant is the appellant, such service must be made on the district attorney of the county in which the local criminal court is located.” Section 460.10(3)(c) then provides: “Upon the filing and service of the affidavit of errors as prescribed in paragraphs (a) and (b), the appeal is deemed to have been taken.”

The record indicates that the defendant did not comply with these

requirements in appealing respondent's first restitution order in *Finch*, for the reasons mentioned above, and thus that Judge Smith's determination, by order dated October 25, 2011, that the defendant had "timely filed an Affidavit of Errors on or about December 21, 2010," was erroneous. It therefore appears that when respondent asserted in the first of his letters to Judge Smith, dated December 20, 2011 (Exhibit 32), that the appeal had "not been perfected as required," his statement was accurate, even if he likely did not understand why it was correct.

The defendant's attorney's belated submission on February 1, 2012, of an affirmation of errors that complied with the statutory requirements could not cure the jurisdictional defect. The record shows that Judge Smith advised respondent by letter on that date that "[t]he defendant appeared before the Court this morning and the Court granted his counsel, Craig Fritzsich, Esq., further time to file an affidavit of errors" and directed him to do so by the end of that day. However, the record does not contain a written motion seeking such relief and, in any event, the time to do so had expired since the notice of appeal had been filed well over a year earlier.¹ The only means to grant such an extension at that stage would have been by writ of coram nobis on the grounds that counsel was ineffective in failing to file a proper affidavit of errors. The record does not reflect that any writ of coram nobis petition was filed.

The Court of Appeals recently confirmed that the failure to comply with the

¹ CPL §460.30(1) permits a court to grant a 30-day extension for filing a notice of appeal or affidavit of errors in certain circumstances but requires that an application for such an extension "must be made with due diligence after the time for taking such an appeal has expired, and in any case not more than one year thereafter."

requirement to file an affidavit of errors is a jurisdictional defect. In *People v. Smith*, 27 NY3d 643, 647 (2016), the Court stated that “CPL §460.10 contains the procedural requirements for the taking of a criminal appeal, and adherence to those requirements is a jurisdictional pre-requisite for the taking of an appeal,” citing *People v. Duggan*, 69 NY2d 931, 932 (1987).² Similarly, the Court had stated in *People v. Andrews*, 23 NY3d 605, 611 (2014), that the statutory “one-year grace period” for seeking permission to file a late notice of appeal “is strictly enforced... ‘since the time limits within which appeals must be taken are jurisdictional in nature and courts lack inherent power to modify or extend them,’” citing *People v. Corso*, 40 NY2d 578, 581 (1976), and *People v. Thomas*, 47 NY2d 37, 43 (1979). On remand in *Smith*, *supra*, the Appellate Term of the Second Department for the 2nd, 9th and 10 Judicial Districts acknowledged that the failure to file an affidavit of errors required dismissal of the appeal but simultaneously granted a writ of coram nobis on the grounds that counsel was ineffective in failing to file the appeal, thereby permitting the appeal to go forward (*People v. Smith*, 43 Misc3d 143[A]).

It is thus evident, based on the record before us, that the County Court did not obtain jurisdiction of the appeal in *Finch* in December of 2010, or likely thereafter.


Nevertheless, while the aforementioned irregularities and jurisdictional defects might have been raised by the District Attorney or the County Court on its own

² A year before his February 2012 order in *Finch*, Judge Smith cited *Duggan* in granting a timely-requested 30-day extension under CPL §460.30(1) in *People v. Bartholomew*, 31 Misc3d 698 (Broome Co Ct 2011), stating that “[a]ny procedural requirement must be adhered to strictly” and that “the ‘failure to comply with applicable appellate procedure is a jurisdictional defect and results in dismissal of the appeal.’”

motion, it was not respondent's place to become an advocate in the appellate process, as the Commission's determination has noted. Notwithstanding the procedural irregularities in the filing and prosecution of the appeal, I agree that respondent's eight letters to the County Court Judge, five of which were *ex parte*, cannot be condoned. In the letters, respondent abandoned his role as a neutral arbiter and became an advocate, advancing factual and legal arguments in support of his claims while offering his personal opinions about the merits of the appeal, making biased and undignified statements about the defendant and his attorney, and impugning the integrity of the County Court. Even if the orders and directives of the County Court were not enforceable, that does not mitigate the misconduct demonstrated in the eight letters, which were ethically and procedurally improper.

