COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: **Complaint Nos. 2000-110, *et seq.***

In the Matter of Judge Maria I. Lopez

The Commission on Judicial Conduct has charged Judge Maria I. Lopez with six (6) counts of misconduct in violation of 12 separate canons of the Code of Judicial Conduct. The charges do not focus on a single act or a single canon: the charges allege a pattern of bias, abuse, and indiscretion that undermined the integrity of the judiciary during the period August 1, 2000, through the hearing in this matter.

By St. 1987, c. 656, §1 (approved Jan. 4, 1988), the Legislature rewrote M.G.L. c. 211C. Among other things, where the earlier version of M.G.L. c. 211C had been silent, the new statute provides that the Commission shall have the burden of proving any charges by clear and convincing evidence. See M.G.L. c. 211C, §7(4) (1988 ed.). The new c. 211C also provides that the rules of evidence apply, and as such, this hearing officer is obliged to observe said rules.

The clear and convincing standard of proof is an intermediate one: it "involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases . . . The evidence must be sufficient to convey to "'a high degree of probability'" that the charges as alleged are true. See ***Tosti v. Ayik*, 394 Mass. 482, 493 n. 9 (1985), cert. denied 484 U.S. 964 (1987)** "The requisite proof must be strong and positive;" see **Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997)** . . . it must be "full, clear and decisive." ***Callahan v. Westinghouse Broadcasting Co.*, 372 Mass. 582, 584 (1977).** See **Liacos,**

Massachusetts Evidence, §§ 5.2.2 - 5.2.3 (6th ed. 1994). See also **Ireland Juvenile Law, § 107 (1993).**

Judiciary disciplinary proceedings are unique and fundamentally distinct from all other criminal or civil legal proceedings. The purpose of such proceedings is to protect the people from corruption and abuse on the part of those who wield judicial power. "Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses . . .The effectiveness of our judicial system is dependent upon the public trust." **In Re: Ferrara, 458 Mich. 350, 372 (1998)** "The ordinary administration of criminal and civil justice...contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem and reverence towards the government." Alexander Hamilton, the Federalist, No. 17. Article 29 of the Declaration of Rights of the Constitution of the Commonwealth states in part: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice." John Adams, the author of "A Constitution or Form of Government for the Commonwealth of Massachusetts", called for a government of laws, - not of men. In the writing of this document, Adams established in the Constitution, an independent judiciary, appointed for life. In many ways, this Constitution reflected what Adams had first proposed in his Thoughts on Government, written in 1776 where he advocated an "able and impartial administration of justice." Essential to the operation of this independent judiciary, Adams recognized that there must be "[m]en of experience on the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application...subservient to none."

"[O]ver generations of judicial service involving many hundreds of judges, only in a minuscule number of cases has it been necessary to discipline any of

them." In the **Matter of Morrissey, 366 Mass. 11, 17 (1974).** While these few instances should not have occurred, the fact "that the resulting disciplinary measures have served to give assurance to the public that such conduct will not be tolerated and that the judiciary itself is ever ready to carry out the corrective process when necessary." Id. It was within this spirit, that the Supreme Judicial Court itself supported the concept of the creation of the Commission with the power necessary to investigate and establish facts concerning possible judicial misconduct. The question remains as to whether the Commission has established facts in this case concerning alleged judicial misconduct by clear and convincing evidence.

In this case, the Commission is not dealing with illegal and corrupt acts on the part of a judge. Rather, the Commission argues that this "is a case about self-interest and self-dealing, the currency of which is not money but judicial position. Judge Lopez has manipulated the judicial system itself - by, among other things:

- misleading and misusing the court's press office;
- issuing a false personal statement to deflect public criticism of her actions;
- entering and misusing false "findings" as a pretext for continuing Horton's plea and sentencing on August 4, 2000;
- making *ex parte* contacts with defense counsel to publicly defend her sentencing decision; and
- making an anonymous call to a complainant during the Commission's investigation, all in an effort to promote her self-interest.

Even beyond the charged misconduct, Judge Lopez has shown her total disregard for the judiciary, the public interest, and the Code of Judicial Conduct by providing false testimony during the Commission's investigation and in this hearing. Throughout the ***Horton*** case, and the Commission's investigation, Judge

Lopez has concerned herself with self-preservation and retaining her position on the court. She has failed entirely to take responsibility for actions which her own counsel conceded "could be viewed as creating appearances of impropriety." See Commission on Judicial Conduct's Post-Hearing Brief, preponderance of the evidence. 1 & 2. See also Commission, Ex. 44 at p. 4.

Commonwealth v. Horton originated in November 1999, when Charles Horton was arrested and subsequently indicted on charges of:

1. kidnapping;
2. assault with intent to rape a child under 16;
3. indecent assault and battery on a child under 14;
4. assault and battery; and
5. assault and battery by means of a dangerous weapon.

The victim of these crimes was an eleven (11) year old boy whom Horton enticed to enter his car on a pretext. Further, the evidence also shows that some force was used, Horton was dressed as a woman and claimed to need assistance in finding "her" son.

The case first came before Judge Lopez on August 1, 2000, when the Court held a plea conference with the Assistant District Attorney ("ADA") and defense counsel. A plea hearing was scheduled for August 4, 2000. On that date, August 4, 2000, Judge Lopez continued the change of plea and sentencing to September 6, 2000, and issued written findings in the case.

On September 6, 2000, Judge Lopez found that Mr. Horton had pled guilty knowingly and voluntarily, and found that there was a sufficient factual basis for this guilty plea. Mr. Horton, stating that he agreed with all of the material facts as presented by the prosecution, was sentenced to five (5) years probation, subject to certain specified conditions.

Following the sentencing, the Commission received complaints relating to Judge Lopez and her handling of the ***Horton*** case. Pursuant to its mandate under M.G.L. c. 211C, the Commission initiated an investigation.

The Commission alleges that Judge Lopez exhibited bias in favor of the defendant because he was transgendered. On August 1, 2000, Judge Lopez held a conference at side bar with ADA Leora Joseph and Defense Attorney Anne Goldbach. ADA Joseph had consulted with her supervisor David Deakins, Esq., and had decided from the Commonwealth's perspective to recommend an 8 to 10 year sentence. Defense counsel was requesting probation. The ADA went through her recitation to Judge Lopez. According to ADA Joseph, all was going well until Attorney Goldbach brought up the fact that the defendant was transgendered. At that point, the attitude of Judge Lopez toward the case changed.

This is when Judge Lopez said to the ADA "You don't know anything about transgendered people, do you?" The ADA replied "not much". Judge Lopez then said "Well, I do. I have a house in P_town. They're not violent." See Vol. VI, p. 55. See also Vol. VI, p. 46.

At that point, according to ADA Joseph, defense counsel Goldbach told Judge Lopez that she "had a report her to show the judge about the defendant." See Vol VI, p.47. Further, ADA Joseph testified that Ms. Goldbach said that it was a social report or a psychological report. At that point, Judge Lopez indicated that she would likely give the defendant the probationary sentence, which defense counsel has requested.

While Judge Lopez denies this statement, her own witness, Ms. Goldbach, specifically recalls Judge Lopez saying that she "knows transgendered people", and conceding that Judge Lopez could have characterized transgendered people as "not violent." See testimony of Anne Goldbach, Vol. XIII 22-23. In examining the credibility of the witness, on this point, the ADA's testimony was clear and

unequivocal.

Judge Lopez's sentence is not an issue in this case. What is at issue is whether she rendered the sentence because of bias? The courts have demanded strict compliance with the letter and spirit of the canons because, without it, "our judicial system which depends on public confidence in the integrity and impartiality of the judiciary would surely fail." (Emphasis added) See ***In Re: Ferrara*, 458 Mich. 350, 372 (1998).** The judge must be scrupulous to avoid losing her impartiality and to maintain her unfamiliarity with disputed matters and with extraneous matters which should not be known by her. A biased decision-maker is constitutionally unacceptable. Our system of law has always endeavored to prevent even the probability of unfairness. See ***Withrow v. Larkin*, *421 U.S. 35 (1975)*.**

Judge Lopez's stereotyping of transgendered people is offensive, dangerous, and inconsistent with the Code of Judicial Conduct. The suggestion that any group of people is or is not violent, cuts against the very principle that rights and responsibilities are accorded to each and every individual. If Judge Lopez had sentenced the defendant to an 8 to 10 year sentence because he was a transgendered person, the sentence though lawful, would be equally inconsistent with the Code of Judicial Conduct. Judge Lopez's comments were not based on a judicial source. These comments were derived from personal opinion, not judicial sources.

It is axiomatic that a judge would pervert justice by deferring to a majority view if that judge is convinced that it is erroneous. But the first requirement of civilization is justice - the assurance that a law once made will not be broken in favor of an individual. If nonlegal considerations are permitted to distort legal judgment, then people will lose faith in the fairness of the courts.

But Judge Lopez did not extend to the defendant probation solely because

he was transgendered. In cross examination of ADA Joseph (See Vol. VII, p. 147) she was presented with her prior testimony before the Commission. "She agreed", meaning the judge, "it was a serious case and she would be hard-pressed to give probation. Then when she heard the defendant has this transgendered issue and she saw the report, I think she was like, well, she was swayed at that point." Ms. Joseph, in agreeing with that prior testimony, thus testified that the social worker's report was a factor in Judge Lopez's determination of the sentence.

The Commission asserts that the social worker's report was useless, and that Judge Lopez could not reasonably make a sentencing report based on it. Judge Lopez's attorney, Richard Egbert, replies that it was the responsibility of the ADA to have asserted objections to the report from being considered. To the Commission "junk science is still junk science, whether or not its rebutted". Vol. VIII, p. 108.

This hearing officer agrees with Judge Lopez, that under the system operating within the Superior Court, that even though the report was useless, as argued by commission counsel - it was something. As explained by Judge Lopez and confirmed by Chief Justice DelVecchio, there are no real rules governing plea bargaining, as long as the judge stays within the statutory sentence and does not violate any constitutional rights of the defendant. There is no formal structure for receiving documents in consideration of sentence at these plea conferences.

In answer to Attorney Egbert's question concerning the introduction of documents and whether they are placed in any permanent record, the Chief Justice answered "No. Sometimes they may be placed in a probation file, but they're not placed as part of the public record of the case. And I'm talking there can be medical reports, psychiatric reports, even letters, character reference letters for a defendant, whatever, victim impact statements. Those are all placed in a - - if they are placed at all - - in a probation file". See Volume XI, p. 91. The

Chief Justice was further asked "and if they're not placed in a probation file, what's done with them?", to which she responded "they're generally given back to the attorneys." This is precisely what Judge Lopez did. Ms. Joseph, at that point, did not appreciate that Judge Lopez was relying on that report. The system thus, created a void, which prejudiced the prosecution and which offends the American system of due process and fair play.

This hearing officer is mindful that as the Supreme Court wrote over thirty-five (35) years ago that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basis and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." ***In re*: *Gault*, 387 U.S. 1, 19-20 (1967)**. The rules that govern adversarial proceedings are the "instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing version and conflicting data. Procedure is to law what 'scientific method' is to science." ***Id.*** at 21. When testifying in this case, the ADA was not even sure that the social worker's report was part of the record because Judge Lopez did not retain a copy. Judge Lopez's attorney at one point at Vol. VIII, pp.130-131 asked this hearing officer to strike testimony on pages 102, 103, and 104 appearing in Vol. VI because he was prohibited from cross examining the ADA on whether there were any facts that couldn't be disclosed by the judge. That motion is denied. If the social worker's report had been accepted by Judge Lopez as being part of the record, then it could be disclosed. There was no evidence of any type of statutory restrictions presented to this hearing officer that would have restricted the social worker's report from being made public, if it was part of the record. The social worker was not treating the defendant. If there was a privilege, it had to be asserted by the defendant. But it was the defendant's attorney who placed it in the record. In any event, Judge Lopez never explained to this hearing officer the

existence or basis that the social worker's report could not be made public. The Commission argues that Judge Lopez could not have relied upon the social worker's report, because it was never officially entered into the record of the case until after the sentencing hearing September 6, 2000. But Chief Justice DelVecchio was very clear that according to the customs and practice of the Superior Court, Judge Lopez did not have to place the document into the record in order for her to rely upon it.

Continuing, Chief Justice DelVecchio testified (Volume XI - 103) that "when we are doing the sentencing conference, we generally have a probation officer and we tell them to run the guidelines, just to give us an idea for a particular crime and taking everything into account that I've talked about the way a sentencing could be." Judge Lopez had been involved in other abuse cases, and questionably she did not seek the input of a probation officer to run the guidelines in this case. If she had involved a probation officer, that officer would have probably informed the court at the September 6, 2000 sentencing, that the defendant had committed another sexual crime in the midst of the current controversy, and had pled guilty. This hearing officer finds it amazing, that Judge Lopez was not informed of this intervening crime.

The bottom line is that the system permitted Judge Lopez to act as she did. The system allowed her to hang her hat on a dubious report entitled "Psycho Social Assessment and Dispositional Plan for Charles Ebony Horton" prepared by one employed in defendant counsel Goldbach's office. It is clear now that Judge Lopez did not enter that report as an official part of the record, and the report itself was not even filed with the court until after the sentencing hearing on September 6, 2000, and then, by the defense counsel sending the report to the Probation Department.

Judge Lopez's stereotyping of transgendered people has no place in the

judiciary. The Commonwealth has satisfactorily proved only by a preponderance of the evidence that in this specific incident, Judge Lopez exhibited bias in favor of the defendant. However, if rules of evidence were in place, which would have made it improper for Judge Lopez to rely upon such a social worker's report, or if official sentencing guidelines were in place, then the proceeding would have been more discernible making it difficult to allow any bias or prejudice in favor of the defendant's transgendered status to operate.

Judge Lopez, in attempting to justify her later action, constantly reiterated, directly and through counsel, that the case was essentially over on August 1, 2000. If this be true, then all of the remaining stages of the case were a charade, with each party play acting their roles to protect themselves. If this be true, then Judge Lopez violated the spirit of M.G.L. c. 258B, enacted in 1983, where Massachusetts approved a victim's bill of rights, providing crime victims the right to be informed of and participate in criminal prosecutions. "[T[he statute was intended to change the 'traditional view' of victims from virtually silent observers to active participants in the criminal justice process." ***Hagen v. Commonwealth, 437 Mass. 374, 380-381***. The procedures operating in Judge Lopez's courtroom on August 1, 2000 would appear to have made a mockery of this statute. While Judge Lopez acknowledges on cross examination that she was free to change her mind at the September 6, 2000 hearing, this hearing officer agrees with Judge Lopez and her counsel that the case was essentially over on August 1, 2000. In reviewing the evidence presented to me concerning two (2) criminal cases presided over by Judge Lopez, which were referred to in this hearing, namely ***Commonwealth v. Calixte*** and ***Commonwealth v. Estrada***, there can be discerned no pattern of behavior in giving any deference to the victim impact statement, except to utilize the statement in a way which meets her perceived sense of justice. In ***Estrada*** , it seems that Judge Lopez did not even know what

the maximum sentence for rape of a child, see Ex. 65 at 8 where Judge Lopez asks of ADA Joseph:

> Let me just see. Rape of a child carries? What is the maximum?
>
> MS. JOSEPH: It carries a life sentence.

In ***Calixte*** the victim testified that:

> I don't think it is fair that you are walking away with only eight years' probation, because you came close to killing me.
>
> See Ex. 66, p. 25

By doing so, she violated the clear legislative intent "that the right of the victim be considered in the course of criminal proceedings by the officials responsible for them, including judges".

The facts show clearly that Judge Lopez exhibited concern for the defendant. While none of the steps taken on behalf of Defendant Horton were requested by defense counsel, this hearing officer cannot say that the arrangements made for the defendant was in fact special and was not driven by a desire for the orderly administration of justice. Even though the defendant Horton walked into court through the front door with no attention whatsoever from the media or anyone else, does not mean that Judge Lopez was wrong in her concerns for the defendant. The fact that Judge Lopez did not show the same consideration for the victim or his family during the proceedings, does not mean that she violated the Canons. This indifference may merit question, it does not merit sanctions.

Thus, as to the charge in Count II that Judge Lopez exhibited bias in the

discharge of her duties toward the defendant because of this transgendered status and additionally, being overly solicitous of the defendant, one must examine the standard of proof required in this proceeding, namely: clear and convincing.

This hearing officer has deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering that decision. Although the line between merit and conduct is not always easily found, courts have been able to draw a meaningful distinction between legal or factual determinations. The Judicial Conduct Commission has recognized that its own limited jurisdiction excludes specifically legal questions. The clear and convincing standards provide a measure of insulation so that a judge will not be sanctioned out of disagreement with the merits of her rulings. The central thrust of the charge against Judge Lopez is to make her accountable for conduct not related to the merits of rulings that arise in the course of the performance of judicial duties. There can be no question that the independence of the judiciary is a fundamental precept upon which our system of government was founded. There is an imperative need for total and absolute independence of judges in deciding cases. The Code of Judicial Conduct, based upon the Code of Judicial Conduct as drafted by the American Bar Association, represents an effort to protect the integrity of the judiciary as a whole by placing limits on the independence of individual judges, in order to preserve the integrity of the judiciary, maintain public confidence in the judicial process, while at the same time strengthening judicial independence. Our Code of Judicial Conduct merely echoes existing Canons of long standing to guide judges in the impartial performance of their duties. The Commission would have proved that Judge Lopez had violated the Canon in that she exhibited bias in the discharge of her duties toward the defendant because of his transgendered status, if the standard of proof was simply by a preponderance of the evidence. But, this hearing officer must recognize the import of c. 211C, as amended by St.

1987, c. 656, §1 in creating a new comprehensive scheme.

Thus, under the heightened standards of c. 211C, I am not convinced that the Commission has proved by clear and convincing evidence sufficient to sustain the charge of bias in favor of the defendant, which amounts to a violation of the Canon (to a) reasonable certainty. Judge Lopez had an independent source as the underpinning for her sentence, namely: the social worker's report. According to the standards and practice of the Superior Court, the trial judge, at the plea hearing, is not acting as a gate keeper. If there is no objection, the report is in. Under the lack of rules for this procedure, there is really little that an ADA could do. There is little recourse that one can take where a judge relies upon evidence which is dubious. Superintendence is only available in extraordinary circumstances and in any event, the issue would be mooted out before effective relief could be obtained.

But Count II not only charges favoritism toward the defense, but also alleges that at every turn throughout the proceedings, Judge Lopez exhibited disdain for the DA's office. Thus, Count II also charges that Judge Lopez violated the Code of Judicial Conduct by exhibiting that bias and failing to appear impartial in presiding over the ***Horton*** case.

It is true that the evidence reveals throughout the proceedings, that Judge Lopez exhibited disdain against ADA Joseph. She had already presided over two (2) earlier cases involving ADA Joseph, namely: ***Commonwealth v. Calixte*** and ***Commonwealth v. Estrada***. Thus, Judge Lopez's opinion and treatment of ADA Joseph was already "informed" by the ***Calixte*** and ***Estrada*** cases.

That bias was not evident at the August 1, 2000 court hearing. To the contrary, in making her presentation, ADA Joseph thought Judge Lopez was being responsive to her arguments in making her presentation. The DA's office was recommending an 8 to 10 year sentence. From their perspective, it was a very

serious case: the defendant was a stranger to the child; a weapon was used in order to force the child to simulate a sex act; and the child was kidnapped. The case was extremely strong; the family of the boy had been very cooperative with the DA's office and prepared to follow through to trial. The defendant had made a confession and the police had recovered from the car in which the boy was kidnapped, the weapon that was used to force him to simulate a sex act. Had the police not come onto the scene by happenstance, there was a real possibility of the sex act being consummated. In making her presentation, the ADA left out crucial bits of information which could have better informed Judge Lopez.

Defense attorney Anne Goldbach, came into this conference with the perception that a Detective Jay Greene had exculpatory information. She was also armed with an evaluation of her client by an employee of her office, Joan Katz. Defense counsel originally sought this report to assist her in any bail hearing. Additionally, there was alleged concern on the part of counsel about competency on the part of her client. She also thought the report could be useful on disposition.

In fact, defense counsel had offered the report to ADA Joseph at the Superior Court arraignment. ADA Joseph had a look of disdain on her face like the report was a worthless piece of paper, and refused to accept the document, See Vol. XI, p. 210.

However, Attorney Goldbach found a more receptive audience from Judge Lopez. In good faith, Attorney Goldbach put forth evidence which later turned out to be untrue. She indicated to Judge Lopez that this was not a total stranger situation. She also told Judge Lopez about the information that she had gotten from Jay Greene. That he was a veteran detective who was not a "softy". Ms. Goldbach felt that the Commonwealth was exaggerating the case, making it look serious, ignoring what she viewed as mitigating aspects of the case. Ms. Goldbach

vigorously objected to the "good boy" description of the victim advanced by the ADA by stating "I don't think he's everything your making him out to be", see Vol. VI, p. 54.

There was no outward evidence of any animus displayed by Judge Lopez toward ADA Joseph during the sidebar on August 1, 2000. Ms. Joseph made it clear to Judge Lopez that "the DA's office was not going to agree to probation on any level". The ADA again argued that in their office's perspective, this was a "very serious crime". "The victim's family feels strongly about the case as well." Vol. VI, p.56. And Judge Lopez responded, "You can argue and say whatever you want, but that's what I'm going to do." Vol. VI, p.56.

Up to this point, the Commission has not established that Judge Lopez had violated any Canons through August 1, 2000. If she had done nothing further, but simply imposed the sentence that she indicated, this matter could have been avoided. Instead, the events that unfolded display a journey into quicksand. The more that Judge Lopez struggled to extricate herself from that quicksand, the further she sank.

My job as hearing officer is to make factual determinations and to evaluate the truthfulness of witnesses appearing before me. It must be recognized that since the advent of the Commission on Judicial Conduct, the bench has in many ways been governed by a higher standard of conduct than the bar. Unlike the bar, a judge must not and cannot engage and descend into petty feuds. But this is what was about to occur in this case. The actions and course of conduct that Judge Lopez was about to embark upon was disingenuous to say the least.

On August 4, 2000, when ADA Joseph got off the elevator in front of the courtroom, she was immediately confronted by Attorney Goldbach. Ms. Goldbach was very upset complaining to the ADA about how she could do "this". The press was there. To Ms. Joseph, the press attention was of little concern. But to

Attorney Goldbach, the Great Wall of China had just collapsed. She wanted to see the judge. Her client was very upset.

Attorney Goldbach was outraged by a press release issued by the DA's office (Exhibit 7) which identified "Charles Horton, 31, a transgendered person who appears as a woman." The attorney felt that the DA's office "was sensationalizing the case and that it was a lure for the media to go there. And I found it quite offensive, frankly." Testimony of Anne Goldbach, Vol. XII-104.

Attorney Goldbach also expressed her outrage to Judge Lopez at the morning lobby conference in the day. She "indicated to Judge Lopez that at that point, I had 23 years of experience, that you usually see this type of media coverage for either a first-degree murder case or a case that was a high-profile case in the press, which was not the case in this instance. That my client wasn't a murderer, that this was not fair, that this wasn't just, and that it was cruel for the DA's office to have done this." Vol. XII, pp.106-107.

Judge Lopez was equally upset with ADA Joseph. While I believe that ADA Joseph engaged in hyperbole in describing the tone of Judge Lopez's voice as screaming, I do find that Judge Lopez did in fact unleash a barrage of criticism at the ADA that was not warranted. Judge Lopez called ADA Joseph "very mean" and stated that she "belonged in the suburbs." The judge blamed ADA Joseph for calling in the media saying that Ms. Joseph was unfit to be a prosecutor and had no credibility. She accused ADA Joseph of orchestrating the presence of the media in creating a "circus". Judge Lopez was clearly displeased. The instigator to this entire barrage was Attorney Goldbach. She had a job to do - to protect her client; and unfortunately, she did it at the expense of ADA Joseph. While in Attorney Goldbach's mind there was a circus in the courthouse, the evidence is not there to support that belief. But while Attorney Goldbach was the instigator, she found a willing partner in Judge Lopez, who accepted everything that defense

counsel had to say without question or investigation. Facilitating Judge Lopez's acceptance of proffers made by Attorney Goldbach was the fact that Judge Lopez had developed a dislike of ADA Joseph because of prior public criticism. Where actual bias on the part of a judge is present because she perceives that she has been the target of personal abuse or criticism from the party before her, then there is a constitutionally intolerable proceeding. While Judge Lopez's bias against ADA Joseph was not clearly prejudicial to the adversarial process, it was clearly abusive. There are certainly aggressive trial lawyers who routinely test the limits of proper advocacy. But ADA Joseph was being punished for properly exercising her First Amendment Rights. Judges, like other public officials, frequently become targets of public criticism for their actions. Although the spirit of collegiality tends to shield judges from criticism from within the judicial branch, such collegiality does not extend to the Fourth Estate. The fact that the judge made offensive remarks privately within the judge's expectation of privacy in her chambers, does not make the remarks less offensive. But when the judge allows offensive remarks to be made part of the public landscape, those remarks may well justify the imposition of discipline. But this does not mean that slurs directed toward an attorney, (whether) such remarks are made in chambers or in the courtroom, can still not constitute language that prejudices the administration of justice.

There was a total lack of understanding on the part of Judge Lopez as to the interaction between the press and the DA's office. Judge Lopez perceived that the ADA had orchestrated the media coverage. It is true that ADA Joseph set the wheels in motion by which the press was drawn to the ***Horton*** case. But the DA's office had a written policy requiring all Assistant District Attorneys to apprize the press office of the District Attorney of cases likely to generate press coverage or that were otherwise newsworthy. The bottom line is that the DA's office had a

right to issue a press release. The DA has a public responsibility to inform the public of crimes being prosecuted and sentences being imposed. Child molesters are no exception to the public's right to know.

Judge Lopez might have found it offensive for the DA's office to have mentioned in the press release that the defendant was transgendered. This is why Judge Lopez attacked ADA Joseph as very mean, very young and this was all her fault. Both Judge Lopez and Attorney Goldbach found that the mention in the press release that the defendant was transgendered as being extraneous to the case. But it was Attorney Goldbach and Judge Lopez who made the transgendered status of the defendant the central focus of the entire case. It was precisely because the defendant was transgendered that Judge Lopez adopted the sentencing recommendation of Attorney Goldbach. Even the social worker's report focused upon the defendant being transgendered. It was the transgendered nature of the defendant which to them explained and justified the action being taken in this case.

Judge Lopez had a low opinion of ADA Joseph based on her history with Joseph in the ***Calizte*** and ***Estrada*** cases. Judge Lopez believed that ADA Joseph had a habit of criticizing her in the press. Again, this belief is derived from her misunderstanding of the nature of the DA's office and its policies. Judge Lopez testified that ADA Joseph's comments in the article written by Eileen McNamara, **Two-Tier Justice Hurts Children, Boston Globe, 2/14/99 (Ex. 43)** "criticize [her] personally." While ADA Joseph denies that her comments were a personal attack upon Judge Lopez in that she never mentioned the judge by name, one could easily ascertain who the judge was referred to in the column.

Ms. Joseph's contention that she never mentioned Judge Lopez's name during her interview with Ms. McNamara (Vol. VI:88), and the Commission's claim that Ms. Joseph's quoted statements were not a personal attack on Judge Lopez

(CB at fn. 11) are both fictions. McNamara's article and Ms. Joseph's statements were obviously about Judge Lopez. Was Judge Lopez warranted in believing that Ms. Joseph's quoted statements were intended to, and actually did, refer to her as the sentencing in judge in the ***Estrada*** and ***Calixte*** cases? Yes. Did Judge Lopez believe that ADA Joseph's representation of the reasoning that Judge Lopez used in deciding what sentences to impose in the two (2) cases was a misrepresentation? Obviously. Did Judge Lopez believe that she had been repeatedly and falsely portrayed to the public by the prosecutor? Certainly. Did Judge Lopez believe that ADA Joseph was quoted as having implied that her sentences in the two (2) cases "condone[d] the rape and beating of children"? Of course. Did Judge Lopez believe that it was inappropriate for ADA Joseph to make sentencing arguments in the press that she never advanced in court? Yes. Was Judge Lopez warranted in reading ADA Joseph's quoted statements as maliciously false attacks that put the Superior Court and Judge Lopez in a false and damaging light? Absolutely not.

Judge Lopez would like this hearing officer to believe that ADA Joseph perjured herself when she testified that Judge Lopez expressed an opinion that transgendered people are not violent. Judge Lopez argues that the statement is so ridiculous that she could not have made this statement. The statement is indeed ridiculous, but she did make that statement. The record clearly shows that the very animus that Judge Lopez accuses ADA Joseph had against her is the same animus that Judge Lopez bears against the ADA. Judge Lopez's continuing diatribe against Ms. Joseph is proof enough of actual bias. Despite this finding, this hearing officer does not believe that Judge Lopez's animus against Ms. Joseph in any way affected the sentence that she handed down on August 1, 2000.

Judge Lopez argues there is no reported Massachusetts judicial misconduct case in which the legal meaning of actual bias in violation of Canon 3(B)(5) is

explicated. The judge argues that no reason appears why the meaning of "bias" in Canon 3(B)(5) is different than its meaning in the disqualification standard - Canon 3(C)(1) - which in turn, is the same standard used to determine whether a judge should recuse herself from presiding over a case. To a certain extent, this hearing officer agrees, although in these circumstances there is no possible showing that Judge Lopez's bias against the ADA could have required a reversal of her sentencing decision. Then too, the bias and prejudice relevant in a recusal proceeding are not necessarily so restricted to show a violation of a Canon. In any event, the spirit and purpose of the Canon would hardly be served by holding that a judge may act in an undignified manner while on the bench so long as she only chooses to berate attorneys. Any discourtesy to the attorneys is clearly within the scope of the Canon.

> Under art. 29 of the Massachusetts Declaration of Rights, judges are to be "as 'free, impartial, and independent as the lot of humanity will admit.'" ***Commonwealth v. Leventhal*, 364 Mass. 718, 721 (1974).** "Ordinarily, the question of disqualification Is left to the discretion of the trial judge." ***Commonwealth v. Dane Entertainment Servs., Inc.*, 18 Mass. App. Ct. 449 (1984). *Care & Protection of Martha*, 407 Mass. 319, 329 n. 10 (1990).** "[A]n abuse of that discretion must be shown to reverse a decision Not to allow recusal." ***Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991).**
>
> When confronted with a recusal motion, a "judge [must] consult first his own emotions and conscience" to ascertain if he is free from disabling bias or prejudice. ***Haddad v. Gonzalez, supra***, quoting from ***Lena v. Commonwealth*, 369 Mass. 571, 575 (1976)**. If the judge passes the internal test of freedom from disabling prejudice, he must next "attempt an objective appraisal of whether this was a proceeding in which 'his impartiality might reasonably be questioned.'" ***Haddad v. Gonzalez*, supra,** quoting from **S.J.C. Rule 3:09, Canon 3 (C)(1), 382 Mass. 811 (1981)**. Under the rule, "[c]ircumstances where a judge's impartiality might reasonably be questioned include instances where the judge 'has a

personal bias or prejudice concerning a party . . . .'" Id., quoting from **S.J.C. Rule 3:09, Canon 3 (C)(1)(a).**

Judge Lopez argues that there are no cases in which the presiding judge's criticism of the conduct of a lawyer, as distinguished from a party involved in a case, supports a finding of actual bias. But where the facts clearly shows actual admitted bias against the attorney, the judge's impartiality might now reasonably be questioned. In ***Parenteau v. Jacobson*, 32 Mass. App. Ct. 97, 100**, where the trial judge explained that he did not recall the first time that the defendant appeared before him, and he "did observe that he was one of the biggest liars that I'd seen in a long time, based upon the evidence that I'd heard", it was obvious that the judge's impartiality might reasonably be questioned if he presided at a jury-waived trial. The fact that the trial judge in that instant, ordered a jury trial, concluding that his impartiality could not reasonably be questioned if his only connection with the case was to preside at the trial, was not persuasive. The judge's role at any hearing is to be the "directing and controlling mind...and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings." ***Whitney v. Wellesley & Boston St. Ry.*, 197 Mass. 495, 502 (1908)**. Therefore, a courtroom has no place for a judge whose impartiality in a matter may be reasonably questioned. Judge Lopez argues that, if she were biased against the ADA's they should have sought her recusal. But the Supreme Judicial Court has soundly rejected the argument that the Canons are only violated by bias that rises to the level requiring recusal. See **In the Matter of Brown, 427 Mass. 146, 152 (1998)** ("the bias and prejudice relevant in a recusal proceeding are not therefore necessary to find a violation of Canon 3(A)(3)"). Moreover, any decision on recusal would have been made by Judge Lopez herself, who even now claims no bias. Thus, such a motion would have been futile given the circumstances of the case.

It is true that in the Jacobson case, as well as other cases, i.e., ***Commonwealth v. Fitzgerald*, 380 Mass. 840, 846-849 (1980); *Commonwealth v. Sylvester*, 388 Mass. 749, 752 (1982)**, which in fact were cases where the judge made critical statements, plus exhibited angry or hostile demeanor toward counsel, did not result in any charges being brought against the judge involved in those cases. But despite the arguments of Judge Lopez, this hearing officer cannot condone or absolve her behavior, on the basis that other judges may have acted in a similar fashion. Judge Lopez asks why the alleged bias against the prosecution in the ***Horton*** case occasioned the charges against Judge Lopez when no charges were brought against these other judges. The answer is simple, though unfair in certain ways. The episode of judicial misconduct was seen on television. The introduction of television was supposed to elevate the administration of justice. The public has a constitutional right to view all phases of any public hearing. The fact remains that in most cases, what occurs in our courtroom, remains mostly unseen. Justice is usually dispensed in a courteous but quiet fashion. The fact that this case attained notoriety because of television is not unfair to Judge Lopez in that she knew well that her conduct was there for all to see. That viewing generated the controversy. "The judiciary must behave with circumspection when in the public eye." ***Matter of Brown*, 427 Mass. 146, 149 (1998).** The fact remains in this case that even if Judge Lopez reasonably believed that the prosecutors' conduct merited criticism, she cannot act vindictively towards those attorneys.

This hearing officer agrees with Judge Lopez that the judicial system would not survive if lawyers could relentlessly accuse a judge of bias or the appearance of bias based on the judge's well-founded criticism of the conduct of counsel who appear before them. "Nor can that artifice prevail, which insinuates that the decision of this Court will be the effect of personal resentment; for, if it could,

every man could evade punishment due to his offenses, by first pouring a torrent of abuse upon his judge, and then asserting that they act from passion, because their treatment has been such as would naturally excite resentment in the human disposition. But it must be remembered, that judges discharge their functions under the solemn obligation of an oath; and if their virtues entitles them to their station, they can neither be corrupted by favor to swerve from, nor influenced by fear to deter their duty." ***Respublica v. Oswald*, 1 U.S. (1 Dallas) 319, 326 (Pa. 1788).**

But on the other hand, even if an attorney runs afoul of his or her obligations to the court, this does not give license to the judge to enact revenge. To brook it in a single courtroom would degrade the courts in general. As the Judicial Conference of the United States has stated, "the robe a judge wears as he sits upon the bench is not a license to excoriate lawyers or anyone else." J.M. Shaman, S. Lubet & J.J. Akfini, Judicial Conduct and Ethics, 61 (2d. Ed. 1995).

Judge Lopez has raised profound free speech questions on behalf of judges. At the same time, she is willing to heap punishment on ADAs for exercising their rights under the First Amendment. "The administration of justice by an impartial judiciary has been basic to our conception of freedom every since Magna Carta." ***Bridges v. California*, 314 U.S. 282 (1941) (Frankfurter, J., dissenting)**. "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." ***Bridges v. California*, *Ibid* at 260 (Frankfurter, J., dissenting).** While Judge Lopez has the obligation to maintain decorum in the courtroom, she does not have the right to act in a way to "lay by the heel" those responsible for what she perceived to be "scandalizing the court," that is, bringing it into general disrepute. Such foolishness has never found lodgment in the Courts of Massachusetts, whereby judges are allowed to utilize their courtroom to carry out their petty feuds. There

are proper avenues whereby judges can punish attorneys. But this does not mean that the attorneys who practice before the court, lose their right to condemn decisions or the judges who render them. *"Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interest of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench, as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor, however blunt."* (Emphasis supplied) ***Bridges v. California*, Ibid. at 289 (Frankfurter, J., dissenting)**

> "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. *On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body ofmen can be set on a pedestal and decorated with a halo.* (Emphasis supplied) True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

See the **Lincoln Day, 1898** address of Mr. Justice Brewer, **Government by Injunction, 15 Nat. Corp. Rep. 848, 849.**

Judges wield an awesome and final power over the liberty and property of their fellow citizens. This power is the more awesome because in this Commonwealth, as in the Federal system, we are neither elected nor subject to recall or retention elections. This power is tolerable in a democracy because judges speak only for reason and the law. ***In the Matter of Brown*, 427 Mass. 146, 149 (1998)**. "Surely it is arrogance for us to say to them that we may not

seem impartial but we know we are, and so they must submit." **Id.** Normally the public does not witness the events in question, so they must instead trust what happens. In this case, the public did witness the events in question. As stated in the Federalist No. 78 (Alexander Hamilton), we have "neither force nor will, but merely judgment."

But I also believe that to prevent disciplinary action from encroaching upon legitimate and necessary use of the judges' powers to control their management of cases, sanctions should be employed only for conduct, that viewed from the perspective of reasonable judges and lawyers, is clearly abusive toward counsel or clearly prejudicial to the adversarial process. Judges are not all alike. There are as many appropriate courtroom management techniques as there are judges. In any given situation, there will be more than one appropriate way to manage a session. Then too there are aggressive trial lawyers who routinely test the limits of proper advocacy. Thus, out of context, the trial management techniques needed to control these lawyers may seem harsh, even abusive. I am also aware that judicial discipline can chill the proper exercise of judicial discretion. If judges can be sanctioned for conduct that is only arguably or possible abusive, they may be reluctant to employ stern measures even when necessary to keep control of the adversarial process.

While comments uttered off the bench pose a less serious threat to public esteem for the integrity of the judiciary, such remarks can constitute prejudicial misconduct. More importantly, the remarks made to ADA Joseph in the privacy of the lobby set the stage for the events that followed.

There is no question that Judge Lopez's remarks at the conference were meant to inflict emotional trauma upon ADA Joseph. The fact that Judge Lopez stated to Attorney Goldbach that she was considering continuing the case until a time when ADA Joseph was on vacation was a deliberate attempt to humiliate

her. Vol. VI, p.66

After the conference in Judge Lopez's chambers, ADA Joseph contacted her supervisors. ADA Joseph's immediate supervisor, ADA David Deakin, went to the courthouse to assist her. When he arrived at the courthouse, he was immediately confronted by Attorney Goldbach, just as Ms. Joseph had been confronted earlier in the morning.

In the lobby conference, Attorney Goldbach had asked Judge Lopez for a continuance because her "client wasn't in any condition to engage in a plea that day." The attorney felt that "given my client's condition at that point, that there was no way she could knowingly and intelligently make that decision and go through a guilty plea." Vol. XII -112. Judge Lopez , in turn, based on that ground, indicated to Attorney Goldbach that she could have her continuance. In reaction to Judge Lopez's indication that she would grant a continuance, Attorney Deakin worked with ADA Joseph to draft a **Motion in Opposition to a Continuance,** see Exhibit 17.

When Judge Lopez came back on the bench after the case was again called after the lunch recess, the parties were informed that the case would be continued, without hearing further arguments. In granting the continuance, Judge Lopez now explained that the court docket was too crowded to reach the case, and there wasn't time to do the plea. See testimony of Attorney Deakin, Vol IX - 55. But according to Attorney Goldbach, the real reason that the continuance was allowed was because she would not allow her client to make a plea given the fact that the press was there and the emotional trauma that would be inflicted upon her client.

Pursuant to M.G.L. c. 278, §16F, Judge Lopez was required to make written findings before granting a continuance in a child sexual abuse case. When ADA Deakin submitted a **Motion to Oppose the Continuance**, Judge Lopez responded

that "Okay. You will get written findings." "Her tone was intense." Vol. IX, p.56

The findings were sent later on that day. Up to this point, in reviewing the actions of Judge Lopez under the clear and convincing standards, she was in the clear. If she did nothing further, the matter for all extent and purposes would have been over. Unfortunately, with her written findings, Judge Lopez crossed the line. Her findings were replete with half-truths and misleading statements.

The "findings'" included:

(1) the ADA had a habit of calling in the press;

(2) the ADA attempted to embarrass and ridicule a defendant suffering from a psychological disorder;

(3) the Commonwealth caused the continuance by seeking to turn the court proceedings into a circus; and

(4) there would be little or no impact to the "alleged victim."

Each of these findings were misleading and based solely on the judge's antipathy toward ADA Joseph and the DA's office. At this point, she started her campaign to embarrass and discredit ADA Joseph.

The unrebutted record evidence establishes that ADA Joseph never "called in the press" in any case, let alone habitually. The only occasion on which ADA Joseph discussed a case handled by Judge Lopez followed the ***Calixte*** and ***Astride*** matters. In that single instance, the reporter contacted the DA's office and ADA Joseph's supervisors requested that she talk to Ms. McNamara. Such conversation was neither initiated by ADA Joseph nor related to "calling in the press." Notably, Judge Lopez did not even attempt to take any evidence before making this "finding", which amounted to nothing more than a personal attack on ADA Joseph. In making this finding, the judge's treatment of the ADA was an abuse of judicial authority and was clearly motivated by feelings of animosity.

Judge Lopez, in issuing this finding, was acting on her suspicions. Judge Lopez similarly had no basis to find that ADA Joseph attempted to "embarrass and ridicule a defendant suffering from a psychological disorder."

The reference by Judge Lopez that the defendant "suffered from a psychological disorder" is troubling in that the report that she relied upon was not officially part of the record, at that time. Judge Lopez's effort to elevate a four-page social worker's report into something meaningful was pure sophistry. But for the reasons already expressed, I cannot find that Judge Lopez made an entirely dishonest use of the social worker's report. But clearly, Judge Lopez knew that the ADA thought that the report was worthless. Thus, there was no evidence that the ADA was attempting to embarrass a defendant suffering from a psychological disorder.

Judge Lopez also found that the DA's office caused the continuance by "seeking to turn the court proceedings into a circus." The presence of the media in the courtroom is not only permissible, but is assured by the Supreme Judicial Court. There was no evidence that there was a "circus" atmosphere within the courtroom. Indeed, it is the obligation of a judge to control the courtroom. This is essential to the exercise of judicial power. There was no evidence that Judge Lopez had lost control of her courtroom.

In writing her findings, Judge Lopez was acting in bad faith, indulging in petty animosities which would only serve to bring the judiciary into disrepute. Unfortunately, the finding was only a precursor to more unfortunate events that were to unfold in the near future. While Judge Lopez may have believed that her findings for the continuance were true, they were in fact her own suspicions which were not reasonably supported by research or investigation.

A judge must not act upon suspicion, since to do so, would interfere with the atmosphere of impartiality which judges have the duty to maintain. Judge

Lopez's personal attack on the ADA was unsettling in that counsel must feel free to advance claims with the assurance that the judge will listen with an open mind and, without prejudgment, that the matter is not being presented in a dishonest or exaggerated manner, or that the action is otherwise in bad faith. But this is what Judge Lopez was doing. She had prejudged the matter within a five (5) to ten (10) minute span at the first conference hearing, and all the efforts by the DA's office to change her position, she viewed as being presented in a dishonest or exaggerated manner, and in bad faith. But in her defense at this hearing, Judge Lopez now argues that the DA's office was at fault because it was not vigorous enough.

