

BEFORE THE COMMISSION ON JUDICIAL CONDUCT

**IN THE MATTER OF THE HONORABLE MARIA I. LOPEZ,
ASSOCIATE JUSTICE, SUPERIOR COURT DEPARTMENT**

RESPONSE TO CHARGES

The Honorable Maria I. Lopez, Associate Justice of the Superior Court Department, hereby responds to the charges issued by the Commission on Judicial Conduct ("Commission").

Judge Lopez denies that she engaged in the pattern of conduct alleged by the Commission to be prejudicial to the administration of justice and unbecoming a judicial officer, and that she violated Massachusetts General Laws, chapter 211C, §§ 2(5)(d) and 2(5)(e).

CASE HISTORY

The Commission's charges are founded on affirmatively false and materially misleading allegations concerning events in *Commonwealth v. Charles (Ebony) Horton* and its aftermath. The false picture presented results from a variety of improper and biased investigatory techniques aimed at arriving at a pre-conceived result that is wholly at odds with a fair and accurate picture. The following facts are true.

1. On Monday, November 22, 1999, the Dorchester District Court issued a criminal complaint against Horton alleging rape and abuse of a child under 16, kidnaping, and assault and battery by means of a dangerous weapon. Horton had been arrested on Saturday, November 20, 1999, which the complaint alleged to be the date of the offense. The Committee for Public Counsel Services was appointed to represent Horton. The Suffolk District Attorney's Office did not move the Court for an order that Horton be held without bail based on dangerousness to the community. The Court set a bail in an amount that Horton was unable to post. As a result, Horton was remanded to the custody of the Suffolk County Sheriff to await further proceedings and his trial.

2. Through counsel, Horton appealed to the Superior Court for a reduction in the bail amount set by the Dorchester District Court. The District Attorney again did not seek an order that Horton be held without bail due to dangerousness. A Superior Court Justice (not Judge Lopez) reduced the bail, which was then posted by Horton's family. On December 29, 1999, Horton was released under conditions monitored by the Probation Department, including a curfew.

3. On January 12, 2000, a Suffolk County indictment was returned charging Horton with kidnaping, assault with intent to rape a child under 16, indecent assault and battery on a child under 14, assault and battery, and assault and battery by means of a dangerous weapon. Horton appeared in response to a summons for arraignment on January 26, 2000. Again, the prosecution did not seek a dangerousness adjudication. Horton remained free on bail since December 29,

1999. On May 11, 2000, the Court (not Judge Lopez) granted Horton's motion for the services of a psychologist or psychiatrist to aid in his defense.

4. The case, with Horton appearing in person, first came before Judge Lopez on August 1, 2000. On that date, Judge Lopez conferred at the sidebar with the prosecutor, Assistant District Attorney Leora Joseph, and Horton's appointed counsel, Anne C. Goldbach Esquire, concerning the sentence that would be imposed in the event Horton were to plead guilty. As is commonly and customarily the case, what was said during the plea conference was not recorded by electronic or any other means. Neither party requested that the conference be recorded. During the conference, both prosecutor and defense counsel made representations to Judge Lopez concerning what they believed the evidence would show concerning the offenses. Judge Lopez read copies of the police reports and statements given to the police. As is often true, each side's representations concerning what the evidence would show conflicted to some degree with the other. However, there was no dispute concerning the age of the victim. Contrary to the false statement in the Commission's charges, the victim was not eleven years old at the time of the offenses; instead, on the date of the offenses, the male victim was seven weeks short of his thirteenth birthday. Judge Lopez was also provided with information concerning Horton, including the Probation Department's criminal history record of him. In the presence of Assistant District Attorney Joseph, defense counsel Goldbach provided Judge Lopez with a written psycho-social assessment and a proposed dispositional plan signed by the Director of Social Services of the Committee for Public Counsel Services who is a board-certified, licensed independent social worker. Defense counsel offered ADA Joseph a copy of this document, but she refused to accept it. The defense's report included information and an assessment concerning Horton's psychological condition, and his developmental, family, social, educational and vocational history. The report included assessments to the effect that the risk that Horton would repeat the offense behavior was low and the risk of serious harm to Horton if imprisoned was high. There was no information in the report indicating that Horton's mental illness would make him likely to repeat sexual abuse of anyone. ADA Joseph did not object to the defense's submission of the report to Judge Lopez for the court's consideration in determining what sentence would be imposed in the event of a guilty plea. Neither did ADA Joseph request that the District Attorney's office be allowed to engage a qualified professional to interview Horton and investigate Horton's condition and report the results of a prosecution-obtained evaluation to the Court. Hence, the defense's psycho-social report was un rebutted. Both parties made recommendations concerning the appropriate sentence in the event that Horton were to plead guilty and were given a full and fair opportunity to be heard concerning the reasons for their respective sentencing recommendations.

