State of New York
Commission on Judicial Conduct

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

MARDIS F. KELSEN,

a Justice of the Cortlandville Town Court and McGraw Village Court, Cortland County.

# Determination

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THE COMMISSION:

Henry T. Berger, Esq., Chair
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Pomeroy, Armstrong, Baranello & Casullo, L.L.P. (By William J. Pomeroy) for Respondent

The respondent, Mardis F. Kelsen, a justice of the Cortlandville Town Court and the McGraw Village Court, Cortland County, was served with a Formal Written Complaint dated May 10, 1996, alleging one charge of misconduct. Respondent filed an answer dated June 28, 1996.

By order dated July 18, 1996, the Commission designated Patrick J. Berrigan, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 1, 1996, and the referee filed his report with the Commission on February 21, 1997.

By motion dated April 23, 1997, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on May 12, 1997. The administrator filed a reply dated May 14, 1997. Oral argument was waived.

On May 22, 1997, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the McGraw Village Court since 1980 and of the Cortlandville Town Court since 1985.

2. Prior to December 1991, it was respondent's practice to send to defendants who had pleaded not guilty by mail to traffic offenses a form letter that "required" the posting of $100 bail. The letter also noted, "After due consideration, if you wish to withdraw your plea of not guilty and enter a plea of guilty as charged, send the court...a total of $85.00 to dispose of this matter."

3. On December 19, 1991, the Commission sent respondent a confidential letter of dismissal and caution concerning her use of the form letter. The Commission advised respondent that the practice of requiring defendants who asked for a trial to post bail or change their plea was not authorized by law and "appears to have been designed to coerce guilty pleas, which compromised your impartiality as a judge." The Commission noted that it had decided not

to institute formal charges and that, in doing so, it had considered that respondent had asserted that she had ceased the practice.

4. By October 1994, respondent had re-instituted a practice of setting bail in traffic cases when defendants pleaded not guilty by mail. Respondent routinely sent a letter in which she indicated that $100 bail was "requested" and that it "must be" sent within ten days. By this letter, respondent acknowledged at the hearing, she was fixing bail in accordance with the Criminal Procedure Law and would have the authority to commit defendants to jail if they did not post it. Her use of the word "requested" in the 1994 letter, she acknowledged, did not change the fact that she was requiring that bail be posted, as she had by the letter sent prior to 1991.

5. In the 1994 letter, respondent did not indicate that defendants could pay a lesser fine if they wished to change their plea to guilty. However, she did note that they could change the plea if they had "inadvertently signed the not guilty side of the ticket and you wish to enter a plea of guilty as charged...."

6. In the 1994 letter, respondent also advised defendants of the name and address of the prosecutor in the event that "you wish to negotiate a possible amended disposition...."

7. The 1994 letter was sent only to defendants who lived outside of Cortland County and who were unknown to respondent. If they lived in Cortland County or were known to respondent, defendants were not required to post bail.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(1)*, and Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint, as amended at the hearing, is sustained, and respondent's misconduct is established.

By routinely setting $100 bail for every defendant who had pleaded not guilty by mail to a traffic charge, respondent failed to follow the law, which requires consideration of a number of personal factors designed to determine whether an individual is likely to return to court. (See, CPL 510.30[2][a]; Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 289).

More significantly, respondent combined this unauthorized and summary method of setting bail with suggestions that defendants relinquish their demands for trial and, instead, plead guilty. In her first form letter, respondent set, in advance, a lower fine for a guilty plea than the bail required to secure a trial date. A reasonable person could only see this as an inducement to plead guilty. After being criticized by the Commission, respondent altered the form to allow defendants to forego the bail and change an "inadvertent" plea of not guilty.

Both letters give the appearance that the judge is discouraging defendants from exercising their constitutional right to trial and is attempting to coerce guilty pleas. Such conduct undermines the independence and impartiality required of a judicial officer. (See, Matter of Cavotta, 1996 Ann Report of NY Commn on Jud Conduct, at 75). That respondent re-instituted

* Now Section 100.3(B)(1)

the practice after being warned that it appeared coercive and contrary to law exacerbates her wrongdoing. (See, Matter of Lenney v State Commission on Judicial Conduct, 71 NY2d 456, 458-59).

Respondent contends that, by requiring bail only of defendants from out of the county whom she did not know, she was following the dictates of CPL 510.30. She fails to appreciate that she is contravening the purpose of the law by setting a standard bail and by presuming that all county residents are good bail risks and all others are not. Furthermore, respondent apparently does not recognize that such a practice enhances the likelihood of coercion by imposing a greater burden on defendants who live farther from the court and are less likely to travel in order to contest relatively minor charges carrying the likelihood of only minor penalties.

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Newton, Mr. Pope and Judge Salisbury concur.

Judge Marshall dissents as to sanction only and votes that respondent be censured.

Ms. Crotty and Judge Thompson were not present.

## CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: July 17, 1997

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct