

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 LLP
(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
Monday, December 16, 2002
9:39 a.m.

(Jane M. Williamson, Registered Merit Reporter)

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I N D E X

WITNESS DIRECT CROSS REDIRECT RECROSS

David Deakin				
(By Mr. Egbert)		10-3		10-134
(By Braceras)			10-126	
Joan Kenney				
(By Mr. Ware)	10-145		10-209, 211	
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E X H I B I T S

EX. NO.		FOR ID	IN EVID.
S	Bail list for Friday, August 4, 2000		10-41
67	Chapter S 66	10-130	

1 P R O C E E D I N G S
2 HEARING OFFICER DAHER: Mr. Egbert, do you
3 want to pick it up?
4 MR. EGBERT: Thanks, Judge.
5 DAVID DEAKIN, Previously Sworn
6 CROSS EXAMINATION, Resumed
7 BY MR. EGBERT:
8 Q. Good morning, Mr. Deakin.
9 A. Good morning, Mr. Egbert.
10 MR. EGBERT: Good morning, Your Honor.
11 Q. Mr. Deakin, after August 1st -- and we've
12 discussed at some length the discussions you had
13 with Ms. Joseph concerning press releases and the
14 like -- what was the next event in which you were
15 involved in any way with regard to the Horton case?
16 A. It was the hearing regarding change of plea
17 on I believe August 4th of that year, three days
18 later.
19 Q. And I think you testified that you received
20 a phone call from Ms. Joseph, correct?
21 A. That's correct.
22 Q. And you went over to court?
23 A. That's correct.
24 Q. Now, when you received the phone call from

1 Ms. Joseph, she told you, did she not, that there
2 were media at the courtroom or courthouse?

3 A. I believe so. I don't have a specific
4 recollection of her saying there was media, but I
5 believe that she did.

6 Q. She told you that there had been some event
7 between the media and Mr. Horton and his mother?

8 A. I'm not sure if she ever told me that. And
9 if she did, I'm not certain whether it was in the
10 phone call or after I got to court. I learned that,
11 but I'm not sure if she told me that or not.

12 Q. Let's combine for a moment the phone call
13 and getting to court in terms of the information you
14 received, all right?

15 A. Yes.

16 Q. It's at or about the same period, correct?

17 A. Correct.

18 Q. And it's fair to say that you have some
19 difficulty differentiating what you heard in the
20 phone call versus what you may have heard when you
21 got to court?

22 A. I remember some things clearly from the
23 phone call and some things clearly from court.

24 Q. In any event, you did learn during that

1 period of the phone call and coming to court that
2 there had been some event between the media and Mr.
3 Horton to cause some kind of a difficulty, correct?
4 A. I heard that, yes.
5 Q. You heard it?
6 A. Yes.
7 Q. Because one thing is clear. You weren't
8 there. You weren't at court when court began its
9 session on August 4th; is that correct?
10 A. That's correct.
11 Q. And you weren't there when the media
12 arrived, correct?
13 A. No, I was not.
14 Q. You weren't there when Mr. Horton arrived,
15 correct?
16 A. I don't believe so, no.
17 Q. You weren't there when Mr. Horton's mother
18 arrived, correct?
19 A. Again, I don't believe so.
20 Q. You weren't there when Anne Goldbach
21 arrived, correct?
22 A. No.
23 Q. And you weren't there when Ms. Joseph
24 arrived.

1 A. No, I was not.

2 Q. You weren't there when Ms. Goldbach and Ms.
3 Joseph went into Judge Lopez's lobby.

4 A. No, I was not.

5 Q. You weren't present for any of those
6 conversations.

7 A. No, I was not.

8 Q. So anything you know about that you know
9 from what people may have told you.

10 A. Correct.

11 Q. And you don't know whether what they're
12 telling you is truthful, accurate or otherwise,
13 correct?

14 A. I have an opinion about it, but I don't
15 know of my own --

16 Q. Typical of not having firsthand knowledge,
17 you lack it as to those events, correct?

18 A. That's correct.

19 Q. And one thing you do now know, however, is
20 that Ms. Joseph told you that when she was in Judge
21 Lopez's lobby, Judge Lopez told her that she
22 belonged prosecuting cases in the suburbs, correct?

23 A. What I recall her saying is, "You belong in
24 the suburbs." I didn't know whether that was

1 prosecuting cases or otherwise.

2 Q. Do you recall testifying under oath at a
3 Commission interview I think we've been calling it
4 on or about August 16th of 2001?

5 A. Yes.

6 Q. And that was your first statement under
7 oath at a time close to the event, correct?

8 A. Yes.

9 Q. And at that time you were doing your best
10 to accurately give your best memory while under
11 oath, correct?

12 A. Yes.

13 Q. Now would you turn to Page 35 of what is
14 now R-1.

15 HEARING OFFICER DAHER: It's on my desk.

16 MR. EGBERT: Let's hold on that for a
17 moment and I'll come back to it.

18 HEARING OFFICER DAHER: Okay.

19 Q. When you arrived at the courthouse, you got
20 into a conversation with Anne Goldbach, didn't you?

21 A. Yes, I did.

22 Q. And Anne Goldbach, by reputation, to you
23 was an honest, intelligent attorney with high
24 integrity; is that correct?

1 A. Yes.

2 Q. And she -- at that time did she seem to you

3 to be a bit out of sorts?

4 A. She seemed quite upset, yes.

5 Q. And when you say "she seemed quite upset,"

6 can you tell her demeanor?

7 A. Her demeanor was very intense. She was

8 obviously -- I'm not sure how to say it other than

9 upset, agitated.

10 Q. And in that conversation with you, she told

11 you that she was upset with the district attorney's

12 office press release in the Horton case; is that

13 correct?

14 A. Yes, she did.

15 Q. She told you that she thought that was an

16 unfair and inappropriate thing to do; isn't that

17 correct?

18 A. I'm not sure of the specific words she

19 used, whether she used "unfair," "inappropriate."

20 Inappropriate was definitely the substance of what

21 she was saying.

22 Q. It was the message she was delivering,

23 right?

24 A. Yes.

1 Q. And she indicated to you that as a result
2 of that press release, certain things had happened
3 in the courthouse before your arrival; is that
4 right?

5 A. I believe she did, yes.

6 Q. She indicated to you that the press had
7 come and there had been an event in the hallway
8 concerning Mr. Horton, his mother and some press
9 camera people; isn't that right?

10 A. Yes.

11 Q. And that it caused Mr. Horton and his
12 mother to leave the 15th floor area -- strike
13 that -- the 12th floor area, isn't it? Let me ask
14 you. What area was it?

15 A. I was never exactly clear where in the
16 courthouse it was happening. It was an elevator
17 area, but --

18 Q. Where was the First Session at the time?

19 A. The 15th floor, Courtroom 21.

20 Q. So you were aware, were you not, that the
21 cameras -- that Mr. Horton had some event on the
22 15th floor which caused Mr. Horton to go to some
23 other floor with his mother and caused some upset in
24 the courthouse.

1 A. With the exception of knowing whether it
2 was the 15th floor where that happened, yes, I did
3 know that.

4 Q. On some floor.

5 A. On some floor, yes, that's what she told
6 me.

7 Q. And she particularly told you -- she showed
8 you the language in the press release that described
9 transgendered person who dresses like a female,
10 correct?

11 A. That's a paraphrase of it. Yes, she did
12 show me that.

13 Q. There's an exhibit book in front of you.

14 A. Large one or small one?

15 Q. The large one. Would you turn to Exhibit
16 7. And do you see there where it says, "Charles
17 Horton, 31, a transgendered person who appears as a
18 woman, is expected to plead guilt"?

19 A. Yes.

20 Q. And that's the language that Ms. Goldbach
21 focused on when she spoke with you concerning the
22 inappropriateness of the press release, correct?

23 A. That's correct.

24 Q. And she indicated to you generally that

1 that press release had caused much press attention
2 in which she felt to be an inappropriate way on an
3 inappropriate subject matter?

4 A. What she expressed to me was she felt that
5 the press release was inappropriate and that it had
6 caused the press attention that was there. That's
7 what she said to me.

8 Q. And there was some discussion, wasn't
9 there, to the fact that this basically played to the
10 more salacious or prurient interests of the press?

11 A. She didn't discuss that with me at the
12 time. She, I think, just felt that it called
13 attention to her client. She didn't discuss the
14 salaciousness of the coverage. She just said she
15 didn't feel the issuing of the press release was
16 appropriate.

17 Q. The language she said it centered upon was
18 "transgendered person who appears as a woman,"
19 correct?

20 A. Yes.

21 Q. And you understood what she was playing to
22 was prurient or salacious interests of the press,
23 didn't you?

24 A. I'm not sure whether I understood it in

1 exactly those terms. I'm not sure. It's a fair --
2 retrospectively, I would say that that's a fair
3 reading of what she was saying. I'm not sure I
4 understood it that way at the time. I think at the
5 time I understood it to mean that it was an invasion
6 of her client's privacy.

7 Q. And you responded to her, didn't you, in
8 that conversation that you didn't know why the
9 office had done that, but that you regretted that
10 the office had done that because you didn't see it
11 as relevant to any issue in the case or in
12 disposition? Was that your reply to Anne Goldbach?

13 A. I believe that I said that, yes.

14 Q. Well, you know you said it, don't you?

15 A. To be honest, two years later, I don't
16 recall, but I believe that I did.

17 Q. Well, would you turn, please, to Page 53 in
18 R-1, which is your initial statement to the
19 Commission, and go, if you would, to Line 5.

20 A. Yes.

21 Q. And did you testify as follows under oath:
22 "And I recall telling her that. I didn't know why
23 the office had done that, but that I regretted that
24 the office had done that because I didn't see it as

1 relevant to any issues in the case or in
2 disposition." Is that how you testified under oath
3 on that occasion?

4 A. Yes, it is.

5 MR. EGBERT: Your Honor, with regard to an
6 evidentiary rule of the proceedings, I would ask
7 that all matters which have been testified to
8 previously under oath and have been presented as
9 either prior inconsistent statements or prior
10 statements under oath be admitted throughout these
11 proceedings, both as impeachment, such as it is, and
12 for substantive evidence of the events being
13 described under the appropriate rule where
14 statements under oath --

15 HEARING OFFICER DAHER: I'll hear you, Mr.
16 Braceras.

17 MR. BRACERAS: Your Honor, we oppose that.
18 That is not the law. We have two cases to hand up
19 to Your Honor, the Martin case, an SJC case, and an
20 Appeals Court case. Both of these cases directly
21 address this issue. A failure of recollection is
22 not sufficient to cross examine the witness with
23 prior inconsistent statements. If a witness has a
24 failure of recollection, Mr. Egbert can refresh his

1 recollection --

2 HEARING OFFICER DAHER: Again, why can't
3 you ask him to make an election?

4 MR. EGBERT: Because I believe this case is
5 inapposite. But if I can take a look at it for a
6 minute, because the law is quite clear that prior
7 statements under oath are admissible for both
8 impeachment and for the substantive -- for
9 substantive purposes --

10 MR. BRACERAS: Your Honor, that's plainly
11 wrong.

12 MR. EGBERT: Why don't you give me a
13 moment.

14 MR. BRACERAS: Your Honor, I would direct
15 you to the Martin case at Note 16 and in the Santos
16 case at Page 5 to 6. It directly addressed this
17 issue.

18 The Court says that it is settled that for
19 purposes of impeachment, there is no inconsistency
20 between a present failure of memory on the witness
21 stand and a past existence of memory.

22 This transcript is just hearsay. Mr.
23 Deakin is here to testify. Mr. Egbert can examine
24 Mr. Deakin today. Unlike the situation with Judge

1 Lopez, where her transcript came in solely because
2 there was admission of the party, an admission of
3 the defendant in this case, this transcript is
4 hearsay and it has no -- there is no grounds for it
5 to be admitted.

6 HEARING OFFICER DAHER: Go ahead. I'll
7 hear you, Mr. Egbert.

8 MR. EGBERT: If I can read the case.

9 HEARING OFFICER DAHER: Go ahead.

10 MR. EGBERT: Judge, this is plainly
11 inapposite. What they had on a prior statement
12 under oath is the witness saying "I'm not sure."
13 Prior statements under oath given by this witness on
14 the subject matter, if inconsistent, is admissible
15 as an inconsistent statement and for its substantive
16 purposes. It was not used to refresh this witness'
17 memory, and the fact of the matter is that this is
18 testimony which is given under oath on these facts,
19 and I suggest it is admissible for those purposes.

20 HEARING OFFICER DAHER: Objection
21 sustained.

22 BY MR. EGBERT:

23 Q. Was the statement that you just read or had
24 read to you true when you made it?

1 A. I believe so.
2 Q. And is it true today?
3 A. It is true that I said that to Anne
4 Goldbach, yes.
5 Q. Were you telling the truth to Anne
6 Goldbach? Yes or no?
7 A. I was doing my best to tell the truth to
8 Anne Goldbach. And I think I spoke a bit more
9 broadly than I actually intended to.
10 Q. You said that to Anne Goldbach, right?
11 A. Yes.
12 Q. You said that it was true when you said it.
13 A. Yes.
14 Q. Correct?
15 A. I meant it.
16 Q. You said it was true now, correct?
17 A. It's true that I said it to Anne Goldbach,
18 yes.
19 Q. And you weren't lying to Anne Goldbach.
20 HEARING OFFICER DAHER: This is in regard
21 to the testimony, the irrelevancy of the
22 transgendered?
23 THE WITNESS: Correct.
24 HEARING OFFICER DAHER: It may have been

1 irrelevant to him, but it was relevant to the Judge.
2 It meant a lot to her.

3 MR. EGBERT: There's a difference, Judge,
4 between something being relevant to the Court at
5 sentencing and being relevant and appropriate in a
6 press release.

7 HEARING OFFICER DAHER: Go ahead.

8 Q. Now, getting back to the prior question I
9 asked you, I asked you whether or not Ms. Joseph
10 told you that Judge Lopez told her that she belonged
11 prosecuting cases in the suburbs, correct? Do you
12 remember that question?

13 A. I do remember that question.

14 Q. And you responded your memory is that she
15 said "You belong in the suburbs," correct?

16 A. That's my memory.

17 Q. Would you turn, please, to Page 35 of the
18 R-1 transcript.

19 A. Yes.

20 Q. Do you see on Page 35, Line 4 and 5, did
21 you testify previously that she told you, "You
22 belong prosecuting cases in the suburbs, not in the
23 city"?

24 A. That's what the transcript says.

1 Q. Do you think the transcript is lying?
2 A. No, I have no reason to think it's wrong.
3 Q. Are you blaming the court reporter for
4 misquoting you?
5 A. I'm not saying I was misquoted. I'm saying
6 I don't recall specifically this answer, but this is
7 what the transcript says and I have no doubt it's
8 what I said.
9 Q. Did you testify in that fashion before the
10 Commission?
11 A. Mr. Egbert, what I can tell you is I don't
12 specifically recall, but I have no reason to doubt
13 the transcript.
14 MR. EGBERT: Your Honor, I offer Lines 4
15 and 5 of Page 35 of --
16 HEARING OFFICER DAHER: Mr. Braceras?
17 MR. BRACERAS: Objection.
18 MR. EGBERT: -- of R-1.
19 MR. BRACERAS: Same grounds. This is not
20 inconsistent. He just doesn't recall.
21 HEARING OFFICER DAHER: Sustained.
22 MR. EGBERT: Your Honor, it's inconsistent.
23 He has said today that all she told him was, "You
24 belong in the suburbs."

1 HEARING OFFICER DAHER: Sustained.
2 Q. Now, did you have a conversation with Mr.
3 Borghesani concerning this press release?
4 A. After my conversation with Ms. Goldbach,
5 yes.
6 Q. And did you tell Mr. Borghesani that you
7 wished he hadn't used the word "transgendered" in
8 the press release?
9 A. My memory is --
10 Q. Please answer my question. Did you tell
11 him that?
12 A. I believe I told him -- I honestly can't
13 remember at that moment whether I told him that I
14 wished that he hadn't used it at all or that I
15 wished that he hadn't used it so prominently, but I
16 do recall saying that I wished he hadn't used it.
17 Q. I'm sorry?
18 A. I do recall saying that I wished he hadn't
19 used it. Whether I said "I wished you hadn't used
20 it so prominently," I'm not sure.
21 Q. When you told him that you wished he had
22 not used it, what did he say?
23 A. I don't remember him saying -- I don't
24 remember him saying much of anything about it other

1 than -- I don't remember him saying much at all
2 about it actually.

3 Q. Now, on August 4th, when you got to court,
4 you had your conversations with Ms. Goldbach and
5 also Ms. Joseph, didn't you?

6 A. Yes, I did.

7 Q. And they were involved in some heated
8 conversations?

9 A. Yes.

10 Q. And after those conversations -- strike
11 that. When you went over to court, it was your
12 understanding that the case was going to be
13 continued; is that correct?

14 A. That's correct.

15 Q. And who told you that the case was going to
16 be continued?

17 A. Ms. Joseph told me that the Judge had said
18 it would be continued. That's what she said.

19 Q. In the lobby?

20 A. I understood it to mean that. I don't
21 remember if she said "in the lobby," but that was my
22 understanding.

23 Q. You understood that to be the only place
24 where Judge Lopez and Ms. Joseph had had any

1 conversations before that.

2 A. That's right.

3 Q. So it was clear to you when you arrived --
4 by the way, when did you arrive?

5 A. I can't recall. I know it was before the
6 lunch recess, which I don't remember exactly when
7 the lunch recess was that day. It was late morning
8 or just after noon.

9 Q. And so do you know whether it was on the
10 phone or in person that Ms. Joseph informed you that
11 Judge Lopez indicated she was continuing the case?

12 A. I don't recall whether it was on the phone
13 or in person. I believe it was in person, but I'm
14 not sure of that.

15 Q. It was certainly either around or upon your
16 arrival.

17 A. Either shortly before or shortly after,
18 yes.

19 Q. And when you learned the case was going to
20 be continued, did you converse with Leora Joseph as
21 to whether or not she had made an objection to the
22 continuance?

23 A. I don't recall whether we talked about that
24 or not.

1 Q. Did you decide to make an objection to the
2 continuance?

3 A. We decided together to make an objection.

4 Q. And did you do it pursuant to some
5 statutory authority?

6 A. Yes, we did.

7 Q. And do you know what the statute is
8 pursuant to which you did it?

9 A. It's in the written objection I made. It's
10 270-something. I want to say 15F. I'm bad with
11 statutory numbers. I usually have to look them up,
12 which I did in this case. I think it's 15F. 278,
13 15F; something like that.

14 MR. EGBERT: Could the witness be shown P
15 for identification of which judicial notice has been
16 taken.

17 (Document handed to witness.)

18 Q. Now, P for identification is Chapter 278,
19 Section 16F; is that correct?

20 A. Yes.

21 Q. Is that the statute you're referring to?

22 A. Could I have just a quick moment to look at
23 it?

24 Q. Of course.

1 A. (Witness reviews document) Yes, this is
2 the statute.

3 Q. And is that the statute upon which you
4 sought to rely in seeking an opposition to the
5 continuance?

6 A. Yes, in addition to a general opposition.

7 Q. Is that the statute by which you asked the
8 Court to make findings?

9 A. Yes, it is.

10 Q. Now, with regard to that statute, that
11 requires, does it not, that the prosecutor first
12 inform the Court whether or not the child or the
13 child's representative agrees to the request?

14 A. Actually, the first requirement is whether
15 the Commonwealth agrees to the request. The second
16 requirement is whether the child or the child's
17 representative agrees to such a request.

18 Q. And did your motion or opposition indicate
19 to the Judge whether or not the child or the child's
20 representative agreed to the request?

21 A. I believe that it did.

22 Q. It did?

23 A. I believe that it did.

24 Q. Turn, please, in your book to Exhibit 17.

1 A. Yes.

2 Q. By the way, let me just stop you for one
3 moment before we get to that. And let me first --
4 you just indicated that there is in your opposition
5 some statement which would indicate that the victim
6 and/or his representative object, correct?

7 A. That's correct.

8 Q. Now, you testified exactly to the opposite
9 of that when you testified on August 23rd of 2002
10 while you were under oath; isn't that correct?

11 A. I'd have to see my testimony.

12 Q. Why don't you turn to Page 116 of R-2, and
13 go down to Line 13.

14 A. Yes.

15 Q. Do you see it?

16 A. Yes.

17 Q. And the following question was asked of
18 you: "And there is nothing in this document which
19 indicates that the victim and his family objected to
20 the continuance, correct?" And you responded:
21 "Answer: There is nothing in the documents that
22 indicates that, no." Isn't that correct?

23 A. Yes, it is.

24 Q. Now, that's exactly the opposite of what

1 you just testified to, isn't it?
2 A. I don't think it's exactly the opposite.
3 Q. Well, it either does have something that
4 indicates the objection or it doesn't have something
5 that indicates the objection.
6 MR. BRACERAS: Objection, Your Honor. The
7 motion is not just the document, Exhibit 17. So
8 it's not directly inconsistent.
9 HEARING OFFICER DAHER: I'll give him some
10 latitude. Go ahead.
11 Q. Mr. Braceras just said the motion is not
12 just the document. Was there some other document
13 attached to that motion?
14 A. No.
15 Q. Was there any other place that you told the
16 Court that there was an objection?
17 A. We discussed it -- there was an oral, brief
18 oral hearing on this motion.
19 Q. And is that satisfactory under the statute?
20 A. I don't know the answer. It appears that
21 it is not.
22 Q. I mean, you've been a prosecutor for ten
23 years?
24 A. Yes.

1 Q. You're head of a unit, correct?

2 A. Yes.

3 Q. You certainly must be familiar with
4 statutes relating to sex crimes.

5 A. Yes.

6 Q. Correct?

7 A. Yes.

8 Q. And you don't know whether this statute
9 requires the Commonwealth to put in writing for the
10 Court the matters covered by the statute?

11 A. I believe that it does require it to be put
12 in writing. I believe that the writing -- a fair
13 reading of the writing indicates the family's
14 position on this.

15 Q. So you've changed your mind?

16 A. I've thought about it a little bit more
17 since you asked me the question --

18 Q. You thought about it a little bit more
19 since you and Mr. Braceras have had a chance to
20 talk; isn't that right?

21 A. No.

22 Q. How many times since you gave this
23 testimony under oath have you talked with Mr.
24 Braceras?

1 A. I believe four times.

2 Q. And did you discuss this subject in
3 particular?

4 A. No, we did not.

5 Q. Not at all?

6 A. No.

7 Q. You didn't discuss any of this testimony or
8 these motions?

9 A. No, we did not.

10 Q. So this just came to you in some kind of a
11 epiphany, is that it?

12 A. No. It came to me when I was rereading my
13 deposition that I gave in your office.

14 Q. Point, if you would, in the document as to
15 where it says the victim objects.

16 A. When I said that the child victim in this
17 case and his family was made aware that the case
18 would be resolved today, a fair inference from that
19 is that they would have objected to continuing the
20 case.

21 Q. A fair inference?

22 A. In my view.

23 Q. You think from that statement it's fair for
24 the Court to draw an inference that the child is

1 issuing an objection?

2 MR. BRACERAS: Objection. He should at
3 least be allowed to look at the transcript where he
4 made the argument on the record, Exhibit 42.

5 MR. EGBERT: If he wants to ask him about
6 the hearing --

7 HEARING OFFICER DAHER: Overruled.

8 Q. Is that your statement?

9 A. I believe that is a fair reading of that
10 statement, yes. Let me say it this way. I believe
11 a judge would be justified in concluding from my
12 statement that the family was objecting.

13 Q. Would a judge be equally justified in
14 concluding that they had no objection?

15 A. I don't believe so, no.

16 Q. So you think that satisfies the statutory
17 requirement that the Court must be told by the
18 prosecutor whether the child or the child's
19 representatives agrees to the request?

20 A. I believe so.

21 Q. And then it also requires that the
22 prosecutor lay out for the judge the effect that any
23 continuance will have on the child, correct?

24 A. That's correct.

1 Q. And where do you put in your motion the
2 effect it will have on the child?

3 A. I believe it's implicit in the motion that
4 the child would be hoping to see the case end on
5 that day and would be upset to see it continued
6 without a finding.

7 Q. Where does it say that?

8 A. It doesn't say that expressly in the
9 document.

10 Q. There's not a word about it, is there?

11 A. I think there is a word about it.

12 Q. What is it?

13 A. It says, "The child victim in this case and
14 his family was made aware that the case would be
15 resolved today. The child's guardian, his maternal
16 grandmother, has been present in the courtroom since
17 early this morning. She would like to be present
18 when her impact statement is read in court."