I have no doubt that defendant Horton was emotionally overwrought by the presence of the press. But the reaction of the defense counsel to the presence of the press only exasperated the situation. Ms. Goldbach expressed real dissatisfaction with ADA Deakin when he appeared on the scene outside the courtroom. She was angry at him and his office for issuing the press release. Attorney Goldbach pointed specifically to that portion which said "Charles Horton, 31, a transgendered person who appears as a woman". She raised other concerns with him. She told him that this case isn't what it looked like. When asked to explain, she told ADA Deakin to talk to Detective Jay Greene. When ADA Deakin asked what does Jay Greene say, she again responded "Talk to Jay Greene." After being pressed by ADA Deakin for more specificity, she spread her poison that Jay Greene would say that the boy "he's not the angel or choir boy that you're saying he is." But when ADA Deakin asked what was the relevance of this information, she either couldn't or wouldn't answer it. See Vol. IX-pp.44-45.

Finally, Judge Lopez found that the continuance would have little or no impact on the "alleged victim." She mentioned the victim, only because the statute required her to make that statement. Her real objective it appears was to

punish the ADA. The written findings as to the continuance presented an opportunity to vilify and discredit ADA Joseph to the very press and television media that she decried. Judge Lopez asked Joan Kenney, the Public Information Officer at the Supreme Judicial Court to send her written findings to those television stations that she listed on her fax. Joan Kenney considered Judge Lopez's written findings to be a press release to be sent to Channels 4, 5, 7 and 56. In addition, because Judge Lopez had asked Joan Kenney to fax the findings and order to the media that same day, the Public Information Office also sent it to other media outlets, namely, the Globe, the Herald, the A.P., and perhaps, others who might have been interested in this case.

Judge Lopez had informed Joan Kenney that she was upset at the media being present that day, particularly filming Charles Horton, and because of that, she was continuing the case. (See Vol. X, p. 147) This hearing officer finds it odd that Judge Lopez could believe that simply by continuing the case, the media would go away. Stranger still that Judge Lopez then would inform the media in writing of the continuance date. Common sense dictates that the media attention would only intensify by the continuance. In fact, there was a greater media presence on September 6, 2000, after the judge issued her "findings"/press release on August 4, 2000.

I also have no doubt that Judge Lopez was truthful in stating in open court that she had 16 bails and a lot of other things to take care of. The evidence clearly shows that. What is disingenuous, was using this fact as a reason for putting over the plea to another time in Middlesex. It was evident that the matter was continued to avoid the media. She had plenty of time to take the plea in the morning.

It is also curious that Judge Lopez sees no wrongdoing in sending out a statement to the press which did not represent the reality of the situation, while

at the same time attacking the ADA for sending out an initial press release which indicated that the defendant was pleading guilty on August 4, 2000. It is disingenuous of both Judge Lopez and defense counsel to state this was not proper, when defense counsel was getting exactly what she asked for in sentencing. This heightened sense of indignation could be accepted, if there was any doubt that the defendant would take the plea. The outrage was sheer sophistry, serving only as a pretext to attack the ADA. What is important though is not whether the DA was unethical in sending out its press release, but that Judge Lopez thought it was unethical. This is what she meant when she informed the ADA's in their opposition to the continuance, "Okay. You will get written findings."

What is further troubling is that Judge Lopez states in ¶9 of her Responses to Charges that she "was unaware of it at the time she made her findings, the Suffolk County District Attorney's Office issued on August 3, 2000, a press release . . ." On the stand in this hearing, Judge Lopez admitted that, in fact, that she had read the press release before she issued her finding. See Vol. I, p. 107. Judge Lopez explained at 108 that "[b]etween my morning lobby conference and the time I wrote these findings, I had read that press release." What Judge Lopez did not say is that she knew from Attorney Goldbach, that there was a press release, and the essence of that press release.

Attorney Goldbach, called by Judge Lopez on direct examination, explained what had happened earlier in the morning before any findings were made. "We went in and sat down. Judge Lopez was already seated. And I was the first person to speak. And I explained to Judge Lopez that the DA's office had issued a press release indicating that my client was expected to plead guilty and that my client was transgendered." Vol. XII, p. 126.

The August 4, 2000 findings issued by the judge were significant in at least

two (2) other respects. First, Judge Lopez described the findings as a "press release," which she instructed Ms. Kenney to circulate to the media. Judge Lopez thus misused an Order of the Court as a press release to personally attack the DA's office and ADA Joseph. Before the issuance of the findings, the public knew only that the ***Horton*** matter was scheduled for a guilty plea on August 4. By issuing the findings and affirmatively seeking to publish them to the media, Judge Lopez escalated a professional disagreement over sentencing to a personal and public antagonism between a sitting judge and the DA's office. Judge Lopez's decision to publish the "findings" was wrong, not only because official court orders should not be used as a subterfuge for personal battles or as a press release, but because such a "press release" was inconsistent with the purported basis for the continuance itself. ***Compare*** Ex. 17 *with* Ex. 42 at 2. The hypocrisy of Judge Lopez's conduct, as previously noted, is that she attacked the DA's office merely for issuing a standard press release and then blamed the ADAs for the mere presence of the media in the courtroom on August 4; yet she published a highly inflammatory order (as a press release) which guaranteed greater media attention at the September 6 hearing. The record evidence establishes that Judge Lopez took no evidence before writing her findings. The findings, in fact, include a number of false assertions.

Her counsel argues that the DA, if they thought that the press release was wrong, could have sought relief by seeking redress by way of superintendence to the Supreme Judicial Court. But superintendence is an extraordinary remedy which would have been a most improbable avenue of redress. Imposition of the sentence would have mooted out the case. There was little for the DA to do for past events.

But for the future, the course of events had now changed with the arrival of ADA Deakin. Knowing full well what happened to Ms. Joseph, he was

determined not to be so compliant. On that day, Judge Lopez acted as a Judge Judy. Judge Lopez, who had been prepared for Ms. Joseph, would prove not to be so prepared for ADA Deakin.

On September 6, 2000, the ***Horton*** matter came before Judge Lopez in Middlesex Superior Court. Ostensibly, the hearing was set to take a plea. In reality, it was a sham. On that day, the judge's treatment of the ADA was designed to embarrass the Office of the DA. Judge Lopez had been frustrated with the prosecutors for what she perceived to be their unethical behavior in this case. The proceeding constituted an artifice merely designed to punish the Commonwealth - depriving the public of its interest in a just and impartial disposition of the case. On that day, Judge Lopez exalted form over substance.

The well publicized evidence showed Judge Lopez to be rude, discourteous, and abusive to ADA Deakin during the proceedings. Such treatment of ADA Deakin had at least the appearance of bias against the DA's office. Indeed, Judge Lopez's treatment of ADA Deakin, after a month long hiatus during which she had an opportunity to "cool down," is proof of her actual bias against the DA's office.

During the September 6 hearing, when ADA Deakin was about to recite the facts that supported Horton's pleas of guilty, Judge Lopez emphasized to ADA Deakin that she wanted to hear only the facts "relevant" to the indictments. Midway through ADA Deakin's presentation of those facts, Judge Lopez interrupted him and said that his recitation was sufficient. Deakin was allowed to continue only after he requested permission to do so. Subsequently, Judge Lopez solicited ADA Deakin's sentencing recommendation. After Deakin explained in detail the basis for the Commonwealth's sentencing recommendation of 8 - 10 years of imprisonment, Judge Lopez asked sarcastically whether the defendant should be sent to a male prison or female prison. This remark is notable in that Judge Lopez has testified that the defendant's sentence of probation was already

a foregone conclusion; thus, her question was intended only to be sarcastic and antagonistic to ADA Deakin.[1]

When Deakin completed his sentencing recommendation, Judge Lopez asked him, how he would rate the seriousness of the case on a scale of 1 - 10. ADA Deakin provided an in-depth response explaining, among other things, that the seriousness of a case rested on a number of different "axes." ADA Deakin did not provide a single numerical rating of the seriousness of the case, but rather described the seriousness of different aspects of the case. The judge's contrary testimony that she understood him to have provided a single numerical rating is unsupported by the evidence. Rather, the tape and transcript reveal ADA Deakin to have said that, because the defendant was a stranger to the victim, that aspect of the crime rated a 10; the young age of the child placed the case in the "quite serious" range; and the lack of a completed sexual assault was "moderately serious." At the end of Deakin's response, Judge Lopez erupted , lashing out at ADA Deakin and accusing him of being "disingenuous". Judge Lopez also characterized the offense as "on a very low level." When ADA Deakin attempted to exercise his right to object to the judge's finding him to be "disingenuous," Judge Lopez wagged her finger and threatened him, stating in a raised voice that the would have to sit down or she would order a court officer to make him sit down.[2]

1

The insincere and sarcastic nature of Judge Lopez's question is apparent from the videotape of the proceedings. See Ex. 41. The evidence demonstrates that the public also perceived her to be sarcastic and antagonistic towards ADA Deakin. See Exs. 11, 14 (complaints discussing the judge's arcastic and abusive treatment of Deakin); see also ***Matter of Blackman*, 124 NJ 547, 552-53 (N.J. 1991)** (citing newspaper articles as evidence of the judge's conduct having created the appearance of impropriety - "Even if such criticism might be a misrepresentation of his motives, respondent nonetheless had an obligation to avoid any conduct that might lead to such criticism").

2

Remarkably, while purporting to regret this behavior, Judge Lopez continues to justify it by characterizing ADA Deakin's objection as "contumacious conduct." See Vol. IV at 119.

Throughout this exchange, ADA Deakin remained calm and professional. Her reference now that she was referring to the Ronan sentencing guidelines is disingenuous. She knew well that the ADA was referring to the proposed sentencing guidelines that was posted on the Superior Court website, and which the Legislature had not approved. Joan Kenney, when asked about the sentencing guidelines, never heard Judge Lopez refer to the Ronan guidelines.

In truth, as Chief Justice DelVecchio testified, there was not much difference between the Ronan guidelines and the proposed guidelines that went before the Legislature. The main difference is the extra kick in the proposed guidelines that could increase the time to be served. But the Ronan guidelines were in effect well before the Legislature passed truth in sentencing provisions that made time given by a judge to be served, real time. The bottom line is that Judge Lopez has discretion under the statute to give probation, and it was under that statute she exercised her discretion. There was no evidence of any grid showing what the sentencing could have been under any sentencing guidelines.

The event described up to the point, that ADA Deakin attempted to exercise his right to object to the judge' finding him to be "disingenuous", was unfortunate. Up to that point, the judge's voice, expression, and demeanor toward ADA Deakin can be described as being sarcastic. She was lacking in judicial temperament and devoid of the basic concepts of impartiality in the conduct of this hearing. Events later proved that Judge Lopez treated the whole proceeding as a sham. In trying to position the ADA to make him look like a fool, Judge Lopez did not count on ADA Deakin standing up to her abuse. ADA Joseph had never confronted her, rather she suffered in silence and complained to her superiors. When Judge Lopez viewed the tape during this hearing, even she winced recognizing that, at that point, she was lacking the dignity expected of a judge. The judge's actions during the sentencing hearing demeaned the system of justice within the

Commonwealth of Massachusetts.

In reviewing the dynamics of the proceeding, there were two (2) competing forces at work during this sentencing hearing. The ADA wanted to make an extensive record at this hearing to show that the recommended sentence was just and proper, and that the judge's imposition of probation was unjust; and Judge Lopez , who was interested in showing to the world that the DA's office was incompetent, and that she knew better.

The pattern of conduct shown by Judge Lopez towards the ADA in this case demonstrates profound concerns for the legal community as a whole. While every judge has a bad day from time to time, and lawyers have on many occasions taken the brunt of verbal assault from judges as an occasional occupational hazard, it should not be a plan of action for a judge to conduct such a hearing. A judge with a temper is not necessarily one without a keen sense of justice. But while litigants and attorneys may be willing to endure a temporarily awkward moment in court, in exchange for a just result, the display of her lack of demeanor in the courtroom to the public was unfortunate to witness.

The central problem for Judge Lopez was that her conduct at the September 6, 2000 hearing did not comport with the public perception of how a judge should act. While the public may be receptive to an abrasive grandmother from Manhattan on TV, who panders to the millions who watch her on the Judge Judy show, they are not willing to accept that from a sitting judge within the Commonwealth of Massachusetts. "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done.*" (Emphasis supplied) So said Lord Hewart in ***Rex v. Sussex Justice***, **1 K.B. 256, 259 (1924)**. See also in the ***In the Matter of Troy***, **364 Mass. 15, 71 (1973).** "The manner of disposition is as essential to public confidence as is the disposition itself." **Id.**

Knowledgeable observers would scoff at any suggestion that courtroom

civility is slipping within the Commonwealth. But to the public, what they saw there that day was a regrettable decline in civility. For the public to perceive that there is a lack of civility among the very judges who are supposed to maintain civility would be regrettable. As Justice Anthony Kenney reminds us, "[c]ivility has deep roots in the idea of respect for the individual...respect [for] one another's human aspirations and equal standing in a democratic society." Justice Anthony Kennedy, Address to 1997 ABA Ann. Meeting (Summer 1997, San Francisco, CA). If civility among lawyers threatens to bring the entire legal profession into disrepute, than a lack of civility in the judiciary promises to undermine profoundly American society's respect for the rule of law and its faith in the possibility of achieving just results. Chief Justice Warren Berger admonished his judicial colleagues over thirty (30) years ago: "Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider." Warren E. Burger, The Necessity for Civility, 52 F.R.D. 211, 215 (1971) (Text of speech delivered at the Opening Session, American Law Institute, May 18, 1971, Wash. D.C.). "Judges occupy a unique and uniquely powerful role in American society; thus, when they behave toward attorneys...in an intemperate, contemptuous, and arbitrary manner, the consequences extend beyond the immediate target of their actions." ***McBryde v. Committee to Rev. Cir. Council Conduct*, 83 F. Supp. 2d, 135, 164 n. 16 (D.D.C. 1999)**. As Judge Louis Pollak, former law school dean and American Bar Association section chair wrote: "when the target of a judge's unjustified polemic is a lawyer practicing in the judge's court - the harm to civility may be even more serious. This for the reason that the judge, speaking from a privileged sanctuary, is acting the bully and dishonoring the robe." Hon. Louis H. Pollak, Professional Attitude, A.B.A.J., Aug. 1988, at 66, 67. If a judge's conduct is gratuitously abusive, it is likely to exercise a pernicious

influence upon the morale and efficacy of the legal profession and the administration of justice. It may be unfortunate that Judge Lopez did not have the common sense to be on her best behavior knowing that the television camera was in her courtroom that day. Instead, she insisted on continuing her behavior of trying to inflict damage upon the DA's office, engaging in her view, a tit for tat approach. The fact that the press and television were there only served to compound the matter. The overall impact of Judge Lopez's conduct had far reaching consequences that extended beyond the legal community to the general public. In addition, Judge Lopez's conduct that day had a deleterious effect on the entire legal community. The Canons require Judge Lopez to conduct herself in a manner promoting public confidence in the judiciary by being patient, dignified and courteous. See ***In the Matter of Brown*, 427 Mass. 146, 150 (1998).** Indeed, throughout the ***Horton*** proceedings, Judge Lopez exhibited behavior that was antithetical to proper judicial demeanor: rudeness (haste) discourtesy, sarcasm and condescension. This behavior was not limited to isolated losses of temper, but was extended and repeated over time as a result of her bias toward ADA Joseph and the DA's office.

It is my finding that the Commission has proven Charge (Count) II by clear and convincing evidence, that Judge Lopez violated the Code of Judicial Conduct by exhibiting bias and disdain against the ADAs, thus violating the Canons as specified on p.63 of this order.

Ironically, the plea by the defendant has largely been forgotten by all concerned in the ***Horton*** matter. The defendant had admitted to all the essential facts in the case, and the defendant had pled guilty to kidnapping and attempted rape of a child under 16. There are occasions where a defendant may plead guilty yet not admit all the facts that comprise the crime. See ***North Carolina v. Alford*, 40 U.S. 25 (1970)**. The United States Supreme Court held in ***Alford*** that an

accused may consent voluntarily, knowingly, and understandingly to the imposition of a prison sentence although unwilling to admit culpability, or even if the guilty plea contains a protestation of innocence, when the accused intelligently concludes that his interests require a guilty plea, and the evidence strongly supports his guilt of the offense charged. The defendant made no such protestation of innocence. Despite the fact that the defendant pled guilty before Judge Lopez, in an attempt to justify her actions, after receiving a barrage of hostile criticism, *Judge Lopez took it upon herself to undermine the very plea that was rendered in her courtroom.*

Judge Lopez had an ideal opportunity to explain herself by issuing a sentencing report, but elected not to do so. She knew that the case had generated controversy. It would have been far better for her to have addressed the controversy straight on in a sentencing report. The problem facing her in explaining the sentence is that she would have been obliged to comport to the record of the case that was before her.

Count I charges Judge Lopez with engaging in improper *ex parte* contacts to promote a public campaign to defend her conduct in ***Horton.*** Despite the judge's initial equivocation, it is now unrebutted that the charged *ex parte* communications occurred.

The Record Evidence Shows By Clear and Convincing Evidence that Judge Lopez Engaged in Improper Ex Parte Contacts.

Almost immediately after the ***Horton*** sentencing on September 6, 2000, Judge Lopez initiated several calls to defense counsel Attorney Goldbach, at least one call to William Leahy, chief legal counsel to CPCS, and a call to a Boston Police detective, all intended to deflect criticism, and to further the judge's

personal defense of her actions.[3]

Initially, Judge Lopez testified under oath that *she did not* initiate any telephone calls to Attorney Goldbach and that such calls "would have been initiated by [defense counsel], not initiated by me." See Ex. 32 at 95. At the hearing, however, Judge Lopez changed her testimony and admitted that she did, in fact, make calls to Attorney Goldbach.[4] Thus, the factual allegations concerning Judge Lopez's *ex parte* communications with Attorney Goldbach are largely unrebutted.

Judge Lopez called Attorney Goldbach on two (2) or three (3) occasions in the days following the ***Horton*** sentencing. On at least one of those occasions, she called Attorney Goldbach at home on a weekend. (Vol XIII, p.41) Judge Lopez has conceded that her conversations with Attorney Goldbach were intended, at least implicitly, to encourage Attorney Goldbach to defend Judge Lopez's sentence publicly.

Judge Lopez further conceded that she had hoped that CPCS would make a statement supportive of both the sentence she imposed in ***Horton,*** and her personally. Subsequent to Judge Lopez's first conversation with Attorney Goldbach, Goldbach did speak with the press, both on background and for attribution. In addition to asking Attorney Goldbach to defend the sentence,

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Judge Lopez engaged in these *ex parte* contacts to justify her sentence and to improve her portrayal in the public's eyes, despite Chief Justice DelVecchio's admonition that she remain silent and say nothing about the ***Horton*** matter. While Judge Lopez may insist that she did not make any direct comment on the ***Horton*** case following the sentencing, the Code of Judicial Conduct does not permit a judge to accomplish indirectly and secretly through third parties, that which she could not do openly and directly.

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Not coincidentally, Judge Lopez changed her testimony after the Commission took Attorney Goldbach's testimony, the transcript of which was provided to the judge prior to hearing. The judge's initial denial is extremely troubling. A Superior Court judge is unlikely to have "forgotten" placing "highly unusual" phone calls to defense counsel's home on a weekend, and discussing whether the judge should retain a lawyer.

during these conversations, Judge Lopez expressed concern for Horton, and inquired as to his personal well-being. Throughout this period, Attorney Goldbach was still acting as Horton's lawyer.

Importantly, Judge Lopez initiated these calls to Attorney Goldbach at a time after she had been advised by Chief Justice DelVecchio to remain silent. Further, Judge Lopez engaged in the *ex parte* communications with defense counsel after specifically retaining jurisdiction of the ***Horton*** case. Accordingly, she knew that the ***Horton*** matter very well could come before her again. The judge made these contacts without ever notifying the District Attorney's office. It is telling that Attorney Goldbach, one of Judge Lopez's own witnesses, considered this series of calls initiated by the judge to be "highly unusual." (See Vol XIII, p. 44) Attorney Goldbach was careful in her testimony to explain that she (Goldbach) did not initiate any of the calls. See Vol. XIII, p.41.

Judge Lopez Initiated An Ex Parte Call to William Leahy

The undisputed record evidence further shows that Judge Lopez made an ex parte call to William Leahy, Chief Counsel of CPCS, shortly after the September 6, 2000 ***Horton*** sentencing. Though Leahy was not Horton's personal attorney, Judge Lopez acknowledged that he was, in effect, a member of Attorney Goldbach's "law firm." Judge Lopez's own testimony is unequivocal that she called Leahy to encourage him to defend her publicly: she wanted Leahy to defend the process, the judiciary, her sentence of Horton, and her personally.

Following Judge Lopez's conversation with Leahy, he gave several television interviews and spoke with the press on a number of occasions in defense of the judge. Again, Judge Lopez never informed the District Attorney's Office that she had spoken with Leahy or anyone else at CPCS.

Judge Lopez Engaged in an Ex Parte Conversation with Police Officer - Detective Jay Greene

Judge Lopez engaged in an ex parte conversation with Detective Jay Greene shortly after the September 6 ***Horton*** sentencing. Since Greene was a Boston Police detective who came to the scene following Horton's arrest, he was potentially a witness in the case. Judge Lopez made this highly unusual contact because she believed that Greene might have information, which proved to be false, that could be used to deflect the criticism of her in the press. The judge admits that she had never before contacted a Boston Police witness and that her actions were "unprecedented." Judge Lopez was thus personally orchestrating sources of rumor which she understood were contrary to the facts which Horton admitted in open court. Judge Lopez was thus acting as an advocate for herself at the specific expense of the judicial role in which she had accepted pleas of guilty.

Though Greene as a Boston Police detective was a potential witness, Judge Lopez never advised the District Attorney's Office that she had contacted him. Rather, the judge provided Greene's contact information to Ms. Kenney, and instructed her to contact him.

Judge Lopez intended that Ms. Kenney contact Greene to obtain information that would help deflect criticism of Judge Lopez and her sentence of Horton. Ms Kenney contacted Greene but ultimately refused to rely on his information, as she was unable to corroborate it. In addition to forwarding Greene's name to Ms. Kenney, Judge Lopez personally used the information provided by Greene on "hundreds" of occasions to publicly justify her sentence. Such behavior is particularly disturbing given the judge's understanding that Greene was not first on scene, was not the arresting officer, was not the investigating officer, and that his testimony directly conflicted with the defendant's

own admissions which the judge had specifically relied upon in accepting Horton's plea of guilty.

Judge Lopez intended Ms. Kenney to rely on Greene's information even though: the defendant had admitted to all the essential facts in the case, and had pled guilty to kidnapping and attempted rape of a child under 16. As stated above, the judge knew that Greene had a limited role and "was not part of the investigation."

Judge Lopez forwarded Greene's contact information to Ms. Kenney even though she knew that his "information" was contradicted by the defendant's own admissions In so doing, Judge Lopez was encouraging misleading comment on the case. In engaging in these *ex parte* communications, Judge Lopez abdicated her role as an impartial decision-maker, disregarded her obligations to uphold the integrity of the judiciary, and adopted the role of advocate - marshaling a defense and assembling "evidence" for her self-interest. As charged in Count I, such proven misconduct violated:

- Canon I, as the judge failed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved";
- Canon 2, because the judge failed to avoid impropriety and the appearance of impropriety in all activities;
- Canon 2(A), because the judge did not "respect and comply with the law and ...conduct [herself] at all times in a manner that promote[d] public confidence in the integrity and impartiality of the judiciary"; and
- Canon 3, as the judge did not perform the duties of her office impartially.

In this case, where Judge Lopez fully acknowledged before the Commission that the case before her was still pending, and was conscious when she made her press statement that she was prohibited from making ex parte remarks, this hearing officer decided not to grant the **Motion to Dismiss** those Counts, but

rather to proceed to hear the matter on the merits under the rules. In ascertaining the raison d'etre of the Canons, I am reminded of the admonition of Lord Cooke (Coke). While his insightful commentary related to analysis of legislative interpretation of statutes, these admonitions are equally applicable to Canon interpretation. In ***Heydon's Case*, 3 Co. Rep. 7A, 7B; 76 Eng. Rep. 637, 638 (1584)**, Lord Coke enumerated four (4) things to be "disclosed and considered" in the interpretation of statutes:

> "(b) 1st What was the common law before making of the Act;
>
> (c) 2nd What was the mischief and defect for which the common law did not provide;
>
> 3rd What remedy the Parliament both resolved and appointed to cure the disease of the Commonwealth;
>
> And 4th The true reason of the remedy . . .".

Canon 3A(4) bars *ex parte* communications in order to ensure that every person who is legally interested in a proceeding, or his lawyer, has full rights to be heard according to law. *Ex parte* communications are barred when they concern pending litigation. Thus, "general discussions of the law, outside of the explicit or implicit context of a case, will not usually be considered an ex parte communication." See **Shaman, Lubet, Alfini, Judicial Conduct and Ethics, Third Edition, §5.02, pgs. 160-161.** A proceeding upon which a judge may not comment "must be a case that is actually in some stage of litigation. . . A judge who comments on an actual matter in controversy is making a statement about how the law applies to a fixed set of facts or circumstances. In other words, the judge is judging - something that should only be done in court and in the context of an entire case . . . That is why the prohibitions of the Code of Judicial Conduct should apply only to cases, and not to general propositions of law, legal philosophy, or similar discussions." **Id. §12.04, pgs. 421-422.**

A restriction against discussing matters that are currently in litigation seems clear enough. Judge Lopez argues that the case was essentially over; the record had been established and the issues had been joined. Thus, she argues her comments could not possibly influence the course of the case. But the perplexing aspect of this case is that Judge Lopez specifically retained jurisdiction over the case, and knew that the Horton matter could come back before her again. While Judge Lopez attempts to minimize this scenario as purely procedural and administrative, there remained the possibility that a probation violation could result in a new sentencing. That possibility was indeed possible given the fact that the defendant had committed a subsequent criminal offense after the incident with the boy, but before the actual sentencing hearing. *Ex parte* contacts are inherently improper because they create the appearance of impropriety. An innocuous contact would be a technical violation of the Canon, but one that might not be punishable by sanction. I recognize that "the evil of these communications is their effect on the judicial process. Seemingly, innocuous contacts can have an influence on a judge that even the judge, in all good faith does not recognize." **The American Judicature Society - <u>The Danger of *Ex Parte* Communications</u>, 74 Judicature 288 (1991)**.

As noted previously, Judge Lopez has raised profound free speech questions on behalf of judges. This hearing officer agrees in practice that, any interpretation of Canon 3(A)(6) that would restrict a judge from commenting on a case when for all practical purposes the case is over, without more, no longer serves a public purpose. But Judge Lopez has not presented any unique circumstances to carve out an exception that permitted her to make specific comments as proved, without compromising the validity of the plea that she took from Mr. Horton. It is ironic that Judge Lopez strongly argues that any interpretation of Canon 3(A)(6) that would restrict her from commenting on the

Horton case for that time after the plea is unconstitutional. She argues that the restriction no longer serves a public purpose, and indeed is adverse to good public policy, as well as the First Amendment rights of the judge to speak and the public to hear. But to fairly assess the situation, the total context of the Horton case must be viewed. In this matter, there is overlap with other alleged violations of the Canons. If Judge Lopez's conduct offended more than one of the standards to which a judge must conform while each charge must be considered independently, the key concern of Canon 2A is the appearance of impropriety. The Commission argues that whether conduct is prejudicial to the administration of justice depends not so much on the judge's motive, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.

As noted, Judge Lopez argues that Canon 3(A)(6) does not apply here, as Count I and Count IV concerns her post-sentencing conduct. But the fact remains, however, the case law supports a finding that Horton was still pending as Judge Lopez had retained jurisdiction and that Judge Lopez herself understood and believed that she was restricted from commenting on the case. In any event, it seems of little value to argue a technicality, when her proven conduct constitutes a manifest violation of the Code of Judicial Conduct's overarching obligations, namely, to promote the integrity of the judiciary, to preserve the public's confidence in the integrity and impartiality of the judiciary, and to avoid the appearance of impropriety.

It is disturbing that Judge Lopez would seek refuge behind a technicality for actions which an objective observer would see as undermining the integrity of the judiciary. "That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and

there should be strict adherence to them, for failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process. "Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench." In the **Matter of Morrissey, 366 Mass 11, 16-17 (1974).**

Judge Lopez fails to recognize that in the Complaint, many of the Counts are overlapping. Despite the fact that in her testimony before the Commission, as explained in my Order denying her **Motion to Dismiss**, Judge Lopez agreed that the case was pending, she now avers that it was not until this Complaint, that she understood that the ***Horton*** case was pending. But Judge Lopez had no right to make material misrepresentations of the case in order to encourage misleading public comment on the ***Horton*** case. Thus, under the same set of facts, Judge Lopez has run afoul of other parts of the Canon.

Judge Lopez Made Material Misrepresentations to the Court's Public Information Officer and Issues a False Press Release

It is this hearing officer's findings that Judge Lopez knowingly and falsely told Ms. Kenney that:

(i) the defendant did not kidnap the eleven (11) year old boy;

(ii) the defendant did not use the screwdriver as a weapon; and

(iii) her statement that the ***Horton*** offense was "low level" referred to the Sentencing Guidelines.

Judge Lopez gave this false information to Ms. Kenney knowing that Ms. Kenney was the judge's liaison with the media and the public, and Ms. Kenney did, in fact, rely on it in communicating with the public. Accordingly, through her misrepresentations to Ms. Kenney, Judge Lopez misinformed the public.

Judge Lopez also approved and issued a false statement. Indeed, Judge

Lopez admitted under oath that the statement was "inartful" (see Vol II, p.64) and "erroneous" (see Vol II, p.66) in that it stated that (i) that Judge Lopez's "low scale" remark referred to the Sentencing Guidelines. (See also Vol II, p. 74);

> "Because I thought they would - - the fact that I called 'low scale.' Look, I had a bad day that day. Okay? So I called it 'low scale.' I shouldn't have called it 'low scale' in the scheme of things. All right?"
>
> "And they were giving some sort of spin to the 'low-scale' statement that was in the tape." (Testimony of Judge Lopez)

and (ii) that there were "certain facts" known to the judge, the prosecution, and defense counsel which, if known by the public, would justify the ***Horton*** sentence. The judge also testified that she had the opportunity to correct the inaccuracies, but that she did not do so. See Vol. II. pp. 60, 63, 64, 66, 67, 68. Rather, she expressly authorized the misleading press release because she was hopeful that it would deflect criticism and improve her public image.

Her personal statement was particularly disturbing as it implied that there were "certain facts" that mitigated Horton's conduct. Ex. 4. In her testimony before the Commission, however, Judge Lopez admitted that there were no such other facts. ADAs Deakin and Joseph, the line prosecutors, likewise testified that there were no such facts that minimized the offense or fit Judge Lopez's description in any way. At this hearing, however, Judge Lopez changed her testimony . She testified for the first time that the "certain facts" referred to the CPCS social worker's report. This testimony is plainly untrue since the "certain facts" referenced in her statement could not possibly have referred to the CPCS psycho social report. Among other things:

(i) Judge Lopez never mentioned the Psycho Social report to Ms. Kenney at the time she drafted the statement;

(ii) Ms. Kenney testified that, in drafting the statement, she intended the "certain facts" to refer to Judge Lopez's description of the case, namely, that the boy was not kidnapped and the screwdriver was not used as a weapon in the crime;

(iii) In her prior testimony, Judge Lopez specifically stated that she did not know what the "certain facts" could have been, as there were no such facts that she was aware of that fit the description.

(iv) The statement says that such "certain facts" could not be released publicly, but Judge Lopez conceded in her prior testimony that there were no facts, including the CPCS psycho social report, that could not be publicly disclosed.

The reference to the "certain facts" is, perhaps, most troubling because it implied that there were mitigating circumstances when in fact there were not.

Kenney, who was relying on Judge Lopez to accurately describe the facts, See Vol. II, pp 56-57; Vol. X, pp 157-58, took Judge Lopez's false characterization of the kidnapping and the screwdriver and drafted a personal statement for the Judge, approved by the Judge, that referred to "certain facts" the Judge could not reveal, "which would change the characterization of [the] case as currently reported by some media outlets." Ex. 24. The Statement also encouraged the media and the public to speculate and search for such "certain facts." In so doing, the media rehashed the crime in public, intruded on the victim's privacy, and "re-victimized" the victim. The judge's campaign to defend her public image was thus conducted at the expense of both the truth and the 11 year old victim. The statement, which Judge Lopez viewed as an exercise in "spin" to deflect public criticism, had the desired effect: public comment shifted to the 11-year old boy, and the public began to wonder whether the facts and charges to which Horton pled represented the real story.

The evidence proving at least two of Judge Lopez's separate false statements to Ms. Kenney is ironclad. Kenney's recollection is specific and unwavering:

> Q. Judge Lopez told you that this was not a kidnapping; isn't that right?
>
> A. That's correct.
>
> Q. To your best recollection, those were her words, without qualifiers; is that right?
>
> A. That's correct.
>
> ***
>
> Q. Judge Lopez did not tell you that the defendant admitted putting a screwdriver to the child's neck; isn't that so?
>
> A. Yes, she did not think it was used as a weapon.
>
> Q. In fact, she told you the reverse; that it wasn't used as a weapon, right?
>
> A. That's right, yes.
>
> Q. She never told you that in open court the defendant had admitted to using the screwdriver as a weapon on the child, correct?
>
> A. She told me what the charges were and what he had agreed to in the plea, but she obviously didn't believe that happened that way.
>
> Q. In any event, she told you the screwdriver wasn't used as a weapon.
>
> A. That's correct.
>
> Q. Whatever the defendant had said in open court.
>
> A. Right.

Vol. XI at 62-65; *see also* Vol. X at 170 ("She told me that she did not think it had been a kidnapping"); Vol. XI at 54 ("She seemed skeptical that the boy had been

kidnapped. She said it wasn't a kidnapping").

The best Judge Lopez can do in defense is to obfuscate concerning one of her misrepresentations: that there was "no kidnapping." The defense makes much of the fact that, on cross-examination, Ms. Kenney stated Judge Lopez informed her that it was not a "kidnapping in the traditional sense." See Lopez br. 49-50. This point is both irrelevant and disingenuous. Where the Judge told Kenney that it was "not a kidnapping" or "not a kidnapping in the *usual sense*" is beside the point. In either case, the Judge misrepresented the fact that there *was* a kidnapping - usual or not. In any event, even this argument is directly contradicted by the record evidence. As seen above, when Ms. Kenney was recalled as a witness and given the opportunity to clarify her testimony, she explained that Judge Lopez falsely told her that there was no kidnapping - *without any qualifiers*. It also is noteworthy that Judge Lopez herself *denies* ever saying that there was "no kidnapping in the usual sense." See Vol. II at 90.

To reiterate the two facts, Judge Lopez informed Joan Kenney as the reason for the sentence was "[s]he didn't think this was a real kidnapping and the screwdriver was not used as a weapon." See Vol. X, p. 161. Judge Lopez's recollection however is that she told Ms. Kenney that there was a dispute about the kidnapping and about the screwdriver. The problem for Judge Lopez is that the defendant pled guilty to an assault by means of a dangerous weapon and that the defendant had agreed to the fact that the screwdriver had indeed been used as a weapon and put to the boy's neck. See Vol. II, pp. 90-91. Thus even under

Judge Lopez's version of events, she still sought to undermine the plea.

The Judge's campaign subverted the guilty plea that she accepted only hours earlier. If she truly believed the crime did not happen, she could neither legally, nor ethically, accept the plea. Having accepted the plea, she could neither legally, nor ethically, misrepresent facts about the case to cast doubt on the seriousness of the offense. Her misrepresentations to Ms. Kenney undermined a central role of the judiciary: promoting public confidence in the integrity and impartiality of the judiciary, and the integrity of criminal convictions.

Judge Lopez Had "Hundreds of Conversations" About the Horton Case

Despite specifically retaining jurisdiction over the ***Horton*** case, and despite Chief Justice DelVecchio's admonition that she remain silent, Judge Lopez admitted that she has had "hundreds" of public conversations about the ***Horton*** case. She further admits that, in these conversations, she has relied upon and discussed Greene's information to justify her sentence. Again, Judge Lopez admits to having relied on Greene's information, despite the defendant's specific admissions before her, despite the defendant's guilty pleas, and despite the first hand knowledge of the arresting officers who were first on scene.

Judge Lopez's Campaign to Make and Encourage Misleading Public Comment on the Horton Case Violated the Code of Judicial Conduct

The record evidence establishes that Judge Lopez engaged in a campaign to spread misinformation to deflect criticism and promote her self-interest, all in violation of:

- Canon 1, because, by encouraging misleading public comment, Judge Lopez failed to uphold the integrity of the judiciary;

- Canon 2, because the judge's conduct in commenting and encouraging others to comment on ***Horton*** was and appeared improper;

- Canon 2(A), because the judge's conduct undermined public confidence in the integrity and impartiality of the judiciary;

- Canon 3, because, by commenting on the case and causing others to comment, Judge Lopez failed to perform her judicial duties impartially and diligently; and

- Canon 3(A)(6), because Judge Lopez failed to abstain from public comment about a pending case.

In Charge IV, the Commission also alleged that Judge Lopez made and encouraged misleading public information that misportrayed the facts of the ***Horton*** case by telling Boston Herald reporter Jose Martinez that "[T]here is more to the case than meets the eye", and also stated "Call around and you'll get the real story. I'm sorry, but I can't give it to you though." See Formal Charge IV, ¶ 4. Judge Lopez did not recall talking to Martinez, (Ex. 32 at 138), and the Commission never produced any evidence or witnesses to support this allegation. Though the article itself might be in evidence, it was not in for the truth of assertion, merely for public reaction. Though Judge Lopez opened Pandora's box by the use of her words, implying that there was exculpatory evidence, the Commission has not proved this specific allegation by clear and convincing evidence.

The evidence , though, proves most of the other allegations of Charge IV, and such proven misconduct constitutes a violation of each of the above charged Canons. Indeed, by directing the issuance of an inaccurate statement, by providing the Court's Public Information Officer with misleading information concerning the merits of the ***Horton*** case, by encouraging defense counsel and a Boston Police detective (through *ex parte* contacts) to support the judge publicly, and by admitting to "hundreds" of personal conversations in which she discussed the merits of the ***Horton*** case, Judge Lopez did significant and lasting damage to

the integrity and reputation of the judiciary, all in violation of Canons 1, 2, 2(A), 3, and 3(A)(6).

Worst of all was her attempt to inflict damage on the victim. By her use of words, she made the victim the defendant, and the defendant the victim. It made it appear that there were certain facts accepted by both prosecutor and the defense attorney that were part of the plea conference that undoubtedly would change the characterization of this case as currently reported by some outlets. There was no exculpatory evidence which was accepted by both prosecution or defense counsel. Exculpatory evidence includes "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of key prosecution witnesses." ***Commonwealth v. Gregory*, 401 Mass. 437, 442 (1988)**. ***Commonwealth v. Pisa*, 372 Mass. 590, 595 (1977)**, makes clear that "exculpatory" is a technical term meaning alibi or other complete proof of innocence, but simply imports evidence "which tends to 'negate the guilt of the accused'..., stated affirmatively, 'supporting the innocence of the defendant.'" But in this case, where the defendant pled guilty, there was no profound doubt as to the defendant's guilt generated by the record that was given at the September 6, 2000 hearing. Judge Lopez essentially treated the September 6, 2000 hearing as a sham in disregarding the colloquy between herself and the defendant in accepting the plea.

Even at the hearing before me, Judge Lopez, through counsel, was asserting the existing of exculpatory evidence. Attorney Goldbach was asked a series of questions concerning the lack of the victim's saliva on the screwdriver. It was an important fact for Attorney Goldbach that after the amylase test, the victim's saliva was not detected on the screwdriver. See Vol. XI, p. 212, 213, 214.

But the important fact is that according to Attorney Goldbach, she did not know about the results of the test on August 1, 2000. Therefore, this argument could not have been the exculpatory evidence that Judge Lopez relied upon when on August 1, 2000, she announced what sentence she would impose upon the defendant. The fact that Attorney Goldbach will continue to raise this test as exculpatory evidence only points to the obvious, that it would have been better for everybody if this matter had gone to trial where evidence could be subjected to scientific examination for its veracity rather than in a plea conference where seemingly anything goes.

Could the social worker's report have been the exculpatory evidence? This was Judge Lopez's story to this hearing officer. Though this hearing officer gave the benefit of the doubt with regard to the social worker's report as a reason on which Judge Lopez based her sentence, it is a stretch to say that this report can be considered to be exculpatory. As stated previously, this was not a reason advanced to Ms. Kenney as a basis for the statement that certain facts would change the characterization of this case. The fact that the defendant would not re-offend because of his experience in jail could be ascribed to all accused who cannot make bail. This is no justification as a basis for offering this as exculpatory evidence. The fact that Judge Lopez would not acknowledge that the Psycho Social Assessment and Dispositional Report was produced by a social worker, an employee out of Attorney Goldbach's office, when Ms Goldbach clearly acknowledged this fact demonstrates that Judge Lopez knew the weakness of this report. Judge DelVecchio, who was not even the judge in the ***Horton*** case, had no trouble in identifying where the report came from. The very characterization that Judge Lopez ascribes to ADA Deakin, can be ascribed to Judge Lopez's testimony before this hearing officer, namely disingenuous.

The fact that Judge Lopez made no mention of the social worker's report to

Joan Kenney speaks volumes that this report was not one of the facts that would undoubtedly change the characterization of this case, neither was the fact that Judge Lopez believed the defendant in his statement that he thought the victim was fourteen (14) not eleven (11) The fact that Judge Lopez would accept this perception as true without even looking at the victim in his taped interview to the police which was given in the normal course of events to discern its veracity, is puzzling. Whether the victim was 14 or 11 is immaterial as the relevant age was 16. Many defendants who are sent to jail for statutory rape claim that the victim appeared to be of age.

Judge Lopez argues that the Katz assessment was not a matter of public record at the time the press release was issued. She asserts that due to the often sensitive nature of the Katz report, this report could not be treated as part of the public court file, but are instead treated like other criminal offender record information material, and are filed with the Probation Department. While it is true that under Mass. R. Crim. P. 28(d), the filing of certain materials with the Probation Department serves to prevent the disclosure of sensitive and confidential information, which if disclosed, might result in harm to the defendant or others, this would include information about a defendant's psychological disorders, family history, the particulars of any rehabilitation or other program in which a defendant may be participating, and other sensitive information. As a matter of fact, the Katz report could not be considered to be sensitive information. The main ingredient of the Katz report was that the defendant was transgendered. This was already public information. The fact that the report proffers that he was not a pedophile, could not result in harm to the defendant. The assertion that the Katz report was protected, seeks to implant on that document a confidential status that it is not entitled to. The fact that Judge Lopez is allowed to rely upon the report is one thing. Confidentiality in this case does not protect the

defendant. The Katz report was not a pre-sentenced investigation by the Probation Officer, but rather, a self-serving report by the defendant.