I therefore concur with the majority in finding misconduct with respect to Charges I and II, subject to the reservations expressed herein, and in concluding that respondent's removal is warranted.

Dated: May 4, 2017


Richard A. Stoloff, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

J. MARSHALL AYRES,

a Justice of the Conklin Town Court,
Broome County.

CONCURRING OPINION
BY MS. YEBOAH

I concur with the majority's findings that Charges I and II of the Formal Written Complaint are sustained, and I believe that based on the record presented, the respondent's serious misconduct may well warrant his removal from office, the most severe sanction available by law. However, I believe that the circumstances of this case require additional comment.

Having reviewed the record of the proceedings before the referee and having participated in the oral argument as a Commission member, it appeared to me that the respondent, a town justice who is not a lawyer, was at a significant disadvantage because he was unrepresented by counsel in the proceedings.¹ This was particularly evident at the oral argument, where the choice between censure and removal hung in the

¹ In his answer to the Formal Written Complaint, Judge Ayres stated that "due to financial restraints" he would not be represented by an attorney, and he added, "While clearly it would be in my best interest to have legal counsel present throughout this process, fiscally this is not possible." I expect that the cost of legal representation in a contested Commission matter might be substantial, especially as compared with the salary of a modestly-paid part-time judge.

balance. Although Judge Ayres vigorously attempted to defend his actions and was given every opportunity to do so,² his inconsistent presentation and responses to questions that might have tipped the scales in his favor clearly fell short. (This was especially true of questions that probed his understanding of the ethical issues his conduct involved.) As the Commission's determination indicates, the judge's "failure to recognize the impropriety of his actions" was a significant factor in determining that removal was appropriate, a factor that was based on his hearing testimony and his statements at the oral argument. While it may be that even with the advice and assistance of legal counsel to help shape a more coherent, persuasive argument, the result might well have been the same, it is unfortunate that, with so much at stake, the judge lacked such assistance.

Although a judge may obtain review of a Commission determination by the Court of Appeals upon request, the review process delineated in the Court's rules (22 NYCRR §§530.2, 530.5) requires a substantial effort and likely entails considerable expense for any judge; for an unrepresented lay justice, it may present an almost insurmountable challenge. Mindful of the consequences of the Commission's decision today, I note these circumstances to express my concerns about a disciplinary system that provides no support for a judge who, "due to financial restraints," is unable to present an adequate defense.

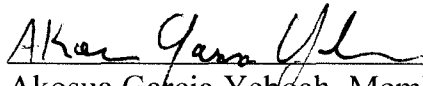
Further, I believe that the function of discipline is not only to punish but

² The Commission accommodated the judge's request, which was also based on financial considerations, to have the oral argument take place in the Commission's Albany office, with some Commission members participating by videoconference.

also to instruct. While the Commission's decision in this case may serve as instruction to others who might read it, I am concerned that the opportunity to instruct Judge Ayres is lost because his career as a judge is now over, subject to review by the Court of Appeals. The record before us shows no history of prior discipline or even cautionary warnings issued to him where he might or should have learned his lesson.

I note that in several cases and in its annual reports (including the 2017 Report), the Commission has urged the Legislature to consider a constitutional amendment providing for suspension from office without pay as a sanction available to the Commission and the Court of Appeals, a sanction that could be considered in a case where the judge's conduct is more serious than would warrant a censure, yet where removal, which permanently bars a judge from holding judicial office in the future, might be too harsh. If such a sanction were available, I might consider it in this case since, on the totality of the record, I am not entirely persuaded that Judge Ayres' conduct is irredeemable and that, given the opportunity, he could not learn from his mistakes.

Dated: May 4, 2017


Akosua Garcia Yehovah, Member
New York State
Commission on Judicial Conduct