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

HENRY R. BAUER,

a Judge of the Troy City Court,
Rensselaer County.

DETERMINATION

- -

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn Blake, Of Counsel)

Roche, Corrigan, McCoy & Bush (By Robert P. Roche) for Respondent

The respondent, Henry R. Bauer, a judge of the Troy City Court, Rensselaer County, was served with a Superseding Formal Written Complaint dated October 4, 2002, containing 51 charges. Respondent filed an answer dated October 29,

2002.

By Order dated November 21, 2002, the Commission designated Honorable Richard D. Simons as referee to hear and report proposed findings of fact and conclusions of law. After respondent requested a public hearing in the matter by letter dated July 21, 2003, a hearing was held on July 28, 29, 30 and 31 and August 1, 3 and 4, 2003, in Albany, New York. The referee filed a report dated December 12, 2003.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. On January 30, 2004, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent, an attorney, was appointed Troy City Court judge in 1994; later that year he was elected to a ten-year term. Prior to becoming a judge, respondent served as an assistant public defender in Rensselear County. Respondent's judicial salary is $113,900.

2. Respondent sits as a judge Monday through Friday, beginning at 8:30 A.M.

3. Troy City Court is a court of record, and all proceedings are recorded stenographically, unless the stenographer has left for the day or an arraignment is conducted on the weekend.

4. At all times relevant herein, respondent was aware of the statutory requirements of Sections 170.10 and 510.30 of the Criminal Procedure Law (hereinafter

"CPL") and was aware that the sole purpose for bail is to ensure the defendant's reappearance in court.

5. With respect to assigning counsel, respondent testified that once a defendant says that he or she is employed, respondent does not generally inquire further into the details of the employment because he is "inclined to give people an appropriate opportunity to retain their own counsel, if they have an ability to do that"; he testified that if a defendant returns to court without an attorney and says that he or she has attempted to hire an attorney but the rates are too high, respondent will reconsider the issue of assigned counsel. He testified further: "[I]t doesn't take much employment to retain one's own attorney... as opposed to saddling the county with the expense of providing him or anybody else with an attorney" and that: "Everyone, virtually everyone, says they can't afford an attorney and everyone has bills."

6. Respondent had only four criminal trials from 2000 through 2002, all of which were nonjury. The vast majority of defendants in respondent's court plead guilty.

As to Charge I of the Formal Written Complaint:

7. On Friday, May 12, 2000, respondent arraigned Daquan Austin, who gave his age as 16, on a charge of Open Container, for allegedly drinking a bottle of beer in a vehicle. (Subsequently, in connection with another matter, respondent learned that the defendant's name was different from the one he gave and that he was actually 19 years old.) Respondent informed the defendant of the charge and then asked the arresting

officer whether the defendant had been cooperative. The officer said, "Uncooperative." Respondent then asked the defendant, "Sir, are you getting a lawyer on these matters?" and the defendant answered, "I don't know." Respondent set bail of $500 and told the defendant, "If you get bailed out, be here on Monday. If you can get a lawyer, bring one in on Monday and if you can't, we will assign one on Monday. All right?" The defendant said, "All right." Respondent issued a preliminary Order of Protection directing that the defendant stay away from the location where he was arrested for six months and committed the defendant to jail in lieu of bail until May 15, 2000. Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

8. On the return date, the defendant appeared without counsel; there was no appearance on the record by the prosecution. Respondent advised the defendant that if he pled guilty to the charge, respondent would impose a sentence of time served and a fine of $30. The defendant pled guilty and was sentenced accordingly.

9. Prior to accepting the defendant's guilty plea, respondent did not say anything about the right to counsel and assigned counsel.

As to Charge II of the Formal Written Complaint:

10. On April 29, 2000, respondent arraigned Lucien Battiste, age 20, who was charged with a violation of Trespass. The defendant had been arrested pursuant to the City of Troy Trespass Affidavit Program ("TAP"), based upon an affidavit of a

property owner asking the police to arrest anyone on the property who is not a tenant, according to a list provided, or the guest of a tenant. The defendant gave a Troy address and his occupation as a dishwasher in Latham. There is no transcript of the arraignment.

11. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail until May 5, 2000.

12. On the return date, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by advising him that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

13. Prior to accepting the defendant's guilty plea, respondent did not say anything about the right to counsel and assigned counsel and did not conduct a meaningful inquiry of the defendant as to whether he understood the consequences of his guilty plea. Respondent failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

As to Charge III of the Formal Written Complaint:

14. On May 12, 2000, respondent arraigned Kenneth Brooks, who was charged with Bicycle With No Lights, Bicycle Without Warning Device and Operating Bicycle On Sidewalk. When respondent asked the defendant, "Do you work or go to school?", the defendant answered, "I don't know"; the defendant gave a similar response to an inquiry about his age. Respondent failed to advise the defendant of his right to

counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL. Respondent remanded the defendant to jail in lieu of $25,000 bail and set a return date for one week later, stating, "I will adjourn the case until next Friday and somehow we will figure out how old you are"; he also issued an Order of Protection.

15. On May 19, 2000, the defendant was returned to court from jail. There was no appearance by any prosecutor. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would impose a sentence of time served and a fine and would issue a final Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

16. Respondent said nothing about the right to counsel and assigned counsel before accepting the unrepresented defendant's guilty plea.

As to Charge IV of the Formal Written Complaint:

17. On April 7, 2000, respondent arraigned John F. Casey, who was charged with Trespass, Loitering, Open Container and Violation of an Order of Protection. After ascertaining that the defendant had not complied with the terms of an earlier sentence to a work order program, respondent told the defendant, "You need a lawyer on these matters. Given your gainful employment, if you can get a lawyer, hire one. And if you can, bring one in on Friday." The defendant, whom respondent described at the hearing as an alcoholic and a crack addict and a "semi-regular" in the court, was employed by his father's cleaning service and, on some previous occasions,

had been represented by the public defender.

18. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000; committed the defendant to jail in lieu of bail until April 14, 2000, without advising him of his right to counsel and assigned counsel; and failed to take affirmative action to effectuate the defendant's right to counsel, as required by Section 170.10 of the CPL.

19. On the return date, April 14, 2000, respondent contacted the jail and directed that the defendant not be returned to court that day. At 8:30 A.M., with no appearance by the defendant, a prosecutor or defense counsel, respondent stated on the record that Mr. Casey "is a plea and time served," entered convictions for the defendant on the charges and issued an order releasing the defendant from jail, notwithstanding that the defendant had not pled guilty and was never brought back before the court.

20. On the record of the proceeding, there is no appearance by the prosecutor or defense counsel, and there is no record that the defendant agreed to the plea.

As to Charge V of the Formal Written Complaint:

21. On June 14, 2000, respondent arraigned John F. Casey on new charges, Open Container and Failure To Appear. After noting the bench warrant based on the defendant's failure to appear a week earlier, respondent asked the defendant, "Do you work or go to school?" and the defendant answered, "I work"; respondent made no other inquiry about the defendant's financial or personal circumstances. Respondent set

bail of $500 and committed the defendant to jail in lieu of bail for five days. Respondent said nothing about the right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's right to counsel, as required by Section 170.10 of the CPL.

22. On the return date, June 19, 2000, respondent contacted the jail and directed them not to bring the defendant back to court. Respondent stated on the record, with no appearance by the defendant, a prosecutor or defense counsel: "The matter of People against John Casey was a plea and time served on an open container matter." Respondent entered a conviction for the defendant notwithstanding that the defendant had not appeared and had not pled guilty.

23. Later that day, Mr. Casey, who had been released from jail, came into court and asked what had happened to his case; respondent informed him that the case had been resolved.

24. On the record of the proceeding, there is no appearance by the prosecutor or defense counsel, and there is no record that the defendant agreed to the plea.

As to Charge VI of the Formal Written Complaint:

25. On April 29, 2000, respondent arraigned T'shad Clark, age 16, who was charged with a Trespass violation pursuant to the City of Troy TAP Program (*see* Finding 10, *supra*). The defendant had no criminal history. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set

unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000. There is no transcript of the arraignment.

26. On May 5, 2000, the defendant was returned to court from jail. The 16 year old defendant told respondent that he attended GED classes and was supported by his mother. Respondent coerced the defendant's guilty plea by telling him that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

27. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights, as required by Section 170.10 of the CPL.

As to Charge VII of the Formal Written Complaint:

28. On April 29, 2000, respondent arraigned Marquise Eason, age 19, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). There is no transcript of the arraignment.

29. Respondent set bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000.

30. On May 5, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled

guilty and was sentenced accordingly.

31. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge VIII of the Formal Written Complaint:

32. On July 7, 2000, respondent arraigned Kenneth Grant, who was charged with Unlawful Possession Of Marijuana. The defendant was one of five persons charged with possession of a single marijuana "cigar" in a motor vehicle (*see also* Charges IX, X and XII). There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana. Since a parole warrant had been filed against the defendant as a result of his arrest, the defendant would not have been released regardless of the bail set by respondent.

33. On July 10, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would sentence him to ten days and a fine and the defendant "would be out on Friday." Without the benefit of counsel, the defendant pled guilty.