Judge Lopez's decision to embrace her September 7 statement also led her to change her testimony concerning the "certain facts" mentioned in that statement. In her testimony before the Commission, Judge Lopez testified repeatedly that she *could have* discussed the contents of the Katz Report in her September 7 public statement; therefore, the "certain facts" referenced in her statement could not, in her mind, have included the Katz Report (Ex 32, pp. 139-140):

> Q. Could you have discussed, in your view, facts brought to your attention in the reports which were not public, had you chosen to do so?
>
> A. I don't think there were any such facts. I put in my findings when I continued the case that she suffered from a sexual identity disorder. The very confidential nature of what was in that report I put on the record the day I continued the case on August 4, was it. So once I put it on the record, once it's an in-court statement, I can talk about that all I want.

At the Hearing, having embraced her September 7 statement, Judge Lopez flatly contradicted her prior testimony and said (under oath) that she could *not* have discussed the contents of the Katz Report.

> Q. And what were the [certain facts]?
>
> A. Those would be the facts contained in the psychological assessment that I had...
>
> Q. For example, in that psycho social report, I'll call it, there was

- there was a finding...that the person before you was not a predatory pedophile, correct?

A. That's correct.

Q. And was not a likely recidivist, repeater?

A. Unlikely to repeat an offense of this kind or something.

***

Q. And all of the matters which you have previously discussed that went into your sentence that were not a matter of public record are matters which you're talking about there.

A. That's right; that I could not reveal there. Vol. IV, pp. 155-57

Judge Lopez has made much of the fact that the prosecution, at no time made mention that the eleven (11) year old boy was in fact being pulled into the car by his arm. But the facts remain that Judge Lopez testified that she knew that the boy was pulled into the car because Attorney Goldbach told her so. See Volume III, p .126, where the following interchange occurred between Mr. Ware and Judge Lopez:

Q. Now, also during the course of that conference the prosecutor was telling you, were they not, that this victim got into the car, Ebony Horton, voluntarily under some ruse, correct?

A. Right.

Q. Didn't Ms. Goldbach tell you, at that time, that on the very tape that we've just discussed that in fact, that's not at all what the victim was saying what happened? He said he was pulled by the arm through a window of the car.

A. Yes. I believe she had a different version of how the kid got into the

car, and it involved some pulling into it, yes.

The best insight into Judge Lopez's state of mind were her conversations with Joan Kenney. Both Judge Lopez and Ms. Kenney thought their conversations were confidential, and but for this hearing, they would be. Thus, Judge Lopez felt free to provide Ms. Kenney with tidbits of information so that the public information officer could serve as a neutral third party to dispense Judge Lopez's story without it being attributed to Judge Lopez. The fact that Joan Kenney would not be used in this fashion, speaks well of her office.

Over the course of the next several days, Judge Lopez attempted to utilize Joan Kenney to flesh out her concept that this case was not a real kidnapping. In addition Judge Lopez took additional steps to provide Ms. Kenney with a source to corroborate her account of the crime. Soon after the September 7 press release was issued, the Judge put Ms. Kenney in contact with Detective Jay Greene, hoping that he would bolster her story that the victim was not kidnapped.

Judge Lopez had been told by defense counsel Anne Goldbach on August 1 that Greene said the victim "knew what he was getting into" when he entered Horton's car and had "been involved in this type of pick-up situation before." See Vol. XII at 32-33. The Judge viewed such information, if true, as "exculpatory" and told Kenney that Greene had "exculpatory" information when she spoke to Kenney before issuance of the September 7 statement. See Vol. II at 50-51. Lopez then passed Green's pager number along to Kenney, suggesting he had "useful or interesting" information. See Vol. XI at 50.

Detective Greene gave to Joan Kenney, information that Judge Lopez wanted her to hear. Judge Lopez told Ms. Kenney that Jay Greene would have some important information, but she didn't say exactly what he was going to tell her. She didn't have to, because Judge Lopez had spoken with Jay Greene and

Attorney Goldbach and knew exactly what he was going to say.

As press officer, it would be within Joan Kenney's domain to seek out people who could explain procedure; someone who could say something supportive of the judge. The press officer tries to put forth general principles of law which could help explain the actions of a judge - it is not her job to be an investigator, to discover facts, and to put those facts out to the media in defense of the judge. Yet, this is precisely what Judge Lopez wanted Ms. Kenney to do, in her role as Public Information Officer of the Supreme Judicial Court. In effect, to get Ms. Kenney's imprimatur for the actions that the judge had already taken.

The information proffered by Jay Greene to Joan Kenney was that he thought the boy was faking it. He thought the boy was very street-savvy. He also indicated that this may not have been the first time that either he or the brother had gotten into a car. *All that Detective Greene said was a lie.* Judge Lopez, in approaching Ms. Kenney of the SJC's Public Information Office, was mistaken as to the role of that office. She believed that she could use this office to ameliorate the reaction to what had occurred in the Horton case. And she treated that as spin. Her testimony on that is quite clear.

As it turned out, both the Commission and the defense could not call Detective Greene to the stand because there was reason to believe that Detective Greene's testimony before the Commission was simply not truthful. Mr. Egbert, the attorney for Judge Lopez, was commendable and quite blunt as why he could not call Greene as a witness. "I think I'm ethically bound not to call him as a witness. The Canons of Ethics require that lawyers not present evidence that in good reason we believe is false." See Vol. II, p. 8, Vol. III, pp. 59,60.

The most astounding part of Jay Greene's story is that Jay Greene indicated to Attorney Goldbach the week of September 6 or the following week, that he disagreed with Judge Lopez's sentence. Thus, the very man upon whose

statement Judge Lopez relied upon as exculpatory, did not himself believe that it was exculpatory. See Vol XII, p. 185.

Judge Lopez herself did not take Detective Greene's role into account when she made her sentencing decision on August 1, 2000. See Vol. II, p. 54. She merely considered the representations made by Attorney Goldbach as an officer of the court, that the Commonwealth had failed to pursue what the defense perceived to be exculpatory evidence. See Volume II, p. 54. On August 1, 2000, she was not accepting the version put forth by Attorney Goldbach, who was inspired by Detective Greene, that the victim was not an angel. After the plea, she was now trying to put forth the story told by Detective Greene as factual, and hoping that Ms. Kenney would somehow, as the Supreme Judicial Court's media person and a disinterested person, have the credibility to put forth this story to the press.

But to use Ms. Kenny as her spin doctor, was a perversion of the process set up by the Supreme Judicial Court. In dealing with the SJC's Office of Public Information, it is not an exercise in spin, it is an opportunity for the truth to be presented. In no event did Judge Lopez have the right to utilize Ms. Kenney as her spin meister. Judge Lopez made less than forthright representations to Ms. Kenney. Those statements undercut the fundamental premise of integrity in the judiciary. Judge Lopez was personally undercutting what she had done in open court.

It is one thing for Ms. Kenny to be a spokesperson, a filter of information, a buffer against newspapers and television stations. It's quite another for the judge to permit a statement that she knows to be inaccurate to be presented to the public - and that's what happened here.

It is one thing to defend Judge Lopez and her sentence publicly; it is another thing to demean the boy. Judge Lopez's sentence could have been

defended on the basis that the District Attorney only put forth evidence to demonstrate that it was kidnapping by guile, rather than by force, that the sexual act had not yet occurred. At least if Judge Lopez had issued a sentencing report, the District Attorney could have properly objected. It was her duty to deal with her difficulties by lawful and proper means. As Justice Douglas of the United States Supreme Court has written "judges are supposed to be men of fortitude, able to thrive in a hardy climate." ***Craig v. Harney*, 331, U.S. 367, 376 (1947).** Certainly, the public comments that Judge Lopez made in her press release, and the public comments that were generated because of the open door that she invited others to walk through as a result of those inappropriate remarks, would lead a reasonably informed observer to question her impartiality. The fact that her effort to change public opinion proved fruitless, does not take away from the fact that she had made the effort to prejudice the victim. Sometimes appearance may be all that is necessary to invoke a conflict with a Canon. The integrity of the institution, with respect to the public trust, can be preserved only if judges shoulder the difficulty responsibility of monitoring their own conduct.

Mr. Egbert, in his closing, talked about Judge Lopez's courage. Judge Lopez would have been entitled to take on the mantle of a courageous jurist if once having made findings, she was prepared to live with the consequences of those findings. A courageous judge is prepared to stand the abuse, prepared to take whatever criticism is inherent in making a decision. That's what good judges do. They do it everyday. They don't like it. They can't strike back. They have a position of great honor, but also of great responsibility. Portion's of Mr. Ware's closing and brief cut to this very point along to the heart of this litigation and are in part adopted by this hearing officer.

The story of Judge Lopez reflects a very different decision. She was not courageous. Almost immediately, she engaged in circling the wagons, putting out

her view of the case for public opinion in a highly improper way. The evidence shows that in Judge Lopez's dealings with Ms. Kenny and the Supreme Judicial Court's Office of Public Information, she was anything but candid. She owed that office absolute candor.

Judge Lopez's Bias and Appearance of Bias Against the ADAs Violated the Code of Judicial Conduct

The record evidence as previously stated establishes that Judge Lopez's bias and appearance of bias violated:

- Canon 1, because the judge's bias and appearance of bias undermined the integrity of the judiciary;
- Canon 2, because the judge failed to avoid impropriety and the appearance of impropriety;
- Canon 2(A), because the judge's bias and appearance of bias undermined public confidence in the integrity and impartiality of the judiciary;
- Canon 2(B), because the judge's prejudice toward ADA Joseph after the initial decision on August 1, 2000, influenced her conduct and judgement;
- Canon 3, because she failed to perform her judicial duties impartially;
- Canon 3(A)(1), because she failed to be faithful to the law and failed to be unswayed by partisan interests, public clamor, or fear of criticism, as among other things, she reacted in response to such public criticism; and
- Canon 3(B)(5), because she failed to perform judicial duties, by words and conduct, without exhibiting bias or the perception of bias.

Canons 1, 2, 2(A), 3, and 3(B)(5) are similar in that each is violated by Judge Lopez's appearance of bias. The disparity in the treatment of the Assistant District Attorneys (as lawyers for the public) as opposed to the defendant and defense counsel by itself establishes the appearance of bias, even though the Commission

has not established by clear and convincing evidence that Judge Lopez violated any Canon in her favorable treatment of the defendant. Indeed, it was the disparity of treatment - Judge Lopez abusing the Assistant District Attorneys while being solicitous of the defendant - that provoked the filing and docketing of dozens of complaints against Judge Lopez with the Commission.[5] Although all that is necessary to establish violations of Canons 1, 2, 2(A), 3 and 3(B)(5) is the appearance of bias,[6] the disparity in treatment was so great as to constitute actual bias.

Judge Lopez's actual bias is also evident from her view of the role of the media. With no factual basis, Judge Lopez found that ADA Joseph acted unethically in her dealings with the press: she found ADA Joseph's comments to Eileen McNamara to be "huge hyperbole" and a personal attack.[7] See Vol. II,

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See Exs. 53, 55-57, 63 (Complaints filed by members of the public who viewed Judge Lopez's behavior as indicative of a bias against the prosecution and in favor of Horton); see also Exs. 10, 14, 19, 33, 34, 38 (newspaper articles reporting on public outrage over Judge Lopez's treatment of the ADAs and her lenient and overly solicitous treatment of the defendant).

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See e.g. ***Matter of Gerard*, 631, N.W. 2d 271, 278 (Iowa 2001)** ("It is immaterial that the judge's association may not have had a detrimental impact on defendants appearing before him. The key concern of this canon [2A] is the appearance of impropriety.") ***In re: Jones*, 255 Neb. 1, 9-10 (Neb. 1998)** ("[w]hether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonable have upon knowledgeable observers."); ***King*, 409 Mass. at 599** (appearance of impropriety is "cornerstone principle" of Code of Judicial Conduct).

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Judge Lopez personalized this criticism to a heightened degree. The judge was unable to separate ADA Joseph's legitimate, professional criticism of a sentence from personal criticism of the judge herself. This is particularly ironic, as Judge Lopez was not able to criticize Joseph professionally, but launched an *ad hominem* attack, calling ADA Joseph "cruel", a woman who "belongs in the suburbs," and the type of woman who "stays at home, does her nails, and goes to the beauty parlor." Judge Lopez's inability to separate professional disagreements on the merits from personal animosity is an unwelcome characteristic in a judge. Judges by nature must have a thick skin. See ***e.g.*, *Troy*, 306 N.E. 2d at 234-35**; ***Morrissey*, 366 Mass. at 17; *Killam*, 388 Mass. at 623.** Interpreting professional criticism to be a personal attack can too easily lead to the bias seen in ***Horton;*** when professional disagreements are viewed as personal affronts, honest disagreements escalate into personal challenges.

pp. 16,17,18. Judge Lopez stated the article "would have a chilling effect on the exercise of independent judgement by the judiciary, absolutely." See Vol. II, p. 14. Is it not the duty of the media to report and make comment? *"Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt".* ***Bridges v. California*, supra at 289 (Frankfurter, J. dissenting)**

The judge's double standard is manifest, i.e., while criticizing ADA Joseph for her comments to McNamara, Judge Lopez solicited defense counsel to appear on television and make public comment in the ***Horton*** case. Judge Lopez's view that the ADA could not speak with a reporter about sentencing philosophy, but defense counsel and Leahy could advocate for the judge to the press cannot be reconciled. In short, the evidence shows that Judge Lopez exhibited actual bias, and was undisputedly perceived to be biased in presiding over the ***Horton*** case, all in violation of Canons 1, 2, 2(A), 2(B), 3, 3(A)(1), and 3(B)(5).

It should be remembered that, Judge Lopez viewed ADA Joseph's description of the rapes in ***Estrada*** as "vile" to be hyperbole. This was a situation where over a period of years a stepfather would have his 11 year old stepdaughter perform fellatio.

> The defendant admitted this behavior to DSS, to his wife, to his pastor. The wife and the pastor have supported his criminal behavior, even at the expense of this girl's well being. Her own mother refers to these vile rapes as an accident.
>
> The defendant has been in therapy, and his therapist identified all his -
>
> THE COURT: Well, I will let her put the hyperbole on the record. . .
>
> THE COURT: Ms. Joseph, let me just say something on the record.

> Next time - do you want to stand up. Stand up.
>
> MS. JOSEPH: Yes, your honor.
>
> THE COURT: Okay. Next time that you are going to recite the facts to me on a plea, dispense with hyperbole and with subjective characterizations.
>
> Exhibit 65, Transcript of the February 10, 1999 Proceeding in Commonwealth v. Estrada at 12-13, 25-26.

Judge Lopez also violated Canon 2(B) (which prohibits personal relationships from influencing conduct or judgment), as she allowed her conduct to be influenced by her pre-existing prejudices against ADA Joseph and the District Attorney's Office - malice has a long memory. Judge Lopez likewise violated Canon 3(A)(1), which required her to be faithful to the law and to be unswayed by partisan interest, public clamor, or fear of criticism.

At critical junctures in the ***Horton*** proceedings, Judge Lopez exhibited bias against the District Attorney's Office and the Assistant District Attorneys and favoritism towards Horton. Were a male judge to have labeled a young professional woman as belonging in the suburbs where she could do her nails, there would be no question as to the seriousness of his misconduct.

Judge Lopez Improperly Contacted a Complainant to the Commission.

It is unrebutted that Judge Lopez contacted Sister Angela Beaucage at 11:04 p.m., on November 1, 2000, only hours after the judge received Sister Beaucage's first complaint from the Commission. Sister Beaucage, living alone, had to get out of bed to answer the phone. When Sister Beaucage answered the phone, Judge Lopez said "I am pleased to meet you." Judge Lopez's statement that she was pleased to meet Sister Beaucage traced the complainant's statement

that she did not know or had not met the judge previously. Ex. 31 (Complaint of Sister Beaucage, dated October 17, 2000).

Sister Beaucage perceived the call to be a potential threat and an attempt at intimidation, which she found extremely disturbing. Indeed, the ensuing morning, Sister Beaucage called her representative who called the police to report the call. Sister Beaucage subsequently submitted another complaint to the Commission. Ex. 31 (Complaint of Sister Beaucage, dated January 19, 2001).

Judge Lopez's explanation why she called Sister Beaucage is simply not credible. She suggests that she had, in the past, received false complaints and somehow believed that Sister Beaucage's complaint was false, because it came from a region of Massachusetts near where the Demoulas family lives and operates. The judge offered no evidence of this. Moreover the testimony is questionable:

(i) Judge Lopez was under investigation and was represented by counsel when she made the call. If she had questions about the validity of Sister Beaucage's complaint, why did she not refer them to her counsel? Why did she not refer her questions to the Commission?

(ii) When the judge received two letters at the courthouse, (Exhibits H and I), she referred them to a court officer to research their authenticity during working hours. Here, by contrast, the judge received a formal complaint that, as she well understood, had already been screened by the Commission. Judge Lopez chose not to refer this complaint to a court officer, or even to her lawyer. Rather, she called the complainant directly after 11:00 p.m.

(iii) The notion that Sister Beaucage could be a "Demoulas" agent is baseless. The Demoulas family does business throughout all of Massachusetts and New England. See Def. Ex. L. There is no evidence that any Demoulas family member was in Billerica, where Sister Beaucage lives, or even had any relationship whatsoever with Sister Beaucage or any other complainant to the Commission concerning this case. Further, Sister Beaucage's phone number and address were listed on the complaint. Ex. 31. Through either the phonebook or the Internet, Judge Lopez could

have easily confirmed her address.

Judge Lopez's explanation for calling Sister Beaucage - i.e. to determine whether she was an ally of the Judge's "Demoulas enemies", - is troubling. The improbability of this excuse was underscored by her admission that there were other, far more reasonable alternatives available to her if she in fact was calling to "confirm" Sister Beaucage's identity. See Vol. II, pp. 70-72. Morever, Judge Lopez admits that she received Sister Beaucage's complaint from the Commission, which had already screened it for legitimacy. See Vol. V, pp. 125-126. Judge Lopez offers no credible reason to believe that Sister Beaucage's complaint was in any way related to her alleged "Demoulas enemies," yet she claims to this day to have continuing doubts about the legitimacy of Sister Beaucage's complaints. See Vol. III, pp. 74-75. Once again, Judge Lopez refuses to accept responsibility for her actions. She attacks the Commission and Sister Beaucage for the testimony that after learning who the caller was, that the Sister perceived the call to be a threat. Sister Beaucage's own words, as set forth in the complaint she filed long before she ever spoke with Commission Counsel, are unambiguous - she described the call as "disturbing".

The problem with this approach is that in blaming others, many within the legal community have accepted the fact that Judge Lopez is the victim. This is a mantra that Judge Lopez is utilizing and foisting on the Judiciary. She seeks to create apprehension within the system, that in the Commission going after her, her fellow judges may be next. This tactic is unfortunate and untrue. The following interchange is illustrative of the problem.

Q. And you believe that indeed you are the victim here, don't you?

A. With regards to these proceedings?

Q. Yes.

A. Yes, I do.

Q. You're the victim, correct?

A. Yes, I do.

MR. WARE: I have nothing further. Thank you, Your Honor. See Vol. III, p.75.

Judge Lopez's late-night call to Sister Beaucage was indefensible. In many respects, the Commission functions parallel to those of a grand jury. ***In the Matter of Roche*, 381 Mass. 624, 633, N. 10 (1980)** Yet, Judge Lopez's defense at the hearing was to ignore the conduct on the pretense that the Commission is at fault for even considering its charges.

Ironically, a central allegation in the Demoulas aftermath has been that lawyers improperly called and attempted to compromise the confidential interworkings of a judge and her office. See Vol. III, pp. 77,79. Yet, Judge Lopez felt entirely free to ignore a statutory investigation into her judicial conduct and made a late-night anonymous call to a witness/complainant. This is a violation of M.G.L. c. 211C.

M.G.L. c. 211C still retains a measure of confidentiality even in its most recent amendment. The confidentiality provision in the statute serves a variety of legitimate state interest, i.e., protecting the judge from spurious criticism, the judiciary as an institution from disrepute, and also witnesses and complainants from unwanted publicity. There is a legitimate concern for witness privacy and the necessity of encouraging witnesses to come forward with complaints. Judge Lopez's telephone call after 11:00 p.m., puts into jeopardy this legitimate concern.

This hearing officer understands that every judge comes under great

scrutiny in high profile cases and must withstand the pressure. In it's essence whenever a judge makes a decision he or she is alone. Something is wrong when a judge is making a call after 11:00 p.m., to a complainant. It is not a trivial matter. But unlike the course of conduct of acting improperly toward a recalcitrant District Attorney's Office, this act was done in isolation; Judge Lopez should have known better, and I am also mindful that under a realistic appraisal of psychological tendencies and human weakness, that the incident though regrettable, would not rise to a violation of a Canon, but for the fact that the Commission investigation is parallel to a grand jury proceeding.

The problem for Judge Lopez is that no judge under administrative investigation by the Commission is free to call complainants. If this hearing officer does not say that this practice is wrong in violation of the Canon, it is inviting other judges in the future to possibly commit the same wrong. Unless this hearing officer says that this act of Judge Lopez was wrong, the consequences for the Commission could be adverse to their operation. While the Commission has demonstrated that Judge Lopez's telephone call after 11:00 p.m. to Sister Beaucage affected her to some degree, the harm committed in making this phone call was fundamentally anathema to the important work carried out by the Commission. It does not matter whether the phone call was intimidating to Sister Beaucage, it was improper.

Judge Lopez's Misleading Testimony in the Course of this Investigation Violated the Code of Judicial Conduct

Separate and apart from Judge Lopez's charged misconduct in connection with the ***Horton*** case, Judge Lopez has exhibited questionable misconduct in the course of the Commission's investigation and prosecution of the Formal Charges.

Indeed, the judge has changed her testimony under oath such that her testimony must be considered at least misleading, if not patently false. Her obfuscation on the stand at this hearing was unfortunate.

This is the most troubling aspect of the case for this hearing officer. Judge Lopez has treated this investigation as an attack on her character. Judge Lopez's misrepresentations are catalogued in the *Commission's Summary of Judge Lopez's False and Inconsistent Statements*, submitted to this hearing officer. The Summary details numerous representations, each of which merits careful examination. The evidence demonstrates that even under the scrutiny of investigation, Judge Lopez embarked on a campaign of giving less than candid testimony. Throughout the Commission's investigation and prosecution of the Formal Charges, Judge Lopez has provided at times, a less than candid response in favor of her defense. As this case developed, so did her testimony. For instance:

1. *Judge Lopez testified before the Commission that her "low level" comment had no relation to the Sentencing Guidelines, but at the Formal Hearing, the judge changed her testimony and, for the first time, stated that the "low level" comment vaguely related to the factors undergoing the Sentencing Guidelines.*

2. *Judge Lopez testified before the Commission that she had one ex parte telephone conversation with Attorney Goldbach, and that the conversation was initiated by Ms. Goldbach. At the hearing, Judge Lopez changed her testimony and admitted that she (Judge Lopez) had, in fact, initiated the ex parte communication. Further, the judge's own witness, Attorney Goldbach confirmed that Judge Lopez made several telephone calls - not just one - shortly after the sentencing of Mr. Horton*

3. *During her prior testimony, Judge Lopez stated that the September 7, 2000 statement was "not her statement" and was presented to her Joan Kenney and Chief Justice DelVecchio. During the hearing,- - -Judge Lopez testified that it "[was] my statement" for which she "absolutely" took responsibility.*

4. *During her prior testimony, Judge Lopez made clear that she*

*believed she was permitted to say anything at all about the **Horton** case without limitation, even in a press release. At the hearing, --- Judge Lopez attempted to modify her earlier testimony by stating that she could say anything that she wanted about the case but only "in a sentencing memorandum."*

5. *During her prior testimony, Judge Lopez stated that she was unaware of the "certain facts" referenced in her September 7, 2000, press statement that supposedly justified her sentence. Indeed, Judge Lopez explained that she did not think that such facts existed, as there were no facts (including those in the CPCS psycho social assessment) that could not be disclosed. At the hearing, however, --- Judge Lopez testified that such facts did exist and, for the first time, pointed to the CPCS psycho social assessment as a purported basis for the "facts" referenced in her press release.*[8]

6. *During her prior testimony, Judge Lopez stated that her September 7, 2000 statement contained numerous inaccuracies and errors. Judge Lopez nevertheless allowed the statement to be released, because she was hopeful that the "spin" would support her sentencing decision and deflect public criticism. During the hearing, however, — Judge Lopez testified for the first time that her press release was an accurate statement "for a press release".*[9]

7. *In her Response to Formal Charges, Judge Lopez stated that she was unaware of the District Attorney's August 3, 2000, press release when she wrote her "findings" regarding the continuance of the **Horton** sentencing on August 4, 2000. At the hearing, however ---- Judge Lopez testified that she had, in*

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This testimony contradicted not only her earlier deposition testimony, but also contradicted Ms. Kenny's unwavering testimony that the "certain facts" that supposedly justified Judge Lopez's sentence had nothing to do with the CPCS psycho social assessment whatsoever; rather, the "certain facts" referred to Judge Lopez's misrepresentation to Ms. Kenny that defendant Horton had not used the screwdriver as a weapon and had not kidnapped the victim. *Facts*, ¶134.

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Such hearing testimony is particularly telling. Not only did her testimony in this regard directly conflict with her earlier statements under oath that her press statement was not accurate, her hearing testimony that the press release was accurate enough for its purposes, shows a reckless and cavalier attitude toward the truth. Certainly, the law demands greater honesty from a witness testifying under oath, and the Code of Judicial Conduct holds a judge to a higher standard yet.

fact, read the District Attorney's press release and relied on it in making her "findings" on August 4. False Statements, ¶ 5.

Adopting a new strategy , of course, does not give anyone, especially a judge, the right to be less than candid. Each of the judge's misrepresentations, standing alone, causes concern. Taken together, the multitude of misrepresentations creates a fundamental question about the judge's fitness to serve.[10]

Through her tactics, *ad hominem* attacks, and overt disdain for the Commission and these proceedings, Judge Lopez has revealed a demeanor and temperament inconsistent with the Code of Judicial Conduct. Her intemperance was evident in her unprecedented soliloquy at the end of the hearing. What this hearing officer allowed her to present as allocution, amounted to a little more than a diatribe against the Commission, its witnesses, and Commission counsel.

The judge used this forum not to defend her actions, but to launch yet another attack on the Assistant District Attorneys whom she described as "inexperienced, unprofessional, and of questionable veracity." See Vol. XIV, p. 104. The Assistant District Attorneys are public servants who have made sacrifices to represent the people of Massachusetts.

Judge Lopez, of course, did not limit herself to criticizing the prosecutors; she took aim at the Commission and Commission counsel as well. Indeed, she prefaced her closing remarks by admitting that they were largely critical of the Commission and its attorneys, describing the investigation as "politically motivated." Despite the irrefutable evidence that Judge Lopez misrepresented

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Lying under oath itself is, of course, a violation of the Canons. ***Troy*, 364 Mass. at 73.** Lack of candor before the Commission is also an aggravating factor to be considered in the judicial conduct proceedings. ***King*, 409 Mass. at 598.**

facts to the Public Information Officer for the Supreme Judicial Court, misled the public, and testified with less than candor, the judge asserts that this matter is "political" and involves "unfounded and irresponsible charges." See Vol. XIV at 105, 114. Judge Lopez's attempt to lay blame on Commission counsel or "politics," while refusing to accept responsibility for her conduct, is troubling.

Judge Lopez's suggestion that the Commission and these proceedings are a threat to the independence of the judiciary is similarly perverse and is yet one more subtle attempt by the judge to put undue pressure on the process and instill fear into the Judiciary. Indeed, our Supreme Judicial Court has already warned that "judges who do not abide by those high and well recognized standards of personal and judicial conduct to which they must be held, cannot employ the argument of judicial independence as a shield when questionable practices on their part are challenged." ***In Re: DeSaulnier*, 360 Mass. 787, 809 (1972)**. The Code of Judicial Conduct and the Commission that enforces it are integral to the independence of the judiciary. See ***In the Matter of Killam*, 388 Mass. at 622** (the purpose of judicial conduct "is to preserve the integrity, independence, and impartiality of the judiciary and, moreover, to preserve public confidence in the integrity, independence, and impartiality of the judiciary").

Massachusetts is fortunate to be one of only three (3) states in the entire nation in which judges are appointed with life tenure. Without elections or term limits, the only accountability is the Code of Judicial Conduct enforced by the Commission. Should the system fail, should there be no accountability for misconduct, then the call for term limits or the election of judges will only escalate.

Even if the judge disagrees with the policy interests undergirding the Commission and its work, the Commission is a creature of the Legislature - the people's representatives. Indeed, the judge's closing soliloquy demonstrates a lack

of judgment and an intemperance fundamentally at odds with the Code of Judicial Conduct.

Judge Lopez rightly asserts in her allocution that, as a judge, she has the same rights guaranteed to all citizens of this Commonwealth by Article 29 of the Declaration of Rights. Indeed, the Constitution of the United States, as well as that of Massachusetts, apply to all persons; nothing in their text suggest that judges are excluded from their protection. But then, she asserts "How do we quantify the chilling effect that these proceedings have had on the exercise of independent judgment by judges. I have heard it from colleagues on the Superior Court, as well as freely from judges in the other courts of the Commonwealth." See Vol. XIV, p. 105. "These proceedings against me have undermined the very foundation of our judiciary's constitutional mandate, which is to dispense justice freely, impartially and independently." See Vol. XIV, p. 107. She previously had equated herself to Lord Cooke (Coke). "Because Cooke was removed from the bench by the King, the Chief Justice's theory of a judiciary, independent of control by the royalty or Parliament, was not developed further in England. It was, as we know, highly regarded and adopted by the American colonies as early as 1761." Vol. XIV, p. 106. Judge Lopez's assertions are nothing more than an attempt to create apprehension within the judiciary.

There can be no question that the independence of the judiciary is a "fundamental precept [ ] upon which our systems of government is founded." Hastings I, 770 F. 2d 1093, 1104 (D.C. Cir. 1985) (Edwards, J., concurring). In the hallowed words of Alexander Hamilton, the "independence of the judges is requisite to guard the Constitution and the rights of individuals (against legislative encroachments and) from the effect of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves." ***The Federalist No.*** **78 at 527 (Alexander Hamilton) (J.**

Cooke ed. 1961). Indeed, the Supreme Court of the United States has stressed "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." **Chandler v. Judicial Council 398 U.S. 74, 84 (1970) (Judge Douglas, Dissenting)** But, "judicial independence and judicial accountability" are partners in maintaining the respect and confidence necessary to the effectiveness of the . . . judiciary. ***McBryde v. Committee to Rev. Cir. Council Conduct*, 83 F. Supp. 2d 135, 155 (D.D.C. 1999) quoting H. Rep. No. 101-512 at 8.** "[T]he Framers never intended that the independence of any one officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government." ***Hastings*, 593 F. Supp. at 1379.** Our courts have consistently rejected the notion "that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business" ***Chandler*, 398 U.S. at 84.** Courts "are not mere collections of individual judges, each of whom is a complete law unto himself or herself." ***Hasting II*, 783, F. 2d at 1505.**

"Hamilton's concern with judicial independence seems largely to have been directed at the threat from the two other branches." (Emphasis added.) ***McBryde v. Committee to Rev. Cir. Council Conduct*, 264 F. 3d 52, 66 (D.C. Cir. 2001).** "I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" ***The* Federalist No. 78 at 523** (Hamilton) (Jacob E. Cooke, ed.) (quoting Montesquieu) Hamilton famously characterized the judiciary as "the least dangerous" branch. Id. at 522. "Thus, it seems natural to read Hamilton as seeing the guarantees of life tenure and undiminished compensation and the limited means for denying a judge their protection, simply as assuring *independence* for the judiciary *from the other branches*" ***McBryde* at 66**. (Emphasis added) "Indeed, the Hamiltonian concern for protecting the judiciary from other branches argues for internal disciplinary powers. Arrogance

and bullying by individual judges exposes the judicial branch to the citizen's justifiable contempt. The judiciary can only gain from being able to limit the occasion for such contempt." ***McBryde*** **at 66.** Judge Lopez's premises is thus fundamentally at odds with the structure created by the Constitution that John Adams created for Massachusetts which in turn was reflected in the U.S. Constitution. The judicial power that was crafted by John Adams vested judicial powers not in an individual judge but in the courts. The judiciary is not a batch of unconnected courts, but a judicial department. Individual judges are not entitled to choose their own manner of conducting judicial business. "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. ***Chandler*** **at 84**.

In her allocution, the judge said "I fear it is quickly becoming a justice system composed of judges not just concerned with applying the law in a fair and just fashion, but it is become a justice system that will think first about what happened to Judge Maria Lopez." Judge Lopez does not have to remind this hearing officer about judicial independence and the sacrifices that it entails. But judges acting rightfully within their jurisdictional domain, have no fear. The doctrine of judicial immunity has been deeply entrenched in our legal system, since the time of Lord Cooke (Coke). In the seminal case of ***Floyd v. Barker*****, 12 Coke Rep. 23, 77 Eng. Rep. (Star Chamber 1607)** decided by Lord Cooke (Coke) in 1607, judicial immunity was established for judges who served on English courts of record. In that decision, Lord Cooke discussed for the first time what are now considered some of the modern policies that underlie the doctrine of judicial immunity. As stated by Lord Coke, judicial immunity serves the following

purposes: (1) it insures the finality of judgments; (2) it protects judicial independence; (3) it avoids continual attacks upon judges who may be sincere in their conduct; and (4) it protects the system of justice from falling into disrepute. Yet, as for the Supreme Court of the United States, the doctrine of judicial immunity is needed because judges, who often are called upon to decide controversial difficult, and emotion-laden cases, should not have to fear that disgruntled litigants will hound them with litigation charging improper judicial behavior. See ***Pierson v. Ray*, 386 U.S. 547, 554 (1967)**. The grant of absolute immunity to judges has often been criticized, especially since it is judges who have granted absolute immunity to themselves. Without the right of the judiciary to monitor itself and without the courage to impose sanctions where violations of the Canons has occurred, it would then be the very independence of the judiciary which would be questioned.

If the purpose of the Canons is to uphold the integrity and independence of the judiciary, then the failure to enforce that Canon threatens the independence of the judiciary. Judge Lopez's attack is not an attack upon the Commission, but upon the Canons themselves.

The first Canon of the Code of Judicial Conduct is greater than all the rest: "A judge should uphold the integrity and independence of the judiciary." [11] Judge Lopez's behavior in her handling of the ***Commonwealth v. Horton*** matter, together with her less than forthright testimony in these proceedings, demonstrates a failure to uphold the integrity of the judiciary .

11

As the Supreme Judicial Court has explained, the very purpose of the Code of Judicial Conduct is to "preserve the integrity, independence, and impartiality of the judiciary and, moreover, to preserve public confidence in the integrity, independence, and impartiality of the judiciary." ***In the Matter of Killam*, 388 Mass. 619, 622 (1983)**. Canon 1 itself states that all other provisions of the Code are to be "construed and applied to further that objective." S.J.C. Rule 3:09, Code of Judicial Conduct, Canon 1.

The Commission's heavy burden is to persuade the hearing officer that there is clear and convincing evidence that the charged misconduct occurred. G.L. c. 211C, §7(4). The evidence must be more persuasive than the preponderance standard requires, but need not be proof beyond a reasonable doubt. The proof "must be strong, positive and free from doubt' and 'full clear and decisive'" ***Callahan v. Westinghouse Broadcasting Co., Inc.*, 372 Mass. 582 (1977).** The evidence must be sufficient to prove "to a high degree of probability" that a charge is true. ***Tosti v. Ayik*, 394 Mass. 482, 493 n.9 (1985).** This burden of persuasion applies to issues of fact, and to how the Canons apply to the facts. ***Matter of Brown*, 427 Mass. 146, 150 n.4 (1998).**

These demanding standards are heightened still further with respect to many of the charges by G.L. c 211, §2(4):

> In the absence of fraud, corrupt motive, bad faith, or clear indication that the judge's conduct violates the Code of Judicial Conduct, the Commission shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. Commission proceedings shall not be a substitute for an appeal.

This statute provides to Massachusetts judges a measure of qualified immunity from sanctions for good faith conduct in the performance of their judicial duties. Otherwise, findings of fact determined to be erroneous and unfounded, erroneous legal rulings, and actions taken based on a good faith understanding of the law would be sanctionable. Where the charges involve Judge Lopez's conduct in making findings of fact, conclusions of law, or applying the law as she understood it, the Commission bears the heightened burden to convince the hearing officer that Judge Lopez did not act in good faith or that there is a clear indication that the code was violated. It was in this vein and spirit, as to each charge, that this hearing officer asked himself whether I am quite certain of my conclusions on this

question of application. Unfortunately, I am.

The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield. Ultimately, it is the protection of the public that the Commission has to be concerned with, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system. The task presented me is to make findings of fact and recommendations, inclusive of sanctions and discipline, if any, that is necessary to achieve these goals. To that end, I have considered evidence offered by the judge in explanation and/or mitigation of her conduct. But where there is maliciously motivated judicial misconduct, mitigation as a factor in determining the nature of the discipline becomes less of a factor. What makes it harder is Judge Lopez's patent misunderstanding of the nature of her judicial responsibilities that serves not to mitigate but to aggravate the severity of her misconduct. While she has not engaged in a continuous course of overreaching and abuse of judicial authority, a judge is not excused simply because she has not made a habit of being vindictive and not accepting responsibility for her actions.

She is not the subject of this action because she possesses an unpopular philosophy, has offensive idiosyncracies, has rendered unpopular decisions or is too compassionate. She is here for specific acts that allegedly violate the Canons. Judge Lopez, because she refuses to recognize that what she did was wrong both to the victim and to the Assistant District Attorneys, has "never exhibited true remorsefulness for her misleading comments to the public, and has never shown that she understands the damage to the judiciary that occurs when a judge offers, as fact, public statements that are not reasonably supported, researched, investigated, or believed to be true." ***In Re*: *Ferrara*, 458 Mich. 350, 362 (1998).** A judge who is opinionated, outspoken, hardworking and extroverted, must also

insure that she is never prejudiced and always impartial. Rather than respond immediately and convincingly to the specific charges that she prejudiced the administration of justice by not being impartial, she expends most of her defense effort in attacking the character and credibility of the adverse witnesses, the Commission, and the Commission's attorney. While she concedes that she lost her temper on one occasion, she denies she has ever deliberately abused her judicial office and generally refuses to admit she has done anything improper. She puts forth a conspiracy theory that she is the subject of this attack because she is a woman, Hispanic and liberal. She has never exhibited true remorsefulness for her misleading comments to the public, and has never shown that she understands the damage that she has done to the judiciary. Judge Lopez fundamentally misperceives the nature and gravity of the charges, and instead, views the entire matter as one of ideological and ethnic differences. I agree with Judge Lopez that the "idiosyncrasies" of individual judges "may be displeasing to those who walk in more measured conservative steps [,] [b]ut those idiosyncrasies can be of no possible constitutional concern to those critics." ***Chandler*** **at 140.** In this case, Judge Lopez has displayed a lack of candor with both the Commission, and with this hearing officer.

It is clear that in the ***Horton*** case, one is not dealing with illegal and corrupt acts on the part of the judge. In this case, Judge Lopez allowed pride to control her behavior. In so doing, she forgot her responsibilities to the public and, in particular, an eleven (11) year old boy, the victim.

If indeed sanctions are to be imposed, one must recognize that choosing the proper sanction is an art, not a science and turns on the facts of the case at bar. In making her allocution, this hearing officer was hoping to hear an apology by Judge Lopez to the judiciary, to the lawyers involved, and most importantly, to the then eleven (11) year old victim - none was forthcoming. *Sanctions are necessary,*

not only to pointedly tell Judge Lopez that she was wrong, but to let all those who believe that Judge Lopez was wrongly prosecuted, that when you look at the particulars, wrong was done by Judge Maria I. Lopez.

Judge Lopez asserts that she has never before been the subject of a complaint that has survived the Commission's screening process. The implication of this assertion is that a judge can act vindictively in a single case, as long as it does not become a habit. This argument does not preclude the Commission from responding to that behavior. Judge Lopez's insistence that she saw nothing judicially improper about her conduct, except for her one (1) time loss of temper with ADA Deakin, only serves to heighten the severity of her misconduct. Judge Lopez's patent misunderstanding of the nature of the accusations against her is indeed troubling. A judge is not an absolute monarch, restrained only by the risk of appeal or certiorari.

Rather than respond affirmatively and convincingly to the specific charges, Judge Lopez expends most of her defense in attacking the character and credibility of the adverse witnesses. But leaving aside the testimony of the adverse witnesses, there is still clear and convincing evidence to support these findings.

As pointed out by Commission's counsel, the entire thrust of the judge's defense here is "I am a victim. I'm a victim of the District Attorney's Office. I've been victimized by that District Attorney's Office. They were out to get me. They conspired to do so. Deakin and Joseph made an affirmative decision. The District Attorney's Office ginned up a press release to infuriate me and drew me into a circumstance in which I had no choice but to discipline them in the way that I did." See Closing Argument of Mr. Ware, Volume XV, pp.113-115.

Judge Lopez, in her closing, expands the list of those she attacks to other judges who have been in the past found wanting. The fact that Mr. Ware, on behalf of the Commission, is asking this hearing officer to consider recommending

her removal is, according to Judge Lopez, nothing short of blasphemy, when other judges have received a far less sanction. Judge Lopez attacks Appeals Court Judge Brown as a repeat offender. See ***In Re: Brown, supra***. Why her and not Judge Brown? Judge Brown is indeed an outspoken jurist. Judge Brown has the courage of his conviction, he accepts responsibility.

Mr. Egbert asks this hearing officer to "remember, nine months ago, there was a case before the Supreme Judicial Court of the Commonwealth, ***In Re: Markey***. A judge used his judicial position to deliberately interfere and intercede in a case to affect the outcome of a case in front of another judge. And that judge suffered a short suspension. Nothing about that when the Commission on Judicial Conduct wants you to remove Judge Lopez for yelling on tape." See closing arguments of Mr. Egbert, Volume XXV, pp. 106-107. See ***In the Matter of Markey*, 427 Mass. 797 (1998).** Mr. Egbert argues that "[Commission's accusation that Judge Lopez engaged in a pattern of abuse of office warranting severe sanctions, including removal, lacks the proportionality required by pertinent Supreme Judicial Court cases. Nothing in this record remotely approaches the pattern of gross misconduct in several judicial misconduct cases. See Judge Maria I. Lopez's post-hearing brief, p. 87.

But the Commission's attorney is not asking for her removal because of the underlying transgressions that Judge Lopez committed in the ***Horton*** *case in breach of the Canons. He argues that the problem for Judge Lopez is her lack of candor in these proceedings, the fact that Judge Lopez has not been honest in her sworn testimony, either before the Commission on October 2001, or before this hearing officer or both. How can it be that a judge who cannot be completely open and honest in this courtroom can sit by as a witness, take an oath to tell the truth, and monitor the testimony of that witness?*

"There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission on Judicial Performance in the course of its investigation into charges of wilful misconduct on the part of the judge." ***Adams v. Commission on Judicial Performance,*** **10 Cal. 4th 866, 914 (1995).**

Judge Lopez argues that removal is not necessary to protect the public and the judicial system itself. She argues that such a sanction would be sharply out of line with prior Supreme Judicial Court decisions. In looking at the question whether a judge should be removed from office, the misconduct that justifies this most severe sanction frequently revolves around a pattern of arbitrary, irrational, and inappropriate conduct of the judge while acting on the bench in dealings with litigants, attorneys, witnesses, and other persons, or while otherwise performing his or her judicial function and an abuse of his or her judicial powers and authority. But if a judge has not been candid in a proceeding, that lack of candor can be fundamentally disqualifying.

