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

WALTER W. HAFNER, JR.,

a Judge of the County Court,
Oswego County.

DETERMINATION

- -

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash[1]
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission

Gerald Stern for the Respondent

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[1] Judge Ash resigned from the Commission on August 11, 2016. The vote in this matter was taken on June 2, 2016.

The respondent, Walter W. Hafner, Jr., a Judge of the County Court, Oswego County, was served with a Formal Written Complaint dated November 18, 2013, containing one charge. The Formal Written Complaint alleged that respondent made inappropriate remarks about the alleged victim in a sexual assault case. Respondent filed a verified Answer dated January 3, 2014. Respondent was served with a Second Formal Written Complaint dated May 27, 2015, containing two charges. The Second Formal Written Complaint alleged that on two occasions respondent made improper statements to or about the District Attorney and the prosecution of cases. Respondent filed a verified Answer dated June 18, 2015.

On May 23, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 2, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the County Court, Oswego County, since 1999. Respondent's current term expires on December 31, 2018.

As to Charge I of the Formal Written Complaint:

2. On November 15, 2010, while presiding over *People v Steven M.*

Swank, respondent failed to be patient, dignified and courteous when he made condescending and inappropriate remarks about a teenage sexual assault victim during a plea discussion while the jury was deliberating.

3. Steven M. Swank was indicted on April 15, 2010, on one count of rape in the second degree (Penal Law §130.30[1]), two counts of criminal sexual act in the second degree (Penal Law §130.45[1]), and one count of unlawfully dealing with a child in the first degree (Penal Law §260.20[2]). From November 9, 2010, to November 16, 2010, respondent presided over a jury trial in *People v Steven M. Swank.*

4. At trial, evidence was offered that the defendant, who was about 30 years of age, had provided alcohol to a 14-year-old girl and then engaged in sexual intercourse and oral sexual conduct with her. The defendant, who had no criminal record, denied having sex with the girl, and there was no eyewitness testimony or DNA evidence presented confirming the girl's testimony that she and the defendant had sex. The incident was not reported to law enforcement for more than seven months after it occurred. At the time of Mr. Swank's trial, about two years after the incident, the girl had given birth to a child fathered by a different man.

5. Respondent avers, and the administrator has no information to the contrary, that from the beginning of the trial to the jury deliberations, respondent's judicial actions were consistent with his duties and he showed no favoritism to either side.

6. On November 15, 2010, the jury was in its second day of deliberations. In the courtroom, outside of the jury's presence, respondent, the defense

counsel and the prosecutor discussed the possibility that the jury may be deadlocked, based in part on a note from one juror stating that she was troubled about her participation in the deliberations. After that juror appeared before respondent and counsel to express and be questioned about her concerns, the juror returned to deliberate with the other jurors.

7. While the jurors continued to deliberate, respondent initiated a discussion with counsel regarding a possible plea disposition of the case. Respondent suggested a plea to the Class A misdemeanor of endangering the welfare of a child, which would not require the defendant to register as a sex offender. That suggestion was based on respondent's understanding that the defendant refused to plead guilty to any charge that would compel him to register as a sex offender. Assistant District Attorney Gregory S. Oakes replied that he would consider a plea to two other Class A misdemeanors (sexual misconduct and unlawfully dealing with a child) and that sexual misconduct would require Mr. Swank to register as a sex offender. Respondent asked Mr. Swank's attorney, David E. Russell, whether his client would plead guilty to endangering the welfare of a child. Mr. Oakes noted his opposition to a plea to that charge and reiterated his plea offer.

8. Respondent clarified that the charge of unlawfully dealing with a child was based on giving the girl alcohol, and Mr. Russell indicated he would have to talk to Mr. Swank about a plea to that charge. Respondent said, "Certainly nothing that had anything to do with even touching that girl."

9. Addressing Mr. Oakes, respondent stated, "Frankly, I was a little surprised that you still want him to plead to a sex crime when she is apparently not upset at the whole incident, from her testimony."

