

COMMISSION ON JUDICIAL CONDUCT  
Complaint No. 2000-110 et seq

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In the Matter of Investigation of:       :  
The Honorable Maria I. Lopez,           :  
Associate Justice, Superior Court       :  
Department                               :  
- - - - - x

BEFORE: Hearing officer E. George Daher,  
          Chief Justice (Ret.)

Harvey Chopp, Clerk

APPEARANCES:

Goodwin Procter  
    (by Paul F. Ware, Jr., Esq., Roberto  
    M. Braceras, Esq., and Cheryl R.  
    Brunetti, Esq.) Exchange Place, Boston, MA  
    02109, for the Commission on Judicial  
    Conduct.

Law Offices of Richard M. Egbert  
    (by Richard M. Egbert, Esq.  
    and Patricia A. DeJuneas, Esq.)  
    99 Summer Street, Suite 1800,  
    Boston, MA 02110, for the Honorable  
    Maria I. Lopez.

Held at:  
Edward W. Brooke Courthouse  
24 New Chardon Street  
Boston, Massachusetts  
Tuesday, November 19, 2002  
9:30 a.m.

(Jane M. Williamson, Registered Merit Reporter)

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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Maria Lopez (By Mr. Ware)	2-5			
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## E X H I B I T S

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## P R O C E E D I N G S

1  
2 HEARING OFFICER DAHER: Mr. Ware, do you  
3 want to pick it up?

4 MR. WARE: Your Honor, if I could just  
5 comment on the exhibits in the case. The Court's  
6 been given an exhibit -- at the beginning of the  
7 book, Your Honor, there's an exhibit list. And just  
8 so the record is clear and the Court is clear,  
9 exhibits which are in by agreement are in normal  
10 typeface, if you will. Exhibits as to which there  
11 remains some dispute are in bold, just so the Court  
12 knows.

13 HEARING OFFICER DAHER: Thank you.

14 MR. WARE: The tape that will be played  
15 this morning or the clips of the tape that will be  
16 played this morning, I would just note Exhibit 41 is  
17 the entire videotape which I will offer during the  
18 course of the proceedings. I may not offer it this  
19 morning. And in addition, I intend to offer a  
20 CD-ROM with those portions that we have in fact  
21 played, as well as the entire videotape.

22 MR. EGBERT: Judge, I have no objection to  
23 the videotape. I would object to it being played in  
24 excerpts. I think it should be played in full so

1 you have a complete understanding of the proceeding  
2 that's at hand.

3 MR. WARE: Well, again, this is my  
4 examination. I don't want to spend the time playing  
5 the entire videotape. If counsel wants to do that,  
6 that's okay. We have it here. He can do it.

7 HEARING OFFICER DAHER: All right, fine.

8 MR. EGBERT: You're the master of the  
9 efficiency of it. I'm going to ask that the whole  
10 thing be played, so it doesn't seem to me to make a  
11 lot of sense to play 20 minutes of excerpts and then  
12 play the whole tape, because I assure you that --

13 HEARING OFFICER DAHER: He's giving you  
14 advance notice that he's going to request that the  
15 entire tape be played. But how does that fit with  
16 your presentation? You can present your  
17 presentation in segments, and if he wants to play  
18 the entire tape, he can.

19 MR. WARE: Yes.

20 HEARING OFFICER DAHER: That's how it's  
21 going to come out.

22 MR. WARE: Thank you, Your Honor.

23 THE CLERK: You're still under oath.

24 THE WITNESS: Yes.

MARIA LOPEZ, Previously Sworn  
DIRECT EXAMINATION, Resumed

BY MR. WARE:

Q. Judge Lopez, before we go to the videotape of the hearing on December 6th, I'd like to return just for a minute to the findings you made on August 4th. And I've put on the monitor the finding with respect to -- it should be on the monitor in front of you so you don't have to turn around uncomfortably there.

In any event, this was one of the findings that you made: "Ms. Joseph has a habit of doing this," and we talked about it in some detail yesterday, correct?

A. Correct.

Q. Now, leading up to this was the what we've called lobbying of the case or plea conference on August 1, correct?

A. Correct.

Q. That conference in the real world occurred at side bar, didn't it?

A. Yes, it did.

Q. So even though we've used the term "lobbying" or "lobby conference," it is in fact a

1 side-bar conference in the First Session -- or at  
2 least was in this occasion.

3 A. Generally that's -- some judges do it in  
4 the lobby. Some judges do it at side bar.

5 Q. But in this particular case, in the Horton  
6 case, on August 1, 2000, it was in fact a side-bar  
7 conference.

8 A. It was.

9 Q. And it's length was roughly five minutes;  
10 is that correct?

11 A. I would think not, because I had a lot of  
12 information to read.

13 Q. Well, what is your estimate?

14 A. Maybe 15.

15 Q. Fifteen minutes?

16 A. Yeah.

17 Q. In the First Session?

18 A. I remember I had to review a police report,  
19 a psychological evaluation, the defendant's criminal  
20 record, I had to listen to both counsel, and then I  
21 had to make up my mind as to what I thought an  
22 appropriate sentence in this case would be. So --

23 Q. And -- please go ahead.

24 A. I can't imagine I would do that in five

1 minutes.

2 Q. I'm not asking you to imagine. Do you have  
3 a recollection how long this particular conference  
4 was on August 1? Yes or no?

5 A. My recollection is it would have been about  
6 15 minutes.

7 Q. Now, Judge, having made the finding that I  
8 have put on the monitor that "Ms. Joseph has a habit  
9 of doing this," you've testified, have you not, that  
10 that was based on the fact of what occurred in the  
11 Horton case, plus Calixte and Estrada; isn't that  
12 correct?

13 A. Yes.

14 Q. And when you testified for the Commission,  
15 that's indeed what you said; that it was Calixte and  
16 Estrada and the fact that the press was present in  
17 this case, isn't that so?

18 A. I believe that when I referred to -- can I  
19 see it again?

20 Q. Yes.

21 A. My findings.

22 Q. Your findings would be Exhibit 17, Judge.

23 A. I believe -- and maybe we were confused  
24 yesterday -- "a habit of doing this" is that when

1 she is unhappy with the disposition that the Court  
2 imposes, she goes to the press and criticizes the  
3 judge.

4 Q. I'm not asking you for your rationale. The  
5 fact is, the experience which gave rise to your  
6 finding that Ms. Joseph had a habit was Calixte,  
7 Estrada, and Horton; isn't that right?

8 A. Correct.

9 Q. And that's indeed what you said when you  
10 testified before Commission counsel 13 months ago;  
11 isn't that right?

12 A. Yes.

13 Q. At some time you mentioned yesterday that  
14 there was a column by Eileen McNamara, correct?

15 A. Yes.

16 Q. And you characterized that column as  
17 representative of Ms. Joseph's criticizing you or  
18 your sentence, is that so?

19 A. In making what I deemed to be inappropriate  
20 and probably unethical comments to the press.

21 Q. All right. So this Eileen McNamara article  
22 you would say represented criticizing your sentence,  
23 criticizing you, and making unethical comments to  
24 the press; is that correct?



1           A.    Yes.  
2           Q.    Let's take a look at that article, just for  
3 a moment. I think it's Slide 74, and in hard copy  
4 this appears as Exhibit 43 for identification.  
5           A.    I can hardly see this.  
6           Q.    It may be easier to see in the monitor, but  
7 in any event, this is the article to which you  
8 refer; isn't that so?  
9           A.    I believe so.  
10          Q.    And within that article there are some  
11 comments by Ms. Joseph as a result of an interview  
12 she was asked to give by the district attorney,  
13 correct?  
14          A.    I don't know how this conversation with  
15 Eileen McNamara came about.  
16          Q.    But you know there are some comments in  
17 here from Ms. Joseph.  
18          A.    I do know that.  
19          Q.    Now, what Ms. Joseph says here -- and I put  
20 it on the monitor -- is nothing specific to Judge  
21 Lopez; isn't that true? This is a discussion of the  
22 circumstances of sentencing a child abuser, correct?  
23          A.    Can I read the entire article, because you  
24 asked me --

1 Q. If you would like to read the entire  
2 article, you may do that. I will show you all of --  
3 on the monitor I will show you all of what Ms.  
4 Joseph said.

5 A. (Witness reviews document) Yes, I think  
6 I've been able to read most of it. It's very hard  
7 for me to -- my eyes are not -- go ahead.

8 Q. Have you had enough time to read the  
9 article?

10 A. I think so, yes.

11 Q. All right. Now, what the article says in  
12 terms of comments by Ms. Joseph, as is displayed on  
13 the monitor, "If you say 'he's not a threat because  
14 he just raped a girl in his own household,' then  
15 can't you also look at the car thief and say 'this  
16 guy's not a threat to me because he only steals cars  
17 in poor neighborhoods' or 'that guy is not a threat  
18 to me because he only breaks into houses in rich  
19 neighborhoods'? Is that how we want to mete out  
20 justice?"

21 At that point that is an accurate quotation  
22 of what Ms. Joseph says according to the article;  
23 isn't that so?

24 A. That's what the article says, yes.

1 Q. And nothing in that paragraph says anything  
2 about Judge Lopez. In fact, it doesn't even say  
3 much about the Estrada case, does it?

4 A. I think it says a lot and it's  
5 characterized the facts in the Estrada case, and  
6 those facts I am sure are provided by Ms. Joseph or  
7 the district attorney's office.

8 Q. Do you see anything in that paragraph which  
9 is specific to Judge Lopez or what kind of a judge  
10 you are or what kind of sentences you mete out?

11 A. Yes.

12 Q. All right. Would you agree that your name  
13 is not mentioned in the paragraph?

14 A. Let me see where it is in context, because  
15 I think I was mentioned right before that in the  
16 preceding paragraph.

17 Q. By the author, Ms. McNamara?

18 A. Where does that come up in this article?

19 Q. Judge, if you would, stick with me. Let's  
20 just talk about --

21 MR. EGBERT: She's sticking with you.  
22 She's looking for the answer to your question.

23 MR. WARE: I don't believe so.

24 Q. Do you see your name in the paragraph

1 that's on the monitor?

2 A. Not in that paragraph.

3 Q. All right. Let's look at the rest of what  
4 Ms. Joseph said.

5 Ms. Joseph goes on to say, "Is jail the  
6 perfect solution in every case? No. But even brief  
7 jail time sends a message to everyone, especially  
8 the victim, that society does not condone the rape  
9 and beating of children -- even in your own house.  
10 If we don't send that message, how else do we break  
11 the cycle? All the studies show the abused often  
12 become abusers. They learn that violence is an  
13 acceptable way to deal with stress. How do we tell  
14 kids that adults in their lives can beat them or  
15 rape them and then walk free?" Do you see that?

16 A. Yes.

17 Q. Is your name mentioned in that paragraph?

18 A. Not in that paragraph.

19 Q. And does Ms. Joseph make any comment about  
20 you in that paragraph?

21 A. Absolutely.

22 Q. Your view, Judge, is that the district  
23 attorney is not entitled to comment even on the type  
24 of child abuse case at issue following your

1 sentence?

2 A. That is not my view.

3 Q. Well, what do you think in that paragraph  
4 the district attorney's office could say?

5 A. I'm sure there's a lot of things they could  
6 have said.

7 Q. Why don't you turn your attention to this  
8 particular language, and you tell us which of that  
9 language is permissible for a district attorney  
10 representing the public to say following sentencing  
11 in this kind of abuse case.

12 A. Did you ask me permissible or  
13 impermissible?

14 Q. Permissible. What do you think breaks the  
15 rules in this paragraph, Judge?

16 A. I'm not suggesting that this breaks the  
17 rules. I'm suggesting it's a criticism of my  
18 sentence.

19 Q. So you're saying that the statement is a  
20 permissible statement, but it nonetheless criticizes  
21 you personally.

22 A. Correct.

23 Q. And where do you see the personal criticism  
24 in this particular quotation?

1           A.    It concerns a sentence I imposed.  
2           Q.    And that is your standard.  That so far as  
3 the district attorney commented on the sentence you  
4 imposed and at least impliedly disagreed with that  
5 sentence, that that is a personal criticism of Maria  
6 Lopez.  Is that your testimony?  
7           A.    Of the sentence that Judge Lopez imposed.  
8           Q.    Is the public or a newspaper or any media  
9 outlet entitled to criticize a sentence of a judge?  
10          A.    Totally.  
11          Q.    What do you see in that paragraph that goes  
12 beyond, as you've said, criticizing the sentence?  
13          A.    That a member of the bar, an officer of the  
14 court, went to the press in order to criticize and  
15 bring pressure on judges whose sentence they don't  
16 approve of.  
17          Q.    So what you disagreed with here was not  
18 something specific to you; rather it was the  
19 district attorney's office was somehow intimidating  
20 with this article all judges of the Superior Court  
21 in sentences in criminal cases in the Commonwealth?  
22          A.    I think that these kinds of articles would  
23 have a chilling effect on the exercise of  
24 independent judgment by the judiciary, absolutely.

1 Q. In any event, without spending the morning  
2 on this, this is an impermissible comment or article  
3 in a newspaper. The public shouldn't see this  
4 according to you; is that right?

5 A. I don't think it's an impermissible  
6 comment. It is just a comment that comes from Leora  
7 Joseph, who is an officer of the court, who is a  
8 lawyer before me in a case.

9 Q. Let's look at the earlier quotation, the  
10 previous slide. This is the beginning of Ms.  
11 Joseph's comments.

12 What is it in the text of that comment that  
13 you say the district attorney's office is not  
14 entitled to have said to the public press, or the  
15 press is not entitled to have printed?

16 A. Okay; let me -- I'm trying to find where  
17 this occurs in this so I can put it into context,  
18 Mr. Ware.

19 Q. Let me see if I can help you on that.

20 A. Take your time.

21 MR. EGBERT: May I suggest that I hand her  
22 a copy?

23 MR. WARE: Sure.

24 MR. EGBERT: This is a legible copy. Why

1 don't you read that.

2 A. Okay.

3 Q. Take your time and see if you can find this  
4 paragraph on the Internet version of this article.

5 A. Yes, I got the paragraph, yes.

6 Q. Now, Judge, again, you are saying, with  
7 respect to these comments by the assistant district  
8 attorney, that these comments are critical of your  
9 sentence, correct?

10 A. Yes.

11 Q. And that you object to that the district  
12 attorney's office should make statements published  
13 by the press critical of a sentence handed down in  
14 this critical case.

15 A. And that I object to? I think Ms. Joseph  
16 in this statement shows an ignorance, total  
17 ignorance about the different types of sexual abuse  
18 cases. And I believe that there is huge hyperbole  
19 in this.

20 Q. Will you point out to us the huge  
21 hyperbole, Judge?

22 A. Because this shows --

23 Q. Please, if you would, point out the huge  
24 hyperbole, Judge. Tell us the words.



1           A.    Her equation to it.  It's in response to an  
2 article.  
3           Q.    Judge --  
4           MR. EGBERT:  Let her finish.  
5           Q.    Judge, point out the words that you are  
6 characterizing as "huge hyperbole."  
7           HEARING OFFICER DAHER:  It's a very simple  
8 question, Mr. Egbert.  He asked her to point out and  
9 explain and show the hyperbole.  
10          MR. EGBERT:  And she was about to show him  
11 the context --  
12          MR. WARE:  I don't want the context.  
13          Q.    I want the words you're saying --  
14          MR. EGBERT:  It's not a vacuum cleaner.  
15          MR. WARE:  You're entitled to question when  
16 I sit down and not make speeches.  
17          HEARING OFFICER DAHER:  Overruled.  Go  
18 ahead.  
19          MR. WARE:  Thank you, Your Honor.  
20          Q.    Judge, you said that there are words here;  
21 that in this statement there is huge hyperbole.  I  
22 want you to show us the words which you've  
23 characterized as hugely hyperbolic here.  
24          A.    The statement is in response to --

1 Q. Judge, are there words in this paragraph or  
2 are there not which are, in your view, "huge  
3 hyperbole"?

4 A. Correct, because the sentence I imposed  
5 protected the child.

6 Q. All right. Show us the huge hyperbole.

7 A. The hyperbole is the -- the implication of  
8 this is that Mr. Estrada remained a threat to the  
9 victim in this case by analogizing it to, you know,  
10 stealing cars in poor neighborhoods. This had  
11 nothing to do with that, and it doesn't speak to the  
12 sentence I imposed.

13 Q. Are you telling us that the fact that the  
14 assistant district attorney used a metaphor or an  
15 analogy of thievery when discussing a Nashua Street  
16 guard -- excuse me -- a Nashua Street jail guard who  
17 repeatedly raped his stepdaughter while she was ages  
18 11 to 15, that that's over the top? That's  
19 hyperbole?

20 A. I'm not sure that that's the case. My  
21 recollection is there were two -- that was not the  
22 case and the facts of the case. That may be what  
23 you've read from the DA's office.

24 Q. Yesterday you thought that was the case.

1 You now have a different recollection?

2 A. I did not say that was the case.

3 Q. Are you saying that for the district  
4 attorney to talk about a child abuser who has  
5 admitted guilt with respect to having raped his  
6 stepdaughter for four years during her age 11 to 15  
7 is somehow hyperbolic?

8 A. Mr. Ware, as you well know, "rape" means a  
9 lot of things under our laws.

10 Q. Well, we won't debate that this morning,  
11 Judge.

12 Other than this article, as I asked you  
13 yesterday, there is no other article anywhere in  
14 which Ms. Joseph makes any statement to the press  
15 regarding your sentence; isn't that correct?