34. Respondent sentenced the defendant to a fine of $300 (including a

$50 surcharge and $10 victim fee) and ten days in jail, notwithstanding that, pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a different sentence. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge IX of the Formal Written Complaint:

35. On July 7, 2000, respondent arraigned Marilyn Grant, who was charged with Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

36. On July 10, 2000, the defendant was returned to court from jail. No prosecutor was present. The defendant's attorney, Jill Kehn, Esq., told respondent that she had spoken with the district attorney, who had said that the defendant had no prior convictions and that respondent would offer an adjournment in contemplation of dismissal. Respondent asked the defendant if she had ever been arrested before, and the defendant said no. Respondent then said, "If she pleads to the charge, it will be a fine of $300 and a final Order of Protection to stay out of the area of the alleged incident." The

defendant pled guilty, and respondent imposed a sentence of time served plus a $300 fine and issued an Order of Protection.

37. Pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge X of the Formal Written Complaint:

38. On July 7, 2000, respondent arraigned Denise Lawrence, who was charged with Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

39. On July 10, 2000, the defendant was brought to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling her that if she pled guilty at that time, respondent would impose a sentence of time served and a fine and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty to the charge.

40. Respondent sentenced the defendant to a $300 fine, notwithstanding

that, pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge XI of the Formal Written Complaint:

41. On July 6, 2000, respondent arraigned Robert Mielenz, age 18, a lifelong resident of Troy, who was charged with Harassment after getting into an argument with the mother of his son and allegedly pushing her to the ground. Mr. Mielenz had appeared before respondent on two prior occasions, charged with Loitering and Jaywalking.

42. At the arraignment, respondent ascertained the defendant's age and asked, "Do you work or go to school?" and the defendant replied, "I just got a job, hopefully." After advising the defendant of the charge, respondent asked, "Are you getting a lawyer on these matters?" The defendant replied, "I didn't think I needed one. None of that is actually true." Respondent set bail of $25,000, remanded the defendant to jail in lieu of bail until July 10, 2000, and issued an Order of Protection for him to stay away from the complaining witness for six months. Respondent did not question the defendant about his financial resources or his prior record.

43. Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate his rights as required

by Section 170.10 of the CPL. Apart from respondent's question, "Are you getting a lawyer on these matters?" there was no discussion of the right to counsel or assigned counsel.

44. On July 10, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would impose a sentence of time served and a fine of $200 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly. Mr. Mielenz testified that he pled guilty because he "just wanted to go home," and that as a result of his incarceration, he lost the job he had obtained just prior to his arrest.

45. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge XII of the Formal Written Complaint:

46. On July 7, 2000, respondent arraigned Shawn Parris, who was charged with Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

47. On July 10, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling him that if he pled guilty at that time, respondent would sentence the defendant to ten days and a fine and he "would be out on Friday." Without the benefit of counsel, the defendant pled guilty.

48. Respondent sentenced the defendant to ten days in jail and a fine of $300, an excessive sentence under Section 221.05 of the Penal Law, and issued an Order of Protection. Pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine or a jail sentence. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge XIII of the Formal Written Complaint:

49. On February 13, 2000, respondent arraigned Shawn Potter of Troy, who was charged with three counts of Disorderly Conduct for allegedly making unreasonable noise, using obscene language and failing to leave the area when told to do so by a police officer. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $50,000 and committed the defendant to jail in lieu of bail until February 15, 2000. Respondent did not have any criminal history for the defendant and erroneously believed that the defendant was on felony probation at the time of arrest. There is no transcript of the

arraignment.

50. On February 14, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by plea by telling him that if he pled guilty to one count of Disorderly Conduct at that time, respondent would sentence him to six days in jail and a fine and would issue an Order of Protection, and the defendant "would be out" the next day. Without the benefit of counsel, the defendant pled guilty, and respondent sentenced him accordingly. Respondent issued an Order of Protection for the defendant to stay away from the location of his arrest for one year.

As to Charge XIV of the Formal Written Complaint:

51. On April 25, 2000, respondent arraigned Shawantay Thomas of Troy, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). The defendant had no criminal history. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent committed the defendant to jail in lieu of unreasonably high bail of $25,000 until May 2, 2000. There is no transcript of the arraignment.

52. On May 2, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling her that if she pled guilty at that time, respondent would impose a sentence of time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty, and respondent sentenced her accordingly.

As to Charge XV of the Formal Written Complaint:

53. On April 25, 2000, respondent arraigned Lashana Bobo, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent committed the defendant to jail in lieu of unreasonably high bail of $25,000 until May 2, 2000. The arrest report indicates that the defendant lived in Troy and was a nurse employed in Albany. There is no transcript of the arraignment.

54. On May 2, 2000, the defendant was returned to court from jail. The defendant was represented by an assistant public defender. The defendant pled guilty, and respondent sentenced her to time served and a fine of $95 and issued an Order of Protection directing her to stay away from the location of the arrest for one year.

As to Charge XVI of the Formal Written Complaint:

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

As to Charge XVII of the Formal Written Complaint:

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

As to Charge XVIII of the Formal Written Complaint:

57. On December 29, 1999, respondent arraigned Michael Ferguson, who was charged with False Personation, a misdemeanor, after allegedly giving a false name to police when stopped in connection with a burglary investigation. After

ascertaining that the defendant worked "off and on" doing hardwood floors, respondent informed the defendant of the charge and then asked, "Ever been arrested before?" The defendant replied, "Colonie, possession of marijuana. And that's about it." Respondent asked the defendant, "Are you getting a lawyer on these matters?" and the defendant responded, "I doubt it." Respondent then stated:

> It's a misdemeanor. So, you do need one. I will set a bail at a thousand dollars. I will adjourn the case until January 6. If you can get a lawyer, do just that. And if you can't, raise the issue of counsel on the 6th.

Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate those rights as required by Section 170.10 of the CPL. Respondent committed the defendant to jail in lieu of $1,000 bail until January 6, 2000.

58. On January 6, 2000, the defendant was returned to court from jail, and although an assistant public defender was present, respondent told the attorney that he was not in the case yet. Respondent asked the defendant if he worked full time, and the defendant said he did, "under the table, though." Respondent asked, "Are you getting a lawyer?" and the defendant answered, "I don't know. I don't believe I can afford one." Respondent said that he would assign a public defender and had the defendant fill out an affidavit for eligibility for the public defender.

59. Respondent recommitted the defendant to jail until January 13, 2000, when the defendant pled guilty to the charge. Respondent sentenced him to time served and a fine of $90 and issued an Order of Protection for the defendant to stay away from

the location of the arrest for three years.

As to Charge XIX of the Formal Written Complaint:

60. On May 25, 2000, respondent arraigned Robert Fogarty, who was charged with Criminal Sale Of Marijuana, a misdemeanor. The defendant, who was on parole, had appeared in court pursuant to an appearance ticket. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $50,000 and committed the defendant to jail in lieu of bail until June 1, 2000. Probation later found the defendant ineligible for pretrial release. On June 1, 2000, the defendant pled guilty, and respondent sentenced him to 90 days in jail and a fine of $200 and issued an Order of Protection.

As to Charge XX of the Formal Written Complaint:

61. Keith Fox and his wife Mae have lived in Troy for several years; he was the foreman at a local construction company. On the night of February 26, 2000, a Saturday, Mr. Fox was arrested for Disorderly Conduct outside his apartment building after getting into an argument with his sister-in-law.

62. The police took the defendant to the police station. The defendant's wallet, which contained over $800 in cash, was taken from him by an officer.

63. Respondent came to the police station and signed an order committing the defendant to the Rensselaer County Jail in lieu of $20,000 bail, with a return date of March 3, 2000. There is no transcript of an arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL,

respondent set unreasonably high bail of $20,000.

64. After being taken to the jail, the defendant called his wife and asked her to go to the police station to get the cash he had had when he was arrested. Ms. Fox went to the jail, where she was issued an appearance ticket on a charge of Disorderly Conduct in connection with the events on the night of her husband's arrest. On Monday, February 28, 2000, when she appeared before respondent pursuant to the appearance ticket, Ms. Fox told respondent that her husband was still in jail, was not on probation or parole and had no criminal record, and respondent agreed to release Mr. Fox on his own recognizance.

65. On March 3, 2000, Mr. Fox appeared before respondent with a law intern from the public defender's office and pled guilty to an outstanding Open Container charge. Respondent sentenced him to a fine of $30. On March 10, 2000, the Disorderly Conduct charge was adjourned in contemplation of dismissal.

As to Charge XXI of the Formal Written Complaint:

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

As to Charge XXII of the Formal Written Complaint:

67. On May 10, 2001, respondent arraigned Michael Francis, who was charged with an Imitation Controlled Substance, a misdemeanor. After respondent ascertained that the defendant lived in Albany and worked at the Albany Greyhound Bus terminal, that his family was in Troy and that he had been arrested previously, respondent asked him, "Are you getting a lawyer?" and the defendant replied, "I haven't even had a

chance to make a phone call yet." Respondent advised the defendant of the charge, said that he was entering a plea of not guilty, issued a preliminary Order of Protection and set bail at $10,000. Respondent told the defendant, "If you can get a lawyer, bring one in next Thursday and we will go from there." Respondent committed the defendant to jail in lieu of bail until May 17, 2001.

68. Respondent did not inform the defendant of the right to counsel and assigned counsel and failed to take affirmative action to effectuate those rights as required by Section 170.10 of the CPL.

69. When the defendant was returned to court from jail on May 17, 2001, respondent asked him, "Have you spoke to an attorney?" The defendant said he had not, and the following ensured:

THE COURT:	Do you intend to get an attorney?
THE DEFENDANT:	I can't afford an attorney.
THE COURT:	Do you wish to apply for the Public Defender?
THE DEFENDANT:	Really, no.
THE COURT:	Do you want a week to file discovery demands?
THE DEFENDANT:	I don't really know what to do. I was here last time with a Public Defender for two months and he didn't do nothing for me.