10. Mr. Oakes responded that the point of the New York State statute was that 14-year-olds could not have consensual sexual relations with adults. Respondent replied:

> "I understand, but you weren't successful. She's got a baby. She's only sixteen now. So the statute didn't save her, did it [?] ... I don't think it's going to save her."

11. Respondent's comments were made in the presence of the attorneys in the case and court personnel. The victim was not present.

12. The plea-bargain attempt failed. On the following day, November 16, 2010, the jury returned a verdict finding Mr. Swank guilty of all charges. The defendant moved to set aside the verdict based on post-trial statements of the victim's sister. After a hearing, respondent denied the motion. The Appellate Division, Fourth Department, affirmed the conviction.

Additional Factors as to Charge I

13. Respondent acknowledges that the comments he made to explore a plea bargain were inappropriately focused on the victim and created the appearance that he was being critical of her. Respondent avers that his comments, at a point in time when it appeared that the jury was deadlocked, were part of an attempt to demonstrate to both counsel that a plea bargain might be an acceptable alternative. Respondent acknowledges

that his choice of words was careless, harsh and insensitive and asserts that in the future he will be more sensitive to the appearance such comments convey.

As to Charge II of the Formal Written Complaint:

14. On September 5, 2013, while presiding over *People v Lee A. Johnson, Jr.*, respondent failed to be patient, dignified and courteous when he made loud and derogatory statements in response to the Oswego County District Attorney's inquiry into advancing the defendant's trial date in place of another case.

15. On December 10, 2012, seven days after Lee A. Johnson, Jr., was arrested, arraigned and held on $10,000 cash/$20,000 bond, he appeared with his defense attorney, Mary A. Felasco, before Judge Spencer J. Ludington in Fulton City Court for a preliminary hearing. No hearing was held and the matter was waived to superior court. On that same date, both Mr. Johnson and Ms. Felasco signed a "Waiver for Pre-Plea Probation Investigation and Report," authorizing the Oswego County Probation Department to proceed with an investigation of Mr. Johnson and submit a report to the Court "in contemplation of a plea of guilty to the crime[s] of Rape 3rd." The executed waiver stated: "**THE DEFENDANT,** by execution of this document, **EXPRESSLY WAIVES any time limitations contained in the Criminal Procedure Law, including but not limited to CPL §§30.30, 180.80, 190.80, 30.20 and the Sixth Amendment to the U.S. Constitution"** (emphasis in original document). The waiver did not specify a termination date. The "Court Order for Investigation and Report" was dated December 10, 2012, and indicated January 23, 2013 as the return date.

16. On January 23, 2013, Mr. Johnson, Ms. Felasco and Assistant District Attorney Thomas Christopher appeared before respondent for the pre-plea report. Respondent indicated that, upon a guilty plea, he would sentence Mr. Johnson to a four-year determinate sentence of incarceration with ten years of post-release supervision along with $1,425 in various charges and an order of protection. The matter was adjourned for a report.

17. On February 8, 2013, Mr. Johnson, Ms. Felasco and Mr. Christopher again appeared before respondent. No plea agreement was reached.

18. The District Attorney provided Mr. Johnson and Ms. Felasco a "Notice of Presentment to Grand Jury" dated February 14, 2013, advising that evidence against Mr. Johnson was scheduled for presentment on February 27, 2013.

19. On February 25, 2013, Mr. Johnson and Ms. Felasco signed a "Waiver of Speedy Trial/Waiver of CPL §190.80 and §180.80" that provided for Mr. Johnson "to gain more time for the purpose of negotiating a plea bargain" by waiving the statutory provisions mandating his release from custody based upon the non-occurrence of Grand Jury action within 45 days of his confinement. Mr. Johnson further agreed both that the waiver nullified "any time that has so far accumulated for the purpose of CPL §190.80" and that the 45-day period set forth in CPL §190.80 "begins anew the day after this agreement is rescinded or revoked." The waiver, which was unlimited in duration, stated directly above the signatures of Mr. Johnson and Ms. Felasco: "This matter has been discussed between defendant and counsel for the defendant and the defendant is in

accord with this waiver." The waiver was forwarded to the District Attorney's Office under cover of letter from Ms. Felasco dated February 26, 2013, which stated that she had met with Mr. Johnson and that he had agreed to voluntarily provide a DNA sample to the District Attorney's Office.

