

CERTIFIED HEARING TRANSCRIPT (DAY 3)

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME III

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 11, 2025

9:00 A.M.

Boston, Massachusetts

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1 JUDGE FABRICANT: The
2 Commission now calls Scott Noe, who, I take it,
3 is in the hallway.

4 HEARING OFFICER: We're on the
5 record. And if counsel could just introduce
6 themselves for the record.

7 JUDGE FABRICANT: I'm sorry for
8 jumping the gun here.

9 Judge Fabricant for the
10 Commission on Judicial Conduct.

11 MR. NEFF: Howard Neff for the
12 Commission on Judicial Conduct.

13 MR. HOOPES: Tom Hoopes for
14 Judge Joseph.

15 MS. MULVEY: Elizabeth Mulvey
16 for Judge Joseph.

17 MR. KEATING: Michael Keating
18 for Judge Joseph.

19 HEARING OFFICER: Great. Thank
20 you very much.

21 JUDGE FABRICANT: He'll be
22 right with us, I'm told. Apparently the highway
23 that comes up from the South Shore is
24 problematic this morning.

25 HEARING OFFICER: Totally

1 relate to those issues. No issue whatsoever.

2 (PAUSE)

3 HEARING OFFICER: Good morning.

4 PAUL SCOTT NOE, SWORN

5 HEARING OFFICER. Thank you.

6 Please be seated.

7 DIRECT EXAMINATION

8 BY JUDGE FABRICANT:

9 Q. Good morning.

10 A. Good morning.

11 Q. Please tell us your name.

12 A. First name is Paul, middle name is Scott,
13 last name is Noe, N-o-e.

14 Q. And do you go generally by Scott?

15 A. I do.

16 Q. Thank you.

17 And Mr. Noe, would you tell us briefly your
18 professional background?

19 A. I began my career in law enforcement with the
20 Norfolk County Sheriff's Department, and I
21 became a court officer six years into that.
22 Still stand at Norfolk County, worked nights,
23 was a court officer until I retired between
24 '15, in 2019, became chief court officer in
25 Concord, Waltham, Newton courts in 2015.

1 Q. So I want to just make sure we've got the
2 sequence there. So in 2015 you became the chief
3 court officer for three courts, Newton, Waltham,
4 and Concord?

5 A. Yes.

6 Q. And then in 2019 you retired from the court
7 officers.

8 A. Correct. The start to the end of 2019.

9 Q. And what do you do now?

10 A. Retired from the courts and the sheriff's
11 department and I work for NAGE, National
12 Association of Government Employees. I'm a
13 union rep for the court officers.

14 Q. So NAGE represents the court officers in
15 Massachusetts.

16 A. Yes, court officers, probation officers.

17 Q. Court officers and probation officers.

18 A. Yup.

19 Q. I'm going to ask you to give us a general
20 virtual tour of the Newton District Court, and
21 we have some photographs that we're going to
22 show assist in that process, and that binder in
23 front of you has a set of exhibits that are
24 appendices that have already been admitted in
25 evidence. Appendix U is the photographs. So

1 look at them in the binder or look at them on
2 the screen as is more convenient for you.

3 So let's start with what's
4 right in front of you here, which is Page 526 of
5 the appendix. What is this?

6 A. This is the front door of the Newton
7 courthouse.

8 Q. And --

9 HEARING OFFICER: If you could
10 just be a little closer to the mic. Much
11 appreciate that. Thank you.

12 A. That's the front door to the Newton District
13 Court.

14 Q. And what level is that when you enter the door?

15 A. Well, the picture is taken from the street
16 level. You climb up those 10 steps and you're
17 at first level of the courthouse.

18 Q. So once you're in the courthouse and go in those
19 doors, how many levels does the courthouse have?

20 A. You have one down below, which is at ground
21 level, when you go out in the back of the
22 courthouse, it goes downhill from there. So you
23 have lower level, that first level, and then the
24 second floor level.