Respondent said that he was adjourning the case for another week and told the defendant, "If you want to apply for the Public Defender, you can. If you don't wish to, you don't

have to." Respondent recommitted the defendant to jail in lieu of bail.

70. On May 24, 2001, when the defendant was returned to court from jail, respondent again asked the defendant whether he had spoken to an attorney:

THE DEFENDANT:	No. I was supposed to get an attorney today from the court.
THE COURT:	No. You were getting your own attorney.
THE DEFENDANT:	No.
THE COURT:	Do you wish to apply for the Public Defender?
THE DEFENDANT:	That's what you told me last week. You were going to appoint me an attorney this week.
THE COURT:	I don't think I had that indication. Have you filled out an application for the Public Defender?
THE DEFENDANT:	No.
THE COURT:	I will give you a form to fill out. We will evaluate it. I will adjourn the case until next Thursday.
THE DEFENDANT:	Next Thursday? Another week? You told me that last week.
THE COURT:	It could be months before we resolve this. It could be up to a year. So, fill out the form real quick and we will take a look at it.
THE DEFENDANT:	Is there any way I can speak to an attorney today, though?
THE COURT:	Probably not, no.

Respondent committed the defendant to jail for another week in lieu of bail.

71. At the defendant's fourth appearance in court on May 31, 2001, he appeared with an assistant public defender and stated that he had lost his job. Respondent refused to release the defendant on the attorney's request and offered a plea to the charge and 90 days in jail, which the defendant refused. Respondent adjourned the case until June 14, 2001, and again committed the defendant to jail in lieu of bail.

72. On June 14, 2001, after the defendant had spent over a month in jail, he was returned to court and appeared with another assistant public defender. Noting that the defendant had a "lengthy history," respondent offered a sentence of 60 days, which the defendant accepted. The defendant pled guilty, and respondent sentenced him to 60 days and a fine of $200 and issued a three-year Order of Protection to stay away from the location of his arrest.

73. Respondent failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

As to Charge XXIII of the Formal Written Complaint:

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

As to Charge XXIV of the Formal Written Complaint:

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

As to Charge XXV of the Formal Written Complaint:

76. On April 27, 2000, respondent arraigned Michelle Gillihan, who was

charged with the misdemeanor of Loitering, three Vehicle and Traffic violations, and Driving With A Suspended License, an unclassified misdemeanor. Ms. Gillihan had no criminal record and lived in Troy. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 4, 2000. He also issued an Order of Protection for the defendant to stay away from the location of the arrest. There is no transcript of the arraignment. The next day, the defendant was bailed out by a bail bondsman at a cost of approximately $2,500.

77. On May 4, 2000, when the defendant returned to court, she said that she had not yet met with her assigned lawyer, and respondent adjourned the matter. Thereafter, the defendant and/or her attorney made numerous court appearances before respondent adjourned the charges in contemplation of dismissal in March 2001.

As to Charge XXVI of the Formal Written Complaint:

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

As to Charge XXVII of the Formal Written Complaint:

79. On January 3, 2000, respondent arraigned Robert Guynup, who was charged with Harassment and Criminal Contempt for allegedly throwing a magazine at his girlfriend. After ascertaining that the defendant worked full-time at Central Service Center in Albany and lived with his girlfriend, respondent advised him of the charge and asked, "Are you getting a lawyer on these matters?" The defendant said, "Yes, sir."

80. Without due consideration of the factors of pretrial release set forth

in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail for one week.

81. On January 5, 2000, the probation department recommended that the defendant be released due to a good employment history, ties to the community, and no previous criminal history. Respondent released the defendant on January 10, 2000, when he appeared with his retained attorney. Ultimately, the defendant pled guilty to the Contempt charge, and respondent sentenced him to probation and issued a final Order of Protection.

As to Charge XXVIII of the Formal Written Complaint:

82. On April 30, 2000, respondent arraigned David Junco, who was charged with Theft Of Services for allegedly failing to pay a $25 cab fare. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $30,000 and committed the defendant to jail in lieu of bail until the next day, when he was released. There is no transcript of the arraignment.

83. Subsequently, the defendant was arrested on a Disorderly Conduct charge, and he pled guilty to two counts of Disorderly Conduct in satisfaction of both charges. Respondent sentenced him to fines totaling $190.

As to Charge XXIX of the Formal Written Complaint:

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

As to Charge XXX of the Formal Written Complaint:

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

As to Charge XXXI of the Formal Written Complaint:

86. On August 17, 2001, respondent arraigned Daniel Lewis, who was charged with the violations of Unlawfully Dealing With Fireworks and Uninspected Motor Vehicle. After noting that the defendant was on probation and advising him of the charges, respondent told the defendant, "[Y]ou need a lawyer on these matters.... How much time do you need to be back here with a lawyer?" Respondent failed to advise the defendant of his right to assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL. Respondent released the defendant on his own recognizance.

87. When the defendant appeared on the adjourned date, September 18, 2001, respondent asked him, "Have you had the opportunity to speak to an attorney?" and the defendant replied, "No. I called the Public Defender yesterday and they told me just to come in and fill out some paperwork. And then I asked one of the police officers here and they said to come up to the desk." As the defendant repeatedly requested assigned counsel, respondent, after ascertaining that the defendant was employed, repeatedly told him that he needed to hire an attorney:

THE COURT:	Why don't you hire an attorney?
THE DEFENDANT:	I was just going to go with the Public Defender.

THE COURT:	Do you have any minor children?
THE DEFENDANT:	I'm sorry.
THE COURT:	Do you have any children?
THE DEFENDANT:	No.
THE COURT:	You need to hire your own lawyer, wouldn't you?
THE DEFENDANT:	I can't go with the Public Defender?
THE COURT:	Well, how would that -- I mean, if you were indigent, yes, absolutely, but you don't appear to be indigent, meaning lacking money or employment, right?
THE DEFENDANT:	Right.
THE COURT:	So, you need to work and save. Hire a lawyer and bring one in next Tuesday. If it's ultimately impossible to do, we will certainly address that. You are not suggesting you can't do that.
THE DEFENDANT:	I live on my own.
THE COURT:	Okay. Make a good faith effort and we will certainly address the issue as it comes up, but you need to make an attempt to get a lawyer and bring one in if you can. And if you can't, raise that issue next Thursday.

88. When he appeared the following week, the defendant again asked for assigned counsel, and respondent admonished him that he needed "to save" and that

"This would be a bill that would go to the top of the stack":

THE COURT:	Have you spoke to an attorney on these new matters?
THE DEFENDANT:	I spoke to my assigned counselor and he said to come down here and get a public defender.
THE COURT:	You are still working full-time?
THE DEFENDANT:	I can't afford one, Your Honor.
THE COURT:	How much have you saved?
THE DEFENDANT:	I'm sorry.
THE COURT:	How much have you saved?
THE DEFENDANT:	I don't really save.
THE COURT:	That's the problem.
THE DEFENDANT:	Yeah.
THE COURT:	If you did, you would be able to afford an attorney. Do you support any minor children?
THE DEFENDANT:	No. I got insurance, heat bill, rent.
THE COURT:	I wouldn't worry about any of those bills. You need to try to get a lawyer. And I'm going to go until next Tuesday for you to try to get a lawyer.
THE DEFENDANT:	If the Public Defender's office says I'm fit for it--
THE COURT:	They can say whatever they want, I suppose. October 2.

THE DEFENDANT:	If I'm eligible, I can get one?
THE COURT:	I don't know who is telling you you are or what the basis for that is.
THE DEFENDANT:	Uh-huh.
THE COURT:	I just don't know. You need to save money, you need to get a lawyer, and you need to be back here next Tuesday.
THE DEFENDANT:	If they do say I can have one --
THE COURT:	It is of no relevance to me what an assigned lawyer in another county -- how he or she evaluates your financial situation.
THE DEFENDANT:	Do you evaluate it yourself?
THE COURT:	Try to get a lawyer and be here next Tuesday. You have just indicated you pay tons of other bills. This would be a bill that would go to the top of the stack. All right?
THE DEFENDANT:	All right.

89. When the defendant did not appear the next week, respondent issued a warrant. Finally, on October 30, 2001, after the defendant told respondent that he had been laid off, respondent gave him a financial affidavit to apply for the public defender. On November 13, 2001, the defendant appeared with an assistant public defender, and the charges were adjourned in contemplation of dismissal.

As to Charge XXXII of the Formal Written Complaint:

90. On May 12, 2000, respondent arraigned Gabriel Lewis, who was charged with Loitering, a misdemeanor. After determining that the defendant was on probation for a drug felony, respondent entered a plea of not guilty for the defendant, announced that he was issuing an Order of Protection and assigned the public defender. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 19, 2000. Respondent made no inquiry of the defendant other than to determine that he was on probation. Respondent believed that the defendant was probably unemployed since there was no entry under "occupation" on the arrest report.

91. On June 16, 2000, the defendant pled guilty to the charge, and respondent sentenced him to 90 days in jail and $200 in court costs.

