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

DONNA G. RECANT,

a Judge of the Criminal Court of the City
of New York, New York County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, 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:

Gerald Stern (Vickie Ma, Of Counsel) for the Commission

LaRossa & Ross (By Michael S. Ross) and Herrick, Feinstein LLP
(By Milton Mollen) for Respondent

The respondent, Donna G. Recant, a judge of the Criminal Court of the City of New York, New York County, was served with a Superseding Formal Written

Complaint dated May 31, 2001, containing six charges.

On June 8, 2001, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On June 18, 2001, the Commission approved the agreed statement and made the following determination.

1. Respondent is a judge of the Criminal Court of the City of New York, New York County, serving a ten-year term that commenced in June 1995 and expires in December 2005.

As to Charge I of the Superseding Formal Written Complaint:

2. On or about July 20, 1998, while presiding over pre-trial conferences in People v. Leo Kazan, in which the defendant was charged, *inter alia*, with Aggravated Harassment in the Second Degree, respondent engaged in an improper *ex parte* conversation with the prosecutor's supervisor, as set forth below.

3. During pre-trial motions, respondent granted the Molineux application of Assistant District Attorney ("ADA") Joseph Mazel to introduce prior, uncharged telephone calls that the defendant had made to the victim to show identity and

absence of mistake on his direct case. When Mr. Mazel made a Sandoval application to introduce the defendant's prior convictions for aggravated harassment and the underlying facts of those convictions if the defendant testified at trial, respondent asked:

> Wouldn't what you're asking for be part of a Molineux application? Is that what you are seeking on your direct case? Why is that Sandoval? On the Sandoval theory, it's clearly prejudicial. I could allow the facts of the conviction should he take the stand on the Molineux theory.

Respondent asked Mr. Mazel if he wanted to "think about this" and granted Mr. Mazel's Sandoval application in part by allowing Mr. Mazel to introduce the defendant's prior convictions into evidence without the underlying facts.

4. Later that day, respondent called Mr. Mazel's supervisor, Joan Illuzi-Orbon, during a recess and asked to see her in chambers where, in the absence of defense counsel and without advising defense counsel, respondent told Ms. Illuzi-Orbon that Mr. Mazel had improperly identified a Molineux application as a Sandoval application. Subsequently, and unbeknown to respondent, Ms. Illuzi-Orbon met with Mr. Mazel and asked him how his trial was going, without advising him of her conversation with respondent. Mr. Mazel told Ms. Illuzi-Orbon what had transpired earlier in court concerning his Molineux and Sandoval applications. Ms. Illuzi-Orbon commented that his application sounded like a Molineux application and arranged for a more experienced ADA, Seth Krauss, to review the Molineux and Sandoval rules with Mr. Mazel.

5. The following day, on July 21, 1998, respondent stated that she

wanted "to go over the Molineux and Sandoval issues." Mr. Mazel responded that he was amending his Molineux application because defense counsel Elizabeth Johnson had raised the issue of identity, intent and mistake during voir dire. After a hearing, respondent permitted Mr. Mazel to introduce into evidence one of the defendant's prior convictions and its underlying facts on his direct case.

As to Charge II of the Superseding Formal Written Complaint:

6. On or about October 26, 1998, while presiding over People v. Alassane Niass, when 18-B attorney John Wilson declined the court's plea offer, respondent replied, "Okay. That's fine, because this will be the third time around the block, that we know of," and set bail at $500, although the prosecution was silent on bail. When Mr. Wilson objected and asked why respondent was setting bail, she replied, "Because the way I see it is because he won't plea. That's why. A person that doesn't learn their lesson the first two times does it again."

7. On or about December 20, 1998, respondent denied 18-B attorney John Wilson's oral motion to dismiss the complaint for facial insufficiency in the matter of People v. Darren King and asked him whether his client wanted time served. Respondent noted that the defendant had a warrant, on which she could keep him in, and asked him if he wanted to be heard on bail. When Mr. Wilson responded, "You would hold my client in? This is a SAP warrant," respondent replied, "Not if he pleads to the

disorderly conduct, I won't." When the defendant refused to plead guilty, respondent set $500 bail on the warrant, $1 bail on the instant matter, and adjourned the matter to the following day.

8. On or about September 21, 1999, while presiding over People v. Jose Rodriguez, in which respondent earlier in the day had issued a bench warrant and had ordered bail forfeited when the defendant was not in court on time, respondent advised New York County Defender Services attorney Cheryl Moran that the defendant had two choices: to "acknowledge responsibility" for his crime or she was "likely to increase his bail." Ms. Moran informed the court that the defendant was unable to pay the mandatory fine, to which respondent replied, "If he wants to fight it, that's fine. I'm telling you now, I'm likely to set bail. I'm giving you a heads up."