25 Q. So three floors altogether.

1 A. Yes.

2 Q. One of which is below ground at the front and at
3 ground level at the back.

4 A. Yes.

5 Q. When you enter from the front, through this
6 door, where are you?

7 A. You're in the main lobby of the courthouse at
8 the security entrance.

9 Q. And let's go to 523. And what do we see there?

10 A. So the right would be coming through the
11 front doors to the courthouse, and that's the
12 security station, security office to your right.

13 JUDGE FABRICANT: And his voice
14 loud enough at this point?

15 HEARING OFFICER: It's pretty
16 good. If you could get just a little closer to
17 the mic for everybody in the court, I think that
18 would be great. Thank you.

19 Q. So that's the security equipment you come
20 through if you come through that main door.

21 A. Yes.

22 Q. And what else do you see in this main hallway?

23 A. That's the entry door from the main entrance
24 off of the main road. That door to your right
25 is the security office, a lot of administrative

1 things are done.

2 Q. And let's go to the Number 506. What do you see
3 there?

4 A. That's -- To your right would be that main
5 door that you come in through and that door in
6 front of you is the entrance to the clerk's
7 office.

8 Q. Do we see here some of the security equipment?

9 A. Yes.

10 Q. So if you just come through the security
11 equipment, you've got the clerk's office just to
12 your right?

13 A. Correct.

14 Q. And you see that bench along the left wall
15 there?

16 A. Yes.

17 Q. If you got to the end of the bench where the
18 picture doesn't show, what would be there?

19 A. That would be the entrance to courtroom one
20 of Newton District Court.

21 Q. And let's go to 525. What's that?

22 A. That is the entrance to courtroom one on the
23 first floor.

24 Q. And the chair, the bench that we see there, is
25 that the end of the bench that we saw in the

1 last picture?

2 A. Yes. Same bench.

3 Q. And then there's a chair next to it?

4 A. Yes.

5 Q. Was that chair usually there?

6 A. I believe it was.

7 Q. Let's go to 509. What do you see here?

8 A. That's courtroom one of Newton District
9 Court, the judge's bench, clerk's seating area,
10 DA's table, and defense attorney's table.

11 Q. And which side are the DA and the defense
12 attorney usually?

13 A. Typically, the DA would be on the left side
14 of that picture, and defense attorney would be
15 on right, on the left side of the dock.

16 Q. So the DA, if there's a defendant in custody,
17 the DA would be closer to the defendant than the
18 defense lawyer is.

19 A. Yes. Typically.

20 Q. And do you see, along that glass wall of the
21 dock, do you see a little, a little metal
22 circle?

23 A. Oh, yes.

24 Q. What's that, what's that used for?

25 A. That's the opening so you could hear clearly

1 from the dock. It's not -- I don't think it's a
2 microphone on it, but it would be for that.

3 Q. It's a space for hearing?

4 A. Yes.

5 Q. If there's an interpreter, would the interpreter
6 use that to speak to the person in the dock?

7 A. Yes.

8 Q. Let's look at 510. What do we see here?

9 A. That's the right side of the same courtroom.
10 That's the two exit doors.

11 Q. Those two exit doors there, are those for public
12 or for other people?

13 A. Those are for employees. The one on the
14 right is typically -- almost leads you directly
15 into the clerk's office, along the left brings
16 you to the employee elevator and entrance to the
17 judge's lobby.

18 Q. And those two desks that we see there, who uses
19 those?

20 A. Typically, probation would sit at one and the
21 other one is used for administrative duties.

22 Q. If there's a witness in the courtroom, where
23 would the witness be?

24 A. The witness stands back in the bar.

25 Q. Okay. Let's bring up 512 -- 511. What do you

1 see here?

2 A. That's the view from those same pictures you
3 just looked at looking at from the judge's
4 bench, on the side of the bench.