5. After carefully considering and weighing — in light of her twelve years of experience as a judge — all of the information and advocacy presented, Judge Lopez informed both parties that, if Horton were to plead guilty as charged, the Court would impose a probationary sentence. In reaching this decision, Judge Lopez was not affected by bias, nor by any extraneous or inappropriate factor or information. Instead, Judge Lopez relied upon many wholly appropriate considerations based exclusively on the information presented by the parties in court, including

but not limited to the nature and amount of the sexual acts involved, the presence or absence and the level of any violence, and the age of and harm done to the victim. Based on the information presented in court, Judge Lopez also determined that the offenses did not constitute acts evidencing that Horton was a pedophile, much less a dangerous pedophile, nor a person who would likely repeat the offenses. This conclusion was supported by the fact that nothing in Horton's offenses and history demonstrated a desire to perform sexual acts involving pre-pubescent children. Another important factor was the unrebutted evidence that Horton suffered from a gender-identity disorder, a scientifically-recognized psychological disorder which is different from, and not associated with, pedophilia nor with sexual abuse of anyone, including post-pubescent adolescents. Upon hearing Judge Lopez's decision, Defense Counsel Goldbach stated that she would consult with Horton as to whether to plead guilty as charged and agree to accept the probationary sentence set out in the court's decision. The parties scheduled a hearing for August 4, 2000, in the Suffolk County Superior Court, by which time Horton would decide whether to proffer his guilty pleas and be sentenced as stated by the court.

6. Upon her arrival on August 4, 2000, Judge Lopez saw that a television camera had already been set up in the courtroom without her having been asked, and without her having given the legally required prior judicial approval. Judge Lopez also saw that a substantial number of reporters were present. She was told that Horton and his mother had become upset when they encountered unruly press cameras and reporters inside the courthouse, and that they had gone to another floor while awaiting commencement of the hearing. Judge Lopez then conducted a non-public lobby conference with ADA Leora Joseph and defense counsel Anne Goldbach. In answer to Judge Lopez's questions, ADA Joseph denied having caused the courtroom press coverage. Judge Lopez did not believe ADA Joseph. Judge Lopez believed from her experience and common sense that the prosecutor was the only one with an interest in causing media interest in the case and that she would be the most likely person to cause media interest. Another reason for Judge Lopez's belief that ADA Joseph had not been honest and candid with the court was that ADA Joseph had in the past engaged in a pattern of attempting to use press coverage, rather than persuasive evidence and advocacy in court, to influence judicial decisions. For example, ADA Joseph had given a press interview in which she attacked Judge Lopez's sentencing decisions in two prior cases that ADA Joseph had prosecuted: *Commonwealth v. Edwin Estrada* and *Commonwealth v. Marie Calixte*. See Eileen McNamara, "Two Tier Justice Hurts Children," The Boston Globe, February 14, 1999. The testimony of Assistant District Attorney David Deakin before the Commission confirms that Judge Lopez's negative credibility assessment of ADA Joseph's protestations concerning her lack of a role in causing the press coverage of the *Horton* case was correct.

7. Judge Lopez thus was rightly angered by ADA Joseph's proven lack of candor toward the tribunal. Having in mind that ADA Joseph had failed at the *Horton* plea conference to rebut the defense's proffer of evidence when given a full and fair opportunity to do so, and also that ADA Joseph was attempting to use the pressure of press coverage, rather than relevant evidence and effective advocacy to support the prosecution's sentencing position, Judge Lopez admonished Ms. Joseph during the lobby conference. Judge Lopez correctly believed that Ms.

Joseph merited strong criticism for her lack of candor and poor professionalism. Judges throughout the Commonwealth often criticize and praise counsel concerning their performance. The statements made by Judge Lopez to ADA Joseph were neither improper nor evidence of bias. Given ADA Joseph's attempt to manipulate and pressure the court through media pressure rather than by credible evidence and persuasive arguments, Judge Lopez' admonition of her was mild.

8. Judge Lopez decided to postpone the August 4, 2000 *Horton* guilty plea and sentencing, which the prosecution opposed. Judge Lopez stated truthfully that she had a crowded calendar of bail matters that afternoon and other things to do. According to Suffolk County records, there were eighteen bail appeals to be heard that afternoon. At the request of the Commonwealth, Judge Lopez made written findings for the court record, listing additional reasons for the postponement. Judge Lopez's findings were accurate and fully supported by incidents that occurred in Judge Lopez's presence and by reliable information Judge Lopez received. Among other things, Judge Lopez found that (1) "ADA Joseph., unhappy with the Court's disposition, called the press in. Ms. Joseph has a habit of doing this"; (2) "The Court finds that ADA Joseph attempted to embarrass and ridicule a defendant suffering from a psychological disorder;" and (3) "The Court finds that the Commonwealth caused this continuance because it sought to turn the court proceedings into a circus."

9. Judge Lopez' conclusion that ADA Joseph was seeking to pressure Judge Lopez to change the sentence announced at the plea hearing, and was seeking to do so by media manipulation rather than by the presentation of evidence and argument, is further bolstered by important facts and applicable law. Although Judge Lopez was unaware of it at the time that she made her findings, the Suffolk County District Attorney's Office issued on August 3, 2000, a press release which stated, in pertinent part, that "**Charles Horton, 31,¹ a transgendered person who appears as a woman, is expected to plead guilty before Judge Maria Lopez in Suffolk Superior Court room 21, 15th Floor, tomorrow at about 10 a.m.**" (emphasis in original). Indeed, the Commission heard testimony from ADA David Deakin that he regretted the press release's reference to the fact that Mr. Horton suffers from gender identity disorder. The press release was clearly designed to turn the court proceedings into a media circus and freak show designed, among other purposes, to heighten public condemnation of Horton. By issuing the press release, the then- District Attorney and his staff violated Massachusetts Rule of Professional Conduct 3.8 entitled, "**Special Responsibilities of a Prosecutor**" which states in subsection (g):

The prosecutor in a criminal case shall: (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

¹ Contrary to the press release, Horton was twenty-one at the time.

The press release's reference to Horton as a "transgendered person who appears as a woman" was neither necessary to inform the public of the nature of the prosecutor's action, nor did it serve a legitimate law enforcement purpose.

By postponing the August 4 hearing, Judge Lopez discharged her affirmative judicial duty to prevent the then- District Attorney and his staff from exploiting their unprofessional misconduct. She also acted to preserve the decorum and dignity of the court proceedings and to prevent the courthouse and courtroom from being used to mock, mistreat and endanger a mentally ill person. A failure to do precisely what Judge Lopez did would have been an obvious dereliction of judicial duty under the circumstances. To charge that Judge Lopez' postponement of the plea and sentencing hearing was, under these circumstances, a violation rather than a courageous affirmation of her judicial duty, constitutes an unhelpful, counter-productive and unfair failure to recognize the true nature of judicial duty and independence -- a systemic failure that can and likely will come back to haunt an independent judiciary in the future. The Commission's charge is not helpful in supporting judges' attempts to do justice in difficult cases where public and media opinion, often only partially informed, threatens to turn into the kind of excess that a civilized and independent judicial system is structured and tasked to curb.

10. On September 6, 2000 — the date of the rescheduled *Horton* plea and sentencing hearing — Judge Lopez arrived in the Middlesex County courthouse and found that, again, a television camera had been installed in the courtroom without her approval as required by Supreme Judicial Court Rule 1:19. She saw, too, that there were numerous media personnel present to attend proceedings in the Horton case. Judge Lopez arranged for Horton to wait, until the case would be called, in a non-public area adjacent to the courtroom.

11. The Commission charges that Judge Lopez's pattern of judicial misconduct included her order which prevented television and still photographic pictures to be made of Horton during the court proceedings — even though she allowed cameras in the courtroom albeit with narrowly-drawn limitations. Supreme Judicial Court Rule 1:19(a) concerning "Cameras in the Courts" states, in part: "A judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other harmful consequence." In the proper and lawful exercise of the authority and duty granted by this rule, Judge Lopez signed and dated a September 6, 2000 order which she read to the media in the courtroom on that date. The order states:

The Court hereby orders that the press is not permitted to take pictures, by means of still or moving cameras, of the defendant. The Court finds that the defendant suffers from a sexual identity disorder and is emotionally fragile. The taking of defendant's photograph during this plea will create a substantial likelihood of harm to the defendant. The matter had been set down for a plea previously and the defendant and defendant's mother refused to get off the elevators when they saw the cameras.

The public's right to know about these proceedings will not be affected by this

narrow limitation. The Court sees no reason why the appearance of the defendant is of interest to the public, other than to appeal to a sense of perverse curiosity. There are no other limitations on press coverage of these proceedings.

The Court notes that the media did not give reasonable advance notice of the use of cameras as required by Supreme Judicial Court Rule 1:19(e). Nevertheless, given the media's interest in an otherwise routine case, the Court does not exercise its *[sic]* its discretion to exclude them altogether.

Judge Lopez relied upon the unrebutted psychological evaluation of the defendant and prior events in the case as the basis for this order. The Commission's groundless charge that Judge Lopez's order limiting the use of cameras in court constitutes part of a pattern of judicial misconduct is, in reality, part of a pattern of the Commission's own abuse of its powers and responsibilities. Only a perversion of the proper role of the Commission could result in an accusation directed against the lawful, fully justified — and rather modest — conduct of Judge Lopez in limiting (but not prohibiting) television coverage. Judge Lopez acted in response to the prosecutor's unprofessional tactics designed to turn the proceedings into an undignified circus-like freak show and media event for the purpose of harming the defendant and improperly influencing the court's sentencing decision.

12. The issue here is not whether the press, including television, should have been allowed to cover a public proceeding such as the *Horton* sentencing; of course the press was free to do so, and Judge Lopez specifically gave such permission, with very modest limitations, even though the press had violated the SJC rule by not seeking permission in advance. Judge Lopez could have refused to permit cameras in the courtroom at all, but she did not. The issue is not even whether the District Attorney's office has the right to notify the press and the public of what cases are scheduled for hearing. Rather, in this case the judge justifiably became angry at the District Attorney's calling in the news media in a context and in a manner that emphasized the emotional and physical difficulties of the defendant, thereby inviting a circus-like freak show. This unethical ploy by the District Attorney predictably threatened not only the defendant's well-being but also the dignity and decorum of the courtroom. The District Attorney engaged in this misconduct for the purpose of seeking to pressure a judge and influence a sentence that the District Attorney could instead have sought, but did not in fact seek, to influence by the proper presentation of rebuttal evidence to contradict the crucial expert and other evidence presented by the defense counsel to Judge Lopez at the earlier plea conference. Once the District Attorney and his staff chose to achieve their goal by improper stoking of media sensationalism, all at the expense of a highly vulnerable and ill defendant and the dignity and decorum of the courthouse and courtroom, Judge Lopez had a judicial duty to respond. She did so in an appropriate manner. The Commission's charge hinders, rather than fosters, achievement of essential attributes of the judicial branch: the integrity and impartiality of judicial proceedings, and judicial independence.

13. The Commission charges (Charge II, 7):

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

The charging document displays a startling lack of familiarity with courts of this Commonwealth. In many of our state courthouses, including those in Suffolk and Middlesex Counties, facilities are provided for prosecution witnesses, including victims, such as back elevators and non-public waiting rooms. There are also victim-witness advocates who assist prosecution witnesses in these relatively comfortable, isolated, and safe locations. Comparable facilities opportunities are not afforded to defendants and their witnesses. Judge Lopez did not seek to "defeat" the press' right to cover this case. What she did was to seek to maintain the dignity and decorum of the courthouse, by protecting a mentally ill and vulnerable defendant and his mother from the leering, circus-like onslaught that was generated by the District Attorney's Office unprofessional effort to turn a court proceeding concerning a transgendered person into a freak show. Judge Lopez discharged her duty to maintain dignity and decorum, but also her duty, pursuant to Canon of Judicial Conduct 3(B)(5), to "not...manifest bias or prejudice, including but not limited to bias or prejudice based upon...disability [or] sexual orientation, and shall not permit staff, court officials and others subject to the judge's direction and control to do so." The victim was not in court. Given that the victim's family was being well taken care of by the District Attorney and the numerous special facilities available to the District Attorney with which to do so, it was the judge's obligation to make sufficient accommodations to the defendant to prevent harm to him and to his mother. The Commission's perverse charge seeks to punish Judge Lopez for a laudable performance of her sworn duty to assure equal justice under the law.

14. During the September 6, 2000, hearing in which the guilty pleas were tendered, Judge Lopez reminded the prosecutor to state only the facts that pertain to the indictments. At this stage of the hearing, the sole issue was whether there was a factual basis for the guilty pleas, not to hear sentencing-related facts. When Assistant District Attorney David Deakin stated facts which were correctly determined by Judge Lopez to be sufficient to establish that a factual basis for guilty pleas to all of the charges, she interrupted the prosecutor, thanked him, and stated she deemed the facts stated to be sufficient. The prosecutor responded that he wished to add a representation concerning an out-of-court statement which the defendant had made. Judge Lopez allowed the prosecutor to add the information concerning the defendant's statement even though it added nothing material to the already sufficient factual bases for the guilty pleas.

15. Judge Lopez asked ADA Deakin to rate the offense on a one-to-ten scale. After ADA Deakin gave his response, Judge Lopez told him that she considered his high rating of the offense to be "disingenuous." In so doing, Judge Lopez expressly relied upon her extensive experience as a judge who was familiar with many cases involving sexual assaults upon children.

The bases for Judge Lopez's view that ADA Deakin's rating was disingenuous and grandstanding for the press, included at least the following:

(A) Unlike many other horrendous and all too common cases, the adolescent victim was almost certainly not pre-pubescent and was believed by the offender to be fourteen years old. The offense did not involve pedophilia which poses a high risk of recidivism and there was no evidence that Horton's illness created a risk that he would sexually re-offend against anyone;

(B) the offense did not involve obtaining physical access to the victim through an abuse or betrayal of a family, household or other relationship of trust;

(C) the adolescent had not been physically and repeatedly brutalized either by sexual penetration or otherwise;

(D) the adolescent had suffered no physical injury;

(E) according to the unrebutted psychological assessment, the offense had been committed by a person who suffered from a mental illness that is not associated with compulsive recidivist sexual offenses against anyone, including pre- or post-pubescent children; and

(F) according to the unrebutted assessment, the offender's mental illness posed a substantial risk of either self-inflicted harm or harm from others, or both, if the offender were to be incarcerated.

(G) Horton's criminal history was limited to misdemeanors with no prior sex offenses, or criminal involvement with children.

(H) From November 22, 1999, through the date of sentencing, September 6, 2000, the prosecution had never filed a motion asserting that Horton should be detained without bail based on danger to the community.

(I) Horton has satisfactorily complied with all the conditions of pre-trial release, including a curfew. Horton was a high school drop-out at the time of the offenses. While on pre-trial release in lieu of bail, Horton earned a GED high school diploma and had commenced college.

In assessing the credibility of Mr. Deakin's extraordinarily high rating of the offense, Judge Lopez also had in mind, and was justifiably angered by, the Commonwealth's attempt to exploit manipulated, circus-like press coverage in an unprofessional and offensive manner, rather than rely upon courtroom advocacy based on credible evidence, to persuade the court to impose a lengthy prison sentence.

16. Having listened to the prosecutor's presentation and after she expressed her view that the prosecutor's rating was disingenuous, Judge Lopez stated to the prosecutor that she wished to hear from defense counsel. The prosecutor attempted to speak again even though Judge Lopez had ordered that she wanted to hear from defense counsel. (Judge Lopez had already given the Commonwealth and the defendant full and fair opportunity to be heard at the August 1, 2000 plea conference; thus, the Commonwealth was being heard at the September 6, 2000 hearing to be urging Judge Lopez to reconsider a decision she had already made.) ADA Deakin continued to attempt to thwart Judge Lopez's ruling that it was time to hear from defense counsel. The prosecutor nonetheless objected to Judge Lopez's statement that she deemed his rating of the offense to be disingenuous. In Judge Lopez's view, ADA Deakin was then attempting to argue with her view that he had been disingenuous. Judge Lopez, wanting to return to the sentencing issue, appropriately raised her voice in ordering the prosecutor to be seated after he interrupted her. Judge Lopez repeated her view that the prosecutor had been disingenuous and told defense counsel to proceed, because the prosecutor had previously stated that he had completed his sentencing presentation.