As to Charge III of the Superseding Formal Written Complaint:

9. On or about January 13, 1998, while considering the defendant's request for assigned counsel in People v. Tatiana Demidenko, respondent demanded proof of her income. Previously, the defendant had appeared in court with retained counsel, who had not been relieved. When the defendant asserted that she was unable to provide such proof because she was merely a tourist, respondent then requested to see her visa. When the defendant claimed that her visa had been stolen, respondent directed the defendant to go to her embassy to obtain documentation of her legal status in the country.

Respondent threatened to call the "authorities" if the defendant was in the country illegally and further stated that the defendant was not entitled to legal services at the taxpayers' expense if she was in the country illegally.

As to Charge IV of the Superseding Formal Written Complaint:

10. On or about October 20, 1998, while presiding over People v. Terry Chen, in response to noisy and distracting gum chewing from someone in the audience, respondent ordered the defendant's mother, who was seated in the audience section of the courtroom, to "stop with the gum." When a defense attorney advised the court that the woman did not speak English, respondent replied in substance that it did not matter, that it was not respondent's "problem," and that if the woman wanted to come to an American courtroom, she could learn to speak English or leave.

As to Charge V of the Superseding Formal Written Complaint:

11. On two occasions, as set forth below, respondent held defendants in custody without complying with the procedure governing summary contempt.

12. On or about April 22, 1998, in People v. Andrea Ballard, when the defendant objected to the harsh manner in which respondent was speaking to her, respondent, in effect, temporarily remanded the defendant by ordering her on the "bench" where prisoners sat, as set forth below. Respondent was presiding in a courtroom in

which the children of the defendant were unruly. When the defendant's case was called, respondent admonished the defendant, who had been charged with Endangering the Welfare of a Child, for bringing her children to court with her: "I'm going to tell you something right here, right now. Number one, this is not a place to bring children. There is a day care center." The defendant replied, "Yes your honor." Respondent continued, "You have a problem in this courtroom for—involving care of your children to begin with." When the defendant replied, "Right," the following occurred:

COURT: I don't like your attitude. I don't like the way you are caring for your children and I don't want to hear anything out of your mouth. Your attorney is not here right now and I don't want you to say anything. I don't want you to say anything. I'm telling you right now you are skating on thin ice. The next time you come to court, you make arrangements for the care of your children and you don't burden this court and you don't open up your mouth.

DEFENDANT: But you don't talk to me that way.

COURT: That's it. Put her on the bench.

DEFENDANT: Call your daddy.

COURT: The officers will taken [*sic*] the children.

13. The defendant, who had been released on her own recognizance, was then handcuffed and placed on the bench, inside the well of the courtroom, while respondent went to the back room of the court to contact the defendant's attorney. The defendant remained on the prisoner's bench until her case was later recalled and she

apologized to the court. The defendant's children, who had been removed to the back room during this incident, were returned to her. Although respondent apparently did not witness the defendant in handcuffs, respondent should have taken steps to insure that her instructions to the court officer were not misinterpreted as a direction to handcuff the defendant.

14. On or about November 10, 1998, respondent ordered the defendant in People v. Kern Cedeno "on the [prisoner's] bench" for blowing a bubble-gum bubble during his appearance before her. The defendant, who had been released on bail, had remained on the prisoner's bench until his case was recalled. The defendant's assigned counsel asked to be relieved from the case because the defendant's family had been abusive to her. As respondent was addressing the issue of replacing counsel, defendant, while standing before the court, blew and popped a bubble-gum bubble. Respondent responded by ordering defendant to sit on the bench inside of the well to "teach [him] a little lesson" for showing "disrespect" to the court. Subsequently, the case was recalled, new counsel was assigned, and defendant thanked respondent.

As to Charge VI of the Superseding Formal Written Complaint:

15. On two occasions, respondent excluded counsel from the courtroom without establishing a full record justifying such action and without initiating a summary contempt proceeding, as set forth below.

16. On or about September 17, 1999, while presiding over People v. Jorge Delgado, respondent ordered Legal Aid Society attorney Courtney Shapiro out of the courtroom when Ms. Shapiro, who had been outside the courtroom discussing a case with a client when the case was called, declined a plea offer without consulting her client because she had not had enough time to discuss the offer with the defendant. Shortly after the ADA had made the defendant a plea offer, respondent stated, "Come on. Let's go." Ms. Shapiro stated, "I am speaking to my client." Respondent replied, "If you had been here when the case was called then you would have had the opportunity."

17. The following then occurred:

COUNSEL: You are absolutely right. I apologize. I was speaking with—

COURT: Time up. Does he want the offer or not?

COUNSEL: No, Your Honor. Since I don't have time to finish completing my discussion with my client, he doesn't want to take the offer today.

COURT: You're excused. Leave the courtroom as soon as we are done with this. Don't come back. Find another catcher.* 18-B to be assigned. Legal Aid is relieved.