5 Q. If there's a side bar conference, is that where
6 it would occur?

7 A. Yes. And there's a swinging door that
8 brings -- gives access to the judge's bench.

9 Q. And is that how the judge goes in and out,
10 through that swinging door?

11 A. Yes.

12 Q. And let's go to 512. What do you see here?

13 A. That's a view looking back from where we just
14 were, looking back at the exit of courtroom one.

15 Q. So if you were standing at the judge's bench or
16 at the clerk's bench, is this what you would
17 see?

18 A. Yes. The defendant stands in the block box.
19 There's a microphone there.

20 Q. So if the defendant is not in custody, is that
21 where the defendant would stand, just behind the
22 bar?

23 A. Correct.

24 Q. And are there seats for spectators on both sides
25 of the entrance?

1 A. Yes.

2 Q. And if you look down, is that the audience
3 section on the other side?

4 A. Correct.

5 JUDGE FABRICANT: I don't know
6 that this has a number yet.

7 MR. HOOPES: Nope.

8 JUDGE FABRICANT: We'll get it
9 in.

10 Q. Let's go to 513. And we're going to go through
11 a series starting with 513. So what is this
12 that you see here?

13 A. That's the custody dock and the second -- the
14 first door brings you into the custody dock, the
15 second door brings you into the lockup.

16 Q. So two doors.

17 A. Correct.

18 Q. Are those both doors that you need a keycard to
19 open and close?

20 A. Neither door has a keycard. They're both key
21 open.

22 Q. So help me understand the distinction there.

23 A. Manual keyed open.

24 Q. So an old-fashioned key.

25 A. Yes.

1 Q. Physical key.

2 A. Right.

3 Q. And are they -- You could see here that both of
4 them look like they're a little bit ajar.

5 A. Yes.

6 Q. Would that be the normal condition for those
7 doors?

8 A. Typically, they're kept ajar, to give access
9 for us to come up and down or maintenance.

10 Q. If there's a person who's in custody who's in
11 the dock, would they be ajar?

12 A. No. They'd be secure.

13 Q. And who's responsible for securing?

14 A. The court officers.

15 Q. And then let's go to 514. What do we see there?

16 A. That's a view from inside the dock.

17 Q. So if a person is inside the dock, is that --
18 would the person be standing or sitting in that
19 location?

20 A. Correct. It looks to be looking at the
21 judge's bench.

22 Q. Let's go to 515. What's that?

23 A. That's the stairwell bringing you down to the
24 lockup, exiting the dock.

25 Q. So look to the left of that photograph, looks

1 like there's an open door. Is that that second
2 secure door?

3 A. Yes, it is.

4 Q. And let's go to 516. What's that?

5 A. That brings you down to the door that gives
6 you access to the lockup area.

7 Q. And then 517. What's that?

8 A. That is from inside the lockup. Not sure
9 which direction that's in. Oh, I believe, when
10 you enter that door that we just saw, it would
11 be straight in. And so it was typically used
12 for storage. And one of the prisoner cells to
13 the right.

14 Q. Then let's go to 527. Now, can you describe
15 what that is generally?

16 A. Yes. That's the rear of the building. The
17 building to the left is the Newton District
18 Court. It's ground level from behind now. And
19 the building to the right is Newton Police
20 Department.

21 Q. And can you see a sort of fenced area there
22 between the two buildings?

23 A. Yes. That's the sallyport.

24 Q. And what is a sallyport?

25 A. Sallyport is where custodies are brought in,

1 transported in. And in this particular case,
2 the arrest could be walked over from the
3 Newton Police Department or, typical, brought in
4 from the sheriff's department, they back in the
5 van and deliver the prisoner that way.

6 Q. So that fenced area, is that for the purpose of
7 putting a van in --

8 A. Yes.

9 Q. -- for transporting people in custody?

10 A. Yes.

11 Q. And what characterizes a sallyport as opposed to
12 any other kind of exit and --

13 A. A sallyport, typically they're secured to
14 keep the public from gaining access to them or
15 from somebody escaping while they're being
16 transported in, if they're brought in to the
17 courthouse. That particular sallyport had a
18 door. It had fencing that was on an electronic
19 runner that locked up, but there was problems
20 with the -- with that door. It would get jammed
21 closed sometimes. So typically, when I was
22 chief, that door was left open.