17. At the conclusion of the Commonwealth's statement of its recommendation that a sentence of imprisonment be imposed, Judge Lopez inquired whether the Commonwealth was requesting whether the commitment be to a male or female prison. Judge Lopez put the question as a way of pointing to the hazards and difficulties that would result from a prison sentence to a transgendered person. Judge Lopez denies that she was, nor intended to be, sarcastic in posing this question, and she denies that her tone of voice — which is recorded and hence available for all to hear — was sarcastic. Her question to Mr. Deakin was a serious and important question put to the prosecutor with proper decorum, as any objective listener to the tape would have to agree. In fact, when questioned concerning the likely conditions of confinement that would be imposed if Horton were imprisoned, Mr. Deakin attempted to suggest that the Horton's illness would not cause him to suffer harsh conditions of imprisonment even though, at the plea conference, Ms. Goldbach had made an unrebutted representation to Judge Lopez that, while in held by the Suffolk County Sheriff for over thirty days, Horton had been confined in a cell 23 hours per day and was isolated when not in a cell.

18. The Commission charges that Judge Lopez engaged in misconduct by requiring that Mr. Deakin, rather than Ms. Joseph, read the victim impact statements. The court has inherent authority to limit advocacy for each party in a case to one lawyer. Where more than one counsel appear for single party in a case, judges commonly limit advocacy to one counsel per side on a particular issue, or in questioning each witness. Only one lawyer spoke for the defendant. Moreover, this was not an instance in which any advocacy by Mr. Deakin or Ms. Joseph was to be presented; rather, it involved the reading of a statement written by a victim. Which lawyer would read a statement written by a victim was of no consequence or significance. It was the victim's views that were being transmitted — and properly so — and not the views of the lawyer.

19. After Judge Lopez directed the clerk to announce the probationary sentence, ADA Deakin rose and asked to be heard. Believing that ADA Deakin was attempting to be heard

further in opposition to the sentence which she had already directed the clerk to announce, Judge Lopez again raised her voice in telling ADA Deakin that she'd heard enough and he would not be heard. ADA Deakin then informed the court that he wished only to be heard concerning the conditions of electronic monitoring. Upon hearing this, Judge Lopez immediately changed her ruling and allowed ADA Deakin to be heard in full, thus demonstrating that she was open-minded in hearing further relevant argument on a matter not already decided.

20. The District Attorney's Office never filed a motion requesting Judge Lopez to recuse herself on any grounds, including a claim that she had exhibited, or that her actions were affected by, bias.

21. After the sentencing, Judge Lopez consulted with several of her colleagues, including Superior Court Chief Justice Suzanne DelVecchio, concerning statements about the *Horton* case that appeared in the media. She also consulted with the Supreme Judicial Court's Public Information Officer. Initially, Chief Justice DelVecchio and others stated that Judge Lopez should neither issue a formal opinion explaining the sentence, nor respond publicly. Judge Lopez believed that she should defer to the Chief Justice and the court system's public information officer with respect to any publicized response to the reactions of the media and the public concerning the *Horton* case. For this reason, she followed their directions. However, shortly thereafter, the Chief Justice DelVecchio and the Public Information Officer adopted the opposite view with respect to the issuance of a press release. The Public Information Officer composed, and the Chief Justice edited, a statement to be released in Judge Lopez's name by the Supreme Judicial Court's Public Information Office. The first sentence of the release stated that judges are prohibited from making public comment about a pending or impending case and then proceeded to defend the fairness of the sentence in the *Horton* case. After the statement composed by the Chief Justice and the Public Information Officer was read to Judge Lopez during a telephone call and she did not object to its contents, the statement was issued by the Supreme Judicial Court's Public Information Office.

22. The Commission alleges that the *Horton* case was pending at the time that the release was issued by the Supreme Judicial Court's Public Information Office, and indeed that it remains pending. Based on this groundless premise, the Commission charges, among other things, that Judge Lopez failed to abstain from public comment about a pending case, engaged in prohibited *ex parte* contacts, and failed to uphold the impartiality and integrity of the courts. Yet Judge Lopez properly relied upon Chief Justice DelVecchio's accurate view that, as of the pronouncement of the sentence, the *Horton* case ceased to be a pending or impending case. According to the evidence before the Commission, the press release would not have issued at all but for Chief Justice DelVecchio's decision to issue it.

23. The Commission alleges three grounds -- all faulty -- to support its claim that the *Horton* case remained and, indeed, remains pending or impending: (a) Judge Lopez retained jurisdiction to supervise the administration of the probationary sentence; (b) some of Judge Lopez's statements, including the statement composed by the Superior Court's Chief Justice and

issued by the Supreme Judicial Court's Public Information Office, occurred during a period when either Horton or the Commonwealth theoretically could appeal; and (c) Horton could file a motion for a new trial.