16 A. In this article?

17 Q. In any article anywhere ever.

18 A. I'd like to see the one that was  
19 attached -- there was another article involving  
20 quotes from her.

21 Q. Let me show you a document not yet marked  
22 for identification -- or is it -- which appears to  
23 be a Boston Herald article, Thursday, February 11th,  
24 1999, by Andrea Estes and ask you whether or not

1 that is the article to which you're referring.  
2 A. I'm not sure this is the article. I  
3 thought there was a direct quote in an article from  
4 her.  
5 Q. Well, let me represent to you that this is  
6 in fact the only other article and the one which you  
7 characterized yesterday as having been brought up in  
8 deposition.  
9 MR. EGBERT: Well, I object.  
10 HEARING OFFICER DAHER: Sustained.  
11 A. Here it is.  
12 Q. You now agree that this is the article?  
13 A. I think so, yes.  
14 THE CLERK: For the record, this is Exhibit  
15 64 for ID.  
16 (Document marked as Exhibit 64  
17 for identification)  
18 MR. WARE: Thank you.  
19 Q. Now, this article, Judge, is a reporter in  
20 the courtroom who is quoting what is said in open  
21 court; isn't that correct?  
22 A. I don't know. I don't remember a reporter  
23 being there.  
24 Q. Well, when you say you don't know, you

1 said, and made a finding, that Ms. Joseph had a  
2 habit of calling in the press, and what distressed  
3 you was that she commented in interviews regarding  
4 her sentences; isn't that so?

5 A. Correct.

6 Q. How is it, then, that you don't know  
7 whether this is one of the articles? There have  
8 only been at most two.

9 A. No. This is one of the articles where she  
10 went to the press, presented only the Commonwealth's  
11 version, no mitigating circumstances, did not  
12 explain my sentence adequately; so that information  
13 would have come from her.

14 Q. In any event, Judge, you don't know whether  
15 or not all of the statements in here came right from  
16 the open courtroom.

17 A. I do not know that.

18 MR. WARE: I offer this article, Your  
19 Honor, as Exhibit 64.

20 HEARING OFFICER DAHER: Mr. Egbert, any  
21 objections?

22 MR. EGBERT: No objections.

23 HEARING OFFICER DAHER: All right. Thank  
24 you.

1 (Document marked as Exhibit 64  
2 in evidence)  
3 MR. WARE: And, Your Honor, I will also  
4 offer at this time the transcript of the Estrada  
5 proceedings, which will demonstrate that indeed the  
6 quotes are from open court.  
7 HEARING OFFICER DAHER: Any objection, Mr.  
8 Egbert?  
9 MR. EGBERT: No objection.  
10 HEARING OFFICER DAHER: Thank you. Let's  
11 go.  
12 THE CLERK: Exhibit 65.  
13 (Document marked as Exhibit 65  
14 in evidence)  
15 THE CLERK: Of the plaintiff's.  
16 HEARING OFFICER DAHER: Mr. Egbert, is Mr.  
17 Mone expected here this afternoon?  
18 MR. EGBERT: He is at one o'clock, Judge.  
19 HEARING OFFICER DAHER: That's fine. Good.  
20 MR. WARE: Your Honor, before Mr. Mone is  
21 called, I would like you to hear some further  
22 argument.  
23 HEARING OFFICER DAHER: Absolutely.  
24 MR. WARE: Thank you. Your Honor, I'm not

1 sure I offered Exhibit 43, which I now do, that  
2 being a McNamara column that we've been discussing.

3 MR. EGBERT: No objection.

4 HEARING OFFICER DAHER: Thank you. Let's  
5 go.

6 (Document marked as Exhibit 43  
7 in evidence)

8 Q. Judge, I'd like to talk with you a little  
9 bit about September 6th and then we can view  
10 portions of the proceedings on that day.

11 On September 6th, when the sentencing and  
12 disposition in fact occurred, you made certain  
13 arrangements for the defendant that morning prior to  
14 the proceedings, did you not?

15 A. I did.

16 Q. And will you tell us what arrangements you  
17 made.

18 A. I had informed my Middlesex personnel --

19 Q. Excuse me, Judge. If possible, without  
20 telling me conversations, just tell me what the  
21 arrangements were that you made.

22 MR. EGBERT: I object. He asked her what  
23 she did. She's about to tell him. He doesn't seem  
24 to want to know.

1           MR. WARE: I don't want the conversations  
2 with court officers. What I'd like to know is what  
3 arrangements she made.

4           HEARING OFFICER DAHER: Again, obviously on  
5 examination you can bring that out, Mr. Egbert.

6           MR. EGBERT: It's time in a vacuum, except  
7 counsel knows the arrangements were made by giving  
8 court officers instructions. So you can't have it  
9 without having the truth. And that's what  
10 arrangements were made.

11          HEARING OFFICER DAHER: Do you have a  
12 response, Mr. Ware?

13          MR. WARE: Your Honor, I'm interested in  
14 the arrangements. We'll get to the details, if, as  
15 and when it's relevant here.

16          HEARING OFFICER DAHER: Overruled. Go  
17 ahead.

18          Q. What arrangements did you make for the  
19 defendant?

20          HEARING OFFICER DAHER: I'm going to give  
21 you wide latitude, Mr. Egbert.

22          MR. EGBERT: I respect that, Your Honor,  
23 but as to the question, it's both an unfair vacuum,  
24 and causing this kind of guesswork, Your Honor, is,



1 I believe, improper. It is proper to ask her what  
2 she said and did. That's an appropriate question.

3 HEARING OFFICER DAHER: Mr. Egbert, your  
4 reputation as an attorney precedes you and I'm  
5 pretty sure you'll be able to redress that on  
6 examination.

7 MR. EGBERT: The witness ought to be able  
8 to be given a fair chance to answer a question.

9 HEARING OFFICER DAHER: We'll make sure she  
10 gets that. Go ahead, Mr. Ware.

11 Q. What arrangements did you make?

12 A. In the course of my responsibilities as a  
13 judge, I arranged for the defendant to be located  
14 and brought into the courthouse in some manner that  
15 would avoid press frenzy like we had had before in  
16 Suffolk, yes.

17 Q. Let me repeat the question.

18 What arrangements did you make?

19 A. I asked the court officers to arrange to  
20 have Ebony Horton met outside the courthouse, to  
21 have her brought up to a side room and then to be  
22 brought into the courtroom in a manner where the  
23 cameras would not affect the orderly administration  
24 of justice.

1 Q. Where did you have Mr. Horton placed? What  
2 room next to the courthouse?

3 A. I believe it was one of the jury rooms we  
4 have there.

5 Q. So you instructed the court officers to  
6 what? Wait on the street for Mr. Horton?

7 A. I believe there might have been a  
8 conversation with the defense -- I had the clerk  
9 call the defense attorney. I believe somehow -- I  
10 believe there was notice to meet this defendant  
11 somewhere outside.

12 Q. So you believe you had a conversation with  
13 defense counsel, that you notified defense  
14 counsel -- excuse me. You had the court officer  
15 call the defense counsel, that the court officer and  
16 the defense counsel made arrangements to meet  
17 outside the building, and that Mr. Horton was  
18 escorted up on some elevator other than a public  
19 elevator; is that correct?

20 A. Those were the arrangements I wanted, yes.

21 Q. As far as you know, those are the  
22 arrangements you made, correct?

23 A. Right. I don't know if that's in fact what  
24 was implemented, though. I heard different things.

1 Q. And at some point, as you understand it,  
2 Mr. Horton was in fact placed in a room which you  
3 believe to have been a jury room next to the  
4 courtroom.

5 A. Correct.

6 Q. This was in Middlesex Superior Court,  
7 right?

8 A. Correct.

9 Q. And then in order to bring the defendant  
10 into the courtroom, you had him brought in in some  
11 way so that he could not be photographed.

12 A. I had issued an order limiting the cameras.

13 Q. And that order said, among other things,  
14 that his face was not to be photographed.

15 A. Correct.

16 Q. What other arrangements did you make during  
17 the course of the plea?

18 A. In order to assure that this plea would  
19 take place --

20 Q. Judge, please, I want to know the  
21 arrangements. That's all I want to know. What did  
22 you do?

23 A. Okay. I had a chair placed in the  
24 courtroom, and I allowed the defendant's attorney

1 and some other attorney and a court officer to be  
2 towards the back of the defendant.

3 Q. And when you say "towards the back of the  
4 defendant," what you mean by that is they in effect  
5 surrounded the defendant, who was seated in a chair  
6 for the most part, so that the cameras could not  
7 photograph the defendant.

8 A. Well, the cameras had been told they  
9 couldn't.

10 Q. Yes.

11 A. So I didn't think they would.

12 Q. Right, but you took the precaution, you  
13 would say, not only of issuing an order, but in  
14 fact, screening the defendant so that the cameras  
15 could not photograph even his back; is that right?

16 A. It had nothing to do with the cameras. I  
17 had already issued an order about that.

18 Q. Judge, let's talk --

19 MR. EGBERT: I object.

20 HEARING OFFICER DAHER: Sustained. Go  
21 ahead. You ask the question and you can respond.

22 A. What was the question?

23 Q. The question was, the arrangements made  
24 were such that individuals stood behind the

1 defendant, the court officer, counsel, an assistant  
2 from counsel's office or another lawyer, so that  
3 even the back of the defendant as a result was not  
4 photographed; isn't that so?

5 A. That was the effect of that, yes.

6 MR. WARE: Now I'd like to play portions of  
7 that sentencing proceeding on September 6th, if I  
8 may. Judge, is it possible to darken the overhead  
9 lights just a bit, briefly?

10 MR. EGBERT: Again, Your Honor, note my  
11 objection to playing only portions. The answer,  
12 Judge, as far as I'm concerned, if they're playing  
13 portions of the proceedings, then they have to take  
14 it down stenographically or there will be no record  
15 of what's being played.

16 MR. WARE: I think Mr. Egbert is right on  
17 that point, Your Honor. To the extent that we play  
18 the entire tape, I'll call it, in the courtroom,  
19 that's another matter. We have a transcript. But  
20 at this point I'm only playing selections and so I'm  
21 afraid we do have to ask the court reporters to take  
22 it down. We'll furnish them with a transcript so  
23 that they can -- it will be helpful afterwards.

24 HEARING OFFICER DAHER: The entire matter

1 will be put in, but you will play excerpts of the  
2 case.

3 MR. EGBERT: I'm sorry; but the court  
4 reporters will take down what's being said now on  
5 the tape.

6 HEARING OFFICER DAHER: Right.

7 MR. EGBERT: Because we have to have what's  
8 being played on the record so that we'll know what  
9 the Judge's responses are to.

10 MR. WARE: I think that's correct.

11 HEARING OFFICER DAHER: That's fine.

12 MR. WARE: Would you play the tape, please.  
13 (Tape playing) (Unintelligible)

14 HEARING OFFICER DAHER: Do you understand  
15 that?

16 THE COURT REPORTER: No.

17 MR. EGBERT: I have an objection.

18 HEARING OFFICER DAHER: What is your  
19 objection?

20 MR. EGBERT: It's an unrecognizable  
21 videotape, where the words cannot be understood by  
22 any of the listeners.

23 HEARING OFFICER DAHER: I can't understand  
24 it. Can you?

1 THE COURT REPORTER: No.  
2 MR. BERRIMAN: I can play it with the  
3 transcript scrolling.  
4 MR. EGBERT: Then the transcript becomes  
5 the evidence; not the tape.  
6 HEARING OFFICER DAHER: He's right.  
7 MR. WARE: I don't have an immediate answer  
8 for that. Let me consult for a moment.  
9 HEARING OFFICER DAHER: Indeed.  
10 MR. EGBERT: I have no objection to playing  
11 the videotape --  
12 HEARING OFFICER DAHER: He's consulting.  
13 (Pause)  
14 MR. WARE: Your Honor, let's take a shot at  
15 turning the volume down a little and see if we get a  
16 little better resolution. If that doesn't work,  
17 we'll bring a monitor in and play the tape later, a  
18 television monitor. Let's try it again and see if  
19 we make any progress.  
20 (Tape playing) (Unintelligible)  
21 MR. EGBERT: I continue my objection.  
22 HEARING OFFICER DAHER: Do you want to  
23 defer on the tape?  
24 MR. WARE: I think we better do that, yes.

1 BY MR. WARE:

2 Q. By the time September 6th rolled around,  
3 the date of the sentencing, whatever had transpired  
4 between you and Ms. Joseph was four or five weeks  
5 old; isn't that correct?

6 A. Correct.

7 Q. You had a month in between to reflect on,  
8 you would think, her conduct and the temperature in  
9 the lobby conference; isn't that correct?

10 A. Yes.

11 Q. You also had a month, had you chosen to do  
12 so, to make proposed findings with respect to the  
13 sentence itself; isn't that true?

14 A. I did have a month to do that.

15 Q. But chose not to make such findings or  
16 draft findings in anticipation of the plea; isn't  
17 that correct?

18 MR. EGBERT: Judge, I'm confused.

19 A. You mean before the plea or after the plea?

20 Q. Before the plea.

21 CHECK HEARING OFFICER DAHER: Excuse me one  
22 second.

23 MR. EGBERT: Are you talking about in the  
24 Horton case?



1 MR. WARE: Yes.

2 BY MR. WARE:

3 Q. On August 4th you had a conference with  
4 counsel. You anticipated there would be a plea and  
5 sentencing. It was continued to September 6th,  
6 correct?

7 A. Correct.

8 Q. At that time you had what you say is  
9 considerable information, you told us this morning.  
10 You had police reports, you had something from a  
11 social worker from CPCS; isn't that correct?

12 A. Correct.

13 Q. You had, I think you've said, other  
14 information regarding the case. You had --

15 A. Record.

16 Q. The record.

17 A. Record information.

18 Q. You had the indictments.

19 A. I had the indictments.

20 Q. You had statements and representations from  
21 the assistant district attorney with respect to the  
22 underlying facts and the evidence which the  
23 Commonwealth expected to prove in the event of  
24 trial.

1 A. Correct.

2 Q. Now, since you announced an intended  
3 decision of probation on August 4th -- so actually  
4 on August 1 --

5 A. Right.

6 Q. -- you had made at least a tentative  
7 decision of the sentence that you were going to  
8 impose; isn't that so?

9 A. Yes.

10 Q. And accordingly, you had gone through some  
11 reasoning and come to a conclusion; isn't that  
12 correct?

13 A. Yes.

14 Q. You did not attempt to put down those  
15 reasons or conclusions in any kind of a draft  
16 memorandum for your own purposes in anticipation of  
17 the plea on September 6th.

18 A. No, I did not draft any potential  
19 memorandum in anticipation, no.

20 Q. And I think, as you said yesterday, it is,  
21 of course, possible that the defendant could have  
22 shown up on September 6th and could have said, Well,  
23 I'm not going to plead guilty, or there could have  
24 been additional facts brought to your attention;

1 isn't that so?

2 A. That's true.

3 Q. For that matter, the district attorney  
4 might have brought additional facts to your  
5 attention.

6 A. That's right.

7 Q. And that's one of the reasons that in the  
8 course of the plea colloquy -- excuse me -- the  
9 disposition phase of what happened on September 6th,  
10 you indeed asked the assistant district attorney for  
11 not only a factual basis, but a sentencing  
12 recommendation; isn't that right?

13 A. I asked both -- what did you say? What was  
14 the purpose I asked them for? I missed the first  
15 part of your question.

16 Q. One of the reasons you asked for a factual  
17 basis is that you might learn a fact which they had  
18 not brought to your attention which could  
19 conceivably change your view of the case; isn't that  
20 so?

21 A. Not in this case.

22 Q. No, it didn't happen that way. But one of  
23 the precautions you take as a judge is, in order to  
24 satisfy yourself that there is a factual basis for

1 the indictments, you ask the assistant district  
2 attorney to recite those facts he would expect to  
3 prove if the case went to trial; isn't that so?

4 MR. EGBERT: Judge, that's about four  
5 questions. And no answer will accurately reflect  
6 what is appropriate.

7 HEARING OFFICER DAHER: Compound question.  
8 Pretty simple. Overruled.

9 A. The recitation of facts is not an  
10 opportunity for the Commonwealth to present  
11 additional facts. That would be done before the  
12 plea, before I took the plea. They would have had  
13 to file a motion or request an additional hearing.  
14 So no, I would not expect in any way that the  
15 Commonwealth would add additional facts not  
16 previously made known to me during this plea.

17 Q. Accordingly, you're saying that all of the  
18 facts recited to you during the course of the  
19 factual basis were facts that had been previously  
20 brought to your attention on August 1.

21 A. Not only recited; that I had read in the  
22 various documents that were presented to me.

23 Q. You would agree, would you not, that even  
24 though the Commonwealth -- that is, in the person of

1 the assistant district attorney -- and defense  
2 counsel anticipate that there will be a plea and  
3 that that plea will be accepted and that they'll be  
4 able to sentence, they still have a job to do in the  
5 courtroom; isn't that right?

6 A. Yes.

7 Q. And that job is important to a thorough  
8 plea which will stand the test of any possible  
9 challenge by the defendant after he has indeed pled  
10 guilty; isn't that so?

11 A. Absolutely. Everyone involved I think has  
12 that interest in mind.

13 Q. And the district attorney has an obligation  
14 to the Court and to the public in that regard, does  
15 he not?

16 A. To the Court, to the public, and to the  
17 law, yes.

18 Q. Following the sentence, you had occasion --  
19 first of all, you became aware of a storm of  
20 protest, for want of a better way to put it; isn't  
21 that so?

22 A. I became aware of the media frenzy, the  
23 feeding frenzy, yes.

24 Q. And that frenzy, as you're describing it,

1 consisted of, among other things, criticism of the  
2 sentence that was imposed; is that so?

3 A. Yes.

4 Q. Following that, you contacted the Office of  
5 Press Information of the Supreme Judicial Court --  
6 excuse me -- Office of Public Information of the  
7 Supreme Judicial Court.

8 A. No. I had contacted Joan Kenney before  
9 that --

10 Q. You had --

11 A. -- about this case.

12 Q. Excuse me. You had contacted her initially  
13 on August 4th; isn't that so?

14 A. Yes.

15 Q. And you had sent her the findings that we  
16 see in Exhibit 17 as we discussed yesterday.

17 A. Correct.

18 Q. But after the media story started to break  
19 following the sentencing, you called her up again,  
20 isn't that so, to confer with her about how to  
21 handle the press relations?

22 A. Yes, I did, but I had actually spoken to  
23 her before -- again, on the 6th, I think --  
24 concerning my order limiting the use of cameras.