23 Q. Okay. Now, taking our virtual tour back inside.
24 So we're now back in that -- in the lockup area.
25 From there, if you wanted to go inside to a

1 public area, where would you be going?

2 A. Well, at the end of this first brick wall,
3 there's an access door for employees, and
4 electronically access to the back stairwell,
5 which would bring you up to the judge's lobby
6 and all the way to the second floor to the
7 courtroom.

8 Q. So you're now talking on the outside of the
9 building.

10 A. Yes. Prior to going into the sallyport,
11 there's an employee entrance, only accessed
12 electronically.

13 Q. And is there actually more than one in different
14 locations along the back of the building?

15 A. On the back of the building, there's one
16 there, yes, there's one behind the sallyport,
17 where there's a parking area, and then on this
18 side of the building there's a maintenance
19 entrance you can electronically access.

20 Q. And each of those doors that would bring you
21 into the secure area, do you need a security
22 pass to get in and out of those?

23 A. Yes.

24 Q. So envisioning that we're back inside the
25 building and you're in that secure hallway, if

1 you go down the secure hallway, and you've got
2 those secure doors that are there, but you need
3 a security pass to go in and out, so envisioning
4 that we're going down that secure hallway, where
5 do you eventually get?

6 A. Coming in through that employee entrance I
7 just mentioned?

8 Q. Once you're inside.

9 A. Okay. Once you're inside of this first
10 entrance, at the end of that brick, you'll enter
11 a stairwell, and the stairwell you can take up
12 to both floors or you can use your electronic
13 access card to go in behind the probation
14 department or another door that brings you into
15 the lockup area.

16 Q. So that first stairwell that you just referred
17 to, is that within the secure space?

18 A. It's not a lockup area but it's secured for
19 employees only.

20 Q. So you can't get into that stairwell without a
21 security pass.

22 A. Correct.

23 Q. If you walked down that secure hallway to
24 eventually get to a place where, at that lower
25 level, without going up or down, you could with

1 a security pass get out of the secure area into
2 a public area?

3 A. You'd have to go through several doors to
4 get -- you'd have to go through probation
5 department or somehow go through the lockup area
6 and back up to the courtroom.

7 Q. So if you go through the probation department,
8 if you have -- if you're escorted by somebody
9 who has a security pass, can you go through a
10 secure door and end up in the public area of
11 probation?

12 A. Yes, yes.

13 Q. And let's look at Photograph 519. What's that?

14 A. That's the lockup officer's office.

15 Q. Where is that?

16 A. Located in the lockup on the lower level.

17 Q. Is there also an office somewhere in the lower
18 level for the chief court officer?

19 A. Yes.

20 Q. Where's that?

21 A. That's back out through probation, back out
22 to the public area, and it's a locked office.

23 Q. So is that on the public side of that secure
24 door in the downstairs --

25 A. Yes.

1 Q. -- location? Is there a phone in the chief
2 court officer's office?

3 A. Yes.

4 Q. Is there also a phone in this office in the
5 lockup?

6 A. Yes.

7 Q. Now, if you went to where -- to the chief court
8 officer's office, you went through that secure
9 door, so you're now in the public space, you're
10 at the location where the probation, the public
11 probation desk is, is there a way to get
12 upstairs from there?

13 A. Yes.

14 Q. Tell me about that.

15 A. It's a public hallway.

16 Q. Okay.

17 A. So if you came out of the chief court
18 officer's office, to the right there's an
19 entrance into the counter area for probation,
20 and then there's a stairwell that brings you
21 back up to the first floor or the second floor.

22 Q. Public stairway.

23 A. Yes, public stairway.

24 Q. Going back to the sallyport. How many vehicles
25 fit there? Now I want you to -- Things of

1 course could have changed. -- take your mind
2 back to be April of 2018. That's a long time
3 ago. So that's what these questions are about,
4 April of 2018.