As to Charge XXXIII of the Formal Written Complaint:

92. On November 14, 2001, respondent arraigned Tice McGee, who was charged with a violation of Harassment 2nd Degree after an argument with his girlfriend's mother. Respondent released the defendant on his own recognizance. There is no transcript of the arraignment. At a court appearance two days later, respondent ascertained that the defendant worked at All Metro Health and asked, "Have you had the opportunity to speak to a lawyer?" The defendant responded, "No, I haven't." Respondent told the defendant, "Given the level of the charge -- it is a violation -- it's up

to you as to whether or not you intend to seek the advice of counsel or retain an attorney," and he adjourned the case to December 7, 2001.

93. On the return date, on the recommendation of the district attorney's office, respondent imposed an adjournment in contemplation of dismissal and issued an Order of Protection for one year. Respondent never raised the issue of assigned counsel with the unrepresented defendant and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

94. Respondent testified that the defendant, who worked full-time as a nurse's aide, did not qualify for the public defender because he was "gainfully employed." Respondent also testified that he does not advise defendants of the right to assigned counsel if they are not "exposed" to jail time.

As to Charge XXXIV of the Formal Written Complaint:

95. On April 27, 2000, respondent arraigned Mark Monge, who was charged with Loitering, a misdemeanor. The defendant lived in Troy, and the arrest report indicated that he was a bricklayer. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail for one week. There is no transcript of the arraignment.

96. On the return date, respondent recommitted the defendant for another two weeks. On May 15, 2000, the probation department recommended that the defendant be released under their supervision because he was not a flight risk.

97. On May 18, 2000, the defendant appeared with his attorney, and respondent proposed a plea with a sentence of 90 days in jail. The defendant's attorney asked the court to consider something less than the maximum time. The defendant stated that he had just started a new job and had a baby on the way, and he asked if there was any way he could do weekends so that he could get back to work. Respondent replied, "Weekends are a disaster for everyone." Ultimately, the defendant pled guilty, and respondent sentenced him to 60 days in jail and a final Order of Protection for him to stay away from the location of the arrest.

As to Charge XXXV of the Formal Written Complaint:

98. On August 4, 2000, respondent arraigned Scott Morgan of Troy, who was charged with Petit Larceny, a misdemeanor. The defendant said that he had worked at Skyway Roofing but had just quit his job. Respondent told the defendant, "If you can get a lawyer, bring one in next Friday. If you can't, we will assign a lawyer to represent you." Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

99. Respondent set bail of $25,000 and committed the defendant to jail in lieu of bail for a week.

100. Probation found the defendant ineligible for pretrial release. An 18B attorney was assigned, and on August 11, 2000, the defendant appeared with counsel. In September, the director of the TASC substance abuse treatment program wrote to

respondent requesting that the defendant be released so that a County Court could send him to a treatment program. On October 6, 2000, after being incarcerated for two months, the defendant pled guilty, and respondent sentenced him to five months in jail and a $200 fine. There is no appearance on the record by defense counsel or a prosecutor.

As to Charge XXXVI of the Formal Written Complaint:

101. On April 27, 2000, respondent arraigned Richard Myers, Jr., of Troy, who was charged with Imitation Controlled Substance, an unclassified misdemeanor. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000, committed the defendant to jail in lieu of bail until May 2, 2000, and issued an Order of Protection for the defendant to stay away for six months from the area where he had been arrested. There is no transcript of the arraignment.

102. On May 2, 2000, respondent recommitted the defendant to jail for another week. On the return date, the defendant, appearing with the public defender, pled guilty and was sentenced to 30 days in jail and $90 in court costs, and respondent issued a final Order of Protection.

As to Charge XXXVII of the Formal Written Complaint:

103. The charge was not sustained and is therefore dismissed.

As to Charge XXXVIII of the Formal Written Complaint:

104. On April 8, 2000, respondent arraigned Earnest Pinsonneault, who was charged with two counts of Harassment, a violation. Respondent committed the defendant to jail in lieu of bail of $1,500 and issued an Order of Protection for the defendant to stay away from the two complaining witnesses. There is no transcript of the arraignment.

105. The defendant was released from jail after a bail bond was posted. When the defendant appeared on April 10, 2000, he asked if he needed an attorney, and respondent told him, "If you need one, you can hire one":

THE COURT:	Where do you work?
THE DEFENDANT:	Carter's Machinery, Watervliet, Elm Street.
THE COURT:	Are you on probation or parole?
THE DEFENDANT:	No.
THE COURT:	Sir, these charges are violations. I will enter pleas of not guilty. I will tell you that if you plead guilty, I will impose fines of $95 on each and issue limited final orders of protection, which means you could be in their company, but there can't be any trouble. And if there is, it would make things a lot more serious in the future.
THE DEFENDANT:	Well, I had him removed from my home and she still lives with me. We are still together.
THE COURT:	Is that proposal acceptable?

THE DEFENDANT: Yeah. We get along. They got me bailed out.

THE COURT: How do you then plea to both harassment charges?

THE DEFENDANT: I don't feel that I'm guilty.

THE COURT: Okay.

THE DEFENDANT: I mean, it was my home. I got grabbed by the neck and everything. All I did was defend myself and pushed him away.

THE COURT: How old is he?

THE DEFENDANT: 23 years old.

THE COURT: Do you want to settle this matter up for trial in a few weeks? Given the level of the charge, there is not much to do with it. Be back here on May 8 at 9 o'clock. Let me give you a slip as a reminder.

THE DEFENDANT: Do I need an attorney?

THE COURT: If you want one, you can hire one.

THE DEFENDANT: I don't have the money to hire one.

THE COURT: You will get it. You are working. It will be up to you. If you want to get a lawyer, you can get one. And if you don't want to, given the level of the charge, you don't have to. It is up to you.

THE DEFENDANT: Okay. Thanks.

THE COURT: Here is a slip that reminds you to be here on May 8.

106. On May 8, 2000, the date scheduled for trial, the unrepresented defendant appeared, and respondent asked him if he wanted his trial that morning; the defendant said "yes." Respondent asked the defendant to "give us a few minutes" to see if the district attorney was ready to proceed; the defendant asked to use the bathroom and respondent said, "Sure. We won't do anything without you." Respondent discussed the case with the assistant district attorney, who said that she was "inclined to let him plea to one count of harassment"; thereafter, respondent advised the defendant that if he pled guilty, respondent would impose a fine of $95 and would issue a final Order of Protection. The defendant said that respondent's proposal was "Acceptable," then during the colloquy he repeated that he "didn't harass anyone":

THE COURT:	Are you aware that there is a preliminary Order of Protection in effect now; correct?
THE DEFENDANT:	I guess. I'm not sure.
THE COURT:	Now, is that proposal acceptable or unacceptable?
THE DEFENDANT:	Acceptable.
THE COURT:	I ask you, then, is it a fact on April 7 of this year, 2250 p.m., at 1002 2nd Avenue here in the City of Troy, did you at that date, place and time harass James Sweeney?
THE DEFENDANT:	No.
THE COURT:	Did you have an argument with him?

THE DEFENDANT: There was words. There was a lot of drinking that night.

THE COURT: Do you acknowledge in the course of whatever was going on that you harassed him?

THE DEFENDANT: I did not harass him. No, I didn't. He was harassed --

THE COURT: Who is he in relation to you?

THE DEFENDANT: My girlfriend's son.

THE COURT: How old is he?

THE DEFENDANT: 25.

THE COURT: 25?

THE DEFENDANT: 25, 26.

THE COURT: Then who did you harass that night?

THE DEFENDANT: I didn't harass anybody. It was a lot of argument. He was drinking and I got taken out of my house. It is my house and my girlfriend lives there with me. He was staying there temporarily and he didn't have a place to live.

THE COURT: Okay. And there is one involving her, too?

MS. MERKLEN: Right.

THE COURT: In the course of this evening of festivities did you have a discussion with a Donna Butler and during the course of that

	discussion, and at least as you have described the drinking that had been going on, did you harass her?
THE DEFENDANT:	We both yelled at each other.
THE COURT:	And do you admit during the course of that you harassed her, for the purpose of this resolution?
THE DEFENDANT:	Yes.
THE COURT:	On the admission how do you plea to the one count of harassment involving a Donna Butler?
THE DEFENDANT:	Guilty.
THE COURT:	I will accept the plea of guilty. Can the fine of $95 be paid by September 1? You have June, July and August.
THE DEFENDANT:	September 1? Sure.

107. Respondent did not advise the defendant of the right to counsel and assigned counsel before accepting the defendant's guilty plea, never explored the issue of assigned counsel with the defendant, and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

108. Respondent testified that he attempted to assign the public defender at arraignment but determined on April 10 that the defendant was ineligible; he adjourned the case for a month to give the defendant the "opportunity" to figure out if he could hire a lawyer. Respondent testified that he did not believe he had a "technical obligation" to revisit the issue of counsel prior to accepting the defendant's guilty plea.

As to Charge XXXIX of the Formal Written Complaint:

109. On March 9, 2000, respondent arraigned Sean Quackenbush, who was charged with Disorderly Conduct, a violation, and Resisting Arrest, a misdemeanor. After ascertaining that the defendant was not on probation or parole and was self-employed as a carpenter, respondent asked him, "Are you getting a lawyer?" and the defendant replied, "No." Respondent told the defendant, "If you can get a lawyer, I would, because you need one." Respondent failed to properly advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

110. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail for one week. Later that day, a bail bond was posted and the defendant was released.

111. On March 10, 2000, respondent signed an Application for Assignment of Public Defender and/or Assigned Counsel. On March 30, 2000, the defendant appeared in court with retained counsel and pled guilty to Disorderly Conduct in satisfaction of both charges. Respondent imposed a fine of $95 and issued a final Order of Protection for the defendant to stay away from the location of the arrest for one year.