18. On or about April 22, 1998, while presiding over People v. Kevin Brown, respondent ordered Legal Aid Society attorney Donna Klett out of the

* The Legal Aid Society "catcher" is the attorney who is assigned to a particular court part to appear as a substitute for all assigned counsel having matters in that part. The presence of the catcher thereby obviates the need for each assigned attorney to make a court appearance. The catcher typically remains in the assigned court part until the end of the day, when court business is concluded.

courtroom when Ms. Klett attempted to address what she perceived to be a misrepresentation by the prosecution concerning an issue which respondent believed was irrelevant. The ADA in the case had requested an Order of Protection and explained why the prior judge at arraignment had denied an earlier request for such an order. When Ms. Klett objected to the ADA's explanation as being false and attempted to make a record, respondent refused to hear her on the matter:

KLETT: I want to make a record. What People [*sic*] said is not true.

COURT: I will not hear it. I can take it as ex parte argument because your client is not here. Warrant ordered. Order of Protection.

KLETT: The reason the People are now giving is not accurate. It was not—I made a motion to dismiss for facial insufficiency.

COURT: I control the record, not you. You are finished. Out. Good-bye. You are done. Case over. Bye-bye.

When Ms. Klett stated that she had a right to be heard, respondent replied, "No, you don't. Good-bye, it is my courtroom and I rule as I see fit."

By reason of the foregoing, respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct and Sections 604.1(e)(1) and 604.1(e)(5) of the Rules of the Appellate Division, First Department, 22 NYCRR (hereinafter "Special Rules Concerning Court Decorum").

Charges I through VI of the Superseding Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's

misconduct is established.

The record depicts a judge who, in numerous cases in 1998 and 1999, mistreated both defendants and attorneys, abused her judicial powers, and ignored proper legal procedure. By acting in a manner that was coercive, discourteous and contrary to law, respondent violated well-established ethical standards requiring a judge to "comply with the law" and to be "the exemplar of dignity and impartiality" (Section 100.2 of the Rules Governing Judicial and Section 604.1[e][1] of the Special Rules Concerning Court Decorum).

In Kazan, respondent initiated and engaged in an improper *ex parte* conversation with the assistant district attorney's supervisor during pre-trial conferences in the matter. Respondent's out-of-court conversation with the supervisor about an application the ADA had made, even if intended as administrative or instructive, was highly inappropriate, especially since respondent failed to inform defense counsel of the conversation. Such conduct not only violated a specific prohibition against *ex parte* communications (Section 100.3[B][6] of the Rules Governing Judicial Conduct) but conveys the appearance that respondent was providing out-of-court legal assistance to the prosecution and that she had abandoned her proper role as a neutral magistrate.

In three cases, respondent misused bail in an attempt to coerce guilty pleas. Respondent's statements during the proceedings convey the explicit message that she was

using bail as a coercive tactic when defendants appeared reluctant to accept the plea that was offered. The purpose of bail is to insure a defendant's future appearances in court, not to punish a defendant or coerce a guilty plea. Matter of Sardino v. Commn on Jud Conduct, 58 NY2d 286, 289-90 (1983); Matter of Wylie, 1991 Ann Report of NY Commn on Jud Conduct 89.

Respondent also abused her judicial power by holding two defendants in custody without complying with the procedure governing summary contempt. *See* Matter of Feinman, 2000 Ann Report of NY Commn on Jud Conduct 105. While a judge has broad discretion in the exercise of the contempt power (*see* Judiciary Law §§750, 751), such power must be exercised in accordance with proper legal procedure, which generally requires giving the individual a warning and an opportunity to desist from the contumacious conduct as well as "a reasonable opportunity to make a statement in his defense or in extenuation of his conduct" (*see* Sections 604.2[c] and 604.2[a][3] of the Special Rules Concerning Court Decorum). Respondent ignored these procedures in Ballard, where the defendant was placed in handcuffs, and Cedeno, where respondent detained a defendant who had blown a bubble-gum bubble, stating that she would "teach [him] a little lesson." Similarly, by excluding two Legal Aid Society attorneys from the courtroom, again without complying with the requirements of a summary contempt proceeding, respondent not only deviated from proper legal procedure but violated the

ethical standard requiring a judge to be "patient, dignified and courteous" (Section 100.3[B][3] of the Rules Governing Judicial Conduct).

Respondent's comments, with respect to a defendant's mother who was seated in the audience, that if the woman wanted to come to an American courtroom, she could learn to speak English or leave were also discourteous and inappropriate, as was her treatment of the defendant in Demidenko. By directing Ms. Demidenko to go to her embassy to obtain proof of legal residency as a requisite for access to legal services, respondent effectively deprived the defendant of counsel.

The totality of respondent's conduct represents a significant departure from the proper role of a judge and warrants a severe sanction.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Goldman did not participate.

Judge Marshall and Mr. Pope were not present.

CERTIFICATION

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

Dated: November 19, 2001

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