1 Q. So you think you spoke to her before you  
2 actually imposed sentence, do you mean?

3 A. I think I discussed the issue of limiting  
4 the cameras with her that morning, yes.

5 Q. Following the media blitz after the  
6 sentencing, did you and Ms. Kenney have additional  
7 conversation?

8 A. We did.

9 Q. You understand that Ms. Kenney, as Public  
10 Information Officer, has a number of duties, but one  
11 of them is to assist judges in dealing with the  
12 media; is that correct?

13 A. Yes.

14 Q. Among other things, to field phone calls  
15 and to run some interference, if you will, for calls  
16 from the press; isn't that so?

17 A. Yes. To act as a liaison between the  
18 judiciary and members of the press, yes.

19 Q. And you and Ms. Kenney discussed your  
20 putting out a statement through that office as a  
21 result of the sentencing proceeding; isn't that so?

22 A. That's right, we did.

23 MR. WARE: May I have just a moment, Your  
24 Honor?

1 (Pause)

2 BY MR. WARE:

3 Q. Let me direct your attention to Exhibit 24.  
4 Do you have that before you?

5 A. Yes.

6 MR. WARE: And for the record, I'm going to  
7 explain what Exhibit 24 is.

8 MR. EGBERT: Judge, I think the witness  
9 ought to explain Exhibit 24.

10 MR. WARE: That's fine.

11 Q. If you know what it is, why don't you tell  
12 us. This is a three-page document, is it not?

13 A. Well, it's not one document. It's related  
14 to the same thing, but it's not -- not all of  
15 them --

16 HEARING OFFICER DAHER: Mr. Ware, is it  
17 going to be on the screen?

18 MR. WARE: No, Your Honor.

19 A. Some are drafts of what ended up being a  
20 final version.

21 Q. Okay. So if we look at Exhibit 24, the top  
22 page is a document which shows all of the -- or  
23 shows the draft -- shows changes made to the draft  
24 and shows the final version; isn't that so?



1 A. Correct.

2 Q. In other words, the words that are struck  
3 out on the face page of Exhibit 24 are the changes  
4 made from the original draft to the final version.

5 A. Yes. But is the first draft and this first  
6 document the same thing?

7 Q. Let me tell you what I believe it is and  
8 you tell me if I'm right. Let's go to the second  
9 page, the middle page that says in the upper  
10 right-hand corner "First Draft."

11 A. Correct.

12 Q. It is my understanding -- and you correct  
13 me if I'm not right -- that this was a first draft  
14 of a statement that was written initially by Joan  
15 Kenney of the Public Information Office.

16 A. Correct.

17 Q. The last document, which says in the upper  
18 right-hand corner "Final Version," is the version  
19 which actually went out to the press.

20 A. Correct.

21 Q. The top document, which appears as the  
22 first document in Exhibit 24, combines Pages 2 and  
23 3, and it shows with strike-outs, so-called red  
24 lines, the words that were taken out of the draft

1 and the words that were put in instead.

2 A. Was this a document created by you?

3 Q. Yes.

4 A. Okay. That's what I want to make sure;  
5 that it's not a document that Joan Kenney ever  
6 created.

7 Q. No. As I think was explained when you  
8 testified before the Commission, this is a  
9 combination of the two documents, just for ease of  
10 reference.

11 A. Okay.

12 Q. So again, just to be clear, the version  
13 which went out to the press is Exhibit 24. It's the  
14 last page, and it says in the upper right "The Final  
15 Version"; is that right?

16 A. That's correct.

17 Q. In that final version, the first sentence  
18 says, "The canons of judicial conduct prohibit  
19 judges from commenting on pending and impending  
20 cases." Do you see that?

21 A. Yes.

22 Q. Now, that's not a statement with which you  
23 agree; isn't that right?

24 A. I do agree with that statement for purposes

1 of a press release, yes.

2 Q. In this particular instance you did not  
3 believe that there was any prohibition to your  
4 making a statement of any kind; isn't that so?

5 A. It depends on what the statement was.

6 Q. Let me ask you to turn to what I think is  
7 Exhibit 32, which is your sworn testimony before the  
8 Commission --

9 A. Yes.

10 Q. -- at Page 139, and specifically, beginning  
11 at Line 3.

12 A. Yes.

13 Q. And the following colloquy occurred:  
14 "Question: I understood you to say earlier  
15 you were not prohibited by Justice DelVecchio from  
16 saying anything. You were advised.  
17 "Answer: Exactly.  
18 "Question: So any prohibition I presume  
19 would have been a legal prohibition.  
20 "Answer: I had no legal prohibition. I  
21 didn't believe I had a legal prohibition."  
22 Do you see that?

23 A. Yes.

24 Q. And the next question:

1                   "Did you have a legal prohibition as you  
2 understood it with respect to any aspect of the  
3 case, meaning could you discuss any --" and you  
4 interrupt me and you say, beginning on Line 14:  
5                   "Answer: The truth is I believe I could  
6 have discussed anything I wanted about that case."  
7 Is that your testimony?  
8           A.    In the sentencing memorandum.  
9           Q.    Is that your testimony?  
10          A.    That is my testimony, but it is in a  
11 sentencing memorandum.  
12          Q.    Judge, is that your sworn testimony 13  
13 months ago?  
14          A.    Yes, it is.  
15          Q.    Do you see the words "in a sentencing  
16 memorandum" there?  
17          A.    No. But I think if you read several pages  
18 around it, you will see that's exactly what we were  
19 discussing.  
20          Q.    I see. Here at this point in your sworn  
21 testimony before the Commission you said there's no  
22 legal prohibition; isn't that right?  
23          A.    I have no legal prohibition as a judge --  
24          Q.    Judge, I'm asking you what you said in

1 sworn testimony 13 months ago before your trial --  
2 MR. EGBERT: Why don't you let her read the  
3 whole page.  
4 A. I said that.  
5 MR. EGBERT: Why don't you let her read the  
6 whole page.  
7 Q. And you say, do you not, "I believe I could  
8 have discussed anything I wanted about that case"?  
9 Isn't that true?  
10 A. I could have discussed anything I wanted in  
11 my judicial capacity, yes.  
12 Q. I'm asking you what you said in your sworn  
13 testimony, not now, not as you gear up from this  
14 proceeding --  
15 MR. EGBERT: I object. I object and move  
16 to strike.  
17 HEARING OFFICER DAHER: Grounds?  
18 MR. WARE: I withdraw it, Your Honor.  
19 HEARING OFFICER DAHER: Go ahead.  
20 Q. You testified on that occasion, "The truth  
21 is I believe I could have discussed anything I  
22 wanted about the case." Isn't that what you said?  
23 Yes or no?  
24 A. I said that, yes.

1 HEARING OFFICER DAHER: The answer is  
2 "Yes." Let's move on.  
3 Q. And in fact, you believed you could discuss  
4 anything; isn't that correct?  
5 A. In a sentencing memorandum.  
6 Q. You didn't say "in a sentencing  
7 memorandum," did you, Judge?  
8 A. If you put it all in context --  
9 Q. Judge, did you say "in a sentencing  
10 memorandum" 13 months ago?  
11 A. I did. There are other places in this  
12 deposition where I in fact refer to it.  
13 Q. Did you say it here?  
14 A. Not in those lines, no.  
15 Q. This is the testimony you gave on that  
16 occasion at this time, at this point in the  
17 testimony before the Commission; isn't that right?  
18 A. On that page in those sentences, that's  
19 correct.  
20 Q. And the fact is you testified that you  
21 didn't believe there were any facts which you could  
22 not talk about; isn't that right?  
23 MR. WARE: Put up the next slide.  
24 A. In a sentencing memorandum, that's correct.

1 Q. Do you see on the monitor, Judge, the  
2 question, "Could you have discussed, in your view,  
3 facts brought to your attention in the reports which  
4 were not public, had you chosen to do so?

5 "Answer: I don't think there are any such  
6 facts."

7 Did you say that?

8 A. What page is it on here?

9 Q. That is Page --

10 A. The same page?

11 Q. Page 139, yes.

12 MR. EGBERT: I think that it is absolutely  
13 inappropriate to read CHECK half of the incident and  
14 ask about it. It's bad enough we have testimony  
15 about one page out of a deposition where the subject  
16 was discussed, but to not show her whole answer and  
17 put the whole answer in front of her is  
18 inappropriate.

19 HEARING OFFICER DAHER: What I have before  
20 me -- obviously it's cross examination. I'm going  
21 to allow him that latitude and I'm going to allow  
22 you as much freedom as you need, Mr. Egbert.

23 You may proceed.

24 Q. Do you have Page 139 before you?

1 A. I do.

2 Q. So let's take Mr. Egbert's suggestion and  
3 go to the end of that page. You say fully, in  
4 addition to what's on the monitor:

5 "Answer: I don't think there are any such  
6 facts," meaning facts that you couldn't discuss.  
7 Correct?

8 A. Correct.

9 Q. And you go on to say, "I put it in my  
10 findings when I continued the case that she suffered  
11 from a sexual identity disorder."

12 A. Yes.

13 Q. "The very confidential nature of what was  
14 in that report I put on the record the day I  
15 continued the case August 4th. So once I put it on  
16 the record, once it's an in-court statement, I can  
17 talk about that all I want." Isn't that your  
18 testimony?

19 A. Once it's part of the record --

20 Q. Is that your testimony?

21 A. Yes.

22 Q. When you contacted Ms. Kenney, you asked  
23 her, among other things, whether she would assist  
24 you in handling the press calls; is that right?



1           A.    Yes.  
2           Q.    And you -- I think you said earlier you did  
3 have some conversation with respect to a statement  
4 to be issued under your name, which she initially  
5 drafted; isn't that so?  
6           A.    Right.  
7           Q.    You knew at the time that this was your  
8 statement, correct?  
9           A.    That it was going to be issued on my  
10 behalf, yes.  
11          Q.    Let me ask you to take a look at your sworn  
12 testimony before the Commission, specifically at  
13 Page 26, beginning on Line 17.  
14                "Question: The statement indicates that it  
15 is your statement. Did you understand that at the  
16 time?  
17                "Answer: Yes."  
18          A.    Correct.  
19          Q.    Correct?  
20          A.    Yes.  
21          Q.    And when you discussed matters with Ms.  
22 Kenney, you told her, among other things, that you  
23 had some background information on the case, isn't  
24 that so, on the basis of which you had made a

1 tentative sentencing decision back on August 1?

2 A. I didn't say that to her. I told her what  
3 the background information was.

4 Q. You gave her some of the background  
5 information.

6 A. Yes.

7 Q. All right. And part of that information  
8 was that she should call someone named Detective  
9 Greene; is that so?

10 A. That was after the press release issued.

11 Q. So at the time of the press release you had  
12 not yet told Ms. Kenney about Detective Greene; is  
13 that so?

14 A. I had told Ms. Kenney that Detective Greene  
15 had come up in the course of the lobby conference as  
16 exculpatory evidence that was never pursued by the  
17 Commonwealth, since the case was in the district  
18 courts, yes.

19 Q. It's your testimony that you said all of  
20 that to Ms. Kenney prior to the point at which this  
21 statement was prepared?

22 A. Probably not in those words, but I am sure  
23 I mentioned to her that there was information of  
24 exculpatory evidence in this case.

1 Q. And what is the exculpatory evidence,  
2 Judge, that you say was brought up to you on the  
3 basis of which you made that statement to Ms.  
4 Kenney?

5 A. What was represented to me by Anne Goldbach  
6 during the lobby conference was that there was a  
7 detective from the Boston Police who had arrived on  
8 the scene before the sexual assault unit had arrived  
9 there and that contrary to the -- and it conflicted  
10 with a number of the statements -- his observations  
11 were in conflict with a number of the statements  
12 made in the police report.

13 Q. Now, you had read the police report, so you  
14 knew that Detective Greene was not the first officer  
15 on the scene; isn't that correct?

16 A. That's a report by the sexual assault unit,  
17 yes.

18 Q. No. You told us yesterday, when we looked  
19 at the -- well, let me ask you to look at Exhibit  
20 27, which is the police report -- or one of the  
21 police reports. Exhibit 28 is as well.

22 A. Yes.

23 Q. This is one of the reports that you looked  
24 at on August 1; isn't that correct?

1           A.    Yes.

2           Q.    And it says in the very first line that the  
3 two officers who came upon the scene were Officers  
4 Rose and Sweeney; isn't that correct?

5           A.    That's what the report says, yes.

6           Q.    So you knew that Detective Greene was not  
7 the first officer there and didn't make the initial  
8 observations; isn't that correct?

9           A.    I didn't know that. It was represented to  
10 me that there was a detective that arrived before  
11 the sexual assault unit.

12          Q.    Well, these officers are not from the  
13 sexual assault unit. The sexual assault unit comes  
14 later. You know that, don't you?

15          A.    I thought the sexual assault unit was  
16 called to the scene.

17          Q.    Is it your testimony that on August 1, when  
18 you made your sentencing decision or your tentative  
19 decision, that you thought the sexual assault unit  
20 arrived on the scene before a patrol car?

21          A.    Oh, no. No, that's not my testimony.

22          Q.    All right. The police report says there  
23 was a patrol car in the area, he happened on the  
24 scene, and the two officers were Rose and Sweeney,

1 isn't that so?

2 A. Yes.

3 Q. And you knew that the officers who were in  
4 fact first on scene were Officers Rose and Sweeney,  
5 correct?

6 A. I knew that those were the officers  
7 preparing this report.

8 Q. You knew that the officers, because it says  
9 so right in the report, were the officers who  
10 actually came upon the scene, put on their lights,  
11 got out of the car and made the observation; isn't  
12 that true?

13 A. That's what the report says, yes.

14 Q. And you had the report at the time you made  
15 your initial decisions; isn't that so?

16 A. Correct.

17 Q. And then, when in fact the district  
18 attorney recited the factual basis, he identified  
19 Officers Rose and Sweeney to you, as you told us  
20 yesterday, correct?

21 A. I believe so. I'm sure he did.

22 Q. The upshot of all of this is that you knew  
23 that this Detective Greene was not first on scene;  
24 isn't that correct?

1 A. I didn't know that.

2 Q. Did you think he was riding in the patrol  
3 car?

4 A. Mr. Ware, just because it's not in this  
5 report doesn't mean that he wasn't there.

6 Q. Do you think he was riding in the patrol  
7 car, Judge?

8 A. I don't -- I'm just repeating what was  
9 represented to me.

10 Q. Did you understand from Ms. Goldbach that  
11 Detective Greene had somehow come upon the scene  
12 before the police car that actually made the arrest?

13 A. No. I didn't really understand that. I  
14 mean, he could have arrived at about the same time.

15 Q. Well, if you didn't understand that, what  
16 did you do to get clarification about Detective  
17 Greene's role before you took into account, as  
18 you're now saying you did, this, quote, exculpatory  
19 evidence?

20 A. I didn't take it into account. All I said  
21 was that I considered a representation by an officer  
22 of the court that the Commonwealth had failed to  
23 pursue what the defense perceived to be exculpatory  
24 evidence.

1 Q. In any event, you did not take Detective  
2 Greene's -- the assertions about Detective Greene  
3 into account in making your decision; is that what  
4 you're saying?

5 A. I can't say that because --

6 Q. Well, you just said that.

7 A. I didn't say that.

8 MR. EGBERT: She didn't just say it. You  
9 said it.

10 HEARING OFFICER DAHER: Stricken.

11 MR. EGBERT: There's a certain point --

12 HEARING OFFICER DAHER: Stricken.

13 MR. EGBERT: This witness ought to be  
14 treated with the same respect as any other witness.

15 HEARING OFFICER DAHER: Your objection is  
16 sustained. The comment of Mr. Ware, the last  
17 comment is stricken. Go ahead.

18 MR. WARE: Thank you, Your Honor.

19 BY MR. WARE:

20 Q. The information which you've provided to  
21 Ms. Kenney was information, as you've said, about  
22 circumstances of the case as you understood them; is  
23 that so?

24 A. Right.

1 Q. And you knew that Ms. Kenney was dependent  
2 upon you for that information; isn't that right?  
3 A. That would be her only source of it at that  
4 point, yes.  
5 Q. You were the only source of information for  
6 the Public Information Office; is that right?  
7 A. Oh, I don't know that to be the case. I  
8 believe she talked to a number of other people.  
9 Q. At the time the statement was being  
10 prepared, you were the source of information. It  
11 was your statement; isn't that right?  
12 A. Yes.  
13 Q. And you understood that the statement  
14 contained representations regarding the sentencing  
15 process in the case.  
16 MR. WARE: And could you show us Slide 34,  
17 Jim, please. 33 and 34.  
18 Q. Isn't that so, Judge?  
19 A. Excuse me. I'm looking for it in my book.  
20 Q. Take a look at 32, which is your sworn  
21 testimony before the Commission.  
22 A. Okay. And what page should I refer to?  
23 Q. I've put it on the monitor. But as you --  
24 MR. EGBERT: Why don't you look at the



1 exhibit.  
2 Q. Take a look at Line 15 to 18.  
3 A. On what page?  
4 Q. On Page 31.  
5 A. Yes.  
6 Q. And so the information with which Ms.  
7 Kenney responded was based on the information which  
8 you provided her, correct?  
9 A. Yes. Yes.  
10 Q. But you understood that those  
11 representations were being attributed to you in the  
12 statement; isn't that so?  
13 A. Yes.  
14 Q. And you so testified before the Commission,  
15 at the bottom of that same page, 31, and the top of  
16 Page 32, where you say:  
17 "Question," beginning at Line 19: "You  
18 understood, when you received Exhibit 4" -- that is  
19 the statement -- "that it contained representations  
20 regarding the sentencing process in the case.  
21 "Answer: Yes.  
22 "Question: And you understood that those  
23 representations were ones that were being attributed  
24 to you.

1                   "Answer: Yes."  
2                   Correct?  
3            A.     Correct.  
4            Q.     You received a draft of the statement  
5 before it was issued; isn't that so?  
6            A.     I believe it was read to me over the phone.  
7            Q.     Did you have a physical draft of it?  
8            A.     I can't recall.  
9            Q.     Let me ask you to take a look at your sworn  
10 testimony on Page 24 and ask you whether that  
11 refreshes your recollection --  
12           A.     What page?  
13           Q.     Page 24, beginning at Line 13:  
14                 "Question: You believe you received a  
15 draft at some point following September 6th.  
16                 "Answer: Right."  
17                 Is that so?  
18           A.     Yes.  
19           Q.     Now, the statement actually went out on  
20 September 7th; is that true?  
21           A.     Yes.  
22           Q.     So you had a draft -- since it's a draft,  
23 you had the draft before the final statement went  
24 out, correct?