As to Charge XL of the Formal Written Complaint:

112. Adam Russell, a senior program analyst for the state Department of

Labor, has resided in the Capital District his entire life. In the summer of 2000, he was living at a friend's apartment in Troy while a student at Springfield College and was working at two jobs: at All Sports Pub in Troy and Domino's Pizza in Albany. He had no criminal record.

113. On the night of August 4, 2000, Mr. Russell left All Sports Pub with a friend and headed home; when the two men stopped at a market to pick up sandwiches, Mr. Russell's friend got into an argument with some people, one of whom left and returned shortly with a group of men who "jumped" Mr. Russell and his friend. Mr. Russell was beaten with a baseball bat, which caused lacerations on his head and chest. When the police arrived, an officer told Mr. Russell to leave the scene, but as he started to leave, another officer told him to sit down on the sidewalk. When the first officer noticed him sitting on the sidewalk, the officer arrested him for Loitering after being told to leave the area.

114. The defendant was taken to the police station, where he was held until the next morning, when he and other defendants were transported to the court for arraignment.

115. At the arraignment, respondent ascertained that the defendant attended college, had two jobs and had never been arrested before. Respondent then asked him, "Are you getting a lawyer on these matters?" and the defendant responded, "If needed." Respondent adjourned the case for a week and told the defendant, "And, again, you need to be here next Friday with a lawyer." Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative

action to effectuate the defendants' rights as required by Section 170.10 of the CPL.

116. Respondent stated that he determined that the defendant was not eligible for assigned counsel since he attended college and had two jobs. That determination was not based on any meaningful inquiry into the defendant's ability to afford counsel, as required by statute.

117. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until August 11, 2000.

118. Respondent issued a preliminary Order of Protection, which required the defendant to stay away from the location of his arrest for six months. This was difficult, since the defendant lived only a block away from that location.

119. The defendant had been cooperative during his arrest and was cooperative and polite at the arraignment.

120. The defendant remained in jail for 14 hours until his bail was posted through a bail bondsman, who had been paid $1,000 by Mr. Russell's employer.

121. The defendant retained an attorney. On August 11, 2000, the Loitering charge was adjourned in contemplation of dismissal.

As to Charge XLI of the Formal Written Complaint:

122. On January 7, 2000, respondent arraigned Wayne Skaarup of Troy, who had been arrested on a bench warrant for Aggravated Unlicensed Operation and, after marijuana was found, was also charged with Unlawful Possession Of Marijuana.

The defendant's probation officer had written a note indicating that the defendant would be violated for failure to report. After the defendant told respondent that he was employed at Quad Graphics in Saratoga, respondent asked, "Are you getting a lawyer?" and the defendant replied, "I would like to try, yes." Respondent set bail of $25,000, remanded the defendant to jail in lieu of bail and adjourned the case for a week, telling the defendant, "You need to see a lawyer, you need to bring a lawyer back next Friday."

123. On the return date, respondent adjourned the case to the following week and issued another commitment order to hold the defendant in jail.

124. On January 21, 2000, the defendant appeared with retained counsel, who requested an adjournment because the defendant was attempting to resolve traffic charges that were pending in other courts. On February 4, 2000, the defendant pled guilty to the Aggravated Unlicensed Operation charge, and respondent imposed a fine of $225 and dismissed the marijuana charge.

125. Respondent never properly advised the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge XLII of the Formal Written Complaint:

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

As to Charges XLIII and XLIV of the Formal Written Complaint:

127. On April 25, 2000, respondent arraigned Kamika Thomas, who was charged with a violation of Trespass under the City of Troy TAP Program (*see* Finding

10 above) and with Bicycle On The Sidewalk, a violation of the Troy City Ordinance. According to the arrest report, the 19 year old defendant lived in Troy and was a babysitter. There is no transcript of the arraignment.

128. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000, committed the defendant to jail in lieu of bail until May 2, 2000, and issued a preliminary Order of Protection for the defendant to stay away from the location of the arrest.

129. On April 27, 2000, the probation department recommended that the defendant be released because she had no criminal record, worked part time and lived with her sister. On April 28, 2000, another judge ordered her release.

130. On April 29, 2000, Ms. Thomas was arrested again for Trespass on the basis of another TAP "owner affidavit." Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000. Respondent issued an Order of Protection for the defendant to stay away from the location of the arrest. There is no transcript of the arraignment.

131. On May 5, 2000, the defendant returned to court. There was no appearance by a prosecutor or defense counsel. Respondent advised the defendant that if she pled guilty, he would sentence her to time served and a fine of $95 and would issue a final Order of Protection directing her to stay away from the location of her arrest for one year. The defendant pled guilty and was sentenced accordingly.

132. Prior to accepting the defendant's guilty plea, respondent said

nothing about the right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

133. Court records indicate that the defendant pled guilty to the first Trespass charge on May 2, 2000, and that the bicycle charge was dismissed.

As to Charge XLV of the Formal Written Complaint:

134. After Jose Velez failed to appear pursuant to an appearance ticket issued for Unlawful Possession Of Marijuana, respondent issued a bench warrant. The arrest report indicates that the 18 year-old defendant, who had a Brooklyn address, "may have something pending in NYC." On May 24, 2000, respondent arraigned the defendant. The defendant said that he went to school; when respondent asked why he had not appeared as required in February, the defendant replied that he had been away because his grandfather had died, that he had returned on Wednesday, and that he had been picked up when his friend was stopped for driving without a license. Respondent asked the defendant how he supported himself, and the defendant replied that his friend bought him "food and stuff." Respondent then said that he would enter a plea of not guilty and assign counsel. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 26, 2000.

135. On that date, the defendant was returned to court from jail. Respondent told the defendant, who was represented by an assistant public defender, that if he pled guilty to the charge, respondent would sentence him to time served and a fine

of $150 and would issue an Order of Protection for him to stay away from the location of his arrest. The defendant pled guilty, and respondent sentenced him accordingly.

136. Respondent testified that he did not allow the defendant to plead guilty to the marijuana charge at the arraignment because "it doesn't look right."

As to Charge XLVI of the Formal Written Complaint:

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

As to Charge XLVII of the Formal Written Complaint:

138. On February 4, 2000, respondent arraigned Carl Wallace of Troy, who was charged with Imitation Controlled Substance, a misdemeanor. After the defendant said that he worked in a barber shop and had never been arrested before, respondent advised him of the charge and asked, "Are you getting a lawyer on these matters?" and the defendant replied, "Yeah, I guess so." Respondent said, "Your own or do you wish to have one assigned?" The defendant said, "Wish to have one assigned," and respondent said he would assign the public defender.

139. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until February 10, 2000. On that date, there were no appearances, but respondent noted on the record: "Carl Wallace. Plea and 90 days and a week to decide on the offer"; the defendant remained committed to jail.

140. On February 14, 2000, probation recommended that the defendant be released to Honor Court for drug treatment, and by letter of the same date, the Honor

Court made the same recommendation. Respondent did not release the defendant; when the defendant returned to court with the public defender on February 17, 2000, respondent advised the defendant that if he pled guilty, respondent would sentence him to 90 days and $90 court costs and would issue an Order of Protection. The defendant said, "90 days?" Respondent said he would adjourn the matter for a week. Later that day, the defendant pled guilty, and respondent sentenced him to 90 days in jail and $90 in court costs and issued a final Order of Protection for him to stay away from the location of the arrest for three years.

As to Charge XLVIII of the Formal Written Complaint:

141. On July 11, 2000, respondent arraigned James Williams, Jr., who was charged with Petit Larceny, a misdemeanor, and Open Container, a violation. According to the arrest report, the defendant worked as a cook. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until July 18, 2000. There is no transcript of the arraignment.

142. On the return date, the defendant returned to court, represented by the public defender, and pled guilty to the Petit Larceny charge. Respondent sentenced the defendant to six months in jail and a fine of $200 and issued a final Order of Protection for the defendant to stay out of the store where he was arrested for three years.

As to Charge XLIX of the Formal Written Complaint:

143. On February 4, 2000, respondent arraigned Leroy Williams of Troy,

who was charged with Imitation Controlled Substance, a misdemeanor, after allegedly attempting to sell the substance to an undercover police officer. The defendant stated that he was not on probation or parole and that he worked full-time; the arrest report indicated that he was a carpenter. Respondent asked the defendant, "Are you getting a lawyer?" and the defendant replied, "Child support got my money." Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until February 10, 2000. Respondent assigned the public defender.

144. On the return date, respondent adjourned the matter to the following week for an "offer conference" and stated that the "court position on that is 60 days."

145. On February 17, 2000, the defendant appeared with the public defender. Respondent told the defendant that the proposal was a plea of guilty with 60 days in jail, and the defendant asked if he could serve weekends so that he did not lose his job. Respondent said, "See, I don't do weekends because it never works out," and the defendant said, "It will work out with me, sir." Respondent said, "No, because people make you smuggle drugs in the jail"; the defendant said, "Never," and respondent said:

> Always. Weekends are a disaster for everybody and people don't do them. They do a couple and don't do the rest and it creates all sorts of security problems at the jail and hassles for everybody else.

Later that day, after 13 days in jail, the defendant pled guilty to the charge, and respondent sentenced him to 60 days in jail and $90 in court costs and issued a final Order of Protection for the defendant to stay out of the area of the arrest for three years.