5 A. Yes.

6 Q. How many vehicles would fit?

7 A. One vehicle.

8 Q. And the sheriff's vans, the vans that came from
9 the sheriff's department that transported people
10 in custody, how big were they?

11 A. They're long. They have extended bumpers on
12 the back. I don't know the length of them. But
13 very long. I think one in and secure the
14 sallyport.

15 Q. Was the fence at the back of the sallyport
16 usually kept opened or closed?

17 A. The gate itself was typically kept open.

18 Q. And why was that?

19 A. Because it had jammed -- I was told when I
20 became chief it had a history of jamming and
21 vans couldn't get out once they were in there,
22 they'd secure the sallyport and the van couldn't
23 get out. Manually.

24 Q. So it was usually kept open.

25 A. Yes.

1 Q. And you told us earlier that the police
2 department is next to the courthouse.

3 A. Yes.

4 Q. We saw that photograph with the police
5 department back there.

6 A. Yes.

7 Q. Now, I'm going to ask you about some practices.
8 Again, I'm asking about the way things were done
9 in April 2018. So you became the chief court
10 officer you said in 2015.

11 A. Yes.

12 Q. So you had been the chief court officer for
13 about three years at that point?

14 A. Yes.

15 Q. So in that time frame, what was the standard
16 practice if a defendant who had been in custody
17 was being released from custody and didn't need
18 to go check in with probation and didn't need to
19 wait for somebody to post bail, was just being
20 released? What was the standard practice?

21 A. Standard practice would be that he was
22 released from the courtroom, from that dock.

23 Q. And how was that -- I'm sorry.

24 A. From the dock in the courtroom.

25 Q. How exactly would that work?

1 A. Typically, they'd bring the custody up, bring
2 his property up with him, the lockup officer
3 would stay in the dock with him, there would be
4 a court officer in the courtroom, the case would
5 be resolved, if it was determined that the
6 custody was to be released, then the court
7 officer would bring the custody out, and
8 depending on what the property bag had in it,
9 they could just hand him his property bag and
10 tell him he was all set to go, or he would have
11 to check in to probation from there, if he had
12 something in there that was unacceptable inside
13 the courthouse, then it would be brought to the
14 front door security, the front door security
15 would hold onto the bag until he did any
16 business he had to do inside the courthouse, in
17 the clerk's office and anything in probation,
18 and when he exited, he received his property.

19 Q. When the person is in the dock, is the person
20 usually in restraints?

21 A. Yes.

22 Q. When in that sequence of events would the
23 restraints be removed?

24 A. He'd be seated inside the dock, the cuffs
25 would be removed, and he'd be escorted out.

1 Q. Before April 2nd of 2018, in your experience,
2 was anybody ever released through the sallyport
3 door?

4 A. Never.

5 Q. Why not?

6 A. Never when I was the chief. And I inquired
7 with prior chiefs when I became chief and then I
8 inquired after this incident occurred.

9 Q. Why would that not be the way that someone would
10 be released?

11 A. Because you'd be releasing them into the
12 police department's parking lot.

13 Q. And what would you want to prevent there?

14 A. Well, typically, there are weapons involved
15 and the police are coming in and out of work.
16 You don't want them to run into a police officer
17 who arrested them early in the day, the night
18 before. Could be running -- could be dropped
19 off by his wife. Could be a bad scene releasing
20 him out to the police department's parking lot.

21 Q. Before April 2nd of 2018, was there in the
22 Newton District Court any written policy or
23 written instructions about how anybody was to be
24 released?

25 A. No. There's a standard in the

1 policy/procedures for Trial Court. It didn't --
2 Each building's different. I supervised in
3 three buildings at the time, and they all
4 release different.