1           A.    I knew about the language in the draft,  
2    yes.

3           Q.    You had the draft, Judge, did you not?  
4    Isn't that what you testified to?

5           MR. EGBERT:  She testified that she  
6    believed she received a draft.  That's what she  
7    testified to.

8           Q.    Fine.  You believe you received a draft,  
9    correct?

10          A.    I believed that at the time of this  
11   deposition, yes.

12          Q.    And you had conversations with Ms. Kenney  
13   and at some point on September 7th a final statement  
14   went out, correct?

15          A.    Yes.

16          Q.    You understood as well that Justice  
17   DelVecchio was reviewing the statement and, in fact,  
18   made some changes to it, some minor changes; isn't  
19   that so?

20          A.    That's so, yes.

21          Q.    And at some point you had conversations  
22   directly with Justice DelVecchio.

23          A.    It appears that I did, yes.

24          Q.    And let me show you in that regard Exhibit

1 51, which is on the monitor and is also in the book.  
2 MR. WARE: And if we could show the next  
3 slide --  
4 A. 51?  
5 Q. 51, yes.  
6 A. (Witness reviews document)  
7 Q. It indicates there, does it not, that there  
8 was a revision to the original draft by Justice  
9 DelVecchio following a telephone consultation with  
10 you?  
11 A. Yes.  
12 Q. Does that refresh you that in fact you  
13 talked with Justice DelVecchio?  
14 A. Yes.  
15 Q. You made no changes or suggested changes on  
16 the draft; isn't that so?  
17 A. That is so.  
18 Q. You weren't prohibited at any time from  
19 making such changes, were you?  
20 A. No, I wasn't.  
21 Q. And you had disagreements at that time with  
22 the language which you did not raise with Justice  
23 DelVecchio or Joan Kenney; isn't that true?  
24 A. That's not true, not at the time.

1 Q. Let me ask you to look at Page 28.  
2 A. Page 28 of my deposition?  
3 Q. Yes. You refer to it as a deposition. In  
4 fact, this was sworn testimony before a Commission  
5 of Special Counsel, was it not?  
6 A. It was a deposition, wasn't it? I mean,  
7 the same thing, under oath, ask questions, you  
8 answer them. So it's a deposition.  
9 Q. Is that the way you understood it?  
10 A. I understood I was subpoenaed for a  
11 deposition, yes.  
12 Q. In any event --  
13 A. Page 28?  
14 Q. Yes. You indicated a number of differences  
15 with the language --  
16 A. During our deposition.  
17 Q. And you did not make any -- you didn't tell  
18 Justice DelVecchio or Joan Kenney about those  
19 differences, correct?  
20 MR. EGBERT: The question he asked her was,  
21 "Did you agree with the language of that" -- strike  
22 that. "Did you disagree with the language at that  
23 time?" She then said --  
24 MR. WARE: Your Honor, please.

1                   MR. EGBERT: Counsel is now impeaching,  
2 with a new question instead of the same one, to  
3 leave a false impression with the Court as to what  
4 is going on here.

5                   BY MR. WARE:

6                   Q. The question you were asked at Page 28 at  
7 Line 14 was:

8                   "You indicated a number of differences or  
9 disagreement with the specific language of this  
10 statement. Why did you not raise those with Justice  
11 DelVecchio or Joan Kenney at the time?

12                   "Answer: Because I just chose to let them  
13 handle it."

14                   Isn't that what you testified to?

15                   A. That's what I testified to, yes. So long  
16 as you understand that you've indicated those were  
17 indicated in the course of my deposition.

18                   Q. Judge, you didn't have any doubt that we  
19 were talking about your interaction with the Public  
20 Information Office at the time; isn't that so?

21                   A. Correct. I knew we were discussing the  
22 statement.

23                   Q. And as you said, there was no prohibition  
24 on your making any changes when you received the

1 draft back on September 6th or 7th, correct?

2 A. Correct.

3 Q. You refer in the statement -- again,  
4 Exhibit 24 -- where the statement says, "My  
5 statement in open court that it was a low-scale  
6 matter pertained solely to the appropriate level of  
7 the sentencing guidelines used by judges in  
8 sentencing convicted defendants," correct?

9 A. Yes.

10 Q. Now, when you saw that statement, you  
11 disagreed with it and you disagreed with the  
12 characterization that "low scale" was referencing  
13 the sentencing guidelines; is that right?

14 A. No, I didn't.

15 Q. You did not disagree with it?

16 A. That "low scale" was referring to the same  
17 and similar factors that would be used by sentencing  
18 guidelines. We don't have sentencing guidelines in  
19 Massachusetts.

20 Q. The statement which you received under your  
21 name on September 7th that you sent out as your  
22 statement to the press says that your reference to,  
23 quote, low scale in the courtroom was a reference,  
24 quote, solely to the appropriate level of the

1 sentencing guidelines; isn't that so?

2 A. That's correct.

3 Q. At the time you saw the statement you  
4 knew -- you realized that that was not true; isn't  
5 that so?

6 A. Well, no, I don't think it wasn't true.

7 Q. Judge, was it so or wasn't it so?

8 A. It was not so. It was inartful, but it  
9 wasn't so.

10 Q. Judge, please. The reference to "low  
11 scale" as you used it in the courtroom was not a  
12 reference to sentencing guidelines, was it?

13 A. Not to any particular sentencing  
14 guidelines.

15 Q. It was not a reference to sentencing  
16 guidelines at all, was it?

17 A. Well, I have no idea what sentencing  
18 guidelines you would be talking about.

19 Q. You testified -- let me direct your  
20 attention to Page 38 of your sworn testimony 13  
21 months ago, at the top of the page, and the question  
22 beginning on Line 3.

23 A. Yes.

24 Q. "Your reference to 'low scale' during the



1 course of the sentencing was a reference to 'the  
2 appropriate level of sentencing guidelines.'  
3 "answer: That's correct."  
4 That's quoting the statement, correct?  
5 A. The appropriate level of matters that would  
6 be considered under sentencing guidelines, because  
7 we don't have sentencing guidelines.  
8 Q. Your statement says "appropriate" -- that  
9 it pertains solely to the appropriate level of  
10 sentencing guidelines, correct?  
11 A. That's what this statement says, yes.  
12 Q. And you acknowledge that that's what the  
13 statement says on Line 6, and you say, "That's not  
14 what I intended when I said 'low scale,'" correct?  
15 A. That was not what was going through my  
16 mind.  
17 Q. Judge, I'm asking you how you testified  
18 when you were testifying under oath more than a year  
19 ago. You testified at that time, "That's not what I  
20 intended when I said 'low scale'"; isn't that so?  
21 A. Not a reference to any particular set of  
22 sentencing guidelines, that's correct.  
23 Q. Let's see if we can focus on your sworn  
24 testimony under oath 13 months ago when you came

1 before Commission counsel.  
2 At that time you said that it was not a  
3 reference to sentencing guidelines; that, "that's  
4 not what I intended when I said 'low scale'."  
5 Period end quote; isn't that right?  
6 A. That's what I said, yes.  
7 Q. And I asked you the next question:  
8 "Question: So this statement is erroneous  
9 in that respect?  
10 "Answer: Right."  
11 That's what you testified to, correct?  
12 A. Correct.  
13 Q. And at the top of the next page, Line 2 --  
14 this is Page 39, Slides 38 and 39.  
15 "Question," beginning at Line 2: "And  
16 you're saying that, as characterized here in the  
17 statement, it is in fact incorrect. It does not  
18 accurately reflect your thinking.  
19 "Answer: It does not reflect what was on  
20 the tape. I know that's my thinking."  
21 And that's what you said.  
22 A. Correct. I referred to a scale of 1 to 10.  
23 We do not have sentencing guidelines that go 1 to  
24 10.

1 Q. Judge, let's focus again on your sworn  
2 testimony under oath 13 months ago. You swore at  
3 that time that the characterization of "low scale"  
4 was not what you had in mind during the sentencing  
5 proceeding; isn't that so?

6 A. When I said --

7 Q. I don't want an explanation, Judge. I want  
8 your testimony 13 months ago.

9 A. Yes.

10 Q. You said at that time that the reference to  
11 "low scale" was not a reference to the sentencing  
12 guidelines; isn't it that simple? Yes or no?

13 A. The sentencing guidelines that may be  
14 referred to in the vernacular, yes.

15 Q. And you did nothing at that time -- that  
16 is, back in September of 2000 -- either to correct  
17 the statement or bring that error to the attention  
18 of either Justice DelVecchio or Joan Kenney; isn't  
19 that true?

20 A. That's true.

21 Q. Do you agree that you could have made them  
22 aware of that error, that characterization of "low  
23 scale"; isn't that so?

24 A. I could have, yes. And I might have even

1 made Justice DelVecchio aware of it. I'm not sure.

2 Q. Now you're speculating that you might have  
3 said something about it?

4 A. Well, clearly she would know that there are  
5 no sentencing guidelines that go 1 to 10.

6 Q. Judge, we're not talking about what's in  
7 Justice DelVecchio's mind in September of 2000. I'd  
8 like your testimony based on what you said before  
9 the Commission. And let me refer you to Slide 42,  
10 to Line 15 on Page 40, which is on the monitor as  
11 well, where I ask you the following question and you  
12 respond as follows under oath:

13 "Question: The bottom line here is you  
14 believe this characterization of what you were doing  
15 in open court is not accurate.

16 "Answer: The characterization of what I  
17 was doing in open court, that it referred to  
18 sentencing guidelines, is not accurate."

19 Correct?

20 A. That's correct.

21 Q. You did not at that time bring any  
22 inaccuracy to the attention of Justice DelVecchio or  
23 to Ms. Kenney, isn't that so?

24 A. That's so.

1 Q. Now, the reason you didn't bring anything  
2 to the attention of Justice DelVecchio or Ms. Kenney  
3 was that you were hopeful that the statement would  
4 assist you in the public press; isn't that correct?

5 A. No.

6 Q. Well, you weren't putting out a statement  
7 which you believed would be harmful to you, were  
8 you?

9 A. There was a bigger concern than to just me  
10 in this situation, Mr. Ware.

11 Q. You were putting out a statement which you  
12 viewed as assisting you in deflecting press  
13 criticism; isn't that right?

14 A. Press criticism with respect to the  
15 judiciary and a judge as a member of that  
16 institution, yes.

17 Q. So are you now saying that your motivation  
18 in having a statement put out under your name, which  
19 you knew to have errors in it, which you did not  
20 bring to the attention of the Press Information  
21 Office, was to assist the judiciary? Is that what  
22 you're telling us? Yes or no?

23 A. I did not believe it had errors in it, so  
24 no.

1 Q. I'm not going to retrace those steps,  
2 Judge.

3 MR. EGBERT: Objection and move to strike.

4 HEARING OFFICER DAHER: Allowed.

5 Q. "Low scale" was not a reference to  
6 sentencing guidelines as you used it in the  
7 courtroom, was it?

8 A. Not to any of these sentencing guidelines  
9 that are out there, but it was a reference to the  
10 same or similar factors that we use in evaluating a  
11 case for the purposes of determining an appropriate  
12 sentence.

13 Q. Have you anywhere ever given that  
14 explanation to anyone other than today in this  
15 courtroom?

16 A. I believe if you read the deposition, you  
17 will find --

18 Q. Let's get back to your conversations and  
19 your statement as issued to the public press. The  
20 reason you didn't want to make this information  
21 known or any corrections to Ms. Kenney or Justice  
22 DelVecchio was that you viewed this as an exercise  
23 in spin, didn't you?

24 A. That's correct.

1 Q. Well, didn't you view this statement,  
2 Judge, as trying to explain away your statement of  
3 "low scale" in open court?

4 A. It was a way of informing the public that  
5 the reference to "low scale" was to the sentence  
6 that the Court determined was appropriate in this  
7 case.

8 Q. In fact, weren't you trying to explain away  
9 your reference to "low scale" because you were  
10 embarrassed by that reference?

11 A. No.

12 Q. Isn't it that simple?

13 A. It was taken out of context.

14 Q. Regardless whether it was taken out of  
15 context, you realized after the fact that the  
16 reference to "low level" or "low scale" was an  
17 unfortunate reference; isn't that so?

18 A. Regrettable and unfortunate. I should have  
19 never asked Mr. Deakin the question of rating it 1  
20 to 10, you're right.

21 Q. Is it Mr. Deakin's fault or is it your  
22 fault for having made the statement?

23 A. It's my fault.

24 Q. And so you regretted having said "low

1 scale" or "low level"; is that true?

2 A. I regret the entire exchange with Mr.  
3 Deakin concerning the evaluation of the case.

4 Q. You regret your personal response to Mr.  
5 Deakin in which you characterized something as "low  
6 level" or "low scale," correct?

7 A. For purposes of the sentencing  
8 guidelines -- for purposes of the factors we would  
9 consider in determining a sentence, yes.

10 Q. You regretted your choice of words "low  
11 level" or "low scale"; isn't that right, Judge?

12 A. If I had to take it back today, I would.

13 Q. You regretted it.

14 A. I do.

15 Q. And when it came to your discussions with  
16 the Office of Public Information, you viewed that as  
17 an exercise in spin, right?

18 A. Well, that's a generic term we use when  
19 you're going to deal with public relations or press  
20 releases, so yes. I mean...

21 Q. You thought it was an exercise in spin.

22 A. In the way something is presented to the  
23 public and how to present it, that is an exercise  
24 that I guess is in spin, yes.



1 Q. And you viewed the effort with the Public  
2 Information Office of the Supreme Judicial Court as,  
3 in part trying to explain away this reference to,  
4 "low scale" or "low level," correct?

5 A. Not explain away. Explain it.

6 Q. Let me direct your attention to Page 40,  
7 beginning at Line 6. You're giving an answer. And  
8 you say, in part -- I'm beginning actually at Line  
9 7. Do you see the language that says, "If you're  
10 trying to explain away that statement" -- meaning  
11 the "low level" statement -- "that 'low-scale'  
12 statement on the tape, this makes sense." You're  
13 referring to characterization in the press release  
14 that's to go out under your name?

15 A. Correct. Read the entire thing.

16 Q. All right. And you say, "Fine. Let's  
17 refer to it as 'low scale' in terms given the, you  
18 know, the sentencing guidelines."

19 Again, you say "sentencing guidelines."  
20 Your choice, right?

21 A. Exactly, but that's my point.

22 Q. And you go on to say, "The minor record the  
23 defendant had. You could say in the scheme of  
24 things, that it refers to low guidelines

1 sentencing." Isn't that what you said?

2 A. That is what I said, yes.

3 Q. And you further characterize your effort  
4 with the Public Information Office as giving some  
5 sort of spin to the "low-scale" statement, don't  
6 you?

7 A. Yes.

8 Q. Let me ask you to take a look at your sworn  
9 testimony on Page 38, Lines 19 and 20, and it's on  
10 the monitor.

11 A. (Witness reviews document)

12 Q. You say, beginning at Line 14:

13 "Answer: Because I thought they would --  
14 the fact that I called it 'low scale.' Look, I had  
15 a bad day that day. Okay? So I called it 'low  
16 scale.' I shouldn't have called it 'low scale' in  
17 the scheme of things. All right?" And you go on,  
18 "And they were giving some sort of spin to the 'low-  
19 scale' statement that was in the tape."

20 That was your characterization of what was  
21 going on, wasn't it?

22 A. That's how I explained, yes.

23 Q. And this wasn't once. Back on Page 32 of  
24 your sworn testimony, you likewise characterized

1 this as an exercise in spin, beginning at Line 15.  
2 And you say -- let me read my question beginning at  
3 Line 7 to the end of your answer, Line 15:

4 "Question: You would have let the  
5 statement go out under your name with inaccurate  
6 representations in it, knowing that she" -- Ms.  
7 Kenney -- "depended upon you for the factual basis  
8 of this statement?"

9 "Answer: Well, first of all, I don't see  
10 anything here that is materially inaccurate. Okay?  
11 And I thought they would have better expertise as to  
12 how to frame or what spin to give, whatever, than I  
13 would. So I let them handle it."

14 Isn't that right?

15 A. That's right.

16 MR. WARE: Your Honor, are we going to take  
17 a morning break?

18 HEARING OFFICER DAHER: Right now. I was  
19 hoping someone would bring that up. We'll take a  
20 short recess.

21 (Recess)

22 MR. WARE: Your Honor, before I go further,  
23 I'd like to offer at this time Exhibits 26, 27 and  
24 28, which are the police reports from which the

1 witness referred.  
2 HEARING OFFICER DAHER: Any objections?  
3 MR. EGBERT: Can I have a moment?  
4 HEARING OFFICER DAHER: Take your time.  
5 MR. EGBERT: I suppose my question is for  
6 what purpose.  
7 MR. WARE: For all purposes.  
8 MR. EGBERT: If it's for the purpose of the  
9 truth of the matter, I object. If it's for the  
10 purpose of notice of information that she was  
11 provided, I don't object.  
12 CHECK MR. WARE: It's offered generally,  
13 Your Honor, for purposes, among other things, to  
14 show what Judge Lopez saw at the time of the  
15 sentencing.  
16 MR. EGBERT: If it's being offered for what  
17 she saw, then it's not for the truth of the matter.  
18 You can't take it for the truth of the matter as  
19 asserted. For that purpose, it will be hearsay.  
20 MR. WARE: I'm offering Exhibits 26, 27 and  
21 28 without restriction.  
22 MR. EGBERT: Then I object to it as being  
23 offered without restriction. It's clearly hearsay.  
24 HEARING OFFICER DAHER: Overruled.

1 (Documents marked as Exhibits 26  
2 through 28 in evidence)

3 MR. WARE: At this time, Your Honor, I'd  
4 like to play a segment of the -- the tape of the  
5 sentencing proceeding, which we're going to do on  
6 videotape. And for the Court's reference, the  
7 transcript of this portion of the tape -- first of  
8 all, the transcript itself is Exhibit 22, I think --  
9 Exhibit 22. And the portion that will be played at  
10 this point begins at Page 29, Line 1, and goes  
11 through Page 31, Line 7 or 8.