24. The Commission's grounds are patently erroneous: (a) Judge Lopez's retention of jurisdiction was solely to administer the sentence. During the pending proceeding, Judge Lopez embodied the tribunal to resolve disputed matters between the Commonwealth and Horton. When the Court administers the sentence it is no longer performing as the dispute-resolving tribunal. The exercise of jurisdiction to administer a sentence does not pertain to a pending or impending proceeding but solely to supervising the imposition of punishment ordered at the conclusion of the adversarial proceeding. (b) No appeal was available to either party. The Commonwealth had no good faith basis to contend that the sentence was unlawful. There is no other basis for the Commonwealth to appeal. Horton agreed not to appeal when he agreed to plead guilty as charged, provided that the Court would impose the probation sentence decided upon on August 1, 2000. (c) A motion for a new trial filed after a sentencing based upon guilty pleas is, by definition, an application to re-open an already-closed case. The case thus was closed, not pending or impending.

25. Judge Lopez denies that she misled anyone, including the Supreme Judicial Court's Public Information Officer, concerning material information. The release issued by that office in Judge Lopez' name stated, in part, that "there were certain facts before me, known by the prosecutor and the defense attorney, that were part of the plea conference and cannot be revealed by me, but which would undoubtedly change the characterization of this case as currently reported by some media outlets." Judge Lopez was accurately referring to facts stated in the un rebutted psychological report and assessment as well as representations of counsel, during the plea conference concerning other evidence, which she did not believe it appropriate to discuss publicly. Judge Lopez believed then, and believes now, that if an objective observer were to review all of the information that was before her at the time of sentencing, that observer would be less inclined to take issue with her judgment in imposing a probationary sentence with strict probationary conditions.

26. On or about November 1, 2000, Judge Lopez received a copy of a typewritten complaint from an individual whose street address was in Billerica. The complaint had been received by the Commission, and a copy had been provided to Judge Lopez by the Commission. Judge Lopez earlier had been victimized by numerous bogus "complaints" filed against her by persons aggrieved by her decisions in litigation between members of the Demoulas family. The Demoulas family business had a substantial presence in Billerica and environs. Based on these and other circumstances, Judge Lopez had reason to strongly suspect that the copy of the complaint that the Commission received and that she in turn received from the Commission on or about November 1, 2000, was a bogus complaint. Judge Lopez used her home telephone to determine whether a person answering her call would identify herself as the complainant. Because the *Horton* case was no longer pending, no misconduct would have occurred even if Judge Lopez had engaged the complainant in conversation by discussing the complaint's merits.

Instead, when the individual who answered the phone identified herself with the complainant's name, Judge Lopez did not engage in an extended dialogue but simply terminated the call, satisfied that this complaint was not bogus and was not part of a Demoulas-like pattern. Under the circumstances, Judge Lopez did not engage in misconduct by making the call solely to verify that the complainant was not a fictitious person.

27. While Judge Lopez firmly believes that during the course of this difficult criminal case, Commonwealth vs. Horton, she conducted herself in a lawful, responsible and ethical (although not always perfect, especially when she raised her voice and began to lose her temper) manner, she admits that she made one serious error such that, if she could re-write history, she would act differently. Given the nature of the case and the factors -- some of them invisible to those who observed the open court hearings but had no idea what had preceded those hearings -- that went into Judge Lopez' controversial sentencing decision, and in view of the fact that the District Attorney's office took the step of sensationalizing the case in its ill-considered press release focusing on the "transgendered" condition of the defendant, the judge should have issued a written opinion stating the factors that determined the Horton sentence. While this was not a violation of any applicable statute, rule or code, it reflected unrealistic and poor judgment. The public, the judge now realizes, had and has a right to know why a judge imposes a sentence so at odds with the District Attorney's recommendation and with the views of many citizens, legislators, and even some other judges. A judge owes the public more than this, and Judge Lopez should have followed her better instincts and written an explanatory opinion, rather than follow the contrary advice she was receiving from some of her colleagues who believed that the less said, the better. In a democracy, the rule-of-thumb should be that the more said, the better. An important lesson has been learned by this experience that has been so painful for so many.