19 Q. She would like to be present when her
20 impact statement is read in, correct?

21 A. Correct.

22 Q. No indication in there that she couldn't
23 come back on another day.

24 A. That's true.

1 Q. No indication that she couldn't read her
2 impact statement on September 6th when the case came
3 to fruition, correct?
4 A. That's true.
5 Q. No indication that there was any
6 inconvenience beyond a coming back to court for a
7 particular day, correct?
8 A. No; I disagree with that. I think any time
9 someone is asked to sit in court for a substantial
10 portion of the day and does nothing, that's an
11 inconvenience.
12 Q. That's the kind of inconvenience that goes
13 on in our courthouses every day all over the
14 country, correct?
15 A. Unfortunately that's true.
16 Q. Nothing special about that.
17 A. No, I suppose there's nothing special about
18 that, unfortunately.
19 Q. And there is nothing in the document that
20 would indicate that the family would in any way be
21 harmed or prejudiced by a continuance, correct?
22 A. I disagree with that.
23 Q. You disagree with that?
24 A. Yes.

1 Q. Let's go back to your testimony again in
2 August of 2002 under oath on Page 116, where you
3 were asked the following question and gave the
4 following answer.

5 "Question: And there is nothing in the
6 document by way of the affidavit or affirmation that
7 the family would in any way be harmed or prejudiced
8 by a continuance, correct?"

9 And your answer: "There is nothing in the
10 motion to that effect, no, or by way of affidavit,
11 no."

12 Now, another epiphany since then?

13 A. Again, counsel, it's not expressed in the
14 motion, but a fair reading of the motion indicates
15 the likely disappointment and upset --

16 Q. Sir, you weren't asked about anything
17 expressed in a deposition. You were asked a simple
18 question: To give your best answer as to whether or
19 not there is anything in the document to indicate
20 these matters. And you answered "no" at the time,
21 didn't you?

22 A. I was --

23 Q. You answered "no" at the time, didn't you?

24 A. Yes, I did.

1 MR. EGBERT: Again, Your Honor, I would ask
2 that the Court take those statements for substantive
3 evidence purposes.

4 MR. BRACERAS: Objection. Your Honor, the
5 cross examination is evidence in and of itself.
6 That's it. I don't know what Mr. Egbert intends to
7 do with the transcripts. His examination is already
8 in evidence. It's in the record. The testimony is
9 evidence. That's it. That's cross examination.

10 MR. EGBERT: Judge, there are two different
11 uses for impeachment evidence. One is to impeach
12 the credibility of a witness, and it is solely for
13 that purpose.

14 HEARING OFFICER DAHER: Right.

15 MR. EGBERT: And can be used by the Court
16 only for that purpose. Prior inconsistent
17 statements which are made under oath, however, carry
18 with it two abilities for the Court to use. One, to
19 affect the credibility of the witness, and, two, as
20 substantive evidence of those statements made under
21 oath on a prior occasion. That is Hornbook law and
22 prior inconsistent statements when made under oath.

23 MR. BRACERAS: Your Honor, again, to the
24 extent that Mr. Deakin's testimony that he said

1 these things previously is already part of the
2 record, that's the evidence. To the extent that Mr.
3 Egbert is intending to introduce --

4 HEARING OFFICER DAHER: He's introducing
5 it, his argument is, for the impeachment and then
6 for the truthfulness of the statements that were
7 made in re the four grounds for impeachment. He's
8 citing two. Sustained. I'm going to sustain Mr.
9 Braceras's objection.

10 MR. EGBERT: At some point when you have
11 time, I'd like to be heard on this issue, and I'll
12 provide you some case law.

13 HEARING OFFICER DAHER: Sure, absolutely.
14 We're on Page 115.

15 BY MR. EGBERT:

16 Q. Now, with regard to the findings that were
17 ultimately received by you by fax, I believe, later
18 on that day, which are part of Exhibit 17 -- do you
19 recognize those?

20 A. Yes.

21 Q. With regard to those, I'd like to ask you
22 some questions about your personal knowledge of
23 certain events. Okay?

24 No. 1, do you know of your own personal

1 knowledge what Ms. Joseph had done with regard to
2 the press in the past in Judge Lopez's cases?

3 A. Of my own personal knowledge I don't know
4 that she did anything with respect to the press.

5 Q. Of your own personal knowledge you don't
6 know what she did; is that correct?

7 A. No, that's not true.

8 Q. You want to say she did nothing, right?

9 A. What I know of my own personal knowledge is
10 that at some point in the past she had been asked by
11 the press office to speak to a reporter, a columnist
12 who had contacted our office --

13 Q. Let's stop there for a moment. You say you
14 know of your own personal knowledge she was asked to
15 do something by the press office?

16 A. Right.

17 Q. Were you present for that conversation?

18 A. No. ADA Joseph told me that.

19 Q. That's what she told you?

20 A. Correct.

21 Q. That's not personal knowledge, right?

22 A. I stand corrected. You're right. Of my
23 own personal knowledge I don't know that she did
24 anything.

1 Q. You don't know either way.
2 A. That's correct.
3 Q. You don't know what she said to reporters
4 because you weren't present.
5 A. That's certainly correct, yes.
6 Q. And you don't know the tone of what she
7 said to reporters because you weren't present.
8 A. That's correct.
9 Q. And you don't know how many reporters she
10 spoke to because you weren't present.
11 A. Correct.
12 Q. The next finding is, "The defendant suffers
13 from a sexual identity disorder. She looks female
14 in all respects." Do you see that?
15 A. Yes.
16 Q. Do you have personal knowledge in that
17 regard?
18 A. I have slight personal knowledge that the
19 defendant appears female. I haven't seen the
20 defendant very often, but when I saw the defendant,
21 he or she appears female.
22 Q. And that's the extent of your personal
23 knowledge.
24 A. My personal knowledge, yes, that's correct.

1 Q. And then, "When the defendant and her
2 mother were getting off the elevator on the 15th
3 floor, there was a television camera waiting for her
4 in the hallway." You don't know whether that's true
5 or not, correct?

6 A. I wasn't present if and when that happened,
7 no.

8 Q. So all you would rely on is your own
9 reports from different parties, and you make your
10 own assessments based on hearsay information,
11 correct?

12 A. To the extent I make assessments, that's
13 correct, yes.

14 Q. On that issue.

15 A. Yes.

16 Q. And, "The defendant and her mother refused
17 to get off the elevator. There was an interruption
18 in the hallway, with the defendant's mother yelling
19 at the press." You don't know whether that's true
20 or not, correct?

21 A. Not of my own personal knowledge.

22 Q. You have no personal knowledge because you
23 weren't there.

24 A. Correct.

1 Q. "The Court finds that ADA Joseph attempted
2 to embarrass and ridicule the defendant suffering
3 from a psychological disorder." Do you see that
4 finding?
5 A. I do.
6 Q. Again, you have no personal knowledge of
7 that either way, do you?
8 A. I believe I do have personal knowledge.
9 Q. And your personal knowledge would come from
10 what source?
11 A. Working with Ms. Joseph on the case through
12 the 10 or so months that it was in the court.
13 Q. So you had formed an opinion.
14 A. Yes.
15 Q. But you don't know of your own knowledge
16 other than you forming an opinion based on past
17 behavior, correct?
18 A. The classic dilemma in the law: No one can
19 have personal knowledge of another person's
20 thoughts.
21 Q. And that was my question to you.
22 A. If that's your question, then no, of course
23 I can't know what was in her heart.
24 Q. And, "The Court finds that the Commonwealth

1 caused this continuance because it sought to turn
2 the court proceedings into a circus." Now, again,
3 you don't know what was in the mind of Ms. Joseph,
4 correct?

5 A. Not directly, no.

6 Q. And you don't know what was in the mind of
7 Mr. Borghesani, correct?

8 A. Not directly, no.

9 Q. And in fact, Mr. Borghesani never even told
10 you what he was putting in this press release,
11 correct?

12 A. That's correct.

13 Q. And you regretted what he put in it.

14 A. I regretted one phrase --

15 Q. "Transgendered, dresses like a woman."

16 A. That phrase I regretted. The rest of it I
17 thought was --

18 Q. Well --

19 MR. BRACERAS: Your Honor, may the witness
20 finish his answer?

21 A. I regretted that phrase for personal
22 reasons. I thought the press release was an
23 appropriate action to take.

24 Q. The comment we're talking about,

1 "Transgendered, dressed like a woman." You've said
2 repeatedly you regretted that comment, correct?

3 A. Yes, I did. I still do.

4 Q. "There is little, if no, impact on the
5 alleged victim, as this is a plea."

6 Based upon what you provided the Judge in
7 the motion or the opposition, let's call it, that's
8 a fair statement, isn't it?

9 A. No, I don't believe so.

10 Q. Well, the victim wasn't there that day on
11 August 4th, correct?

12 A. That is correct.

13 Q. The victim didn't intend to be there on
14 September 6th, correct?

15 A. As of August 4th I didn't have any
16 information of that one way or the other.

17 Q. Wasn't the information you had gotten that
18 the victim didn't intend to be at the plea
19 proceedings?

20 A. I'm not sure -- honestly, I'm not sure
21 whether I heard that the victim didn't intend to be
22 there ever or the victim didn't intend to be there
23 on August 4th. I didn't know that.

24 Q. You don't know one way or the other.

1 A. I did not.

2 Q. And did you understand that come September
3 6th, the victim would be in school.

4 A. I didn't have an understanding about that
5 one way or the other, other than the sort of
6 assumption that one makes that the kid would be in
7 school after Labor Day, but...

8 Q. And is there anything that you told Judge
9 Lopez about the impact on the alleged victim of a
10 continuance that we don't know about today?

11 A. I'd have to look at the transcript of the
12 hearing that we had. I'm not sure.

13 Q. Go to Page -- strike that. Exhibit 42?

14 A. Yes.

15 Q. And let's go to where you start talking on
16 Page 2. Do you see that?

17 A. Yes.

18 Q. Now, that, in fact, is the hearing on the
19 continuance, correct?

20 A. Yes.

21 Q. Now, before that, by the way, the Judge
22 came out and said, "This case is going to be
23 continued until the week of August 21st. You can
24 come and see me in Middlesex. I have 16 bails and a

1 lot of other things to take care of," correct?
2 A. That's correct.
3 Q. Were you aware of the amount of bails that
4 the Judge had at that time?
5 A. I don't -- I don't think I was.
6 MR. EGBERT: May I approach?
7 HEARING OFFICER DAHER: Please.
8 Q. Would you look at that, Mr. Deakin.
9 A. Yes.
10 Q. Does that appear to you to be a fair list
11 from Friday, August 4th of 2000?
12 A. That's what it appears to be, yes.
13 Q. And you've seen lists like this before.
14 A. Yes.
15 MR. EGBERT: I would offer this, Your
16 Honor, as Defendant's Exhibit --
17 MR. BRACERAS: No objection.
18 HEARING OFFICER DAHER: No objections.
19 That will be S.
20 (Document marked as Hearing
21 Exhibit S moved into evidence)
22 Q. Now, after the Judge made those remarks,
23 you said, "Your Honor, the Commonwealth objects,"
24 correct?

1 A. Yes.
2 Q. And had you previously handed up to her
3 your objection?
4 A. I don't recall if I had handed it to her or
5 to the clerk before the Judge took the bench. It
6 had been filed. I don't know exactly...
7 Q. And then you informed the Judge that you
8 had filed the objection on 278, 16F, correct?
9 A. Yes.
10 Q. And you said that it requires her to make a
11 decision regarding a continuance in the best
12 interests of the child victim, who at the time of
13 the assault was 12 years old, correct?
14 A. Yes.
15 Q. By the way, that statement you made was
16 erroneous, correct?
17 A. In what way?
18 Q. The age of the child.
19 A. That's correct.
20 Q. You had been working under an assumption
21 that was wrong concerning the child's age from the
22 beginning of the case to the end; isn't that right?
23 A. That's correct.
24 Q. And the child was actually 11.

1 A. That's correct.

2 Q. But in every proceeding before the Court,
3 you or your associates informed the Court that he
4 was 12; is that correct?

5 A. As you pointed out, I can't be sure, not
6 having been there when my associates did it, but
7 that's my understanding, yes.

8 Q. And on the next page you said, "The child's
9 guardian, his grandmother, who's been present here
10 since the Court convened this morning, has expected
11 to be able to see the plea happen today and present
12 an impact statement in court"; is that right?

13 A. Yes.

14 Q. Now, is the child's guardian the victim
15 under 278, 16F?

16 A. He was the -- she was the child's
17 representative.

18 Q. Was she the victim?

19 A. No.

20 Q. And in fact, when we talk about impact
21 under this statute, who is the person who's impact
22 the statute is directed to?

23 A. The victim's.

24 Q. The child, right?

1 A. Correct.

2 Q. Not the grandmother.

3 A. No, although the grandmother's input is
4 solicited -- the representative's input is
5 solicited.

6 Q. But the Judge's concern is the child under
7 the statute.

8 A. That's correct.

9 Q. Correct?

10 A. That's correct.

11 Q. So then you go on, "That's because the
12 child victim and his family were notified after the
13 lobby conference two days ago that this matter would
14 be marked for a plea today; and that if, in fact, it
15 would go forward as a plea, that would happen
16 today," right?

17 A. That's correct.

18 Q. Now, who told the child and the child's
19 family that there was going to be a plea that day?

20 A. I'm not certain who told. Someone from our
21 office did. I would assume --

22 Q. Well, are you assuming or do you know?

23 A. If I knew it -- I may have known it at the
24 time. I don't recall now who did that.

1 Q. And you indicated, I think, that -- strike
2 that. When were they notified of that fact?

3 A. It was sometime after the August 1st lobby
4 conference.

5 Q. And before the press release?

6 A. I'm not certain of that. I don't have a
7 recollection of who did it.

8 Q. Would it surprise you to know that defense
9 counsel and the defendant had not communicated the
10 fact that there would definitely be a plea until the
11 morning of August 4th?

12 A. It would surprise me tremendously, as it
13 was marked for a plea on August 1st.

14 Q. It was marked for a possible plea, wasn't
15 it?

16 A. It was marked for a change of plea, is my
17 understanding.

18 Q. And that's done all the time, isn't it, to
19 set up a date for when the defendant may or may not
20 enter a plea?

21 A. It's done frequently. Most commonly it's
22 when the defendant has decided to enter a plea.

23 Q. So it would not surprise you to learn --
24 strike that. Would it surprise you to learn that

1 the defendant and his counsel, as late as August 3rd
2 in the afternoon, were discussing whether or not to
3 enter a plea when your representative, Ms. Joseph,
4 called that office? Would that surprise you?

5 A. It would surprise me in that Ms. Joseph
6 indicated to me that the case was going to proceed
7 by way of a plea.

8 Q. So you had no idea then that that was a
9 matter up in the air right up until the morning of
10 the 4th?

11 A. I did not have any idea of that.

12 Q. Now, is there anything else you said that
13 would have been of interest in that regard with
14 regard to these proceedings that you want to point
15 out?

16 A. What I've pointed out is that the family
17 had been notified --

18 MR. BRACERAS: At what time? I lost you.

19 MR. EGBERT: I wanted to know if there's
20 anything he'd like to point out in that transcript
21 which would have been of interest to these
22 proceedings.

23 A. Yes. It was that the child and his family
24 had been notified that the case would be marked for

1 a plea today and that if in fact the case was going
2 forward as a plea, it would happen on that day.

3 Q. And was the child and his family not told,
4 you know, in this business anything can happen? It
5 might not go that day?

6 A. I don't know what the child and his family
7 were told.

8 Q. Well, in this business, the business of the
9 practice of criminal law, will you agree with me
10 that it's at least a fair statement that anything
11 can happen?

12 A. Yes, I would.

13 Q. And that if the victim and his family were
14 told, "There is definitely going to be a plea
15 today," that the people who built the expectations
16 that there would be a plea that day was the DA's
17 office?

18 A. I'm not sure that I would agree with who
19 built the expectations. They were told what the
20 case was scheduled for.

21 Q. Were they told as a general matter, look,
22 things can happen in this business that change
23 things?

24 A. They were never prepared for the

1 possibility that a case would be continued for what
2 we would view as inappropriate reasons.

3 Q. What you would view as inappropriate
4 reasons?

5 A. Correct.

6 Q. What the defendant viewed as appropriate
7 reasons, right?

8 A. As I understand it, what the Judge viewed
9 as appropriate reasons.

10 Q. Again, so you don't know as you sit here
11 today that it was the defendant seeking a
12 continuance?

13 A. I have never had any indication it was the
14 defendant seeking a continuance.

15 Q. Not by Ms. Joseph or Ms. Goldbach?

16 A. Neither one.

17 Q. So that would all be news to you?

18 A. That would be news to me.

19 Q. And would that be an important fact to
20 know?

21 A. Not in light of what Ms. Joseph told me the
22 Judge said about a continuance, no.

23 Q. So -- but you will agree with me -- by the
24 way, even though you don't know what was said to the

1 victim and its family, you'll agree with me that if
2 there was anyone who built an expectation that the
3 case would come and go on the 4th and be
4 completed, it was the DA's office.

5 A. No. I disagree. I think the system made
6 that expectation.

7 Q. The system talked to the victim?

8 A. The system scheduled a matter for a plea on
9 August 4th and the representative of the
10 Commonwealth, who has contact with the victim,
11 explained that to them.

12 Q. In the criminal justice system in the First
13 Session or in any other session, isn't it true that
14 cases come and go and get continued and things
15 happen and get put off for a few days or a month
16 often?

17 A. Yes.

18 Q. And so to build the expectation of these
19 people that it was going to happen on August 4th
20 without giving them an understanding of the vague
21 reasons of the criminal justice system, that came
22 from the DA's office, didn't it?

23 A. I don't know whether they were prepared for
24 the possibility of a continuance or not, so I can't

1 answer --

2 Q. If they were prepared for the possibility
3 of a continuance, then all of your motion is a lie.

4 A. No, sir.

5 Q. If they were told that, look, this might
6 not happen today and prepared for that, then all of
7 this business about how they expected it to go today
8 would not be accurate; isn't that correct?

9 A. No, it's not correct.

10 Q. Well, you can't have it both ways, can you?
11 Either they were prepared for how this system works
12 sometimes or they weren't.

13 A. Counselor, someone can be prepared for a
14 disappointment and still experience that
15 disappointment when it eventuates. So the fact that
16 they may have been prepared for the continuance
17 doesn't mean that it wasn't hard on them.

18 Q. Do you know if the victim was disappointed?
19 Did he express that to you?

20 A. No, he did not.

21 Q. At any time did you talk to the victim
22 about whether the victim could care less about
23 whether or not this case went on August 4th or
24 September 6th?

1 A. No, I did not.

2 Q. Did you receive any victim impact
3 statements from the victim which indicated that he
4 wanted it to go on August 4th and couldn't wait
5 until September 6th?

6 A. Not on August 4th.

7 Q. At any time.

8 A. We had throughout the case heard from --
9 when I say "we," I had not, but --

10 Q. Well, if you did not --

11 HEARING OFFICER DAHER: Let him finish.

12 MR. EGBERT: If he did not, he's just going
13 to give us some hearsay.

14 HEARING OFFICER DAHER: Go ahead. Finish.

15 A. There had been reports throughout the case
16 that the pendency of the case was difficult for the
17 child, as it is in virtually every child abuse case
18 that's prosecuted. I would think it was a fair
19 inference from that, and my general experience
20 prosecuting cases is that waiting another 30 days to
21 resolve the case would be hard on the child.

22 Q. Did you tell the Judge that you had had
23 reports during the course of this proceeding that
24 the victim was having a difficult time?

- 1 A. No, I did not. I'm not saying he was
2 having a difficult time. I'm saying it was
3 troubling to him.
- 4 Q. Did you tell the Judge that?
- 5 A. No, I did not.
- 6 Q. In your motion or in your oral statement?
- 7 A. No, I did not.
- 8 Q. Now, after you had the hearing before Judge
9 Lopez and received back the findings of fact --
10 strike that.
- 11 After you received the findings of fact,
12 you disagreed with those findings, correct?
- 13 A. Yes, I did.
- 14 Q. You testified to that on direct, correct?
- 15 A. Strongly.
- 16 Q. Pardon me?
- 17 A. Strongly.
- 18 Q. Strongly. So you used the prerogative of
19 your strong disagreement to appeal the case,
20 correct?
- 21 A. No, I did not.
- 22 Q. Did you seek a motion for reconsideration?
- 23 A. No, we did not.
- 24 Q. Did you seek a rehearing?

1 A. No, we did not.
2 Q. Did you seek to have an evidentiary
3 hearing?
4 A. No, we did not.
5 Q. Did you file a written objection in any
6 way?
7 A. No, we did not.
8 Q. Did you appeal under Chapter 211, Section
9 3?
10 A. No, we did not.
11 Q. That was available to you, was it not?
12 A. I believe it was, yes.
13 Q. So the DA's office, in disagreeing with
14 these findings and your strong disagreement, as you
15 have indicated, did nothing whatsoever to overturn
16 them, have them reheard or have them reviewed by a
17 court, correct?
18 A. That's correct.
19 Q. But instead --
20 MR. EGBERT: May I have a minute?
21 (Discussion off the record)
22 MR. EGBERT: May I approach the witness?
23 HEARING OFFICER DAHER: Please.
24 Q. Take a look at Exhibit 15, if you would.

1 And that's a two-page newspaper article -- printout
2 of a newspaper article; is that correct?

3 A. That's what it appears to be, yes.

4 Q. And that newspaper article ran the day
5 after these findings were made, correct?

6 A. That's what the printout indicates.

7 Q. Do you have any reason to doubt that?

8 A. No. I'd have to read it to see whether I
9 read it or not. I have no reason to doubt it.

10 Q. Will you accept it for now?

11 A. If it seems -- if it will speed things
12 along, sure.

13 Q. After not having appealed, asked for
14 reconsideration, asked for rehearing, sought an
15 evidentiary hearing, the DA's office did, however,
16 make public statements concerning Judge Lopez's
17 findings, correct?

18 A. I don't know of my personal knowledge, as
19 you've pointed out, but there does appear to be a
20 comment in the article from the press office of the
21 district attorney's office.

22 Q. When the DA disagrees with findings of a
23 court and has appellate rights, do you think it
24 appropriate to be commenting on those findings

1 without exercising your rights of appeal?
2 A. I'm sorry. Could you repeat the question?
3 Q. Yes. You are aware of the way or manner in
4 which cases are proceeding in the criminal courts,
5 correct?
6 A. Yes.
7 Q. And you're aware of ethical obligations of
8 lawyers, correct, with regard to releasing
9 information to the public?
10 A. Yes.
11 Q. And at the time that this was being done,
12 this press statement was being made, it was while
13 the Horton case was pending and had yet to be
14 disposed of; isn't that correct?
15 A. That's correct.
16 Q. There had been no plea, there had been no
17 sentence, correct?
18 A. That's correct.
19 Q. And so it was just within its proceedings
20 in a criminal case.
21 A. That's correct.
22 Q. And the DA's office, in dissatisfaction
23 with the Judge's rulings, said what? Can you read
24 that to us?

1 A. Which portion are you asking me to read?
2 Q. Read, if you would, the first lines
3 attributed to Ralph Martin, the district attorney.
4 A. Which page am I looking at?
5 Q. Page 2. Do you want me to read them?
6 A. It's up to you, obviously, but I just want
7 to make sure I'm reading the part you're asking me
8 to read.
9 Q. Why don't I mark it for you.
10 A. It appears to me to start at Page 1.
11 Q. It does start at Page 1, but I'm going to
12 go to Page 2.
13 A. Okay.
14 Q. If you would, read for me what Ralph
15 Martin, the district attorney, said during the time
16 that this case was pending.
17 A. It appears that, according to this, he
18 said, "The unfounded accusations contained in Judge
19 Lopez's decision speak more to the Judge's state of
20 mind than they do about the merits of the case."
21 This case was handled no different than others."
22 Q. And that's clearly talking about Judge
23 Lopez's findings, correct?
24 A. I think you'd have to ask the district

1 attorney what he's talking about.

2 MR. BRACERAS: Your Honor, objection. This
3 witness has no basis whether Martin is talking about
4 the findings or what Judge Lopez issued as a press
5 release earlier --

6 MR. EGBERT: Just so it's crystal clear,
7 you have no evidence that there was a press release.
8 All the evidence is that the findings were given to
9 the press. So let's not confuse the issues, Mr.
10 Braceras.

11 MR. BRACERAS: With a cover letter that
12 said "Press Release" to various Boston television
13 stations.

14 HEARING OFFICER DAHER: Well, again, if
15 we're dealing with the state of mind of the Judge,
16 the findings -- how would he know what Ralph Martin
17 was making reference to? Because right here we're
18 not talking about Mr. Borghesani. We're talking
19 about Ralph Martin.

20 MR. EGBERT: Right, the district attorney.

21 HEARING OFFICER DAHER: Sustained

22 BY MR. EGBERT:

23 Q. And Mr. Martin's responses, were they not,
24 were to what was contained in Judge Lopez's

1 findings?

2 A. You would have to ask the district
3 attorney. I didn't discuss it with him.

4 Q. Do you know from the context of this
5 article?

6 MR. BRACERAS: Objection.

7 A. I could make assumptions from the context
8 of this article.

9 HEARING OFFICER DAHER: Sustained.

10 MR. EGBERT: Judge, respectfully, we've
11 had, pursuant to the Commission's request to the
12 Court, newspaper article upon newspaper article upon
13 newspaper article introduced --

14 HEARING OFFICER DAHER: But you're asking
15 for Mr. Deakin to delve into the mind of Judge
16 Lopez --

17 MR. EGBERT: As Judge Lopez was asked to do
18 with regard to every one of these articles.

19 HEARING OFFICER DAHER: Sustained.

20 Q. Mr. Borghesani went on to say, "No one
21 should be deceived by this smoke screen. Judge
22 Lopez was prepared to hand down an extremely lenient
23 sentence and she balked when the media was present
24 to witness it." Do you see that?

1 A. I do.

2 Q. Is that an appropriate response by a
3 district attorney's office, in your opinion, when
4 you did not exercise your rights of appeal,
5 rehearing or reconsideration?

6 MR. BRACERAS: Objection, Your Honor.

7 HEARING OFFICER DAHER: What's the
8 objection?

9 MR. BRACERAS: Your Honor, he is not an
10 expert as to press issues. It's Martin's statement;
11 it's Mr. Borghesani's statement. Mr. Egbert can ask
12 Mr. Borghesani and mr. Martin about their
13 statements.

14 HEARING OFFICER DAHER: The testimony that
15 we have is that he's a supervisor. What happens is
16 Ms. Joseph contacted him then they contacted a press
17 office.

18 MR. EGBERT: Judge, these DAs cannot
19 ethically hide behind the press office. Their
20 ethical responsibilities require them to in fact
21 take reasonable and appropriate steps to control the
22 press in a pending criminal prosecution. You've
23 taken judicial notice of Rule 3.6 and 3.8.

24 HEARING OFFICER DAHER: Again, we've

1 already heard Mr. Deakin state that the question of
2 transgender was something that he probably would not
3 have used, but to ask him now the question you put
4 before him, I think I'm going to sustain the
5 objection. You're going to have Mr. Borghesani, I
6 think -- someone's going to call him. You'll
7 certainly be able to ask him.

8 MR. EGBERT: I think it goes to this
9 particular witness' bias, Your Honor, and I'll leave
10 it at that.

11 MR. BRACERAS: Well --

12 HEARING OFFICER DAHER: What's your
13 position? I've sustained your objection. Let's go.

14 BY MR. EGBERT:

15 Q. Did you see this newspaper article on or
16 about the time it was printed?

17 A. I don't specifically remember. I would
18 guess that I did --

19 Q. Were you paying attention to the case in
20 the press at the time?

21 A. Yes.

22 Q. And so it would be fair to say that you
23 probably saw it?

24 A. I would guess that I probably did, but that

1 would be, as best I can say, a guess. I don't
2 specifically remember.

3 Q. And would you agree with me that the
4 following statement, "No one should be deceived by
5 this smoke screen," talking about the Judge's
6 findings, was likely to raise the ire of the Court?

7 MR. BRACERAS: Objection. This objection
8 has been sustained twice, and this is completely
9 irrelevant to the pending charges.

10 MR. EGBERT: It's not irrelevant, Your
11 Honor.

12 HEARING OFFICER DAHER: Show me the
13 relevancy.

14 MR. EGBERT: The relevance is, Your Honor,
15 that part of what led us here -- and, for example,
16 the taped September 6th hearing, one cannot simply
17 exclude everything that happened before that to make
18 a determination both as to mitigation and as to fact
19 as to what the Judge's state of mind was at the time
20 she came to court on September 6th. And I suggest
21 to the Court that although it may not make it
22 appropriate -- nor have I ever argued it was
23 appropriate for her to raise her voice and yell, it
24 may make it a little more understandable as to what

1 her state of mind was and mitigate in those records
2 that when you find out that from one hearing to the
3 next in a consistent pattern the DA's office, rather
4 than taking the legal steps appropriate for appeals
5 or reconsiderations, simply blast her in the press
6 with this kind of language.

7 HEARING OFFICER DAHER: Mr. Braceras?

8 MR. BRACERAS: Your Honor, a couple of
9 things. First, we had Judge Lopez on the stand
10 nearly for a week. I mean, there's no evidence that
11 she ever saw this. It's completely irrelevant. The
12 Judge herself could have testified to this.

13 Second, the Judge made the findings public.
14 She's the one who circulated them to the media on
15 the 4th.

16 MR. EGBERT: Findings of the court are
17 public. You don't make them public. Findings of
18 the court are public. These were a public record.
19 Whether or not they were sent to people that they
20 request is another thing. They were a public
21 record. And the fact of the matter is that the
22 things that the DA's office did to try to get her
23 -- or to try to jack her up --

24 HEARING OFFICER DAHER: Help me out for a

1 moment. If I allow it, it's going to be relevant
2 against Judge Lopez. It's going to be relevant
3 against her. You want it? Overruled. Go ahead.
4 You have it. Go ahead.

5 MR. EGBERT: May I have the question
6 repeated?

7 HEARING OFFICER DAHER: The question, would
8 it increase the ire, sure. You can have it.

9 *Q. Would you think that that would be likely
10 to increase the ire of the Judge, reading that in
11 the paper?

12 A. Much in the same way that Judge Lopez's
13 findings raised the ire --

14 Q. Answer my question.

15 HEARING OFFICER DAHER: Just answer the
16 question.

17 MR. EGBERT: Judge, he's not. He wants to
18 play some game. The question was very simple. He
19 can on redirect be asked anything he wants.

20 MR. EGBERT: What was the last question?

21 *(Question read)

22 MR. BRACERAS: Objection.

23 HEARING OFFICER DAHER: You're objecting to
24 that? Overruled. You want it? Go ahead.

1 A. I obviously can't -- as you pointed out
2 earlier, I can't get inside the Judge's head. It
3 certainly might.

4 Q. And do you know whether or not Mr.
5 Borghesani designed it for that fashion?

6 A. I have no idea.

7 Q. Mr. Borghesani, to your understanding, was
8 a pretty adept press person?

9 A. I'm not sure how to evaluate adeptness. He
10 had done his job for a period of time. He was
11 experienced.

12 Q. Now, the next event -- by the way, do you
13 know whether or not -- did you ever talk to the
14 victim or his family concerning the notification to
15 the press on August 3rd?

16 A. No, I did not.

17 Q. So you don't know, as a matter of your own
18 personal knowledge, whether or not the victim or his
19 family ever wanted to have the press attention that
20 this case got.

21 A. No, I do not.

22 Q. Prior to September 6th you had decided to
23 be the spokesperson for the district attorney's
24 office in the case of Commonwealth versus Horton for

1 the hearing on September 6th; is that correct?

2 A. That's correct.

3 Q. And had you made that known to any court
4 personnel?

5 A. Other than appearing on August 4th at the
6 hearing on the opposition of the motion to continue,
7 no.

8 Q. So at any time between August 4th and
9 September 6th did you make known to Judge Lopez or
10 any court personnel that you would now be lead
11 counsel basically in the Horton case?

12 A. No; I didn't see that as necessary.

13 Q. Necessary or not, did you do it?

14 A. I did not, no.

15 Q. And in fact, you were now lead counsel in
16 the Horton case, correct?

17 A. That's correct.

18 Q. And you were going to be the spokesperson
19 in the Horton case.

20 A. That's correct.

21 Q. Would you agree with me that there are many
22 times in the Superior Court system where issues of
23 the press and its interrelation or interaction with
24 parties comes to be an issue in our courts?

1 A. Yes.

2 Q. And that during those -- strike that. That
3 it is in the interest of justice not to have
4 eruptions between participants and the press in the
5 hallways outside of proceedings?

6 A. Yes.

7 Q. That's a good thing, isn't it?

8 A. I think indisputably, sure.

9 Q. And one of the ways to prepare for
10 incidents of eruptions between participants and the
11 press is to look at the history of the case and see
12 if there have been prior problems, correct?

13 A. Yes.

14 Q. And you will agree with me that with regard
15 to the Horton case, there had been a prior problem,
16 at least as reported to the Court.

17 A. Yes.

18 Q. And that there was then a matter of concern
19 for -- rightfully a matter of concern between the
20 interaction of the participants and the press.

21 A. Yes.

22 Q. And that it is the duty of the Court and
23 the court system that if rational steps can be taken
24 to avoid such eruptions, they should be taken.

1 A. Yes.
2 Q. And that one of the ways to keep two
3 parties apart in those circumstances is to have the
4 defendant come in a separate door.
5 A. Yes.
6 Q. And that you accept, do you not, that it is
7 a rational security concern in a courthouse under
8 the circumstances I have just described?
9 A. Yes.
10 Q. You have in the DA's office victim witness
11 advocates, correct?
12 A. Yes.
13 Q. Victim witness people, correct?
14 A. Victim witness advocates, that's what we
15 have.
16 Q. And they're there to help victims and
17 witnesses get from courthouse to courtroom and DA's
18 office to courtroom and the like, correct?
19 A. That's part of their function, yes.
20 Q. And part of their function also is to find
21 rooms for them to be in to avoid interaction if they
22 so desire, correct?
23 A. When we can, yes.
24 Q. And there are occasions where you have made

1 arrangements like that in the past, correct?
2 A. Yes.
3 Q. And those arrangements that you have made,
4 you have made with the court officers and the
5 clerks, correct?
6 A. No. We usually make them on our own.
7 Q. On your own?
8 A. On our own.
9 Q. And how do you do that on your own?
10 A. We usually, when we have rooms available --
11 which we sometimes do, sometimes don't -- we simply
12 make use of those rooms and we ask the victim
13 advocates to communicate between the assistant
14 district attorney who's in court and understands
15 what the schedule requires and has them come when
16 it's time for them to come.
17 Q. And other than the Horton case, have you
18 ever had any proceeding in the Middlesex County
19 Superior Court?
20 A. Are you asking as of the time of the Horton
21 case?
22 Q. Correct.
23 A. Only -- I'm sorry. Middlesex Superior
24 Court?

1 Q. That's correct.
2 A. I think I may have had a routine hearing or
3 two, but I'm not positive of that. I think so.
4 Q. Is it fair to say that you were not
5 intimately familiar with the workings of the
6 Middlesex Superior Courthouse?
7 A. Yes.
8 Q. And it's court officers, personnel and the
9 like?
10 A. Yes.
11 Q. And you were not familiar with any prior
12 problems that had been had at the Middlesex Superior
13 Court with regard to high-profile cases and the
14 press?
15 A. Only maybe occasionally what I've read in
16 the paper. But other than --
17 Q. No personal involvement.
18 A. No.
19 Q. So you weren't aware of the custom and
20 practice, let's say, of the Superior Court court
21 officers in Middlesex County as it related to
22 controlling the press vis-a-vis the participants in
23 criminal cases.
24 A. No, I was not.

1 Q. Now, the press in the Lopez case, I've
2 shown you some of it; is that correct?

3 A. Yes.

4 Q. Now, you, Mr. Deakin, have also in the past
5 tried to use the press as a muscle against judges,
6 have you not?

7 A. No, I have not.

8 MR. BRACERAS: Relevance. No relevance to
9 this. No relevance that Judge Lopez --

10 HEARING OFFICER DAHER: He's already
11 answered. The answer is no. Overruled. Go ahead.

12 Q. Sir, you were before Judge Dominic Russo on
13 a case approximately two years ago, were you not, in
14 East Boston Court?

15 MR. BRACERAS: I object, Your Honor.

16 HEARING OFFICER DAHER: What's the
17 objection?

18 MR. BRACERAS: The same basis. I don't
19 know what character assassination Mr. Egbert is
20 trying here, but this is completely irrelevant to
21 this case. Mr. Deakin is not on trial here.
22 There's no testimony that Judge Lopez is aware of
23 any other prior conduct on the part of Mr. Deakin.

24 HEARING OFFICER DAHER: What does this have

1 to do with Judge Russo?
2 MR. EGBERT: I'll give you an offer of
3 proof at the side bar.
4 HEARING OFFICER DAHER: I think he's on the
5 witness list.
6 MR. EGBERT: Yes, he is.
7 HEARING OFFICER DAHER: Is that your
8 objection? Relevancy?
9 MR. BRACERAS: Yes. This type of character
10 testimony --
11 MR. EGBERT: Judge, this isn't character
12 testimony. This goes to whether or not this DA and
13 this office were consistently attempting to jack up
14 judges --
15 MR. BRACERAS: Can we have a side bar?
16 HEARING OFFICER DAHER: Yes. Let him
17 finish.
18 MR. EGBERT: -- to use the press to push
19 judges around, to use the press to try to embarrass
20 judges or get judges to do things they didn't want.
21 And this witness has, as Ms. Joseph has, have tried
22 to run from the fact that what this press release
23 was on August 3rd and the statements thereafter were
24 geared to do nothing more than to try to jack up

1 this case and jack up this Judge.

2 Now, this witness has done it before. And
3 this witness was involved in a proceeding where he
4 told a judge, when the judge said that he was going
5 to issue a particular ruling --

6 MR. WARE: Your Honor --

7 HEARING OFFICER DAHER: Again, I'm going to
8 sustain the objection.

9 MR. EGBERT: And I want to be heard at side
10 bar.

11 (At side bar.)

12 MR. EGBERT: In Commonwealth versus Kelly
13 Angell, which was tried in the trial court of the
14 East Boston District, in a plea conference before
15 Judge Russo, asked for by both the parties, which
16 Mr. Deakin was the prosecutor, Judge Russo indicated
17 that under certain circumstances, he would consider
18 continuing that particular case without a finding.
19 Mr. Deakin turned to Judge Russo and told him and
20 said, "If you do that, I'll go public with it,"
21 clearly meaning to Judge Russo to the press.

22 Judge Russo was sufficiently upset that he
23 called the district attorney's office, spoke to Mr.
24 Borghesani, and complained of their attempts to use

1 the press to influence his decisions and to
2 influence his ability to issue a decision.

3 I suggest that it is part and parcel of
4 their conduct in this case. And the fact that they
5 did it on other occasions would go to the
6 credibility of his statements that he never does
7 such a thing, that this was all on the up and up,
8 and at no time were they attempting to pressure
9 Judge Lopez in any way. It is conduct which is
10 inconsistent with his present testimony, it is
11 inconsistent with what the theory has been within
12 this case. It goes to his bias, it goes to his
13 prejudice, it goes to the manner in which Judge
14 Lopez was treated, and the ultimate result. And all
15 of that goes into what is both sanctioned, if
16 anything, and what the sanction --

17 HEARING OFFICER DAHER: I take it you've
18 made an election as to who's going to address the
19 Court?

20 MR. WARE: Yes. First of all, under no
21 circumstance would it be relevant, unless there were
22 testimony that Judge Lopez knew about it, and, of
23 course, after five days, she's said nothing about
24 her knowing about it and therefore, it could not

1 have impacted any attitude she brought to sentencing
2 on September 6th.
3 HEARING OFFICER DAHER: Would it give
4 predicate?
5 MR. EGBERT: No. It goes to explaining his
6 conduct. Judge Lopez --
7 MR. WARE: No.
8 HEARING OFFICER DAHER: Let him finish.
9 MR. WARE: I thought it was my turn.
10 HEARING OFFICER DAHER: But you hesitated.
11 MR. EGBERT: I thought you asked me a
12 question.
13 HEARING OFFICER DAHER: Go ahead.
14 MR. EGBERT: It goes to his conduct, the
15 conduct of the DA's office. It's the very essence
16 of what Judge Lopez found in her findings. The DA's
17 office was using the press to create a circus, to do
18 this, to do the other thing. It goes to the whole
19 issue of what she testified to about the prior
20 statements to the press by Ms. Joseph concerning the
21 Estrada case and Calixte case, the running to the
22 press after cases.
23 Judge Lopez testified that she believed
24 that this press release that was issued on the 3rd

1 of the transgendered and the like was an attempt to
2 affect her, to influence her, because she was giving
3 an opinion that was different than what the
4 Commonwealth wanted. And, quite frankly, that seems
5 to me to be the centerpiece to this case. She
6 didn't have to know about this event. This is an
7 event consistent in conduct with what was going on
8 here and explains for the Court, so you can
9 understand what was going on.

10 And I can tell you that I have interviewed
11 Judge Russo. What I've proffered to you as his
12 testimony is his testimony. I made it quite
13 clear -- I have the court file with the appearances
14 and the like in it. For that purpose, it seems to
15 me to be relevant to these issues. This is not
16 character assassination. This is fact. And the
17 fact of the matter is that these DAs -- and there
18 will be more testimony with regard to this -- the
19 DAs have come to use it in the press and the threat
20 of press as some kind of a wedge against judges, and
21 that all of that impacts the way she was treated --
22 I don't condone the way she was treated -- and what
23 led up to these kinds of events.

24 HEARING OFFICER DAHER: Go ahead.

1 MR. WARE: Your Honor, I understand that
2 the defense in this case is everybody's at fault,
3 except the Judge. I understand that. And I
4 understand we're going to blame victims, we're going
5 to blame assistant DAs, we're going to blame
6 lawyers, we're going to blame the press, we're going
7 to blame Mr. Borghesani. But the relevant point
8 here is there's no evidence in this case that the
9 Judge knew of any such incident. Therefore, it
10 couldn't affect her on September 6th, No. 1.

11 No. 2, this is a collateral issue. What
12 are we then going to do? Have a trial on what was
13 said to Judge Russo?

14 HEARING OFFICER DAHER: It's relevant to
15 her frame of mind. If she thought that she was
16 being set up by the press --

17 MR. WARE: That isn't what she has said.
18 Her testimony over five days is what it is. I'm not
19 going to characterize it. But I think an incident
20 wholly out of the blue involving the assistant
21 district attorney and another judge in a District
22 Court in East Boston has nothing to do with what
23 Judge Lopez did on September 6th, and we're going to
24 go down another collateral road and extend this case

1 another few days for more assassination of the
2 district attorney's office.

3 Mr. Egbert has Mr. Borghesani on his
4 witness list. He can get all he wants about press
5 relations from Mr. Borghesani.

6 MR. EGBERT: Mr. Borghesani is one of them
7 and is taking the party line with them. Let's not
8 kid anybody here. I don't have to be left only to
9 take people who are adverse in interest. I've got
10 an independent judge who's telling what happened
11 here. And, Judge, they can put all this blather
12 about assassination and the like. This is about
13 people's conduct. The Judge made findings here.
14 The Judge made findings that this office was engaged
15 in using the press, in shorthand, as a bludgeon.
16 And this is conduct that is consistent with that.

17 MR. WARE: Those findings have nothing to
18 do with Judge Russo.

19 HEARING OFFICER DAHER: Let him finish.

20 MR. EGBERT: These people have all
21 claimed -- whether it be Joseph or Deakin -- have
22 all claimed that they're the angels of mercy and
23 would never do such a thing, that this was all on
24 the up and up, perfectly appropriate, and that the

1 findings of Judge Lopez were outrageous, terrible;
2 yet, they never appealed, they never did anything
3 about it. And I suggest to you that part of the
4 answer to that, part of the reason to that is
5 because that's what they do. And they do it in
6 cases when they don't like the judge's findings.
7 There are other judges who will so testify as to
8 this particular office --

9 HEARING OFFICER DAHER: My findings will
10 certainly weigh all the evidence and take care of
11 that.

12 MR. EGBERT: Because you'll be better
13 off -- you'll be better able to make a finding as to
14 what -- to the extent you think it's relevant -- to
15 what these people were up to by hearing what they do
16 in criminal cases and what they've done in criminal
17 cases in this regard. This isn't appropriate
18 conduct. You don't threaten judges with going to
19 the press.

20 HEARING OFFICER DAHER: But again, it lends
21 credence to Mr. Ware's argument. This is somewhat
22 collateral to the issue as to her demeanor, her
23 behavior -- you're trying to say that their getting
24 information about Mr. Russo would justify anything

1 that she did or didn't do?

2 MR. EGBERT: It certainly would go to this
3 witness' utter --

4 HEARING OFFICER DAHER: Credibility?

5 MR. EGBERT: -- utter shock that anybody
6 would make a finding that him and his office would
7 use the press --

8 HEARING OFFICER DAHER: I can assess his
9 testimony.

10 MR. EGBERT: Except you'd have clear
11 evidence of it here. You'd have clear, unequivocal
12 evidence of it here from a person who's not a party
13 to these proceedings and may be biased in any way.
14 And these are findings you have to make, No. 1.

15 No. 2, I believe it goes to why they didn't
16 do anything, like appeal or seek reconsideration,
17 because these facts would have come out in a hearing
18 or could have come out in a hearing as to their
19 conduct. So they can't simply back here --

20 HEARING OFFICER DAHER: Your turn, Mr.
21 Ware.

22 MR. WARE: This is my last shot. This is
23 my coming to the Bench and arguing that we should be
24 able to present ten other instances of Judge Lopez

1 acting out of order, and it's simply not the case.
2 We're here with respect to one incident based on
3 September 6th. Even Calixte and Estrada are in this
4 case only because the Judge put them in her
5 response. They're in her formal response. We're
6 not entitled to proffer to this Court a host of
7 other incidents that the Judge has been involved in.
8 And by the same token, we shouldn't be trying the
9 district attorney's office.

10 MR. EGBERT: By the way, this host of other
11 incidents, there's never been a mention of one.

12 MR. WARE: I'll give you an example --

13 MR. EGBERT: And, No. 2, that's because the
14 rules with regards to JCC are very clear. The
15 charge is the charge that you brought, not ones you
16 want to make up.

17 HEARING OFFICER DAHER: We'll break here.
18 I'll take it under advisement. I'll make a ruling
19 after we take a break.

20 (End of side bar.)

21 (Recess.)

22 HEARING OFFICER DAHER: Two issues in
23 regards to this: If I allow Mr. Deakin's testimony
24 in regards to this issue, you're going to put on

1 Judge Russo; is that correct?

2 MR. EGBERT: Correct.

3 HEARING OFFICER DAHER: Secondly, it does
4 goes to the issue of credibility. And it also goes
5 to show that Judge Russo followed scheduled
6 procedure when he notified the district attorney's
7 office, and your client did not. So if you want to
8 put that in on these two issues, credibility and the
9 fact that Judge Russo did call up the district
10 attorney's office and complain, go ahead.

11 MR. WARE: Note our objection to that, and
12 we will file a memorandum after court today.

13 HEARING OFFICER DAHER: On what issue?

14 MR. WARE: On the whole Russo issue, a
15 parade of witnesses coming in here to bring up
16 third-party incidents, this list of judges -- we're
17 going to be here until February on a tangent, and
18 this is one of them.

19 MR. EGBERT: We won't be here until
20 February. We're going to be done this week.

21 MR. WARE: Furthermore, it's my
22 understanding that this particular case happened
23 after September 6th, 2000, anyway, so it's
24 impossible that Judge Lopez could have had it in

1 mind. It is by definition irrelevant here.

2 MR. EGBERT: Judge, the assigning of it has
3 nothing to do with it.

4 MR. WARE: It has a lot to do with it.
5 We're talking about the Judge's conduct.

6 MR. EGBERT: I have never argued to the
7 Court, nor am I arguing now, that Judge Lopez knew
8 of this incident. I'm not arguing that at all.
9 What I've indicated is it goes to the credibility of
10 this witness and their procedure and their conduct
11 in using the press or threats of the press --

12 HEARING OFFICER DAHER: But by the same
13 token, Mr. Egbert, if I recall correctly, Judge
14 Russo, taken aback by what had happened in the
15 press, followed an established procedure: Called
16 the district attorney's office and complained. The
17 testimony is that your client did not do that. She
18 said, I think on examination by Mr. Ware, that would
19 be an ex parte communication.