20. Under cover of letter dated March 29, 2013, Assistant District Attorney Allison M. O'Neill forwarded a copy of the lab report in Mr. Johnson's case to Ms. Felasco.

21. By letter dated April 24, 2013, Ms. Felasco acknowledged receipt of Mr. Johnson's lab report, confirmed Mr. Johnson's rejection of the People's plea offer of rape in the third degree, and rescinded the speedy trial waiver signed on February 25, 2013.

22. The District Attorney provided Mr. Johnson and Ms. Felasco a second "Notice of Presentment to Grand Jury" dated April 26, 2013, advising that evidence against Mr. Johnson would be presented on May 29, 2013.

23. On May 17, 2013, after unsuccessful plea negotiations, Ms. Felasco filed an application seeking Mr. Johnson's release on his own recognizance for the prosecution's failure to take timely grand jury action.

24. On May 20, 2013, Mr. Johnson, Ms. Felasco and Ms. O'Neill appeared before respondent concerning Ms. Felasco's application seeking Mr. Johnson's release. Mr. Johnson acknowledged that he had signed the February 25, 2013 speedy trial waiver but claimed that he felt pressured by his attorney. Respondent relieved Ms.

Felasco as Mr. Johnson's attorney and replaced her with Anthony J. DiMartino, Jr.

25. On May 22, 2013, Ms. O'Neill filed a response to Ms. Felasco's application for the defendant's release on his own recognizance.

26. On May 24, 2013, Ms. O'Neill, Mr. Johnson and Mr. DiMartino appeared before respondent for further legal argument and a decision concerning Mr. Johnson's custodial status. Respondent determined that Mr. Johnson was not legally entitled to be released on his own recognizance.

27. On May 29, 2013, an Oswego County Grand Jury heard evidence against Mr. Johnson.

28. On June 5, 2013, a ten-count indictment was filed against Mr. Johnson, charging him with one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of sexual abuse in the first degree (Penal Law §130.65[1]); two counts of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and four counts of harassment in the second degree (Penal Law §240.26[1]). Mr. Johnson's bail was subsequently reduced to $5,000 cash or $10,000 bond. Mr. Johnson had been in pre-trial detention for six months at that point.

29. On September 5, 2013, respondent presided over a preliminary conference in *People v Lee A. Johnson, Jr.*, for the purpose of either accepting a plea resolution or scheduling a trial. After Mr. DiMartino informed the court that Mr. Johnson rejected the prosecution's plea offer, respondent indicated that Mr. Johnson's case would

be scheduled for trial as the second jury matter on December 9, 2013. Mr. DiMartino responded that Mr. Johnson had been incarcerated for nine months and moved for his release from custody pending trial.

30. Oswego County District Attorney Gregory S. Oakes,[2] who was present in the courtroom, asked respondent if Mr. Johnson's case could be tried in October in place of a previously scheduled trial in the matter *People v James E. Rogers*, the first of two pending indictments against Mr. Rogers, who was not in custody. The first *Rogers* matter was the oldest case on respondent's calendar and had been pending longer than the court system's promulgated "standards and goals" for the timely disposition of matters. Mr. Rogers' first attorney had succumbed to illness during his representation, and by September 2013 four different attorneys had appeared on his behalf.

31. Respondent, who asserts that he had told Mr. Oakes' office earlier that the first Rogers case had to be tried in October, yelled at Mr. Oakes, in a frustrated tone, stating *inter alia* as follows:

> "...How come [Mr. Johnson] isn't indicted by January 1st? Why is it June? So don't come here now and make this argument. Okay? It -- it just doesn't hold water. I don't understand why it happens. You indict people in your office. Okay? Why does it take till June? Why does it take over six months to get him indicted? He's always said no rape occurred. He should have been indicted in January. Okay?"

[2] Mr. Oakes was elected as Oswego County District Attorney on November 8, 2011, and took office on January 1, 2012.