146. Respondent testified that he did not know the defendant's criminal history, but the defendant "was known to the court on some level." Respondent stated, "[I]t's not always one hundred percent clear on the record as to how I come up with a bail figure on arraignment."

As to Charge L of the Formal Written Complaint:

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

As to Charge LI of the Formal Written Complaint:

148. As demonstrated by the conduct set forth above, respondent engaged in a pattern of disregarding basic, fundamental rights of defendants.

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)(1), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Respondent's misconduct is established, and the following charges of the Superseding Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions: I through XV, XVIII through XX, XXII, XXV, XXVII, XXVIII, XXXI through XXXVI, XXXVIII through XLI, XLIII through XLV, XLVII through XLIX and LI. Charges XVI, XVII, XXI, XXIII, XXIV, XXVI, XXIX, XXX, XXXVII, XLII, XLVI and L are not sustained and are therefore dismissed.

The record establishes that over a two-year period, respondent engaged in a pattern of serious misconduct that repeatedly deprived defendants of their liberty without according them fundamental rights. Respondent ignored well-established law requiring judges to advise defendants of the right to counsel and to take affirmative action to effectuate that right. In numerous cases he set exorbitant, punitive bail for defendants charged with misdemeanors and violations, even where incarceration was not an authorized sentence. He coerced guilty pleas from incarcerated, unrepresented defendants who, if they refused to accept respondent's plea offer, faced continued incarceration because of the unreasonably high bail he had set. He imposed illegal sentences in four marijuana cases, and on two separate occasions he convicted an incarcerated defendant in the defendant's absence by announcing that the case was "a plea and time served," although the defendant had not pled guilty. Respondent's failure to recognize the impropriety of his procedures compounds his misconduct and suggests that defendants in his court will continue to be at great risk. Viewed in its totality, respondent's conduct demonstrates a sustained pattern of indifference to the rights of defendants and establishes that his future retention in office "is inconsistent with the fair and proper administration of justice." *Matter of Reeves*, 63 NY2d 105, 111 (1984).

The transcripts of arraignments conducted by respondent depict proceedings that bear scant resemblance to the procedures required by law. At arraignment, a judge is obliged to advise every defendant of the right to counsel and, except for traffic infractions, the right to have an attorney assigned by the court if he or she is "financially unable to obtain the same"; in addition, the judge must "take such

affirmative action as is necessary to effectuate" those rights (CPL §170.10). We agree with the referee's finding that, despite respondent's familiarity with this critically important statute, respondent "did not fulfill his obligations under the statute either at the time of the arraignment or at subsequent court appearances" (Rep. 4) and committed numerous defendants to jail in lieu of bail without affording them this fundamental right.[1]

In case after case, respondent ignored the statutory requirements, often commencing by asking the defendant, "Are you getting a lawyer on these matters?" without advising the defendants their rights. In many cases, from the arraignment through a plea of guilty days or weeks later, there was no mention whatsoever of the right to counsel at each and every stage of the proceeding and often no reference to the possibility of assigned counsel. Respondent effectively shifted the burden to defendants to inquire about assigned counsel, although often, even when defendants did so, respondent directed them to first make an effort to hire an attorney prior to the next scheduled court appearance; in the meantime, the defendants were often remanded to jail for several days or up to one week. At the hearing, respondent testified that he is "inclined to give people an appropriate opportunity to retain their own counsel, if they have an ability to do that"; he added, "Everyone, virtually everyone, says they can't afford an attorney..." and asserted that "it doesn't take much employment to retain one's

[1] We are unpersuaded by respondent's testimony that in cases where there are no transcripts of the arraignments, he properly advised defendants of their rights. The available transcripts -- which respondent similarly defends -- consistently demonstrate the impropriety of his procedures at arraignment. Moreover, in a number of cases, transcripts of the defendants' subsequent court appearances clearly establish violations of the right to counsel.

own attorney...as opposed to saddling the county with the expense...." Respondent's conduct, and his explanation for his actions, show a profound misunderstanding of a fundamental principle of law that goes to the heart of a fair proceeding.

To be sure, not every defendant who requests assigned counsel may be deemed financially eligible, but that determination cannot be made without a full evaluation of the defendant's personal circumstances, a procedure that respondent often ignored or postponed until the defendant had been incarcerated for days or even weeks. Respondent's explanation about giving defendants an "opportunity" to retain counsel in order to avoid "saddling the county with the expense" suggests that he placed his personal views above the law he is sworn to administer, and his practice in that regard is contrary to both the letter and the spirit of the statutory requirements. When defendants facing incarceration indicated that they had low-wage jobs, or worked part-time, or asserted that they could not afford to hire an attorney, or pleaded to have an attorney assigned, the circumstances cried out for affording them a prompt opportunity to apply for assigned counsel, whereby a formal assessment of their eligibility could be made. Instead, respondent repeatedly told defendants to "come back with a lawyer" or that it was "up to you" whether to get a lawyer, without advising them of the right to assigned counsel if they could not afford one or giving them an opportunity to apply for assigned counsel.

Respondent's omissions in this regard are an inexcusable lapse, regardless of whether, as he asserted at the hearing, some defendants knew their rights from previous court experiences, or were too intoxicated to understand the advice, or indicated

that they would attempt to hire an attorney without being told of the right to assigned counsel. It is noteworthy that some defendants who initially indicated that they would try to get a lawyer were unrepresented when they returned to court, yet respondent never revisited the right to counsel and the possibility of assigned counsel before accepting their guilty pleas. As an experienced judge who had previously served as an assistant public defender, respondent should appreciate the importance of ensuring that every defendant has been fully apprised of his or her rights as required by law.

The law requires defendants charged with misdemeanors or violations to be released on recognizance or to have bail set, determined on the basis of numerous statutory criteria, including the defendant's character, employment, financial resources, ties to the community, criminal history and record of appearing in court when required (CPL §510.30[2]). In setting bail, "the only matter of legitimate concern" for the court is fixing an amount that "is necessary to secure [the defendant's] court attendance when required" (CPL §510.30[2][a]; *Matter of Sardino,* 58 NY2d 286, 289 [1983]). A bail determination cannot be motivated by bias or used to punish, to coerce pleas of guilty, or as preventive detention. *See, Matter of Sardino, supra*; *Matter of LaBelle*, 79 NY2d 350 (1992).

The conclusion is inescapable that respondent abused the bail process by using bail in a coercive, punitive manner. Repeatedly, after making no more than a perfunctory inquiry into the defendant's personal circumstances, respondent set bail in amounts for violations and misdemeanors that were so exorbitant that they were tantamount to no bail, bore no reasonable relation to the statutory criteria and compel an

inference that respondent's purpose was an improper one. In many cases, defendants were unemployed or indigent, and thus their appearance in court could have been secured by a much lesser bail amount.

For example, one defendant charged with a violation of Disorderly Conduct after an altercation with a relative was remanded to jail on $20,000 bail, notwithstanding that he was a long-time resident of Troy, was employed and had no prior record except for an outstanding Open Container violation (Charge XX). Another defendant charged with Disorderly Conduct was held on $50,000 bail because respondent erroneously believed he was on felony probation (Charge XIII). A college student charged with Loitering, who had no prior criminal history, was held on $10,000 bail (Charge XL). Defendants charged with Trespass violations were committed to jail on $25,000 bail; defendants charged with Unlawful Possession Of Marijuana were held on bail of $20,000 or more, notwithstanding that incarceration is not an authorized sentence for a first or second conviction for that offense.

While bail in such amounts for a relatively minor offense can be justified in some instances, the pattern of these exceptionally high amounts in cases that presented no extraordinary circumstances compels the conclusion that respondent did not set bail in accordance with the statutory guidelines, to insure that the defendants would return to court, but that his purpose was punitive: he wanted to insure that these defendants spent time in jail. This is particularly so given the totality of this record, suggesting that the bail determinations were part of a punitive, biased pattern.

We emphasize that we do not propose to substitute our judgment for that of

an arraigning judge in the absence of persuasive evidence that the judge was motivated by bias, or acted with a punitive or other improper intent, or acted with reckless disregard for the basic, fundamental rights of litigants. A bail determination is a significant exercise of discretion, circumscribed by the statutory guidelines, which can be reviewed in the courts and reduced if the reviewing court deems the amount excessive. However, when defendants were remanded on exorbitant bail without being advised of the right to counsel or the possibility of having counsel assigned, the combination of those elements was coercive and punitive, creating a system of assembly-line justice that flourished in respondent's court.

While the record does not establish that respondent was motivated by bias against particular defendants or a class of defendants, the inexorable results of this coercive pattern seemed particularly harsh on defendants who could not an afford to hire an attorney to assert their rights. Thus, an incarcerated defendant, remanded on high bail, without the assistance of counsel and with no indication from the court that assigned counsel could be provided, faced the stark reality that a plea of guilty was probably the only way to get out of jail anytime soon. Instead of recognizing the significant potential for injustice in these circumstances, respondent proposed and accepted guilty pleas from such defendants. Regardless of whether respondent had a specific intent to coerce guilty pleas, his conduct created a significant risk of that result, which he could scarcely have failed to recognize.

On two occasions respondent convicted an incarcerated defendant in the defendant's absence by announcing on the record that the case was "a plea and time

served." We are unpersuaded by respondent's explanation that on both occasions an assistant public defender consented to the procedure for security reasons, particularly since there is no appearance by defense counsel on the record and no indication that the defendant was even represented by the public defender's office in these matters. In any event, such a procedure -- admittedly concocted to avoid another court appearance by a defendant whom respondent described as a "semi-regular" in his court -- was completely inappropriate in the absence of any documentation that the absent defendant had actually consented to the plea.