12 MR. WARE: Excuse me, Your Honor, I  
13 misspoke with respect to the end point. It's Page  
14 33, Line 5.

15 So to repeat, Exhibit 22, beginning at the  
16 top of Page 29 of the transcript, following through  
17 to Page 33, Line 5.

18 (Tape playing)

19 THE COURT: Okay. Let me just ask you  
20 something. How long have you been in charge of the  
21 sexual assault unit?

22 MR. DEAKIN: Twenty-one months.

23 THE COURT: Okay. And how many of these  
24 sex cases have you seen?

1 MR. DEAKIN: I'm not sure that I can answer  
2 that with an exact figure.

3 THE COURT: A ballpark figure.

4 MR. DEAKIN: We see approximately 500 such  
5 investigations.

6 THE COURT: No, the ones that get indicted.

7 MR. DEAKIN: I think, Your Honor, and I'm  
8 not prepared with the figures, but I expect that we  
9 indict close to a hundred cases a year.

10 THE COURT: Okay. And of those 100 cases,  
11 in terms of the facts of this case, on a scale of 1  
12 to 10, where would you put this case?

13 MR. DEAKIN: Depends -- I would say to Your  
14 Honor that it depends on -- there are several axes  
15 that one can evaluate a case on.

16 In terms of the lack of a relationship  
17 between the perpetrator and the victim, I would say  
18 this is a ten, because what is relatively rare in  
19 fact but perhaps most frightening to the general  
20 population is the case of a person without a  
21 relationship to a child who abducts the child off  
22 the street, takes it to a secret location, and  
23 sexually assaults the child. In terms of the age of  
24 the child, I would say it's in the quite serious

1 range as well. The child was 12 years old at the  
2 time.

3 In terms of the completed sexual assault  
4 that the child has disclosed, I would say that the  
5 facts are in the moderately serious range. I would  
6 also note, however, Your Honor, that the assault was  
7 interrupted by police who came to a -- just happened  
8 upon this on routine patrol. And as a prosecutor  
9 who has prosecuted a number of these cases, I would  
10 remain concerned that this assault might have been  
11 quite a bit worse had they not quite -- had they not  
12 quite fortuitously come upon what they came upon.

13 THE COURT: Well, let me just say that I've  
14 been a judge now since 1988, and I have seen many of  
15 these cases. And in the scale of cases that charge  
16 sexual assault of children, this is on a very low  
17 level. Okay? And, so, I really think it's  
18 disingenuous for you to tell me that this is a ten.

19 I'll hear from the defense attorney.

20 MR. DEAKIN: Your Honor, if I may --

21 THE COURT: No, you may not. You may sit  
22 down now.

23 MR. DEAKIN: I --

24 THE COURT: You may sit down now or I'll

1 get a court officer to make you sit down. And I'll  
2 hear from the defense attorney.

3 MR. DEAKIN: I object to being charged with  
4 being disengenuous.

5 THE COURT: I find it was disingenuous, and  
6 I know better than that. Go ahead.

7 MS. GOLDBACH: Your Honor, on behalf of my  
8 client, you know my client's background, you know  
9 what kind of work and things that my client has done  
10 since she was charged in this case. And for reasons  
11 of my client's privacy, I'm not going to go into  
12 those details at this time. But I'd ask Your Honor  
13 to sentence my client as you indicated earlier this  
14 morning.

15 THE COURT: Okay. Let's sentence her as I  
16 indicated. Five years' probation, one year of that  
17 on electronic monitoring, counseling, stay away from  
18 children under the age of 16.

19 THE CLERK: DNA sample?

20 THE COURT: Yes.

21 THE CLERK: As to all indictments,  
22 concurrent, Your Honor.

23 MR. DEAKIN: Your Honor, if I may --

24 THE COURT: I don't want to hear from you



1 anymore. Do you understand?  
2 MR. DEAKIN: Your Honor, if I may be heard.  
3 THE COURT: No. You will not be heard. I  
4 said I've heard enough.  
5 MR. DEAKIN: I'm only inquiring as to one  
6 of the conditions of the electronic monitoring.  
7 It's not clear to me that the Probation Department  
8 will know the conditions of the electronic  
9 monitoring; that is, what is being monitored.  
10 (End of tape)  
11 MR. WARE: Thank you, Your Honor.  
12 BY MR. WARE:  
13 Q. Now, Judge Lopez, directing your attention  
14 to the transcript of the hearing on September 6th  
15 and specifically to Exhibit 22, Page 29 -- Page 29  
16 and 30.  
17 A. Yes.  
18 Q. You asked Mr. Deakin, beginning at Line 19  
19 on Page 29, "And of those 100 cases, in terms of the  
20 facts of this case, on a scale of 1 to 10, where  
21 would you put this case?" And Mr. Deakin responds,  
22 beginning at Line 3 of Page 30; is that correct?  
23 Substantively responds; is that correct?  
24 A. Well, if you want to skip that, that would

1 be fine.

2 Q. Skip what?

3 A. Well, in fact, Mr. Deakin understood  
4 exactly what I meant when I said 1-to-10 scale.

5 Q. Let's not talk about what Mr. Deakin may  
6 have understood, all right, Judge?

7 A. Okay.

8 Q. Let's talk about the transcript and the  
9 words that were said in the hearing. Okay?

10 A. Yes.

11 Q. Mr. Deakin does in fact give you an  
12 explanation of his recommendation or his statement  
13 that he believes -- or he rates the case in response  
14 to your question; isn't that right?

15 A. Yes, he does for purposes of sentencing.  
16 We're at the sentencing stage of this.

17 Q. Okay. And he does that substantively  
18 beginning on Line 3 of Page 30, correct?

19 A. Correct.

20 Q. And what he says is that the case is a ten,  
21 quote, in terms of the lack of a relationship  
22 between the perpetrator and the victim, correct?

23 A. Yes. That's what he said.

24 Q. That's the only basis on which he rates it

1 as a ten; isn't that so?

2 A. No. He goes on to explain a couple of  
3 other things.

4 Q. How else does he rate it as a ten, Judge?

5 A. He says, "In terms of the age of the child,  
6 I would say it's in the quite serious range." He  
7 goes on to say, "In terms of the completed sexual  
8 assault that the child has disclosed, I would say  
9 that the facts are in the moderately serious range."  
10 So he refers to a number of factors.

11 Q. Well, in fact, he gave you three different  
12 ratings, did he not? He rates the case as a 10 with  
13 respect to, as he says, "In terms of the lack of a  
14 relationship between the perpetrator and the  
15 victim." That he rates a 10, correct?

16 A. Yes.

17 Q. All right.

18 A. Well, with the other factors. I just don't  
19 want you to say that that alone formed the basis of  
20 his evaluation.

21 Q. Well, you don't know what he was thinking,  
22 do you?

23 A. I know what he said to me.

24 Q. So let's go down to what he did say,

1 beginning on Line 10.  
2 A. Yes.  
3 Q. In each aspect of his rating of the case he  
4 begins with the words "In terms of" at Line 3?  
5 A. Yes.  
6 Q. A second time at Line 10 and a third time  
7 at Line 14; isn't that so?  
8 A. Correct.  
9 Q. And you understood that he was rating  
10 different aspects of the facts of this case; isn't  
11 that so?  
12 A. For purposes of sentencing, yes.  
13 Q. For purposes of sentencing?  
14 A. Yes.  
15 Q. And so once again, because he says, "In  
16 terms of the lack of relationship between the  
17 perpetrator and the victim," he says it's a 10,  
18 correct?  
19 A. Yes.  
20 Q. And going down to Line 10 on Page 30, he  
21 says, "In terms of the age of the child, I would say  
22 it's in the quite serious range," correct?  
23 A. Correct.  
24 Q. And then going down to Lines 14 through 17

1 he says, in terms of whether it was a completed  
2 sexual assault, he rates it moderately serious,  
3 correct?

4 A. Correct.

5 Q. So indeed, he did not rate each aspect of  
6 the case as a 10. He rated different aspects of the  
7 case: One of them, moderately seriously, one of  
8 them quite serious, and one that is, the fact of no  
9 relationship between the perpetrator and the victim,  
10 as a 10; isn't that so?

11 A. That is not what I understood. He labeled  
12 it a 10 and then went on to explain.

13 Q. You understood Mr. Deakin to mean something  
14 other than this; is that correct?

15 A. No. I understood him to mean exactly what  
16 he said here. That based on the facts of the case,  
17 in his opinion, it would be a 10.

18 Q. And that's all you heard; that the entire  
19 case is a 10, not different aspects of it?

20 A. That is what I understand he is explaining  
21 to me. That's what I asked him.

22 Q. I'd like to go back, if I can, Judge, to --  
23 it actually appears in Exhibit 4 and Exhibit 24,  
24 which is a statement issued by you through the

1 Public Information Office on September 7th.

2 A. Correct.

3 Q. Now, in addition to the "low-level" or  
4 "low-scale" statement, there is reference in the  
5 statement to certain facts before you; isn't that  
6 correct?

7 A. Correct.

8 Q. This was at a time when you believed that  
9 there were no facts that you could not reveal; is  
10 that correct?

11 A. In the sentencing memorandum.

12 Q. Let's take a look again at Page 139, Line  
13 14, the question beginning at Line 11:

14 "Did you have a legal prohibition, as you  
15 understood it, with respect to any aspect of the  
16 case, meaning could you discuss any --" and you  
17 interrupt and you say:

18 "Answer: Truth is I believe I could have  
19 discussed anything I wanted about that case."

20 Isn't that correct?

21 A. In the course of my judicial duties, yes.

22 Q. What you said here is, "I could have  
23 discussed anything I wanted about that case,"  
24 correct?

1           A.    I did say that, correct.

2           Q.    Now, when you were asked in your testimony  
3 before the Commission what are the facts to which  
4 you were alluding in this statement when you said  
5 "certain facts," you said "I don't know"; isn't that  
6 correct?

7           A.    What the facts that the drafter of the  
8 statement had in mind? Yes, I said that.

9           Q.    And you say it at the bottom of Page 146  
10 and the top of Page 147 of Exhibit 32, your  
11 transcript; isn't that so? And it's on the monitor  
12 before you.

13          A.    Correct.

14          Q.    And then you go on to say at Page 147,  
15 Lines 5 to 7 -- actually -- yes, on Page 147, you go  
16 on to say, in response to my question:

17                "Question: That's because you take the  
18 view that this wasn't your statement.

19                "Answer: Right."

20          A.    I did not draft it.

21          Q.    But you didn't say you didn't draft it.  
22 You said, in response to my question:

23                "Question: That's because you take the  
24 view that this wasn't your statement.

1 "Answer: Right."

2 Isn't that what you testified to, Judge?

3 A. That's what I said there.

4 Q. You then say in your sworn testimony that  
5 you don't know what was in Joan Kenney's mind or  
6 Justice DelVecchio's mind when the statement was  
7 drafted; isn't that correct?

8 A. That's correct.

9 Q. And if we could put that on the monitor at  
10 Slide 50, and let me direct you to Page 149. Let me  
11 begin at Line 16.

12 A. Page 149?

13 Q. Actually, let's go to 148, beginning on  
14 Line 16. And what I have on the monitor I think is  
15 Page 149 -- but in any event, backing up to Line 16,  
16 Page 148, you were asked the following question:

17 "Question: Were there other facts which  
18 you understood could not be revealed by you which  
19 informed this view that people would react  
20 differently if they knew those facts?

21 "Answer: I think I could have revealed all  
22 the facts. And if I had been allowed to -- if I  
23 could have issued a sentencing memorandum, I could  
24 have justified my sentence."



1                   And then the colloquy goes on.  
2                   "Question: At the risk of repeating  
3 myself, you're not sure what facts this is referring  
4 to when it says 'certain facts'."  
5                   Beginning on Line 4:  
6                   "Answer: I would be repeating myself. I  
7 don't know exactly what was in Joan Kenney's mind or  
8 Chief Justice DelVecchio's mind when that sentence  
9 was put in there.  
10                  Question: You did nothing to get that  
11 clarified, I take it, prior to this being issued?  
12                  Answer: No."  
13                  Is that correct?  
14                  A. Correct.  
15                  Q. Now, after this statement was issued, the  
16 media did indeed pick up on the "certain facts"  
17 statement, didn't they?  
18                  A. The media had picked up on them before.  
19                  Q. Well, they didn't pick up on it before the  
20 statement was issued, right?  
21                  A. What specifically are you referring to?  
22                  Q. Let me see if I can be clear.  
23                  Following the issuance of your statement  
24 through the Public Information Office, a theme began

1 to play in the media that there might be other facts  
2 out there that would change the public's view of the  
3 sentence and its appropriateness; isn't that  
4 correct?

5 A. That's correct.

6 Q. And at that time, among the things you told  
7 Ms. Kenney, was there was no screwdriver used in  
8 this case as a weapon; isn't that true?

9 A. That is not true. That's not what I said.

10 Q. And didn't you tell her there was no  
11 kidnapping in the usual sense?

12 A. I did not say that. I told her those were  
13 disputed facts.

14 Q. So your recollection is that what you told  
15 Ms. Kenney was not that this was not a kidnapping in  
16 the usual sense or that a screwdriver wasn't used as  
17 a weapon, but, rather, that there was dispute about  
18 that?

19 A. Correct. And I think it's in my  
20 deposition, Mr. Ware.

21 Q. And so if there was dispute about it, you  
22 mean by that that you had to take into account at  
23 the time of your sentencing that the screwdriver was  
24 used as a weapon; isn't that right?

1           A.    The defendant pled to an assault by means  
2 of a dangerous weapon, so that was part of the plea.

3           Q.    The defendant agreed to the fact that the  
4 screwdriver was used as a weapon and put to the  
5 boy's neck, wasn't it?

6           A.    That's correct.

7           Q.    And the defendant agreed to the fact that  
8 he approached the boy in a car, that he -- dressed  
9 as a woman, that he asked the boy to get into the  
10 car to help him look for his son, quote, Michael,  
11 and that the boy got in with the offer of money;  
12 isn't that correct?

13          A.    I'd have to go back to see exactly what the  
14 presentation was, because I don't know if I can  
15 agree with your characterization of those facts.

16          Q.    Well, you can at least agree that the  
17 defendant admitted, in pleading guilty and in not  
18 taking issue with the factual bases asserted by the  
19 assistant district attorney, that he approached the  
20 child in a car while the child was walking on the  
21 street, correct?

22          A.    Correct.

23          Q.    And he was dressed as a woman at the time,  
24 correct?

1 A. She always dresses as a woman.

2 Q. Judge, you understood that at the time that  
3 Mr. Horton, however dressed and with whatever  
4 misfortune there may be in his life, approached the  
5 child on November 20th, 1999, he was in fact dressed  
6 as a woman; isn't that so?

7 A. Correct.

8 Q. And he asked the child to help him look for  
9 his son, Michael; and he agreed to that fact, didn't  
10 he?

11 A. I don't recall that's what the factual  
12 presentation is. I'll take your representation for  
13 it that he said -- that the defendant said there was  
14 a son, Michael.

15 Q. Let me ask you to look at Exhibit 22, then,  
16 and let's be sure. And specifically to the bottom  
17 of Page 12, beginning at roughly Line 20.

18 A. Yes.

19 Q. The factual recitation of the assistant  
20 district attorney was as follows, beginning at Line  
21 19: "As he, the victim, walked on Corona Street  
22 heading towards Geneva Avenue, a car pulled up  
23 beside him. In the car was the defendant, who  
24 appeared to the boy to be a woman he did not know."

1                   Let's just take that much. Mr. Horton did  
2 not take issue with the plea that he did not know  
3 the child and the child did not know him; isn't that  
4 correct?

5           A. Not at the plea, not when this was -- they  
6 did take issue with it during the lobby conference.

7           Q. But at the time you accepted the plea and  
8 statements were made on the record and you based  
9 your decision to accept the plea as knowing and  
10 intelligent under whatever legal requirements there  
11 are, Mr. Horton admitted this fact, did he not?

12          A. He did. Sufficient facts -- let's remember  
13 the standard that we use for a plea.

14          Q. No, Judge --

15               MR. EGBERT: Objection, and move to strike.  
16 Ask a question. If you want to be a witness --

17               HEARING OFFICER DAHER: Sustained. Let's  
18 go.

19               BY MR. WARE:

20          Q. Let me direct you to the question you put  
21 to the defendant on Page 18, Lines 4 and 5. After  
22 the Commonwealth had represented what the evidence  
23 would be and what the facts were, you asked, at  
24 Lines 4 and 5:

1                   "Now, does the defendant agree with all of  
2 those facts?" Isn't that the question you put?

3           A.    Yes, that is the question I put.

4           Q.    And then the defendant had certain  
5 disagreements that we went over yesterday; isn't  
6 that so?

7           A.    Yes.

8           Q.    None of those had to do with -- he did not  
9 challenge that he did not know the child or the  
10 child did not know him; isn't that correct?

11          A.    The ones we discussed yesterday, that's  
12 correct.

13          Q.    And now I'm asking you to go back to Page  
14 13 of the transcript, at the top. The assistant  
15 district attorney further represented, as part of  
16 the factual basis, that the defendant, Mr. Horton,  
17 told the boy, top of Page 13, "The defendant was  
18 searching for a missing son named Michael and that  
19 the defendant would pay \$100 to anyone who found the  
20 missing boy. The defendant asked the victim to get  
21 into the car, and the boy agreed." Isn't that so?

22          A.    Yes, that is the representation made by the  
23 assistant district attorney.

24          Q.    And Mr. Horton took no issue with those

1 facts as represented; isn't that correct?

2 A. Correct, at that hearing.

3 Q. Well, Your Honor, you keep saying "at that  
4 hearing." That was the hearing that counted.

5 That's where you accepted the guilty plea; isn't  
6 that right?

7 A. Correct.

8 Q. Following the statement -- your statement  
9 issued by the Public Information Office, the media,  
10 in fact, adopted it as a statement from you, did  
11 they not?