"Although we agree with the Commission that these isolated occurrences, standing alone, would not be sufficient to justify removal, petitioner's misconduct is magnified here by a pattern of evasive, deceitful, and outright untruthful behavior, evidencing a lack of fitness to hold judicial office...Particularly relevant here is our conviction that 'deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth.'" ***In the Matter of Collazo,*** **91 N.Y. 2d 251, 254, 255 (1998).**

Judge Lopez now admits at the hearing that one part of her answer was in error. She admits ¶ 9 of her Response to Charges was wrong when she said that "[a]lthough Judge Lopez was unaware of it at the time that she made her findings, the Suffolk County District Attorney's Office issued on August 3, 2000, a press release . . ." Judge Lopez now acknowledges that she not only was aware of the

press release, but read it before she made her findings of August 4, 2000. The problem for Judge Lopez is that her answer to the Complaint has never been amended. It was not until this hearing when this error was revealed, does Judge Lopez admit that her answer was wrong. The answer was filed on May 6, 2002. She had the opportunity to correct her answer before the hearing, but failed to do so.

Judge Lopez had an epiphany on the stand and testified that she not only had read the D.A.'s press release before issuing her Findings, but she actually had based the Findings, in part, on the press release. See Vol. I at 107-09; Vol. IV at 41. But this not only contradicts her Response (¶9), it also is inconsistent with her prior testimony. See Ex. 32 at 79-81 (failing to identify D.A.'s press release as basis for her Findings). This Court can assess the credibility of the judge's explanation as to her "error" in the Response (and, presumably, in her prior testimony), but it is hard to see how a judge - particularly a judge as smart and sophisticated as Judge Lopez (see Vol. XIV at 32, 40, 62, 66 91) - accidently puts such a clear and unambiguous statement into a document as important as her Response to the Formal Charges. Moreover, while she claims "error" as to her Response, she has little or no explanation for the inconsistencies with her prior testimony. As noted above, it is noteworthy that Judge Lopez had more than one (1) year since her prior testimony, and six (6) months since her Response, to correct her error before the hearing, but this she did not do.

Even more egregious in her answer is Judge Lopez's attempt to lay responsibility for issuing her post-sentencing press release upon Chief Justice DelVecchio. In ¶22, Judge Lopez asserts that "*[a]ccording to the evidence before the Commission, the press release would not have issued at all but for Chief Justice DelVecchio's decision to issue it." [Emphasis added]. But the evidence before this hearing officer is just the contrary; that Chief Justice DelVecchio advised Judge*

Lopez not to issue any press release. See Vol. II, p. 155. Again, this answer has not been amended. The answer is indicative of Judge Lopez's proclivity not to accept responsibility for her own actions, but to blame someone else for the transgression. Chief DelVecchio was quite illuminating as to her interaction with Judge Lopez.

> Q. And did you in this case, as Chief Justice of the Court, tell Judge Lopez not to issue a press release or press statement?
>
> A. I told her she shouldn't say anything.
>
> Q. Was that as a directive of the Court? In other words –
>
> A. I can't direct a judge not to do something. I can advise. I can't forbid a judge from talking to the press. I can't do any of those things. But I advised her not to say anything.
>
> Q. And was that from a public relations standpoint?
>
> A. I didn't consider the Canons at the time, whether it was appropriate - - but that's up to her to consider. I don't tell a judge how to conduct themselves pursuant to the Canons, but I did think that at that point in this case, the less said, the better." See Vol. II, pp. 124-125.

As stated previously, Judge Lopez looks for protection from the First Amendment. I agree that the protection of the First Amendment extends and is afforded to judges themselves. Judge Lopez is right to embrace the First Amendment. She has the right to marshal her own explanation or defenses to justify her actions in the ***Horton*** matter. But the public right and interest in unfettered expression does not mean that a judge can be less than forthright in

presenting that defense.

In his closing, the Commission's counsel included compilations of this lack of candor by Judge Lopez. Although these compilations are not evidence, they are adopted by this hearing officer as illustrative of Judge Lopez's habit of not being totally candid in answering questions.

THEN	NOW
(Sworn Testimony 10/31/01)	**(Hearing Testimony 11/02)**
Judge Lopez DID continue the case toavoid media attention.	**Judge Lopez did NOT continue the case to avoid media attention.**
LOPEZ: I wanted to continue the case because I really believed that on another date there would be some other new[s] story that was hotter than mine. Exhibit 32 at 84	**WARE:** And you continued the case because you believed that on another date there might be a hotter news story than this case, isnt' that so? **LOPEZ:** Those were not the reasons why I continued the case. Volume I at 83
THEN	**NOW**
(Response to Formal Charges 5/6/02)	**(Hearing Testimony 11/02)**
Judge Lopez was NOT aware of the District Attorney's August 3 press release when she made findings.	**Judge Lopez WAS aware of the District Attorney's August 3 press release when she made her findings.**
"Although Judge Lopez was unaware of it at the time she made her findings, the Suffolk County District Attorney's Officeissued on August 3, 2000, a press release . . . . Response para. 9	**LOPEZ:** What I mean by that statement [the findings, Ex. 17] was that, after having reviewed the DA's press release, *because these findings were made after I had seen that press release,* . . . . Volume IV at 41

	WARE: So now you're saying that you saw this press release on August 4th in the afternoon before you wrote the findings, but after the proceedings in the lobby. **LOPEZ:** Correct Between my morning lobby conference and the time I wrote these findings, I had read the press release. Volume I at 107-08
THEN **(Sworn testimony 10/31/01)** **The District Attorney's press release was NOT unethical.**	**NOW** **(Hearing Testimony 11/02)** **The District Attorney's press release WAS unethical.**
LOPEZ: Yes. I believed [the DA's Office] issued a press release the day before. **WARE**: Is there anything in your mind inappropriate about that? **LOPEZ:** Look. They're politicians. There's probably nothing inappropriate.... Nothing inappropriate. There's nothing unethical.... Exhibit 32 at 74	**WARE:** And if follows from that, does it not, that you are saying the District Attorney's office at large acted unethically in this case, isn't that so? **LOPEZ**: That is so. Volume IV at 41

THEN	NOW
(Sworn Testimony 10/31/01) **The press statement of 9/7/00 was NOT her statement.**	**(Hearing Testimony 11/02)** **The press release of 9/7/00 WAS her statement.**
WARE: That's because you take the view that this wasn't your statement? **LOPEZ:** Right. Exhibit 32 at 146-47	**EGBERT:** It purports to be your statement, correct? **LOPEZ:** It is my statement. Volume IV at 147
THEN	**NOW**
(Sworn Testimony 10/31/01) **Judge Lopez does NOT know the "certain facts" mentioned in the press statement of 9/7/00.**	**(Hearing Testimony 11/02)** **Judge Lopez DOES know the "certain facts" mentioned in the press statement of 9/7/00.**
WARE: In the press release, it says there are certain facts before you. What are the facts to which this alludes, if you know? **LOPEZ**: I don't know. Exhibit 32 at 146-47.	**EGBERT:** And what are those facts and circumstances that you had in mind [in your 9/7/00 statement]? **LOPEZ:** Those would be the facts contained in the psycho social assessment that I had, the disputed facts that had been presented to me in the lobby conferences, the defendant's criminal record information, police reports which were not part of the public record. Volume IV at 156

THEN	NOW
(Sworn Testimony 10/31/01)	**(Hearing Testimony 11/02)**
The press statement of 9/7/00 was NOT accurate.	**The press statement of 9/7/00 WAS accurate "for a press release."**
LOPEZ: [In Ex. 24] I didn't mean in terms of guidelines, no. That's not my statement. **WARE:** So this statement is erroneous in that respect? **LOPEZ**: Right. Exhibit 32 at 37-38 **LOPEZ**: The characterization of what I was doing in open court, that it referred to sentencing guidelines, is not accurate. Exhibit 32 at 40	**EGBERT:** Did you feel, at the time it was issued, that it was a generally accurate reflection of your position? **LOPEZ**: For its purpose, it was accurate of what had gone on, what my position was, yes. **EGBERT**: And do you consider it generally accurate as to your position for a press release? **LOPEZ:** Yes. . . . Volume IV at 157

JOAN KENNEY'S TESTIMONY	JUDGE LOPEZ'S TESTIMONY
WARE: Before you drafted the statement, did you learn from Judge Lopez additional facts about the case, specifically about a weapon or about the kidnapping? **KENNEY**: . . .[S]he did tell me that she did not believe it was a kidnapping and that the screwdriver was not used as a weapon. Volume X at 155-56 **WARE:** Judge Lopez told you that this was not a kidnapping, isn't that right? **KENNEY**: That's correct. **WARE**: And to your best recollection, those were her words, without qualifiers; is that right? **KENNEY**: That's correct. Volume XI at 62-63	**WARE**: And at that time, among the things you told Ms. Kenney, was that there was no screwdriver used in this case as a weapon; isn't that true? **LOPEZ**: That is not true. That's not what I said. **WARE**: And didn't you tell her there was no kidnapping in the usual sense? **LOPEZ**: I did not say that. I told her those were disputed facts. Volume II at 90

See also *Commission's Summary of Lopez's False and Inconsistent Statements.*

While the Supreme Judicial Court has in the past disbarred a judge and enjoined him from the exercise of all duties and powers as a judge, see ***In the Matter of Troy*, 364 Mass. 15, 73 (1973), M.G.L. c. 211C,** as amended, appears to be a supplement to, but not a substitute for, the impeachment process or a Bill

of Address. It is designed to deal with those matter which do not rise to the level of impeachable offenses, a long-term disqualification or suspension could by its practical effect, effect an unconstitutional removal of a judge from office.

The Commission's recommendation, along with those of this hearing officer, are forwarded to the Supreme Judicial Court. It is the Supreme Judicial Court that will make the ultimate, dispositive decision in this matter. That Judge Lopez's defenses to the initial Charges presented were for the most part, ill-founded, has been established to this hearing officer.

Judge Lopez, in her allocution, quotes Pascal that "we must not expect too much of judges." To this, one must say that more is expected of her, since she is a judge, and rightfully so. A judge should weigh this before she accepts her office. Subject as she is to constant public scrutiny in her community and beyond, she must adhere to standards of probity and propriety higher than those deemed acceptable for others. See ***In the Matter of Troy*, Ibid. at 71.**

Judges should exercise their judicial functions with integrity and impartiality and and unfortunately, Judge Lopez's TV courtroom behavior was unpleasant to witness and reflected negatively on the Massachusetts judiciary. She has thus compromised the notion that the law is uniform and impartial in its application within the court system of Massachusetts. She has exacerbated and changed the dynamics of her situation by not having the courage of her conviction to stand by her decisions, and instead, engaged in a pattern of unfortunate contradictions to cover up what had occurred. A third rate burglary was the undoing of President Nixon. One would think that public officials would learn that to be less than honest in order to cover up would only compound the problem. "The single, overriding thing we have learned is the need for confidence by the citizens of Massachusetts in the conduct of their government. The depth of skepticism, sometimes to the point of outright cynicism, about elected and

appointed public officials, should be disturbing to private citizens, not just to the politicians. It is a measure of the alienation of people from government and of the erosion of the will to act as citizens." **Report of the Ward Commission, Dec. 31, 1980.**

If the public perceives that the judiciary accepts that its members are in a different class, distinct and above the ordinary person, then the judiciary will truly become alienated from the people. Judge Lopez should not be viewed as a martyr. In defending herself against the Formal Charges, Judge Lopez has consistently and repeatedly attempted to distract from what is at issue. Judge Lopez still fails to recognize the seriousness of her misconduct; she still fails to recognize that a judge who makes misrepresentations to the public and to this hearing officer, has breached her obligations under the Code of Judicial Conduct. See ***Adams v. Commission*, 10 Cal. 4th 866, 914 (1995).** The case against Judge Lopez concerns her complete disregard of this Code. Judge Lopez's "duty to be completely candid" is not a triviality to be glossed over See ***In Re: King*, 409 Mass. 590, 606 (1991).**

> A judge who refuses to recognize [her] own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others. We are troubled by the fact that [the judge] shows nor remorse and we can only presume that if this Court reprimanded him, he would continue to violate the precepts of the Code of Judicial Conduct.

***In Re: Graham*, 620 So. 2d 1273, 1276 (Fla. 1993)** (removing judge from office); see also ***Inquiry Concerning a Judge*, 462 S.E. 2d 728, 736 (Ga. 1995)** (removing judge where court found "from [the judge's] own testimony" it was unlikely she would alter her previous conduct); ***Mississippi Judicial Performance Comm'n v. Hopkins*, 590 So. 2d 857, 866 (Miss. 1991)** (removing from office judge who denies all wrongdoing and "offers explanations and excuses for every act); ***Judicial Discipline and Disability Comm'n v. Thompson*, 16 S.W. 3d 212, 226**

(Ark. 2000).

Blaming others for one's own misconduct, as Judge Lopez has so often done in this case, also weighs heavily against a judge in misconduct proceedings.

The Arizona Supreme Court's words could have been written for Judge Lopez:

> Respondent's accusations [against the Commission] only confirm that he lacks the judgment needed to carry out his duties competently. Respondent blames the world for his troubles, refuses to see his own shortcomings, and, consequently, does nothing to cure them. We take this as some indication that no amount of rehabilitation or education will solve these problems and that Respondent poses a danger of committing future violations bringing the judiciary into disrepute.

Matter of Peck, **867 P.2d 853, 860 (Ariz. 1994)** (rejecting Commission's recommendation for a 30-day suspension and removing judge from office). As in ***Peck,*** Judge Lopez has continued to justify her behavior by pointing her finger at the very targets of her misconduct - namely, the Assistant District Attorneys, the District Attorney's Office, and the media. Then why not as in ***Peck,*** not remove Judge Lopez. Alexander Hamilton wrote in the **Federalist No. 78** that "the Judiciary . . . may truly be said to have neither force nor will, but merely judgment." Does she have the temperament and judgement to serve as a judge? Her prior track record indicates that she does.

To Judge Lopez and her supporters, the Commission's accusation of lies and deceit are mere fairy tales, deliberate and highly offensive falsifications that have unfairly caused serious harm. To the Commission, Judge Lopez's attacks on its integrity is highly offensive. There is no middle ground.

This hearing officer is mindful that a temporary suspension, without pay, would not remove Judge Lopez from her judgship or create a vacancy in her office triggering the Governor's appointment authority. The Commission has been

authorized by the Legislature, pursuant to M.G.L.A. c. 211C, §8(4), to recommend to the Supreme Judicial Court various sanctions, including "removal," the "imposition of limitations or conditions on the performance of judicial duties", the "imposition of a fine," and the "imposition of any other sanction which is reasonable and lawful." The Supreme Judicial Court has concluded on previous occasions that a temporary suspension does not constitute a removal. See ***The Governor v. McGonigle*, 418 Mass. 558, 560-561 (1994)** (sheriff not removed from office where his temporary suspension did not create vacancy in the office).

In ***Matter of Bonin*, 375 Mass. 680, 683 (1978),** the Supreme Judicial Court entered an Order temporarily enjoining Chief Justice Bonin from the performance of all judicial and administrative functions during the pendency of the proceedings before that court. At the conclusion of the proceedings, the court extended his suspension "for a reasonable time to permit the executive and legislative branches to consider. . . the question of the continuance of the Chief Justice in office." **Id.** at **711-712.** Thus, a distinction was drawn in that case between temporary suspension of a judge from his duties, which is appropriate for the court to impose, and a removal of the judge from office, which is the perogative of the Executive and Legislature.

The essential question is:

Can a Judge Who Makes Inconsistent Statements Under Oath Retain the Office?

The answer may be found in the evidence which shows that:

1. Judge Lopez was acting from pride, an all to common human failing, and not from corruption or bribery;
2. In 14 years on the bench, she has never been the subject of disciplinary action;

3. The Judge and her husband and indeed family, have been the subject of extraordinary humiliation and embarrassment over the past few years;

4. The Judge appears to be compassionate and hard-working, as attested to the distinguished list of jurists and attorneys. Particularly noteworthy is Associate Superior Court Justice Regina Quinlin who stated, "Whenever she was assigned anything it was always done. But what I think impressed me the most was she would call and volunteer, which not many did." Vol. XIV, p. 45

5. The memory of the Horton case will forever be with her.

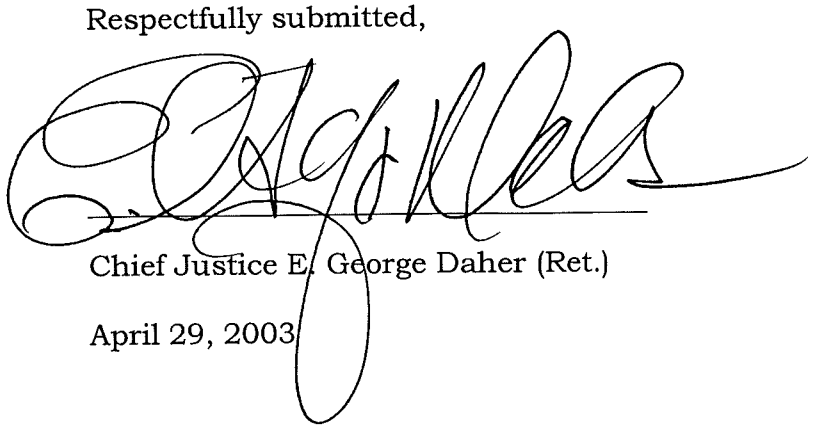
The Commission's representative recognizes that the underlying offense which triggered the Complaint against Judge Lopez does not warrant her loss of office. It was Judge Lopez's feeble attempt at coverup which provoked Mr. Ware's recommendation of removal.

However, notwithstanding the above recommendation of removal, it is this hearing officer's view, taking into consideration all the evidence presented me, if Judge Lopez were to:

1. Issue a mea culpa to the findings in this order and;
2. Admit and accept responsibility for her inconsistent statements and testimony,

then the recommendation would be a six (6) month suspension without pay. This act of contrition will do much to enable the system to heal itself and in a sense be, a public apology to the 11 year old victim in the Horton case.

Respectfully submitted,



Chief Justice E. George Daher (Ret.)

April 29, 2003

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BEFORE THE COMMISSION ON JUDICIAL CONDUCT

In re Judge Maria I. Lopez	))))	Complaint Nos. 2000-110, *et seq.*

COMMISSION ON JUDICIAL CONDUCT'S

PROPOSED FINDINGS OF FACT

I. Judge Lopez Engaged In Improper *Ex Parte* Contacts

Following her having retained jurisdiction in the *Horton* case, and during the period of appeal and/or for motions under Rule 30 of the Massachusetts Rules of Criminal Procedure, Judge Lopez engaged in at least the following *ex parte* contacts:

A. Judge Lopez initiated a telephone conversation with defense counsel Anne Goldbach of the Committee for Public Counsel Services ("CPCS") shortly following the September 6, 2000 sentencing, during which Judge Lopez discussed Horton and the publicity which followed his sentencing.

1. At the end of the September 6, 2000 sentencing hearing, Judge Lopez explicitly retained jurisdiction over the *Horton* case at the request of defense counsel Anne Goldbach. Ex. 22 at 34. In doing so, the Judge understood that Horton would appear before her again. Indeed, Judge Lopez testified that she viewed the matter as pending for purposes of probation. Vol. II at 99 (Testimony of Judge Lopez); Ex. 32 at 11-12, 14; Vol. XIII at 49-50 (Testimony of Anne Goldbach).

ALLOWED

2. Following the *Horton* sentencing, between approximately September 7 and September 10, 2000, Judge Lopez made at least two *ex parte* phone calls to Ms. Goldbach, who was still representing Horton (and continues to do so). At least one of these calls was made to Goldbach's home on a weekend. Vol. II at 100–01, Vol. III at 25-26 (Testimony of Judge Lopez); Vol. XII at 181-83, V ol. XIII at 30, 41-42. (Testimony of Anne Goldbach). During one of these conversations, Judge Lopez discussed with Goldbach whether the Judge should obtain counsel. Vol. XIII at 43-44 (Testimony of Anne Goldbach).

ALLOWED

3. During their first telephone conversation, Judge Lopez asked questions about Horton and expressed concern and worry for Horton's well-being. Vol. XIII at 42 (Testimony of Anne Goldbach). She and Goldbach also discussed the media attention and how the

Judge "was being treated." Ex. 32 at 95-97, 101; Vol. III at 27, 31 (Testimony of Judge Lopez). Indeed, the Judge implicitly requested that Goldbach speak with the media and publicly defend her. Ex. 32 at 109; Vol. III at 38-39 (Testimony of Judge Lopez).

ALLOWED

4. One of the purposes of Judge Lopez's calls was to encourage defense counsel and the Committee for Public Counsel Services ("CPCS") to make a public statement supportive of the sentence in *Horton* and of the Judge. Vol. II at 103, Vol. III at 38-39 (Testimony of Judge Lopez); Ex. 32 at 106, 109–10. Ms. Goldbach did, in fact, speak with the press both on background and for attribution following her *ex parte* conversations with Judge Lopez. Vol. XIII at 45 (Testimony of Anne Goldbach); Exs. 20, 21 (news articles quoting Ms. Goldbach).

ALLOWED

5. At the time she made the calls to Goldbach, the Judge was aware that she had been instructed by the Chief Justice of the Superior Court and her own counsel not to speak with the press or third parties regarding the *Horton* matter. Vol. II at 100 (Testimony of Judge Lopez); Ex. 32 at 35, 104; Vol. XI at 124-25 (Testimony of Chief Justice DelVecchio).

ALLOWED

6. Ms. Goldbach considered Judge Lopez's calls to be "highly unusual." In fact, defense counsel agreed that her being called by the trial judge in a criminal case on an *ex parte* basis was "unique" in her experience. Vol. XIII at 44 (Testimony of Anne Goldbach).

ALLOWED

7. Judge Lopez never advised the District Attorney's Office or the ADA that she had *ex parte* communications with defense counsel following the September 6 sentencing. Vol. III at 48, 51 (Testimony of Judge Lopez). Indeed, the District Attorney was never made aware of such communications by any source.

ALLOWED

8. Since the September 6, 2000 hearing, the *Horton* matter has been before Judge Lopez on repeated occasions with respect to probation matters. The Judge continues to monitor Horton's probation today. Ex. 32 at 11, 101; Vol. II at 99–100 (Testimony of Judge Lopez).

ALLOWED

9. Judge Lopez called defense counsel *ex parte* following sentencing in order to solicit assistance in defending her image in the press, and by doing so, created at least the appearance of impropriety by asking defense counsel and CPCS to do indirectly (*i.e.,* defend the sentence in the press) what she had been told not to do directly.

ALLOWED

B. On or about September 7, 2000, Judge Lopez placed a telephone call to William Leahy, Chief Counsel at CPCS and expressed her anger at the press coverage of the *Horton* sentencing. The Judge encouraged Leahy and CPCS to come to her defense publicly.

10. Judge Lopez initiated an *ex parte* telephone call to William Leahy, Chief Counsel of CPCS, within a few days of the September 6 sentencing in the *Horton* case. Vol. II at 103–04 (Testimony of Judge Lopez); Ex. 32 at 103. Judge Lopez viewed CPCS as defense counsel's "law firm." She knew that Ms. Goldbach was also employed by CPCS. Vol. II at 102 (Testimony of Judge Lopez); Ex. 32 at 89.

ALLOWED

11. Judge Lopez expressly encouraged Leahy to defend her publicly. Vol. II at 102-04, Vol. III at 32-34 (Testimony of Judge Lopez); Ex. 32 at 106-07, 109.

ALLOWED

12. In talking with Leahy, Judge Lopez made it clear that she wanted the public to understand her position. She called on Leahy to advance her personal defense, because she was prohibited from doing so herself. Ex. 32 at 104-05, 109-10.

ALLOWED

13. Following Judge Lopez's *ex parte* conversation with Leahy, Leahy

complied with the Judge's instructions and gave television interviews and spoke with the written media in support of both the sentence in the *Horton* case and Judge Lopez personally. Vol. II at 104 (Testimony of Judge Lopez); Ex. 32 at 108; Vol. XIII at 46 (Testimony of Anne Goldbach); Exs. 11-14, 34 (news articles quoting Mr. Leahy).

ALLOWED

14. Judge Lopez never advised the District Attorney's Office that she had such *ex parte* conversations with anyone at CPCS following the sentencing on September 6. Vol. III at 48 (Testimony of Judge Lopez). Indeed, the District Attorney was never made aware of such *ex parte* contacts by any source.

ALLOWED

C. Following her first telephone call to Ms. Goldbach, Judge Lopez placed one or more additional telephone calls to her, again discussing the *Horton* sentencing and the press coverage.

15. *See* Section I (A), above.

ALLOWED

D. During one of the calls to Goldbach, Judge Lopez sought information regarding Boston Police detective Jay Greene, whom the Judge believed to be a material witness in the *Horton* case. The Judge contacted the detective and elicited information from Greene which she later characterized as supporting her sentencing decision.

16. The *Horton* police reports indicate that Boston Police officers Rose and Sweeney were the first to arrive at the scene of the crime and that Detective Greene did not arrive on scene until some later point. Detective Greene's involvement in the *Horton* case was, at most, to read the defendant his Miranda rights. Ex. 27 (Boston Police Incident Report); Vol. XIII at 17 (Testimony of Anne Goldbach); Vol. VI at 104 (Testimony of Leora Joseph).

ALLOWED

17. As reflected in the police reports, Detective Greene was not part of the investigation of the *Horton* matter – he was not first on the scene of the crime, he was not one of the officers responsible for interviewing witnesses, and he did not prepare the police reports nor conduct any follow-up in the *Horton* investigation. Exs. 27 (Boston Police Incident Report), 28 (Boston Police Sexual Assault Unit Reports); Vol. III at 41–42 (Testimony of Judge Lopez); Vol. VI at 106 (Testimony of Leora Joseph); Vol. XIII at 17 (Testimony of Anne Goldbach).

ALLOWED

18. Officers Rose and Sweeney, the first to arrive on the scene of the crime, observed that the "victim was crying" when they arrived. Ex. 27 (Boston Police Incident Report) at 2; Ex. 22 at 15.

ALLOWED

19. Judge Lopez read the police reports during the August 1, 2000 plea conference. Accordingly, Judge Lopez knew that Detective Greene was not first on scene and that he had no substantive involvement in the *Horton* investigation. Vol. I at 71, Vol. II at 51-52 (Testimony of Judge Lopez); Ex. 32 at 43. Nor did Greene testify before the Grand Jury. Vol. VI at 105-06 (Testimony of Leora Joseph). Greene later told the Judge "that he was not part of the investigation of the Horton matter." Ex. 32 at 49.

ALLOWED

20. At the September 6 sentencing hearing before Judge Lopez, Horton admitted to, among other things, the following facts: on Saturday, November 20, 1999, Horton, in his car, pulled up beside the victim, who was walking on the street; the boy did not know Horton; Horton lured the boy into Horton's car by lying to him and offering money to the boy to help Horton find a fictitious missing son; Horton drove the boy to a place the boy did not know; Horton asked the boy if he wanted to perform oral sex on Horton, using a common vulgarity to refer to female genitalia; the boy said no and told Horton that he wanted to go home; Horton did not let the boy leave the car; Horton

put a screwdriver to the boy's neck and told him to be quiet; Horton pulled the boy's head into Horton's lap; Horton told the boy to suck on Horton's finger and moved the boy's head up and down; the boy was crying and pleading to go home; Horton told the boy to "shut up"; Horton told the boy to suck on the screwdriver; a police cruiser then pulled up behind Horton's car; Horton pulled the boy's head up and told him to tell the police that he was helping Horton look for Horton's children; Horton lied to the Boston Police, telling officers Rose and Sweeney that the boy was helping him look for his missing son; Horton denied any wrongdoing after being read his Miranda rights; Horton then stated to the police that he had intended to perform oral sex on the boy. Ex. 22 at 12-18. Judge Lopez heard and accepted these admissions which were made in open court.

ALLOWED

21. Horton's admissions corroborated the observations in the police reports of Rose and Sweeney when they first arrived on the scene of the crime, including the fact that the "victim was crying" when the police arrived. Ex. 27 (Boston Police Incident Report).

ALLOWED

22. In the face of these admissions, Horton pleaded guilty to kidnapping, assault with intent to rape a child under 16, indecent assault on a child under 14, assault and battery, and assault and battery with a dangerous weapon. Ex. 2 (*Commonwealth v. Horton* Docket) at 1,

3; Ex. 22 at 4-5. Judge Lopez found a factual basis for the guilty pleas and accepted each plea as knowingly and voluntarily offered. Ex. 22 at 19. Accordingly, the Judge understood Horton to have admitted the facts as represented by the District Attorney.

ALLOWED

23. Notwithstanding her knowledge of Detective Greene's limited role in the *Horton* case, and notwithstanding Horton's admissions in her presence in open court, and the Judge's acceptance of his guilty pleas, Judge Lopez contacted Detective Greene for the purpose of soliciting his help in deflecting criticism of the Judge in the press. Vol. II at 104-05, Vol. III at 29-30, 61-62 (Testimony of Judge Lopez). The Judge admits that her decision to call a Boston Police detective to defend her was "unprecedented." Ex. 32 at 152.

ALLOWED

24. Judge Lopez used the information she claimed to have received from Greene — which she knew to be false based on the police reports, the defendant's own admissions, and his pleas of guilty — on "hundreds" of occasions to publicly justify her sentence, telling people that a local police officer agreed with her version of the facts of the case. Vol. III at 44-45 (Testimony of Judge Lopez); Ex. 32 at 53-55. Indeed, Judge Lopez forwarded Greene's telephone contact to Joan Kenney, the Court's Public Information Officer with the intent that Ms. Kenney would unknowingly use Greene's false information.

Vol. III at 61-62 (Testimony of Judge Lopez).

ALLOWED

25. Judge Lopez actively solicited information about the *Horton* case that she knew to be false and communicated it to the public and the media in an attempt to rescue her own public image at the expense of both the truth and the victim's reputation.

ALLOWED

E. Following September 6, 2000, Judge Lopez had one or more conversations with Greene, whom the Judge believed to be a material witness in the *Horton* case. Judge Lopez subsequently caused the Supreme Judicial Court's Office of Public Information to contact the detective for information to justify her sentencing decision.

26. Section I(D), above.

ALLOWED

27. Judge Lopez intentionally directed Joan Kenney, the Supreme Judicial Court's Public Information Officer, to contact Greene to obtain *false* information to use in deflecting criticism of the Judge in the press. Vol. II at 105, Vol. III at 61–62, Vol. V at 37–38 (Testimony of Judge Lopez); Vol. XI at 50 (Testimony of Joan Kenney). The Judge knew that Greene "was not part of the

investigation of the Horton matter." Ex. 32 at 49.

ALLOWED

28. Judge Lopez directed Ms. Kenney to speak with Greene, knowing that he was not first on the scene of the crime, and that he therefore could have no useful information to contribute. Vol. XI at 50 (Testimony of Joan Kenney); Vol. II at 105, Vol. III at 61-62; Vol. V at 37-38 (Testimony of Judge Lopez). Indeed, the Judge directed Ms. Kenney to speak with Greene knowing that Greene's information was false and conflicted with the very admissions that formed the basis of the guilty pleas that the Judge had accepted only a few days earlier. *See* Section I(D) above.

ALLOWED

29. The Judge knew that Ms. Kenney had no first-hand knowledge of the *Horton* case, and that the Judge was Ms. Kenney's source of information about the case. Vol. II at 55-57 (Testimony of Judge Lopez). Ms. Kenney, in fact, relied exclusively on Judge Lopez for information about the case. Vol. X at 157-58 (Testimony of Joan Kenney).

ALLOWED

30. Ms. Kenney found the information that she received from Detective Greene to be uncorroborated and unreliable. Accordingly, she did not

use it. Vol. XI at 53-55 (Testimony of Joan Kenney).

ALLOWED

31. Judge Lopez attempted, through the Court's public information officer, to communicate to the public information that she knew to be false, which was harmful to the victim's reputation, in order to defend her own public image.

ALLOWED

II. Judge Lopez Exhibited Bias In The Discharge Of Her Duties

A. Throughout the proceedings, Judge Lopez exhibited a bias against counsel for the Commonwealth based at least in part on her prior experiences with Assistant District Attorney Leora Joseph in the *Calixte* and *Estrada* cases.

32. Judge Lopez entered the *Horton* case with a pre-existing, negative view of ADA Joseph. Indeed, Judge Lopez justified her treatment and abuse of ADA Joseph in *Horton* based on her "history" with Joseph in two prior cases, *Commonwealth v. Calixte* and *Commonwealth v. Estrada*. Vol. I at 84–85, 100-02, Vol. II at 7–8 (Testimony of Judge Lopez); Ex. 32 at 66-67.

ALLOWED

33. Judge Lopez falsely and without foundation blamed ADA Joseph for

promoting media attention and personally criticizing the Judge in the press following *Calixte* and *Estrada*. Vol. I at 100-02, Vol. II at 13–14 (Testimony of Judge Lopez). Both *Calixte* and *Estrada*, however, were followed closely in the press prior to Judge Lopez's involvement in those cases. Vol. I at 97–100 (Testimony of Judge Lopez).

ALLOWED

34. Further, ADA Joseph spoke to the press on only one occasion concerning *Calixte* and *Estrada*, when she was directed by the District Attorney's press office to speak with Eileen McNamara, a columnist from the Boston Globe who had called the press office and expressed an interest in speaking with ADA Joseph. ADA Joseph agreed to speak with Ms. McNamara only at the direction of her superiors in accordance with the District Attorney's Office's press policy. She was accompanied throughout the interview by a representative of the District Attorney's press office. Vol. VI at 83-88 (Testimony of Leora Joseph).

ALLOWED

35. ADA Joseph's comments reported in the McNamara article never mention Judge Lopez by name, and do not personally attack her. At most, ADA Joseph's comments can be read as general thoughts on the goals of sentencing. Ex. 43 (McNamara article); Vol. VI at 85-88 (Testimony of Leora Joseph). Notably, this was the *only* instance in

which ADA Joseph ever spoke with the media concerning a case before Judge Lopez.

NEITHER ALLOWED NOR DENIED - SEE DECISION

36. The only other news article involving Judge Lopez and ADA Joseph contains information taken by the reporter from ADA Joseph's statements in open court. ADA Joseph did not know that the reporter in question was present in Court at the time or was transcribing her argument, and Joseph *never* submitted to an interview for the article. Vol. II at 20-21 (Testimony of Judge Lopez); *Compare* Ex. 64 (2/11/99 Boston Herald article re: *Estrada* sentencing hearing) *to* Ex. 65 (2/10/99 Transcript of *Estrada* sentencing hearing) at 12-13.

ALLOWED

37. Following the *Estrada* sentencing, Judge Lopez criticized ADA Joseph for using "hyperbole" when Joseph described the repeated oral rapes by the defendant of his 11-year-old stepdaughter as "vile." Ex. 65 (2/10/99 Transcript of *Estrada* sentencing hearing) at 13, 25-26.

ALLOWED

38. There is no basis for Judge Lopez's assertion that ADA Joseph called in the press in *Calixte* and *Estrada*, had a habit of criticizing the Judge, or was prone to use "hyperbole" in her recitation of facts.

ALLOWED

39. *See also* Sections II(B), (C), (F) and (I), below.

ALLOWED AS IN THESE SECTIONS

B. On August 4, 2000, during a lobby conference in *Horton*, Judge Lopez reprimanded Assistant District Attorney Leora Joseph by stating in substance, "You're very mean. . . . You're very young. . . . This is all your fault. . . . You belong in the suburbs."

40. On the morning of August 4, 2000, reporters were present in the courthouse, and there was a camera in the courtroom. There was nothing approximating a "media circus." Vol. I at 81 (Testimony of Judge Lopez); Vol. VI at 90-92 (Testimony of Leora Joseph). Indeed, Judge Lopez testified that she was "not at all" angry with the behavior of the press on August 4. Vol. I at 82-83 (Testimony of Judge Lopez).

ALLOWED

41. Ms. Goldbach approached ADA Joseph when she arrived at the courthouse and accused her of arranging for the press to cover the *Horton* hearing, which ADA Joseph denied. Vol. VI at 63 (Testimony of Leora Joseph); Vol. XII at 92 (Testimony of Anne Goldbach).

ALLOWED

42. Judge Lopez subsequently held a conference in her chambers, at which only Judge Lopez, ADA Joseph, and Ms. Goldbach were

present. The Judge described herself as "angry, upset." Ex. 32 at 76. The Judge began berating Joseph almost immediately after Joseph entered her chambers. Vol. I at 82, 84, Vol. III at 135 (Testimony of Judge Lopez); Vol. VI at 64-65 (Testimony of Leora Joseph); Vol. XII at 106-08 (Testimony of Anne Goldbach).

ALLOWED

43. Judge Lopez said to Ms. Joseph: "You belong in the suburbs." Vol. I at 85 (Testimony of Judge Lopez); Ex. 32 at 76; Vol. XII at 107-08 (Testimony of Anne Goldbach); Vol. VI at 65 (Testimony of Leora Joseph). Judge Lopez also told ADA Joseph that she was "very mean," that Joseph had no credibility with the Court, that she did not want Joseph to appear before her again, and that Joseph was "very young" and "didn't get it." Judge Lopez also accused ADA Joseph of "calling in the press." Vol. VI at 65-66 (Testimony of Leora Joseph); Vol. XII at 107-08, 110 (Testimony of Anne Goldbach). The Judge testified that Ms. Joseph denied calling the press but indicated she was not responsible for decisions of the District Attorney's press office. Ex. 32 at 75.

ALLOWED

44. Judge Lopez did not ask ADA Joseph nor Ms. Goldbach any further questions concerning the presence of the press and did not engage in any discussion as to how the parties might resolve any perceived problems concerning the media. The Judge merely accused ADA

Joseph of "calling in" the press. To the extent that she had an opportunity to respond, ADA Joseph denied that she "called in the press." Vol. VI at 65-66, Vol. VIII at 60-62 (Testimony of Leora Joseph); Vol. I at 88, Vol. III at 146 (Testimony of Judge Lopez).

ALLOWED

45. As ADA Joseph was leaving the lobby conference, Judge Lopez remarked to Ms. Goldbach that the case should be continued until ADA Joseph was on vacation. Vol. VI at 66 (Testimony of Leora Joseph).

ALLOWED

46. Judge Lopez's abusive comments unsettled ADA Joseph and effectively removed her as the lead prosecutor on the case. Vol. VI at 66-67, Vol. VIII at 120-21 (Testimony of Leora Joseph); Vol. IX at 37-39, Vol. X at 65 (Testimony of David Deakin).

ALLOWED

47. Judge Lopez's comments to ADA Joseph were unwarranted and unprofessional. They did not represent professional criticism of a lawyer appearing before the Court. Rather, they were intended to be demeaning and personally insulting to the prosecutor. The net effect of such treatment was the removal of ADA Joseph as the lead prosecutor. Vol. VIII at 120-121 (Testimony of Leora Joseph); Vol.

X at 65 (Testimony of David Deakin).

ALLOWED

C. Judge Lopez intended her comments to ADA Joseph on August 4 as a personal insult and as a characterization of "the woman who, you know, stays home, goes to the beauty parlor and does her nails."

48. By telling ADA Joseph that she belonged in the suburbs, Judge Lopez meant to criticize ADA Joseph by conveying to her that she did not know how to do her job, that she was not competent to handle cases that arise in an inner-city court, and that she was the kind of woman who "stays home, goes to the beauty parlor and does her nails." Vol. I at 85–87 (Testimony of Judge Lopez); Ex. 32 at 76.

ALLOWED

49. In fact, contrary to Judge Lopez's baseless assertion, ADA Joseph has had extensive experience with urban populations. She grew up in Montreal, Canada, and attended Barnard College in New York City and McGill University Law School in Montreal. While at Barnard, ADA Joseph worked with emotionally abused children as a teacher's aid. She also had an internship with the City of New York working with inner-city teenage mothers, and she wrote her undergraduate thesis on the topic of teenage inner-city mothers. Vol. VI at 6-8 (Testimony of Leora Joseph).

ALLOWED

50. At the time of the *Horton* sentencing, ADA Joseph had been working in the Suffolk County District Attorney's office for approximately 6 ½ years and had spent one year as supervisor of the assistant district attorneys at the Boston Municipal Court. She began working in the child abuse unit in 1997, where she had an annual case load of approximately 80 cases, of which approximately 15 were indicted as felonies each year. Vol. VI at 8-10 (Testimony of Leora Joseph).

ALLOWED

51. Although Judge Lopez admitted that her comment "you belong in the suburbs" was inappropriate, she justified it as part of her (Judge Lopez's) personality. Vol. I at 87–88 (Testimony of Judge Lopez); Ex. 32 at 77.

ALLOWED

52. Judge Lopez's comments to ADA Joseph were unwarranted and unprofessional. They did not represent professional criticism of a lawyer appearing before the Court. Rather, they were intended to be demeaning and personally insulting to the prosecutor, as, in fact, they were. *See supra* ¶¶ 48-51.

ALLOWED

D. During the August 4, 2000 hearing on the continuance of the plea, Judge Lopez falsely stated that she would not hear the *Horton* case because of her crowded calendar that day, when in truth the Court continued the hearing specifically to avoid media coverage.

53. On August 4, 2000, Judge Lopez falsely stated in open court that she would not hear the *Horton* case because she had too many other matters to address that day. Ex. 42 (8/4/00 Transcript of *Horton* continuance hearing) at 2. In fact, the Court's schedule was not the reason for her continuing the Horton case. Ex. 32 at 84; Vol. X at 147 (Testimony of Joan Kenney).

ALLOWED

54. After granting the continuance, Judge Lopez wrote findings of fact in response to the opposition filed by the Commonwealth and faxed the document as a "press release" to be issued by Ms. Kenney. The fax line indicates that it was sent to Ms. Kenney at 4:07 p.m. that afternoon. Ex. 49 (Fax from Judge Lopez to Joan Kenney); Vol. I at 120 (Testimony of Judge Lopez); Vol. X at 147-48 (Testimony of Joan Kenney).

ALLOWED

55. Judge Lopez's true reason for granting the continuance was the presence of the media. She hoped that, by continuing the case, she would avoid media attention. Ex. 32 at 84; Vol. X at 147 (Testimony of Joan Kenney); Vol. VI at 74 (Testimony of Leora Joseph); Vol. IX

at 52-53 (Testimony of David Deakin); Ex. 17 (Judge Lopez's August 4 Findings).

ALLOWED-EXCEPT THE COURT WOULD SAY THAT ONE OF JUDGE LOPEZ'S TRUE REASONS WAS THE PRESENCE OF THE MEDIA. THE MAIN REASON WAS THE DEFENSE COUNSEL'S RELUCTANCE TO GO FORWARD.

E. On August 4, 2000, Assistant District Attorney David Deakin objected to the continuance on behalf of the Commonwealth and noted to Judge Lopez her statutory obligation to enter written findings. Judge Lopez responded in what the Assistant District Attorney perceived to be a hostile tone: "You will get written findings."

56. When Judge Lopez announced that she was continuing the case, ADAs Deakin and Joseph opposed the continuance, having in mind that the child's grandmother had been waiting in court all day for the case to be resolved, and that a September hearing would prevent the victim from resolving his traumatic experience prior to the new school year. Vol. VI at 71 (Testimony of Leora Joseph); Ex. 17 (Commonwealth's Opposition to a Continuance); Vol. IX at 50-51 (Testimony of David Deakin).