In four cases where defendants were charged with Unlawful Possession Of Marijuana, respondent committed the defendants to jail in lieu of high bail and, thereafter, after they had spent several days in jail, he imposed fines that exceeded the legal maximum and jail sentences of time served or ten days, notwithstanding that incarceration is not authorized for a first or second conviction of this offense. Significantly, respondent testified that he would probably not have accepted their guilty pleas at the arraignment, thereby insuring that these defendants would spend time in jail for an offense deemed so minor that incarceration is not an authorized sentence. An experienced judge who presumably has handled many cases involving this charge should be fully cognizant of the authorized sentences. As a judge, respondent is required to maintain professional competence in the law (Section 100.3[B][1] of the Rules Governing Judicial Conduct). We conclude that the illegal sentences by respondent were not merely an error of law, but part of a pattern of improper conduct that violated the rights of defendants.

In considering an appropriate sanction, we are mindful that the Court of Appeals has stated that the purpose of disciplinary sanctions is not punishment, but "to safeguard the bench from unfit incumbents." *Matter of Reeves, supra*, 63 NY2d at 111, quoting *Matter of Waltemade*, 37 NY2d [a], [lll]. Here, respondent has demonstrated that he is apt to continue to violate the rights of unrepresented defendants. At no stage of this proceeding did respondent give any persuasive indication that he recognized the impropriety of his conduct. Even at the oral argument, after the referee had sustained most of the charges, respondent adhered to his position that on undisputed facts (*i.e.,* his failure to advise defendants of their right to counsel and assigned counsel and his responsibility to effectuate the right to counsel), his conduct was appropriate. In responding to the Commission's questions, he had the opportunity to demonstrate that he understood the importance of strict adherence to the statutory mandates and recognized that his procedures were inadequate, but he appeared unwilling or unable to do so. *See, e.g., Matter of Sims*, 61 NY2d 349, 357 (1984); *Matter of Aldrich*, 58 NY2d 279, 283 (1983); *Matter of Shilling*, 51 NY2d 397, 401 (1980). The conclusion is inescapable that respondent's future retention on the bench would continue to place the rights of defendants in serious jeopardy. Accordingly, we conclude that the appropriate disposition is removal from office.

The members of the Commission concur with the above findings and conclusions, except as follows:

As to Charge II, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge; Mr. Berger dissents only as to the bail allegation and votes to dismiss that

allegation; and Mr. Coffey dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge III, Mr. Coffey, Mr. Felder and Ms. Hernandez dissent only as to the bail allegation and vote to sustain that allegation; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge IV, Mr. Goldman, Judge Peters and Judge Ruderman dissent only as to the bail allegation and vote to dismiss that allegation.

As to Charge VI, Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge VII, Mr. Berger, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge VIII, Mr. Goldman and Judge Peters dissent only as to the bail allegation and the coercion of a guilty plea and vote to dismiss those allegations.

As to Charge IX, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge X, Judge Peters dissents only as to the bail allegation and the coercion of a guilty plea and votes to dismiss those allegations; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge XI, Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge XII, Mr. Goldman and Judge Peters dissent only as to the

coercion of a guilty plea and vote to dismiss that allegation.

As to Charge XIII, Mr. Goldman dissents and votes to dismiss the charge; Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XIV, Mr. Goldman and Judge Peters dissent only as to the coercion of a guilty plea and vote to dismiss that allegation.

As to Charge XVII, Mr. Pope dissents and votes to sustain the charge.

As to Charge XIX, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XX, Mr. Coffey and Judge Peters dissent only as to the bail allegation and vote to dismiss that allegation.

As to Charge XXIV, Mr. Berger, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent and vote to sustain the charge.

As to Charge XXV, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXVI, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation.

As to Charge XXVII, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XXVIII, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXII, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXIV, Judge Peters dissents and votes to dismiss the charge.

As to Charge XXXV, Mr. Goldman dissents only as to the right to counsel allegation and votes to dismiss that allegation.

As to Charge XXXVI, Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXVIII, Mr. Coffey and Mr. Goldman dissent and vote to dismiss the charge.

As to Charge XXXIX, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation; Mr. Coffey dissents only as to the right to counsel allegation and votes to dismiss that allegation.

As to Charge XL, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XLI, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation.

As to Charge XLIII, Judge Peters dissents and votes to dismiss the charge.

As to Charge XLIV, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XLV, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XLVI, Judge Ciardullo, Mr. Felder and Mr. Pope dissent and vote to sustain the charge.

As to Charge XLVII, Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge XLVIII, Judge Peters dissents and votes to dismiss the charge.

As to Charge XLIX, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge L, Mr. Berger, Judge Ciardullo, Mr. Felder, Mr. Pope and Judge Ruderman dissent and vote to sustain the charge.

As to sanctions, Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Felder, Mr. Pope and Judge Ruderman concur as to the sanction of removal. Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote that appropriate sanction is censure.

Judge Luciano was not present.

CERTIFICATION

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

Dated: March 30, 2004

Henry T. Berger

Henry T. Berger, Esq., Chair
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

HENRY R. BAUER,

a Judge of the Troy City Court,
Rensselaer County.

CONCURRING OPINION
BY MR. FELDER

In his presentation to the Commission, respondent poses the question (twice):

> "On a very basic level, I've asked myself...the following question: can one be both a very good judge and a bad judge at the same time?"
>
> (Oral argument, p. 62)
>
> "Can a person be both a good judge and a bad judge at the same time?"
>
> (Oral argument, pp. 62-63)

He correctly answers his own question: "I respectfully suggest that one cannot" (Oral argument, p. 63).

The problem lies not in respondent's answer, but in his reasoning. By respondent's logic, he has dispensed more "good" justice than "bad," and, therefore, he is a "good" judge. Suggesting that his good works as a judge outweigh his shortcomings, respondent cites his accomplishments, *e.g.*, establishing a drug court and a domestic

violence court. He treats "good" justice and "bad" justice as fungible commodities, and whichever is paramount in the mix characterizes the whole.

The reason one cannot be both a good judge and a bad judge is because the public is entitled not to have justice improperly dispensed, in respondent's words, by "a bad judge," notwithstanding the judge's good works. We do not expect our judges to be perfect instruments of the law, but we do expect them to follow the law as it clearly should be comprehended, and then apply to this understanding of the law the judge's full and honest intellectual capacity.

Respondent engaged in consistent, pernicious and unremitting violations of the rights of defendants who appeared before him. The pattern was that defendants were arrested for rather minimal infractions of the law, including those for which there was no jail sentence applicable as a punishment. Since the defendants were virtually all poor persons or persons of modest financial ability, bail was set in such an amount that would be impossible for them to meet. Not having the ability to post bail, they would be incarcerated, and, usually after a weekend or more in jail, on the return date, respondent would make them aware that if they pled guilty, a fine would be set and they would be sentenced to time already served, able to walk out of the courthouse immediately. In the words of one defendant, "I just wanted to go home" (Tr. 105).

Additionally, many defendants were not effectively advised of their right to counsel or to have assigned counsel. It is noteworthy that on the occasions respondent claims he did proceed appropriately, there were no transcripts made of the proceedings.

As the Commission's decision states: "This...coercive pattern seemed

particularly harsh on defendants who could not afford to hire an attorney to assert their rights."

The financial ability or lack of it by defendants was the linchpin in respondent's panoply of wrongdoings. The inescapable leitmotif throughout respondent's justice-dispensing scheme is that the defendants were poor. Without this central component, respondent's methodology would fail. To set $25,000 bail for persons because of whom they associate with, or for riding a bicycle on the sidewalk, or on a 16 or 19 year old for trespassing, or for a violation that by law carries with it no jail time, would be, given the financial realities of the defendants' lives, as insurmountable an obstacle as if bail were set at $25,000,000. In short, it was effectively a way to put people in jail (assisted by lack of counsel) without any practical recourse.

Parenthetically, I do not believe that respondent's unfailing use of the word "sir" in addressing a defendant demonstrates his politeness. The word "sir," when coupled with a colloquy that, in substance, denied the defendants their right to counsel, is akin to the police officer who stops a driver and, with all the attendant intimidation of flashing lights, gun on belt and uniform, asks for a driver's license or tells the driver to "Get out of the car, *Sir*." While on paper the words may convey courtesy and respect, the tone of the actual encounter may be quite different.

Respondent's general approach to his duties did, however, accomplish one thing. It enabled him to deal with a large volume of cases and to conduct four trials in three years.

What is disturbing is that respondent, at this late time, neither

acknowledges his mistakes nor clearly indicates that he has any intention of changing his methodology. At oral argument, I asked him the question directly, twice:

> MR. FELDER: Judge, may I ask you something? Since you received notification from the Commission of these things, have you changed your bail practice or your methodology for advising people of their rights to counsel?
>
> (Oral argument, p. 66)

> MR. FELDER: But do you, since this stuff began here, since this little proceeding we have, have you plainly advised them that if they can't afford an attorney, that an attorney will be obtained for them?"
>
> (Oral argument, p. 68)

Respondent's answers were cloudy and certainly less than satisfactory. He did not inspire confidence that he has learned anything from the proceeding, and it is established law in New York that a judge's "failure to recognize the inappropriateness of his actions or attitudes" compounds the impropriety. *Matter of Aldrich*, 58 NY2d 279, 283 (1983).