5 Q. And was that because of the physical situation?

6 A. Correct.

7 Q. Before April 2nd, 2018, did you have experience
8 with ICE coming to the Newton District
9 Courthouse?

10 A. Yes.

11 Q. And how often did that happen in Newton?

12 A. Very rare.

13 Q. Would you become -- When it did happen, would
14 you be informed of a detainer?

15 A. Typically, the van arrives with the custody.

16 Q. So from the police station or from the sheriff's
17 department?

18 A. Yes. And copies would be distributed. In
19 the normal circumstance, from my experience and
20 all of my years in the many different courts
21 that I've worked in, typically, the detainer
22 would arrive with the custody.

23 Q. On April 2nd of 2018, when did you arrive in
24 Newton?

25 A. Sometime in the afternoon. I'm not certain

1 of the time. If I was to guess, I'd say
2 2:00 p.m.

3 Q. Okay. So we don't want guesses. But your best
4 estimate, if you can.

5 A. Yeah. Afternoon time. It was in the
6 afternoon I arrived on that day.

7 Q. Okay. And when you arrived, what did you do?

8 A. I came in through that employee entrance in
9 the back, went straight up to first session
10 through the probation department, I believe I
11 dropped off things in my office, then I went
12 straight up to the first session and entered the
13 first session courtroom.

14 Q. And when you went into the first session
15 courtroom, was anything happening there?

16 A. No. They were waiting for the judge to take
17 the bench.

18 Q. And was there any person present?

19 A. Court Officer Mike Walsh was seated in the
20 courthouse.

21 Q. Did you have any conversation with him?

22 A. Yes. I said, hi, Mike, how's everything
23 going. He said, good Chief, we have one case
24 left, it should be done in a few minutes.

25 Q. Okay. And did he give you any more information?

1 A. He said the custody that's downstairs has the
2 ICE detainer, should be coming up, he's going to
3 be released on our case.

4 Q. So he had that information at that point. He
5 gave you that information.

6 A. Correct. Typically, in Newton Court, being
7 such a small setup and not that many custody
8 cases in particular, you would know before you
9 even bring the custody up if he was going to be
10 released.

11 Q. So if the court officers would know before the
12 custody -- before bringing the person in custody
13 up that the person was going or was likely to be
14 released, would that have indications for how
15 property would usually be handled?

16 A. Correct. If you know he's not being
17 released, if he's -- the sheriff's department is
18 not going to be returning to them, then you
19 just -- there would be no property typically
20 coming in from the sheriff's department unless
21 he was going to be released. A new arrest has
22 the property. But you find out in advance if
23 they're asking for bail, and then that would
24 dictate if you bring the property up to custody.

25 Q. How would you find that out if they're asking

1 for bail?

2 A. Typically, the court officer that's assigned
3 to the courtroom would know from speaking to the
4 district attorney, the clerk, the defense
5 attorney.

6 Q. After you spoke with Officer Walsh, what did you
7 do?

8 A. He, he informed me of the case that was --
9 the one case that we had remaining in custody,
10 what was going on, he said the ICE agent's
11 outside for him, outside the courtroom.

12 Q. And then what did you do?

13 A. I went out to the public hallway. There was
14 the associate court officer Tony Caruso at his
15 station, and the ICE agent was leaning up
16 against the wall next to what we saw, he would
17 have been looking just like we're looking at
18 this picture right now. Would be at the
19 courtroom. His back was at the wall next to the
20 security office looking at the courtroom.

21 Q. And did you have conversation with him?

22 A. Yes.

23 Q. Tell us about that conversation.

24 A. I introduced myself as the chief, told him
25 the custody would be coming up soon, I believe

1 the last name was Perez Medina, said he would be
2 coming up soon, said he's going to get released
3 on the charges here, you can go to the
4 sallyport, back in the sallyport if you'd like
5 to pick him up, or you can wait right here, he's
6 going to be released from here. I informed him,
7 when I come in, there was a van in the
8 sallyport. So there's a van in the sallyport,
9 you can go around there, if you'd like, or you
10 can wait here, he'll be released from here.