20 But there was an established procedure if
21 there is a complaint -- if you have a complaint,
22 call the district attorney's office in regard to
23 that. She didn't do that.

24 MR. EGBERT: Nor is she required to. She's

1 not required to make such a complaint, No. 1, nor is
2 that a subject of this proceeding. What is at issue
3 is on this particular piece of evidence -- you can
4 use it for whatever you care to -- but what is at
5 issue is the fact that this witness and Ms. Joseph
6 have consistently said that they have --

7 HEARING OFFICER DAHER: I'll allow you some
8 latitude on a very short leash. Go ahead in regard
9 to that question. Do you want to play back the last
10 question, please, prior to the side bar and my
11 comments.

12 MR. EGBERT: Judge, I can start over.
13 That's a long way.

14 HEARING OFFICER DAHER: If you're prepared
15 to pick it up, let's go.

16 MR. EGBERT: I am.

17 BY MR. EGBERT:

18 Q. Mr. Deakin, did you represent the
19 Commonwealth of Massachusetts in the case of
20 Commonwealth versus Kelly Angell, A-n-g-e-l-l?

21 A. Yes, I did.

22 Q. And was that a case that took place in the
23 East Boston District Court?

24 A. Yes, it was.

1 MR. WARE: Objection. This whole line of
2 questioning is irrelevant.
3 HEARING OFFICER DAHER: You've already made
4 that objection.
5 MR. WARE: It happened after September 6th,
6 2000. It can't possibly bear on this case.
7 HEARING OFFICER DAHER: Overruled. Go
8 ahead.
9 Q. And were you engaged in a plea conference
10 with regard to the case of Commonwealth versus
11 Angell with defense counsel?
12 MR. WARE: Same objection.
13 HEARING OFFICER DAHER: No need to keep on
14 jumping up. It's a continuing objection and I
15 recognize that. Go ahead.
16 Q. Were you involved in a plea conference in
17 the case of Commonwealth versus Kelly Angell with
18 Judge Russo, Dominic Russo, and defense counsel?
19 A. Yes. Anthony Lochiatto was the defense
20 counsel.
21 Q. And during that plea conference did Judge
22 Russo express an opinion that he may consider a
23 continuance without a finding in that case?
24 A. I don't remember specifically. He may

1 have. I don't remember that, but it's certainly
2 possible.

3 Q. And did you respond to Judge Russo in that
4 regard that if he did that, you would, quote, go
5 public?

6 A. No, I did not.

7 Q. And so you swear, as you sit here today,
8 that that never occurred?

9 A. That never occurred.

10 Q. And are you aware of whether or not Judge
11 Russo was in communication with your office after
12 this plea conference?

13 A. Yes. He called the first assistant
14 district attorney, Elizabeth Keeley.

15 Q. And did he speak with Ms. Keeley?

16 A. She told me that he did.

17 Q. Did he speak with Mr. Borghesani?

18 A. I've never heard that he spoke to Mr.
19 Borghesani.

20 Q. And you weren't present for the
21 conversation between Ms. Keeley and Judge Russo or
22 Mr. Borghesani and Judge Russo; is that correct?

23 A. No, I was not, although I subsequently had
24 a conversation with Judge Russo.

1 Q. You did?

2 A. Yes.

3 Q. And when was that conversation?

4 A. He apparently had asked the first -- I'm
5 not sure. The first assistant district attorney
6 suggested that I call Judge Russo.

7 Q. And what was the purpose of your being
8 asked to call Judge Russo?

9 A. She informed me that he had a concern about
10 my -- an area of my presentation of the case and she
11 thought it would be a good idea -- I don't know
12 whether it was his suggestion to her or her
13 suggestion that I call.

14 Q. And did you call Judge Russo?

15 A. I did.

16 Q. About that case?

17 A. I did.

18 Q. And when you called Judge Russo about that
19 case, how long after the case was pled did you do
20 that?

21 A. I don't recall.

22 Q. Approximately.

23 A. A few days.

24 Q. And in fact, is that a time while the

1 defendant in that case was on probation?

2 A. Yes.

3 Q. And so you called Judge Russo directly
4 while the case that you had been involved in was on
5 probation; is that correct?

6 A. Yes.

7 Q. And you had a conversation with Judge
8 Russo?

9 A. I did.

10 Q. And did Judge Russo tell you that he didn't
11 appreciate you threatening to go, quote, go public?

12 A. Absolutely not. What Judge Russo said to
13 me was -- that I had said to him on the record, I
14 believe, something to the effect is, "Judge, you
15 can't do that." What I meant by that was -- and I
16 explained this to Judge Russo -- that something he
17 was doing -- and, frankly, I didn't know I was going
18 to be asked this question -- but something that he
19 was doing was not authorized by statute; that he
20 didn't have the authority to do it. And he said to
21 me that he thought the way I phrased that, "Judge,
22 you can't do that," had the effect of showing him
23 up. That he thought I meant you can't do that, like
24 it's wrong to do that. And I said, "Judge, I

1 apologize. That wasn't my intention. My intention
2 was to explain that the Court lacked the authority
3 to do that." So it was an amicable conversation,
4 and he never suggested that I said I would go
5 public.

6 Q. And just so I'm crystal clear and the
7 record is crystal clear, you never said to Judge
8 Russo in a plea conference words to the effect, "If
9 you do that" --

10 MR. WARE: Objection to "words to the
11 effect." That wasn't your question.

12 MR. EGBERT: I'm asking the question.

13 MR. WARE: I object to "words to the
14 effect."

15 HEARING OFFICER DAHER: Sustained. Ask the
16 question.

17 Q. Did you ever say to Judge Russo in a plea
18 conference, while discussing the possibility of a
19 continuance without a finding, that you would go
20 public?

21 A. No, counsel.

22 Q. The answer is no, right?

23 HEARING OFFICER DAHER: Finish. You asked
24 him a question.

1 MR. EGBERT: The question is a yes or no
2 question: Did you say it.
3 HEARING OFFICER DAHER: That's all it calls
4 for. You're right. Go ahead.
5 A. Counsel, every single hearing -- the Kelly
6 Angell case was widely publicized from the moment of
7 the defendant's arrest. It was an extraordinarily
8 high-profile case. Every single hearing in that
9 case was attended by tons of media that had nothing
10 to do with our office bringing them there. They
11 followed it extremely closely. Everything I did,
12 everything the defense attorney did, everything the
13 Judge did in that case was public by definition.
14 There was no way for me to go public in that case.
15 Everything was public.
16 Q. Mr. Deakin, the conference that I'm
17 describing is a conference that took place outside
18 of the press.
19 A. Understood.
20 Q. It was a private plea conference.
21 A. Understood.
22 Q. Not on the record, correct?
23 A. No, it was not on the record.
24 Q. Just so it's clear, did you say those words

1 or words to that effect in that plea conference?

2 A. No, I did not.

3 HEARING OFFICER DAHER: Did you at any time
4 threaten -- if it is indeed to be considered a
5 threat -- that you would go public to Judge Russo in
6 re that particular matter?

7 THE WITNESS: No, Judge.

8 HEARING OFFICER DAHER: The answer is no.
9 Let's go.

10 Q. Now, on September 6th, when you appeared
11 for the plea conference -- strike that -- for the
12 plea and sentencing at the Middlesex Superior Court,
13 you appeared there with Ms. Joseph, correct?

14 A. That's correct. I mean, I arrived there by
15 myself. But we appeared together, yes.

16 Q. You appeared in court with Ms. Joseph?

17 A. Yes, correct.

18 Q. And when you appeared in court with Ms.
19 Joseph, counsel was asked to introduce themselves,
20 correct?

21 A. Honestly, I don't specifically recall, but
22 I'm sure we were.

23 Q. And you introduced yourself?

24 A. Yes.

1 Q. And you introduced Ms. Joseph, correct?

2 A. I believe that's right.

3 Q. And you stood and she didn't. Do you
4 recall that?

5 A. I think that's right, too, yes. I wasn't
6 paying attention, really.

7 Q. And you indicated to the Court at that
8 time, both through your conduct and your statements,
9 that you would be speaking on behalf of the
10 Commonwealth, correct?

11 A. Through my conduct I did. I'm not sure
12 that I made any specific statements that I would be
13 speaking instead of Joseph or not, but through my
14 conduct, yes.

15 Q. And at no time did you seek from the Court
16 permission or authority to have some other lawyer,
17 including Ms. Joseph, participate in the proceedings
18 orally?

19 A. No, I did not.

20 Q. Now, when you presented the facts of the
21 case at the plea hearing -- let me step back a
22 minute.

23 The facts at a plea hearing -- let me
24 withdraw that, because it gets confusing.

1 Part of a plea hearing is a requirement
2 that the defendant listen to what facts the
3 Commonwealth could prove at trial, correct?

4 A. Yes.

5 Q. And for the defendant to acknowledge those
6 facts, correct?

7 A. Acknowledge that those facts are true,
8 that's right.

9 Q. And that forms what's called a factual
10 basis for a plea.

11 A. Correct.

12 Q. And that's not a time to argue sentencing;
13 am I correct?

14 A. It's not a time to argue sentencing. It is
15 a time to lay out those facts that you intend to
16 refer to in your sentencing argument.

17 Q. Well, if that is the time where the Judge
18 said to you, for example, just put the facts on the
19 record, you were not to argue at that point.

20 A. There's no argument, no. There's just a
21 recitation of facts.

22 Q. And during that time you know that the
23 purpose for that part of the proceedings is to show
24 that there is sufficient facts for entry of the

1 plea.

2 A. Correct.

3 Q. And at one point in time you indicated the
4 Judge stopped you in your recitation of facts,
5 correct?

6 A. That's correct.

7 Q. And you'll agree with me that the time she
8 stopped you -- and the words "stopped you" -- in the
9 transcript I think she said, "I think I've heard
10 sufficient facts." What did she say? Do you
11 recall?

12 A. I don't recall her exact words. It was
13 something along those lines. I'd have to look at
14 the transcript to be sure.

15 Q. Let's look at it so we're accurate. Let me
16 get it for you.

17 Turn to Exhibit 22 in your book.

18 A. Yes.

19 Q. Page 15, to acclimate you.

20 A. Yes.

21 Q. Do you have it?

22 A. Yes.

23 Q. Now, you gave the facts -- or were giving
24 the facts, correct?

1 A. Yes.
2 Q. And you reached the point where the police
3 arrived, correct?
4 A. Yes.
5 Q. And the Judge said, "Thank you. I think
6 that completes the facts that are relevant for
7 purposes of these indictments," correct?
8 A. Correct.
9 Q. Now, you may quarrel with the word
10 "relevant," but certainly you had reached the point
11 where you had delivered sufficient facts for the
12 Judge to rely on that phase of the proceedings; am I
13 correct?
14 A. I think I had at that point recounted
15 sufficient facts for the Judge to make a factual
16 finding that there was a basis for the plea. I had
17 not, however, recited sufficient facts for me to
18 base a sentencing argument.
19 Q. And we're going to get to that in a minute.
20 You recognize that what's important at that stage of
21 the proceeding is sufficient facts for the plea.
22 A. That's -- when you say, "what's important,"
23 no. That's one of the things that's important.
24 It's not the only thing that's important.

1 Q. You can add whatever facts you want in your
2 sentencing argument, can't you?

3 A. No, because in order for the facts to be
4 admitted to, the defendant has to hear them and
5 acknowledge them. If I put them in later in my
6 sentencing argument, the Judge could look at me and
7 say the defendant didn't admit to those facts.

8 Q. The defendant isn't required to admit
9 anything more than a factual basis under the law of
10 this Commonwealth?

11 A. The Commonwealth is entitled to present --

12 Q. You can answer your question in a minute.
13 But answer mine.

14 MR. WARE: Objection, Your Honor.

15 HEARING OFFICER DAHER: What is your
16 objection?

17 MR. WARE: The witness is trying to answer
18 that question. It is responsive.

19 MR. EGBERT: It's not, Judge.

20 MR. WARE: It is.

21 HEARING OFFICER DAHER: Sustained. Go
22 ahead.

23 A. The Commonwealth has a right to present
24 those facts that it believes it would establish at

1 trial and it would justify as sentencing
2 recommendation. The defendant is only legally
3 required to admit to those facts that are true. But
4 the Judge has wide discretion to allow the
5 Commonwealth to present those facts which will
6 support its sentencing recommendation and ask the
7 defendant whether those facts are true.

8 Q. And that's the words "wide discretion"?

9 A. Yes.

10 Q. And you'll agree with me that the Judge had
11 heard sufficient facts for the plea by the time you
12 reached the end of your colloquy on Page 15.

13 A. No, I would not agree with you. I would
14 agree that she had heard sufficient facts to find a
15 factual basis for the crimes alleged.

16 Q. You're arguing with my words.

17 A. No, I'm not.

18 MR. WARE: Objection, Your Honor.

19 Q. Go ahead. Finish.

20 A. The plea, however -- part of the plea is
21 for the Commonwealth to make a sentencing
22 recommendation. And the Commonwealth should be
23 allowed to present those facts that are relevant to
24 its sentencing recommendation and allow the

1 defendant the opportunity to either admit to the
2 truth of those facts or to deny the truth of those
3 facts.

4 Q. Do you agree with me that you had reached
5 the point in your recitation where the Judge had
6 sufficient facts before her to accept the plea and
7 find a factual basis for the plea?

8 A. Yes.

9 Q. And it was within her discretion to stop it
10 there.

11 A. I don't believe it was within her
12 discretion to stop it there when the Commonwealth
13 made a good-faith representation that there were
14 additional facts that would support our sentencing
15 recommendation that it was necessary for the
16 defendant to either admit to or not admit to.

17 Q. And indeed, when the Commonwealth made that
18 representation, she exercised her discretion by
19 telling you to continue.

20 A. Correct.

21 Q. Isn't that correct?

22 A. That is correct.

23 Q. So we have reached a point in time where
24 sufficient facts had been made, correct?

1 A. Sufficient facts for the Judge to find a
2 factual basis --

3 Q. Which is exactly what you were doing at the
4 time, weren't you, when the Judge said -- asked the
5 defendant to listen up to the facts, because she was
6 basically at that point finding a factual basis,
7 correct?

8 A. That was part of what I was doing, yes.

9 Q. And in any event, when you asked her to
10 exercise her discretion basically to let you go on,
11 she did so.

12 A. That's correct.

13 Q. Because you explained to her that you had
14 more you had to say.

15 A. That's correct.

16 Q. Now, I saw on the tape -- and we don't have
17 to look at it again, unless you wish to -- that you
18 were reading from a statement of facts.

19 A. That's correct.

20 Q. Did you write those up?

21 A. Yes, I did.

22 Q. And where did you get the information to
23 develop those facts?

24 A. I got them from a variety of sources. I

1 got them from my own review of police reports when
2 the case had originally come in, I got them from
3 ongoing discussions with ADA Joseph, I got them
4 from -- well, I had reviewed the tape of the boy's
5 statement, I got them from supplemental reports of
6 the detectives -- Detectives Hargrove and Keeley --
7 I believe -- I'm not positive, but I believe that's
8 my sources of the information.

9 Q. Now, on the taped statement, the boy made
10 clear, did he not, that he was pulled into the car
11 by force by Mr. Horton?

12 A. My review of that tape, it was an issue
13 that was raised initially when the taped interview
14 was done, when I didn't see it.

15 Q. I'm sorry. I just missed your answer.

16 A. This issue that was raised with me was
17 about what he had said on the tape while I had seen
18 the tape in discussions with ADA Joseph.

19 When I reviewed the tape, it wasn't
20 entirely clear to me whether he had been pulled in
21 forcefully or whether he had been lured in and the
22 defendant had sort of assisted him or encouraged him
23 to come into the car by pulling on his arm.

24 MR. EGBERT: Can we play the tape, please.

1 HEARING OFFICER DAHER: Sure.
2 MR. WARE: Your Honor, would it be possible
3 to move on and do this after lunch?
4 HEARING OFFICER DAHER: Is that a problem?
5 Can we do it after lunch? Is that possible or do
6 you need it right now?
7 MR. EGBERT: I don't think it is.
8 HEARING OFFICER DAHER: You need it right
9 now?
10 MR. EGBERT: Yes. We're coming towards the
11 conclusion.
12 HEARING OFFICER DAHER: Okay.
13 Q. You saw me fiddling with that. Does that
14 appear to you to be the tape of the alleged victim
15 in this case? The victim in this case?
16 A. Yes, that is.
17 Q. And that's the tape you had reviewed
18 before?
19 A. Correct.
20 (Videotape playing.)
21 "Q. ... from the beginning to the end of what
22 had happened.
23 A. Yeah. I was walking from my friend's
24 house, because I just got dropped off from UMass.

1 And I seen -- I was like at the corner of the second
2 street from my house. Then this lady said, Oh, I
3 know you from somewhere. Will you help me look for
4 my son? I was like, What? I ignored her. I kept
5 walking. The second time she was like, Oh, I know
6 you. Can you help me find my son? I was like, I
7 don't even know you.

8 Q. Where was the lady?

9 A. She was at the corner of the same street I
10 was at.

11 Q. Was she standing on the street?

12 A. Hum-um, a car.

13 Q. She was in a car. And then what happened?

14 A. Then after that she said, I offered
15 somebody \$100 to whoever helps me find my son. So I
16 was like, I know where he was, but -- she's like,
17 Oh, can you show me? I was like -- at first I
18 started walking, and then she was like, Oh, come in.
19 And then she like grabbed my hand and sort of pulled
20 me in."

21 (Videotape stopped.)

22 Q. She said, "She grabbed my hand and pulled
23 me in."

24 A. "Sort of pulled me in."

1 Q. "Grabbed my hand and sort of pulled me in"
2 while she was in the car and he was on the sidewalk,
3 right?
4 A. It's not clear to me that he was on the
5 sidewalk.
6 Q. Well, where was he?
7 A. It wasn't clear to me whether he was on the
8 sidewalk or whether he was in the doorway to her car
9 or whether he was getting into the car.
10 Q. So that lack of clarity to you meant that
11 you didn't know whether he was pulled in the car or
12 not, right?
13 A. Counselor, what I knew was --
14 Q. Is that right?
15 MR. WARE: Objection.
16 A. No, that's not right.
17 HEARING OFFICER DAHER: Go ahead.
18 Q. So you did have the statement that the boy
19 was pulled into the car by his hand, right?
20 A. I'm sorry. He was sort of pulled into the
21 car --
22 Q. "Grabbed my hand and sort of pulled me into
23 the car," right?
24 A. That's correct, yes.

1 Q. Did you talk to the victim?
2 A. Did I speak to the victim?
3 Q. Yes.
4 A. No, I did not.
5 Q. Did you seek to ask whether or not that was
6 in fact true, that there was a forceful pulling into
7 the car?
8 A. No, I did not.
9 Q. Never sought to get that fact one way or
10 the other?
11 A. No, I did not.
12 Q. Would that be an important fact?
13 A. In light of the violence of the defendant's
14 subsequent actions, it did not seem to me to be
15 worth revisiting for this trial the issue of the
16 victim saying --
17 Q. Well, the child was willing and anxious to
18 testify, right?
19 A. As I said --
20 Q. Right? The child was willing and anxious
21 to testify. Wasn't that your testimony?
22 A. No, it was not.
23 Q. If it was not your testimony --
24 MR. WARE: Objection, Your Honor. May the

1 witness finish?

2 A. My recollection of my testimony was that he
3 was willing, and I've never heard him described as
4 anxious.

5 Q. Willing to testify?

6 A. Correct.

7 Q. And had no troubles with it.

8 A. I'm not sure I'd say that. No, I would not
9 say that. "Willing" is what I used.

10 Q. And you didn't think it was worthwhile to
11 send one of your officers down, because you couldn't
12 figure out if that really meant he was being pulled
13 in, right?

14 A. In light of the actions that were
15 unambiguous and the defendant subsequently admitted
16 to, no, I did not.

17 Q. You've been a prosecutor of the sexual
18 assault unit for some time?

19 A. Child abuse unit.

20 Q. Do you think there's a difference in terms
21 of impulse when someone is snatched off the street
22 forcefully versus when someone is rused into a car?

23 A. I don't understand your question.

24 Q. Do you know anything about impulse control

1 as it relates to child sexual abuse?
2 A. I know some things about it, yes.
3 Q. Have you read on the subject?
4 A. Some.
5 Q. You've studied it a bit?
6 A. A bit.
7 Q. And is it fair to say that you, in
8 fashioning your arguments to judges or sentences to
9 judges, have in mind whether a particular defendant
10 is unable to control their impulses in such a way as
11 they would be a repeat offender, for example?
12 A. We certainly have that in mind. It's
13 certainly difficult --
14 Q. But it's something you consider.
15 A. Certainly.
16 Q. And do you know from your studies and
17 readings whether or not, when someone forcibly
18 removes somebody off the street, that that is of a
19 different impulse type than a ruse, so to speak?
20 A. I don't know the answer to that.
21 Q. Simply don't know.
22 A. I don't know.
23 Q. Let me ask you the next question.
24 Did you tell the Judge at that time

1 anything about this defendant -- this victim saying
2 anything about being pulled into the car?

3 A. No, I did not.

4 Q. And did you tell the Judge anything about
5 the victim claiming or indicating that the
6 defendant, Ebony Horton, had threatened to kill the
7 victim if he said a word?

8 A. I don't believe the defendant -- I don't
9 believe anyone has ever said that the defendant
10 threatened to kill the victim.

11 Q. Threatened to have him killed?

12 A. I did not say that to the Judge.

13 Q. You knew that the victim had claimed that
14 the defendant had threatened to have her husband
15 kill the victim if he talked, right?

16 A. At the time that I --

17 Q. Please; can you answer my question?

18 A. I'm trying to answer it.

19 Q. Well, did you know that or didn't you?

20 HEARING OFFICER DAHER: He's not being
21 responsive.

22 Q. Did you know that or didn't you?

23 A. When are you asking me about?

24 Q. Did you know it on the date of September

1 6th, when you had this plea hearing?

2 A. I do not believe that I recalled it as of
3 September 6th.

4 Q. You forgot it?

5 A. I believe that's correct.

6 Q. So the first one you weren't sure of, the
7 second one you forgot. Now, threats to kill are an
8 important part of a factual presentation in a
9 criminal case, wouldn't you agree?

10 A. Yes.

11 Q. But you forgot it.

12 A. Working from the --

13 Q. You forgot it.

14 A. It had been some time since I had seen the
15 tape. I did not recall that fact.

16 Q. You forgot it.

17 A. Correct.

18 Q. And then you didn't tell the Judge that the
19 victim claimed that Ebony Horton got on the
20 passenger side seat with his pants unbuttoned and
21 laid on the victim belly to belly, correct?

22 A. I did not tell the Judge that, no.

23 Q. Did you forget that one, too? Did you
24 forget that one?

1 A. I think that I recalled it in the context
2 of the defendant reclining the boy's seat. I did
3 not recall the specifics of getting on top of him.
4 Q. So you forgot that.
5 A. It had been some time since I reviewed the
6 tape.
7 Q. So you forgot it.
8 A. Yes.
9 Q. Now, as this conference or plea went on --
10 A. I'm sorry. Which exhibit?
11 Q. I'm not there yet. I'll get you to it if
12 you need it.
13 A. I'll just close it.
14 Q. As this plea went on, there came a time
15 where the Judge indicated to you that she thought it
16 was disingenuous for you to tell her it was a 10,
17 right?
18 A. Yes.
19 Q. And what she was talking about, as you saw
20 at the time, was that she thought -- strike that.
21 You understood that to be her saying that it was her
22 opinion that you were disingenuous, correct?
23 A. Yes.
24 Q. In calling this crime a 10 or this set of

1 facts a 10.
2 A. Yes, that was my understanding.
3 Q. Is that correct?
4 A. I mean, I didn't feel I had called it a 10,
5 but my understanding was that the Judge was
6 expressing her opinion that I was disingenuous for
7 calling it a 10.
8 Q. And then at that time -- after she made
9 that statement, she said, "I'll hear from the
10 defense attorney," correct?
11 A. I believe -- I'd have to look at the
12 transcript to be sure.
13 Q. Go to Page 31 of the transcript.
14 A. Which exhibit?
15 Q. Exhibit 22?
16 A. I lost my place.
17 Q. Exhibit 22.
18 A. Exhibit 22, Page?
19 Q. Page 31?
20 A. Yes.
21 Q. That transcript is accurate?
22 A. As best I can remember, yes, it is.
23 Q. And she said, "I'll hear from the defense
24 attorney," correct?