12 A. Correct.

13 Q. And there are a number of media outlets  
14 which characterize the statement as your statement;  
15 isn't that so?

16 A. Yes.

17 Q. You intended that, didn't you? You knew  
18 that would be an obvious consequence of issuing a  
19 statement under your name?

20 A. Yes.

21 Q. In this case, following the sentencing, you  
22 were asked to retain jurisdiction, were you not?

23 A. For probation purposes, yes.

24 Q. Well, you were asked whether or not you

1 would retain jurisdiction, correct?

2 A. For probation supervision purposes.

3 Q. Let me direct you back to Exhibit 22. And  
4 let me just see if I can locate the colloquy on that  
5 for you. Directing you specifically to Page 34 of  
6 the transcript, Line 18. And there you say, at Line  
7 18 -- defense counsel says:

8 "Your Honor, I'd ask you to retain  
9 jurisdiction of this case.

10 "The Court: And I will." Isn't that  
11 correct?

12 A. I had sentenced the defendant. So she was  
13 placed on probation. And if you read before that,  
14 we were discussing probationary issues.

15 Q. What you said on the record was "I will  
16 retain jurisdiction," correct?

17 A. Absolutely, for probation purposes.

18 Q. And what that meant was for whatever  
19 purposes this case might come back before the  
20 Superior Court with this defendant on a violation of  
21 probation or some other issue, you would be the  
22 judge before whom he came; is that right?

23 A. I could be the judge, yes.

24 Q. You would be the judge, because you



1 retained jurisdiction; isn't that right?

2 A. Under normal circumstances, that would be  
3 the case, yes.

4 Q. Absent something extraordinary, you would  
5 be the judge, correct?

6 A. Correct.

7 Q. That's the purpose of your retaining  
8 jurisdiction; isn't that correct?

9 A. Correct.

10 Q. And, accordingly, you understood that if  
11 the case were to come back before you again, you  
12 would be the judge, you would have the district  
13 attorney, you would have the defense counsel,  
14 correct?

15 A. Not correct.

16 Q. You understood absolutely that Mr. Horton  
17 could come back before you again; isn't that so?

18 A. There was a possibility, if there was a  
19 probation violation, that that defendant would be  
20 brought back before me.

21 Q. Let me ask you to look at Page 13 of your  
22 sworn testimony before the Commission and see if we  
23 can put on the monitor 54.

24 Specifically beginning on Line 20:

1 "Question: You understood" --  
2 A. I'm sorry; I don't know what page you're  
3 referring to.  
4 Q. Go to Exhibit 32, which is your transcript.  
5 A. Yes.  
6 Q. And go to Page 13, toward the bottom.  
7 A. Okay.  
8 Q. And if you would, take a look beginning at  
9 Line 20.  
10 MR. EGBERT: Your Honor, I think we've  
11 reached the point of misrepresentation --  
12 HEARING OFFICER DAHER: Speak into the  
13 microphone.  
14 MR. EGBERT: It should be solely  
15 impermissible. I would ask the Court to look at the  
16 full page, instead of the little bit that they're  
17 showing to this witness, where she says, in answer  
18 to the question just before this, when asked, "What  
19 does it mean to you," "I suppose it means if there  
20 are any probation violations, the case would come  
21 back to me. It changes the probationary  
22 conditions."  
23 MR. WARE: Fine.  
24 BY MR. WARE:

1 Q. So you understood that in the event of a  
2 violation of probation or some other issue that  
3 caused Mr. Horton to have to be resentenced, he  
4 would be back before you; isn't that correct?

5 A. He could be back before me, yes.

6 Q. He would be back before you because you  
7 retained jurisdiction, absent some unusual event,  
8 correct?

9 A. Yes, yes.

10 Q. Since September of 2000, you have in fact  
11 continued to handle Mr. Horton's probation; is that  
12 right?

13 A. I have supervised the probation or I have  
14 been -- the probation department has made inquiries  
15 of me concerning the defendant, yes.

16 Q. And would you describe in general, without  
17 going into any particulars here, the nature of the  
18 decisions you've had to undertake in that role.

19 MR. EGBERT: Judge, I would respectfully  
20 object. I don't think that this is appropriate for  
21 public comment.

22 HEARING OFFICER DAHER: In general.

23 MR. WARE: I'm not asking anything  
24 specific.

1 HEARING OFFICER DAHER: Go ahead.

2 A. At one point the defendant was moved to a  
3 different county. I was requested to approve that.  
4 There were several points where the defendant needed  
5 to be off the electronic bracelet in order to attend  
6 medical appointments. I believe there was a curfew  
7 involved, and we had to -- I guess one time I was  
8 asked to modify a curfew for a particular purpose.

9 Q. Following the sentencing on September 6th,  
10 you had occasion, as you said earlier, to talk with  
11 Justice DelVecchio; is that correct?

12 A. Yes.

13 Q. And among the things she suggested to you  
14 was that you not talk to the press, correct?

15 A. That's what she suggested, yes.

16 Q. You also had advice from counsel not to  
17 talk to the press; isn't that correct?

18 A. Correct. That was his opinion. That would  
19 be the best way of dealing with this.

20 Q. And at some time following the sentencing  
21 on September 6th, you talked with defense counsel in  
22 the case, Ms. Goldbach, correct?

23 A. I did.

24 Q. You called her at sometime between

1 September 7th and September 10th; is that right?

2 A. Yes, that's about right. What day of the  
3 week is the 10th? I'm not sure.

4 Q. The 6th was a Wednesday.

5 A. Yes.

6 Q. The 7th would be Thursday, the 8th would be  
7 Friday. Then a weekend.

8 A. It could have been the possible -- the  
9 early part of the following week.

10 Q. You viewed -- well, you knew Ms. Goldbach  
11 was defense counsel, and you knew that the Committee  
12 for Public Counsel Services was, in effect, her law  
13 firm; isn't that so?

14 A. That she was employed by the Committee for  
15 Public Counsel Services; I knew that.

16 Q. Well, you understood that the Committee for  
17 Public Counsel Services functioned, in effect, as  
18 the law firm at which she practiced; isn't that  
19 right?

20 A. The Committee for Public Counsel Services  
21 is in some respects like a law firm and in other  
22 respects it is not. It is a constitutionally-  
23 mandated publicly-funded agency for the purposes of  
24 representing only indigent defendants. It's very

1 different than a traditional law firm.  
2 Q. Let me direct your attention to your sworn  
3 testimony before Commission counsel 13 months ago,  
4 specifically to Page 89. Do you have that before  
5 you?  
6 A. Yes.  
7 Q. The question beginning at Line 10:  
8 "And you viewed CPCS as, in effect, a law  
9 firm from which Ms. Goldbach came?  
10 "Answer: Right."  
11 Is that correct?  
12 A. And I agree with that.  
13 Q. When you called Ms. Goldbach, you felt at  
14 the time that you were hamstrung by your  
15 conversations with Justice DelVecchio, advice from  
16 your lawyer, perhaps other things that inhibited  
17 your -- maybe you thought even prevented you from  
18 talking to the press; isn't that so?  
19 A. Yes. That's generally accurate.  
20 Q. And so you called CPCS, hoping that in one  
21 way or another, they could come to your defense,  
22 correct?  
23 A. I thought CPCS was the agency that could,  
24 in fact, in this instance speak on behalf of the

1 judiciary in this issue.

2 Q. And speaking on behalf of the judiciary on  
3 this issue meant speaking on behalf of Maria Lopez;  
4 isn't that so?

5 A. It was my sentence that was --

6 Q. Let me ask you, Judge, please, if you could  
7 try to respond to my question.

8 When you called CPCS, you were hopeful that  
9 they would make some kind of a sentence supportive  
10 of your decision, correct?

11 A. Correct.

12 Q. And, therefore, supportive of you  
13 personally; isn't that so?

14 A. Well, yes, I guess in some ways, yes.

15 Q. And when you talked to Ms. Goldbach and  
16 eventually to Mr. Leahy, the chief counsel, you were  
17 trying to encourage them to get out front of the  
18 problem; isn't that correct?

19 A. I'm not sure that -- I mean, I could have  
20 interpreted it that way with respect to Ms.  
21 Goldbach; but with Mr. Leahy, I specifically did  
22 discuss this issue with him, yes.

23 Q. When you say "discussed this issue," what's  
24 the issue to which you're referring?

1           A.    The issue I'm referring to is whether or  
2 not CPCS would have an institutional interest to  
3 speak on this particular sentence and on the  
4 wholesale attack on the judiciary that was going on  
5 in the media and affecting public opinion about the  
6 judiciary.

7           Q.    Let me ask you to take a look at Page 110  
8 of your sworn testimony, beginning at Line 4, and  
9 Slide 58.

10          A.    What line?

11          Q.    Let's take a look at Line 4 and 5.

12                "Question: You were hopeful that Mr.  
13 Leahy, and for that matter Ms. Goldbach, would  
14 defend the system and defend the sentence, correct?

15                "Answer: Yes. I was hopeful that somebody  
16 else could get out there and do it."

17                Right?

18          A.    Correct.

19          Q.    Am I also correct that, in fact, Mr. Leahy  
20 went on television on more than one occasion and  
21 gave interviews in support of the sentence?

22          A.    I believe he did.

23          Q.    At some time you spoke with Detective  
24 Greene, didn't you?



- 1           A.    Yes.
- 2           Q.    And you did that because you received a  
3 call from defense counsel, who passed along his  
4 telephone number?
- 5           A.    His beeper number.
- 6           Q.    And, accordingly, you took the beeper  
7 number and did a couple of things. No. 1, you  
8 called him; is that correct?
- 9           A.    I did.
- 10          Q.    And, No. 2, you gave that number or a phone  
11 number to Ms. Kenney of the SJC's Office of Public  
12 Information; is that correct?
- 13          A.    Yeah. I mean, the only thing I had was the  
14 beeper number, so I believe I gave her the beeper  
15 number.
- 16          Q.    You asked her on that occasion to give  
17 Detective Greene a call.
- 18          A.    Yes.
- 19          Q.    Have you read the complaints filed with the  
20 Commission in this case, Judge?
- 21          A.    Yes.
- 22          Q.    Have you read all of those complaints at  
23 this time?
- 24          A.    By this time I have read, I think, most of

1 them. I can't say I read every single one of them.

2 MR. WARE: At this time, Your Honor, I  
3 offer the complaints into evidence.

4 MR. EGBERT: I object.

5 HEARING OFFICER DAHER: I'll hear you.

6 MR. EGBERT: Your Honor, the complaints  
7 aren't evidence in this case. This is the  
8 evidentiary aspect of the case. They have no  
9 evidentiary value for you. They are not statements  
10 which are subject to cross examination. The rules  
11 of evidence apply here.

12 HEARING OFFICER DAHER: Mr. Ware?

13 MR. WARE: Your Honor, these statements are  
14 not hearsay, because they are not offered for the  
15 truth. For example, if an individual complainant  
16 characterized what the Judge did in some way, they  
17 are not offered for the truth for that  
18 characterization, so they are not hearsay. They are  
19 relevant to the Commission on Judicial Conduct's  
20 authority here, they're relevant to the  
21 jurisdictional right of the Commission to conduct an  
22 investigation, and they --

23 HEARING OFFICER DAHER: You've made your  
24 point. Last word, Mr. Egbert?

1                   MR. EGBERT: The authorization of the  
2 Commission is not at issue for you. The  
3 jurisdiction of the Commission is not at issue for  
4 you. And this is really nothing more than an  
5 attempt to put confidential complaints without any  
6 evidentiary value in a public record, where they  
7 don't belong. There is so far not yet one piece of  
8 evidentiary right suggested to the Court.

9                   MR. WARE: Your Honor, these -- what makes  
10 these public is the fact of the public hearing.  
11 Like the statement of allegations, up to a certain  
12 point in this proceeding, many things remained  
13 confidential. But having proceeded to formal  
14 charges, a great many things become public, among  
15 them the complaints. As I say, they are not offered  
16 for the truth --

17                   HEARING OFFICER DAHER: The objection is  
18 overruled. Go ahead.

19                   MR. WARE: Thank you, Your Honor.  
20 Those will be, for the record, Exhibit  
21 Nos. --

22                   MR. EGBERT: Your Honor, I must ask the  
23 Court, this Court is accepting those as evidence of  
24 what? We got a nice speech about public records.

1 This is an evidentiary proceeding being held by this  
2 Court under the rules of evidence of the  
3 Commonwealth of Massachusetts, and I would ask on  
4 what evidentiary issue they are being offered and  
5 accepted by this Court.

6 MR. WARE: If I may, Your Honor, you, as  
7 Hearing Officer, have a broad discretion to accept  
8 these into evidence and to use them for whatever  
9 purpose may be helpful to the Hearing Officer.  
10 Among those purposes, certainly the scope of the  
11 investigation is appropriate and that it stay within  
12 the confines of the complaint --

13 HEARING OFFICER DAHER: Mr. Egbert, they're  
14 in evidence. And obviously, once all the factual  
15 presentation is in, I'll give it the weight that it  
16 properly deserves.

17 MR. EGBERT: Let me make my intention known  
18 now.

19 HEARING OFFICER DAHER: Yes.

20 MR. EGBERT: I am now requesting from the  
21 Court a subpoena for each of the people who have  
22 filed these complaints, and I intend to examine each  
23 one of them in full. I'm not going to have  
24 statements by people uncross-examined here before

1 this Court. The rule provides specifically the  
2 Judge should be given due process and a right of  
3 cross examination. So for every person they want to  
4 put a complaint in, I'm moving now for a subpoena to  
5 be issued for those people, and I will call them in  
6 this case.

7 MR. WARE: Your Honor, you have the  
8 discretion, and it would be appropriate for you to  
9 deny that request for subpoenas. The complainants  
10 here -- the public is not on trial in this  
11 proceeding any more than the victim is on trial in  
12 this proceeding.

13 The issue here is the public's reaction to  
14 what they learned, correctly or incorrectly, from  
15 the news media or other sources. That forms the  
16 basis of why we're present here in court. That does  
17 not give Judge Lopez or her counsel the right to  
18 drag in here individual members of the public and to  
19 depose them or to take their testimony. At most,  
20 any of those individuals could only say "I saw it on  
21 television. Here was my recollection," none of  
22 which is probative.

23 The Court has very different issues before  
24 it; namely, whether in fact the Judge's conduct was

1 inappropriate.

2 Second, Mr. Egbert has in fact subpoenaed  
3 one such complainant, and could have subpoenaed them  
4 all had he wanted to do so in advance of the  
5 hearing. So it's sophistry and showmanship to stand  
6 here before you and claim that now he needs a right  
7 to --

8 HEARING OFFICER DAHER: Mr. Egbert, help me  
9 out. Does this come as a surprise to you? Weren't  
10 you aware of the complainants and that you could  
11 have subpoenaed them?

12 MR. EGBERT: Wait a minute, Judge. I'm  
13 aware of the rules of evidence as a beginning point,  
14 and I'm aware that the rules of evidence do not  
15 permit third-party statements as hearsay to come  
16 into a proceeding. That's what I base the first on.

17 Mr. Ware's virtually preposterous remark  
18 that says that the public's reaction, whether it was  
19 based on real facts or not, is appropriate for you  
20 to consider, puts us into the land of Kafka, because  
21 I want to know, for example, if somebody who wrote a  
22 complaint was relying on the fact that their  
23 next-door neighbor told them that Maria Lopez and  
24 all other women judges are bums or whether someone

1 said that Maria Lopez and all other Cuban judges are  
2 bums or whether or not they said all judges are bums  
3 or whether or not they were influenced by any other  
4 people to write those complaints. The only  
5 complainant I ever subpoenaed -- so that the record  
6 is clear -- is a person who is specifically put on  
7 the witness list by the Commission.

8           And so I subpoenaed Ms. Beaucage, as you  
9 know, to depose her. She has specifically alleged  
10 in the complaint to be a witness. She is the only  
11 complainant that has been subpoenaed. It seems to  
12 me to be preposterous to say, at least in this  
13 country, that we will accept a bunch of letters from  
14 third parties without cross examination, to take  
15 that as some kind of evidence that what they say is  
16 true or what beliefs they espouse are true, without  
17 right of cross examination. He had put on his  
18 exhibit list a week ago that he wished to introduce  
19 these complaints. I objected to them as being rank  
20 hearsay.

21           MR. WARE: Your Honor, if I may, I don't  
22 think we could have a better illustration of why the  
23 Court should not permit these individuals to be  
24 subpoenaed than Mr. Egbert's argument. And while

1 I'm rusty on Kafka, I can say that his illustration  
2 that some of these people may have had something  
3 else in their mind, they may have been motivated by  
4 a misperception of what went on in court, is utterly  
5 irrelevant. It doesn't matter whether they had a  
6 misperception of what they saw on the television  
7 set.

8 The Judge's conduct is before you, not  
9 before those individuals. We are not offering their  
10 complaints for the truth of the matter asserted.  
11 That's why they're not hearsay. They are offered  
12 for the purpose of showing that, in fact, the public  
13 reacted to the Judge and that, in fact, the  
14 Commission has investigated the issues brought  
15 before it. That's important, because the canons  
16 talk about the Judge's conduct as perceived by the  
17 public, upholding the public's view, promoting  
18 public confidence in the judiciary. The public's  
19 view, whether it's right or wrong, may be for you to  
20 determine, but their view is admissible here.

21 MR. EGBERT: Judge, a view is not  
22 admissible if their view was the result of what they  
23 read in a newspaper, for example, which we can't  
24 tell from these complaints. So if their view is



1 what they read in a newspaper, Judge Lopez is not  
2 responsible for that. She can't control -- if Mr.  
3 Ware would have his way, then the fact of the matter  
4 is I could go out tomorrow and get 40 people who  
5 never saw one inch of this proceeding and have them  
6 write letters to the JCC saying that Judge Daher was  
7 a terrible judge, did a horrible job, and made a  
8 disgrace of the proceeding. They write them in.  
9 And then at your hearing, as to discipline upon you,  
10 we have 40 uninformed people who write and say that  
11 they think your conduct is a disgrace, and that  
12 comes into evidence.