11 Q. With the van in the sallyport, would ICE have
12 been able to put a vehicle in the sallyport?

13 A. No.

14 Q. What would they have had to do with the vehicle?

15 A. They would either have had to walk to the
16 sallyport, go to a regular parking space.

17 Q. And what was his response when you told him
18 that?

19 A. He said, no, I'm fine, as long as he's coming
20 out from there.

21 Q. And did you tell him anything about where you
22 expected the person would come out?

23 A. I had already told him you could go around
24 or --

25 Q. And would you normally be in uniform?

1 A. Yes. I was.

2 Q. And then after you had that conversation with
3 the ICE officer, what did you do?

4 A. I spoke -- I believe I gave Tony Caruso a
5 bathroom break, so he could use the restroom,
6 just to the left of those doors.

7 Q. So did you cover the equipment while he was
8 doing that?

9 A. Yes. And then I went back down to my office.

10 Q. And when you were down in your office, did you
11 receive a phone call?

12 A. Yes. Approximately 10 minutes after getting
13 back to my office, I got a call from
14 Clerk Okstein.

15 Q. And what did Clerk Okstein say?

16 A. Clerk Okstein said, the custody with the ICE
17 detainer is being released, has to sign papers
18 with probation, but he has several friends in
19 the building, there could be a problem, and any
20 chance you could go out there. I'm literally 20
21 feet away from the probation counter. Hung up
22 the phone.

23 Q. And what --

24 A. There was nobody in there at the counter.
25 There was a young lady Ashley Medeiros working

1 there. And I said, did the ICE custody come out
2 yet to sign papers, and she said he doesn't have
3 to sign papers.

4 Q. And so then what did you do?

5 A. I said, okay, and I headed up to the first
6 floor.

7 Q. And what --

8 A. Through the stairwell.

9 Q. And what did you do? The public stairwell?

10 A. Yes. The ICE agent was leaning against the
11 wall where I had left him 15 minutes earlier. I
12 said to him, where is, where is your custody.
13 He said he hasn't come up yet. And I looked
14 through the glass of the doors and saw that
15 there was nobody on the bench. Called on my
16 radio to the lockup court officer. He didn't
17 respond. Called again. He didn't respond. I
18 went over to the phone at the security desk,
19 called lockup, Officer MacGregor answered the
20 phone.

21 Q. And tell us about your conversation with
22 Officer MacGregor.

23 A. I asked him where the ICE custody was.

24 Q. And what did he answer?

25 A. After a little delay, he said he was

1 released. I think I had asked him twice. Where
2 is he, where is he. And he said I released him
3 out the back.

4 Q. And how did you respond to that?

5 A. I was upset. I said, why would you do
6 something like that. And I hung up the phone
7 quickly, looked at the ICE agent, said he was
8 released out the back.

9 Q. Over the next few days or weeks, did you have
10 further conversation with Officer MacGregor?

11 A. Yes.

12 Q. Did you get varying answers to the question of
13 why?

14 A. Yes.

15 Q. And what he did?

16 A. Yes.

17 Q. Can you tell us what the varying answers were?

18 A. The initial statement he made to me was, I
19 didn't have the detainer in hand.

20 Q. And then did you get a different kind of answer?

21 A. I followed that up with, you knew there was a
22 detainer. He said yeah. And I said, well,
23 could you explain it to me. He said, no. And
24 then we had another conversation at a different
25 time. Could have been the same day. Could have

1 been the morning. But he proceeded to tell me
2 that he didn't bring the person up through the
3 courtroom because the judge was on the bench. I
4 guess to say that he didn't want to disturb the
5 courtroom with the judge on the bench. And then
6 later on in that day, the next day, he said that
7 he had a feeling that the, he had a feeling that
8 the judge wanted the person to be released.

9 Q. And did you have a further conversation, did you
10 have any further conversation with him about
11 that at some point?

12 A. I believe that was it. I gave -- Weeks
13 later, I gave him a written warning for what
14 happened. There was really no discipline to be
15 involved in it. There was nothing in the policy
16 that said he couldn't do what he did. Just had
17 never happened.