ALLOWED

57. When ADA Deakin requested that Judge Lopez provide written findings on his opposition as required by statute, the Judge replied "You will get written findings" in a threatening, hostile tone. Vol.

VI at 70–71 (Testimony of Leora Joseph); Vol. IX at 56 (Testimony of David Deakin); Ex. 42 (8/4/00 Transcript of *Horton* continuance hearing) at 3.

ALLOWED

58. M.G.L. ch. 278, §16F requires that a judge make written findings *before* granting a continuance in a child sexual abuse case. Judge Lopez did not make written findings pursuant to the statute until after she had granted the continuance. Ex. P (M.G.L. ch. 278, §16F) ; Ex. 42 (8/4/00 Transcript of *Horton* continuance hearing) at 2-3; Vol. IX at 56 (Testimony of David Deakin). Her decision to continue the case was made earlier that day in the lobby, according to the Judge's testimony. Ex. 32 at 84.

ALLOWED

F. On August 4, 2000, Judge Lopez issued findings to support the continuance in which the Court falsely stated that:

(a) the Assistant District Attorney had a habit of calling in the press;

59. *See* Sections II (A) and (B), above.

ALLOWED AS IN THESE SECTIONS

60. Press relations and contacts by the Suffolk County Assistant District Attorneys are governed by a specific policy and guidelines. In August 2000, the District Attorney's Office had both a written and

unwritten press policy. The written policy required that all assistant district attorneys consult with the press office before speaking with the press. The Press Office was responsible for deciding whether, and to what extent, the ADAs could speak with the press. The unwritten press policy, and the custom within the Suffolk District Attorney's office, required the ADAs to inform the Press Office of cases likely to generate news coverage or that were otherwise newsworthy. Vol. IX at 17-18, 22-23 (Testimony of David Deakin); Ex. 25 (District Attorney's Written Press Policy).

ALLOWED

61. ADA Joseph complied with the District Attorney's office press policy by keeping the press office apprised of events in the *Horton* case. Vol. IX at 30-31 (Testimony of David Deakin). ADA Joseph never contacted the press concerning the *Horton* matter, nor did she have any conversation with the press concerning the case. Vol. VI at 57–60, 82-83 (Testimony of Leora Joseph). Notably, Ms. Joseph had no involvement in the drafting of, nor the decision to issue, the District Attorney's August 3 press release. Vol. VI at 62 (Testimony of Leora Joseph); Ex. 7 (District Attorney's August 3, 2000 press release). In any event, Judge Lopez testified that there was "nothing inappropriate . . . nothing unethical" about the issuance of the District Attorney's August 3 press release. Ex. 32 at 74.

ALLOWED

62. Judge Lopez made no inquiry before finding that ADA Joseph "called in the press" and had a "habit" of doing so. Vol. IX at 66 (Testimony of David Deakin). The only basis for this finding was ADA Joseph's denial of responsibility for the press release and the mere existence of the press release itself.[0.] Vol. I at 110 (Testimony of Judge Lopez). In fact, the release states that James Borghesani was the author; Mr. Borghesani was in charge of media relations for the District Attorney's Office. Ex. 7 (District Attorney's August 3, 2000 press release); Vol. IX at 23 (Testimony of David Deakin).[1]

ALLOWED

63. By her own admission, Judge Lopez did not contact District Attorney Ralph Martin, ADA Deakin, Mr. Borghesani, or First Assistant Elizabeth Keeley to determine how the press release came about, though she admits that she could have done so. Rather, the Judge simply inferred (wrongly) that ADA Joseph was untruthful and that she wrote or caused the issuance of the press release. Vol. I at 109-10, 119 (Testimony of Judge Lopez).

ALLOWED

64. Based solely on unfounded assumptions drawn from the Judge's prior experience with ADA Joseph in *Calixte* and *Estrada,* Judge Lopez falsely accused ADA Joseph of "calling in the press" in the *Horton* matter. Ex. 32 at 79; Vol. I at 88-89, 100-02, Vol. II at 7-8 (Testimony of Judge Lopez); Vol. VIII at 60-62 (Testimony of Leora

Joseph); Vol. XII at 110-11 (Testimony of Anne Goldbach). Indeed, ADA Joseph did not "call in the press" in *Horton,* and there is simply no basis for the finding that ADA Joseph had a "habit" of "calling in the press." Vol. VI at 82-83 (Testimony of Leora Joseph); Vol. IX at 57 (Testimony of David Deakin).

ALLOWED

65. Judge Lopez instructed court personnel to fax her findings as a "press release" to the Court's public information officer for distribution to the press that very afternoon. Ex. 49 (Fax from Judge Lopez to Joan Kenney); Vol. I at 120-23 (Testimony of Judge Lopez); Vol. X at 147-48 (Testimony of Joan Kenney).

ALLOWED

66. Judge Lopez's issuance of a written finding ascribing intentional and unethical conduct to ADA Joseph was unreasonable and not supported by the facts as the Judge knew them at the time. *See supra* ¶¶ 59-65.

ALLOWED

(b) the Assistant District Attorney attempted to embarrass and ridicule a defendant "suffering from a psychological disorder,"

67. The August 4 finding that ADA Joseph specifically intended to embarrass and ridicule Horton was false, and there is no basis for any such conclusion. ADA Joseph had no intention of embarrassing or ridiculing Mr. Horton, nor did ADA Joseph attempt to use press coverage to gain leverage in the sentencing proceeding. Vol. VI at 89 (Testimony of Leora Joseph); Vol. IX at 57-58, 62 (Testimony of David Deakin).

ALLOWED

68. Further, nothing before Judge Lopez on August 4 stated or established that Horton had a "psychological disorder." The social worker report (Ex. 3) includes no such diagnosis but says only that Horton is "transgendered." Ex. 3 (social worker report) at 1.

ALLOWED

69. Judge Lopez faxed these findings — which were described as a "press release" — to Joan Kenney, the Court's public information officer, for immediate distribution to the press. Ms. Kenney circulated them as instructed. Ex. 49 (Fax from Judge Lopez to Joan Kenney); Vol. I at 120-23 (Testimony of Judge Lopez); Vol. X at 147-49 (Testimony of Joan Kenney).

ALLOWED

70. In publishing her findings to the media, Judge Lopez increased media interest in the matter and focused attention on Horton's

"psychological disorder," stating that "'she' looks female in all respects." The Judge's findings (Ex. 17) were the first public statement that Horton had a "psychological disorder" or a "sexual identity disorder," neither of which diagnoses was adequately established by the social worker's report. Vol. I at 127 (Testimony of Judge Lopez); Ex. 17 (Judge Lopez's August 4 Findings); Ex. 3 (social worker report). The findings also announced to the press the Judge's highly personal and improper rebuke of the District Attorney's Office.

ALLOWED

71. Judge Lopez knew and intended that this finding would be interpreted as a statement that ADA Joseph was acting unethically and intentionally to harm the defendant. The Judge ignored the impact that this (false) finding would have on ADA Joseph or the defendant. Vol. I at 105-06, 111; Vol. III at 154 (Testimony of Judge Lopez).

ALLOWED

(c) the Commonwealth caused the continuance by seeking to turn the court proceedings into a "circus."

72. On the morning of August 4, 2000, there were reporters present in the courthouse, and a camera was set up in the courtroom. There was nothing approximating a "media circus." Vol. VI at 90-92 (Testimony of Leora Joseph).

ALLOWED

73. Nonetheless, Judge Lopez found, without taking any evidence, that the District Attorney's Office intentionally sought to disrupt the August 4 proceedings by turning them into what the Judge characterized as a "media circus." Vol. I at 117–18 (Testimony of Judge Lopez); Ex. 17 at ¶7 (Judge Lopez's August 4 Findings).

ALLOWED

74. There is no reasonable basis for the Court's finding that the District Attorney's Office had any malevolent intent or improper purpose in issuing its press release on August 3. Vol. I at 108-10, 117-18 (Testimony of Judge Lopez); Vol. VI at 90-92 (Testimony of Leora Joseph); Vol. IX at 62-64 (Testimony of David Deakin). In fact, this finding is expressly contradicted by the Judge's sworn testimony before Commission Counsel in which she openly admitted that there was "nothing inappropriate" and "nothing unethical" about the August 3 release. Ex. 32 at 74. Nor is there any basis for the Court's interpretation of the District Attorney's press release as an invitation "calling in the media" for purposes of encouraging a "media circus." Ex. 7 (District Attorney's August 3, 2000 press release).

ALLOWED

75. Judge Lopez knowingly brought this accusation to the media's attention by sending her findings as a "press release" to Joan Kenney for distribution. Ex. 49 (Fax from Judge Lopez to Joan Kenney); Vol.

I at 120-24 (Testimony of Judge Lopez); Vol. X at 147-149 (Testimony of Joan Kenney). In so doing, the Judge publicized her personal disagreement with the District Attorney and thereby escalated the press attention to the *Horton* case, a consequence she claimed to be trying to avoid by continuing the case. Vol. I at 125 (Testimony of Judge Lopez). Indeed, as a result, on August 5, 2000, the day following the Judge's release of her findings to the press, both of the major Boston newspapers ran stories identifying Judge Lopez's findings and her harsh criticism of the District Attorney. Vol. X at 151-52 (Testimony of Joan Kenney); Exs. 15, 19 (newspaper articles commenting on Judge Lopez's August 4 findings).

ALLOWED

76. Judge Lopez's findings did not serve the purposes of the statute by which they were required, and served no legitimate purpose in the *Horton* proceedings. They were intended to embarrass ADA Joseph and punish the District Attorney's Office. Ex. P (M.G.L. ch. 278, §16F); Ex. 17 (Judge Lopez's August 4 Findings)

ALLOWED

77. *See also* Section II(F)(a), (b), above.

ALLOWED

G. On or before September 6, 2000 and in anticipation of what she viewed as unwelcome press interest in the *Horton* case, Judge Lopez made special arrangements for the defendant (but not for the victim's family) to enter the courthouse and utilize a back elevator and a room, neither of which was available to the public or defense counsel in the ordinary course of business. The Judge made these arrangements to defeat what she viewed as inappropriate press attention. At no time was counsel for the Commonwealth advised of these arrangements.

78. In advance of the September 6, 2000 hearing, Judge Lopez arranged to have a court officer meet Horton and his counsel outside the courthouse on the day of the plea, escort them up a private elevator, and place them in a private room to await the hearing. Vol. II at 25-27 (Testimony of Judge Lopez); Vol. XIII at 39-40 (Testimony of Anne Goldbach).

ALLOWED

79. Judge Lopez claims to have initiated these arrangements in order to avoid press attention to Horton. Such arrangements were not requested by the defendant or his counsel. Vol. II at 25-27 (Testimony of Judge Lopez); Vol. XIII at 39-40 (Testimony of Anne Goldbach); Ex. 32 at 85-87.

ALLOWED

80. Neither Judge Lopez nor anyone else informed the District Attorney's Office of these arrangements. Vol. IX at 68-69 (Testimony of David

Deakin).

ALLOWED

81. These arrangements were plainly unwarranted since Horton ignored them and entered the courthouse through the front door and took the public elevator without ever being approached by the press. After Horton found his counsel in or near the courtroom, they took advantage of the Judge's offer and waited in a private room. Vol. II at 27 (Testimony of Judge Lopez); Vol. XIII, at 38-40 (Testimony of Anne Goldbach).

NEITHER ALLOWED NOR DENIED

82. Judge Lopez made these arrangements *sua sponte,* without informing the District Attorney. While a judge has broad discretion to make arrangements to ensure the safety of court personnel and the public, the Horton arrangements were clearly arranged to preclude the press from access to Horton. Such arrangements served to create an appearance of favoritism on the part of the Judge toward the defendant. *See supra* ¶¶ 78-81.

NEITHER ALLOWED NOR DENIED

H. On September 6, 2000 and for the purpose of insulating Horton from exposure to cameras the Court permitted in the courtroom, Judge Lopez ordered court personnel to shield the defendant from cameras and placed Horton in a designated location with his back to the press.

83. Prior to the hearing on September 6, 2000, Judge Lopez issued an Order prohibiting the press from photographing Mr. Horton. Ex. A (Order Limiting use of Cameras).

ALLOWED

84. Usually, criminal defendants are seated in the witness box, in public view, during a plea hearing. Vol. IX at 70-71 (Testimony of David Deakin).

ALLOWED

85. Judge Lopez directed that Horton be placed in a chair, shielded from public view by defense counsel and a court officer. Vol. II at 27-29 (Testimony of Judge Lopez); Vol. XIII at 40-41 (Testimony of Anne Goldbach); Ex. 41 (Videotape of 9/6/00 Sentencing Hearing); Ex. 32 at 87-88. The effect of these arrangements was to prevent the press and the public from viewing the defendant. While Judge Lopez had entered an order permitting the use of cameras during the proceeding, she deliberately frustrated that order by blocking any view of Horton. Indeed, the videotape of the proceedings reveals that Horton could not be seen. Ex. 41 (Videotape of 9/6/00 *Horton* sentencing hearing).

ALLOWED

86. Such arrangements were unusual and excessive, and served to create an appearance of favoritism on the part of the Judge toward the defendant. *See supra*, ¶¶ 83-85.

NEITHER ALLOWED NOR DENIED

I. On September 6, 2000, Judge Lopez conducted the change of plea and sentencing hearing in *Horton*. On separate occasions during that hearing, Judge Lopez failed to accord the Assistant District Attorneys a full right to be heard on behalf of the Commonwealth:

(a) During ADA Deakin's recitation of the facts, Judge Lopez interrupted and suggested that his description was sufficient. The Assistant District Attorney had to request permission to complete the Commonwealth's statement of the facts in support of the plea.

87. The purpose of an ADA's recitation of facts at a plea hearing is to set forth those facts that the Commonwealth expects to prove at trial, including facts sufficient to support the guilty plea and such facts as support the Commonwealth's sentencing recommendation. Vol. IX at 78-79 (Testimony of David Deakin). It is neither a legal requirement nor the practice in Superior Court to interfere with the District Attorney's discretion in determining the scope of his recitation of such facts in criminal cases.

ALLOWED

88. Before allowing ADA Deakin to recite the facts at the September 6, 2000 plea and sentencing hearing, Judge Lopez instructed that she wanted to hear *only* the facts pertaining to the indictments at issue — a statement perceived by Deakin to be bizarre, as it was inherent in the proceeding that he would only recite facts relevant to the charges

to which Horton was pleading guilty. Ex. 22 at 12; Ex. 41; Vol. IX at 72-73 (Testimony of David Deakin).

ALLOWED

89. During ADA Deakin's presentation of the factual basis, Judge Lopez interrupted ADA Deakin, stating that he had recited sufficient facts. Such an interruption is unusual. ADA Deakin explained that there were additional relevant facts and requested permission to continue before the Judge allowed him to complete his recitation. Ex. 22 at 15-16; Ex. 41; Vol. IX at 78 (Testimony of David Deakin).

ALLOWED

90. There was no justification for Judge Lopez's attempt to restrict ADA Deakin's recitation of the facts and to limit his right to be heard. This attempt created at least the appearance that Judge Lopez sought to avoid public disclosure of facts which she viewed as likely to cause public criticism of her or her sentence. *See supra*, ¶¶ 87-89.

ALLOWED

(b) **Judge Lopez asked ADA Deakin to rate the case on a scale of one to ten relative to other cases. The Assistant District Attorney responded, explaining that he rated the case a "ten" in terms of absence of any pre-existing relationship between Horton and the victim; he considered it "in the quite serious range" given the age of the child; and as "moderately serious" in terms of the completed assault, though he noted that it could have been more serious had the police not intervened. The following exchange then took place:**

> *THE COURT: Well, let me just say that I've been a Judge now since 1988, and I have n many of these cases. And in the scale of cases that charge sexual assault of children, this is on a very low level. Okay? And, so, I really think it's disingenuous for you to tell me that this is a ten. I'll hear from the defense attorney.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: Your Honor, if I may –*
>
> *THE COURT: No, you may not. You may sit down now.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: I –*
>
> *THE COURT: You may sit down now or I'll get a Court Officer to make you sit down. And I'll hear from the defense attorney.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: I*

object to being charged with being disingenuous.

THE COURT: I find it was disingenuous, and I know better than that.

During the course of this exchange, Judge Lopez raised her voice and shook her finger at Assistant District Attorney Deakin, who remained calm and professional in his manner.

91. Immediately following ADA Deakin's reading of victim impact statements prepared by the victim's mother and grandmother, Judge Lopez asked the Assistant District Attorney to rate the *Horton* case. The Judge's purpose in asking this question was to demonstrate that his sentencing recommendation was excessive since the Judge claimed to have made her sentencing decision on August 1. Ex. 22 at 29; Vol. IV at 112 (Testimony of Judge Lopez).

ALLOWED

92. Judge Lopez's demeanor in posing these questions was impatient and hostile. Ex. 41.

ALLOWED

93. ADA Deakin responded by explaining that there were several axes on which he evaluated the case, and he identified three separate ratings, providing a detailed explanation for each. Ex. 22 at 29-30; Vol. IX

at 99 (Testimony of David Deakin).

ALLOWED

94. Judge Lopez responded to ADA Deakin in a condescending and hostile manner, stating that the Horton crime was on a "very low level" and accusing ADA Deakin of being "disingenuous" to the Court. Ex. 22 at 31; Ex. 41.

ALLOWED

95. ADA Deakin had a responsibility as a lawyer for the Commonwealth to respond to Judge Lopez's characterization of his analysis as "disingenuous." He attempted to ask if he could be heard, but was cut-off by Judge Lopez, who yelled and pointed her finger at him, telling him to sit down. Indeed, the Judge threatened Deakin with bodily restraint, saying that if he did not sit down, a court officer would make him sit down. Vol. IX at 100 (Testimony of David Deakin); Ex. 22 at 31; Ex. 41.

ALLOWED

96. In response, ADA Deakin stated calmly and professionally that he objected to Judge Lopez's finding that he was disingenuous, to which Judge Lopez responded, still in an elevated and hostile tone, that she "kn[e]w better than that." Ex. 22 at 31; Ex. 41.

ALLOWED

97. The Judge's conduct and demeanor throughout this exchange was unjustified and unprofessional, and intended to demean and embarrass ADA Deakin in open court. *See supra*, ¶¶ 91-96.

ALLOWED

(c) When ADA Joseph (at the request of the victim's mother and grandmother) attempted to read the relevant victim impact statements into the record, Judge Lopez refused to allow her to participate in the hearing and directed ADA Deakin to read the impact statements. At all relevant times, Ms. Joseph was the Assistant District Attorney in charge of the *Horton* case.

98. ADAs Joseph and Deakin decided prior to the September 6 hearing that ADA Deakin would present the Commonwealth's recitation of the facts, but that ADA Joseph would read the victim impact statements because of her relationship with the victim and his family. Vol. VI at 99, Vol. VIII at 119-20 (Testimony of Leora Joseph).

ALLOWED

99. As ADA Joseph stood up to read the victim impact statements, Judge Lopez looked at ADA Deakin and instructed him to read the statements. Vol. VI at 99-100 (Testimony of Leora Joseph); Vol. IX at 94-95 (Testimony of David Deakin); Ex. 22 at 25-26; Ex. 41 (Videotape of 9/6/00 *Horton* sentencing hearing).

ALLOWED

100. There was no reasonable basis for Judge Lopez's refusal to allow ADA Joseph to participate in the *Horton* sentencing proceeding since she had been lead prosecutor in the *Horton* case from its inception. Such treatment of a litigant was undignified and unprofessional. *See supra*, ¶¶ 98-99.

DENIED

(d) When ADA Deakin sought to be heard for the purpose of properly reminding Judge Lopez to specify the conditions of probation, Judge Lopez interrupted the Assistant District Attorney and stated in a hostile manner, "I don't want to hear from you anymore. Do you understand?" and "No. You will not be heard. I said, I've heard enough."

101. Following Judge Lopez's imposition of sentence, ADA Deakin asked if he could be heard to correct the Judge's failure to specify the conditions of probation. See Ex. 22 at 32-33, Vol. IX at 111-12 (Testimony of David Deakin).

ALLOWED

102. Judge Lopez interrupted ADA Deakin, stating that she did not want to hear from him. When ADA Deakin replied by calmly asking to be heard, Judge Lopez yelled at him, saying that he would not be heard, and that she had heard enough from him. Ex. 22 at 32; Ex. 41.

ALLOWED

103. There was no reasonable basis for the Judge's refusal to allow ADA

Deakin to be heard, and her behavior toward ADA Deakin was undignified, unwarranted, and unprofessional.

ALLOWED

(e) **While ADA Deakin was stating the Commonwealth's recommendations for sentence, Judge Lopez asked sarcastically: "And would the Commonwealth request that this defendant be sent to a male prison or female prison?"**

104. Following ADA Deakin's detailed explanation of the Commonwealth's sentencing recommendation, Judge Lopez asked him, "And would the Commonwealth request that this defendant be sent to a male prison or a female prison?" Ex. 22 at 24; Ex. 41. Judge Lopez's tone was sarcastic and impatient. It was apparent that her question was not sincere, particularly since the Judge has stated that she made up her mind about sentencing Horton to probation on August 1 more than a month earlier. Vol. IV at 71-72 (Testimony of Judge Lopez); Response ¶¶14, 16; Ex. 41. In fact, other observers viewed her tone as sarcastic. Ex. 14 (9/12/00 article noting Judge Lopez's sarcastic tone).

ALLOWED

105. ADA Deakin explained — in a calm and sincere manner — that he had determined that arrangements could be made within the prison system to accommodate a defendant such as Mr. Horton. Judge Lopez, however, interrupted ADA Deakin and stated, "And protective

custody means they're locked up all day?" Ex. 22 at 24; Ex. 41.

ALLOWED

106. ADA Deakin responded that such was the case in a maximum security facility, and Judge Lopez again interrupted to emphasize her point by saying, "Right." But ADA Deakin went on to explain that a maximum security facility would not be the likely destination for Mr. Horton, who likely would be placed in a non-violent segment of the prison population. Ex. 22 at 24-25; Ex. 41.

ALLOWED

107. Judge Lopez's question concerning the male/female prison served no legitimate purpose in the *Horton* sentencing proceeding since she intended to sentence him to probation. Her remarks were sarcastic and intended to embarrass or antagonize ADA Deakin.

ALLOWED

J. After the sentencing on September 6, 2000, while the matter was pending before her, Judge Lopez placed *ex parte* telephone calls to defense counsel Anne Goldbach to express her concern for counsel's and the defendant's well-being. She encouraged defense counsel to defend her sentence of Horton publicly.

108. Sections I (A), (B) and (C), above.

ALLOWED

K. In a further effort to defend her sentence to Mr. Horton, Judge Lopez contacted Boston Police detective Jay Greene, whom the Judge understood to have been "first on scene," and therefore, a material witness. She also encouraged the Public Information Officer of the Supreme Judicial Court to contact the detective to obtain information which would justify her sentence in *Horton*.

109. Section I (E), above.

ALLOWED

L. During the August 1, 2000 conference, in *Commonwealth v. Horton*, Judge Lopez categorized transgendered persons, like the defendant, stating that she knows "these people," and justified a sentence of probation by stating: "They are not violent."

110. Following ADA Joseph's presentation of the Commonwealth's position during the August 1, 2000 plea conference, Judge Lopez asked ADA Joseph if she knew anything about transgendered people, to which ADA Joseph responded "not much." Vol. VI at 46, 55 (Testimony of Leora Joseph).

ALLOWED

111. Judge Lopez stated that she had personal experience with transgendered individuals because she has a house in Provincetown, and *that transgendered people are not violent.* Vol. VI at 46, 55 (Testimony of Leora Joseph); Vol. XIII at 22-23 (Testimony of Anne

Goldbach).

ALLOWED

112. Judge Lopez further claimed that Horton was "mentally ill" merely because he was transgendered, without any expert support for such a conclusion. Vol. V at 96-98, 100-101; Response ¶¶9, 12, 13, 15(F), 17.

ALLOWED

113. Judge Lopez's comments regarding transgendered people constituted inappropriate, gratuitous stereotyping that had, and has, no basis in fact, and created the appearance of bias.

ALLOWED

III. Judge Lopez Used The Court System in Disregard Of Her Obligation To Uphold The Impartiality And Integrity Of The Judiciary

A. On August 4, 2000, having continued the *Horton* case for change of plea and sentencing to avoid press attention, Judge Lopez asserted falsely that the continuance was a result of her crowded calendar. At the insistence of the Commonwealth, Judge Lopez entered "findings," which findings were false and constituted a pretext to conceal the Court's actions. These "findings" were entered as part of the official court record.

114. *See* Section II (D), above, regarding Judge Lopez's false statement on the record that she was continuing the *Horton* case because of her crowded calendar.

ALLOWED

115. ADAs Deakin and Joseph opposed the continuance and requested written findings regarding the impact on the child victim as required by M.G.L. ch. 278, §16F. Ex. P (M.G.L. ch. 278, §16F); Ex. 17 (Commonwealth's Motion in Opposition to Continuance); Ex. 42 at 2-3; Vol. IX at 48 (Testimony of David Deakin).

ALLOWED

116. Pursuant to the mandate of M.G.L. ch. 279, §4B, the District Attorney's Office had notified the victim and his family of the scheduled change in plea and sentencing so that they could exercise their right to present impact statements in court. Thus, in opposing the continuance, the ADAs had in mind the fact that the victim's grandmother had been in court all day, and that a September hearing date would prevent the victim from resolving this traumatic experience prior to the start of the new school year. Vol. VI at 70-71 (Testimony of Leora Joseph); Ex. 17 (Commonwealth's Motion in Opposition to Continuance).

ALLOWED

117. Contrary to the requirements of the statute, Judge Lopez did not make

written findings until *after* she had continued the case, and after the Commonwealth specifically requested that she do so. Vol. IX at 56 (Testimony of David Deakin); Ex. 17 (Judge Lopez's August 4 findings); Ex. 42 (Transcript of 8/4/00 *Horton* continuance hearing) at 2-3.

ALLOWED

118. Judge Lopez made only one finding concerning the impact on the victim: "There is little [or] no impact on the **alleged victim** as this is a plea." (emphasis added). The Court took no evidence before making this finding, and although she knew the victim's grandmother was present, Judge Lopez made no inquiry regarding the ability of the victim's grandmother to return on another day to present or observe her impact statement in Court. Vol. VI at 90 (Testimony of Leora Joseph); Vol. IX at 66 (Testimony of David Deakin); Ex. 17 (Judge Lopez's August 4 Findings).

ALLOWED

119. The remainder of Judge Lopez's findings, which were entered as part of the public Court record, had no relevance to the impact on the victim, but attacked ADA Joseph and the District Attorney's Office. Vol. VI at 82, 90 (Testimony of Leora Joseph); Vol. IX at 57-67 (Testimony of David Deakin); Ex. 17 (Judge Lopez's August 4 Findings).

ALLOWED

120. Judge Lopez sent her findings to the Court's Public Information Officer, describing them as a "press release" and instructing Ms. Kenney to distribute them to the media. Ex. 49 (Fax from Judge Lopez to Joan Kenney); Vol. X at 147-149 (Testimony of Joan Kenney); Vol. I at 120-23 (Testimony of Judge Lopez).

ALLOWED

121. These findings did not serve the purpose of the statute nor any legitimate purpose in the *Horton* proceedings.

ALLOWED

122. *See also* Section II (F), above.

AS ALLOWED IN THESE SECTIONS

B. In her "findings" in support of the continuance, Judge Lopez stated: (a) that ADA Joseph had a "habit" of calling in the press; (b) that she attempted to embarrass and ridicule a defendant; and (c) that the Commonwealth had caused the continuance by turning the proceeding into a "circus." There was no basis in fact for these pretextual findings, concerning which the Court took no evidence.

123. *See* Sections II (F) and III (A), above.

AS ALLOWED IN THESE SECTIONS

C. **Following the September 6, 2000 court proceedings, and in response to unfavorable reactions to her decision in the press, Judge Lopez contacted the Office of Public Information of the Supreme Judicial Court. Judge Lopez made material misrepresentations to the Public Information Officer, knowing that she would rely on such false information in communicating with the press and the public. Specifically, Judge Lopez falsely communicated to the Public Information Officer that: (a) the 11-year-old victim was not kidnapped; (b) the defendant did not use a screwdriver as a weapon in the commission of the offense; and (c) that her reference to the offense as "low level" was a reference to sentencing guidelines.**

124. Judge Lopez understood that, as the Court's Public Information Officer, Ms. Kenney acted as the judiciary's liaison with the public and the media. Vol. II at 39 (Testimony of Judge Lopez). She further understood that Ms. Kenney would rely on information provided to her in communicating with the public and the media. Vol. II at 56-57 (Testimony of Judge Lopez); Vol. X at 157-58 (Testimony of Joan Kenney).

ALLOWED

125. Judge Lopez knew that she was the exclusive source of information regarding the *Horton* sentence and she expected Ms. Kenney to accept her representations as true. The Judge knew that the "factual" representations contained in the press release would be attributed to her and based on the information that she provided to Ms. Kenney.

Vol. II at 55–57 (Testimony of Judge Lopez); Vol. X at 157-58 (Testimony of Joan Kenney).

ALLOWED

126. Knowing that Ms. Kenney was the Court's liaison with the public, and knowing that Ms. Kenney was preparing a statement on her behalf, Judge Lopez told Ms. Kenney that the victim was *not* kidnapped, and that the screwdriver was *not* used as a weapon — information that the Judge knew to be false and in direct conflict with Horton's admissions in open court and the guilty pleas that the Judge accepted on September 6. Vol. X at 155-56, 160-61; Vol. XI at 62-63 (Testimony of Joan Kenney).

ALLOWED

127. Judge Lopez specifically told Ms. Kenney that her statement in open court that the Horton case was "on a very low level" was a reference to the sentencing guidelines. Vol. X at 153-54, 159 (Testimony of Joan Kenney). This statement was false. Judge Lopez was *not* referring to the sentencing guidelines when she said in open court that the case was "on a very low level." Ex. 32 at 37-38, 40; Ex. 41 (Videotape of 9/6/00 *Horton* sentencing hearing); Vol. IX at 115 (Testimony of David Deakin). Judge Lopez respectfully testified to the Commission under oath that she never had the guidelines in mind. Ex. 32 at 37-38, 40.

ALLOWED

128. Indeed, under the sentencing guidelines, the crimes to which Horton pled guilty range up to level seven on a nine-level scale, falling within the same category as manslaughter and just below only first and second degree murder, forcible rape of a child, and other similarly egregious crimes. In fact, kidnapping and assault with intent to rape a child under 16 are among the most serious felonies. Vol. IX at 115 (Testimony of David Deakin); Vol. XI at 132-33 (Testimony of Chief Justice DelVecchio).

ALLOWED

129. Judge Lopez provided false information in an attempt to deflect criticism and to "spin" and "explain away" her conduct in the *Horton* case. In so doing, she misled the media and the public. Vol. II at 72–75 (Testimony of Judge Lopez); Ex. 32 at 32, 38, 40.

ALLOWED

130. *See also* Section III (D), below, regarding Judge Lopez's authorization of her press release.

ALLOWED

D. Judge Lopez caused the Public Information Office of the Supreme Judicial Court to issue a press statement on her behalf titled "In the Matter of Charles Horton in Response to Media Reports by Judge Maria Lopez" knowing that this release contained materially false statements including: (a) that Judge Lopez's sentencing reference to "low level" referred to proposed sentencing guidelines; and (b) that there were "certain facts" known to the Judge which, if known by the public, would support her sentencing decision.

131. Following the *Horton* sentencing on September 6, Judge Lopez contacted Joan Kenney to discuss issuing a public statement concerning the sentencing proceeding. Vol. II at 39, Vol. IV at 137 (Testimony of Judge Lopez). It was solely within Judge Lopez's discretion and control whether to issue such a statement. It was the Judge's sole responsibility to ensure that her statement was accurate and appropriate. Vol. II at 49 (Testimony of Judge Lopez); Vol. X at 165 (Testimony of Joan Kenney); Vol. XI at 134-35, 155-57 (Testimony of Chief Justice DelVecchio).

ALLOWED

132. Judge Lopez told Ms. Kenney that her comment that the case was "low level" was a reference to the sentencing guidelines. Vol. X at 153-54, 159 (Testimony of Joan Kenney). As discussed in Section III (C), above, this statement was false and intended only as "spin" on

the part of Judge Lopez to deflect criticism. Vol. II at 72-75 (Testimony of Judge Lopez); Ex. 32 at 37-40.

ALLOWED

133. Judge Lopez also told Joan Kenney that the victim was not kidnapped and that the screwdriver was not used as a weapon — information that the Judge knew to be false. *See* Section III (C), above. The Judge provided this false information to Ms. Kenney, even though the defendant had admitted to these same facts in open court, *and* the Judge accepted the defendant's guilty plea to the kidnapping charge. Ex. 22 at 12-19; Ex. 41 (Videotape of 9/6/00 *Horton* sentencing hearing).

ALLOWED

134. Ms. Kenney drafted Judge Lopez's statement based on the information that the Judge gave her. Vol. X at 157-58, Vol. XI at 78 (Testimony of Joan Kenney). Accordingly, the Judge's statement falsely stated that the Judge was referring to the sentencing guidelines in using the words "low level," and falsely indicated that there were "certain facts" that could not be disclosed. Ex. 4 (September 7 statement by Judge Lopez). Ms. Kenney believed such "certain facts" to refer to the Judge's (false) representation that the child was not kidnapped and that the screwdriver was not used as a weapon. The existence of the social worker assessment (Ex. 3) was not a basis for the reference to "certain facts," as Judge Lopez had never even

mentioned such a report to Ms. Kenney. Vol. X at 160-62 (Testimony of Joan Kenney).

ALLOWED

135. Judge Lopez specifically authorized the release of the public statement without identifying any errors or inaccuracies. Having been told by Judge Lopez to "send it out," Ms. Kenney faxed the statement to the print and broadcast media at Judge Lopez's direction. Vol. X at 165-66 (Testimony of Joan Kenney).

ALLOWED

136. At the time she directed Ms. Kenney to issue the statement to the press, Judge Lopez knew that the information that she had provided to Ms. Kenney was false. Ex. 32 at 37-40, 146. She likewise knew that there were *no* facts that fit the description of the press release — *i.e.,* there were *no* facts that could not be disclosed that would have changed the public perception of the *Horton* case. Ex. 32 at 139-40. Nonetheless, the Judge never disclosed to Ms. Kenney or to the Chief Justice that there were inaccuracies in her statement. Ex. 32 at 28; Vol. II at 62 (Testimony of Judge Lopez); Vol. X at 165-167 (Testimony of Joan Kenney).

ALLOWED

137. The personal statement, issued on September 7, was titled "In the Matter of Charles Horton in response to Media Reports, *by Judge*

Maria Lopez." Exs. 4 and 24 (emphasis added). Judge Lopez intended the document to be accepted as her personal statement, and in fact, the public viewed it as her statement. Vol. II at 95 (Testimony of Judge Lopez); Exs. 10, 12, 34-40, 58, 61, 62 (articles and complaints referring to Judge Lopez's statement).

ALLOWED

138. Judge Lopez approached the issuance of her statement as an opportunity to manipulate public opinion regarding her sentence and conduct in the *Horton* case. She viewed the effort as nothing more than an exercise in "spin." Vol. II at 72-75 (Testimony of Judge Lopez); Ex. 32 at 32, 38.

ALLOWED

139. During the course of the Hearing, the Judge offered numerous revisions to her statement that would be necessary to make it accurate. Indeed, she acknowledged that her statement as issued was *not* accurate, but claimed it was sufficient "for a press release." Vol. IV at 150-51 (Testimony of Judge Lopez). In fact, it was a personal statement from Judge Lopez and was not a press release from the court system. *See* Vol. IV at 147 (Testimony of Judge Lopez).

ALLOWED

140. Following the release on September 7 of Judge Lopez's statement (Exs. 4 and 24) alluding (falsely) to certain "facts" not known to the

public, a recurrent theme appeared in the media that there might be other information that would change the public's perception of the sentence. Such speculation focused on the character of the victim. Vol. II at 89–90 (Testimony of Judge Lopez); Exs. 12, 14, 35-40 (articles referring to the "certain facts").

ALLOWED

141. Judge Lopez intentionally caused Ms. Kenney to issue a public statement on the Judge's behalf that contained false information in order to deflect public criticism of her and her sentence. Vol. II at 72-75 (Testimony of Judge Lopez); Ex. 32 at 38-40.

ALLOWED

IV. Judge Lopez Made And Encouraged Misleading Public Comment On A Pending Matter

A. Following the September 6 sentencing, Judge Lopez engaged in *ex parte* contacts with defense counsel Anne Goldbach and the Chief Counsel William Leahy at CPCS and encouraged them to defend the *Horton* sentence in the press. Both defense counsel and Chief Counsel for CPCS spoke with the press after their *ex parte* conversations with the Judge.

142. Exs. 11-14, 20, 21, 34 (articles referring to statements by William Leahy and Anne Goldbach).

ALLOWED

143. *See* Sections I (A) and (C), above.

ALLOWED

B. Following the September 6 hearing, Judge Lopez talked with Boston Police detective Jay Greene about the *Horton* sentencing. Judge Lopez also provided the Public Information Office of the Supreme Judicial Court with the detective's phone number and encouraged that office to contact the detective and use his information to defend the Judge's sentencing decision.

144. *See* Sections I (D) and (E), above.

ALLOWED

C. On or about September 7, Judge Lopez made material misrepresentations to the Public Information Officer of the Supreme Judicial Court, knowing that she would issue a release containing false information to the press. Specifically, Judge Lopez falsely told the Public Information Officer that: (a) the 11-year-old victim was not kidnapped; (b) the defendant did not use a screwdriver as a weapon in the commission of the offense; and (c) that her reference to the offense as "low level" was a reference to sentencing guidelines. Judge Lopez approved the Public Information Office's issuance of the statement which she knew to be false in order to facilitate a defense of her sentencing decision and without regard for the integrity of the Court's communications to the public.

145. *See* Sections III (C) and (D), above.

ALLOWED

D. In response to a telephone call from a *Boston Herald* reporter, Judge Lopez stated that she was prohibited from discussing the case, and that "[T]here is more to the case than meets the eye." She then stated, "Call around and you'll get the real story. I'm sorry but I can't give it to you, though." This again implied the existence of "facts" which, if known publicly, purported to justify the *Horton* sentence. José Martínez, *Grandma Denies Kid Knew Molester*, BOSTON HERALD, September 10, 2000.

146. Ex. 30 (9/10/00 article containing quote from Judge Lopez).

NEITHER ALLOWED NOR DENIED - SEE DECISION

E. Following September 6, 2000, Judge Lopez discussed the *Horton* case with numerous individuals in order to defend her public image and her sentencing decision.

147. At the end of the September 6, 2000 sentencing hearing, Judge Lopez explicitly retained jurisdiction over the *Horton* case at the request of defense counsel. Ex. 22 at 34.

ALLOWED

148. Judge Lopez understood that, by retaining jurisdiction, she ensured that Horton would come before her again if there were any violation

of probation or other issue that could cause Horton to be re-sentenced. Ex. 22 at 34; Vol. II at 96-99 (Testimony of Judge Lopez). The Judge still considered the case to be "pending" for purposes of probation. In fact, since the September 6, 2000 hearing, the *Horton* matter has been before Judge Lopez with respect to probation matters on several occasions, and Judge Lopez continues to supervise Horton's probation even today. Vol. II at 99-100 (Testimony of Judge Lopez); Ex. 32 at 11, 14, 101; Vol. XIII at 49-50 (Testimony of Anne Goldbach). Correspondingly, defense counsel Anne Goldbach still represents Horton. Vol. XIII at 30 (Testimony of Anne Goldbach).

ALLOWED

149. Notwithstanding her having retained jurisdiction over the case, and despite advice from the Chief Justice not to discuss the case, Judge Lopez repeatedly discussed the *Horton* case, including the false information provided by Greene and the contents of the social worker's report, with third parties in the days following September 6. Vol. XIV at 54-56 (Testimony of Judge McEvoy); Vol. XI at 124 (Testimony of Chief Justice DelVecchio). Indeed, Judge Lopez had conversations with friends, colleagues, and the media concerning the Horton case as early as September 6 and 7. Vol. IV at 137 (Testimony of Judge Lopez); Ex. 32 at 55-56.

ALLOWED

150. Despite having accepted Horton's admissions to the facts as presented by the ADA *and* his guilty pleas, Judge Lopez has discussed publicly the "different versions" of the facts. Ex. 32 at 118-21. Judge Lopez shared the information that she was told by Detective Greene — information she knew to be false — on "hundreds" of occasions following the sentencing in order to defend herself and her sentence. Vol. III at 44-45 (Testimony of Judge Lopez); Ex. 32 at 53-55.

ALLOWED

151. Judge Lopez's purpose in publicly spreading false information was to deflect criticism and to promote her own public image: "I had hundreds of conversations, but my *whole goal* was to have me not portrayed as this crazy judge who puts predatory pedophiles on the street." Ex. 32 at 118-119 (emphasis added).

ALLOWED

V. Judge Lopez Failed To Be Patient, Courteous And Dignified, And Failed To Accord Every Person Or Litigant A Full Right To Be Heard According to Law

A. On August 4, 2000, during a lobby conference prior to the scheduled change of plea, Judge Lopez stated to Assistant District Attorney Leora Joseph, in substance: "You're very mean. . . . You're very young. . . . This is all your fault. . . . You belong in the suburbs."

152. *See* Section II (B), above.

ALLOWED

B. At the hearing on August 4, 2000, Assistant District Attorney David Deakin objected to the continuance of the *Horton* plea and sentencing on behalf of the Commonwealth. The Assistant District Attorney reminded Judge Lopez of her statutory obligation to issue written findings regarding the continuance. Judge Lopez responded to the Assistant District Attorney in a condescending and hostile tone, "You will get written findings."

153. *See* Section II (E), above.

ALLOWED

154. Ex. 42 at 3.

ALLOWED

C. In her findings in support of the continuance, Judge Lopez stated: (a) that the Assistant District Attorney had a "habit" of calling in the press; (b) that she attempted to embarrass and ridicule a defendant; and (c) that the Commonwealth had caused the continuance by turning the proceeding into a "circus." There was no basis in fact for these findings.

155. *See* Section II (F), above.

ALLOWED

D. On September 6, 2000, Judge Lopez conducted the change of plea and sentencing in *Horton*. On separate occasions during that hearing, Judge Lopez failed to accord the Assistant District Attorneys a full right to be heard and was abusive in her manner toward them:

(a) During ADA Deakin's recitation of the facts, Judge Lopez interrupted and suggested that his description was sufficient. The Assistant District Attorney had to request permission to complete the Commonwealth's statement of the facts in support of the plea.

156. Judge Lopez and her counsel have conceded that there is no defense to her demeanor on September 6, 2000. Ex. 44 at 3, 12-13.

ALLOWED

157. *See* Section II (I)(a), above.

ALLOWED

(b) Judge Lopez asked ADA Deakin to rate the case on a scale of one to ten relative to other cases. The Assistant District Attorney responded, explaining that he rated the case a "ten" in terms of absence of any pre-existing relationship between Horton and the victim; he considered it "in the quite serious range" given the age of the child; and as "moderately serious" in terms of the completed assault, though he noted that it could have been more serious had the police not intervened. The following exchange then took place:

> *THE COURT: Well, let me just say that I've been a Judge now since 1988, and I have n many of these cases. And in the scale of cases that charge sexual assault of children, this is on a very low level. Okay? And, so, I really think it's disingenuous for you to tell me that this is a ten. I'll hear from the defense attorney.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: Your Honor, if I may –*
>
> *THE COURT: No, you may not. You may sit down now.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: I –*
>
> *THE COURT: You may sit down now or I'll get a Court Officer to make you sit down. And I'll hear from the defense attorney.*
>
> *ASSISTANT DISTRICT ATTORNEY DEAKIN: I object to being charged with being disingenuous.*

THE COURT: I find it was disingenuous, and I know better than that.