32. Respondent announced that he would continue Mr. Johnson's bail at $5,000 cash/$10,000 bond. After ruling on Mr. Johnson's bail, respondent, who was aware that the District Attorney's Office had a practice of asking defense counsel to sign speedy trial waivers, stated to Mr. DiMartino:

> "And maybe the defense counsel – ...if you want to make the argument he's nine months in custody – shouldn't sign speedy trial waivers, shouldn't ask for pre-plea investigations, and should be beating on Mr. Oakes' door repeatedly, constantly, daily, I want my client indicted. Okay?"

33. Respondent thereafter yelled in an angry tone:

> "They don't indict people. They leave them sit in the jail forever. For whatever reason, I don't have any clue."

34. After Mr. DiMartino noted that he was not Mr. Johnson's first attorney, respondent engaged in a loud angry dispute with Mr. Oakes, as follows:

> "THE COURT: ... So, it isn't just this case, it's for many cases. Okay?
>
> MR. OAKES: No, that's just absolutely not true, your Honor.
>
> THE COURT: Oh, really?
>
> MR. OAKES: Yes.
>
> THE COURT: You wanna have an argument today about it? I'll go get my figures. Okay? I'll show you right now how many cases we have divestitures that are sitting forever. You wanna start this debate? We can start it. And it's not only people in custody, it's all these people that are out on Pretrial Release. I'll get probation down here that's monitoring them, asking – okay? It is absolutely true, Mr. Oakes. And I can give you the numbers, and I can give you the divestitures. I can show you the divesti – there are many cases that are old.

In fact, they're so old, I've been dismissing them lately. Just the other day I released somebody on a 190.80 motion that wasn't indicted in 45 days. You wanna have the debate, we'll have it another day, and I can give you the numbers. You got – I betcha at least 25, 50 cases, okay, that are way old. Not all in custody. Because the only ones you keep hearing about is from the sheriff complaining about the jail being full and all these people sitting over there forever. Okay? You got hundreds more out there that nothing's happening. So you better go back with your office and figure out what's going on.

MR. OAKES: And your Honor, again, I wasn't trying to raise this – this Court is raising the issue that the DA's Office is –

THE COURT: You raised it. You said it's not true. It is absolutely true.

MR. OAKES: No, you're the one, your Honor, who started the idea the DA's Office isn't moving, we're the only ones with indictment – last year we filed over 300 SCI's and indictments. If I look back, you have not had 300 SCI's and indictments filed in this court.

THE COURT: What do I care how many hundred there are? If they're making arrests, you gotta do something with them. Okay? He's complaining he's been in jail for nine months. And he's been saying from day one he didn't commit any rape. So why does it take till June to indict him? Got an answer?

MR. OAKES: Your Honor, I'm not gonna argue about the merits of this particular case and why it took long exactly. We have six months to indict the case. He was indicted within the statutory period of time. Again, there's no 30.30 issues here. Again, my understanding was that cases where a defendant is in custody take priority over those cases where a defendant's not in custody. That was the only issue I was raising. But again, if the Court wants to keep the matter on for December 9th, keep the matter on for December 9th. And certainly if this Court wants to have a discussion –

THE COURT: You know – see, you know –

MR. OAKES: – we can have a discussion –

THE COURT: You know, you started this whole thing, Mr. Oakes. You know, I gave him a trial date, and then you start in, you wanna change my trial schedule. Why don't you run your own calendar, and leave me run mine. Okay? I gave him a date, and that's the date. Okay? Don't start suggesting everything. Okay?

MR. OAKES: That's fine, your Honor. Your Honor, I was simply asking.

THE COURT: You run your calendar, I'll run mine. Okay?

MR. OAKES: Certainly, your Honor.

THE COURT: Always got a suggestion. Again today. Now you want me to change Rogers that's six months old, the oldest case, and give him another date, and this date, and switch everything around. I've gotta do one and two, because I can't even figure out who's going to trial, because you keep these offers open till the last minute. I don't even know what Rancier's (ph) gonna do. I think he's coming in and pleading, but I don't know, because you keep the offer open. Can't even figure out which case is going to trial.