1 A. Correct.
2 Q. And you understood that as the Judge's
3 invitation for the defense attorney to speak and you
4 to sit?
5 A. Correct.
6 Q. And you did not.
7 A. Correct.
8 Q. And you continued to speak.
9 A. I said, "Your Honor, if I may."
10 Q. You continued to speak.
11 A. Yes. And that's what I said.
12 Q. And when you continued to speak and asked
13 to be heard, she said, "No, you may not. You may
14 sit down."
15 A. That's correct.
16 Q. Did you sit down?
17 A. No, I did not.
18 Q. Did you continue to speak?
19 A. I tried to. I got out one word. I said
20 "I."
21 Q. Did you do as the Court had ordered you to?
22 A. No, I did not.
23 Q. And that was intentional, wasn't it?
24 A. Yes, it was.

1 Q. And so at least on two occasions -- whether
2 you were right or wrong, on two occasions you
3 intentionally disobeyed the Court's directive.
4 A. That's correct.
5 Q. Isn't that right?
6 A. That's correct.
7 Q. And then on a third occasion you did it
8 again, correct?
9 A. In this exchange here?
10 Q. Yes.
11 A. I don't think so.
12 Q. She said, "I'll hear from the defense
13 attorney," and you start to speak.
14 A. Correct.
15 Q. That's one. Then she said, "No, you may
16 not. You may sit down," and you started to speak
17 again, correct?
18 A. Correct.
19 Q. That's two, right?
20 A. Correct.
21 Q. And then she told you, "No. You may sit
22 down now," correct?
23 A. Correct.
24 Q. And then again you spoke.

1 A. Actually, although the transcript doesn't
2 reflect it, I think -- no; I take that back. That's
3 correct.

4 Q. Assuredly it was in a mix of words, so if
5 it wasn't three, it was two. But in any event, it
6 was clear to you that you were intentionally
7 disobeying a Court order.

8 A. Yes.

9 Q. Now-- and it's fair to say that the Judge
10 raised her voice and yelled at you.

11 A. Yes.

12 Q. Correct?

13 A. Yes.

14 Q. And then after that, there was some
15 discussion that went on, and you sought to be heard
16 again, correct?

17 A. That's correct.

18 Q. And that was after the Court had indicated
19 that she would deliver the sentence, basically? And
20 that's on Page 32, if you want to look.

21 A. That's correct.

22 Q. And you asked to be heard, and she said, "I
23 don't want to hear from you anymore. Do you
24 understand," correct?

1 A. That's correct.

2 Q. And then ultimately, after the next
3 exchange where she said, "You won't be heard," you
4 indicated you wanted to be heard on a matter
5 different than what you had been asking to be heard
6 before, correct?

7 A. Well, basically what I said -- I explained
8 to her what I wanted to be heard on. I didn't say
9 it was different from what it was before --

10 Q. The content of what you said made it clear
11 you wanted to be heard on a different matter than
12 her opinion of you being disingenuous.

13 A. That's correct.

14 Q. And at that time you were in fact heard,
15 correct?

16 A. Yes.

17 Q. And your arguments were made, correct?

18 A. Yes.

19 Q. And she found in your favor; isn't that
20 correct?

21 A. Yes.

22 Q. In other words, she adopted the
23 recommendations you had made, in large part?

24 A. Well, I didn't really make recommendations.

1 What I said was there need to be conditions for
2 electronic monitoring, and the Judge then imposed
3 such conditions. So I guess if you call that -- I
4 didn't make specific recommendations. I just
5 suggested that there ought to be conditions.

6 Q. Didn't you ask whether or not the curfew
7 would be imposed?

8 A. I'd have to look at the transcript. Off
9 the top of my head I don't recall.

10 Q. Page 34.

11 A. Yes, I did.

12 Q. And didn't you at some point seek to have
13 no contact orders, which you were concerned had not
14 been entered?

15 A. Yes.

16 Q. And that was on Page 36?

17 A. I'm not --

18 Q. Page 36, "MR. DEAKIN: I apologize to the
19 Court. It may have been writing. I didn't hear if
20 there was a no contact order," correct?

21 A. Yes.

22 Q. And she listened to you there.

23 A. Yes.

24 Q. And in fact adopted your implied

1 recommendation there be a no contact order.

2 A. Yes.

3 Q. And in fact, she then sought from you an
4 understanding as to what that no contact order ought
5 to be: just children under 16 or specific
6 individuals, correct?

7 A. Yes -- I'm sorry. I may have misunderstood
8 your question.

9 Q. I said, And therefore, she indicated to you
10 she was seeking your opinion as to whether or not
11 the no contact order should be just to children
12 under 16 and if that would apply to the victim. Do
13 you recall that?

14 A. Well, actually I think what I asked is that
15 it be a blanket no contact with the victim at all,
16 even after she turned 16, and she agreed with that.

17 Q. I want to take it in sequence.

18 A. I'm sorry. It's probably my fault, but I'm
19 not following.

20 Q. Why don't you take a look at Page 36 and
21 familiarize yourself with it.

22 A. (Witness reviews document) Yes.

23 Q. So the sequence basically was that after
24 you indicated the matter upon which you were heard

1 in a number of instances, you were in fact heard
2 without interruption, correct?
3 A. Correct.
4 Q. And in fact your recommendations were
5 adopted in most instances.
6 A. Correct.
7 Q. And your concerns were dealt with by the
8 Court to your satisfaction.
9 A. Those concerns, yes.
10 Q. Is that correct?
11 A. Those concerns, yes.
12 Q. Well, were there any other concerns
13 regarding the sentence that weren't dealt with?
14 A. It depends -- I suppose it depends what you
15 mean by "dealt with." We had concerns about the
16 sentence that was imposed.
17 Q. It was dealt with. You didn't get what you
18 wanted?
19 A. That's correct. Yes, it was dealt with.
20 Q. Now, Mr. Deakin, you indicated that after
21 this proceeding, that you had opportunity to read a
22 press statement from Judge Lopez, correct?
23 A. That's correct.
24 Q. And in that press statement there was some

1 reference -- in fact, let me pull it out for you.
2 Take a look at Exhibit 4 in your book. You
3 were asked during your direct testimony, I think,
4 about the sentence which says, "In this case there
5 were certain facts before me known by both the
6 prosecutor and the defense attorney that were part
7 of the plea conference and cannot be revealed by
8 me." Do you see that?
9 A. Yes.
10 Q. And I'll read the rest of it in a moment,
11 but let's stick with that, if we can.
12 A. I see that.
13 Q. You weren't at the plea conference, were
14 you?
15 A. The one on August 1st?
16 Q. Wasn't that the only plea conference?
17 A. Well, I gather there was one on August 4th
18 that I suppose I wasn't at either. But if you're
19 talking about the lobby conference on August 1st or
20 the bench conference, whatever it was, I was not
21 there.
22 Q. You understood that the plea conference on
23 August 1st was the one where both the prosecution
24 and the defense put together all of the information

1 they wanted the Judge to absorb in order to
2 determine what her sentence would be, correct?
3 A. Yes.
4 Q. And you weren't there?
5 A. No, I was not.
6 Q. Correct?
7 A. That's correct.
8 Q. And you've already indicated that any
9 reports that you have of what occurred on that would
10 have come from Ms. Joseph, correct?
11 A. That's correct.
12 Q. And in fact, you had by that point in time
13 not heard Ms. Goldbach's presentation, correct?
14 A. Only somewhat sketchily secondhand --
15 Q. Sketchily secondhand --
16 A. Not from Anne Goldbach, no.
17 Q. Nor did you have the facts and details
18 contained in what's now become known as Exhibit 3,
19 the psychosocial report.
20 A. Not the details, no.
21 Q. Correct? The facts underlying those
22 things.
23 A. That's correct.
24 Q. So when you testified on direct that you

1 knew of no such facts, it was before the prosecutor
2 and the defense at the plea conference --
3 A. Correct.
4 Q. -- you weren't even at the plea conference?
5 A. That's correct.
6 Q. So you wouldn't have any ability to know
7 that in any event.
8 A. That's not correct.
9 Q. Okay. So you can opine on what facts were
10 known to the Judge that came at a plea conference
11 where you were not present, correct?
12 A. Because I discussed it with ADA Joseph
13 after that.
14 Q. Sketchily, you said.
15 A. No, no. I discussed it sketchily in terms
16 of what Anne Goldbach presented as a defense case.
17 Q. Sir, isn't that part of the problem? That
18 you only look at what the prosecution has as facts.
19 What the defense presented to the Court were also
20 facts, weren't they?
21 A. I can't comment on that. I don't know if
22 they were true facts or not. They were presented as
23 facts.
24 Q. They were presented as facts, correct?

1 A. Correct.

2 Q. They were unrefuted by the DA's office,
3 correct?

4 A. Yes.

5 Q. And they were undisputed by the DA's office
6 in Judge Lopez's presence.

7 A. They were disputed -- the ultimate
8 conclusion was disputed.

9 Q. You know the difference between a
10 conclusion and the facts.

11 A. No, they were not disputed.

12 Q. The facts were not disputed or refuted.

13 A. That's correct.

14 Q. And you don't even know what they are.

15 A. I know more of them now.

16 Q. You certainly didn't know then.

17 A. Not most of them, no.

18 Q. And then what Judge Lopez says in this
19 press statement is -- and I'll read the whole
20 sentence so I don't take it out of context -- "In
21 this case there were certain facts before me known
22 by both the prosecutor and the defense attorney that
23 were part of the plea conference and cannot be
24 revealed by me, but which would undoubtedly change

1 the characterization of this case as currently
2 reported by some media outlets." Do you understand
3 that?
4 A. That's what it says.
5 Q. Now, "undoubtedly change the
6 characterization of the case." You understood that
7 to be Judge Lopez's opinion.
8 A. Yes.
9 Q. That's not a factual statement.
10 A. It seems to me to be a statement of opinion
11 about facts.
12 Q. Right. "Change the characterization" is an
13 opinion, correct?
14 A. Right.
15 Q. About the facts which she's talking about.
16 A. That's how I took it, yes.
17 Q. And you agree with me, don't you, that the
18 matters which were presented to Judge Lopez at the
19 lobby conference, which were not made a part of any
20 public record thereafter, would not have been --
21 could not have been revealed by her in a press
22 release?
23 A. I don't agree with that.
24 Q. You think they could have in a press

1 release?

2 A. In the same point that --

3 Q. Just --

4 MR. WARE: Your Honor --

5 HEARING OFFICER DAHER: I want to hear it.

6 A. Counselor, in the same way that you noted
7 previously when you were asking me questions that
8 the findings that were sent to the press on August
9 4th or 5th were public record, I think the Judge
10 could have, had she chosen to, stated -- if we're
11 talking about the report, the psychosocial report --
12 could have stated in a press release, in a
13 sentencing memorandum, in any fashion that she
14 wanted, that she had reviewed -- that she had
15 reviewed a psychosocial report and that its contents
16 influenced her decision in terms of sentencing. I
17 absolutely think she could have done that.

18 Q. The facts -- the facts in that report --

19 A. I think --

20 Q. Please address my question and then I'll
21 let you answer anything you want. I'll in fact let
22 you have an open-ended question, but I'd like to get
23 to my questions first.

24 The facts in that report, do you think she

1 could have put those in a press release?

2 A. Yes.

3 Q. And under what authority do you say that?

4 A. Under the authority that the only
5 prohibition, it would seem to me, on publishing the
6 facts in that report would be a
7 psychotherapist/patient privilege, which I can't
8 cite you the cite, but I think it's Chapter 123
9 somewhere. The psychotherapist/patient privilege is
10 precisely breached when the defense attorney
11 submitted that report prepared by Joan Katz to the
12 Judge for her consideration. There is no longer a
13 privilege there.

14 As of that point, the Judge could lawfully
15 have disclosed those details. Whether she would
16 choose to or not is a different question.

17 Q. Under what canon of ethics, judicial canon
18 of ethics, do you rely?

19 MR. WARE: Objection.

20 HEARING OFFICER DAHER: Sustained.

21 MR. EGBERT: He said she could ethically do
22 that. So I'm asking --

23 HEARING OFFICER DAHER: He said under the
24 statute that had been waived or breached by Attorney

1 Goldbach, and she could have. And in regards to the
2 canons, I'm going to sustain the objection. Let's
3 move on.

4 Q. Are you familiar with the canons of
5 judicial ethics?

6 MR. WARE: Objection.

7 HEARING OFFICER DAHER: Same objection.
8 Sustained.

9 Q. When the Judge wrote in her press statement
10 "under the applicable law," do you know what she was
11 talking about?

12 A. If you would, I'm sorry, direct me to
13 the -- you mean in the second-to-the-last line?

14 Q. Yes.

15 A. I understand her to be talking there about
16 the penalty -- the statutes that prohibits certain
17 criminal offenses and provide punishments for them.

18 Q. And the plea conference attended by the
19 prosecutor and the defense attorney, what was she
20 talking about?

21 A. I think you're right when you suggested
22 that was the August 1st conference.

23 Q. And the sentencing guidelines, what was she
24 talking about?

1 A. I believe she was speaking about the
2 Commission on sentencing guidelines promulgated in
3 1998.

4 Q. And you base that on the fact that you know
5 of no others?

6 A. I base that on the fact that that's what
7 virtually every judge in the Commonwealth uses.

8 Q. You know of no other guidelines, right?

9 HEARING OFFICER DAHER: Finish that.

10 A. My answer was I'm basing that on the fact
11 that that's what virtually every judge in the
12 Commonwealth uses in sentencing.

13 Q. Have you appeared before Judge DelVecchio
14 at all?

15 A. I'm not sure. Not often, if I have. I
16 don't know that I have.

17 Q. She's the Chief Justice of the Superior
18 Court. Do you know that?

19 A. You didn't ask me if I knew her --

20 Q. I'm asking, she's --

21 MR. WARE: Objection.

22 HEARING OFFICER DAHER: Have you ever
23 appeared before her? Do you have any memory of it?

24 THE WITNESS: I think I have, but only in

1 the First Session on relatively routine matters.

2 Q. And she is the Chief Justice of the
3 Superior Court?

4 A. Yes, she is.

5 MR. EGBERT: May I have a moment, please?

6 HEARING OFFICER DAHER: Sure.

7 (Pause.)

8 MR. EGBERT: No further questions, Your
9 Honor.

10 HEARING OFFICER DAHER: Mr. Braceras, you
11 may pick it up.

12 REDIRECT EXAMINATION

13 BY MR. BRACERAS:

14 Q. Mr. Deakin, since September 6th, 2000, have
15 you had an opportunity to review Exhibit 3, the
16 psychosocial report?

17 A. Yes, I have.

18 Q. After reviewing it, do you see any facts
19 which would change the characterization of the case?

20 MR. EGBERT: Objection.

21 HEARING OFFICER DAHER: What's the
22 objection?

23 MR. EGBERT: The relevance as to what he
24 now knows after some time --

1 HEARING OFFICER DAHER: You asked about the
2 characterization. Overruled. Go ahead. You have
3 it.

4 A. I'm sorry. When you're asking me about
5 change of characterization of the case, what aspect
6 of the case do you mean? The facts of the case or
7 the sentencing? I'm sorry.

8 Q. After reviewing Exhibit 3, would you have
9 changed your sentencing recommendation in any way?

10 A. No.

11 Q. You were also asked about in Exhibit E,
12 certain set of sentencing guidelines that Mr. Egbert
13 represented were drafted in 1981 or 1982?

14 A. Yes.

15 Q. You've been practicing in Superior Court
16 approximately five years? Six years?

17 A. Six and a half years.

18 Q. In all of your sentencing hearings, has any
19 Superior Court judge ever referred to Exhibit E, the
20 1981 guidelines?

21 A. No.

22 Q. Are you familiar with the Truth in
23 Sentencing Act?

24 A. Yes, I am.

1 Q. Briefly, what is the Truth in Sentencing
2 Act?

3 A. It's legislation that was passed I believe
4 in 1994 -- I'm pretty certain of that. It
5 restructured the Superior Court sentencing -- the
6 sentencing -- actually, what it basically
7 restructured was parole eligibility on all felony
8 offenses. I take that back -- for state prison
9 sentences.

10 What it provided was it eliminated the old
11 one-third/two-third eligibility system under which
12 defendants were eligible for parole at one-third of
13 their sentence -- typically violent offenses at
14 two-thirds of their sentence -- and it eliminated
15 statutory good time, which was time taken off a
16 person's sentence by statute. It attempted -- I
17 shouldn't say attempted. Its effect was to make
18 sentencing ranges -- for example, if you use a --
19 say a sentence of three to five years in state
20 prison, it attempted to ensure that prisoners would
21 serve closer to the full three years before they
22 were parole eligible. There's still some earned
23 good time, but it completely restructured the way
24 parole was applied to Superior Court sentences.

1 Q. How did the Truth in Sentencing Act affect
2 any guidelines, sentencing guidelines, that were in
3 existence before then?

4 MR. EGBERT: Objection, since he didn't
5 know there were any guidelines in existence.

6 MR. BRACERAS: Your Honor, he's now seen
7 these guidelines which are in existence. He
8 certainly can testify in his practice as to how
9 Exhibit E, which has been introduced into evidence
10 by Mr. Egbert, would be effective.

11 HEARING OFFICER DAHER: Overruled. Go
12 ahead.

13 A. I would expect that sentencing guidelines
14 that describe specific ranges of sentences that were
15 promulgated before Truth in Sentencing would have to
16 be revised significantly after Truth in Sentencing
17 because they reflect a whole different parole
18 landscape.

19 MR. BRACERAS: Your Honor, I would just
20 like to mark for identification -- I think we're at
21 67 -- Chapter S 66. May I approach?

22 HEARING OFFICER DAHER: Please.

23 Q. I'm showing you what's been marked for ID
24 as Exhibit 66, a chapter --

1 THE CLERK: 67 -- I'm sorry. 66. You're
2 right. I apologize.
3 MR. BRACERAS: 67.
4 THE CLERK: Yes, 67.
5 MR. BRACERAS: My mistake. It's been
6 marked for ID as Exhibit 67, Chapter S 66.
7 (Document marked as Hearing
8 Exhibit 67 for identification)
9 Q. Which codifies the Truth in Sentencing Act.
10 Do you see that, Mr. Deakin?
11 A. I do.
12 Q. Which is the codification of the Truth in
13 Sentencing Act?
14 MR. EGBERT: Is that his testimony?
15 A. Just that I see it. He asked me if I see
16 it.
17 MR. EGBERT: The question was -- the
18 statement was that this codifies the Truth in
19 Sentencing.
20 A. The question I understood to be before me
21 is do I see it. I've just started to review it.
22 Q. Why don't you spend a moment or so just to
23 review Exhibit 67.
24 A. Thank you. (Witness reviews document)

1 This may take me a couple of minutes.

2 HEARING OFFICER DAHER: Take your time.

3 A. Counsel, I think that this is the -- and I
4 don't believe I've read this since it was enacted --
5 or when it was promulgated -- but this is the
6 legislation that established the Massachusetts
7 Sentencing Commission that ultimately produced the
8 sentencing guidelines that are in wide use. I don't
9 think that this is the enactment of the Truth in
10 Sentencing law that changed parole statutes.

11 Q. You understand that Exhibit 23, which is
12 before you, the sentencing guidelines, was a result
13 of this enactment?

14 A. Yes, it clearly was. But that's different
15 from -- and it references Truth in Sentencing in
16 here as a value, that there should be Truth in
17 Sentencing. But the legislation that established
18 Truth in Sentencing law that is separate legislation
19 from this. This is the enabling legislation that
20 created the Massachusetts Sentencing Commission that
21 -- I think most recently then Chief Justice Mulligan
22 was the chairman of that -- promulgated Exhibit 23.

23 Q. When Mr. Egbert was asking you about your
24 September 6th appearance before Judge Lopez, he

1 pointed out that you did not sit down when she asked
2 you to. Do you recall that?

3 A. I do.

4 Q. Why didn't you sit down when Judge Lopez
5 asked you to?

6 A. I felt at that time that the Judge had
7 charged me with being disingenuous and I felt that I
8 had a right and a responsibility on behalf of the
9 Commonwealth and on my own behalf to correct the
10 record and to object. And when the Judge had me sit
11 down, I felt that -- I thought that she was
12 improperly limiting my ability to note on the record
13 an objection to that characterization. I didn't
14 think the record should be allowed to stand with
15 that unobjected-to characterization.

16 Q. Mr. Egbert also asked you a little bit
17 about the recitation of facts. Do you recall that?

18 A. Yes.

19 Q. In particular, he revisited the victim's
20 videotaped interview and questioned why certain
21 facts were not included. Do you recall that?

22 A. Yes, I do.

23 Q. Now, in preparing your recitation of facts,
24 in providing your recitation of facts to Judge

1 Lopez, how did you decide what facts to include?

2 A. I primarily relied upon the report of
3 Detective Thomas Keeley of his interview with the
4 child in the hospital immediately after the assault,
5 and I used those facts. I had much earlier reviewed
6 the tape. But as I was drafting -- I was drafting
7 from that report.

8 Q. And how did you choose which facts to
9 include and not to include?

10 A. I tried to include those facts that would
11 give a picture of a -- an unambiguous picture of the
12 nature of the assault and the level of violence
13 involved in it.

14 MR. BRACERAS: Thank you, Your Honor.
15 That's all.

16 HEARING OFFICER DAHER: Mr. Egbert?

17 MR. EGBERT: May I have a moment?

18 HEARING OFFICER DAHER: Sure. Mr. Braceras
19 or Mr. Ware, who follows Mr. Deakin?

20 MR. WARE: Joan Kenney, Your Honor.

21 HEARING OFFICER DAHER: She's on call?

22 MR. WARE: She'll be here at 1:15.

23 MR. EGBERT: Judge, did they offer Exhibit
24 67?

1 HEARING OFFICER DAHER: It's only for ID.
2 RECROSS EXAMINATION

3 BY MR. EGBERT:

4 Q. But so that it's clear, Exhibit 67 has
5 nothing to do with Truth in Sentencing; isn't that
6 right?

7 A. Well, it has nothing to do with the
8 legislation called Truth in Sentencing. It actually
9 cites as a goal in here Truth in Sentencing -- it's
10 a quote, so it has something to do with it, but
11 nothing to do with the law that --

12 Q. The law that made Truth in Sentencing into
13 law was a totally different law and enactment than
14 what the Commission's lawyers just showed you,
15 correct?

16 A. That's true.

17 Q. In fact, the law that they just showed you
18 and handed up to you as Exhibit 67 is a law that is
19 not in effect; isn't that correct?

20 A. I think this law creating the sentencing
21 Commission is in effect.

22 Q. But the guidelines are not.

23 A. The guidelines that it promulgated pursuant
24 to this law have never been adopted.

1 Q. And in fact, it reads in Section 5 of this
2 submission, doesn't it, "The Massachusetts
3 Sentencing Commission shall submit the initial
4 sentencing guidelines promulgated under this Act to
5 the General Court within 12 months after the
6 effective date of this Act, unless the date for
7 submission is extended by law. The guidelines shall
8 take effect only if enacted into law." Right?

9 A. That's correct.

10 Q. Now, the guidelines have never been enacted
11 into law, correct?

12 A. Correct.

13 Q. The guidelines have never taken effect
14 under the law, correct?

15 A. Correct.

16 MR. BRACERAS: Mr. Deakin --

17 HEARING OFFICER DAHER: One second. He's
18 not done yet.

19 Q. And you were asked about whether or not
20 anything in the report that -- Exhibit 3, the
21 psychosocial report that we've been talking about.
22 Do you understand what I'm talking about?

23 A. Yes.

24 Q. You were asked whether or not anything in

1 that report would change your recommendation as a
2 district attorney, correct?

3 A. That's correct.

4 Q. Will you agree with me, however, that much
5 that is in that report is relevant to sentencing?

6 A. If one accepts this report as
7 authoritative, then, yes, there is much in it that
8 is relevant to sentencing.

9 Q. And relevant for a judge to consider at
10 sentencing?

11 A. If the judge gives -- acknowledges it is
12 authoritative, yes.

13 Q. In other words, if the judge relied on it,
14 then there is a lot of information there that's
15 clearly relevant to the sentence to be imposed,
16 correct?