During the course of this exchange, Judge Lopez raised her voice and shook her finger at ADA Deakin, who remained calm and professional in his manner.

158. Judge Lopez and her counsel have conceded that there is no defense to her demeanor on September 6, 2000. Ex. 44 at 3, 12-13.

ALLOWED

159. *See* Section II (I) (b), above.

ALLOWED

(c) When ADA Joseph (at the request of the victim's mother and grandmother) attempted to read the relevant victim impact statements into the record, Judge Lopez refused to allow her to participate in the hearing and directed ADA Deakin to read the impact statements. At all relevant times, Ms. Joseph was the Assistant District Attorney in charge of the *Horton* case.

160. Judge Lopez and her counsel have conceded that there is no defense to her demeanor on September 6, 2000. Ex. 44 at 3, 12-13.

ALLOWED

161. *See* Section II (I) (c), above.

DENIED

(d) When ADA Deakin sought to be heard for the purpose of properly reminding Judge Lopez to specify the conditions of probation, Judge Lopez interrupted the Assistant District Attorney and stated in a hostile manner, "I don't want to hear from you anymore. Do you understand?" and "No. You will not be heard. I said, I've heard enough."

162. Judge Lopez and her counsel have conceded that there is no defense to her demeanor on September 6, 2000. Ex. 44 at 3, 12-13.

ALLOWED

163. *See* Section II (I) (d), above.

ALLOWED

(e) While ADA Deakin was stating the Commonwealth's recommendations for sentence, Judge Lopez asked sarcastically: "And would the Commonwealth request that this defendant be sent to a male prison or female prison?"

164. Judge Lopez and her counsel have conceded that there is no defense to her demeanor on September 6, 2000. Ex. 44 at 3, 12-13.

ALLOWED

165. *See* Section II (I)(e), above.

ALLOWED

VI. In Light Of The Foregoing Allegations, And In Light Of Conduct Herein Specified, Judge Lopez Has Exhibited A Pattern Of Abuse Of Her Office, Bias, And Indiscretion

A. While the investigation of Judge Lopez undertaken by the Commission on Judicial Conduct was pending, Judge Lopez received a copy of a complaint to the Commission on Judicial Conduct (as to which the Judge had a right of notice) and placed an anonymous telephone call to the complainant on November 1, 2000, just after 11:00 pm. The complainant, an elderly woman, viewed the call as an attempted threat and act of intimidation by the Judge.

166. Sister Angela Beaucage was a Carmelite nun who retired in 1980. Since 1980, she has been affiliated with the Sisters of Christian Community and has lived in Billerica, MA, in a home owned by the Carmelite Sisters. At the time of Hearing, Sister Beaucage was 73 years old. Vol. XI at 12-13 (Testimony of Sister Beaucage).

ALLOWED

167. On October 17, 2000, Sister Beaucage wrote a complaint to the Commission on Judicial Conduct concerning Judge Lopez's actions in the *Horton* case. Judge Lopez received a copy of this complaint on November 1, 2000. Vol. XI at 14, 16 (Testimony of Sister Beaucage); Vol. III at 95 (Testimony of Judge Lopez); Ex. 31 (Complaint of Sister Beaucage dated October 17, 2000). Judge Lopez was represented at the time by able counsel. Vol. III at 70-71

(Testimony of Judge Lopez).

ALLOWED

168. On November 1, 2000, shortly after 11:00 p.m., Judge Lopez made an anonymous call to Sister Beaucage from her home telephone. At the time of the call, Sister Beaucage was asleep, having spent the day caring for a relative at a local hospital. Vol. III at 70 (Testimony of Judge Lopez); Vol. XI at 16-17 (Testimony of Sister Beaucage); Ex. 45 (photograph of Sister Beaucage's caller ID display).

ALLOWED

169. When Sister Beaucage answered the phone, Judge Lopez asked "Is this Angela Beaucage?" Ms. Beaucage answered "Yes." After a long pause, Judge Lopez responded by saying "I am pleased to meet you" and hung up the phone. Judge Lopez never identified herself. Vol. XI at 17, 23-25 (Testimony of Sister Beaucage); Vol. III at 73, 96-97 (Testimony of Judge Lopez); Ex. 31 (Complaint of Sister Beaucage dated January 19, 2001).

ALLOWED

170. Sister Beaucage had a caller-ID device that identified Judge Lopez as the caller. Vol. III at 96 (Testimony of Judge Lopez); Vol. XI at 18-20 (Testimony of Sister Beaucage); Ex. 45 (Photograph of Sister Beaucage's caller-ID display).

ALLOWED

171. Sister Beaucage was disturbed by the call from Judge Lopez. She was concerned that Judge Lopez might be threatening her by sending the message "I know where you live." Vol. XI at 20, 21, 26 (Testimony of Sister Beaucage); Ex. 31 (Complaint of Sister Beaucage dated January 19, 2001).

ALLOWED

172. Prior to November 1, Judge Lopez had established a method for verifying complaint letters through her court officer during business hours. Accordingly, she had resources to investigate this complaint without calling the complainant herself. The Judge knew she could utilize her counsel, a court officer (as she had done previously in response to critical letters), a telephone directory, or the Commission. Vol. III at 71–72, Vol. V at 124-25 (Testimony of Judge Lopez).

ALLOWED

173. Calling a complaining witness in this manner late at night during a pending investigation constituted a serious breach of judgment and of the Judge's ethical responsibilities. Vol. III at 70-71 (Testimony of Judge Lopez). The Judge had been under investigation for two months and knew that complainants were potential witnesses in such proceedings. (Commission Rule 11D and 11E). For a sitting judge (represented by counsel) to contact such a witness in the dead of night is plainly indefensible and comes perilously close to interfering in the investigation itself. At a minimum, this created an appearance of

impropriety and an appearance that Judge Lopez was above the law.

ALLOWED

B. Notwithstanding advice to the contrary from the Chief Justice of the Superior Court, and her having retained jurisdiction in the *Horton* case, Judge Lopez has had numerous conversations with third parties concerning the *Horton* case from September 6, 2000 to the present.

174. *See* Section IV (E), above.

ALLOWED

C. *See also generally* Commission on Judicial Conduct's Summary of Judge Lopez's Inconsistent, False, and Incredible Statements, filed herewith.

SEE DECISION

All in violation of Canons 1 (failure to uphold the integrity of the judiciary); 2 (failure to avoid impropriety and the appearance of impropriety); 2(A) (failure to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and 3 (failure to perform judicial duties impartially).

SUMMARY OF VIOLATIONS

Canon 1 (failure to uphold the integrity of the judiciary);

Canon 2 (failure to avoid impropriety and the appearance of impropriety);

Canon 2(A) (failure to respect and comply with the law);

Canon 2(A) (failure to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary);

Canon 2(B) (failure to prevent social or other relationships from influencing her conduct or judgment);

Canon 3 (failure to perform judicial duties impartially);

Canon 3(A)(1) (failure to be faithful to the law and maintain professional competence in it, and failure to be unswayed by partisan interests, public clamor, or fear of criticism);

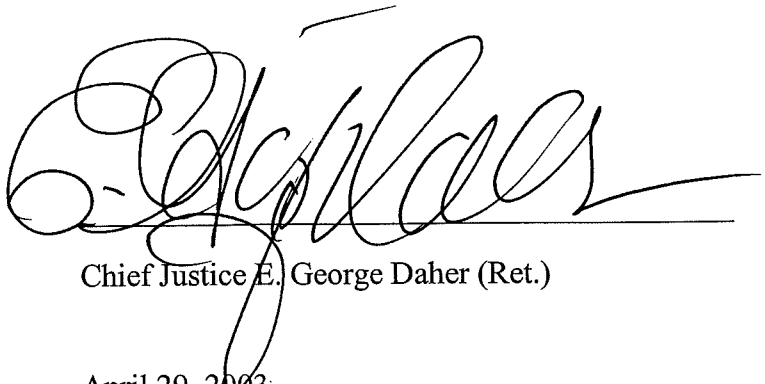
Canon 3(A)(3) (failure to be patient, dignified, and courteous to litigants and others);

Canon 3(A)(4) (failure to accord every person or litigant interested in a proceeding a full right to be heard);

Canon 3(A)(4) (failure to avoid ex parte contacts);

Canon 3(A)(6) (failure to abstain from public comment and/or failure to require court personnel subject to judge's direction to abstain from public comment as to a pending proceeding); and

Canon 3(B)(5) (failure to perform judicial duties, by words and conduct, without exhibiting bias or the perception of bias).



Chief Justice E. George Daher (Ret.)

April 29, 2003

BEFORE THE COMMISSION ON JUDICIAL CONDUCT

In re Judge Maria I. Lopez	)	Complaint Nos. 2000-110, et seq.

JUDGE MARIA I. LOPEZ'S
PROPOSED FINDINGS OF FACT

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JUDGE MARIA I. LOPEZ'S PROPOSED FINDINGS OF FACT PRESENTED BY HER COUNSEL ARE IN MANY OF THE FINDINGS A COMPLEX SERIES OF BOTH FACTS AND CONCLUSIONS, WHICH IF ANY PART OF ONE IS WRONG, COULD ALLOW THIS HEARING OFFICER TO DENY THE SPECIFIC FINDING. RATHER THAN DO THIS, I HAVE TRIED TO SEPARATE THE COMBINATIONS TO ALLOW CERTAIN PORTIONS AND DENY OTHER PORTIONS. WHERE ONE FACT APPEARS TO DISTORT THE ENTIRE PRESENTATION, I HAVE SIMPLY DENIED THE PROPOSED FINDING OF FACT. THE FACT THAT I ALLOW A FINDING WHICH MERELY REPORTS A WITNESS' TESTIMONY DOES NOT MEAN THAT THE TESTIMONY WAS ACCEPTED AS FACT.

Judge Lopez submits the following proposed findings of fact based on the record in these proceedings:

I. COMMONWEALTH V. CALIXTE AND COMMONWEALTH V. ESTRADA.

A. Less than a Year Before the *Horton* Matter, ADA Leora Joseph Appeared Before Judge Lopez in Two Cases Involving Child Victims and Mental Health Issues.

(1) Prior to the *Horton* case, ADA Leora Joseph appeared before Judge Lopez on behalf of the Commonwealth in two cases that involved child victims and mental health issues. There was no evidence presented that Leora Joseph appeared before Judge Lopez prior to these cases.

ALLOWED

1. *Commonwealth v. Calixte.*

(2) The defendant in *Commonwealth v. Marie Calixte* was charged with multiple counts of assault and battery on her children. Ex. 47. The defendant pleaded guilty to these charges, and was sentenced by Judge Lopez on February 5, 1999. Ex. 47. Like the *Horton* case, the *Calixte* case presented unrebutted evidence that the defendant suffered from a serious mental illness. Prior to the plea and sentencing, Judge Lopez was presented with medical and psychological evidence in the form of a letter from the

defendant's doctor, who indicated that the defendant suffered from undiagnosed schizophrenia at the time of the incident and that she was being treated for this condition. III:104-5. This information was discussed with Calixte's counsel and ADA Joseph prior to the sentencing in Calixte's case. III:105.

ALLOWED

(3) During the lobby conference held with Judge Lopez before Calixte's sentencing, ADA Joseph was given a full and fair opportunity to discuss the facts and the Commonwealth's sentencing recommendation (VII:10-11), and there was discussion at the conference about the defendant undergoing treatment. VII:16. Joseph recommended that Calixte be sentenced to a term of incarceration for five to seven years. VI:143.

ALLOWED

(4) Joseph was given a copy of the letter from the Calixte's doctor (VII:23-24; Ex. D), but she could not recall whether she did anything to investigate the facts and representations concerning Calixte's serious mental illness, and she does not believe she sought independent medical examination of Calixte. VII:17-18. Joseph acknowledged that a proper response to such a letter by a prosecutor would be to investigate the *bona fides* of the letter, and to verify the facts to make sure that the information being provided to the judge was accurate. VII:27, 29-30.

ALLOWED

2. Commonwealth v. Estrada.

(5) Within a week after the sentencing in the *Calixte* case, ADA Joseph appeared before Judge Lopez again in the matter of *Commonwealth v. Estrada*. VII:59; Ex. 48. The defendant in *Estrada* was charged with multiple counts of rape and indecent assault

and battery committed against his stepdaughter. Ex. 48. The *Estrada* case was sentenced using the same lobby conference process that had occurred in *Calixte*. VII:32. Once again, ADA Joseph advocated on behalf of the Commonwealth at the lobby conference held with Judge Lopez. VII:32. She was given a full and fair opportunity to present her position, and the defense was given the same opportunity. VII:32. During this process, the defense provided information to Judge Lopez that the defendant was receiving treatment in a sexual offender program. VII:32.

ALLOWED

(6) While Joseph claims to have investigated the treatment that Estrada was receiving, she could not recall what steps she took in this investigation. VII:36. She also recalled that it was also proffered to Judge Lopez that the defendant's wife and stepdaughter were not seeking a jail sentence, because if the defendant were incarcerated, they would lose their home. VII:36. Joseph, however, still requested a sentence of incarceration of eight to ten years in jail. VI:143.

ALLOWED

(7) As was later confirmed at Estrada's sentencing hearing, the child victim and her mother (the defendant's wife) urged Judge Lopez not to imprison Estrada but to impose a house arrest sentence, with requirements that he continue to pay for his family's housing and support, and stay away from the house and the family, because a prison sentence would result in destitution and homelessness for the victim, her mother, and the teenaged victim's infant son. Ex. 65 at 17-21. Judge Lopez decided to heed the victim's family's request, and declined to impose the Commonwealth's recommended prison sentence. Ex. 65 at 22.

ALLOWED

(8) When the court reached the factual-basis stage of the guilty plea hearing, Judge Lopez properly instructed the prosecutor to confine her recitation of the evidence to that which would be presented at trial, and informed Estrada that he would be asked whether the prosecutor's recital of evidence was true:

> THE COURT: Okay. I'm going to ask the assistant district attorney to summarize for me the evidence that she would have expected to introduce had this matter gone to trial. When she is through, I'm going to ask you whether you agree with what she has told me. So listen carefully to what she says.
>
> MS. JOSEPH: Thank you, your Honor. Your Honor, the disturbing facts of this case are as follows: The defendant was employed as a deputy sheriff at the Nashua Street Jail, and while employed in that capacity lived at home in Hyde Park with his wife and stepdaughter, the only father she ever knew.
>
> Between the dates of January of '94 and March of '95 the defendant would sit on the toilet in the family home naked. He would force his erect penis into his stepdaughter's mouth. She was eleven, turning on twelve, when this happened. It happened repeatedly.
>
> He would also try grabbing at her breasts, touching her upper thighs. And at the age of fourteen, when she became pregnant with her boyfriend's child, she told her counselor that she did this to stop his comments, comments that this defendant would make about her breasts, her body, asking to see them, asking to touch them.
>
> The defendant admitted this behavior to DSS, to his wife, to his pastor. The wife and the pastor have supported his criminal behavior, even at the expense of this girl's well-being. Her own mother refers to these vile rapes as an accident. The defendant has been in therapy, and his therapist identified all his --
>
> THE COURT: Well, *I will let her put the hyperbole on record.*
>
> MS. JOSEPH: The defendant['s therapist] has identified him as a reactive sex offender, though it is unclear what he was reacting to when he was repeatedly shoving his erect penis into her mouth when she was eleven years old.
>
> Those would be the facts that the Commonwealth would present at trial, your Honor.

Ex. 65 at 12-13 (bracketed material and emphasis supplied).

DENIED (SEE WORD "PROPERLY", SEE DECISION)

(9) After the guilty plea had been accepted and the sentence imposed, Judge Lopez cautioned Ms. Joseph:

> THE COURT: Ms. Joseph, let me just say something on the record. Next time – do you want to stand up. Stand up.[12]
>
> MS. JOSEPH: Yes, your Honor.
>
> THE COURT: Okay. Next time that you are going to recite facts to me on a plea, dispense with the hyperbole and the subjective characterizations.
>
> MS. JOSEPH: Yes, your Honor.

Ex. 65 at 25-26.

ALLOWED

(10) The audiotape of the *Estrada* sentencing hearing reflects that when Judge Lopez admonished ADA Joseph, Judge Lopez did not "scream" at Joseph, but used an entirely appropriate tone of voice that was no different from the tone of voice that Judge Lopez had used during other parts of the hearing. Ex.B-1; Ex.65. ADA Joseph agreed that Judge Lopez screamed at her in the *Horton* case much like she screamed at her in the *Estrada* case. VI.114.

ALLOWED EXCEPT THAT TESTIMONY OF ADA JOSEPH WAS THAT IT WAS LOUDER AND ANGRIER ON THE AUGUST 4th

B. ADA Leora Joseph Was Dissatisfied with the Sentences Imposed by Judge Lopez in *Calixte* and *Estrada*, and Still Stinging from Judge

[12] Indeed, the record reflects that Judge Lopez had to ask ADA Joseph on two occasions to stand up when speaking or being addressed by the Court.

Lopez's Admonishment During *Estrada*, She Retaliated By Attacking Judge Lopez When She Was Asked to Comment on the Cases by *Boston Globe* Columnist Eileen McNamara.

(11) As noted above, in the *Estrada* case, Joseph had recommended a sentence of incarceration of eight to ten years in jail, and in the *Calixte* case, she had recommended incarceration for five to seven years. VI:143. Judge Lopez, however, rejected Joseph's sentencing arguments and imposed sentences of probation in both cases. Joseph was "disappointed professionally" by these results (VII:38), and acknowledged that in both cases her advocacy had failed to achieve what she had hoped to achieve. VI:147.

ALLOWED

(12) After the plea hearings in *Calixte* and *Estrada*, ADA Joseph spoke with *Boston Globe* columnist Eileen McNamara about the sentences imposed by Judge Lopez in the two cases. Joseph believed that the sentences were lenient (VII:29), and at the time she spoke with McNamara, she was still upset at Judge Lopez's admonishment of her at the end of the *Estrada* sentencing hearing. VII: 41. Ms. Joseph is quoted as having said to McNamara and, most importantly, to the public:

> **If <u>you</u> say 'he's not a threat <u>because he just raped a girl in his own household</u>**, then can't you also look at the car thief and say "This guy's not a threat to me because he only steals cars in poor neighborhoods' or 'That guy is not a threat to me because he only breaks into houses in rich neighborhoods.' Is that how we want to meet out justice?
>
> ***
>
> Is jail the solution in every case? No. But even brief jail time sends a message to everyone, especially the victim, that **society does not condone the rape and beating of children – <u>even in your own house.</u>** If we don't send that message, how else do we break the cycle? All the studies show the abused often become abusers. They learn that violence is an acceptable way to deal with stress. How do we tell kids that adults in their lives can beat or rape them and then walk free?

Ex. 43 (emphasis supplied).

ALLOWED

(13) The statements quoted above were intended by Ms. Joseph, and were fairly and accurately read by Judge Lopez, as the prosecutor's publicized comment on sentences imposed by Judge Lopez in the *Calixte* and *Estrada* cases, both of which involved child abuse committed in the offender's household. Judge Lopez was the only judge mentioned in the McNamara article. Ex. 43. In the context of the full text of the article, and in light of what had been said—and not said—in open court during the *Estrada* and *Calixte* hearings before Judge Lopez (Ex. 65 and Ex. 66), Ms. Joseph's comments were fairly and accurately read by Judge Lopez to be a direct attack on her via a deliberately falsified version of Judge Lopez's reasons for imposing the two probationary sentences.

ALLOWED AS TO FIRST TWO SENTENCES, DENIED AS TO THIRD SENTENCE

II. COMMONWEALTH V. CHARLES HORTON.

A. Horton's Arrest and the Dorchester District Court Criminal Complaint.

(14) On November 20, 1999, Charles "Ebony" Horton was arrested at 50 Park Street in the Dorchester section of Boston. Ex. 27. A number of police officers and members of the Police Department's specialized sexual assault unit were present on the scene including significantly, Detective Greene. Ex. 27. Detective Greene was present with Officer Sweeney when the suspect gave a post-Miranda interview. Ex. 27. The sexual assault unit prepared a separate police report (Ex. 28), to supplement the standard

police report about the matter. Ex. 27.

ALLOWED

(15) On Monday, November 22, 1999, a complaint issued against Horton in the Dorchester District Court alleging rape and abuse of a child under 16, kidnapping, and assault and battery by means of a dangerous weapon. The Committee for Public Counsel Services was appointed to represent Horton.

ALLOWED

B. The Child Victim in *Commonwealth v. Horton* Gave a Videotaped Interview to the Boston Police in December 1999.

(16) In December 1999, the child victim in *Commonwealth v. Horton* gave a videotaped interview regarding the events of November 22. Leora Joseph was present at the interview and observed it from behind a one-way mirror. VII: 100. Among other things, the child told the interviewer:

(A) "[Horton] like grabbed [his] hand and started pulling [him] in the car," (VI:35), and that he "tried to scream" as the defendant did this. VI:35.[13] The child further stated that he tried to get out of the car at this point, but that Horton locked the windows. VI:35.

(B) The child also said that after Horton parked the car in the abandoned parking lot, Horton reclined the passenger seat, in which the child was seated, and then moved from the driver's side of the car to the passenger side, and placed his body on top of the child's body. VI:42. The child

[13] Tape of the child victim's testimony is Ex. 9. As no transcript was entered into evidence, citation is given to the hearing transcript, in which the videotape was transcribed as it was played.

said that while Horton was on top of him, Horton's hands were "on the other side of her," (VI:43), and that Horton's body was "still" when Horton was on top of him. VI:43. The child said that Horton got on top of him because "she didn't want me to scream or nothing like that." VI:43.

(C) Finally, the victim stated that while Horton was on top of him, Horton threatened to have her "husband" kill the victim: "She told me to be quiet before I get my husband to come out here and kill you." VI:42. Regarding the death threat, the victim also testified: "And then she was like, oh, you're going to be quiet or else I'll tell my husband to come out and kill you." VI.31.

ALLOWED

(17) None of this information was contained in the police reports, which are based on the account of the incident that the victim had provided immediately after Horton's arrest. Ex. 27, Ex. 28. As part of its sentencing advocacy, the District Attorney's Office never submitted the videotape to Judge Lopez to review, and Judge Lopez never saw the videotaped interview before Horton's sentencing. XI:28.

ALLOWED

C. The Commonwealth Did Not Request That the Dorchester District Court Order That Horton be Held Without Bail Based on Dangerousness to the Community, And Horton Was Released on Bail Approximately One Month After His Arrest.

(18) At Horton's arraignment in the Dorchester District Court, the District Attorney's Office did not petition the Court for an order that Horton be held without bail based on dangerousness to the community. The District Court, however, set bail in an

amount that Horton was unable to post. As a result, Horton was remanded to the custody of the Suffolk County Sheriff to await further proceedings and his trial. While in jail, Horton's counsel arranged for him to be evaluated by Joan Katz, a Licensed Independent Clinical Social Worker. Horton subsequently appealed to the Superior Court for a reduction of bail and again, the District Attorney's office did not seek to have Horton declared a danger to the community. On December 28, 1999, a Superior Court Justice (not Judge Lopez) reduced Horton's bail, which was then posted by Horton's family. On December 29, 1999, Horton was released under conditions monitored by the Probation Department, including a curfew.

ALLOWED - THE WORD INDEPENDENT REFERS TO TITLE

D. On January 12, 2000, Horton Was Indicted in the Superior Court, and Again the Commonwealth Did Not Move to Have Horton Held Without Bail Based on Dangerousness to the Community.

(19) Horton's case was presented to the grand jury, which returned a five count indictment on January 12, 2000, charging Horton with kidnapping, assault and intent to rape a child under 16, indecent assault and battery on a child under 14, assault and battery, and assault and battery with a dangerous weapon. Ex. 2. Horton was arraigned in the Suffolk Superior Court on January 26, 2000 and remained free on bail. Ex. 2. For the third time, the District Attorney's Office declined to pursue a dangerousness hearing. VII:11-12. Judge Lopez said that if the Commonwealth's believed Horton was a predatory pedophile, she would have expected them to have sought a dangerousness hearing. V:131.

ALLOWED

E. Joan Katz, a Licensed Independent Clinical Social Worker, Examined Horton and Determined that Horton Was Unlikely to Recidivate.

(20) In preparation for Horton's January 2000 arraignment, defense counsel Anne Goldbach retained social worker Joan Katz to evaluate Horton. XI:200. Katz, who was Social Services Director at the Committee on Public Counsel Services from 1987 until 2002, is certified as a Licensed Independent Clinical Social Worker (LICSW), the highest of the Commonwealth's four grades of social workers.[14] She had extensive experience, previously working at the Quincy District Court clinic, evaluating individuals for competency and responsibility, and had seen hundreds and hundreds of individuals as a member of the Quincy District Court clinic and as Director of Social Services at CPCS. XI:200-204. After the Commission raised an issue concerning Joan Katz's qualifications, Judge Lopez proffered Katz's *curriculum vitae* (Ex. V for identification). The Hearing Officer excluded Exhibit V erroneously, and should reconsider his ruling. Exhibit V provides an evidentiary basis for an important aspect of Judge Lopez's defense. Exclusion of Exhibit V would deprive Judge Lopez of her right to due process.

NEITHER DENIED NOR ALLOWED AS IT REFERS TO FACTS NOT IN EVIDENCE

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[14] Goldbach refers to Katz as a "Licensed Clinical Social Worker." XI: 201. As per Ex. V (identification only), the correct classification is in fact Licensed Independent Clinical Social Worker. Pursuant to the regulations promulgated by the Massachusetts Board of Registration of Social Workers, to be a LICSW, one must (a) have a "Master's or Doctorate degree in Social Work with a concentration in clinical social work from an educational institution accredited by the Council on Social Work Education," (b) achieve "a passing grade on a specialty examination in clinical social work developed and administered by the Board"; and, (c) complete "[t]hree years of full time (minimum 35 hours per week) supervised employment in clinical social work providing direct service, or of employment plus a post MSW clinical internship." 258 C.M.R. 12.01.

(21) Beginning in December, 1999, Katz met with Horton on a number of occasions for the purpose of evaluating him: Katz conducted two formal evaluations of Horton, one in December of 1999 (Ex. 68), and the second in July of 2000. Ex. 3. She also met with him informally on many occasions. XII:200-201. Katz had full access to the record of the case: Goldbach gave Katz the police reports in the case and, later, the grand jury minutes and essentially all of the discovery received from the Commonwealth. XI:206; XII:44. Katz also viewed a portion of the videotape of the child victim's interview, prior to her July 2000 evaluation of Horton. XII:50.

ALLOWED

(22) On the basis of her evaluations Katz produced a preliminary report in December 1999 (Ex. U), and a second report in July of 2000. Ex. 3. The reports included information and assessments concerning Horton's psychological condition, and his developmental, family, social, educational and vocational history. Ex. 3. The reports indicated that the risk Horton would repeat the offense behavior was low and the risk of serious harm to Horton if imprisoned was high. Ex. 3. There was no information in the reports indicating that Horton's mental illness would make him likely to repeat sexual abuse of anyone. Ex. 3. Significantly in her reports, Katz described that Horton's chronic depression led Horton to suicidal ideation when under severe pressure. In the report she concluded that there was a "marked difference" in Horton's outlook, including "accepting responsibility" for his past actions. Ex. 3. Katz noted that jail had been a chilling experience for Horton, and concluded that it was "highly unlikely that Ebony will repeat the behavior that brought her to court in this case." Ex. 3.

ALLOWED

(23) At Horton's January 26, 2000 Superior Court arraignment, Goldbach offered ADA Leora Joseph a copy of the preliminary Katz psycho social report. XI:209. Joseph flipped through the report quickly, refused to accept it, and handed it back to Goldbach. XI:209.

ALLOWED

III. THE AUGUST 1, 2000 LOBBY CONFERENCE.

A. ADA Joseph Agrees that Judge Lopez Gave Her a Full and Fair Opportunity to Be Heard at the Lobby Conference.

(24) A lobby conference in *Commonwealth v. Horton* was held on August 1, 2000. Ex. 2. On that date, Judge Lopez conferred at the sidebar with the prosecutor, Assistant District Attorney Leora Joseph, and Horton's appointed counsel, Anne C. Goldbach. As is commonly and customarily the case, what was said during the plea conference was not recorded by electronic or any other means. Neither party requested that the conference be recorded. Prior to the lobby conference, Joseph and Deakin held an internal meeting and settled on a sentencing recommendation of eight to ten years imprisonment. VIII:158-9.

ALLOWED

(25) ADA Joseph testified that during the lobby conference Judge Lopez gave her a full and fair opportunity to be heard and to present the Commonwealth's position. VII: 83-84. Joseph stated that she was never interrupted by the judge, never prohibited from saying anything she wanted to say, and never prevented from arguing anything she wanted to argue. VII:83-84; III:129. ADA Joseph never objected in any way to the

conduct of the proceeding, never complained that she had insufficient time to speak, and never objected to any of the information provided to the court, or to anything else about the process. III:129. Joseph acknowledged that it was a "normal everyday plea conference." VIII.12.

ALLOWED

B. During the August 1 Conference with Judge Lopez, the Prosecution and Defense Made Conflicting Representations About Disputed Facts.

(26) During the conference, both Joseph and Goldbach made representations to Judge Lopez concerning what they believed the evidence would show concerning the offenses. III:121. Judge Lopez reviewed the documents in the case, including copies of the police reports, the psycho social report, and the defendant's criminal record. II:5.

ALLOWED

(27) As is often true, each side's representations concerning what the evidence would show conflicted to some degree with each other (III: 121): Joseph provided Judge Lopez with a recitation of the facts in the case as the Commonwealth saw them (VI:46), including the defendant's partial confession, the arrival of the police at the scene, and the recovery of the screwdriver from Horton's car. VI:54-5. Joseph indicated that Horton lured the victim into the car, but that he entered willingly. XII:29. Joseph also communicated to Judge Lopez the Commonwealth's sentencing recommendation of eight to ten years incarceration. VII:83.

ALLOWED

(28) Anne Goldbach informed Judge Lopez that the kidnapping was not a total

stranger situation, that Horton knew the child victim's older brother, and that Horton and the child victim had seen each other around the neighborhood prior to the incident. XII:32. Goldbach also told Judge Lopez that she had spoken with Boston Police Detective Jay Greene, who was not a "softy" on defendants, who said that he had observed the boy on the scene and that the boy was "cool as a cucumber." XII:32. Goldbach told Judge Lopez that Greene had told her that the boy was not crying, that it was his belief that the boy had been involved in this sort of pickup situation before, and that he knew what he was getting into when he entered Horton's car. XII:32-33. Goldbach also discussed Horton's background, noting that since his arrest, Horton had received his Graduate Equivalency Diploma (GED), and described some of the activities in which Horton had been engaged since his arrest. V:34. Goldbach also mentioned that an amylase test for the boy's saliva had been conducted on the screwdriver in connection with the investigation, but that the prosecution had not disclosed to the defense the results of those tests. III:125-6.

ALLOWED

(29) Goldbach also told Judge Lopez that Horton was transgendered and was dealing with related issues. VI:46. ADA Joseph claims that at this point Lopez said that transgendered people are nonviolent. VI:46. Goldbach did not confirm that the latter statement was made. XIII:22-3. In view of Joseph's animus against Judge Lopez and her demonstrated willingness to falsify testimony against the Judge, it is far from clear that the Judge in fact made this remark.

DENIED AS GOLDBACH'S MEMORY WAS HIGHLY SELECTIVE. SHE DOES NOT REMEMBER TELLING JUDGE LOPEZ THAT FORCE WAS

EVIDENT, YET JUDGE LOPEZ REMEMBERS THAT DETAIL.

(30) Next, Goldbach provided Judge Lopez with Joan Katz's psycho social report. VI:47, Ex. 3. At this time, Judge Lopez read portions of the report aloud. VI:48. Goldbach represented that Horton might not survive in prison due to the conditions described in the report: his suicidal ideation, depression, and transgendered status. XII:63. Goldbach told Judge Lopez that prior to making bail, Horton had "to remain on the medical floor at the Nashua Street Jail, that she was locked up for 23 out of 24 hours a day, that she had been taunted by other inmates and possibly by some corrections officers, and that had been a very scary experience for her." XII:56; IV:105; V:156. Judge Lopez asked Joseph where Horton would be incarcerated if she were incarcerated and Joseph responded that it was not her responsibility. XII:63-64. Goldbach requested that Judge Lopez impose a probationary sentence with heavy supervision. XII:35. In considering the disparate sentencing recommendations, Judge Lopez considered the various facts which both sides had presented, and indicated that because there were many disputed facts, it appeared to her that there was a third story besides the two stories represented to her. III:122.

ALLOWED EXCEPT FOR LAST SENTENCE. DENIED AS TO LAST SENTENCE BECAUSE ALTHOUGH JUDGE LOPEZ WAS ASKED A LEADING QUESTION IN GENERAL, JUDGE LOPEZ DID NOT FIND IN THE CASE A THIRD STORY BUT ACCEPTED THE DEFENDANT'S VERSION.

C. Judge Lopez's Decision At the August 1 Lobby Conference to Sentence Horton to Probation Was Based on the Merits of the Case.

(31) After carefully considering and weighing—in light of her twelve years of

experience as a judge—all of the information and advocacy presented, Judge Lopez informed both parties that, if Horton were to plead guilty as charged, the Court would impose a probationary sentence, including participation in the community corrections program XII:81.

NEITHER ALLOWED NOR DENIED

(32) Judge Lopez testified that in reaching this decision, she was not affected by bias, nor by any extra-judicial factor or information that was not before her. IV:135. Instead, Judge Lopez relied upon wholly appropriate and lawful considerations based exclusively on the information presented by the parties in court, including but not limited to the nature and circumstances of the kidnapping, assault and sex act involved, the level of any violence, and the age of and harm done to the victim. Judge Lopez arrived at Horton's sentence based on the merits of the case, and "considered only the information that was before [her] concerning the crime and the particular characteristics of the defendant." IV:135.

DENIED

(33) Based on the information presented in court, Judge Lopez determined that the offenses did not constitute acts evidencing that Horton was a pedophile, much less a dangerous pedophile, nor a person who would likely repeat the offenses. IV:131-133. This conclusion was supported by the licensed independent social worker's assessment that Horton was unlikely to recidivate (Ex. 3). Another factor Judge Lopez relied upon in determining the sentence was the unrebutted evidence that Horton suffered from a gender-identity disorder, a scientifically-recognized psychological disorder which is different from, and not associated with, pedophilia nor with sexual abuse of anyone,

including pre- or post-pubescent adolescents. (Ex. 3).

ALLOWED

(34) Upon hearing Judge Lopez's decision, defense counsel Goldbach stated that she would consult with Horton as to whether to plead guilty as charged and agree to accept the probationary sentence set out in the court's decision. III: 131-132, XII:83. The parties scheduled a hearing for August 4, 2000, in the Suffolk County Superior Court, by which time Horton would decide whether to proffer his guilty pleas and be sentenced as stated by the court. III: 131.

ALLOWED

D. ADA Joseph Failed to Present Effective Advocacy at the August 1 Lobby Conference.

(35) ADA Joseph failed in her presentation at the lobby conference to effectively advocate the Commonwealth's position. Joseph failed to challenge the psychosocial report presented by Attorney Goldbach, despite her knowledge that in *Calixte* and *Estrada*, Judge Lopez had given significant weight to mental health issues in arriving at her sentencing decisions. Joseph also failed to mention or convey to the Judge certain highly inculpatory facts about the incident: the victim's statements that Horton forcibly pulled him into the car, threatened to have her husband kill him, and climbed on top of him.

DENIED AS TO ESTRADA IN THAT EX. 65 P. 12 AND 13 SHOWS JUDGE LOPEZ INTERRUPTED THE ADA WHEN SHE TRIED TO PRESENT THE THERAPIST'S IDENTIFICATION OF MR. ESTRADA'S BEHAVIOR. SEE

TRANSCRIPT BELOW:

THE COURT: "OKAY. I'M GOING TO ASK THE ASSISTANT DISTRICT ATTORNEY TO SUMMARIZE FOR ME THE EVIDENCE THAT SHE WOULD HAVE EXPECTED TO INTRODUCE HAD THIS MATTER GONE TO TRIAL.

WHEN SHE IS THROUGH, I'M GOING TO ASK YOU WHETHER YOU AGREE WITH WHAT SHE HAS TOLD ME. SO LISTEN CAREFULLY TO WHAT SHE SAYS.

MS. JOSEPH: THANK YOU YOUR HONOR. YOUR HONOR, THE DISTURBING FACTS IN THIS CASE ARE AS FOLLOWS:

THE DEFENDANT WAS EMPLOYED A S DEPUTY SHERIFF AT THE NASHUA STREET JAIL, AND WHILE EMPLOYED IN THAT CAPACITY HE LIVED AT HOME IN HYDE PARK WITH HIS WIFE AND STEPDAUGHTER, THE ONLY FATHER SHE EVER KNEW.

BETWEEN THE DATES OF JANUARY OF '94 AND MARCH OF '95 THE DEFENDANT WOULD SIT ON THE TOILET IN THE FAMILY HOME NAKED. HE WOULD FORCE HIS ERECT PENIS INTO HIS STEPDAUGHTER'S MOUTH. SHE WAS ELEVEN, TURNING ON TWELVE WHEN THIS HAPPENED. IT HAPPENED REPEATEDLY.

HE WOULD ALSO TRY GRABBING AT HER BREASTS, TOUCHING HER UPPER THIGHS. AND AT THE AGE OF FOURTEEN, WHEN SHE BECAME PREGNANT WITH HER BOYFRIEND'S CHILD, SHE TOLD HER COUNSELOR THAT SHE DID THIS TO STOP HIS COMMENTS, COMMENTS THAT THIS DEFENDANT WOULD MAKE ABOUT HER BREASTS, HER BODY, ASKING TO SEE THEM, ASKING TO TOUCH THEM.

THE DEFENDANT ADMITTED THIS BEHAVIOR TO DSS, TO HIS WIFE, TO

HIS PASTOR. THE WIFE AND THE PASTOR HAVE SUPPORTED HIS CRIMINAL BEHAVIOR, EVEN AT THE EXPENSE OF THIS GIRL'S WELL-BEING. HER OWN MOTHER REFERS TO THESE VILE RAPES AS AN ACCIDENT.

THE DEFENDANT HAS BEEN IN THERAPY, AND HIS THERAPIST IDENTIFIED ALL HIS - -

THE COURT: WELL, I WILL LET HER PUT THE HYPERBOLE ON THE RECORD.

MS. JOSEPH: THE DEFENDANT [SIC] HAS IDENTIFIED HIM AS A REACTIVE SEX OFFENDER, THOUGH IT IS UNCLEAR WHAT HE WAS REACTING TO WHEN HE WAS REPEATEDLY SHOVING HIS ERECT PENIS INTO HER MOUTH WHEN SHE WAS ELEVEN YEARS OLD.

THOSE WOULD BE THE FACTS THAT THE COMMONWEALTH WOULD PRESENT AT TRIAL, YOUR HONOR.

ALTHOUGH JUDGE LOPEZ INTRODUCED A LETTER INTO EVIDENCE IN RE: CALIXTE NO SUCH EVIDENCE WAS PROFFERED IN THE ESTRADA CASE. SEE DEFENDANT'S EXHIBIT D.

1. **ADA Joseph Failed to Challenge the Katz Report at the August 1, 2000 Lobby Conference.**

   a. **ADA Joseph Refused to Accept a Copy of the Katz Report From Attorney Goldbach Prior to the August 1 Lobby Conference.**

(36) Goldbach testified that she again offered a copy of the Katz psycho social

report to ADA Joseph in the courtroom prior to August 1 lobby conference (XI:22), but that Joseph once again refused to accept it, as she had similarly refused at the Superior Court arraignment. (XI:209) Goldbach stated that when she gave Joseph a copy of the report on August 1, Joseph "glanced at" it and returned it "seconds" later. XI:227-228.

ALLOWED

b. ADA Joseph Did Not Challenge, Nor Did She Respond to the Katz Report at the August 1 Lobby Conference.

(37) ADA Joseph did not express surprise when Anne Goldbach presented the psychosocial report during the Lobby conference. III:107. Despite her dismissive attitudes towards the report when it was previously presented to her, Joseph did not challenge the report when it was offered to Judge Lopez. III:109. She did not object to the defense's submission of the report to Judge Lopez for the court's consideration in determining what sentence would be imposed in the event of a guilty plea. III:108-110.

ALLOWED

c. ADA Joseph Did Not Undertake an Investigation of Horton's Medical or Psychological History.

(38) ADA Joseph also failed to request that the District Attorney's office be allowed to engage a qualified professional to interview Horton and investigate Horton's condition and report the results of a prosecution-obtained evaluation to the Court. III:108-110. Goldbach testified while she would not have allowed Horton to discuss the incident, she would have made Horton available to discuss the more general issues relating to his psychological condition. XIII:24-27. No evidence was presented that ADA Joseph challenged Katz's credentials or objectivity. Joseph also did not request an opportunity to conduct an investigation of the representations in the report that Horton

suffered from psychological illness (Tr.111:109), for example by requesting copies of documents describing Horton's medical and psychological history.

ALLOWED

2. During the August 1 Lobby Conference, ADA Joseph Never Mentioned Three of the Child Victim's Most Serious Accusations.

(39) At the lobby conference Joseph failed to mention a number of highly inculpatory facts about the incident. As noted, in a videotaped interview that Joseph had observed, the child victim stated (1) that Horton had threatened to have her "husband" kill him (VI:31, 42), (2) that Horton pulled him into the car by force (VI:35), and (3) that once the car was parked, Horton reclined the victim's seat, moved to the victim's side of the car, and climbed on top of the victim (VI:42-44). Joseph said that she does not remember saying anything to Judge Lopez about the victim's claim that Horton threatened to have the victim killed, and does not think that she did. VII:84-85. She could not recall and was unwilling to state that she had told Judge Lopez that Horton had pulled the victim into the car forcibly or that the Horton lay down on top of the victim. VII.77, 85-86.

ALLOWED

E. ADA Joseph, Dissatisfied with Judge Lopez's Decision to Sentence Horton to Probation, Made a Thinly Veiled Threat that Her Office Would Cause Unfavorable Press Coverage of Judge Lopez's Decision, and, After the Hearing, Joseph Immediately Took Steps to Turn This Threat into Action.

(40) At the conclusion of the August 1 lobby conference, in which Judge Lopez announced to Joseph and Goldbach that she was going to sentence Horton to probation, Joseph expressed her dissatisfaction with Judge Lopez's sentencing decision by telling

the Judge that the Commonwealth was seriously objecting to the sentence, and in the same breath, telling her that there had there had been some press attention to or press coverage of the case. VIII:14-15. As she recalls, she said:

> "Your Honor, the Commonwealth is seriously objecting to that sentence. This is something that—this is a case that we've been taking very seriously. I believe there's been some attention or coverage in the case, and we will object, to make—to make it perfectly clear, we will object to this probationary sentence."

VIII:15.