So go back up into your office and figure out your own calendar. Okay? And if you want a list of all the divestitures, and you want all of them, you can have them. There's many of them, and they're really old. Couple weeks ago I dismissed a couple for speedy trial, lack of speedy trial. They were way over six months. I think they were like a year and a half that I dismissed those indictments.

MR. OAKES: Indictments, your Honor?

THE COURT: Yeah, they were indictments, weren't they? Oh, no, they weren't indictments, excuse me. They never were indicted. A year and a half old. Okay. We're all done, right?

MR. DIMARTINO: Yes, your Honor."

35. By letter dated October 29, 2013, respondent advised counsel that Mr. Johnson's matter was scheduled for trial on November 12, 2013.

36. By letter dated November 7, 2013, respondent confirmed that the jury trial in Mr. Johnson's matter would commence on November 12, 2013.

37. On November 15, 2013, the jury in *People v Lee A. Johnson, Jr.* returned a verdict acquitting Mr. Johnson of five charges: one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and one count of harassment in the second degree (Penal Law §240.26[1]). The jury convicted Mr. Johnson of four charges: one count of unlawful imprisonment in the second degree (Penal Law §135.05) and three counts of harassment in the second degree (Penal Law §240.26[1]). The single count of sexual abuse in the first degree (Penal Law §130.65[1]) had been dismissed by motion of the District Attorney, without objection, on November 14, 2013.

Additional Factors as to Charge II

38. Pursuant to CPL §190.80, a felony defendant who has been held in custody for more than 45 days without action by the grand jury must be released upon the defendant's application. Pursuant to CPL §30.30, a criminal case can be dismissed if the People are not ready for trial within six months of commencement, unless that time is extended by various statutory factors. As in this case, however, a defendant may waive these time limits.

39. Respondent handles post-indictment felony cases and is aware that

some cases are not presented to the grand jury until at or near the statutory time limits, including cases in which defendants are in custody. Respondent recognizes that there are legitimate reasons why a particular case may not be expeditiously presented to a grand jury.

40. Respondent became angry with Mr. Oakes for suggesting that respondent alter the court's trial schedule by placing the *Johnson* case ahead of the *Rogers* case, which had been pending longer, and for challenging respondent's observations about moving cases expeditiously. Respondent regrets his tone and volume in addressing the District Attorney. Respondent recognizes his ethical obligation under the Rules to be "patient, dignified and courteous" and that he failed to meet that standard. He pledges to be more sensitive in the future.

As to Charge III of the Formal Written Complaint:

41. On October 16, 2013, while presiding over *People v A__*, respondent failed to be patient, dignified and courteous when he made disparaging and provocative comments regarding the familial relationship between Oswego County District Attorney Gregory S. Oakes and a potential witness, who was a defendant in a related case that was not before respondent. Respondent stated that there appeared to have been impropriety in the prosecution of both cases and that the defendant A__ and the relative of Mr. Oakes "got away with a burglary basically."

42. On December 19, 2012, A__ was charged with burglary in the second degree (Penal Law §140.25) and criminal possession of stolen property in the

third degree (Penal Law §165.50), both felonies. On January 7, 2013, B__, a cousin of Oswego County District Attorney Gregory Oakes, was arraigned in the Albion Town Court on the misdemeanor charge of making a punishable false written statement (Penal Law §210.45) in connection with the law enforcement investigation of A__. B__ was a potential witness against A__, but was not charged with any felony and was not a co-defendant of A__. No charges were filed against B__ in the Oswego County Court.

43. On February 5, 2013, District Attorney Gregory Oakes petitioned for the appointment of a special prosecutor in *People v A__* and *People v B__* because of his relationship to B__. Respondent appointed David Russell as Special District Attorney in both cases.

44. On October 10, 2013, respondent appointed Michael G. Cianfarano to serve as Special District Attorney in place of Mr. Russell, whom he had relieved after communication between them concerning questions regarding the timing of A__'s prosecution.

45. On October 16, 2013, respondent presided over an appearance in the *A__* case. Neither Mr. Russell nor Mr. Oakes was present in the courtroom.