RESPONSES TO CHARGES

- I. Judge Lopez denies the premise of the charge that the Horton case was pending after pronouncement of the sentence by incorporating by reference ¶¶ 22-24 of the Case History, *supra*, and denies that she engaged in improper *ex parte* contacts and violated Canons 1, 2, 2(A), 3, and 3(A)(4). Further answering, Judge Lopez denies that she expressed anger to William Leahy and that she encouraged him and CPCS to come to her defense.
- II. Judge Lopez denies that she exhibited bias in the discharge of her duties and that she violated Canons 1, 2(A), 2(B), 3, 3(A)(1), 3(B)(5). Further answering, Judge Lopez incorporates by reference ¶¶ 1-20, 22-24 of the Case History, *supra*, and that judges may properly rely upon opinions formed from their experience, particularly when these views are confirmed by an un rebutted expert opinion.
- III. Judge Lopez denies that she used the court system in disregard of her obligation to uphold the impartiality and integrity of the judiciary and that she violated Canons 1, 2, 2(A), 3(A)(1), and 3(A)(6). Further answering, Judge Lopez incorporates by reference ¶¶

1-9, 21-22 and 25.

- IV. Judge Lopez denies that she used the court system in disregard of her obligation to uphold the impartiality and integrity of the court system and that she violated Canons 1, 2, 2(A), 3, 3(A)(6). Further answering, Judge Lopez incorporates by reference ¶¶ 21-25 of the Case History, *supra*, and does not recall speaking with Boston Herald reporter, Jose Martinez, and denies making the statements attributed to her by Jose Martinez.
- V. Judge Lopez denies that she failed to be patient, courteous and dignified, and failed to accord every person or litigant a full right to be heard and that she violated Canons 1, 2, 2(A), 3(A)(3), 3(A)(4), 3(B)(5). Further answering, incorporates by reference ¶¶ 1-20 of the Case History, *supra*.
- VI. Judge Lopez denies that she has exhibited a pattern of abuse of her office, bias and indiscretion and that she violated Canons 1, 2, 2(A), and 3. Further answering, Judge incorporates by reference to the Case History, *supra*.

SUMMARY OF VIOLATIONS

Judge Lopez incorporates by reference her Case History and Responses to Charges.

AFFIRMATIVE DEFENSES

- I. The charges violate G.L. c.211C, § 2(4) in that they constitute actions against Judge Lopez in the absence of fraud, corrupt motive, bad faith or a clear indication that her conduct violated the code of judicial conduct for making findings of fact, reaching legal conclusions, and applying the law as she understood it, in at least the following respects:

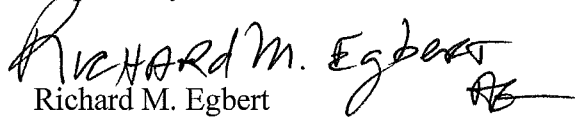
(1) granting a continuance; (2) directives concerning courthouse security arrangements; (3) making an order concerning the use of cameras in the courtroom; (4) forming opinions and finding that ADA Leora Joseph and David Deakin made statements that lacked candor toward the tribunal and were disingenuous; (5) admonishing ADA Joseph for her lack of candor and for poor professionalism in attempting to use press coverage rather than persuasive advocacy based on credible evidence; (6) the order directing ADA Deakin to cease speaking and to be seated; (7) the order that ADA Deakin read the victim impact statement; (8) allowing a press release to be issued by the Supreme Judicial Court Public Information Office upon the advice of the Chief Justice of the Superior Court Department; (9) speaking with various persons about the *Horton* case after the sentence had been imposed; and, (10) placing a telephone call to determine whether the signatory to a complaint against her actually existed.

- II. The charges are a product of a Commission proceedings that were commenced and pursued without complying with G.L. c. 211C, §§ 1 and 2.

WHEREFORE, the charges should be dismissed.

THE FOREGOING RESPONSE TO THE CHARGES IS FILED UNDER PROTEST. THE COMMISSION DENIED JUDGE LOPEZ'S TIMELY REQUEST THAT SHE BE GRANTED AN EXTENSION OF TIME TO RESPOND, BECAUSE HER COUNSEL, RICHARD M. EGBERT, ESQUIRE, IS CURRENTLY ENGAGED IN A JURY TRIAL. THE DENIAL OF THE EXTENSION OF TIME EFFECTIVELY DEPRIVED JUDGE LOPEZ OF HER RIGHT TO COUNSEL OF HER CHOICE GUARANTEED TO HER BY G.L. c. 211C, § 5(8). JUDGE LOPEZ RESERVES HER RIGHT TO AMEND HER RESPONSE TO THE CHARGES.

Respectfully submitted,


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