17 A. I would agree with that.

18 Q. And you understand, do you not, that no one
19 in the district attorney's office ever asked Judge
20 Lopez not to rely on that report? You understand
21 that, don't you?

22 A. My understanding is that ADA Joseph's
23 interpretation of what happened at the plea colloquy
24 made that unnecessary.

1 Q. Made it unnecessary?

2 A. Correct.

3 Q. Answer my question first and then we'll
4 talk about necessities.

5 Do you agree with me that no one in the
6 DA's office ever sought to have the Judge -- strike
7 that. No one in the DA's office ever argued to the
8 Judge that she should not rely on the contents of
9 that report?

10 A. My understanding from ADA Joseph was that
11 she had made it known to the Judge that she did not
12 think that the report ought to be relied on. That's
13 my understanding from her.

14 Q. That is your understanding from her?

15 A. Yes.

16 Q. When did you gain that understanding?

17 A. It would have been either -- it happened in
18 our meeting shortly after the lobby conference.

19 Q. Would it surprise you to know that she has
20 testified consistently that no such objection was
21 ever made?

22 A. That would surprise me.

23 Q. That she never asked the Judge not to rely
24 on it? Would that surprise you? Strike that.

1 Would that be inconsistent with what she
2 reported to you?

3 A. No, it wouldn't.

4 Q. Would it be inconsistent --

5 HEARING OFFICER DAHER: Mr. Egbert, if I
6 recall correctly, the report was viewed by Judge
7 Lopez ever so briefly, with Ms. Joseph looking over
8 her shoulder. Judge Lopez didn't retain a report.
9 I think it was handed back to Ms. Goldbach. So that
10 report, that psychosomatic report, was not in the
11 record. The district attorney didn't have a copy of
12 it. Nobody had a copy of it. Judge Lopez didn't
13 have a copy of it.

14 MR. EGBERT: Judge, again, with all due
15 respect, you couldn't be more wrong.

16 HEARING OFFICER DAHER: Tell me. I want to
17 know. I appreciate your candor. Go ahead.

18 MR. EGBERT: And there are going to be
19 judges who come in here who practice in the criminal
20 courts who are going to unfortunately tell you that.

21 HEARING OFFICER DAHER: What happened to
22 this report?

23 MR. EGBERT: The report was taken back
24 after it was read by the Judge and relied on at the

1 plea conference, at which time a decision was made
2 as to what sentence would be imposed. It was
3 returned to the parties. It was then later on given
4 to Probation after the sentence and put as part of
5 their file. And that is done every day in a plea
6 conference in the courts of the Commonwealth in
7 criminal cases. And you will hear from Judge
8 DelVecchio in that regard, from Judge Spurlock in
9 that regard, from Judge Quinlan -- the fact of the
10 matter is, with all due respect, this Court has
11 never sat criminal. And that is done every single
12 day. And that's the facts that judges in the
13 criminal sessions rely on.

14 HEARING OFFICER DAHER: It would appear,
15 Mr. Egbert -- and obviously a man with your vast
16 experience -- if we're dealing with the charges of
17 kidnapping, et cetera, and the government is seeking
18 a rather stringent punishment, a report like that --
19 the judge would at least have kept a copy, the
20 district attorney should have been given a copy.

21 MR. EGBERT: The district attorney didn't
22 ask for one, didn't want one, and rejected one when
23 it was given.

24 HEARING OFFICER DAHER: Judge Lopez didn't

1 even retain a copy of it.
2 MR. EGBERT: That's No. 1. The Judge
3 doesn't have to retain a copy of it. This is trying
4 to make rules and regulations in the conduct of
5 criminal trials which do not exist and have never
6 existed in the Commonwealth. And that's what the
7 fact of the matter is. And the issue of what goes
8 on daily in lobby conferences on pleas throughout
9 this Commonwealth have occurred just like that four
10 years. And to now try to run away -- have the DA's
11 office --
12 MR. WARE: I hate to interrupt --
13 MR. EGBERT: Well, don't. I'm speaking.
14 MR. WARE: Could you save the closing for a
15 week from now?
16 MR. EGBERT: Are you done?
17 MR. WARE: Not quite.
18 HEARING OFFICER DAHER: Go ahead.
19 MR. EGBERT: I am a bit tired of being
20 interrupted from behind, so to speak, by Mr. Ware
21 and his colleagues.
22 HEARING OFFICER DAHER: Sure.
23 MR. EGBERT: Your Honor, I suggest -- and
24 I'm saddened to say that even after the amount of

1 time that has gone on in these proceedings to
2 describe criminal events, that we haven't obviously
3 made our point to you. But these are conferences
4 that go on in criminal cases every day throughout
5 the Commonwealth where people put forward matters to
6 the judge, both orally and in documents, that the
7 judge reviews them all, and then indicates what
8 their sentence is going to be. And that's it. And
9 matters are not put on the record at that time.
10 Matters are not made a part of the record at that
11 time. There is no record at that time. And what
12 judges do consistently is then either that day, if
13 the occasion arises, because everybody is in
14 agreement --

15 HEARING OFFICER DAHER: I understand that
16 totally. And in the hurried nature of the session,
17 I can understand that. But then when a judge looks
18 at a report, it's not from a board-certified
19 clinical psychologist or psychiatrist. It's from a
20 social worker out of Ms. Goldbach's office. She
21 reviews it for a few minutes and gives it back and
22 there's no copy to the ADA.

23 MR. EGBERT: The ADA didn't ask for a copy,
24 nor would she take a copy when offered to her.

1 MR. WARE: Well, are we going to argue this
2 endlessly?
3 HEARING OFFICER DAHER: Go ahead. Why
4 don't you finish your examination of Mr. Deakin. Go
5 ahead.
6 BY MR. EGBERT:
7 Q. Mr. Deakin, the facts and circumstances in
8 the report you've indicated would be relevant to
9 sentencing?
10 A. If they were viewed as authoritative --
11 Q. If they were viewed as authoritative?
12 A. Yes.
13 Q. Which is a judge's right to do, correct?
14 A. Yes.
15 Q. And in this particular case, they were
16 presented to Judge Lopez, correct?
17 A. Again, I don't know of my own knowledge.
18 Q. Can you take that as a given by now?
19 A. I've been told that, yes.
20 Q. And when you read those facts and
21 circumstances regarding the defendant Ebony Horton,
22 it didn't change your characterization of the case,
23 did it?
24 A. Counsel --

1 Q. Please, just answer my question. Did it?
2 HEARING OFFICER DAHER: Yes or no.
3 A. No, but --
4 Q. "No, but." It didn't, did it?
5 A. No, it did not.
6 Q. Thank you. But it may well have changed
7 Judge Lopez's characterization of the case; isn't
8 that correct?
9 MR. WARE: Objection. She's testified --
10 HEARING OFFICER DAHER: Sustained.
11 Q. That's exactly what the press release says,
12 doesn't it?
13 MR. WARE: Objection.
14 HEARING OFFICER DAHER: Sustained.
15 *Q. That it is her opinion that the
16 characterization would change --
17 MR. WARE: Objection.
18 HEARING OFFICER DAHER: That's not a
19 question. That's a declaration. Next question.
20 Q. Do you understand the meaning of that?
21 HEARING OFFICER DAHER: What is the
22 question?
23 Q. Isn't that your understanding of that
24 statement in the press release?

1 MR. WARE: Objection. What is the
2 question? Whether he understands --
3 HEARING OFFICER DAHER: His understanding.
4 Play back the question, please.
5 *(Question read)
6 HEARING OFFICER DAHER: Are you objecting
7 to it?
8 MR. WARE: Yes.
9 HEARING OFFICER DAHER: Sustained.
10 MR. EGBERT: No further questions.
11 HEARING OFFICER DAHER: Anything on --
12 MR. BRACERAS: No questions, Your Honor.
13 HEARING OFFICER DAHER: We'll break here
14 and get back at --
15 MR. WARE: 1:30?
16 HEARING OFFICER DAHER: We'll make it
17 quarter of.
18 MR. WARE: Yes, Your Honor.
19 HEARING OFFICER DAHER: Quarter of two.
20 We'll break now.
21 (Luncheon recess taken from
22 12:36 p.m. to 1:53 p.m.)
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AFTERNOON SESSION
JOAN KENNEY, Sworn
DIRECT EXAMINATION

BY MR. WARE:

Q. Could you state your name, please, for the Court.

A. My name is Joan Kenney.

Q. And what is your current position, Ms. Kenney?

A. Public information officer at the Supreme Judicial Court.

Q. I'm going to ask you to bend that microphone a little bit closer to you.

And when you say public information officer, tell us what the Public Information Office is.

A. Public Information Office is the central communications office for the court system. It's responsible for responding to media and public inquiries, issuing press releases and the media relations as well as community outreach, development of publications, and special events.

Q. And does the Public Information Office and you, as a public information officer, deal with

1 judges in all courts of the Commonwealth?
2 A. Yes, the duties extend to all of the
3 courts.
4 Q. Including Superior Court judges?
5 A. Yes.
6 Q. Tell us for what period of time you've been
7 the Public Information Officer for the Supreme
8 Judicial Court.
9 A. Since 1988.
10 Q. In the course of your duties, have you had
11 occasion in the past to respond to inquiries from
12 the press and work with individual judges in the
13 Commonwealth?
14 A. Yes, I have.
15 Q. Directing your attention to August of 2000,
16 in the summer of 2000, mainly early August, did you
17 receive a call from Judge Lopez regarding what you
18 learned was the Horton case?
19 A. Yes, I did.
20 Q. And would you tell us what occurred.
21 A. Judge Lopez called my office and said that
22 she was concerned about cameras present at a
23 proceeding she was holding involving Charles Horton.
24 Q. And did she say anything else at that time?

1 A. She was upset that the cameras were near --
2 filming him in or near the elevators.

3 Q. Did she tell you what proceedings were on
4 for that day or whether the case was going to go
5 forward?

6 A. She said she was going to continue the
7 case.

8 Q. And did she tell you why she was going to
9 continue it?

10 A. Well, she was upset at the media being
11 present that day, particularly filming Charles
12 Horton.

13 Q. At that time did she ask you to become
14 involved in any way in the Horton case or in the
15 press relations?

16 A. Yes. She had asked me to fax her findings
17 and order to the media that same day.

18 Q. Let me direct your attention to what's been
19 marked Exhibit 49 in the book before you. And I put
20 that also on the monitor for you.

21 Do you recognize Exhibit 49?

22 A. I do.

23 Q. Will you tell us what it is.

24 A. That is a fax cover sheet that was sent to

1 my office with Judge Lopez's order and findings from
2 August 4th.

3 Q. And when you received the document or
4 documents included within Exhibit 49, did you
5 receive all three of these documents?

6 A. Yes.

7 Q. And what did you understand them to be?

8 A. I considered that to be the press release
9 to send to Channels 4, 5, 7, and 56.

10 Q. Did you have conversation with Judge Lopez
11 regarding your sending this as a press release to
12 Channels 4, 5, 7, and 56?

13 A. I believe I did, but I don't have a
14 specific recollection of what we said.

15 Q. Can you tell from the document
16 approximately when you received it? Directing you
17 specifically to the upper left-hand corner. It may
18 be easier to see on the hard copy.

19 A. Well, it was sent on August 4th in the
20 afternoon.

21 Q. Do you see the notation that says "16:07"?

22 A. Yes.

23 Q. Do you remember whether or not you received
24 it around four o'clock in the afternoon?

1 A. I don't remember, but it probably was.

2 Q. What did you do with the documents after
3 you received them?

4 A. I sent it out to the stations that she
5 listed, and I also sent it to some other media
6 outlets; namely, the Globe, the Herald, AP, perhaps
7 others who might have been interested in this case.

8 Q. Was that consistent with your practice?

9 A. Yes, it was.

10 Q. Now, you know that the document attached to
11 Exhibit 49 or as part of Exhibit 49 was a set of
12 findings by the Judge; is that correct?

13 A. Yes, that's correct.

14 Q. Did you ever send findings out to the media
15 without being directed to do so by the judge who
16 entered the findings?

17 A. No, I wouldn't do it without being directed
18 to do that.

19 Q. Will you tell us what are the rules that
20 you play by in your office with respect to sending
21 statements out or information out under the name of
22 a judge?

23 A. Well, I would always check with the judge
24 first to make sure it is a public document, make

1 sure something's been docketed in the clerk's office
2 to make sure the judge would be in agreement that
3 something could be released to the public or the
4 press.

5 Q. And do you have any reason to believe you
6 did not follow that procedure on this occasion?

7 A. No.

8 Q. Following August 4th, did you have further
9 contact with Judge Lopez at some time?

10 A. Yes. On or about the time that she was to
11 hold the next hearing on the matter.

12 Q. And do you recall approximately when you
13 heard from Judge Lopez again?

14 A. That was in September. The hearing I
15 believe was September 6th, so it was on or about
16 that time or before.

17 Q. Between August 4th and September 6th, did
18 you and Judge Lopez discuss the Horton case or did
19 you have any role in press relations with the Horton
20 case?

21 A. No, not between that time.

22 Q. So during that month you had nothing to do
23 with the case?

24 A. Not that I recall.

1 Q. And then tell us what happened on September
2 6th.

3 A. The Judge and I talked before the hearing
4 began, and she told me that she was going to allow
5 to have a camera in the courtroom for the
6 proceeding. I had suggested to her that she hold a
7 meeting with the press beforehand to go over any
8 ground rules that she wanted.

9 Q. Did you have any further conversation that
10 you recall?

11 A. Not before the hearing.

12 Q. Actually, let me ask you to back up. After
13 you sent out the release or the document marked
14 Exhibit 49, you indicated you sent that to a number
15 of media outlets, including the channels listed on
16 the document. Did there in fact appear newspaper
17 articles the following day quoting from the order?

18 A. I believe so.

19 Q. And let me direct you just quickly, if I
20 may, to Exhibits 15 and 19, and tell me whether or
21 not those were articles in response to the press
22 release. I think 15 is an article from the Globe.
23 And 19.

24 A. Yes, they look like they are.

1 MR. EGBERT: Judge, I'm sorry; I didn't
2 hear the answer. I'm not sure if she's talking
3 about what she remembers or what she looked at.

4 Q. I'll ask a question.

5 You understand Exhibits 15 and 19 to have
6 been articles which came out following the issuance
7 of the press release or order marked Exhibit 49?

8 MR. EGBERT: Judge, again, my quarrel is
9 with the word "understand." If she saw them, that's
10 fine. If she didn't, that's fine, but I'd like to
11 know which it is.

12 HEARING OFFICER DAHER: Sustained. Go
13 ahead.

14 A. I saw them at the time.

15 Q. And did you understand them to be a
16 response to the press release you had sent out on
17 August 4th?

18 A. Yes, to the order and findings.

19 MR. EGBERT: I'm sorry, Your Honor; I
20 couldn't hear the answer.

21 A. To the order and findings.

22 Q. Let's go back to September 6th. You
23 indicated you had some conversation with the Judge
24 with respect to the press and how the press would be

1 handled on that day; is that correct?
2 A. That's right.
3 Q. Other than what you've told us --
4 HEARING OFFICER DAHER: Could you speak up
5 a little louder?
6 THE WITNESS: Sure.
7 Q. Do you remember any other conversation with
8 the Judge about that?
9 A. Prior to the hearing?
10 Q. Yes.
11 A. No, I don't.
12 Q. And what happened after that initial
13 conversation with Judge Lopez on September 6th?
14 What was your next contact with the case?
15 A. My next contact was after the hearing was
16 over, Judge Lopez called me. She was upset because
17 -- I think it may have been in response to a media
18 inquiry that either she received or I received.
19 There was a remark made in the courtroom about a
20 low-scale matter or low-level matter. She was
21 concerned that that would be misinterpreted, and she
22 told me what she meant by that was that she was
23 referring to the sentencing guidelines.
24 Q. And on September 6th, after the earlier

1 conversation about the press and locating the press,
2 did you call Judge Lopez or did she make the initial
3 call to you?

4 A. I remember her calling me.

5 Q. Were you at the time in your office?

6 A. Yes.

7 Q. And will you do your best to repeat for us
8 the conversation as you recall it.

9 A. What I remember her saying was that she was
10 concerned that she was going to be misinterpreted by
11 a remark she made in the courtroom referring to a
12 low-level or low-scale matter and that what she
13 meant by that was sentencing guidelines. She was
14 referring to sentencing guidelines.

15 Q. Did you have any further conversation with
16 her that day about the case or about what to do
17 about the press release?

18 A. I don't remember how many conversations we
19 had that day, but I had said if she wanted to send
20 any media calls to my office that she was getting,
21 that I would take them for her.

22 Q. Did you have any conversation with the
23 Judge about any facts of the case as she was
24 relating them to you?

1 A. She was telling me bits and pieces about
2 the case. I don't know exactly what she told me on
3 that day, how much she told me that day.

4 Q. Will you tell us what you do remember her
5 saying to you that day, other than the "low-scale"
6 comment.

7 A. I can't recall what she said on that
8 particular day. We had many conversations in the
9 following days about the case, but...

10 Q. On September 6th, the date of the
11 sentencing, after you spoke with Judge Lopez, did
12 you do anything? Did you take any steps with the
13 press at that time?

14 A. Well, I think it was the next day we
15 discussed it, and I suggested that we draft a
16 statement to go out to the press.

17 Q. Before you drafted that statement, did you
18 learn from Judge Lopez additional facts about the
19 case, specifically about a weapon or about the
20 kidnapping?

21 A. I did learn a couple of facts from Judge
22 Lopez. I can't remember which day it was, but she
23 did tell me that she did not believe it was a
24 kidnapping and that the screwdriver was not used as

1 a weapon.

2 Q. Do you believe the Judge told you those
3 pieces of information prior to the time that you
4 initially drafted the statement?

5 A. I can't recall if I knew that before I
6 drafted the statement or afterwards.

7 Q. Were there any other facts you learned from
8 Judge Lopez or statements you heard Judge Lopez give
9 you by way of description of the case that you
10 remember?

11 A. Those are the two that stand out in my
12 mind. I'm sure she told me other parts about the
13 case, but I don't remember specifically any other
14 items.

15 Q. Following that, what did you do?

16 A. I drafted a statement based on the
17 information that she was giving me and said, "Let's
18 take a look at this and decide whether we want to
19 put this out or not."

20 Q. And I've placed on the monitor what's been
21 marked in this case as Exhibit -- part of Exhibit
22 24. And you have the entire exhibit in the book
23 before you. Let me just ask you to describe what's
24 contained in Exhibit 24 as you understand it.

1 A. The top page is a draft of the release with
2 changes -- with my original draft and changes that
3 had been made by Chief Justice DelVecchio.
4 Underneath that page is the first draft that I had
5 written and then the final version that was sent out
6 to the press, the final version containing some
7 revisions that Chief Justice DelVecchio and Judge
8 Lopez had made.

9 Q. So let me direct you to the second page,
10 the one marked "First Draft." Is that a document
11 which you prepared with Judge Lopez?

12 A. Yes, it is.

13 Q. You actually wrote the words, as I
14 understand you; is that correct?

15 A. That's correct.

16 Q. And what conversation did you have with
17 Judge Lopez about the content of this proposed
18 statement?

19 A. This was the information that I had at the
20 time, and it was my suggestion to draft a press
21 release based on what she was telling me.

22 Q. Other than the information you got from
23 Judge Lopez, did you have any other sources of
24 information at that time?

1 A. No.

2 Q. Following your preparation of what's marked
3 "First Draft," what did you do with the first draft?

4 A. Discussed it with Judge Lopez. And then
5 either she or I thought it would be a good idea if
6 Chief Justice DelVecchio took a look at it.

7 Q. Now, I'd like to take a look at the
8 document as it was drafted, and direct you
9 specifically to the first sentence of this
10 statement. And I've highlighted a portion of that
11 or the first sentence on the monitor. The first
12 sentence says, "The judicial canons prohibit judges
13 from commenting on pending and impending cases."
14 Can you tell us why you included that in this
15 initial draft?

16 A. Yes. I considered this a pending case
17 because Charles Horton was on probation, and it was
18 an attempt to explain to the press why the Judge
19 couldn't comment about the case. There were many
20 inquiries coming in and requests for her to comment.

21 Q. Did Judge Lopez at any time take issue with
22 your characterization of the cases pending?

23 A. No.

24 Q. Further down the paragraph there's

1 reference to "low scale," I believe. Do you see
2 that?

3 A. Yes.

4 Q. And it says in part, "My statement in open
5 court that it was a low-scale matter pertained
6 solely to the appropriate level of the sentencing
7 guidelines..."

8 Why did you include that language?

9 A. Because that's what Judge Lopez had told
10 me, that it was a low-scale matter, and that that's
11 what she was referring to.

12 Q. What did she say to you in that regard?

13 A. Just that -- that it was -- that she had
14 said in open court that it was a low-scale matter
15 and that she was referring to the sentencing
16 guidelines.

17 Q. When the Judge referred to the sentencing
18 guidelines, did you have an understanding --
19 although you're not a lawyer -- in your official
20 capacity of what she was referring to?

21 A. Yes, I did.

22 Q. And what did you understand the Judge to be
23 referring to?

24 A. These are guidelines that judges use to

1 determine what kind of sentence to give a defendant.

2 Q. And have you had other occasion to work
3 with other judges in issuing statements or referring
4 to the sentencing guidelines?

5 A. I've worked with other judges issuing
6 statements, and I'm familiar in general with what
7 the sentencing guidelines are.

8 Q. And were you familiar as of September 2000
9 with the fact that sentencing guidelines were out
10 there? Whether enacted or not enacted, they were
11 out there?

12 A. Yes.

13 Q. The statement goes on to refer to "certain
14 facts," and I've highlighted a portion of that on
15 the monitor as well.

16 Other than the facts -- well, what are the
17 facts which you understood to be referred to here?

18 A. These were facts that the Judge had told me
19 about the case. Again, I don't specifically
20 remember what I knew on that particular day, but I
21 do remember her talking about the kidnapping and the
22 screwdriver as two facts.

23 Q. And what is it that the Judge told you
24 about the screwdriver and the kidnapping, as you

1 best recall?

2 A. She didn't think this was a real
3 kidnapping, and the screwdriver was not used as a
4 weapon.

5 Q. Was that part of the basis for this
6 reference to "certain facts"?

7 A. Yes.

8 Q. Did you believe that the information
9 regarding the kidnapping and the screwdriver were
10 mentioned by the Judge in conjunction with
11 preparation of this statement or before?

12 A. Yes, and I think there were other facts
13 that I may not have known at the time, but that I
14 knew she couldn't reveal them.

15 Q. What other facts did you understand -- if
16 you didn't know the facts, what kind of facts did
17 you understand were being referred to here?

18 A. I'm not sure I know what you mean.

19 Q. I'm not sure I do either. Let me try it
20 again.

21 You've mentioned a couple of facts about
22 which the Judge informed you at the time of this
23 statement having to do with the screwdriver and the
24 kidnapping, correct?

1 A. Yes.

2 Q. Do you remember any other pieces of
3 information given to you by the Judge, with the
4 exception of the "low-scale" comment, on the basis
5 of which the statement was drafted?

6 A. I don't recall any others.

7 Q. Now, later you had many, many, many
8 conversations with Judge Lopez, did you not?

9 A. That's right.

10 Q. After this statement was issued, correct?

11 A. Yes, right.

12 Q. And to some extent these conversations run
13 together in your mind, I take it, correct?

14 A. Yes, they do.

15 Q. At any time to your knowledge did Judge
16 Lopez mention to you the existence of a social
17 worker's report or a psychological report on which
18 she was relying?

19 A. I don't recall a social worker's report.

20 Q. Do you ever remember referring in any way
21 to a psychological profile or social worker's
22 report?

23 A. I don't recall that.

24 Q. After the statement was drafted, you said

1 that Judge DelVecchio commented about it or made
2 some changes to it, correct?

3 A. Yes.

4 Q. Tell us what you did with the first draft
5 statement.

6 A. I faxed the first draft to Chief Justice
7 DelVecchio's office so she could review it.

8 Q. Did you give it to anybody else?

9 A. No; just Chief Justice DelVecchio, and
10 Judge Lopez also had it.

11 Q. And so when you had the initial draft, it
12 went to Judge Lopez and it went to Justice
13 DelVecchio, correct?

14 A. Yes, that's right.

15 Q. At some time did you receive something back
16 from Justice DelVecchio?

17 A. Yes. Chief Justice DelVecchio faxed a
18 version back to me. She had made some minor
19 revisions to my original draft.