ALLOWED

(41) Joseph's reference to press coverage served no legitimate purpose and was nothing more than a thinly veiled threat that she or her office would cause unfavorable press coverage of Judge Lopez's rejection of the Commonwealth's recommended sentence.

DENIED

(42) When Joseph made this statement, however, she knew that there had been no significant press coverage of the case. Indeed the only press coverage she was able to cite at the hearing was a single article which she claimed had been published in a Dorchester weekly ten months previously. VIII:16-17. Such an article, if it exists, was never produced. After making her thinly-veiled threat, Joseph immediately took steps to put it into action: Right after she left the conference, Joseph telephoned ADA David Deakin, informed him of Judge Lopez's sentencing decision, and discussed their office's press policy. IX:17.

DENIED

IV. THE GENESIS AND ISSUANCE OF THE AUGUST 3 PRESS RELEASE.

(43) On August 3, 2000, the Suffolk County District Attorney's Office issued a press release headlined "BOSTON MAN EXPECTED TO PLEAD TO CHILD KIDNAPPING, SEXUAL ASSAULT," which stated, in pertinent part, that "**Charles Horton, 31, a transgendered person who appears as a woman, is expected to plead guilty before Judge Maria Lopez in Suffolk Superior Court room 21, 15th Floor, tomorrow at about 10 a.m.**" (Ex. 7, emphasis in original).

ALLOWED

A. ADA Deakin and ADA Joseph Were Responsible for Initiating the Process by Which the Press Release Was Issued by the Suffolk County District Attorney's Office.

(44) ADA Deakin and ADA Joseph began taking affirmative steps to issue a press release immediately after the lobby conference on August 1. As described above, Joseph telephoned Deakin from the courthouse, informing him of Judge Lopez's sentencing decision, and immediately initiating discussion of their office's press policy. IX:17. Deakin and Joseph continued this discussion of the office's press policy when Joseph returned to the office later that same day. IX:17. In this second conversation Joseph asked Deakin whether he thought that they should notify the press office (IX:15), and they both agreed that they should do so. IX:183. It was Joseph that first suggested to Deakin that the case was a potential candidate for media coverage. VIII:24-25.

ALLOWED ALTHOUGH THE CHARACTERIZATION IS MISLEADING

(45) According to Deakin, there was no question that Joseph knew that their press

office was being notified. IX:184. Deakin learned that First Assistant Elizabeth Keeley, with whom he had consulted on the matter, was leaning toward notifying the press. IX:189-190. Joseph was aware of Keeley's intentions: Deakin believes that he or Keeley spoke with Joseph about providing the necessary information to the press office, (IX:190-191), that Joseph was tasked with providing this information, (IX:190-191), and that she did provide it to the press office. IX:192. Deakin agreed that he and Joseph, along with Keeley, had initiated the process of ultimately issuing the press release. IX:199.

ALLOWED

B. ADA Deakin and ADA Joseph Violated the Canons of Ethics for Attorneys and Prosecutors by Failing to Take Reasonable Steps to Ensure that the Press Release Did Not Mention Subjects Whose Mention Was Prohibited by the Canons.

(46) Neither Deakin nor Joseph took any steps to ensure that the press release did not mention subjects prohibited by the Massachusetts Rules of Professional Conduct. Joseph, who was the only prosecutor who had filed an appearance in the *Horton* case as of the time of the August 3 press release, took no steps to ensure compliance with ethical Canons 3.6 and 3.8, relating to the ethical obligations of lawyers in dealing with the media, and more specifically, the obligations of a prosecutor to prevent others associated with the prosecutor in a criminal case from making prohibited extra-judicial statements. Deakin testified that there was a custom in his office by which he would review press releases before they were issued to ensure compliance with the canons of ethics, but that in this particular case, he did not review the press release before it issued. IX:195-196. Deakin did not believe that he was relieved of his ethical responsibilities for the content

of the press release under the Canons simply because he did not review the release in this case. IX:196-197. Nonetheless, he stated that he did not believe he had any ultimate authority over whether a press release should issue, and that this decision was in the hands of the executive staff of the office. IX:200.

NEITHER ALLOWED NOR DENIED

V. THE AUGUST 4, 2000 LOBBY CONFERENCE AND COURT PROCEEDINGS.

A. The August 4, 2000 Media Presence at the Suffolk County Courthouse.

(47) Upon her arrival at the courthouse on the morning of August 4, 2000, Horton's counsel Anne Goldbach noticed a large video camera being set up in the corner of the courtroom. XII:89. When she went back out into the corridor, there were more media and camera people filling the hallway in what was a very large group of people. XII:89-90. Goldbach found out from a clerk that the media were there for the *Horton* case. XII:90-1.

ALLOWED

1. Horton's Mother's Became Upset at Discovering the Media Presence.

(48) Later that morning, the defendant's mother got off the elevator and asked Goldbach if the cameras were for Horton's case, and Goldbach told her "yes." XII:91-92. The defendant's mother became very upset at this answer and was "very unhappy about the fact that the cameras were there." XII:92. Later Goldbach heard a screaming match between Horton's mother and members of the media. XII:95-96.

ALLOWED

2. When Goldbach Asked ADA Joseph Whether She Had Caused the Media Presence, Joseph Denied Having Done So.

(49) At some point Goldbach passed ADA Joseph in the hallway, and asked Joseph, "Did you do this," referring to the press, and Joseph answered "No." XII:92. Goldbach told Joseph that the minute Judge Lopez arrived, she was going to ask the Judge to see both of them, to which Joseph responded by nodding but not saying anything. XII:92.

ALLOWED

3. Attorney Goldbach Learned that the District Attorney's Office Had Issued a Press Release Regarding the Horton Case.

(50) At some point that morning, Goldbach learned that the District Attorney's office had issued a press release, and someone from the media allowed her to read a copy of it. XII: 97. Goldbach was very concerned by what she read in the press release. XII: 97. The first line of the press release read "BOSTON MAN EXPECTED TO PLEAD TO CHILD KIDNAPPING, SEXUAL ASSAULT," yet Goldbach had never told anyone in the District Attorney's office that Horton had made a decision to plead guilty. XII: 98. The statement that her client was expected to plead guilty was inaccurate; as of the time she read the press release, her client had still not made a decision whether to plead guilty. XII: 99. Goldbach was also concerned about the statement in the press release that described the defendant as "a transgendered person who appears as a woman." XII: 104. Goldbach felt that this description was "sensationalizing the case" and that it had been placed in the press release as "a lure for the media to get there." XII:104. Prior to seeing Judge Lopez, Goldbach told ADA Joseph that the word "transgendered" was gratuitous, and Joseph said nothing in response. XII:104-105. Goldbach notified the clerk that she

wanted to see Judge Lopez with ADA Joseph as soon as the Judge was available. XII:105-6.

NEITHER ALLOWED NOR DENIED AS SOME ASPECTS NOT APPROPRIATE FOR A FINDING OF FACT

4. Horton Told Goldbach He Would Not Enter a Plea that Day.

(51) Prior to seeing Judge Lopez, Goldbach ran downstairs and waited for Horton. XII:93. When Horton arrived, she informed Horton about what was going on upstairs with the press and cameras. XII:93. Horton was shocked, upset and almost speechless. XII:93. Goldbach took Horton to the public defenders' second floor office, and then returned to the fifteenth floor. XII:93. According to Goldbach, Horton's family was extremely upset about the press presence. XII: 94-5. Goldbach had a conversation with Horton about whether the plea was going to occur that day, and Horton told her that it was not going to happen that day. XII:95.

ALLOWED

5. Judge Lopez Observed the Media Presence Upon Her Arrival at the Courthouse.

(52) Upon her arrival at the Courthouse on August 4, 2000, Judge Lopez was informed that television and other cameras had already been set up in the courtroom without her having been asked, and without her having given the legally-required prior judicial approval. I:81; III:133-134. Judge Lopez also saw an unusually substantial number of people "milling around the hallway right before the First Session." III:133; I:81. Even though the media had not asked for permission to place cameras in the courtroom in advance, Judge Lopez did not ask the media to remove the cameras.

III:134-135. Prior to arriving at Court that day, it had not occurred to Judge Lopez that this was the day that Ebony Horton was supposed to appear before her. III:132. Judge Lopez was also informed by her clerk or a court officer that there were some emotional issues concerning defense counsel Anne Goldbach, who was "very distraught, was crying, and wanted to see" Judge Lopez. III:135.

ALLOWED

B. The August 4 Conference in Judge Lopez's Chambers.

(53) In response to Goldbach's request, Judge Lopez met with Goldbach and ADA Joseph in her chambers. III:135. Goldbach was very distraught when they met, and Joseph was sitting with her arms crossed and appeared indifferent to the situation. III:136.

ALLOWED

1. Goldbach Asked Judge Lopez for a Continuance.

(54) Goldbach informed Judge Lopez that the District Attorney's Office had issued a press release in which it had indicated that her client was expected to plead guilty and that her client was transgendered. XII:106. She told Judge Lopez that it was cruel and unjust for the district attorney's office to have done this, informed her that her client was not in any condition to plead guilty, and asked her for a continuance. XII:107.

ALLOWED

2. Goldbach Informed Judge Lopez of the Events in the Hallway.

(55) Goldbach described to Judge Lopez what was going on out in the hallway with respect to the media, including that there had been screaming out in the hallway and

that her client was still downstairs on the second floor and was unwilling to come upstairs. XII:106-107. She said that in her twenty-three years as an attorney she had never seen coverage like this for this type of case. XII:106. Similarly, Judge Lopez testified that Goldbach informed her that when her client and her client's mother were getting off the elevator, there had been an altercation between the defendant's mother and the camera person, and that when they saw the press, the defendant and her mother refused to get off the elevator. III:137. Goldbach informed Judge Lopez that she had taken the defendant and her mother to another room in the courthouse, that the defendant and her mother were angry with Goldbach because they believed that Goldbach was responsible for the press being there, and that they did not want to come into the courtroom with the cameras. III: 137. Judge Lopez became concerned, because of the defendant's mental illness and fragile emotional state which, in addition to Goldbach's emotional state, indicated to her that the plea might not be completed that day. III:139.

ALLOWED EXCEPT AS TO LAST SENTENCE

3. ADA Joseph Denied Responsibility for the Press Release.

a. Goldbach Recounted Joseph's Prior Denials.

(56) In the conference, Goldbach blamed the district attorney's office and ADA Joseph for the press release, and Joseph said nothing in response. III:142. Goldbach also informed Judge Lopez that prior to coming into chambers Goldbach had a conversation with Joseph concerning the presence of the press at the courthouse that morning, and that Joseph had indicated that "she had no idea what the cameras would be there for." III:143-146. Joseph told Goldbach that she was "shocked" to learn that the media was there for the Horton case. III:142.

ALLOWED

b. Joseph Directly Denied Responsibility for the Press Release in Response to Questions by Judge Lopez.

(57) After being informed about what had occurred that morning, Judge Lopez asked ADA Joseph if she had anything to do with the press release, and ADA Joseph replied in a "fresh" and "angry" tone of voice: "I had nothing to do with it. I can't control what my office does." III:146-147.[15] Goldbach recalls that at some point in the lobby conference, Judge Lopez said to ADA Joseph "You're responsible for this," and that Ms. Joseph did not reply. XII:110.

ALLOWED

c. Judge Lopez Did Not Find ADA Joseph's Denials Credible, and Firmly Reprimanded ADA Joseph for Her Actions in Connection with the Press Release.

(58) As a result of her experience and understanding of the ethical rules governing attorneys and prosecutors, Judge Lopez did not believe ADA Joseph when she proclaimed in chambers that she had nothing to do with the press release, and Judge Lopez told Joseph that she "did not believe her." III:155. When Ms. Joseph denied having anything to do with the presence of the press at the courthouse that morning, Judge Lopez told ADA Joseph that her actions were mean-spirited and that she "belong[ed] in the suburbs." III:160.[16]

ALLOWED IN PART, NOT INCLUSIVE OF MATEIRAL

[15] Joseph asserts that Judge Lopez did not ask her any questions to find out if she was responsible for the press, and that Judge Lopez "simply accused her of doing it." (VI:66)

[16] Anne Goldbach similarly recalls that Judge Lopez told ADA Joseph that she had the right to call in the press, but this was mean and cruel, and that what was going on was not right. She told Ms. Joseph, "You're young, you don't get it. You belong in the suburbs." (XII:107-108)

STARTING WITH THE WORDS "JUDGE LOPEZ"

(59) While Judge Lopez acknowledges that she used a "poor choice of words" (V: 48), she criticized Joseph because she did not believe Joseph was fit to prosecute cases in an inner city court: Judge Lopez thought that Joseph was having difficulty dealing with urban issues and urban crimes, and that Joseph was indifferent to these issues. IV:13-4. Her subsequent remark, made during her statement to the Commission, that her suburbs comment was "sort of a characterization about the woman, who, you know, stays home, goes to the beauty parlor and does her nails" (Ex. 32 at 76) was, to use a phrase from the immediately preceding sentence in her statement to the Commission, intended to explain that "if her life experience was a little broader, if she was a little more sophisticated about people who are marginalized in our society and had a little more compassion about it, she would" be better suited to deal with cases or matters involving defendants like Horton. Ex. 32 at 76. As Judge Lopez noted at the hearing, her hair and nails explanation of her suburbs comment during her statement to the Commission:

> really didn't capture what I meant. I had given Mr. Ware a number of other definitions and descriptions of my opinion about Ms. Joseph and what I meant by the suburbs argument. So it was a sort of ... flippant comment directed to Mr. Ware...

IV:13-14. Moreover, the comment concerning the beauty parlor and doing ones nails was never made to Ms. Joseph. IV:13.

ALLOWED

d. Judge Lopez's Reprimand of ADA Joseph During the August 4 Lobby Conference Was Delivered in a Controlled and Measured Tone.

(60) While ADA Joseph testified that Judge Lopez "screamed" at her, VI:65;

VI:113, this is false. Judge Lopez's comments were in fact delivered in a controlled and measured tone. There was no screaming, no yelling, and Judge Lopez was not out of control. As confirmed by Goldbach, "Judge Lopez was clearly displeased, but it was calm. It was stern, but it was quite controlled." XII:108.

ALLOWED

(61) ADA Joseph's depiction of Judge Lopez's tone at the conference lacks credibility, as demonstrated by her false testimony concerning what had occurred during the earlier plea and sentencing hearing in the *Estrada* case. Regarding *Estrada*, Joseph testified that Judge Lopez "screamed" at her on the record because she was putting too many details in her recitation of the facts, that "it was awful," (VI:122-123), and that Judge Lopez "was very upset with [her], and [she] was very humiliated by that experience on that day." VI:117. This claim that Judge Lopez let loose with an awful, humiliating verbal tirade against her during the *Estrada* plea hearing is belied by the audiotape of that hearing. Exhs. B-1 and B-2[17]; Ex. 65 Transcript of *Estrada* Plea Hearing. The audiotape reflects that there was no screaming whatsoever on the part of Judge Lopez. Rather, Judge Lopez simply asked ADA Joseph to stand up when being spoken to by the Court (the record shows that Joseph was openly disrespectful to the court by failing to adhere to the uniform and expected practice of standing when addressing the court). Judge Lopez told Joseph in an entirely appropriate tone of voice that "[n]ext time that you are going to recite facts to me on a plea, dispense with hyperbole and subjective characterizations." VI:130-131; Ex. B-1 and B-2; Ex.65. While Ms. Joseph testified that Judge Lopez's tone

[17] Ex. B-2 is a second copy of Ex. B-1.

of voice was similar to, but angrier and louder than, the tone of voice that Judge Lopez used to admonish Ms. Joseph during the *Estrada* plea hearing, (VI:113-114), Anne Goldbach listened to the portion of audiotape of the *Estrada* sentencing hearing in which Judge Lopez admonished Ms. Joseph for hyperbole in her factual recitation. Ex. B-1. Goldbach stated that Judge Lopez's voice at the August 4 lobby conference in the *Horton* case was "very similar." XII:110. Joseph, in an attempt to extricate herself from her false statement that Judge Lopez had screamed at her in Estrada, offered the bizarre claim that term "screaming" encompassed both the content as well as the tone of a communication.

> Mr. Egbert: Screaming doesn't relate to the content. It relates to the level of voice, right?
>
> Ms. Joseph: In my mind it relates to both of those things.

VIII:55. Even under Joseph's absurd definition, however, no reasonable person would understand Judge Lopez's statement in *Estrada* to constitute screaming.

ALLOWED

4. Judge Lopez Granted a Continuance in Response to Anne Goldbach's Request.

(62) Goldbach believes that after Judge Lopez's remark to ADA Joseph she repeated her request for a continuance, and reiterated that she did not think that the plea could happen that day. XII:111. In response to her request, Judge Lopez indicated that she would grant a continuance, IV:25; XII:113, and upon hearing this, Leora Joseph stormed out of Judge Lopez's chambers without the Judge's leave to do so. XII: 113-

114.[18]

ALLOWED

C. Events Between the Lobby Conference and Continuance Hearing.

(63) After the lobby conference Goldbach went back downstairs to speak with her client. XII:116. Joseph, who states that she had "never been spoken to like that in [her] life," VI:66, picked up the phone and called Elizabeth Keeley, the First Assistant District Attorney. VI:66.

ALLOWED

1. David Deakin's Arrival at the Courthouse

(64) A short while after Joseph's phone call to Keeley, her supervisor, David Deakin, arrived at the courthouse. VI:67.[19] Goldbach states that after the conference with Judge Lopez, when she came back upstairs after seeing her client, she saw that Deakin had arrived at the courthouse. XII:116. Goldbach understood Deakin to be ADA Joseph's supervisor and she asked to speak with Deakin alone, but Joseph did not appear to be happy with that request, so she said that Joseph could stay for the conversation. XII:117.

ALLOWED

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[18] Joseph claims that as she was leaving the lobby conference, she heard Judge Lopez say to Goldbach "Well maybe we'll just continue the case to when Ms. Joseph ...to when Ms. Joseph is on vacation." (VI:66) Goldbach's recollection is different: She said that Judge Lopez indicated that a continuance would be granted, and that she does not recall that anything else was said. XII:113.

[19] Deakin testified that after the conference with Judge Lopez, Joseph called him and reported that Judge Lopez had "berated Ms. Joseph and criticized her very sharply and in harsh tones, and that there was some question of whether the plea was going to go forward on that day or not." (IX: 38)

2. Goldbach Complained to Deakin About Joseph's Handling of the Case.

(65) Goldbach complained to Deakin about Joseph's handling of the case in a number of respects, including her failure to turn over discovery, her attitude toward the case and refusal to check out mitigating facts. She also told Deakin that she was very upset about the press release. XII:117. Goldbach and Deakin discussed the contents of the press release, and the fact that it announced that her client was expected to plead guilty when no such decision had made, and that Joseph knew as of late in the afternoon on August 3, that no such decision had been made. XII:117. Goldbach also communicated her upset at the fact that the District Attorney's Office had "seen it fit to throw in the word 'transgendered' into this press release and the effect it would have in terms of getting the media to the court." XII:118.[20] Deakin "indicated that it was probably wrong to have the word 'transgendered' in the press release," and stated that his office sent out press releases in cases that had been previously covered in the press. XII:118. Goldbach told him that she had never seen the press the entire time she had been making court appearances in the case. XII:118.

ALLOWED AS TESTIFIED TO BY ATTORNEY GOLDBACH BUT THIS ALLOWANCE DOES NOT MEAN THAT A FINDING IS BEING MADE, THAT THERE WAS ANYTHING MORE IN THE PRESS RELEASE. AS IN MANY OF THE OTHER FINDINGS THE ALLOWANCE THAT A WITNESSS TESTIFIED IN

[20] Joseph testified that Goldbach complained to Deakin about Joseph's sentencing recommendation and that that the charges were too serious for what happened, and that Deakin responded that he had approved the charges and the sentencing recommendation. VI:68. At that point, Joseph claims to have become upset and walked away from the conversation. VI:68. Deakin states that Goldbach expressed anger at him and the District Attorney's office for issuing the press release, and that she then showed him the press release, which was the first time he had seen it. IX:41.

A CERTAIN WAY, DOES NOT MEAN THAT THE HEARING OFFICER IS MAKING A FINDING THAT AN UNDERLYING FACT HAS BEEN ESTABLISHED.

3. The Commonwealth Indicated their Opposition to the Continuance Requested by Goldbach.

(66) Deakin indicated to Goldbach that he was going to be representing the Commonwealth, and told her that they were opposing the continuance that she had requested earlier, and that a motion was being prepared. XII:119. Goldbach was later given a copy of the motion. XII: 119; Ex. 17.

ALLOWED

(67) Sometime that morning, after the conference with Judge Lopez, ADA Joseph approached Anne Goldbach and asked whether she wanted to pick a date for the continuance. XII: 115. Goldbach was not sure whether the case was going to be formally called to be continued or whether the clerk was going to be given an agreed-upon date. XII:115. Goldbach agreed that they should pick a new date, but did not have her calendar with her. XII: 115-116.

ALLOWED

D. Judge Lopez Granted the Continuance Requested by Goldbach.

(68) As per Goldbach's request, Judge Lopez granted a continuance in the *Horton* matter. She announced that the case was going to be continued to August 21, 2000 because she had "sixteen bails and a lot of other things to take care of." VI:69-70; Ex. 42 - 8/4/02 Hearing at 2. According to Suffolk County records, there were eighteen bail appeals to be heard that afternoon (Ex. S).

ALLOWED BUT AGAIN SEE THE DECISION IN THIS CASE. THE FACT THAT JUDGE LOPEZ ANNOUNCED THAT THE CASE WAS GOING TO BE CONTINUED BECAUSE SHE HAD BAIL HEARINGS AND OTHER MATTERS DOES NOT MEAN THAT A FINDING IS MADE, THAT THIS WAS WHY THE HEARING WAS BEING CONTINUED. AS A POINT OF ORDER, A JUDGE HAS CONSIDERABLE DISCRETION IN CONTINUING A CASE AS LONG AS IT IS NOT DONE WITH AN IMPROPER MOTIVE.

(69) Deakin objected to the continuance, filed a written objection with the Court, and asked Judge Lopez to make written findings if she continued the case. VI:70; Ex. 42 – 8/4/02 Hearing at 2-3. Judge Lopez responded "Okay. You will get written findings." Ex. 42 – 8/4/02 Hearing at 3. Contrary to Joseph, who claims that Judge Lopez was "very angry" and her tone was "somewhat menacing," (VI:71), Deakin states that her tone was merely "intense." IX:56.

ALLOWED

E. Judge Lopez's Written Findings in Support of the Continuance Were Well-Grounded in Fact and Issued in Good Faith.

(70) Late on the afternoon of August 4, after reading the DA's press release (IV:41), Judge Lopez issued her written findings for the court record, listing additional reasons for the postponement:

1. This case was on for a change of plea today.
2. ADA Joseph, unhappy with the Court's disposition, called the press in. Ms. Joseph has a habit of doing this.
3. The defendant suffers from an identity disorder. "She" looks female in all respects.

4. When the defendant and her mother were getting off the elevator on the 15th floor, there was a television camera waiting for her in the hallway.

5. The defendant and her mother refused to get off the elevator. There was an eruption in the hallway, with the defendant's mother yelling at the press.

6. The Court finds that ADA Joseph attempted to embarrass and ridicule a defendant suffering from a psychological disorder.

7. The Court finds that the Commonwealth caused this continuance because it sought to turn the court proceedings into a circus.

8. There is little if no impact on the alleged victim as this is a plea.

9. The matter has been rescheduled to September 6, 2000.

Ex. 17.

ALLOWED EXCEPT FOR PREDICATE THAT CONTINUANCE WAS ISSUED IN GOOD FAITH.

(71) The evidence demonstrates that these findings were well-grounded in fact and issued in good faith:

DENIED

1. Judge Lopez's Finding that "ADA Joseph, unhappy with the Court's disposition, called the press in. Ms. Joseph has a habit of doing this."

a. Judge Lopez's Finding that "ADA Joseph, Unhappy with the Court's Disposition, Called the Press in."

(72) ADA Joseph falsely claimed to Judge Lopez that she had nothing to do with the media coverage in the Horton case. III:146-7. As discussed above, the factual record overwhelmingly indicates that Joseph did in fact initiate the process that led to the press coverage of the case, and that she knew that this

process had been carried through to the point that a press release had been issued (see Section IV).

NEITHER ALLOWED NOR DENIED. SEE DECISION.

(73) In arriving at the determination that Joseph was responsible for causing the DA's office to draw the attention of the media to the case, despite her claims to the contrary, Judge Lopez relied on her knowledge, developed over her twelve years as a jurist at the time, that it was the line prosecutor in a case who provides the information to the press office of the district attorney. III:155.

ALLOWED

(74) Judge Lopez further understood that ADA Joseph, as the prosecutor in the case, was responsible under the pertinent ethical codes for any statements to the media issued by her associates: She had responsibilities pursuant to Ethical Canons 3.6 and 3.8 to prevent her colleagues from releasing information to the press in contravention of the applicable ethical standards (III:150-155). Rule 3.8(g) of the Special Responsibilities of Prosecutors, provides *inter alia* that

> The prosecutor in a criminal case shall:
>
> * * *
>
> (g) except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments <u>that have a substantial likelihood of heightening public condemnation of the accused</u>.

III:148-150, emphasis supplied. Judge Lopez also had in mind Rule 3.8(e) which requires a prosecutor to "exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with

the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 [of the Massachusetts Rules of Professional Conduct]."[21] III:150-154. At no point did ADA Joseph indicate to Judge Lopez that she had taken any reasonable efforts to comply with these ethical rules. III:154. Joseph was the Assistant District Attorney in charge of the prosecution (III:154-5), and it was Judge Lopez's experience that the line prosecutor provides the information to the press office of the district attorney. III:155. Thus, when Ms. Joseph told her that she had nothing to do with the press release, Judge Lopez justifiably told Ms. Joseph that she did not believe her, and properly concluded that ADA Joseph, as the lead prosecutor in the case, was responsible for what had occurred. III:155.

THIS IS NOT A FINDING OF FACT

b. Judge Lopez's Finding that "Ms. Joseph has a habit of doing this."

(75) As described in detail above, ADA Joseph had in the past engaged in a pattern of attempting to use press coverage, rather than persuasive evidence and advocacy in court, to influence judicial decisions. Prior to the events in *Horton,* ADA Joseph had given a press interview in which she viciously attacked Judge Lopez's sentencing decisions in *Commonwealth v. Edwin Estrada* and *Commonwealth v. Marie Calixte* (see Section II). In light of this history, Judge

[21] Rule 3.6(a) provides: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

Lopez's finding that "Ms. Joseph has a habit of doing this" was well-grounded in fact.

DENIED

2. Judge Lopez's Findings that "ADA Joseph Attempted To Embarrass And Ridicule a Defendant Suffering From a Psychological Disorder" and that "The Commonwealth Caused This Continuance Because It Sought To Turn The Court Proceedings Into a Circus."

(76) Based on what Judge Lopez had observed when she arrived at the courthouse on August 4, the information that was provided to her in chambers later that morning, and the contents of the press release from the district attorney's office, Judge Lopez believed that ADA Joseph was attempting to embarrass and ridicule a defendant suffering from a psychological disorder and that the Commonwealth sought to turn the proceedings into a circus. IV:44-7.

DENIED. JUST BECAUSE JUDGE LOPEZ SAYS SOMETHING, DOES NOT MAKE IT A FACT.

(77) As described *supra*, there is no question that there was a media circus in the courthouse on August 4, that the defendant's mother had been involved in a skirmish with the media, and that as a result of the media situation, the defendant said he was unwilling to go forward with the plea (see part A of this section). The Commonwealth had issued a press release that gratuitously described Horton as a "transgendered person who appears as a woman" (II:104)—a gratuitous and derisive billing that portrayed Horton as if he were a participant in a freak show at the circus. Judge Lopez found that the Commonwealth "sought to turn the court proceedings into a circus" because she believed that the Commonwealth had turned the proceedings "into a situation where a defendant

was being ridiculed and embarrassed, and that caused a complete disruption of the proceedings." IV:47. As indicated by this testimony, Judge Lopez's use of the word "circus" referred not only to the media circus that the Commonwealth had created, but to the freak show aspect of circuses, in which people with anomalous characteristics are displayed as the object of derisive, leering and lurid interest. IV:44-5. The Commonwealth's gratuitous reference to Horton's transgendered status was neither necessary to inform the public of the nature of the prosecutor's action, nor did it serve any legitimate law enforcement purpose. Indeed, Deakin testified that even though he thought the issuance of the press release was appropriate, he regretted the press release's description of Horton as a "transgendered person who appears as a woman." X:38-39.

DENIED - SEE DECISION.

3. Judge Lopez's Finding That the Continuance Would Have "Little if No Impact on the Alleged Victim."

(78) Judge Lopez's finding that the continuance would have "little if no impact on the alleged victim," was also well-grounded in fact and made in good faith. Indeed, as a consequence of the District Attorney's press release and media circus that day, Judge Lopez testified that she had concerns for both the child and the defendant: Judge Lopez was concerned that the harm from the press release was that "it could abort the plea, and that would mean that everyone involved—the victim would have to testify, the defendant would be put through a trial, that the plea we thought was going to happen would not happen ever." III:157. Judge Lopez did not think it would be a "good thing" for the victim to have to come in and testify, and explained that "a major consideration in child

sexual abuse cases," is "putting a victim through a court proceeding, cross-examination." III:157. More specifically, her concern was that if the plea did not go forward, and a trial took place, "this child would have to...be prepared, having to go over and over the testimony he would give concerning this event[,] and would be subjected to cross-examination." III:159. She was concerned about having to put the child through this process because she had been informed at the lobby conference of some inconsistencies. III:159. Judge Lopez was also concerned for the defendant. She was "aware of the defendant's psychological, psychiatric history, and knew that this was an individual that had depression, suicidal ideation, and [she] was worried about that." III:159-160.

DENIED. JUDGE LOPEZ HAD NO CONCERN FOR THE BOY AS CONFIRMED BY HER LATER ACTIONS.

F. Judge Lopez Had Her Office Send a Copy of Her Findings to Joan Kenney

(79) Judge Lopez believes that she was in touch with Joan Kenney on August 4. IV:51. She decided to send her continuance findings to Kenney because she knew there might be press attention to the continuance. I:123. After preparing her findings, she gave a copy to her clerk to be sent to Kenney. I:120-1. The clerk made a handwritten note on the fax sheet, referring to the findings as a "press release." Ex. 49. This note is not in Judge Lopez's handwriting. Ex. 49. Judge Lopez did not refer to her findings as a press release, ask her clerk to make such a reference, or send the findings to Kenney as a press release. I:120-3. Judge Lopez testified that she did not know what Kenney did with the findings when she received them. I:125

DENIED AS BEING DISINGENUOUS

VI. THE RESPONSE OF THE DISTRICT ATTORNEY'S OFFICE TO JUDGE LOPEZ'S AUGUST 4, 2000 FINDINGS.

(80) On August 5, 2000, an article written by John Ellement appeared in the *Boston Globe* in which both Suffolk County District Attorney Ralph C. Martin II, and Martin's spokesman James Borghesani were quoted. Their statements in the article continued the assault on Judge Lopez by the District Attorney's Office that had begun with the press release on August 3. Both Borghesani and Martin accused Judge Lopez of lying when she issued her findings concerning the prosecutor's conduct:

> In a statement, Suffolk County District Attorney Ralph C. Martin II defended his prosecutors as "professional and dignified."
>
> "The unfounded accusations contained in Judge Lopez's decision speak more to the judge's state of mind than they do about the merits of the case," Martin said. "This case was handled no different than others."
>
> Martin spokesman James Borghesani noted that Lopez concluded that Horton suffers from a psychological disorder without hearing any evidence from experts.
>
> "No one should be deceived by this smokescreen," Borghesani said. "Judge Lopez was prepared to hand down an extremely lenient sentence and she balked when the media was present to witness it."

Ex. 15. As noted above, Judge Lopez's findings that Joseph and the District Attorney's Office had engaged in unethical conduct in relation to the August 3 press release were well-grounded in fact (see Section A). These highly inflammatory remarks by the District Attorney's Office constituted yet another attempt to bludgeon Judge Lopez using the press, rather than evidence-based advocacy in court. Judge Lopez had not falsified her findings, and these officials spoke purely out of their own self-interest, without any

evidence whatsoever of falsification.

ALLOWED UP TO EX. 15. DENIED ON EVERYTHING FOLLOWING.

VII. SEPTEMBER 6 PLEA AND SENTENCING HEARING.

A. Activity Prior to the Hearing.

(80) On September 6, 2000—the date of the rescheduled *Horton* plea and sentencing hearing—Judge Lopez arrived in the Middlesex County courthouse. According to Leora Joseph's testimony, "there was a ton of cameras and press in the lobby area." VI: 98-99.

JUDGE LOPEZ HAS TWO FINDINGS NUMBERED 80. THE FIRST 80 IS LISTED UNDER HER SECTION VI. THE SECOND PROPOSED FINDING NUMBER 80 NOW UNDER CONSIDERATION, IS ALLOWED.

(81) At no time during the nearly six weeks prior to the September 6 sentencing hearing, did the District Attorney's office ever file a motion asking the Judge to recuse herself for bias or any other ground.

ALLOWED

1. Lopez Arranged for Defendant Horton to be Met by Court Officers, to Protect His Physical Security and Ensure Order.

(82) Anticipating the possibility of a repeat media deluge in the courthouse, and to assure the decorum of her court and the safety of the defendant, Judge Lopez under the circumstances arranged for Horton to be met by court officers outside the courthouse so that he could enter by the non-public rear entrance and kept in a room adjacent to the

courtroom until the case would be called. II:25; XIV:16. Brian Grifkin, Assistant Chief Court Officer of the Middlesex Superior Court, testified that his office commonly makes similar arrangements for the security of defendants or victims when requested by the Court, defense lawyers or prosecutors. XIV:12. Despite the arrangement, Horton entered through the front of the courthouse. The court officers located him on the second or third floor and escorted him to a room adjacent to the courtroom until the case was called. XIV:16, II:27. In many of our state courthouses, including those in Middlesex County, court officers often make arrangements for specified facilities and areas to be provided for prosecution witnesses, including victims and defendants. XIV:11-12; 17-18.

ALLOWED

2. Judge Lopez Issued an Order Prohibiting the Media from Photographing Horton.

(83) Upon learning that cameras were in the courtroom again without her permission, Judge Lopez drafted an order, Ex. A, and made arrangements to prevent photographs of Horton from being taken while he was in the courtroom, II:27-8, after consultation with Joan Kenney of the Supreme Judicial Court's Public Information Office about the order and the arrangements. II:38-39.

ALLOWED. BUT SEE TESTIMONY OF BRIAN GRIFKIN, VOL. XIV, pp.23-24 THAT JUDGE LOPEZ SAID "YES" BEFORE THE CAMERAS WERE ABLE TO COME INTO THE COURTROOMS.

(84) The order directed the court officers and court personnel to allow cameras to be used in the courtroom only in accordance with her instructions as required by Supreme

Judicial Court Rule 1:19:

> The Court hereby orders that the press is not permitted to take pictures, by means of still or moving cameras, of the defendant. The Court finds that the defendant suffers from a sexual identity disorder and is emotionally fragile. The taking of defendant's photograph during this plea will create a substantial likelihood of harm to the defendant. This matter had been set down for a plea previously and the defendant and defendant's mother refused to get off the elevators when they saw the cameras.
>
> The public's right to know about these proceedings will not be affected by this narrow limitation. The Court sees no reason why the appearance of the defendant is of interest to the public, other than to appeal to a sense of perverse curiosity. There are no other limitations on press coverage of these proceedings.
>
> The Court notes that the media did not give reasonable advance notice of the use of cameras as required by Supreme Judicial Court Rule 1:19(e). Nevertheless, given the media's interest in an otherwise routine case, the Court did not exercise it's [*sic*] discretion to exclude them altogether.

Ex. A.

ALLOWED

(85) Judge Lopez testified that she imposed the limitations on photographing Horton for two reasons: (1) she believed that Horton might be particularly sensitive about being photographed, as had occurred on August 4, and that could jeopardize his willingness or ability to proceed with the guilty plea hearing; and, (2) published photographs of Horton might heighten the danger with respect to the safety of the offender beyond the high level that is typically present in cases of offenders against children. IV:60-62.

ALLOWED

(86) Judge Lopez relied upon the unrebutted psychological evaluation showing that Horton suffered from psychological disorders including depression and suicidal

ideation, and her concern that there could be a recurrence of the August 4 events as part of the basis for this order. IV: 59-64.

NEITHER ALLOWED NOR DENIED. ASSUMES THAT ON AUGUST 4, THERE WAS A CIRCUS IN HER COURTROOM.

(87) At no time did anyone, including the press or the prosecution, contest or complain about the appropriateness or lawfulness of the order pertaining to the use of cameras in the courtroom or the judge's arrangement to assure Horton's security while in the Middlesex County Courthouse.

ALLOWED

B. The September 6 Hearing.

1. Judge Lopez Requested that ADA Deakin State Only Those Facts Necessary to Establish a Factual Basis for the Plea, But Allowed Him to Add Additional Information on His Request.

(88) During the September 6, 2000, hearing in which the guilty pleas were tendered, Judge Lopez reminded the prosecutor to state only the facts that pertain to the indictments. Ex.22 Tr.9/6/00 at 12. At this stage of the hearing, the sole issue was whether there was a factual basis for the guilty pleas, not sentencing-related facts. When Assistant District Attorney David Deakin recounted the facts through Horton's arrest, Judge Lopez understandably believed that the necessary facts had been stated. Ex.22 Tr.9/9/00 at 15. The facts were correctly determined by Judge Lopez to be sufficient to establish a factual basis for guilty pleas to all of the charges. Judge Lopez interrupted the prosecutor, thanked him, and said she deemed the facts stated to be sufficient. Ex.22

Tr.9/9/00 at 15-16.[22] The prosecutor responded that he wished to add a representation concerning an out-of-court statement which the defendant had made. Id. at 16. Judge Lopez allowed the prosecutor to add the information concerning the defendant's statement even though it added nothing material to the already sufficient factual bases for the guilty pleas. Id. at 16.

ALLOWED EXCEPT AS TO THE SENTENCE CONCERNING JUDGE LOPEZ'S UNDERSTANDING AND TO THE LAST SENTENCE.

2. ADA Deakin Indicated that He Would Personally Read the Victim Impact Statements.

(89) At side-bar Mr. Deakin stated that he would be personally reading the victim impact statement from the victim's mother. ("As to the mother's statement, **I** would propose to read it in its entirety"). Id. at 20, line 3 (emphasis supplied). Later, after the Commonwealth's factual recitation, ADA Joseph, rather than ADA Deakin, rose to begin reading the first victim impact statement. VI:99 At this time, Judge Lopez asked that Mr. Deakin read the victim impact statement, as he had previously stated he would. VI: 99-100.

ALLOWED

(90) This request was proper: Leora Joseph conceded that at the side-bar conference before the plea, neither she nor Mr. Deakin informed the Judge that she would be speaking during the proceeding by reading the victim impact statements or otherwise. VIII:113, 115-6. Joseph did not stand at the beginning of the proceedings when the attorneys were being introduced. VIII:115. As Joseph agreed, the reading of the victim

[22] It is notable, that at this time, Deakin did not remedy any of the deficiencies in Leora Joseph's factual recitation of August 1 (see III.D). To the extent that this was a hearing to reconsider August 1, there were no new facts presented.

impact statements is simply a matter of "reading what someone else wrote." VIII: 119.

ALLOWED

3. Judge Lopez Understood ADA Deakin to be Ranking the Offense as a Whole as a "Ten" on a One-to-Ten Scale, and Found This Ranking Excessive.

(91) Judge Lopez asked ADA Deakin "on a scale of one to ten, where would you put this case?" Ex.22 Tr.9/9/00 at 29. Deakin responded by stating:

> Depends -- I would say to Your Honor that depends on -- there are several axes that one can evaluate a case on.
>
> In terms of the lack of a relationship between the perpetrator and the victim, I would say this is a 10, because what is relatively rare in fact but perhaps most frightening to the general population is the case of a person without a relationship to a child who abducts the child off the street, takes it to a secret location, and sexually assaults the child. In terms of the age of the child, I would say it's in the quite serious range as well. The child was twelve years old at the time.
>
> In terms of the competed [*sic*] sexual assault that the child has disclosed, I would say the that the facts are in the moderately serious range. I would also note, however, Your Honor, that the assault was interrupted by police who came to a—just happened upon this on routine patrol. And as a prosecutor who has prosecuted a number of these cases, I would remain concerned that this assault might have been quite a bit worse had they not quite—had they not quite fortuitously come upon what they came upon.

Ex. 22 at 29-30, emphasis added. Deakin's response to Judge Lopez's question can be understood to have provided a ten-rating for only one aspect of the offense: the abduction of a child by a stranger. However, Judge Lopez understood Deakin to be saying that the offense as a whole deserved a rating of ten:

> Mr. Ware: And that's all you heard; that the entire case is a 10, not different aspects of it?
>
> Judge Lopez: That is what I understand he is explaining to me. That's what I asked him.

II.85. Based on what Judge Lopez understood Deakin to have said, Judge Lopez told him that she thought his rating was disingenuous (see below).

DENIED. JUDGE LOPEZ'S MOTIVATION WAS TO EMBARRASS THE ADA.

(92) Judge Lopez reasonably understood Deakin's "ten" rating as referring to the entire case. The "ten" rating was the only numerical value given by Deakin his response to Judge Lopez, and in giving the rating, he described the entire incident: "In terms of the lack of a relationship between the perpetrator and the victim, I would say this is a ten, because what is relatively rare in fact, but perhaps most frightening to the general population is the case of a person without a relationship to a child who abducts the child off the street, takes it to a secret location, and sexually assaults the child." Ex. 22 at 30. This was the only overarching description of the crime he offered in response to Lopez's question about where "this case"—as a whole—would fall on a one-to-ten scale. Though Deakin's answer addressed a specific aspect of the case, namely the lack of relationship between the perpetrator and the victim, it is also addressed the case more generally: referring to the abduction, removal to a secret location, and the sexual assault, thereby subsuming the other factors that he mentioned. Judge Lopez understood Deakin to be ranking the case as a whole as a "ten" at the very top of the scale as one of the most serious child abuse cases. II:85.

DENIED

4. Judge Lopez Believed in Good Faith that Deakin Was Disingenuous.

(93) Judge Lopez testified that she views it as unfortunate and regrets that she asked Mr. Deakin to rate the case on a one-to-ten scale and that she stated that his answer was disingenuous, because that exchange led immediately to her losing her temper and displaying an inappropriate demeanor. IV: 116-7, 119.

ALLOWED

(94) In reaching the conclusion that Mr. Deakin was disingenuous, Judge Lopez relied upon her extensive experience as a judge in many cases involving sexual assaults upon children. The bases for Judge Lopez's view that ADA Deakin's rating was disingenuous, and that the Horton case was not a 10 on a one-to-ten scale included at least the following:

(A) Unlike in the *Estrada* case, the victim had not been sexually brutalized through penetration, nor had he been repeatedly brutalized.

(B) Unlike in the *Calixte* case, there had been no non-sexual physical brutalization, let alone repetitive brutalization.