What happened here, to paraphrase Shakespeare,[1] is not the stuff of justice. For much of the world, who do not enjoy the legal protections afforded to Americans, justice is the stuff of dreams. What happened here is the stuff of, at least, troubled sleep.

Dated: March 30, 2004

Raoul Lionel Felder, Member
New York State
Commission on Judicial Conduct

[1] "...such stuff as dreams are made on..." (*The Tempest*, Act IV, Sc. 1)

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

HENRY R. BAUER,

a Judge of the Troy City Court,
Rensselaer County.

CONCURRING AND
DISSENTING OPINION
BY JUDGE PETERS

I agree with many of the findings of fact reached by the majority, but disagree with certain determinations of misconduct and the majority's conclusion that the appropriate sanction is removal. I concur in all respects with the dissenting opinion filed by Ms. Hernandez. I concur in the dissenting opinion filed by Mr. Goldman except to the extent that he fails to find that the respondent coerced guilty pleas.

Throughout its history, the Commission has cautiously refrained from intruding into areas that encroach upon judicial discretion. Expressing its reluctance to review a judge's bail determinations, the Commission stated in its 1991 annual report: "Although the Commission has no authority to consider complaints that judges have abused their discretion in setting bail, it may consider complaints that judges have used the bail procedure for other than its intended purpose," *e.g.*, to punish a defendant or coerce a guilty plea. I subscribe to this limitation upon our authority and review the charges concerning bail, mindful that the Commission should not substitute its judgment

for that of an arraigning Magistrate, absent persuasive evidence that such Magistrate's intent was improper.

Within these constraints, I agree with the majority's conclusion that the bail set by respondent in most of the cases that are the subject of charges was excessive but dissent from their findings of misconduct which are grounded solely upon that fact. In numerous cases, the record indicates that a defendant had a parole hold, was on probation, had a history of bench warrants, or that some other factor was present which could be expected to move a bail amount to the higher end of the spectrum.[1] With one or two exceptions, the public defender's office never moved to reduce the amount of bail that had been set and there is no indication that a reviewing court ever found respondent's bails to be excessive. He was neither charged with harboring a discriminative intent when setting bail nor was such intent revealed by testimony; no evidence of racial or ethnic prejudice or bias was presented. For these reasons, I cannot conclude that respondent acted with bias or improper intent, but rather had a sincere, if misguided, belief that the bail amounts he set were appropriate and necessary to ensure the defendant's return to court.

In a few cases, however, it is glaringly apparent that respondent's conduct in setting extremely high bail, combined with a violation of the right to counsel, constituted misconduct. There, defendants were remanded on high bail after respondent failed to advise them of their right to counsel and assigned counsel. Later, while still incarcerated, they were returned to court and accepted respondent's offer of a plea for time served. I

---

[1] Moreover, there is no statutory or decisional requirement that a judge articulate the factors considered on the record when setting bail.

believe those plea were presumptively coerced. Therefore, as to the charges concerning those defendants, I concur with the majority's finding that respondent engaged in serious misconduct which violated the statutory and constitutional rights of those individuals.

I also agree with the bulk of the majority's findings concerning respondent's violation of CPL 170.10. Substantial record evidence and the respondent's own testimony reveal his repeated failure to properly advise defendants of their right to have counsel assigned if they were unable to afford an attorney and respondent's repeated failure to effectuate that right. In this arena, his explanations and excuses ring hollow.

Finally, addressing sanction, I join with my colleagues Hernandez and Goldman in concluding that censure is the appropriate penalty. While I am mindful that judges have been removed for engaging in a pattern of egregious misconduct that violates the right of defendants, including the right to counsel (*e.g., Matter of Esworthy*, 77 NY2d 280 [1991]; *Matter of Reeves*, 63 NY2d 105 [1984]; *Matter of Sardino*, 58 NY2d 286 [1983]), I note that each of those cases involved significant misconduct and exacerbating factors that are not present here. Respondent did not demean or disparage defendants and there is no indication that the he presumed their guilt or elicited incriminating admissions at arraignment. Nothing in this record suggests that he was "vindictive, biased, abusive or venal" (*Matter of LaBelle*, 79 NY2d 350, 363 [1993]). Rather, he was consistently courteous. I believe that he will adjust his practices as guided by our determination. For

these reasons, I would censure, rather than remove, respondent.

Dated: March 30, 2004

Hon. Karen K. Peters, 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

HENRY R. BAUER,

a Judge of the Troy City Court,
Renssealer County.

DISSENTING OPINION
BY MR. GOLDMAN

I concur in the majority's findings of misconduct with respect to many of the charges in the complaint. I respectfully dissent, however, from the majority with respect to some of the charges.

First, the complaint alleged, *inter alia*, that respondent set "unreasonably high" bail "without considering" the statutory factors. The majority, after considering the briefing and hearing oral argument, essentially amended these allegations, *sua sponte*, by finding that respondent imposed unreasonably high bail without giving "*due* consideration" to the statutory factors.

With respect to these charges, I disagree with the majority in those cases in which the record reveals that the defendant had a history of bench warrants or other factors that supported a conclusion that the defendant had little respect for court orders. I also disagree with the majority in those cases in which the defendant was on probation and parole or had a more serious pending case. In those two classes of cases, I cannot say that the bails set, even though in my view excessive, were so "unreasonably high" that

they constituted judicial misconduct. Further, even under the majority's questionable expansion of these allegations to failure to give "*due* consideration," I am not prepared to say that respondent did not acceptably consider the statutory factors in those cases. I believe that the Commission, in order to assure judicial independence, should be extremely hesitant before it finds misconduct in an area of discretionary decision-making, such as bail-setting, and I believe that, in finding misconduct in these cases, it goes too far.

Second, the complaint alleged that respondent intentionally coerced defendants into pleading guilty. With respect to these charges, I certainly believe that respondent created an inherently coercive situation by setting inordinately and often unjustifiably high bails, denying indigent defendants the assistance of counsel, and then offering incarcerated defendants the Hobson's choice of pleading guilty and being released immediately, or refusing to plead and remaining in jail. Defendants in such situations will often choose to plead guilty to gain their freedom – even if they are actually innocent. Nevertheless, I cannot find any evidence in the record that respondent had the *intent* to coerce guilty pleas. Absent such evidence, I find the Commission has not met its burden of proving judicial misconduct on these charges.

Third, the Commission heard charges that respondent failed to assign counsel to defendants. With respect to these charges, I dissent in those cases in which the defendants specifically declined counsel as well as those cases in which respondent asserts that he did in fact, or made some effort to, assign counsel. As to cases for which

there is no transcript, I find an insufficient evidentiary basis to reject respondent's accounts of the facts.

Respondent's misconduct in setting unreasonable and inordinately high bail, and in depriving indigent defendants of assigned counsel, resulted in an unconstitutional deprivation of liberty and thus is extremely serious. Nonetheless, I dissent from the sanction of removal and vote for censure. There are few clear guidelines, either in statutory or case law, as to what particular amounts of bail should be set; judges are afforded considerable discretion. Further, it appears that no appellate court has ever suggested that respondent change his bail practices. Further still, this Commission has never publicly sanctioned a judge for setting high bail, as opposed to no bail. Under these circumstances, respondent's removal is unnecessary.

I also disagree with the majority view that respondent's failure to acknowledge the impropriety of his conduct should be a significant factor in determining an appropriate sanction in this case. In my view, a judge who sincerely believes he or she acted correctly should not be penalized for challenging the allegations against him and thus not admitting impropriety, or for not expressing remorse inconsistent with his or her defense. Respondent's defense of his bail decisions (although not of his clearly inappropriate procedures with respect to the right to counsel) raised legitimate legal and factual issues. The Commission should be careful not to send a message that discourages judges from offering a vigorous defense of their actions.

Accordingly, I would censure, and not remove, respondent.

Dated: March 30, 2004

Lawrence S. Goldman /ds.

Lawrence S. Goldman, 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

HENRY R. BAUER,

a Judge of the Troy City Court,
Rensselaer County.

DISSENTING OPINION
BY MS. HERNANDEZ

I concur that respondent's pervasive record of misconduct warrants a severe sanction. It is a judge's obligation to uphold the law he is sworn to administer and to ensure that all individuals appearing before him are afforded the constitutional rights and justice they are entitled to. Nor should his concern be to avoid "saddling the county with the expense" of providing an eligible individual with assigned counsel.

In concluding that censure, rather than removal from office, is the appropriate sanction, I have considered several factors. The record indicates that respondent treated defendants in a courteous manner, and there is no persuasive evidence that respondent was "vindictive," "abusive or venal," or motivated by bias. *See, Matter of LaBelle*, 79 NY2d 350, 363 (1992); *compare, Matter of Sardino,* 58 NY2d 286 (1983). Nor can I find that respondent intentionally disregarded the law.

In carrying out his duties, respondent has not demonstrated that he acted with malicious intent, but acted with misguided zeal in protecting his community. In my opinion, respondent's conduct, while serious, does not demonstrate that he is unfit for

judicial office or that he is unwilling or unable to learn from these proceedings. I would hope that we can anticipate that he will learn from this experience and change his practices, and if he does not, I would not hesitate to take further action.

Accordingly, I respectfully conclude that respondent should be censured.

Dated: March 30, 2004

Christina Hernandez M.S.W.

Christina Hernandez, M.S.W., Member
New York State
Commission on Judicial Conduct