13 HEARING OFFICER DAHER: Mr. Ware, his  
14 argument -- you could get involved in a letter-  
15 writing campaign and that would, in a sense, negate  
16 your argument.

17 MR. WARE: No, Your Honor. These, again,  
18 are not offered for the truth of what any particular  
19 individual thought or didn't think. They are  
20 offered for specific purposes; namely, to establish  
21 the Commission's right to investigate, to establish  
22 the scope of that investigation, and to establish  
23 that the public reacted to what the Judge did; and  
24 therefore, we can say with some assurance that this

1 conduct did not promote --

2 HEARING OFFICER DAHER: Why couldn't you  
3 say the same thing if Mr. Egbert went out and got 40  
4 to 50 letter-writers and communicated with the  
5 Judicial Conduct Commission? Wouldn't you be in the  
6 same situation?

7 MR. WARE: That is in effect what Mr.  
8 Egbert's witness list may be. I don't know. That  
9 is, he can bring people in here --

10 MR. EGBERT: I don't understand that  
11 statement.

12 MR. WARE: He can bring witnesses in here  
13 to say anything they want about Judge Lopez, and  
14 presumably the Court may prevent that. We have a  
15 defined issue here, which is whether, in a  
16 disciplinary proceeding before the Commission on  
17 Judicial Conduct, Commission's complaints can come  
18 before the Hearing Officer. This isn't a jury case.  
19 We don't have to worry here about prejudice with  
20 respect to lay people who may misinterpret the  
21 complaints.

22 Your Honor has been a judge for 30 years.  
23 That's the issue here; that these should be before  
24 you for your consideration for such purposes as you

1 think are appropriate and nothing further.  
2 HEARING OFFICER DAHER: Go ahead, Mr.  
3 Egbert. What do you have for me?  
4 MR. EGBERT: Just a moment, Judge.  
5 (Pause)  
6 HEARING OFFICER DAHER: Do you need time?  
7 MR. EGBERT: Hold on.  
8 HEARING OFFICER DAHER: Mr. Ware, do you  
9 want to move on and we can address the issue later?  
10 MR. WARE: No, Your Honor. I'd like to  
11 resolve this issue.  
12 HEARING OFFICER DAHER: Why don't we take  
13 five minutes.  
14 (Recess)  
15 HEARING OFFICER DAHER: Okay. Where are  
16 we, Mr. Egbert?  
17 Again, while you're going through your  
18 material there, the public perception is absolutely  
19 crucial in this case, but the issue that you've  
20 introduced, an orchestration, is obviously of great  
21 concern to me. Could there be a stipulation that  
22 there was a public -- the public's perception in  
23 this matter?  
24 MR. EGBERT: Judge, here's the problem, and

1 it's a part of what I was about to argue to you.

2 HEARING OFFICER DAHER: Go ahead.

3 MR. EGBERT: The public's perception, at  
4 least segments of the public as we've seen, is a  
5 perception of her sentence and is driven by their --  
6 in many cases, we know, driven by their failure to  
7 accept the Judge's sentence or displeasure with her  
8 sentence. It's off-limits. It has nothing to do  
9 with this case. And the fact of the matter is, by  
10 way of example, when you look at some of these  
11 complaints, so called, most of those are in the  
12 nature of, We don't like her sentence. She did a  
13 bad thing by sentencing this person to a particular  
14 sentence. And that's driving what we're thinking.

15 Now, I'm entitled -- if you're going to use  
16 any of that, I'm entitled to -- if you're going to  
17 say, well, here it is; these people sent you letters  
18 saying she was cruel to the prosecutor, whatever the  
19 case may be, you have to look at it in its context.  
20 And in its context they're saying, We don't like her  
21 sentence. One of them says, Thank God that this one  
22 isn't dead and that one isn't dead, and the like.  
23 So that goes to what's driving what they say.

24 Her sentence was lawful, it was within the

1 Superior Court's discretion, it was within the  
2 statutory discretion, it is inviolate. And so to  
3 put in evidence like that without being able to  
4 cross-examine people to find out what it is their  
5 perception is and is based on, what it is they  
6 object to, what it is they saw that was wrong and  
7 what they based that on, would deny due process to  
8 this Judge, particularly. Period.

9 It is not in a vacuum. It is not all  
10 alone. We recognize that there are those out there  
11 who disagree with the Judge's sentence, and some of  
12 them quite vehemently and vociferously. To them, I  
13 say that's their right, but it has nothing to do  
14 with judicial discipline. And so to start letting  
15 in wholesale newspaper articles and complaints  
16 without any basis for what motivation, bias, and  
17 what's driving it is simply to deny due process in  
18 this case.

19 And what it means is that if, for example,  
20 Judge, if whatever you rule in this case, if the  
21 public doesn't like it and starts sending in  
22 letters, then you have acted in a fashion which has  
23 provoked the public's perception of the judiciary as  
24 being bad. That is not a relevant consideration

1 here.

2           The public perception or a question of a  
3 public perception or an appearance of a propriety or  
4 an appearance of impropriety is not the standard of  
5 seven individuals. It is an objective standard  
6 which has to be applied across the board, not based  
7 upon what some nut may think and not based on what  
8 some scholar may think. It's what the law thinks  
9 about it.

10           And so I suggest to you that to permit  
11 these in under these circumstances denies to the  
12 defendant her right of cross examination, her right  
13 to due process. It is based on no evidentiary  
14 foundation. And the fact of the matter is -- and  
15 I'll make an offer of proof to the Court -- it is  
16 crystal clear that legislators who had it out for  
17 Judge Lopez did seek people to write letters, did  
18 encourage people to write letters to the Judicial  
19 Conduct Commission.

20           Mr. Marini publicly called out to people to  
21 send letters to the Judicial Conduct Commission  
22 because he didn't like her sentence. And so under  
23 those circumstances, to take in these broad  
24 statements and not permit examination and cross

1 examination --

2 HEARING OFFICER DAHER: Bear with me for a  
3 moment, Mr. Egbert. The public perception; the  
4 Judicial Conduct Commission is apprised of this  
5 quote, end of quote, public perception, and they  
6 conduct an investigation. They don't buy what the  
7 public is telling them. I mean, what they say is,  
8 Look, we may have grounds here for an investigation.  
9 That's what happened. That's what the public  
10 perception, as recognized by the Judicial Conduct  
11 Commission, initiated. That's what it did.

12 MR. EGBERT: I couldn't agree with you  
13 more, Judge.

14 HEARING OFFICER DAHER: How are you hurt by  
15 it?

16 MR. EGBERT: I'm obviously hurt by it. I'm  
17 hurt when any fact finder, such as yourself, is  
18 exposed to uncross-examined complaints. I'm  
19 troubled by that. You are a fact finder, and I have  
20 to believe that the rules of evidence require, for  
21 that very reason, that you not be prejudiced or  
22 poisoned by the kinds of information which our  
23 courts have consistently failed to recognize.

24 HEARING OFFICER DAHER: If the Court did

1 accept -- it's not accepting it for the truthfulness  
2 of the statements made. It's, was there sufficient  
3 material, if I may use that term, for the Judicial  
4 Conduct Commission to conduct an investigation. I'm  
5 not buying it. But go ahead.

6 MR. EGBERT: If that were your job or the  
7 function of this hearing, I would say to you, you're  
8 right. If this was a motion to dismiss, saying the  
9 Judicial Conduct Commission never had before it a  
10 complaint, as required by statute, I would agree  
11 you're right. That as to that motion to dismiss,  
12 those would be relevant to show that, in fact,  
13 jurisdiction was encountered. But that's not an  
14 issue, nor are you to decide it. It's got nothing  
15 to do with what's before you. It is simply an  
16 attempt to try to put in unsworn hearsay -- with all  
17 due respect -- noninformation into --

18 HEARING OFFICER DAHER: It's not being  
19 offered for that. It's being offered -- it's not  
20 being offered for the truthfulness of it. In a  
21 sense, to me, it was the fact of, was there  
22 sufficient material evidence, if I may use that, for  
23 the Judicial Conduct Commission to conduct -- to  
24 move in conducting a hearing.



1                   MR. EGBERT: That's not an issue. And if  
2 that were really what it was about, then I'll  
3 stipulate on the record, as I always have, that the  
4 Commission on Judicial Conduct have jurisdiction of  
5 this matter. That's not what this is about. This  
6 is about an attempt to get this trash into the  
7 public record.

8                   HEARING OFFICER DAHER: Mr. Ware?

9                   MR. WARE: The Commission is not willing to  
10 stipulate to anything in this case, and I'm not  
11 prepared to agree with my colleague's assertion that  
12 the public's reaction to this was trash. I do not  
13 agree with that.

14                   I think the Court has an obligation to hear  
15 the public in this case. Defense counsel and Judge  
16 Lopez have been in this case for two years. They  
17 made a heavy point of it in their opening statement  
18 to this Court, how long this has gone on, what a  
19 hardship it is on the Judge.

20                   Sauce for the goose is sauce for the gander  
21 here. Mr. Mone, Mr. Silverglate, Mr. Good, now Mr.  
22 Egbert, have had two years to dig into these  
23 complaints and their validity.

24                   This Court should not listen for one moment

1 to some argument that there's a violation of due  
2 process here. This is not as if a bunch of people  
3 sitting in the courtroom wrote letters about the  
4 Honorable Judge Daher. The difference is due  
5 process had been applied here. It's been applying  
6 for two years. It's applying today. You are the  
7 arbiter of that process and you have the absolute  
8 right to hear the public and their reaction not to  
9 the Judge's sentence, but to her conduct.

10 HEARING OFFICER DAHER: Mr. Egbert, do you  
11 want to address the seasonableness of your motion?

12 MR. EGBERT: I'm not arguing that I don't  
13 have time to prepare. I looked at these complaints  
14 and said to myself, Under the rules of evidence,  
15 they are not admissible. We're not waiving the  
16 rules just because two years went by. The rules of  
17 evidence apply and due process applies.

18 Mr. Ware says he wants to hear from the  
19 public. Bring them in. Let them be cross-examined,  
20 as every witness is. Let us find out what their  
21 motives and bias are. If it's to be relevant at  
22 all, we need to know where it came from. We do  
23 know is that he stands up and says, Oh, these are  
24 this, that and the other thing. He doesn't know

1       them any more than I do.

2               HEARING OFFICER DAHER: The relevance here,  
3 according to you, would be, as I take it, didn't the  
4 Judicial Conduct Commission have enough before it to  
5 conduct an investigation?

6               MR. EGBERT: We have never asserted that  
7 the Judicial Conduct Commission did not have  
8 jurisdiction.

9               HEARING OFFICER DAHER: Does that satisfy  
10 your concerns?

11              MR. WARE: Absolutely not. We're entitled  
12 to prove the requirements of this case. We're  
13 entitled to present evidence to you and ultimately,  
14 of course, to present this record to the Commission  
15 and to the Supreme Judicial Court. It should be a  
16 record.

17              MR. EGBERT: The Commission has the  
18 complaints. There's no issue as to what the  
19 Commission has. And, Judge, there's no issue that  
20 these complaints exist. The question is, do they  
21 come into evidence in the proceeding before you with  
22 the task that you are charged with. And the task  
23 you are charged with is to find the facts and make  
24 recommendations based upon a due-process hearing

1 with witnesses being cross-examined. It's like  
2 taking a complaint in a civil case and saying, Okay,  
3 ladies and gentlemen of the jury, this complaint is  
4 Exhibit A and it's evidence in this case. We know  
5 it's not.

6 HEARING OFFICER DAHER: Mr. Ware, his  
7 concern is that you introduce a document and you  
8 argue that it's not there for the -- I think in Page  
9 3 -- not for the truth of their allegations, but for  
10 the limited purposes of establishing the authority  
11 of the Commission. His argument is going to be, in  
12 the record anyhow, for the whole world to see, not  
13 for the truth of the allegation, but for the limited  
14 purpose of establishing the JCC's statutory basis  
15 for the Commission's investigation.

16 MR. EGBERT: Which is not at issue.

17 HEARING OFFICER DAHER: You've made that  
18 point.

19 MR. WARE: Your Honor, there are two  
20 reasons that the Court -- there are a lot of  
21 reasons. There are two legal reasons why these are  
22 admissible.

23 First of all, as Your Honor has correctly  
24 said several times, they're simply not hearsay. If

1 they're not hearsay, then the question is, are they  
2 relevant. They are relevant to establish  
3 jurisdiction. They are relevant also as an  
4 indication that, rightly or wrongly, the public's  
5 confidence, the public's reaction to what they saw  
6 on the videotape or on television was outrage.  
7 That's relevant here. We must prove that that's in  
8 fact how the public perceived things. It may be you  
9 might decide that that isn't the Judge's fault. But  
10 we have to prove that. And the Court ought to take  
11 these complaints on those issues.

12 I am prepared to give you two cases.  
13 Neither is a Judicial Conduct Commission case, but I  
14 will hand up copies of two cases, Commonwealth  
15 against Serrano-Ortiz, 53 Mass. App, 608.

16 HEARING OFFICER DAHER: I have it on Page  
17 2.

18 MR. WARE: And lines --

19 MR. EGBERT: Do you have copies for me, Mr.  
20 Ware?

21 MR. WARE: Yes.

22 MR. EGBERT: Judge, I'm going to suggest  
23 that it's twenty minutes to one. Mr. Ware is  
24 handing up cases. Quite frankly, he had a memo

1 prepared on this matter and handed it to me a few  
2 minutes ago. I don't think anybody should have to  
3 fly by the seat of their pants, and I would like to  
4 address this issue tomorrow morning.

5 MR. WARE: I object to that, Your Honor.  
6 We submitted an exhibit list in accordance with the  
7 Court's request and schedule last week. These  
8 exhibits are clearly marked as in dispute --

9 MR. EGBERT: Just yesterday --

10 HEARING OFFICER DAHER: I don't think, Mr.  
11 Ware, you're going to be heard. I thought I saw Mr.  
12 Mone in the courtroom. We can pick up without  
13 missing a breath.

14 MR. WARE: Fine.

15 HEARING OFFICER DAHER: So why don't we get  
16 organized, and we'll pick up this very nice issue  
17 tomorrow morning. We'll take another five.

18 (Recess)

19 HEARING OFFICER DAHER: Mr. Ware, you had  
20 some comment about some motions or some preliminary  
21 matters prior to Mr. Mone taking the stand, if  
22 indeed he does.

23 MR. WARE: Yes, Your Honor. The Commission  
24 objects to having Mr. Mone testify at all, because I

1 don't think there's anything that he can say that's  
2 going to inform this issue.

3         As I've said in the past, it's not a  
4 question of the accuracy of Mr. Mone's  
5 representations.

6         The hearing before the Commission is a  
7 statutory creature, and his views of that hearing or  
8 my views of that hearing really don't matter. It is  
9 what it is. And it doesn't get transformed because  
10 either one of us chooses to characterize it in a  
11 particular way. So that's my principal argument.

12         And as I said the other day, it's in the  
13 nature of allocution for a defendant in a criminal  
14 case. It's in the nature of an answer or response  
15 to the statement of allegations. These are matters  
16 which are voluntary in our choices by the judge  
17 under investigation; and as such, they become  
18 admissible.

19         And if you think about it, one point I made  
20 the other day was that the statement's recorded.  
21 The only reason it could be recorded is because it  
22 is not a settlement discussion. If it were a  
23 settlement discussion, there's no point in recording  
24 it, because everybody would understand that it's

1 inappropriate to use it. In addition to which, Your  
2 Honor, I think in this case, Massachusetts law is  
3 extremely strict about this issue. We're not  
4 dealing here with Rule 408 of the Federal Rules of  
5 Evidence. That's not the standard.

6         The standard in Massachusetts is a good  
7 deal tighter than that. And even if it were a  
8 settlement discussion, any factual statements made  
9 during the course of that would nonetheless be  
10 admissible. And the only thing that wouldn't be  
11 admissible is a specific offer in the terms of that  
12 offer.

13         So on that basis, while I have the greatest  
14 respect and admiration and, for that matter,  
15 friendship for and with Mr. Mone, I don't think the  
16 testimony is helpful to this legal issue.

17         HEARING OFFICER DAHER: Mr. Egbert, do you  
18 want to respond?

19         MR. EGBERT: I'm not sure I understood Mr.  
20 Ware's argument. If his argument is that you don't  
21 have to decide whether or not it is an offer in  
22 compromise or a settlement discussion, I think you  
23 should reject that.

24         HEARING OFFICER DAHER: It basically comes



1 down to that, but give me your position.  
2 MR. EGBERT: I think that should be  
3 rejected forthwith. The rules of evidence apply,  
4 and the maxim of the rules of evidence is that the  
5 Court must make preliminary findings and  
6 determinations as to whether or not evidentiary  
7 exclusion exists or an evidentiary reason for  
8 admission exists. You need the predicate facts in  
9 order to make that finding, and the facts have to  
10 come through the parties that were there --  
11 HEARING OFFICER DAHER: Let me hear from  
12 Mr. Mone. Swear him in. Let's go.  
13 MICHAEL E. MONE, Sworn  
14 DIRECT EXAMINATION  
15 BY MR. EGBERT:  
16 Q. State your name, please.  
17 A. Michael E. Mone.  
18 Q. And Mr. Mone, what is your occupation?  
19 A. I'm an attorney.  
20 Q. How long have you been practicing?  
21 A. Since 1967.  
22 Q. Could you give me a brief history of your  
23 professional background?  
24 A. I graduated from Boston College Law School

1 in 1967. That fall I went to work for what was then  
2 known as Schneider, Reilly & Swartz. I stayed there  
3 and became a shareholder --  
4 HEARING OFFICER DAHER: Do we need a CV on  
5 this?  
6 MR. EGBERT: I think we do, Your Honor,  
7 because I think it goes to the question of his  
8 good-faith belief as to what he was doing at the  
9 Commission and his experience in that regard.  
10 MR. WARE: I'm not here to question this  
11 witness' good faith, Your Honor.  
12 HEARING OFFICER DAHER: Go ahead.  
13 MR. EGBERT: I'm sorry?  
14 HEARING OFFICER DAHER: Go ahead. He  
15 stipulates as to his CV and his qualifications and  
16 the fact that he's been a practicing attorney for  
17 many years.  
18 MR. EGBERT: Well, I think the Court should  
19 know. Let me take a brief minute, if I may.  
20 HEARING OFFICER DAHER: All right.  
21 BY MR. EGBERT:  
22 Q. Mr. Mone, how long have you been practicing  
23 law?  
24 A. Thirty-five years this fall.