20 Q. And let me direct you to the monitor to the
21 fax cover sheet. And in hard copy it is Exhibit 51.
22 Is that the fax cover sheet you received back from
23 Justice DelVecchio's office?

24 A. Yes, it is.

1 Q. In fact, did Justice DelVecchio make a
2 couple of changes to the proposed statement which
3 you had sent out?
4 A. She did.
5 Q. And those are the changes you earlier
6 referred to on the first page of Exhibit 24; is that
7 correct?
8 A. That's right, yes.
9 Q. Let's go back to Exhibit 24 just quickly.
10 The final version -- do you have that in front of
11 you?
12 A. Yes.
13 Q. The final version which went out to the
14 public or to the media is the third page marked
15 "Final Version"; is that correct?
16 A. That's correct.
17 Q. And the changes made by Justice DelVecchio
18 appear on the first page of those three in Exhibit
19 24; is that correct?
20 A. That's correct.
21 Q. Other than those changes, were any other
22 changes made to the initial draft?
23 A. No.
24 Q. Did you at some time have conversation with

1 Judge Lopez regarding the statements in the release?

2 A. Yes. She saw the first draft. I had read
3 it to her and would have faxed it to her. I'm
4 pretty sure I did. And then I called her again
5 after Chief Justice DelVecchio made her revisions,
6 to make sure that Judge Lopez was comfortable with
7 it and it should go out.

8 Q. And what was the conversation with Judge
9 Lopez on those two occasions?

10 A. When I talked with her after Chief Justice
11 DelVecchio had reviewed it, I was under the
12 impression that they had had a conversation about
13 it, the two of them, and that she was in full
14 agreement that this should go out, and in fact,
15 directed me to do so.

16 Q. When you say directed you to do so, did
17 Judge Lopez tell you to send the statement out?

18 A. Yes. She said you can send it out -- that
19 I could send it out.

20 Q. At any time did Judge Lopez indicate to you
21 that she disagreed with any aspect of the release?

22 A. No.

23 Q. And did she in any way indicate to you that
24 she thought changes should be made in that statement

1 because the statements were inaccurate in any way?

2 A. No.

3 Q. Did she at any time come back to you and
4 say, "This sentencing guidelines thing isn't right.
5 Don't send it out. It will mislead someone"?

6 A. No.

7 Q. What did you then do after the Judge
8 instructed you to send out the statement?

9 A. I faxed it to all of the media who had
10 expressed an interest in it.

11 Q. And when you talk about "all the media,"
12 are you talking about print media as well as
13 television stations?

14 A. Print and broadcast.

15 Q. Following the statement, did you receive
16 additional information from Judge Lopez after the
17 statement went out?

18 A. We had many conversations over the course
19 of the week, and weeks, really, while this stayed in
20 the news.

21 Q. I think I neglected to ask you, what was
22 the date on which the statement, Exhibit 24, was
23 actually sent to the public media?

24 A. I believe it was September 7th that the

1 statement went out.

2 Q. The day after the sentencing?

3 A. The day after.

4 Q. And in the subsequent days over the next
5 couple of weeks after September 7th, how often did
6 you speak with Judge Lopez?

7 A. I think every day, sometimes several times
8 a day. I was keeping her informed of every media
9 call that came in, you know, people who wanted
10 interviews or requests for comments. So I was
11 keeping her informed on a daily basis.

12 Q. At any point in time during those next
13 several weeks or even up until today, has the Judge
14 ever indicated to you in any way that there was any
15 inaccuracy in the statement that you sent out at her
16 direction?

17 A. No.

18 Q. Did you learn some additional information
19 which Judge Lopez gave to you after the statement
20 went out?

21 A. Yes. Each time I talked to her there was
22 more information that she gave me. She asked me
23 specifically to call a police detective.

24 Q. And do you recall that detective's name?

1 A. Jay Greene.

2 Q. What did Judge Lopez tell you to do and
3 what did you in fact do?

4 A. She gave me the name of Jay Greene and said
5 he would have information pertaining to this case,
6 and I called him at her suggestion.

7 Q. Did you speak with Greene at that time?

8 A. I did.

9 Q. As a result of the conversation with
10 Detective Greene, what did you do?

11 A. I then called the Boston Police Department,
12 talked to the spokesperson there, and asked what
13 their procedures were about releasing information.

14 Q. And what were you told?

15 A. That this was a case involving a child,
16 sexual assault case, and that they would not release
17 information. I explained that I was concerned
18 because the detective had given me information that
19 was not being reported in the press or it was
20 conflicting with press reports.

21 Q. And at some time did you talk to the
22 detective about going on record and saying what he
23 was telling you?

24 A. I asked if he would talk to the press, if

1 this was information that he was comfortable in
2 talking to the press about.

3 Q. And what did he tell you?

4 MR. EGBERT: Objection.

5 HEARING OFFICER DAHER: I beg your pardon?

6 MR. EGBERT: Objection as hearsay: "What
7 did he tell you?"

8 HEARING OFFICER DAHER: Overruled. I want
9 to hear it.

10 Q. What did Greene tell you?

11 A. He could not speak to the press.

12 Q. Was he at any time willing to verify any of
13 this alleged information?

14 A. Was he willing to verify it?

15 Q. Yes, go on record and substantiate what he
16 was telling you.

17 A. No. He said he was not part of the child
18 assault unit, and he could not comment on it.

19 Q. Did he indicate to you whether or not he
20 was one of the investigating officers?

21 A. I don't think he told me he was.

22 Q. Did you at any time disclose to the media
23 anything which Greene had said to you, given that
24 you could not verify any of it?

1 A. No, I did not.

2 Q. Subsequently, during what period of time
3 did you continue to deal day to day with Judge
4 Lopez?

5 A. Well, we spoke almost every day during that
6 period of time.

7 Q. And once again, at any time did the Judge
8 indicate to you that there was any mistake or error
9 in the statement that had been sent out as her
10 statement and under her instruction?

11 A. No.

12 MR. WARE: I have no further questions.
13 Thank you, Ms. Kenney.

14 HEARING OFFICER DAHER: Again, Ms. Kenney,
15 help me out. Did Judge Lopez ever talk to you about
16 the victim? Did you have any conversations about
17 the alleged victim?

18 THE WITNESS: She told me that she did not
19 think it had been a kidnapping, that he perhaps went
20 willingly into the car.

21 MR. EGBERT: I didn't hear the answer.

22 THE WITNESS: That he went willingly into
23 the car.

24 HEARING OFFICER DAHER: And how about the

1 victim itself? Did she tell you anything about the
2 victim, other than the fact that he may have
3 willingly gotten into the vehicle?

4 THE WITNESS: That's all I can remember
5 about that.

6 HEARING OFFICER DAHER: Okay. Go ahead.

7 Also, you talked to Judge Lopez, and Judge
8 Lopez told you to contact Detective Greene; is that
9 correct?

10 THE WITNESS: That's correct.

11 HEARING OFFICER DAHER: Did she intimate to
12 you what Detective Greene was going to say? Did she
13 tell you?

14 THE WITNESS: She didn't tell me
15 specifically, but I had the impression that it was
16 going to be --

17 MR. EGBERT: I object to her impression.

18 HEARING OFFICER DAHER: I understand. It's
19 on the record. Your objection noted. Go ahead.

20 THE WITNESS: That it was going to be
21 supportive of what she had told me already.

22 HEARING OFFICER DAHER: Namely, that he got
23 into the vehicle willingly?

24 THE WITNESS: I think so, yes.

1 HEARING OFFICER DAHER: Okay. Go ahead.

2 THE WITNESS: Can I just amend that? I
3 just want to make sure you understand what I was
4 saying.

5 HEARING OFFICER DAHER: To a degree. Go
6 ahead.

7 THE WITNESS: I just want to explain that
8 Detective Greene didn't say that he got into the car
9 willingly.

10 HEARING OFFICER DAHER: Did Judge Lopez
11 tell you -- it was the purpose, I take it, for Judge
12 Lopez wanting you to talk to Detective Greene.

13 THE WITNESS: Right.

14 HEARING OFFICER DAHER: Did she tell you
15 what Detective Greene could testify to or would tell
16 you or would bring to your attention?

17 THE WITNESS: She said he would have some
18 important information, but she didn't say exactly
19 what he was going to tell me.

20 HEARING OFFICER DAHER: Okay.

21 CROSS EXAMINATION

22 BY MR. EGBERT:

23 Q. Good afternoon, Ms. Kenney.

24 A. Good afternoon.

1 Q. Let's actually start where you just
2 stopped, so it's fresh in your mind.
3 What Judge Lopez told you, isn't it, that
4 this wasn't a kidnapping, quote, in the usual sense;
5 isn't that right?
6 A. She told me it wasn't a kidnapping.
7 Q. Didn't she use the words "in the usual
8 sense"?
9 A. I don't remember if those were her words.
10 Q. Pardon me?
11 A. I don't remember if those were her words.
12 Q. Well, were those your words at one time?
13 A. I think I said that.
14 Q. So, in fact, when you were first
15 interviewed on these events some -- and you were
16 interviewed in August of 2001 by the Commission's
17 counsel, were you not?
18 A. I was.
19 Q. And have you had an opportunity to review
20 that statement?
21 A. I have had an opportunity to review it.
22 Q. And when did you obtain a copy of that
23 statement?
24 A. Sometime ago.

1 Q. Do you recall how long ago?
2 A. Several months ago, maybe.
3 Q. Can you be more specific than that? Was it
4 before these proceedings started?
5 A. Before which proceedings?
6 Q. The proceedings here in court.
7 A. Oh, yes.
8 Q. And do you recall that in the first
9 instance you were given a copy of that statement to
10 look at sometime well before Judge Daher was
11 appointed to this proceeding?
12 A. Yes.
13 Q. In other words, you were provided with a
14 copy of a confidential Commission document prior to
15 anybody authorizing its release; isn't that true?
16 A. I don't know when it was authorized for
17 release, but I've looked at the testimony that I
18 gave.
19 Q. And that was provided to you by Commission
20 counsel, was it not?
21 A. Yes.
22 Q. And that was not -- you weren't given any
23 kind of protective order or nondisclosure order with
24 regard to that, were you?

1 A. Protective order? No.
2 Q. Or a nondisclosure order?
3 A. I don't think so.
4 Q. You would remember something like that,
5 wouldn't you?
6 A. I would think so.
7 Q. And so you're aware that Commission
8 proceedings are confidential?
9 A. Yes.
10 Q. And the document you were given was a copy
11 of your interview before Paul Ware and Cheryl
12 Rainville?
13 A. Yes.
14 Q. Conducted at their office, at Goodwin
15 Procter, on August 16th, 2001, correct?
16 A. That's correct.
17 Q. Now, in regard to that, since that time,
18 have you had occasion to be -- to have your
19 testimony prepared by lawyers at Goodwin Procter?
20 A. I'm sorry; I didn't hear you.
21 Q. Have you had occasion to have your
22 testimony prepared by lawyers at Goodwin Procter?
23 A. My testimony prepared? No.
24 Q. Have you talked with them about your

1 testimony?
2 A. Yes.
3 Q. Have you prepared for your testimony?
4 A. I don't know what you mean by "prepared."
5 Q. Have you met with them?
6 A. I've met with them.
7 Q. And talked with them about what you're
8 going to testify to?
9 A. Generally, yes.
10 Q. The kinds of questions you would be asked?
11 A. Yes.
12 Q. The kinds of answers you would give?
13 A. They told me to tell the truth.
14 Q. And the kinds of answers you would give?
15 You went over that, right?
16 A. We went over some questions and answers.
17 Q. Right. And during that, did you go over
18 some of your prior testimony?
19 A. I looked at my testimony.
20 Q. Now, would you agree with me that, first of
21 all, in the first instance, the information which
22 you were getting from Judge Lopez was not being
23 given to you in any coherent, organized fashion?
24 A. Yes.

1 Q. It was being provided to you in a -- on the
2 run basically?

3 A. Each time I talked to her, you know, I
4 learned something new.

5 Q. And this was during a time period -- at
6 least for purposes of what went into the press
7 release, this was during a time period of basically
8 24 hours; is that correct?

9 A. The hearing was on the 6th, and I prepared
10 the statement -- the statement was prepared on the
11 7th.

12 Q. And released on the 7th, correct?

13 A. Yes.

14 Q. So we're talking about somewhere in about a
15 24-hour period, correct?

16 A. Yes.

17 Q. Plus or minus an hour?

18 A. Sure, yeah.

19 Q. And approximately how many phone calls went
20 on during that particular period between you and
21 Judge Lopez?

22 A. Well, I'm not sure, but I know I talked
23 with her on the 6th a few times and on the 7th
24 several times.

1 Q. And during that time, were you trying to
2 get some of the facts of the case?

3 A. I wasn't asking her specifically. I was
4 letting her tell me what she wanted me to know.

5 Q. Were you seeking to get an understanding of
6 what the case was about, for example?

7 A. Yes.

8 Q. And she told you, didn't she, that there
9 were disputed facts in regard to the various
10 parties' positions?

11 A. Yes. I didn't understand enough about the
12 case to understand what was disputed or not disputed
13 at the time.

14 Q. What she was giving you was facts that
15 were, at least you perceived to be, relevant to your
16 inquiry. You didn't know whether some of them were
17 disputed or not disputed, correct?

18 A. That's correct; I did not know.

19 Q. Pardon me?

20 A. I did not know.

21 Q. And during the course of that, Judge Lopez
22 told you, didn't she, that -- she explained that she
23 did not feel that he, the victim, had been kidnapped
24 in the traditional sense; that he went willingly

1 with the defendant? Isn't that what she told you?
2 A. I think those were my words.
3 Q. Well --
4 A. But I'd like to see that testimony.
5 Q. I'm sorry?
6 A. I'd like to see that testimony.
7 Q. Did counsel give you a copy of your
8 statement to have up there?
9 A. I don't know.
10 MR. EGBERT: May I approach the witness?
11 HEARING OFFICER DAHER: Of course.
12 Q. What I'm showing you, first of all, is
13 something entitled, "Interview of Joan Kenney,"
14 correct?
15 A. Yes.
16 Q. And that's, in fact, the interview which
17 was provided to you by Mr. Ware sometime ago?
18 A. That's right.
19 Q. And would you turn, please, to Page 20. Do
20 you have that?
21 A. I do.
22 Q. In it you were asked the following question
23 and give the following answer: "Question: Did
24 she" -- and I take it that's Judge Lopez, the "she"

1 being referred to; is that right?
2 A. I'm trying to find where you are. Okay,
3 yeah.
4 Q. Go to Line 19.
5 A. Okay.
6 Q. Have you read that?
7 A. Yes.
8 Q. And the question is, "Did she" -- and
9 that's Judge Lopez you're referring to, correct?
10 A. Right.
11 Q. "Did she say anything else regarding the
12 victim or the victim's character that you recall in
13 the course of these many conversations?" And you
14 respond, "I think she had doubts as to whether the
15 victim was actually kidnapped or not," correct?
16 A. That's right.
17 Q. "I mean, she explained" -- and "she" is
18 Judge Lopez, right?
19 A. That's right.
20 Q. -- "explained that she did not feel he had
21 been kidnapped in the traditional sense; that he
22 went willingly with the defendant," correct?
23 A. Yes.
24 Q. Isn't that what she told you?

1 A. Yes, that it was not a real kidnapping.

2 Q. Because he went willingly with the
3 defendant? That was a fact she gave you, right?

4 A. Yes.

5 Q. That's what you understood, right?

6 A. That's what I understood.

7 Q. And you also understood, didn't you, that
8 the Commonwealth was telling Judge Lopez at the time
9 that in fact the victim willingly got into the
10 defendant's car. Did you understand that?

11 A. No, I don't -- I didn't.

12 Q. Would you turn to Exhibit -- do you see
13 that exhibit book you have in front of you, that big
14 book?

15 A. Yes.

16 Q. Would you turn to Exhibit 22 --

17 MR. WARE: Your Honor, I object to this.

18 HEARING OFFICER DAHER: What's your
19 objection?

20 MR. WARE: She's now going to be cross
21 examined by the transcript of the hearing at which
22 she was not present and of which she had no
23 knowledge.

24 HEARING OFFICER DAHER: Overruled. Go

1 ahead, Mr. Egbert.

2 Q. Do you have Exhibit 22 in front of you?

3 A. Yes.

4 Q. Turn, if you would, to Page 13 of that
5 exhibit and go down to about Line 4. Do you see
6 that there?

7 A. Line 4? Yes.

8 Q. I just want to back you up, if I can, so
9 you can acclimate yourself. Go to Page 12. It's
10 the page right behind it. And you see on Line 11
11 Mr. Deakin starts talking?

12 A. Yes.

13 Q. And you recognize Mr. Deakin as the
14 prosecutor, correct?

15 A. Yes.

16 Q. Now let's go back to Line 13 -- sorry --
17 Page 13, Line 4. And do you see the statement by
18 Mr. Deakin, "The defendant asked the victim to get
19 into the car, and the boy agreed"?

20 A. Yes, I see that.

21 Q. Do you see that?

22 A. Yes.

23 Q. Is that about what Judge Lopez was telling
24 you?

1 MR. WARE: Objection.
2 HEARING OFFICER DAHER: Sustained.
3 Q. Did Judge Lopez tell you that the boy
4 willingly got in the car?
5 MR. WARE: Objection.
6 HEARING OFFICER DAHER: No. He can have
7 that one.
8 A. Yes. I understood it that the Judge was
9 telling me --
10 HEARING OFFICER DAHER: That's what she
11 told you; is that correct?
12 THE WITNESS: That's correct.
13 HEARING OFFICER DAHER: Right. You went
14 over that three times. Go ahead.
15 Q. Let's go back to the August 2000 findings
16 which you say that you sent to the press, correct?
17 A. Yes.
18 Q. Did you send a press release that day?
19 A. No. I considered that to be the press
20 release.
21 Q. Those were findings made in court and filed
22 in court, correct?
23 A. Findings made in court, yes.
24 Q. And filed in court, correct?

1 A. And filed, yes.
2 Q. They were public documents.
3 A. Once they are docketed, yes.
4 Q. And you understood that that's what this
5 was: publicly-docketed findings of the Court,
6 correct?
7 A. Yes.
8 Q. And nothing was attached to it, except for
9 the -- strike that.
10 You attached nothing to it when you sent it
11 out, other than this is the findings of the Court.
12 A. Just a fax cover sheet that would have gone
13 out to each of the media outlets.
14 Q. And did the fax cover sheet say anything on
15 it?
16 A. No.
17 Q. So it was simply publishing, so to speak,
18 the findings of the Court which were already
19 docketed in the court file, correct?
20 A. Yes.
21 Q. And you knew, from your discussions with
22 Judge Lopez that day, that there had been
23 extraordinary or large press interest on August 4th,
24 2000, concerning this case.

1 A. She said there had been cameras present.

2 Q. And you would consider that press interest,
3 wouldn't you?

4 A. There was press interest, definitely.

5 Q. And also that Judge Lopez, in conversation
6 with you on August 4th of 2000, indicated to you
7 that she had been concerned with the conduct of the
8 press and the manner in which it affected the day's
9 proceedings; isn't that correct? I'm talking about
10 August 4th now.

11 A. I'm sorry; could you just repeat that
12 again?

13 Q. Certainly. And I'll take it in steps. I
14 think you said that Judge Lopez called you and told
15 you that there had been an incident with the press
16 on August 4th of 2000, correct?

17 A. That's correct.

18 Q. And she told you that that incident had, to
19 some extent, disrupted court proceedings, correct?

20 A. She said that there were cameras present
21 near the elevator where Charles Horton was getting
22 on or off.

23 Q. And didn't she indicate to you that that
24 had a disruptive effect on the proceedings?

1 A. I don't know whether it disrupted her
2 proceedings or whether this occurred before or
3 afterwards, but...

4 Q. Did you recognize the purpose -- strike
5 that.

6 What did she tell you the purpose of her
7 call was to you?

8 A. Well, she was concerned. I mean, it was a
9 media relations issue, so that's why she called my
10 office.

11 Q. What did she tell you that she was
12 concerned about?

13 A. That Charles Horton was being photographed.
14 He was a transgendered person, and this was a
15 concern to her.

16 Q. And did she tell you that she had to
17 continue the case that day?

18 A. Yes, she did tell me that.

19 Q. And that it was as a result of what had
20 gone on with the press and Mr. Horton.

21 A. Yes.

22 Q. And that that -- so when I asked you before
23 whether or not it had affected or disrupted the
24 court proceedings, in fact you did know that, didn't

1 you?

2 A. Well, I knew she continued it, yes. I
3 didn't know if that was the only reason.

4 Q. But certainly you got from your
5 conversation with her the understanding that the
6 case was being continued -- at least in some part,
7 it had to do with the interplay of the press and the
8 defendant, correct?

9 A. I just knew it was being continued.

10 Q. Did you draw some conclusion that the
11 continuance was somehow in relation to the press?

12 A. Yes, it could have been. I wasn't certain,
13 but...

14 Q. Let me try to phrase it another way.
15 Is it fair to say that the following
16 statements and words were used in the same train of
17 thought, that the press had confronted Mr. Horton,
18 that he was transgendered, it happened out in the
19 hallway, and the case was being continued?

20 MR. WARE: Objection to "trains of
21 thought." I don't even understand the question.

22 Q. Do you understand the question?

23 HEARING OFFICER DAHER: I take it the
24 question is that predicated on the three elements

1 that you just introduced, that was the reason for
2 Judge Lopez seeking a continuance; is that correct?

3 MR. EGBERT: It wasn't quite that, but for,
4 Your Honor. Let me see if I can rephrase it.

5 Q. Because you're having some difficulty
6 remembering the exact conversations two years ago;
7 is that fair to say?

8 A. I can't remember exact conversations.

9 Q. But you do remember in the conversation
10 that -- strike that.

11 Judge Lopez didn't have a habit of calling
12 you, did she, before August of 2000?

13 A. She had called me on other occasions
14 involving press issues.

15 Q. Regularly?

16 A. When she had press issues, yes.

17 Q. And you considered this -- strike that.

18 You considered this, when she called you, a
19 press issue, correct?

20 A. Yes, because she said she was concerned
21 about the cameras being there.

22 Q. And her expression of concern to you was
23 that there had been something that happened in the
24 hallway, correct?

1 A. That's right.
2 Q. That the case was being continued.
3 A. That's right.
4 Q. And that the hallway issue involved the
5 press and Mr. Horton.
6 A. Yes.
7 Q. And that those were all interrelated.
8 A. Well, I didn't know if that was the reason
9 the case was being continued. There could have been
10 things that happened in that proceeding that made
11 her want to continue the case.
12 Q. Well, you read the findings when she sent
13 them to you, didn't you?
14 A. Yes, when she sent them to me.
15 Q. And when you read the findings, you knew
16 exactly what she was saying the case was continued
17 for, didn't you?
18 A. Yes.
19 Q. Right?
20 A. Yes.
21 Q. That was clear, wasn't it?
22 A. I'd have to review them again. I haven't
23 looked at them --
24 Q. Would you like to take a look at them?

1 A. Sure.
2 Q. I think it's Exhibit 17, but let me make
3 sure. Yes, turn to Exhibit 17.
4 A. (Witness reviews document.)
5 Q. Have you looked at them?
6 A. Yes, uh-hum.
7 Q. Are those the findings that were in fact
8 faxed to you?
9 A. Yes, they are.
10 Q. And you had read them at the time?
11 A. Yes.
12 Q. And in fact, these findings talk about some
13 of the things Judge Lopez talked with you about; is
14 that right?
15 A. I don't remember if we talked about them.
16 Q. "Some of the things," I said.
17 A. In August?
18 Q. Right.
19 A. Yes. I don't remember if we did discuss
20 those things.
21 Q. I said the findings address some of the
22 things that you and Judge Lopez talked about on
23 August 4th of 2000, right?
24 A. Yes, regarding the camera and the

1 defendant.

2 Q. They addressed the cameras, the elevator,
3 the, for lack of a better word, event concerning Mr.
4 Horton and the press, correct?

5 A. The cameras and the defendant, yes.

6 Q. And the need for a continuance?

7 A. Yes.

8 Q. Now, Judge Lopez talked to you about the
9 press on a number of occasions, and one in
10 particular involving a request by Eileen McNamara to
11 talk to her; isn't that right?