(C) Unlike the *Calixte* and *Estrada* crimes, the offense did not involve obtaining physical access to the victim through an abuse or betrayal of a family, household or other relationship of trust;

(D) The victim in the Horton case was believed by the offender to be fourteen years old. V:111. There was no evidence that Horton's illness created a risk that he would sexually re-offend against anyone. V.163;

(E) The adolescent had suffered no physical injury. IV.114;

(F) According to the unrebutted psychological assessment, the offense had been committed by a person who suffered from a mental illness that is not associated with compulsive recidivist sexual offenses against anyone, including pre- or post-pubescent children. Ex. 3; V.163;

(G) According to the unrebutted assessment, there was a substantial risk that the offender would not survive incarceration. Ex. 3;

(H) Horton's criminal history was limited to misdemeanors with no prior sex

offenses, or criminal involvement with children. Ex. 18;

(I) From November 22, 1999, through the date of sentencing, September 6, 2000, the prosecution had never filed a motion asserting that Horton should be detained without bail based on danger to the community. IV: 131;

(J) Horton had satisfactorily complied with all the conditions of pre-trial release, including a curfew. Horton was a high school drop-out at the time of the offenses. Ex. 3. While on pre-trial release in lieu of bail, Horton earned a GED high school diploma (Ex. 3), and was about to commence college at the time of the proceedings. Ex.22 Tr.9/9/00 at 33.

DENIED AS THE WHOLE EXERCISE WAS MERELY AN ARTIFICE TO EMBARRASS THE ADA ALTHOUGH MANY OF THE SUBSIDIARY FACTS ARE TRUE.

(95) Judge Lopez's finding that Deakin was "disingenuous" was also because she disbelieved Deakin's representation that kidnapping was a total stranger situation, in light of Goldbach's statement at the lobby conference that Horton knew the child victim's older brother and that Horton and the child victim had seen each other around the neighborhood previous to the incident, XII:32, and the statement in the police report that Horton had stated that he knew where the victim lived. Ex. 28. In fact, Deakin later acknowledged in his post-hearing filing that he had misstated the record during the sentencing hearing, and he corrected his earlier factual recitation by stating that Horton did in fact know the street on which the victim lived, which indicated that the kidnapping was not a total stranger situation, Ex. Q, and confirmed that Deakin's "ten" rating had

indeed been disingenuous.

DENIED. SEE 94.

(96) Having listened to Deakin's disingenuous presentation, Judge Lopez told Deakin that she wished to hear from defense counsel. Ex.22 Tr.9/9/00 at 31. Deakin attempted to speak again even though Judge Lopez had ordered that she wanted to hear from defense counsel. Ex.22 Tr.9/9/00 at 31. (Judge Lopez had already given the Commonwealth and the defendant full and fair opportunity to be heard at the August 1, 2000 plea conference, VII:83-4; thus, the Commonwealth was being heard at the September 6, 2000 hearing to be urging Judge Lopez to reconsider a decision she had already made without any new information or evidence to justify reconsideration.) Deakin continued to attempt to thwart Judge Lopez's ruling that it was time to hear from defense counsel. Ex.22 Tr.9/9/00 at 31. He continued to object to Judge Lopez's statement that she deemed his rating of the offense to be disingenuous. Ex.22 Tr.9/9/00 at 31. In Judge Lopez's view, Deakin was attempting to argue with her view that he had been disingenuous. IV.118-9. Judge Lopez, wanting to return to the sentencing issue, raised her voice and ordered Deakin to be seated after he interrupted her. Ex.22 Tr.9/9/00 at 31. Judge Lopez repeated her view that Deakin had been disingenuous and told defense counsel to proceed, because Deakin had previously stated that he had completed his sentencing presentation. Ex.22 Tr.9/9/00 at 31.

DENIED BECAUSE IT IS PREDICATED ON A FALSE ASSUMPTION

(97) The videotape of the hearing reveals that Judge Lopez's demeanor was normal until just before the few seconds when she yelled at Deakin and asked him to sit down, and that her demeanor returned to normal immediately following her extremely

brief loss of temper. Ex. 41. Deakin admitted that at the time Judge Lopez told him to sit down, he intentionally continued to stand up, and said that he intentionally continued to speak when Judge Lopez told him not to. IX.100. Indeed Deakin said he felt that he "had a right" to be heard in response to Judge Lopez's finding that he was disingenuous. IX.100.

ALLOWED

5. Judge Lopez Allowed Attorney Deakin to Be Heard on the Issue of Electronic Monitoring.

(98) After Judge Lopez directed the clerk to announce the probationary sentence, ADA Deakin rose and asked to be heard. Ex.22 Tr.9/9/00 at 32. Believing that Deakin was attempting to be heard further in opposition to the sentence which she had already directed the clerk to announce (IV.127), Judge Lopez again raised her voice and told Deakin that she had heard enough and he would not be heard. Ex.22 Tr.9/9/00 at 32. Deakin then informed the court that he wished only to be heard concerning the conditions of electronic monitoring. Ex.22 Tr.9/9/00 at 32-33. Upon hearing this, Judge Lopez immediately changed her ruling and allowed Deakin to be heard in full (Ex.22 Tr.9/9/00 at 32-33), thus demonstrating that she was open-minded and willing to hear further argument on issues not already decided. Ex.22 Tr.9/9/00 at 32-33; IV:127-128.

ALLOWED

6. Judge Lopez's Inquiry Regarding Whether the Transgendered Defendant Should be Sent to a Male or Female Prison Was Made in Good Faith.

(99) At the conclusion of the Commonwealth's statement of its recommendation that a sentence of imprisonment be imposed, Judge Lopez inquired whether the

Commonwealth was requesting the commitment be to a male or female prison. Ex.22 Tr.9/9/00 at 24.

ALLOWED

(100) The appropriate place for the incarceration of the transgendered defendant was a serious and important issue. Judge Lopez posed her question regarding this matter as a way of pointing to the hazards and difficulties that would result from a prison sentence to a transgendered person such as Horton. IV 105-108. It was not the first time that the issue had been raised. Defense attorney Anne Goldbach testified that this important issue had been discussed at the August 1 lobby conference. XII: 56,177. In fact, when questioned concerning the likely conditions of confinement that would be imposed if Horton were imprisoned, ADA Deakin attempted to suggest that the Horton's illness would not cause him to suffer harsh conditions of imprisonment, (Ex.22 Tr.9/9/00 at 24-25) even though, at the plea conference, Goldbach had made an unrebutted representation to Judge Lopez that, while in held by the Suffolk County Sheriff for over thirty days, Horton had been confined to a cell 23 hours per day and was isolated when not in a cell. IV.105; V:156. Deakin had clearly anticipated and was prepared for Judge Lopez's inquiry on this issue, stating that the Commonwealth had made "informal inquiry" of the Commissioner of Corrections on the matter. IV:108, Ex. 22 at 24.

DENIED AS JUDGE LOPEZ'S INQUIRY REGARDING WHETHER COMMITMENT SHOULD BE TO A MALE OR FEMALE PRISON WAS DISINGENUOUS IN THAT THE DEFENDANT WAS BEING SENT HOME.

(101) Judge Lopez denies that she was, or intended to be, sarcastic in posing this question regarding the appropriate place of incarceration for Horton and she denies that

her tone of voice was sarcastic. Her question to Mr. Deakin was a serious and important question put to the prosecutor with proper decorum, as any objective viewer of the tape (Ex. 41) would have to agree.

DENIED

VIII. POST-SENTENCING CONTACTS WITH LEAHY AND GOLDBACH.

A. Judge Lopez's Involvement in the Horton Matter was the Subject of Enormous, Extremely Critical Media and Public Attention.

(102) Beginning on September 6, Judge Lopez's involvement in the Horton matter was the subject of enormous highly critical media and public attention. Judge Lopez received telephone calls from people saying that she should be raped, and threatening that her children would be kidnapped and raped. IV:143. A talk radio program was broadcast from her driveway. IV:143. As Judge Lopez testified:

> I was horrified. I was horrified for my children, for my family. It had been an incredible invasion of my family life to have this radio—these radio people broadcasting from my driveway in a morning when my kids were going to school, you know, in front of my neighbors, and then they gave out my telephone number, and people immediately began to call and say things. It was incredibly threatening to everyone, to my children and to me.

IV:143. Even the Governor of the Commonwealth commented publicly on the sentence and numerous legislators called for her removal from the bench. As reported by the *Boston Herald* on Friday, September 8, 2000:

> The case unleashed a torrent of outrange on BeaconHill—including a blast from Gov. Paul Celluci. "This is a complete and utter outrage," said House Minority Leader Francis Marini (R-Hanson).
>
> Marini and other House lawmakers plan to file a "bill of address" against Judge Maria Lopez next week. The rarely used constitutional device, if approved by both the House and Senate, would empower Celluci

to request Governor's Council hearings and a vote on removing Lopez from the bench.

Celluci said the Judge ignored the impact and trauma of "every parent's worst nightmare" in freeing 22-year-old Charles Horton, a Dorchester transsexual who admitted the attack. The Governor—citing Horton's admission to snatching the boy off the street and using a screwdriver to try and force sex—said, "Your child gets lured into a car and taken away to have a sex act performed—these are violent serious crimes that should not be tolerated in this state."

Ex. 10.

ALLOWED

B. Judge Lopez Telephoned Goldbach and Her Superior, CPCS Director William Leahy.

(103) During this media storm, Judge Lopez telephoned defense attorney Anne Goldbach to discuss the coverage of the case (III:26). During her conversations with Goldbach, and a separate conversation with her supervisor, Bill Leahy, Lopez urged the Committee on Public Counsel Services (CPCS) to speak publicly about the Horton case (II:103-104). Judge Lopez did so because CPCS was not only free to comment on the case, but duty bound to do so. Judge Lopez believed then, and believes now, that her conversations with Leahy and Goldbach were fully permitted under the canons because the Horton matter was no longer pending when they took place (V:31). Goldbach and Lopez both testified that Lopez's substantive rulings in the Horton case were not discussed during these conversations, nor were future matters before Judge Lopez discussed (XII:183-4; V:31-32).

ALLOWED EXCEPT THAT JUDGE LOPEZ ADMITTED TO THE COMMISSION THAT THE CASE WAS STILL PENDING AND IN HER PRESS RELEASE ACKNOWLEDGING THAT THE CASE IN HER MIND WAS STILL PENDING. THE FACT THAT JUDGE LOPEZ BELIEVES THAT HER CONTACT

WAS OKAY, DOES NOT MAKE IT RIGHT.

IX. POST-SENTENCING PRESS RELEASE.

(104) On September 7, 2000, the Supreme Judicial Court's Public Information Office issued a press release regarding the *Horton* case in Judge Lopez's name. The press release, read:

> The Judicial Canons prohibit judges from commenting on pending and impending cases. Although I cannot comment on matters that were before me regarding the defendant Charles Horton, I do think it is necessary to clarify media reports that suggest I was insensitive to the victim and his family. My statement in open court that it was a "low scale" matter pertained solely to the appropriate level of the sentencing guidelines used by judges in sentencing convicted defendants. In this case, there were certain facts before me, known by both the prosecutor and the defense attorney, that were part of the plea conference and cannot be revealed by me, but which would undoubtedly change the characterization of this case as currently reported by some media outlets.
>
> Based on the facts of the case before me, the plea conference attended by the prosecutor and the defense attorney, the applicable law, and the sentencing guidelines, the defendant was given a fair sentence.

Ex. 4.

ALLOWED

(105) This press release was issued as a result of candid, confidential conversations in which Judge Lopez shared a truthful picture of the facts of the case and her opinions about these facts with Supreme Judicial Court Press Officer Joan Kenney. It contained a truthful portrayal of the information that was before Judge Lopez in this case. Its issuance was entirely proper in light of the fact that the Horton case was not pending at the time of release.

DENIED

A. Issuance of the Press Release

1. Judge Lopez Did Not Issue a Sentencing Memorandum on the Advice of Chief Justice DelVecchio.

(106) As described in detail above, after the September 6 sentencing, the Horton case was the subject of enormous media coverage, much of which was highly critical of Judge Lopez (see VIII.A). Judge Lopez consulted with her colleagues, including Superior Court Chief Justice Suzanne DelVecchio, concerning the press coverage. IV:137. Judge Lopez wanted to issue a sentencing memorandum in which she could explain the sentence in full. IV:144 Chief Justice DelVecchio and others advised Judge Lopez not to issue a formal opinion explaining the sentence. IV:139-140. Justice DelVecchio also told Judge Lopez that it was "too late" to issue a sentencing memorandum. XI:128-9. Justice DelVecchio further advised Judge Lopez that it would not be a good idea to issue a sentencing opinion because it would probably promote more press activity. IV:139-40. Judge Lopez deferred to the Chief Justice with respect to the issuance of a sentencing memorandum (IV:144) and reluctantly decided not to issue such a memorandum.

ALLOWED EXCEPT THAT JUDGE LOPEZ WAS ACCEPTING OF THE CHIEF JUSTICE'S ADVICE ON THE SENTENCING MEMORANDUM BUT IGNORED HER ADVICE ON THE PRESS RELEASE. THE RESPONSIBILITY FOR HER ACTION OR HER LACK OF ACTION RESTS WITH JUDGE LOPEZ.

2. Joan Kenney Drafted and Issued a Press Release for Judge Lopez.

(107) On September 7, Supreme Judicial Court press officer Joan Kenney drafted

a press statement regarding the Horton case on Judge Lopez's behalf. X:155. Kenney recalls that she was the person who suggested the release. X:155.

ALLOWED BUT STATEMENT IS MISLEADING IN THAT IT WAS JUDGE LOPEZ WHO CONTACTED JOAN KENNEY. SEE X. 153

(108) Kenney wrote the press release on September 7. After doing so, she called Judge Lopez and read it to her over the telephone. IV:147. Kenney said she was "pretty sure" she "would have" faxed the release to Judge Lopez (X:165), but Judge Lopez has no recollection of receiving such a fax. IV:147.

ALLOWED BUT ONCE AGAIN MISLEADING. ALTHOUGH JOAN KENNEY "PHYSICALLY" WROTE THE PRESS RELEASE, SHE WAS DOING SO UNDER INFORMATION PROVIDED BY JUDGE LOPEZ.

(109) Judge Lopez's review of the press release took place as Kenney read it to her over the telephone. During that review she determined that the press release was "substantially accurate" (IV:148), and contained the information that she wanted to portray to the public. IV:148. Judge Lopez did not review the press release with the level of attention to detail that she would have given to a legal document such as sentencing memorandum. IV:147-148. Judge Lopez made no changes to the draft read to her by Kenney. II:60.

ALLOWED

(110) Kenney said that during their discussion either "she [Judge Lopez] or I" thought it would be a good idea to show the press release to Chief Justice DelVecchio. III:158. Kenney then faxed the press release to Justice DelVecchio, who sent it back with minor changes (X:164, Ex. 24), after speaking about the release with Judge Lopez. V:6.

Kenney called Judge Lopez after Justice DelVecchio made her revisions. X:165.

ALLOWED

(111) The press release was issued on September 7. X:166, Ex. 4.

ALLOWED

3. Both Chief Justice DelVecchio and Joan Kenney Believed that the Issuance of the Press Release Was Proper.

(112) Kenney considered the Horton matter a "pending case" at the time the press release was composed and issued. X:158. Kenney said that this was only her view, and that she was neither a lawyer nor a judge (X:196), and that she did not canvass the court to see if the judges shared her view. X:196.

ALLOWED

(113) Kenney said that she included the statement that judges are prohibited from commenting on pending case in the first sentence of the press release because it was her personal view that the case was pending (X.159). However, she insisted that the press release was proper in the context of the canon's prohibition on judicial comment on pending cases as it fell under the exception allowing judges to explain court procedures: Judge Lopez's comments "had nothing to do with the merits of the case" (X:204), but were simply "[e]xplaining procedures for public information." X:206.

ALLOWED EXCEPT THAT SHE WAS NEITHER A LAWYER NOR A JUDGE AND THAT THE PRESS RELEASE WENTTO THE MERITS OF THE CASE

(114) Chief Justice DelVecchio, on the other hand, testified that she believed that the case was "[p] robably not" pending at the time the press release was issued. XI:123.

While Justice DelVecchio stated that on other occasions she had counseled judges when she felt that they were going to embark on conduct proscribed by the canons, she did not tell Judge Lopez that she believed the issuance of the press release in this case transgressed any ethical rule. XI:124-5. Justice DelVecchio noted, however, that from a public relations standpoint she did not think that it was wise for Judge Lopez to comment publicly on the *Horton* matter, and that she advised Judge Lopez not to say anything for public relations reasons. XI:124-5. Significantly, however, Justice DelVecchio placed her imprimatur of approval on the press release by editing it (XI:120; Ex. 24; Ex. 50; Ex. 51), obviously indicating that she believed that the issuance of the press release was ethical. Most importantly, Judge Lopez took Justice DelVecchio's participation as an indication that she did not think that the issuance of the release was improper. V:24-5.

ALLOWED EXCEPT FOR THE LAST TWO SENTENCES WHICH ARE CONCLUSIONS, NOT FACTS. BUT IN FACT, CHIEF JUSTICE DELVECCHIO TESTIFIED ON DIRECT EXAMINATION THAT SHE *NEVER EVEN CONSIDERED THE CANONS* IN ADVISING JUDGE LOPEZ ON THE PERSONAL STATEMENT. ACCORDING TO THE CHIEF JUSTICE, JUDGE LOPEZ WAS RESPONSIBLE FOR HER OWN DECISION CONCERNING THE CANONS. SEE VOL. XI AT 125 ("I DIDN'T CONSIDER THE CANONS AT THE TIME, WHETHER IT WAS APPROPRIATE - BUT THAT'S UP TO HER TO CONSIDER. I DON'T TELL A JUDGE HOW TO CONDUCT THEMSELVES PURSUANT TO THE CANONS").

(115) Judge Lopez testified that based on her knowledge of the law and canons of judicial ethics, she also believed that the *Horton* matter was not a pending case for

purposes of issuing the press release. V:28. She issued the press release in good faith. Judge Lopez relied on DelVecchio's conduct, as well as the advice of the Supreme Judicial Court Public Information Office, in agreeing to have the release issued in her name. V:24-5.

DENIED

B. Judge Lopez Conveyed the True Facts of the Horton Case To Joan Kenney.

(116) Judge Lopez denies the Commission's charge that she misled Supreme Judicial Court's Public Information Officer Joan Kenney, concerning material information. She conveyed the true facts of the Horton case to Kenney.

DENIED

(117) Kenney had a full picture of the case at the time she wrote the press release. She knew all the information that the public knew. Additionally Judge Lopez told her, as was permissible in the context of Kenney's role as a part of the court, certain privileged information that Judge Lopez was not permitted to reveal to the public. Kenney crafted the phrase in Judge Lopez's statement pertaining to "certain facts" that would "undoubtedly change the characterization of this case" as reported by the media on the basis of this confidential information conveyed to her by Judge Lopez.

DENIED

1. Joan Kenney Had a Full Picture of the Case At the Time the Press Release Was Issued

(118) Joan Kenney had a full picture of the Horton case when she issued the press release on September 7, as a result of extensive conversations with Judge Lopez and of her monitoring of media reports regarding the case.

DENIED

(119) Neither Judge Lopez nor Ms. Kenney remembers the number of conversations they had on September 6 and September 7 (X.154; IV:146), however it is clear that they spoke about the case many times. X:155. The two had also spoken about the case on August 4, when Judge Lopez was confronted with the huge media presence at the courthouse. IV:51 These conversations took place in the midst of a rapidly evolving circumstances and intensive media coverage. Judge Lopez and Ms. Kenney had no single conversation in which Judge Lopez gave her a full briefing on the case. Rather, Judge Lopez told Kenney about the case in "bits and pieces," to use Kenney's words, as events unfolded. X:155.

ALLOWED

(120) Ms. Kenney acknowledged that based on these conversations and her following of the press coverage of the case, **she fully understood the fact that Horton had plead guilty** to "assault to rape, assault and battery or assault and battery with a dangerous weapon and the like" at the time she composed Judge Lopez's press statement (XI:69). While Kenney initially stated that her only source of information was Judge Lopez (X:157-8), she conceded that she had also read the press coverage of the case and watched the television coverage, (XI:70-71), because it was part of her responsibilities as the Supreme Judicial Court's Public Information Officer (XI:66).

ALLOWED

2. Judge Lopez Had Candid, "Off the Record" Conversations with Kenney.

(121) Judge Lopez's many conversations with Joan Kenney took place on a

confidential, off-the-record basis (XI.75-7). Kenney, as the Public Information Officer, was a court employee, whose role was to assist and advise judges in matters pertaining to the release of information to the public concerning the court system and individual cases. X:145-6. In order to perform this role, it was necessary for Kenney to have a full understanding of the matter at hand, and in this case, Judge Lopez provided Kenney with a full account of the background to the Horton case and Judge Lopez's views of the case.

ALLOWED EXCEPT AS TO THE CHARACTERIZATION OF THE WORDS "FULL ACCOUNT"

(122) Though this arrangement was informal, Kenney understood that the information Judge Lopez provided her was not to be disclosed to the public, except if Judge Lopez decided to disclose it:

> MR. EGBERT: These matters which she was discussing with you, which we've talked about—kidnapping, screwdriver and thoughts on sentencing and the like—other than the guidelines, those matters were matters which she indicated to you were not to be made public and you were not to publicly disseminate them; isn't that correct?
>
> MS. KENNEY: I don't remember her ever saying "You are not to disseminate this," but I just took it that that's what I should do.
>
> MR. EGBERT: Did you take it from the fact that in her press statement she said she was not permitted to talk about them, that you were also not permitted to talk about them?
>
> MS. KENNEY: I took it that way, that I shouldn't either, yes.

XI:77. Kenney clearly understood that Lopez was sharing with her was not to be disclosed to the public at large. (XI:75-77) Because of this understanding, Lopez saw fit to disclose confidential details about the case to Joan Kenney: She freely told Kenney not only the crimes to which Horton had pled, but also the representation the information she

had received prior to making her sentencing decision at the August 1 lobby conference. II:49-50, 55.

ALLOWED

3. Judge Lopez Provided Joan Kenney with a Truthful Account of the Facts of the *Horton* Case.

(123) Judge Lopez provided Joan Kenney with a truthful account of the facts of the *Horton* case, and did not knowingly provide false information about the facts of the case to Kenney.

DENIED

a. Judge Lopez Did Not Tell Joan Kenney that "the 11-Year Old Victim Was Not Kidnapped."

(124) The Commission repeatedly attempted to have Kenney testify that Judge Lopez told her that no kidnapping at all had occurred in the Horton case:

> Mr. Ware: Ms. Kenney, your best recollection is that Judge Lopez told you on or before September 7th that this was not a kidnapping; is that correct?
>
> Ms. Kenney: That's correct. Tr. X:209

Kenney, however, explained that what Judge Lopez had communicated was that the incident did not involve a kidnapping in the traditional sense because the boy was not kidnapped by the use of physical force, but he had willingly entered Horton's car:

> Mr. Egbert: You've testified continuously what [Judge Lopez] told you is, "It wasn't the traditional kidnap. The boy got into the car willingly," correct?
>
> Ms. Kenney: Yes.
>
> Mr. Egbert: That's what she said, correct?

Ms. Kenney: Yes. The implication was he wasn't snatched off the street and kidnapped. He got into the car willingly.

Mr. Egbert: He got in willingly. He was not snatched off the street by the arm or something, correct?

Ms. Kenney: That's correct.

Mr. Egbert: Or by gun point, whatever the case may be.

Ms. Kenney: That's correct.

Tr. X:210. This was an accurate portrayal of the events at issue, and, indeed, was consistent with the Commonwealth's own version of the events: During his factual recitation at the September 6 sentencing hearing, ADA Deakin stated that "the defendant asked the victim to get into the car, and the boy agreed." Ex. 22 at 13. The Commonwealth never asserted that Horton had pulled the child into the car using physical force. As demonstrated by the record, Judge Lopez described the circumstances surrounding the kidnapping offense to Joan Kenney in a truthful manner. There is no support for a claim that Judge Lopez told Joan Kenney that no kidnapping had occurred.

NEITHER ALLOWED NOR DENIED BECAUSE OF CHARACTERIZATION

b. Judge Lopez Did Not Tell Joan Kenney that the Defendant Did Not Use a Screwdriver as a Weapon in the Commission of the Offense.

(125) Judge Lopez did not tell Kenney that the screwdriver had not been used as a weapon, but rather that that were disputed facts about the screwdriver at the August 1 lobby conference (II:90-91), and that Horton later pled guilty to using the screwdriver as

a weapon. X:212-213.

ALLOWED

(126) As noted above, Judge Lopez did not simply describe what had occurred at Horton's plea and sentencing to Kenney, but also described (1) the background information she had received prior to making her sentencing decision at the August 1 lobby conference, II:49-50, 55, and (2) her thought processes with regard to the sentence. IV:145. While Kenney, on the one hand, stated that she recalled that Judge Lopez told her that the screwdriver had not been used as a weapon, (X:209), she also testified that she knew from her conversations with Judge Lopez that "the defendant admitted to the kidnapping and admitted to using the screwdriver as a weapon" (X:212):

> Mr. Ware: Did she tell you that during the course of the guilty plea the defendant admitted the kidnapping and admitted using the screwdriver as a weapon?
>
> Ms. Kenney: Yes, I did know that.
>
> Mr. Ware: Did you know that from the course of your discussion with the Judge or did you know it from the fact of there being a guilty plea?
>
> Ms. Kenney: Well, when I asked the Judge what the defendant had agreed to, she told me those charges, and those were the things that he had agreed to. So I knew it from that.

X:212-213. Thus, the record reflects that in addition to informing Kenney that there had been a dispute about whether Horton had used the screwdriver as a weapon on August 1, (II.90), Judge Lopez expressly communicated to Kenney that Horton had later admitted to using the screwdriver as a weapon.

ALLOWED

c. Judge Lopez Did Not Falsely Tell Joan Kenney that Her Statement During Horton's Sentencing that "in the Scale of Cases that Charge Sexual Assault of Children, this is on a Very Low Level" was a Reference to the Proposed but Never Enacted Sentencing Guidelines.

(127) In the course of her conversations with Joan Kenney, Judge Lopez noted that her remark in court that "in the scale of cases that charge sexual assault of children, this is on a very low level" (Ex 22 at 31) was made in reference to sentencing guidelines used by judges. X:159. While Joan Kenney testified that she believed that Judge Lopez was trying to explain to her that her remark in court was a reference to proposed but never enacted sentencing guidelines, Kenney readily acknowledged that she and Judge Lopez "didn't discuss the sentencing guidelines in any detail." X:201. There was no conversation between Judge Lopez and Kenney as to what Judge Lopez meant by her "sentencing guidelines" reference. In fact, as Judge Lopez explained, her mention in court of the "sentencing guidelines used by judges" in describing the *Horton* case as "low level" or "low scale" was not intended to refer to the proposed but never enacted sentencing guidelines. IV:134-135, 152-154. Rather, Judge Lopez was referring to the standard factors that judges consider in determining the appropriate sentence, including the nature of the offense and the characteristics of the defendant. Judge Lopez did not make a false statement to Joan Kenney regarding the sentencing guidelines.

ALLOWED

C. The Statement in the Press Release That There Were "Certain Facts" About the *Horton* Case Which Formed the Basis for Judge Lopez's Sentence, Which She Could Not Reveal to the Public, Was Truthful.

(128) The release issued by Kenney's office in Judge Lopez' name stated that

"there were certain facts before me, known by the prosecutor and the defense attorney, that were part of the plea conference and cannot be revealed by me, but which would undoubtedly change the characterization of this case as currently reported by some media outlets." Ex. 4. As Judge Lopez testified, this statement accurately refers to true facts about the case that affected Judge Lopez's sentencing decision in the case. The facts she referred to included the facts contained in the psychological assessment and the defendant's criminal record information. IV:156. Among the confidential subjects discussed in the psychosocial report were:

- The likelihood that Horton would recidivate. Ex. 3 at 1.
- Horton's transgendered status. Ex. 3 at 1.
- Horton's program of hormone therapy. Ex. 3 at 1.
- Horton's status with respect to surgical castration. Ex. 3 at 1.
- Details of Horton's struggle with psychological and social issues surrounding his sexual identity. Ex. 3 at 1.
- The status of transgender issues as the defining factor in Horton's life. Ex. 3 at 1.
- Horton's initial gender issues in early childhood. Ex. 3 at 1.
- Transgender concerns of Horton's cousin. Ex. 3 at 1.
- Horton's problems in school with respect to transgender issues. Ex. 3 at 1.
- The circumstances of the dissolution of Horton's family. Ex. 3 at 2.
- Horton's mother's refusal to allow Horton's father to have contact with Horton. Ex. 3 at 2.
- Horton's mother's drug use and subsequent recovery. Ex. 3 at 2.
- Horton's mother's physical and verbal abuse of Horton. Ex. 3 at 2.
- The circumstances of Horton's father's death. Ex. 3 at 2.
- The details of Horton's relationship with his mother and stepfather. Ex. 3 at 2.
- Horton's counseling record. Ex. 3 at 2-3.
- The circumstances of Horton's decision to stop using prescription anti-depressants. Ex. 3 at 3.
- Horton's chronic depression. Ex. 3 at 3.
- Horton's suicidal ideation. Ex. 3 at 3.
- Horton's need to spend time with individuals closer to his age. Ex. 3 at 3.
- Horton's low self esteem and concerns about what to do with his life. Ex. 3 at 3.
- Horton's receipt of a GED. Ex. 3 at 3.

- Horton's ambitions to attend college. Ex. 3 at 3.
- Horton's status with respect to substance abuse. Ex. 3 at 4.

Among other things, the "certain facts" referred to by Judge Lopez from the psychosocial report were that (1) Horton was not a predatory pedophile who was likely to reoffend (V:29), (2) Horton's criminal record which showed no indicia of predatory behavior (V:30), (3) Horton had been receiving hormone treatment but had not yet undergone surgical castration (III:114), (4) Horton was struggling with a variety of psychological and social issues around her sexual identity and that her life had been defined, for the most part, by gender issues (III:115), (5) Horton had been taunted at school and that she dropped out in the twelfth grade (III:115-6), (6) her parents had separated when she was young because her father had an affair with a younger woman (III:116), (7) her mother refused to allow her contact with her father (III:116), (8) her mother became a drug addict during Horton's childhood and was physically and verbally abusive to Horton (III:116), (9) around age 12, her father died of sickle cell anemia (III:116-117), (10) Horton's mother rehabilitated herself and had been drug free for a number of years (III:117), (11) Horton had became active in church activities (III:117-8), (12) that Horton had been receiving counseling and wanted to resume (III:118), (13) Horton had chronic depression along with suicidal thoughts that surfaced when she was under severe pressure (III:119), (14) Horton had been on medication but was frightened off medication because of information provided by her friends (III:119), (15) Horton was receiving hormone therapy and needed to continue with it (III:119), (16) Horton's incarceration before she made bail was a chilling experience (III:120), and (17) further incarceration would be a disaster for Horton and would place her at considerable risk, and that she might not

survive the prison system (III:120). Judge Lopez testified that these facts were very important to her in her decision in the case. IV:156.

DENIED - SEE DECISION

(129) When Judge Lopez was asked, during her statement before the Commission, what the "certain facts" statement in the press release was meant to allude she said "I don't know." Ex. 32 at 147. As Judge Lopez clarified a few minutes later what she meant by the answer "I don't know," was that she did not know what Joan Kenney was thinking when the statement was drafted:

> Mr. Ware: At the risk of repeating myself, you're not sure what facts this is referring to when it says, quote, certain facts?
>
> Mr. Mone: Not only are you repeating yourself, she's repeating the answer.
>
> Judge Lopez: I would be repeating myself. I don't know exactly what was in Joan Kenney's mind or Chief Justice DelVecchio's mind when that sentence was put in there.

Ex. 32 at 148-149.

DENIED -SEE DECISION

(130) As Judge Lopez made explicitly clear at her deposition, when she said she didn't know what the "certain facts" statement in the press release was meant to allude to, she was simply stating the obvious—that she could not read Joan Kenney's mind. Having testified that she did not know precisely what Joan Kenney's intentions were, however, Judge Lopez proceeded to explain some aspects of the case that Kenney and Chief Justice Delvecchio may have had in mind: "It very well could have been that I discussed the sexual identity disorder with them, I discussed that person is not a predatory pedophile; that there were different versions at one point during the lobby as to what

happened." Ex. 32 at 148-9. Thus, while Judge Lopez stated that she did not know precisely what the "certain facts" Kenney may have had in mind, she knew that she had provided the authors with information that supported the statement, Ex. 32 at 147, and in her own mind, Judge Lopez knew, as discussed *supra*, that there were indeed certain non-public facts—the defendant's criminal record and the majority of the information in the psychological assessment—that she had considered in her sentencing of Horton.

DENIED - SEE DECISION

D. The Statement in the Press Release Regarding the Horton Case Being A "Low Level" Matter was a Reference to the General Factors Used by Judges in Determining the Appropriate Sentence, Rather than a Reference to Any Proposed but Never Enacted Set of Sentencing Guidelines.

(131) On September 6, 2000 Judge Lopez stated in open court that "in the scale of cases that charge sexual assault of children, this is on a very low level." Ex 22 at 31. As noted above, Judge Lopez intended this statement as a reference to the standard factors that judges consider in determining the appropriate sentence, including the nature of the offense and the characteristics of the defendant. IV:134-135, 152-154. As Judge Lopez testified, the statement issued by the Supreme Judicial Court press office and attributed to her fairly portrayed what she meant by this remark (IV.154). In that statement Judge Lopez is quoted as saying that the case "was a 'low scale' matter pertained solely to the appropriate level of the sentencing guidelines used by judges in sentencing convicted defendants." As Judge Lopez testified it would have been better to have used language which described her statement in court as pertaining to "the factors that would be considered by judges in arriving or in determining the appropriate level of sentencing guidelines." IV:153. As Judge Lopez explained, she felt that the sentence in Kenney's

draft fairly portrayed what she was trying to say (IV.154), and she therefore did not correct it.

ALLOWED

X. CONTACTS WITH DETECTIVE JAY GREENE

A. Judge Lopez Telephoned Detective Jay Greene of the Boston Police Department.

(132) Judge Lopez received a voicemail message from Goldbach, which informed Judge Lopez that Detective Greene wanted to speak with her and provided Detective Greene's beeper number. III:30. In response to this message, Judge Lopez then called Detective Greene's beeper number and left a call back number. V:30. Greene called Lopez back and told Lopez that

> he felt badly about the way this was being handled and how I was being attacked and maligned in the press and that he thought it was unfair for me to be being treated this way. He then also told me that he was a regular cop in that area.

V:35-6. Greene went on to describe to Lopez his knowledge of Horton, stating that:

> In the area where Ebony Horton and the victim were that day, the day of the incident; that he was familiar with Ebony Horton; she was well known in that neighborhood; she was flamboyant; she attracted attention, and he said that he didn't believe she would be a pedophile.

V:36. *See also*, Ex. 32 at 47, 48-49. During this conversation, Judge Lopez and Greene did not discuss the victim. Ex. 32 at 50.

DENIED - SEE DECISION

(133) Judge Lopez testified that she told "hundreds" of people that "I made the call, based on what I had seen, that Ebony Horton is not a predatory pedophile. I would

not have released a predatory pedophile, and let me tell you, the local cop on the beat agrees with me." Ex. 32 at 54-55 (emphasis supplied). There is nothing in the police reports, Horton's admissions or guilty plea, which indicates that Greene's statement to Judge Lopez that he did not believe Horton to be a pedophile was false. Judge Lopez asked Greene if he would be willing to speak with Joan Kenney, and he said "Yes." V:36. Lopez at no time asked Greene to speak on her behalf or to issue any statements to the press of his own. V:36.

ALLOWED. NEITHER ALLOWED NOR DENIED AS TO LAST SENTENCE.

B. Judge Lopez Suggested that SJC Press Officer Joan Kenney Contact Detective Greene.

(134) Only after the Public Information Office of the Supreme Judicial Court issued the September 7 press statement did Kenney contact Greene at the suggestion of Judge Lopez. XI:55. Judge Lopez never related to Kenney any of the substance of her conversation with Greene, but simply told her that "he would have information that would be useful or interesting for [her] to hear." X:172, XI:50. Kenney subsequently called Greene. XI:52. Judge Lopez was not a participant in the phone call between Kenney and Greene, and Greene provided Kenney with additional information that was different from the information provided to Judge Lopez in that it concerned the victim, (XI:53-54), whereas, as described above, the information provided to Judge Lopez by Greene concerned only Horton. Kenney testified that Greene told her that he knew the boy and his brother, and believed Greene indicated that this was not the first time that one of them had "gotten into a car." XI:53. Kenney took this comment to mean that the boy

or his brother had previously gotten into the car "with Mr. Horton." XI:53. Kenney said that she found this information to be "in concert" with what Judge Lopez was telling her. XI:54. Greene told Kenney that he would not speak with the press, and Kenney called the Boston Police Department spokesperson about the procedure to release the information. X:168. The spokesperson told her that "this was a case involving a child, [a] sexual assault case, and that they would not release information." X:168. Kenney testified that Greene would not "verify" this information and that she did not disclose it to the press. X:169-70.

DENIED - SEE DECISION

XI. JUDGE LOPEZ'S POST-SENTENCING CONTACTS WITH GREENE, GOLDBACH AND LEAHY WERE NOT IMPROPER AND IN FURTHERANCE OF SJC PUBLIC INFORMATION OFFICE POLICIES.

(135) Joan Kenney testified that the SJC's Public Information Office regularly looks for "supporting people" to make statements on behalf of a judge under fire in the press. X:206. When Kenney contacts people for such support, she calls not on behalf of the Court as a whole, or on her own behalf, but directly on behalf of the judge in question. X:208. As Kenney explained, the purpose of such calls is to find someone to "help the judge." X:208. Judge Lopez's calls to Leahy, Goldbach and Greene to mobilize them to act as "supporting people" were similar to the calls that Kenney stated she makes on a routine basis for judges in the court system.

DENIED

XII. PHONE CALL TO SISTER ANGELA BEAUCAGE.

(136) On or about November 1, 2000, Judge Lopez received (III:95) a copy of a typewritten complaint from an individual whose street address was in Billerica. XI:12.

The complaint had been received by the Commission, and a copy had been provided to Judge Lopez by the Commission. III:95.

ALLOWED

A. Judge Lopez's Suspicions of the Complaints Against Her Were Justified By Her Past Experience

(137) Judge Lopez had earlier determined that two of the "complaints" filed against her regarding the Horton matter were fraudulent and made by fictitious individuals. III:90-95. Furthermore, in another case involving members of the DeMoulas family, she had also been victimized by bogus hate letters that had been sent to the Commission. III:80-83. Because the Beaucage complaint came nearly two months after the initial flood of complaints relating to the Horton incident had ended, Judge Lopez strongly suspected that the complaint purporting to be lodged by an individual named Beaucage was bogus. III:95.

ALLOWED

B. Judge Lopez's Phone Call to Sister Beaucage Was Intended Simply to Verify the Sister's Identity.

(138) Because of her belief and past experience, Judge Lopez decided to call the phone number listed on the complaint purporting to be from a Sister Angela Beaucage, believing that her phone call would reveal no such person. III:95-96. She used her home telephone for this purpose. III:95-96. When Judge Lopez placed the call, the individual who answered the phone identified herself as the complainant, Sister Beaucage. III:96. Judge Lopez did not engage in an extended dialogue but simply terminated the call (XI:17), having confirmed that the complaint was not bogus. III:97. Under the circumstances, and in light of her prior experiences, Judge Lopez did not engage in

misconduct by making the call solely to verify that the complainant was not a fictitious person.

DENIED

C. Sister Beaucage's Reaction to Judge Lopez's Telephone Call.

(139) Sister Beaucage testified that Judge Lopez was courteous during their telephone conversation and that the Judge was not threatening or arrogant. XI.30. Beaucage stated that there was nothing in the substance of the phone call itself that intimidated her in any way. XI.46. She stated, however, that her characterization of the call changed when she looked at her caller ID, and realized that she had been speaking with Judge Lopez. At her December 18, 2001 interview with the Commission, Sister Beaucage first described her reaction to the discovery as follows: "I looked at the number because it registers the name and the number, and I just knew she lived in Newton ... and I just knew it was her. And then, of course, upsetting, and I just wondered what was going on. I thought it was strange." (Interview of Angela Beaucage at 14.)[23] Beaucage then proceeded to characterize the call, in the course of discussion about the details of what happened, as "disturbing." (Interview of Angela Beaucage at 14.) Notably,

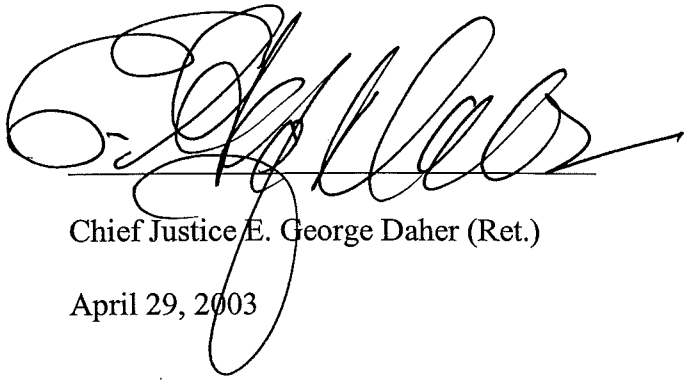
[23] Judge Lopez proffered Ms. Beaucage's prior testimony before the Commission to impeach her testimony at the hearing that she perceived Judge Lopez's call to be threatening or intimidating. The transcript was offered to prove that her use of the word "intimidating" had been the product of the Commission's prompting during the unexplained off the record discussion. The Commission objected to the admissibility of this transcript as if there were some general rule that prior reported testimony is inadmissible. The objection was groundless. The Hearing Officer erred in sustaining it. XI:42-44. The transcribed testimony is clearly admissible to impeach Ms. Beaucage's testimony. *See generally, Commonwealth v. Daye,* 393 Mass. 55, 65-75 (1984). The Commission, not Judge Lopez, had the opportunity to interrogate Ms. Beaucage on the occasion in question, and yet it objects to the admissibility of evidence of what occurred during its unilateral interaction with Ms. Beaucage. The Commission's effort to exclude evidence of its own conduct, which bears directly on the credibility of its witness, is inconsistent with a fair and accurate determination of the truth. The Hearing Officer should correct his ruling; to do otherwise would deprive Judge Lopez of a substantial evidentiary basis of her defense to this charge and would thereby deny her due process of law.

however, she did not at this point describe the fact of the call as threatening or intimidating. However, following an off the record discussion with Commission counsel, Sister Beaucage, without even being prompted by any question, immediately volunteered a characterization of the call as intimidating:

> A: Maybe that's all she said, you know. I was just waiting for the nurse to tell me something and that's it.
>
> (Discussion off the record.)
>
> A. I would say intimidating.

Interview of Angela Beaucage at 16. From this point on Sister Beaucage testified she found the fact that Judge Lopez called her to be not only "strange" and "disturbing" but a an act of intimidation. It is readily inferable that Beaucage's testimony was influenced by the Commission's off-the record discussion with her (the reason for the off the record foray does not appear). No reason for the off-the-record discussion appears, but the results of the discussion are evident, and taint Ms. Beaucage's testimony that she ever did have an actual and unprompted perception that Judge Lopez's call was "intimidating." Moreover, Ms. Beaucage testified before the Hearing Officer that the discussion off the record noted in the notarized transcript of her interview with the Commission never took place, which further undermines her credibility with regard to her characterization of Judge Lopez's call as intimidating. XI:40. Beaucage's testimony that she felt intimidated is unworthy of belief.

DENIED



Chief Justice E. George Daher (Ret.)

April 29, 2003