46. Mr. Cianfarano advised respondent that he intended to prepare an application to have the *A__* case returned to the Albion Town Court to be resolved by a misdemeanor plea with restitution. Respondent inquired twice about B__, whose case was not before respondent. Respondent gratuitously referred to B__'s familial relationship with the District Attorney, stating as follows:

A. "What happened to [B__], the District Attorney's cousin?"

B. "So, you don't even know what happened to the co-defendant, the ...DA's cousin?"

47. While questioning A__'s attorney as to why he was still in custody in excess of ten months, respondent looked through the file and found a letter which refreshed his recollection that he had appointed a Special District Attorney to prosecute both B__ and A__. The file also contained a letter to respondent from Mr. Russell dated August 16, 2013, advising respondent that A__ was being held in custody on a local sentence and was scheduled to be released on October 17, 2013.

48. Respondent identified the charges against both A__ and B__, commented that Mr. Russell had been originally appointed as Special District Attorney in both cases, stated that there appeared to have been impropriety in the prosecution of the cases and indicated that he believed A__ and B__ to be guilty. In doing so, respondent stated *inter alia*:

A. "In the meantime, we have a C violent felony burglary and over $6,000 of restitution, and nothing's happened. There seems to be more to this story than this Court's being informed of, that's for sure."

B. "And the special prosecutor in the application was appointed for the purposes of avoiding the appearance of impropriety. Well, there certainly appears to be a lot of impropriety in how both of these cases were handled."

C. "I mean, they got away with a burglary basically. Nobody prosecuted it. Obviously, the improprieties continue."

Additional Factors as to Charge III

49. Respondent acknowledges that he should not have identified the

relationship between B__ and the District Attorney during the proceeding in A__'s case, and acknowledges further that his comments on October 16, 2013, created the appearance of bias, notwithstanding that he took no action in *People v A__* that was contrary to the defendant's interests.

50. Respondent avers that he had a significant concern on October 16, 2013, that the felony charge in the *A__* matter would likely be dismissed in accordance with law because it had not been prosecuted by the special prosecutor, who had been replaced.

Additional Factors Generally

51. Respondent has been cooperative with the Commission throughout its inquiry, regrets his failure to abide by the Rules in these matters and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint and Charges II and III of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent has acknowledged that on three separate occasions he made inappropriate statements that were inconsistent with his obligation to be "patient, dignified and courteous" in performing his judicial duties (Rules, §100.3[B][3]).

In the *Swank* case, respondent's comments about an alleged victim of statutory rape were insensitive and created the appearance that he was being critical of her. In a plea discussion with counsel as the jury was deliberating, respondent told the prosecutor that he was "a little surprised" by a proposed plea that would require the defendant to register as a sex offender since the victim, who was then age 16, was "apparently not upset at the whole incident, from her testimony." (The alleged crime had occurred two years earlier.) When the prosecutor said that the point of the statute was that a 14 year-old could not consent to sexual activity, respondent commented that the victim now had a baby (fathered by a different man) and added, "She's only 16 now. So the statute didn't save her, did it ... I don't think it's going to save her."

Our system of justice is designed to protect young teenagers from sexual abuse, and such individuals must be viewed with sensitivity and respect. While respondent has acknowledged that his comments were insensitive, he avers that he made the statements in an attempt to determine whether a plea disposition might be acceptable, a discussion that had heightened significance since the possibility that the jury was deadlocked had been raised. In plea discussions, blunt statements, opinions and speculation that would be inappropriate in other contexts may be part of the process in achieving an agreement. Although such a discussion at that stage might appropriately

include a frank assessment of any factors that might be relevant to the likelihood of conviction and an appropriate plea, respondent's choice of words could be perceived as a harsh, judgmental statement about a young woman who was the alleged victim of a serious crime. We note that the victim was not present when respondent made the comments at issue. (Compare *Matter of Fromer*, 1985 NYSCJC Annual Report 135, involving a judge who made "crude" statements about a rape victim to a newspaper reporter [censure].)