12 A. Yes.

13 Q. And Eileen McNamara -- who is a reporter
14 for the Globe, correct?

15 A. Yes, she is.

16 Q. And Ms. McNamara, am I correct, had
17 contacted you as press officer -- I may be using the
18 wrong term. Is that a fair term? Press officer?

19 A. Yes, that's fine.

20 Q. -- contacted you to see if you could
21 arrange an interview between Ms. McNamara and Judge
22 Lopez, correct?

23 A. Not about this case. A different case.

24 Q. I know it's not about this case. It's

1 about another case?

2 A. Yes.

3 Q. About Calixte and Estrada, right? Do you
4 remember those names?

5 A. Yes. I don't remember the particulars, but
6 I do remember Eileen McNamara requesting an
7 interview.

8 Q. And you at that time called Judge Lopez and
9 told her about the McNamara request for an
10 interview; isn't that right?

11 A. Yes.

12 Q. And in fact, you encouraged her to give
13 that interview, didn't you?

14 A. I believe so.

15 Q. You encouraged her to give the interview on
16 Calixte and Estrada some days or, at most, weeks
17 after the Calixte and Estrada sentencing, correct?

18 A. I can't remember what the specifics were of
19 that case or what the...

20 Q. Okay. Would you take a look at your
21 exhibit book and go to Exhibit 33, please. And for
22 your ease, there should be both a copy of the real
23 article and an Internet-typed copy, which may be
24 easier to read.

1 A. I see the article.
2 Q. Well, maybe not. I thought there was. Can
3 you follow that pretty well in the format that it's
4 in?
5 A. Yes.
6 Q. Take a look at it and familiarize yourself
7 with it for a moment.
8 A. (Witness reviews document.)
9 Q. I may have given you the wrong exhibit
10 number. Hold on.
11 MR. EGBERT: May I approach the Bench?
12 HEARING OFFICER DAHER: Please.
13 Q. I did give you the wrong number. Exhibit
14 43. I apologize. Is that article entitled
15 "Two-Tier Justice Hurts Children"?
16 A. Yes, it is.
17 Q. Why don't you take a look at that.
18 A. (Witness reviews document.)
19 Q. Have you read it?
20 A. Quickly, yes.
21 Q. Does that refresh your memory as to the --
22 strike that.
23 That is the interview that you encouraged
24 Judge Lopez to give to Eileen McNamara, isn't it?

1 A. I think so. It's been a while. I don't
2 recall exactly, but I do remember Eileen calling.

3 Q. Do you recall it being more than one
4 occasion where you encouraged this interview between
5 Judge Lopez and Ms. McNamara?

6 A. I don't recall another one, no.

7 Q. And when Ms. McNamara called you and
8 asked -- told you she wanted to interview Judge
9 Lopez, did she tell you what the subject matter of
10 the interview would be?

11 A. I really can't recall the specifics of what
12 she asked.

13 Q. Would it be fair to say you wouldn't have
14 done it in the blind? You would have asked her what
15 it was about?

16 A. I would have asked her what it was about.

17 Q. And it's fair, having read this article, at
18 least briefly, that what she was talking to her
19 about was her sentencing in the Calixte and Estrada
20 case, correct?

21 A. Yes.

22 MR. WARE: Objection. She said she doesn't
23 remember.

24 HEARING OFFICER DAHER: I'm going to

1 overrule it. Go ahead. If you remember, you can
2 respond.

3 A. This was in February of '99. I don't
4 remember the specifics.

5 HEARING OFFICER DAHER: Next question.
6 Let's go.

7 Q. But you do recall there was only one
8 occasion that you encouraged Judge Lopez to speak
9 with Ms. McNamara, correct?

10 A. I think so.

11 Q. Now, on that occasion where Judge Lopez
12 spoke to Miss McNamara regarding the Calixte and
13 Estrada cases, both Ms. Calixte and Mr. Estrada were
14 on probation at the time, weren't they?

15 A. I'm not sure.

16 Q. And did you check to determine that?

17 A. I don't remember the specifics. It was in
18 '99.

19 Q. Well, but you encouraged Judge Lopez to
20 speak on that occasion, correct?

21 A. I did, but we had discussed it.

22 Q. And you encouraged her to speak.

23 A. I perhaps did, but we had discussed it.

24 And if you are on probation and she couldn't, she

1 would have told me that.
2 Q. And you're not an attorney, right?
3 A. No.
4 Q. And on what basis are you making the
5 judgment that when probation is handed down, it's a
6 pending case?
7 A. Well, that's my view that it's a pending
8 case.
9 Q. That's your view?
10 A. Yes.
11 Q. And you're not a lawyer.
12 A. I'm not a lawyer.
13 Q. And you're not a judge.
14 A. I'm not a judge.
15 Q. And have you canvassed the Court to
16 determine whether there's a contrary view to yours?
17 A. I'm sorry, could you repeat that?
18 Q. Have you canvassed the Court to determine
19 whether or not there's a contrary view to yourself?
20 A. A contrary view to what a pending case is?
21 Q. Right.
22 A. No, I haven't canvassed anyone.
23 Q. Pardon me?
24 A. I haven't asked -- canvassed anyone.

1 Q. By the way, are you part of the Court?

2 A. I don't know what you mean.

3 Q. Well, are you considered part of the Court?
4 Are you an officer of the Court?

5 A. Public Information Officer.

6 Q. And do you limit your comments to cases
7 where someone is not on probation?

8 A. I don't know what you mean, my comments.

9 Q. Have you commented on cases or given out
10 information on cases where a person is on probation?

11 MR. WARE: Objection.

12 HEARING OFFICER DAHER: Again, Mr. Egbert,
13 help me out. The nature of this interrogation would
14 indicate that Judge Lopez was seeking authorization
15 from Ms. Kenney. She's not a lawyer, she's not a
16 judge, but Judge Lopez is a judge and she knows
17 whether she should talk to the media or not. I
18 don't know where we're going with this line of
19 questioning.

20 MR. EGBERT: Let me tell you where we're
21 going. Mr. Ware asked this witness for her opinion
22 of whether or not something was a pending case. He
23 did it to someone who's not a lawyer, who's not a
24 judge, and it was over my objection.

1 MR. WARE: That's not correct.

2 MR. EGBERT: Let me finish. You've taken
3 that evidence. I have the right to seek to
4 determine her ability and understanding and level of
5 education and level of teaching on the issue of what
6 is or is not a pending case.

7 HEARING OFFICER DAHER: Mr. Ware, do you
8 want to respond?

9 MR. WARE: Yes, Your Honor. I did not ask
10 the witness' opinion, legal or otherwise, on what a
11 pending case is. The first sentence of the
12 statement refers to the fact that the Judge can't
13 make a comment because of a pending or impending
14 cases.

15 HEARING OFFICER DAHER: I'm going to
16 sustain that objection. Go ahead.

17 BY MR. EGBERT:

18 Q. When Judge Lopez was talking to you about
19 the number of things that weren't in the media that
20 she was concerned about with regard to the Horton
21 case, many of those were about the defendant
22 himself; isn't that right?

23 A. I'm not sure I know what you mean, "about
24 the defendant."

1 Q. Well, was Judge Lopez concerned about how
2 the defendant was being portrayed in the media?

3 MR. WARE: Objection to what Judge Lopez
4 was concerned about.

5 Q. By way of her statements to you?

6 HEARING OFFICER DAHER: Overruled.

7 A. She expressed a concern about the
8 defendant.

9 Q. About what?

10 A. About the defendant.

11 Q. About what about the defendant?

12 A. He was a transgendered person dressed as a
13 woman.

14 Q. And is that it?

15 A. Yes.

16 Q. Well, did she indicate to you that there
17 were matters relating to the defendant's background,
18 for example, that were not being portrayed in the
19 media?

20 A. I don't recall that.

21 Q. Do you recall whether or not there was a
22 discussion of whether or not the defendant was a
23 pedophile?

24 A. I don't recall that.

1 Q. And when you say you don't recall, does
2 that mean it didn't happen or you just don't have a
3 memory?

4 A. I don't have any memory of discussing that
5 with her.

6 Q. One way or the other.

7 A. One way or the other.

8 Q. And did you discuss with Judge Lopez the
9 fact that she believed that the press interest in
10 this case was prurient?

11 A. I think she thought there was press
12 interest because he was a transgendered defendant.

13 Q. And with regard to her statements to you at
14 that time -- give me a second.

15 HEARING OFFICER DAHER: Take your time.

16 (Pause.)

17 Q. Do you recall any discussion with Judge
18 Lopez at the time of the kind of factors she had in
19 mind when she made the remark "low scale" or "low
20 level"?

21 A. I don't know what factors -- she did not
22 think it was a kidnapping. So that would mean
23 probably a lower scale.

24 Q. And when you say "didn't think it was a

1 kidnapping," it was because the victim, quote, went
2 willingly, correct?

3 A. Yes.

4 Q. And did she talk to you about the other
5 factors that she considered in her sentence?

6 A. Well, the screwdriver. She did say that
7 she did not think that was used as a weapon.

8 Q. And any other factors?

9 A. There may have been. Those are the two
10 that I recall.

11 Q. Well, for example, did she talk to you
12 about the factors in various sentencing guidelines
13 concerning characteristics of the defendant?

14 A. We didn't discuss the sentencing guidelines
15 in any detail.

16 Q. Did you discuss -- by the way, are you
17 familiar with those Ronan guidelines?

18 A. Ronan?

19 Q. The Superior Court sentencing guidelines.

20 A. No, I'm not familiar with.

21 Q. And when she said to you "low scale," she
22 said to you that she was talking about an
23 appropriate level of sentencing guidelines, right?

24 A. That's what she was referring to, yes.

1 Q. "Appropriate level" was your words,
2 correct?
3 A. She said she was referring to the
4 sentencing guidelines, yes.
5 Q. Doesn't the press statement say
6 "appropriate level"?
7 A. I'd have to look at it. I'd have to look
8 at it. I don't remember.
9 Q. Well, turn to Exhibit 4 -- I'm sorry.
10 There's two different ones. Let me give you this
11 one.
12 Do you have the final in front of you?
13 A. Okay. I think it's the same. Yes, it
14 looks the same.
15 Q. "Appropriate level"?
16 A. "My statement in open court that it was a
17 low-scale matter pertains solely to the appropriate
18 level of the sentencing guidelines."
19 Q. "The appropriate level," correct?
20 A. Yes.
21 Q. Now, by the way, the press release starts
22 out by saying that the canons prohibit judges from
23 commenting on pending and impending cases, correct?
24 A. Yes.

1 Q. Now, of course, the canons don't prohibit
2 the judge from commenting on pending and impending
3 cases in a sentencing memorandum or while in court;
4 is that correct?

5 A. A sentencing memorandum is different.

6 Q. A sentencing memorandum is different or
7 being in court and actually making findings in court
8 is different, right?

9 A. Right. Those are remarks made on the
10 record.

11 Q. What you understood this to mean was that
12 judicial canons prohibit judges from commenting on
13 pending and impending cases in a press release.

14 A. Or outside of court. It doesn't have to be
15 just in a press release.

16 Q. So "outside of court" would be the more
17 complete statement, correct?

18 A. Not part of the court record.

19 Q. Correct?

20 A. Yes.

21 Q. So this really isn't a complete statement
22 of the laws in that regard, is it?

23 A. It's not a complete statement --

24 Q. Of the canons in that regard, is it?

1 A. Well, there's more to the canon than just
2 that sentence.

3 Q. Right. In other words, to be complete, it
4 should say, "The judicial canons prohibit judges
5 from commenting on pending and impending cases
6 except in some circumstances"?

7 A. It does allow a judge to explain public
8 information procedures and things of that nature.
9 There's a subsection of the provision that does
10 allow a judge to make certain comments to explain
11 procedures of the Court.

12 Q. And so this is not a complete statement of
13 the canon.

14 A. No. It wasn't meant to be a complete
15 statement.

16 Q. It was meant to be a shorthand version for
17 a press release, correct?

18 A. To explain to the press why the Judge
19 couldn't comment.

20 Q. But then the Judge went on and commented
21 and gave a press release.

22 A. But the rest of the press release had
23 nothing to do with the merits of the case. The rest
24 of it was explaining public information procedures.

1 Q. It had nothing -- it had to do with what
2 she was thinking, correct?

3 A. It had to do with the procedures. The
4 sentencing guidelines being one procedure --

5 Q. Ma'am, did it have to do with what she was
6 thinking at the time of the sentencing?

7 A. I don't think it had to do with what she
8 was thinking.

9 Q. When she equated "low scale" to sentencing
10 guidelines --

11 A. That was explaining her comment in court.

12 Q. And when she further went on to say that
13 the defendant was given a fair sentence, that's not
14 a comment on the proceedings -- in those
15 proceedings.

16 A. It's not about the merits of the case.

17 Q. It's about the merits of the sentence,
18 right?

19 A. I didn't consider this a comment on a case,
20 and neither did the Judge, or she wouldn't have
21 allowed me to put it out there.

22 Q. It's about the merits of the sentence,
23 correct?

24 A. I wouldn't call it that.

1 Q. What would you call it?

2 A. Explaining procedures for public
3 information, not commenting on the merit of the
4 case. And I would rely on the Judge to tell me if
5 that were not the case.

6 Q. Including relying on the Judge to determine
7 whether or not this was a pending or impending case.

8 A. Right. If she didn't approve of this, I
9 would have relied on her to tell me that.

10 Q. Now, when Judge Lopez told you or asked you
11 to call Jay Greene, you also asked her, didn't you,
12 if she had any lawyers that she could give you to go
13 and speak out on her behalf?

14 A. She gave me the names of lawyers and judges
15 that I could call.

16 Q. Don't you do that regularly in your job?
17 When a judge may be under some fire by the press,
18 you seek to have that judge give you the names of
19 surrogates that can speak on her behalf or his
20 behalf.

21 A. Yes. And we look for supporting people.

22 Q. But you do that regularly, don't you?

23 A. Sometimes I call the bar associations.

24 Q. When you say "we," you mean you, don't you?

1 A. Myself and the judge who it's about, yes.

2 Q. But as the press officer, you encourage
3 judges to give you the names of surrogates to speak
4 on their behalf in circumstances such as this,
5 correct?

6 A. Sometimes. I mean, it's something we
7 discuss together. Are there people who could say
8 supportive comments. We often use the bar
9 associations, for example.

10 Q. Supportive comments about the judge or
11 about the procedure or about the sentence, for
12 example?

13 A. Someone who could explain the procedure,
14 someone who could say something supportive of the
15 judge, yes.

16 Q. And that's something you regularly do or at
17 least have done in the past with judges, correct?

18 A. I have, yes.

19 Q. And then you have gone and called on behalf
20 of the Court those particular people and asked them
21 to give a statement in support of the Judge to the
22 press, correct?

23 A. It's not on behalf of the Court. I'm
24 calling on behalf of that judge to make a statement,

1 if they choose to do so.
2 Q. And you have oftentimes asked them to do
3 so, correct?
4 A. I have.
5 Q. And given them that opportunity?
6 A. Yes.
7 Q. And you don't see anything wrong with that,
8 do you?
9 A. No.
10 Q. And you're calling on behalf of the judge.
11 A. Excuse me?
12 Q. And you're calling on behalf of the judge.
13 A. And I'm called on --
14 Q. And you're calling on those occasions on
15 behalf of the judge, correct?
16 A. Yes, to help the judge, yes.
17 Q. And you tell the people that you're calling
18 you're calling on behalf of a particular judge to
19 help that particular judge, correct?
20 A. To help that judge, yes.
21 MR. EGBERT: May I have one minute, Judge?
22 HEARING OFFICER DAHER: You may.
23 (Pause.)
24 MR. EGBERT: Nothing further, Your Honor.

1 HEARING OFFICER DAHER: Thank you.
2 REDIRECT EXAMINATION

3 BY MR. WARE:

4 Q. Ms. Kenney, your best recollection is that
5 Judge Lopez told you on or before September 7th that
6 this was not a kidnapping; is that correct?

7 A. That's correct.

8 Q. And Judge Lopez told you on or before
9 September 7th that the screwdriver was not used as a
10 weapon; isn't that correct?

11 A. That's correct.

12 Q. Now, when you call lawyers for statements,
13 you don't call those lawyers and ask them to comment
14 on the merits of a case, do you?

15 A. No, no, not about that.

16 MR. WARE: I have nothing further.

17 RECROSS EXAMINATION

18 BY MR. EGBERT:

19 Q. She didn't use half a sentence; she didn't
20 say this wasn't a kidnap, correct?

21 A. Excuse me?

22 Q. Judge Lopez didn't use half a sentence; she
23 didn't say this wasn't a kidnap. You've testified
24 continuously what she told you is, "It wasn't the

1 traditional kidnap. The boy got into the car
2 willingly," correct?
3 A. Yes.
4 Q. That's what she said, correct?
5 A. Yes. The implication was he wasn't
6 snatched off the street and kidnapped. He got into
7 the car willingly.
8 Q. He got in willingly. He was not snatched
9 off the street by the arm or something, correct?
10 A. That's correct.
11 Q. Or by gun point, whatever the case may be.
12 A. That's correct.
13 Q. As to other facts in the case, what she
14 told you at times were facts which were disputed and
15 facts which had been given to her in various
16 contexts throughout the proceeding; is that correct?
17 A. I'm sorry, state that again.
18 Q. She provided to you a number of facts which
19 were disputed?
20 A. I don't know. I don't know whether they
21 were disputed facts.
22 Q. You don't know which facts, for example --
23 strike that.
24 When you were talking to her in this,

1 quote, as you've described it, incoherent,
2 disorganized fashion over a period of days, getting
3 bits and pieces of information, the bits and pieces
4 of information you were getting was information that
5 had been provided to Judge Lopez; is that correct?

6 A. Yes. What I meant was she didn't tell me
7 from beginning to end what happened in this case.

8 Q. She would give you bits and pieces of
9 information which had been provided to her during
10 the course of the proceedings, correct?

11 A. I believe that's where she would have
12 gotten that information, correct.

13 Q. From one side or the other.

14 A. Yes.

15 MR. EGBERT: No further questions.

16 HEARING OFFICER DAHER: Mr. Ware, anything
17 else?

18 MR. WARE: May I have just a moment, Your
19 Honor?

20 HEARING OFFICER DAHER: Take your time.

21 (Pause)

22 FURTHER REDIRECT EXAMINATION

23 BY MR. WARE:

24 Q. Could you turn to Exhibit 22, please, which

1 is the transcript of the change of plea.

2 Now, obviously Judge Lopez did not make
3 this available to you on September 6th or 7th,
4 because it didn't exist, right?

5 A. Right.

6 Q. Did the Judge tell you that she had
7 accepted pleas of guilty to kidnapping, assault with
8 intent to rape, assault on a child under 14, assault
9 and battery with a dangerous weapon?

10 MR. EGBERT: I just don't think this has
11 anything to do with the cross.

12 HEARING OFFICER DAHER: I understand, but
13 I'm going to allow it. Go ahead.

14 A. I had asked her what charges the defendant
15 had agreed to, and she did tell me.

16 Q. Did she indicate in any way that the
17 defendant had taken issue with the fact of there
18 being a kidnapping or using the screwdriver as a
19 weapon? In other words -- let me rephrase it.

20 Did she tell you that during the course of
21 the guilty plea the defendant admitted the
22 kidnapping and admitted using the screwdriver as a
23 weapon?

24 A. Yes, I did know that.

1 Q. Did you know that from the course of your
2 discussion with the Judge or did you know it from
3 the fact of there being a guilty plea?

4 A. Well, when I asked the Judge what the
5 defendant had agreed to, she told me those charges,
6 and those were the things that he had agreed to. So
7 I knew it from that.

8 MR. WARE: I have nothing further.

9 MR. EGBERT: Nothing further.

10 HEARING OFFICER DAHER: Thank you very
11 much, Ms. Kenney.

12 Mr. Ware, do you want to recess until
13 tomorrow morning?

14 MR. WARE: I would like to recess until
15 tomorrow morning. I have only one more witness who
16 will be about ten minutes on direct. And I can't
17 get that witness here this afternoon because of
18 weather conditions. So with the Court's permission,
19 I would like to call that one witness in the
20 morning, and that will be the last witness for the
21 Commission.

22 HEARING OFFICER DAHER: Okay.

23 MR. EGBERT: Maybe we can have a
24 conference.

1 (At side bar.)
2 MR. EGBERT: I had anticipated there were
3 three other witnesses. I don't know that I'm going
4 to have witnesses available for tomorrow.
5 MR. WARE: Who are the three witnesses?
6 MR. EGBERT: I thought you were going to
7 call Beaucage and Goldbach and the Herald guy.
8 That's what you told me.
9 MR. WARE: I'm not.
10 MR. EGBERT: So you're calling just who?
11 MR. WARE: Beaucage.
12 MR. EGBERT: I've told all my witnesses to
13 probably be ready for Wednesday. I obviously don't
14 want to put you through a ten-minute proceeding
15 tomorrow.
16 HEARING OFFICER DAHER: You're not going to
17 call Wedge?
18 MR. WARE: No.
19 MR. EGBERT: Are we going Thursday?
20 HEARING OFFICER DAHER: I can't. Mr.
21 Egbert has a good point. He isn't going to be ready
22 for tomorrow, because he anticipated your case was
23 going to take much longer. So to just have you for
24 ten minutes, it's really --

1 MR. WARE: Your Honor, I would like to
2 finish our witnesses and then understand who's next
3 going to be called. If Wedge is available, I'll put
4 him on. I think there's an issue of his
5 availability.

6 MR. EGBERT: You don't have to put him
7 on --

8 MR. WARE: I don't want to waste another
9 day. I want to finish the case, and surely counsel
10 can put on some witness. Do we only have judges?
11 Who are the witnesses at this point?

12 MR. EGBERT: Please. I've tried to be as
13 decent as I can, but you won't talk to me like that.
14 I'm tired from in back of me being cross-examined by
15 him.

16 MR. WARE: I would like to know who the
17 witnesses are.

18 HEARING OFFICER DAHER: How many witnesses
19 do you intend to call?

20 MR. EGBERT: At this point I would say
21 probably 14 or 15. Most of them are very quick, as
22 you know. The lengthiest of them I expect will be
23 Judge DelVecchio, who has more factual knowledge of
24 these events.

1 HEARING OFFICER DAHER: And how about
2 Attorney Goldbach?
3 MR. EGBERT: I intend to call her. I have
4 to get a hold of her now, because I thought they
5 were going to call her. And then I'd say --
6 HEARING OFFICER DAHER: Can you have
7 anybody here tomorrow?
8 MR. EGBERT: I don't know the answer to
9 that question. I just don't want to put everybody
10 in a pickle. That's all.
11 HEARING OFFICER DAHER: I understand. I
12 appreciate that. How do you want to handle it? We
13 can start tomorrow; and if he can't get his
14 witnesses --
15 HEARING OFFICER DAHER: That's fine. If we
16 can't, we can't.
17 MR. EGBERT: I just wanted to forewarn you,
18 because I don't want everybody to run around for
19 nothing.
20 HEARING OFFICER DAHER: I appreciate that.
21 MR. EGBERT: So I'll call around today.
22 MR. BRACERAS: Your Honor, could we know
23 who those 14 witnesses are?
24 HEARING OFFICER DAHER: He gave you a list.

1 MR. WARE: We have 33 witnesses on the
2 list.

3 MR. EGBERT: Judge, so it's crystal clear,
4 this morning I told him I'm happy to give him my
5 witnesses in order as I get them. I didn't know
6 they were going to end today. So that's going to
7 change things. I have to call around and see who I
8 can get for tomorrow. I told most of my witnesses
9 to be available starting Wednesday, figuring that
10 was a pretty fair --

11 HEARING OFFICER DAHER: Let's start
12 tomorrow; and if you can get people here, we'll pick
13 up from there.

14 MR. WARE: I anticipate we'll file a motion
15 to exclude some of these witnesses if all they're
16 going to do is be character witnesses. There are no
17 experts by definition. We've already crossed that
18 bridge.

19 HEARING OFFICER DAHER: You can file a
20 motion and I'll make a ruling on it. So we'll see
21 you tomorrow morning.

22 (End of side bar)

23 HEARING OFFICER DAHER: Is anyone going to
24 call Detective Greene?

0218

1 MR. EGBERT: Not that I know of.
2 MR. WARE: No, Your Honor.
3 (Whereupon, the hearing was
4 adjourned at 3:12 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 X, is a true and
accurate transcription of my stenographic notes
taken on Monday, December 16, 2002.

Jane M. Williamson
Registered Merit Reporter

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