1 Q. And how much of that practice has been  
2 devoted to the litigation of civil and criminal  
3 cases?

4 A. All of it.

5 Q. And how much of that practice has been  
6 devoted to the practice before the Board of Bar  
7 Overseers or the Judicial Conduct Commission?

8 A. It's my pro bono practice, so I would say  
9 it's probably -- in any given year I would probably  
10 have two or three cases at the Board, and I probably  
11 have had five or six judicial conduct cases.

12 Q. And have you been selected to be a special  
13 counsel or hearing officer by the Board of Bar  
14 Overseers or the Judicial Conduct Commission?

15 A. I was a member of the Board of Bar  
16 Overseers. I served as special counsel to the  
17 Commission on Judicial Conduct in the Basbas matter.

18 Q. And are you generally familiar with the  
19 Rules of Evidence for civil proceedings?

20 A. I like to think so.

21 Q. Are you familiar with the Rules of  
22 Procedures before the Judicial Conduct Commission?

23 A. I am.

24 Q. Mr. Mone, at some point in time did you

1 represent judge Maria Lopez?

2 A. Yes, I did.

3 Q. During what period of time was that, both  
4 in years and in events, if you could?

5 A. I first represented Judge Lopez in  
6 connection with complaints that were filed by the  
7 Demoulases in connection with her work in that case.  
8 They filed complaints at the Commission. I  
9 represented her in connection with those complaints  
10 and complaints that were ancillary to that  
11 complaint.

12 I began to represent her in this matter --  
13 to the best of my memory, it was about three or four  
14 days after the sentencing. In other words, there  
15 had been the initial fire storm. And then I think  
16 she called me either that weekend or that Monday.  
17 I'm not sure. And I represented her from then until  
18 the Commission issued the formal charges in this  
19 case.

20 Q. During the course of your representation of  
21 Judge Lopez with regard to the issues that are  
22 pending here, did you have -- strike that. Who was,  
23 if anyone, named as special counsel for the  
24 Commission at that time?

1 A. Mr. Ware.

2 Q. And did you engage with Mr. Ware in  
3 conversations concerning the resolution of this  
4 matter?

5 A. I did.

6 Q. During what period of time did those  
7 conversations take place?

8 A. I would say that they were from some time  
9 late last fall -- I had asked Mr. Ware on several  
10 occasions, "What do they want?" In other words, I  
11 was trying to explore an agreed disposition. And I  
12 kept saying to him, "What do they want? What do  
13 they want?" And eventually --

14 HEARING OFFICER DAHER: Mr. Mone, again, at  
15 this particular point let me interject and say I  
16 don't want to hear in re any possible specific  
17 resolution of the matter.

18 THE WITNESS: Okay.

19 Q. Let me see, then, if I can ask some  
20 questions with that in mind.

21 Did you have conversations with Mr. Ware  
22 wherein you proposed a resolution of the matter  
23 short of formal charges and public hearing?

24 A. Yes.

1 Q. And did there come a point in time where  
2 Mr. Ware proposed to you on behalf of the Commission  
3 a resolution of the matter short of formal charges  
4 and public hearings?

5 A. He told me that there was a bottom line  
6 that the Commission had.

7 Q. When you say "a bottom line," is it fair to  
8 say that he suggested to you a disposition which  
9 would satisfy --

10 MR. WARE: Objection, Your Honor.

11 HEARING OFFICER DAHER: I want to hear the  
12 question before you object. Go ahead.

13 Q. That he suggested to you a disposition  
14 which would satisfy the Commission to resolve this  
15 case without formal charges and public hearing?

16 HEARING OFFICER DAHER: Are you still  
17 objecting to that?

18 MR. WARE: No, Your Honor.

19 HEARING OFFICER DAHER: You have it.

20 A. He gave me a bottom line. Yes, yes.

21 Q. When you say "a bottom line," did I  
22 describe the concept correctly?

23 A. Well, an agreed disposition. I mean, under  
24 the rules, she would have to admit to some statement

1 of charges. It would be an agreed disposition. And  
2 that disposition I think under the rules would have  
3 to go to the Court.

4 Q. And that would not be -- strike that. That  
5 resolution would not require formal charges or a  
6 public hearing; is that correct?

7 A. Correct.

8 Q. Now, I take it that your idea of  
9 disposition and the Commission's idea of disposition  
10 were not the same?

11 A. Correct.

12 Q. And during the time -- and during the time  
13 that you were offering dispositions in this case,  
14 there was a motivation, was there not, to avoid a  
15 formal proceeding in a public trial, so to speak?

16 A. I thought the expense of this to the judge,  
17 both emotionally and financially, would be enormous;  
18 and I thought that if we could reach a disposition,  
19 that it would be in her interest, as well as in the  
20 interests of the Commission and the Court.

21 Q. And during sometime in March of the Year  
22 2002, did you have any conversation with Mr. Ware,  
23 again, about disposing of this case?

24 A. Yes.

1 Q. Without mentioning the specific  
2 disposition, what was the conversation?

3 A. That I was not going to get -- they were  
4 not going to go below what they wanted and that the  
5 only possibility would be for me to make, you know,  
6 an argument before them and to come in with a judge  
7 and make an argument before them on disposition.

8 Q. In an attempt to get them to resolve the  
9 matter in a particular way?

10 A. Yes.

11 Q. And did you, in fact, appear before the  
12 Commission in April of 2002?

13 A. I did.

14 Q. When you appeared before the Commission,  
15 did you have an understanding as to whether or not  
16 your appearance and Judge Lopez's appearance was  
17 confidential?

18 A. I believed that everything up to the  
19 statement of formal charges was confidential.

20 Q. I want to, if I may, bring your  
21 attention --

22 MR. EGBERT: May I approach for a moment?

23 MR. WARE: What page, please?

24 MR. EGBERT: 1098. Do you have it?



1 Q. Mr. Mone, I put before you I think it's  
2 Rule 5 of the Rules of the Commission on Judicial  
3 Conduct.

4 A. Yes.

5 Q. And is that rule entitled  
6 "Confidentiality"?

7 A. Yes.

8 Q. And could you read the first section of  
9 that rule.

10 A. 5(A)?

11 Q. Yes.

12 A. "All proceedings prior to a determination  
13 of sufficient cause in the filing of formal charges  
14 shall be confidential."

15 Q. And what did you understand that to mean?

16 A. Just what it says.

17 Q. That everything that occurs before the  
18 issuance of formal charges is confidential?

19 A. Yes.

20 Q. What did you understand the word  
21 "confidential" to mean?

22 A. Confidential, private, cannot be used,  
23 cannot be released. I could get a dictionary, but  
24 my view was that it was private.

1 Q. And would you go down to I think it's  
2 paragraph -- I don't have it in front of me, but I  
3 put a red check mark next to it. Can you read that?  
4 A. That's B(4). "Upon filing of formal  
5 charges, in which case only the formal charges, the  
6 answer thereto, the evidentiary hearings thereon and  
7 the final recommendation of the Commission as to  
8 disposition shall become public, except as provided  
9 in Paragraph D below."  
10 Q. And can you read Paragraph D.  
11 A. I think that's the waiver position, that  
12 the judge can waive confidentiality.  
13 Q. Now, in these particular proceedings --  
14 strike that.  
15 When you appeared before the Commission,  
16 what was your task, as you understood it?  
17 A. My task was to attempt to talk them off  
18 their bottom line.  
19 Q. And I want to put before -- let me get a  
20 clean copy.  
21 MR. EGBERT: May I approach, Your Honor?  
22 HEARING OFFICER DAHER: Yes.  
23 Q. I'm putting before you a transcript of a  
24 proceeding which occurred on April 18, 2002; is that

1 correct?

2 A. Yes.

3 Q. And did you understand that to be  
4 confidential?

5 A. Yes.

6 Q. And your appearance to be confidential?

7 A. Yes.

8 Q. When you arrived at that proceeding, am I  
9 correct that you stated the following: "I would  
10 like to talk to you about a disposition in the case,  
11 and I would like to talk to you about why I  
12 believe," and then you go on to discuss specific  
13 disposition, correct?

14 A. Yes.

15 Q. And then you also indicate, "Now, putting  
16 aside for a minute the fact that we have legal and  
17 factual defenses to a lot of what is in the  
18 statement of allegations; that is, the way the facts  
19 are cast," et cetera, et cetera, you basically say  
20 that you're not going to discuss those at the  
21 meeting; is that right?

22 A. Yes.

23 Q. And so that your purpose was solely to  
24 discuss or offer a disposition of the case?

1           A.    I was trying to settle the case.  
2           Q.    And did you offer a disposition of the  
3 case? Did you offer a resolution of the case?  
4           A.    Yes, I did.  
5           Q.    Did you offer a settlement of the case?  
6           A.    I thought I did. I know I did.  
7           Q.    After your offer of settlement, did you  
8 receive a response from anyone on the Commission or  
9 representing the Commission with regard to your  
10 offer?  
11          A.    Yes.  
12          Q.    And who did you receive that -- strike  
13 that.  
14                Who did you speak with?  
15          A.    Paul Ware called me later on that  
16 afternoon.  
17          Q.    So that we can avoid what the judge does  
18 not want to put on the record, is it fair to say  
19 that your offer to settle was rejected?  
20          A.    Yes.  
21          Q.    Did Mr. Ware reject it in toto or was there  
22 further conversation in that regard?  
23          A.    There was conversation about that we could  
24 continue to talk about how the disposition could be

1 cast -- without talking about the disposition, we  
2 were talking about how -- whether the Commission  
3 could be satisfied in some fashion. So we did  
4 continue to talk about it, but I essentially told  
5 him that he would be dealing with you in the future.

6 Q. And that was because formal charges were  
7 going to be brought?

8 A. Right.

9 Q. So is it fair to say -- how would you  
10 characterize your conversation with Mr. Ware? Would  
11 it be fair to say that it was a further discussion  
12 of a future possibility of settlement?

13 A. I viewed it as a continuation of the  
14 discussion I had with the Commission, which was an  
15 attempt to settle the case.

16 Q. And when you went before the Commission in  
17 an attempt to settle, did you at that time have --  
18 did you at that time attempt to discuss the  
19 allegations against the judge and provide defenses  
20 that the judge had?

21 A. No. I was trying to settle the case. And  
22 I was talking more about disposition and trying to  
23 put into context what had happened. And also, the  
24 talk about -- I mean, I believed -- and I have not

1 read my statement -- I had intended to say -- and I  
2 don't know whether I got to it, since it was  
3 limited, what their precedent was. I didn't think  
4 they had precedent for what they wanted.

5 Q. So you were basically giving your reasons  
6 for your settlement offer?

7 A. Yes.

8 Q. At the time that you and Judge Lopez  
9 appeared before the Commission, was that in any way  
10 believed to be by you a statement of the defense of  
11 the case or the allegations?

12 A. No. I made that clear at the beginning of  
13 my statement; that I was not going to address those  
14 issues.

15 MR. EGBERT: I have no further questions.

16 HEARING OFFICER DAHER: Mr. Ware, you may  
17 examine.

18 MR. WARE: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MR. WARE:

21 Q. Mr. Mone, during the course of the  
22 proceedings on April 18, you would agree, sir, that  
23 there was no back and forth between you and the  
24 Commission with respect to what you're saying was a

1 settlement offer; is that correct?

2 A. They said "hello" and "good-bye."

3 Q. There was no give-and-take among any of the  
4 Commission members and you with respect to any  
5 particular settlement offer that you made; is that  
6 right?

7 A. Nor did I expect one.

8 Q. And during the course of that proceeding, I  
9 had no speaking role at all; isn't that so?

10 A. I think you said "hello" to me. But other  
11 than that, you did not say anything.

12 Q. We certainly did not negotiate in that  
13 Commission proceeding; isn't that correct?

14 A. Well, I disagree. I believe that I was  
15 negotiating.

16 Q. Well, when you say you were negotiating,  
17 what you mean is that you hoped and, from what you  
18 say, intended that the Commission would take into  
19 account your remarks and might subsequently offer  
20 some disposition short of formal charges, correct?

21 A. No. I was making an offer and I hoped the  
22 Commission would accept it.

23 Q. Have you got a copy of your transcript?

24 A. Yes, I have it right here.

1 Q. Where is it that you believe in the  
2 transcript you make a specific offer of settlement,  
3 other than saying, "I would like to talk to you  
4 about a disposition"?

5 A. I believe that's where I made the offer, in  
6 the first paragraph.

7 Q. Well, you say "I'd like to talk to you  
8 about a disposition in the case. And I'd like to  
9 talk to you about why I believe that a public  
10 disposition without sanctions -- without a  
11 suspension" --

12 A. "Without a suspension" is what I meant.

13 Q. But in effect, you came before the  
14 Commission, and both you and Judge Lopez spoke;  
15 isn't that correct?

16 A. Yes.

17 Q. And your hope was the Commission would take  
18 that into account and there would be some  
19 subsequent, but specific offer of a way in which to  
20 resolve the case?

21 A. That's really not what happened.

22 Q. I know it's not what happened --

23 A. That's not what I expected.

24 Q. Did you expect in the Commission proceeding



1     itself that one of the Commissioners would say,  
2     "Here's what we'll do"?

3         A.    No.  Having sat where you sit, Mr. Ware,  
4     and being aware of how they worked, I did not expect  
5     someone to come up with a proposal then.  I expected  
6     someone would get back to me in regards to my offer.

7         Q.    In fact, at least in the proceeding itself,  
8     which is what we're talking about here, there was no  
9     response from the Commission, and I made no offer of  
10    settlement; is that correct?

11        A.    That is correct.

12            MR. WARE:  I have no further questions,  
13    Your Honor.

14            HEARING OFFICER DAHER:  Anything else?

15                    REDIRECT EXAMINATION

16            BY MR. EGBERT:

17         Q.    Did the fact that this was being recorded  
18     in any way make you think that this wasn't a  
19     settlement discussion?

20         A.    No.

21         Q.    Have you been involved in settlement  
22     discussions in cases over your life where they were  
23     on the record -- or on a record?

24         A.    Oh, sure.

1 Q. In both Judge's chambers, for example?

2 A. Well, usually not Judge's chambers, but  
3 certainly I've stood in open court and said things.  
4 And you know, there's someone taking it down.

5 Q. And those were in the course of settlement  
6 discussions?

7 A. Yes. And it did not occur to me the fact  
8 that there was somebody there changed the nature of  
9 the discussion.

10 MR. EGBERT: No further questions.

11 HEARING OFFICER DAHER: Help me out. In  
12 regards to your appearance before the Commission, it  
13 was because Attorney Ware told you that his hands  
14 were tied and he couldn't go any further. And if  
15 you wanted to attempt to negotiate something, you'd  
16 have to go before the JCC; is that correct?

17 THE WITNESS: I suppose, Your Honor, the  
18 best way to answer that is he appealed to my ego, by  
19 saying, essentially, "If anyone could talk them into  
20 this, you could talk them into it." So he hit me  
21 right in my most vulnerable place, which is my ego.

22 HEARING OFFICER DAHER: And you did appear  
23 there?

24 THE WITNESS: I did appear there.

1                   HEARING OFFICER DAHER: Did anyone at the  
2 Commission indicate to you, "Mr. Mone, we're not  
3 here to negotiate?" They just let you appear? You  
4 made your introduction, and you told them that you'd  
5 like to resolve it, you felt it should be resolved,  
6 and then you moved on; is that correct?

7                   THE WITNESS: And I had written them a  
8 letter that said that. I had written them a letter  
9 in advance that said I was coming to see if I could  
10 reach an agreed disposition. So I had no --

11                   HEARING OFFICER DAHER: Was there any  
12 response to that letter?

13                   THE WITNESS: Other than, Please come at  
14 such and such a time and date.

15                   HEARING OFFICER DAHER: Okay. Anything  
16 else?

17                   MR. EGBERT: Nothing.

18                   MR. WARE: No.

19                   HEARING OFFICER DAHER: I'll have an answer  
20 on this tomorrow morning for you at 9:30 when we  
21 pick it up.

22                   Anything else?

23                   MR. WARE: Could I just, for the Court's  
24 convenience, submit copies of Judge Liacos'

1 treatise on a couple of cases that may be helpful.  
2 HEARING OFFICER DAHER: Let me ask you a  
3 question before you leave, in regards to the  
4 admissibility of the articles and complaints and the  
5 letters: Could we bifurcate them, in re letters  
6 that were communications, in re sentencing versus  
7 communications that were in re conduct? Is such a  
8 thing possible?  
9 MR. WARE: No, Your Honor.  
10 HEARING OFFICER DAHER: Okay. You'll have  
11 a memo for me by tomorrow?  
12 MR. EGBERT: I'll have --  
13 HEARING OFFICER DAHER: You'll have an  
14 argument?  
15 MR. EGBERT: Either an argument or a memo.  
16 HEARING OFFICER DAHER: Okay.  
17 MR. EGBERT: I just want to make sure what  
18 they gave you, which is this Handbook of  
19 Massachusetts Evidence -- I don't think they gave  
20 you the most recent version of it. I will provide  
21 to you -- you may have it. I'm assuming you have  
22 it.  
23 HEARING OFFICER DAHER: I've been sleeping  
24 with it every night.

1                   MR. EGBERT: There's a more recent version  
2 than what they gave you.

3                   HEARING OFFICER DAHER: Is that it? See  
4 you tomorrow morning at 9:30.

5                                 (Whereupon, the hearing was  
6                                 adjourned at 1:20 p.m.)

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C E R T I F I C A T E

I, Jane M. Williamson, Registered Professional Reporter, do hereby certify that the foregoing transcript, Volume II, is a true and accurate transcription of my stenographic notes taken on Tuesday, November 19, 2002.

\_\_\_\_\_  
Jane M. Williamson  
Registered Merit Reporter

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