Respondent's statements to and about the prosecutor on two other occasions were also inconsistent with Rule 100.3(B)(3). In *Johnson*, respondent overreacted when the District Attorney suggested that the trial be moved ahead of an older case and, while questioning why it had taken six months to indict a defendant who was in custody, he yelled, "They don't indict people. They leave them sit in the jail forever" and "It isn't just this case, it's for many cases." When the District Attorney responded that respondent's statements were "absolutely not true," respondent, over several minutes, angrily insisted that there were "hundreds more out there that nothing's happening," that he had to dismiss numerous cases because of prosecutorial inaction and that he had "the numbers" to support his statements. Loudly and repeatedly, he also told the prosecutor to "go back to your office and figure out what's going on" and "You run your calendar. I'll run mine." Throughout the exchange, Mr. Oakes challenged respondent's statements and vigorously defended his office, his handling of the *Johnson* case, and his suggestion that the trial be moved ahead of a case that involved a defendant who was not in custody.

The ethical standards recognize a judge's responsibility to dispose of cases "promptly, efficiently and fairly" (Rules, §100.3[B][7]). The need to ensure that justice is administered in a timely manner is particularly acute where, as in *Johnson*, a defendant had been in custody for a period past the statutory time limits (though he had waived his rights under those provisions). While a judge can properly question a prosecutor about perceived inordinate delays, this duty, like all of a judge's responsibilities, must be exercised in a courteous, dignified manner.

A month later, respondent made inappropriate comments about the prosecution of two related cases, one of which involved a defendant who was the District Attorney's relative. Respondent told the new special prosecutor he had appointed that both defendants (one whose case was before respondent and one, the District Attorney's cousin, whose case was pending in a town court) "got away with a burglary" because it appeared that a serious charge had not been prosecuted, and he added that "there certainly appears to be a lot of impropriety in how both of these cases were handled," improprieties that "continue." Respondent's professed concern that a felony charge would likely require dismissal because of inaction by the first special prosecutor did not warrant his gratuitous criticism and innuendo about "improprieties." The special prosecutor may have had legitimate reasons for not pursuing the matters, and, on the record presented, respondent's criticism seems to have been based on mere suspicion. Such statements are detrimental to public confidence in the fair and proper administration of justice.

Respondent's criticism of the handling of the case involving the District

Attorney's relative was especially improper since (i) that case was not before him, (ii) he seemed to have little information about the matter, and (iii) some of his information was inaccurate (the relative was not A__'s "co-defendant," as respondent stated, and was never charged with a felony). By making such comments, respondent violated his duty as a judge to be an exemplar of dignity, courtesy and neutrality. *See Matter of Dillon*, 2003 NYSCJC Annual Report 101 (judge's "excessive, demeaning diatribe" "excoriat[ed]" defense counsel for making "scurrilous" legitimate arguments criticizing the police and prosecutors, whom the judge lavishly praised [admonition]); *Matter of Williams*, 2002 NYSCJC Annual Report 175 (admonishing a judge, *inter alia*, for "unwarranted public criticism" accusing the district attorney's office, with no basis, of making plea offers based on political considerations).

While respondent's comments in the *Swank* and *Johnson* matters, standing alone, might otherwise warrant a confidential caution, his statements in the matter set forth in Charge III, in our view, elevate this matter to public discipline. We therefore conclude that the sanction of admonition is appropriate and accept the stipulated disposition. In doing so, we note that respondent has been cooperative with the Commission, regrets his failure to abide by the Rules in these matters and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

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

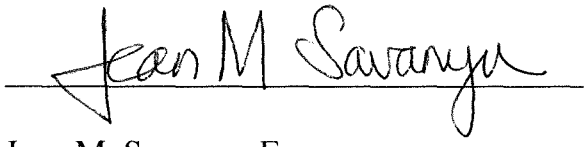
Mr. Belluck, Mr. Harding, Judge Acosta, Judge Ash, Mr. Cohen, Ms.

Corngold, Mr. Emery, Judge Klonick, Mr. Stoloff and Judge Weinstein concur.

CERTIFICATION

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

Dated: August 29, 2016



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Commission on Judicial Conduct