18 Q. And then did you prepare a written policy?

19 A. Yes.

20 Q. When was that, to the best of your memory?

21 A. Within a couple of days. I contacted my
22 supervisor immediately after the incident that
23 day, immediately after the ICE agent left and
24 immediately after speaking with
25 Officer MacGregor, I contacted my supervisor

1 and...

2 Q. Who was your supervisor?

3 A. It was Michael McPherson, the regional
4 director of security at the time.

5 Q. And is he now the director of security?

6 A. He's now the director of security.

7 Q. And after you had consultation with
8 Mike McPherson, what was the policy that you
9 prepared?

10 A. We changed it to indicate that nobody gets
11 released out -- through the back of the
12 courthouse, and we adjusted property issues in a
13 little bit more detail. Everybody had known,
14 but didn't have it in writing.

15 Q. And did you at some point show that policy to
16 First Justice Heffernan?

17 A. I believe that I did. Correct.

18 Q. And what did you do with the policy?

19 A. It was posted in the lockup and shared with
20 the regional director of security and eventually
21 the director of security.

22 Q. And then sometime a few weeks later was there
23 some other directive from the higher-ups in the
24 security department about what the policy should
25 be?

1 A. I believe there was. I believe it was a
2 reissuing of a policy that give a broad view,
3 just a general view of how ICE custodies are
4 handled.

5 Q. At some point did you get a directive from
6 Mike McPherson that people should be released
7 out the back?

8 A. He may have said that to me. I don't
9 remember a directive, if he did.

10 Q. Did you think that that would work in Newton, --

11 A. I did not.

12 Q. -- released out back?

13 A. I remember having a conversation with him
14 about it and sharing my thoughts that it
15 wouldn't work in Newton or shouldn't work.

16 Q. And did Newton ultimately adopt a policy of
17 people being released out the back?

18 A. Not when I was chief.

19 Q. Did Officer MacGregor retire sometime
20 thereafter, that you recall?

21 A. Yes. I don't know how much longer. Maybe
22 six months.

23 Q. And do you remember a party for his retirement?

24 A. Yes.

25 Q. Do you remember anybody who you saw there?

1 A. I remember -- Yes.

2 Q. Tell us who you remember that you saw there.

3 A. The party took place, that probation office
4 that I mentioned on the lower level, had an
5 office off to the side of it where they would
6 meet with probationers, if need be, they had a
7 little party in there with cake,
8 Officer Trocchio, Officer MacGregor, of course,
9 Officer Patterson was there, and
10 Attorney Jellinek was there.

11 Q. And have you had any further communication with
12 Officer MacGregor since then?

13 A. Yes. Up until his retirement. I haven't
14 spoken to him since his retirement.

15 Q. Since his retirement.

16 A. No. No.

17 JUDGE FABRICANT: Very good.
18 Thank you. That's all I have.

19 HEARING OFFICER: Mr. Hoopes.

20 MR. HOOPES: Thank you, Your
21 Honor.

22 CROSS-EXAMINATION

23 BY MR. HOOPES:

24 Q. Good morning, Mr. Noe.

25 A. Good morning.

1 Q. As you know, I'm Tom Hoopes, and I represent
2 Judge Joseph.

3 So you said that you had been
4 at Newton or supervising Newton for roughly
5 three years prior to this incident --

6 A. Yes.

7 Q. -- of April 2nd, 2018; right?

8 A. Yes, I believe so.

9 Q. And you characterized the frequency of ICE
10 agents coming to the Newton District Court to
11 make arrests as infrequent.

12 A. Yes.

13 Q. And would it be fair to say that that may have
14 been one, two, three times a year? Would that
15 be an accurate number?

16 A. I think so.

17 Q. Now, from 2015, '16, and '17, there was no real
18 court policy giving you direction on how to
19 interact with ICE. Would that be fair to say?

20 A. There had been policies throughout the years
21 in reference to detainers and how court officers
22 deal -- it changed a lot. And typically, I did
23 everything the same way that I had always done.

24 Q. Okay. And there was a case that came down from
25 the Supreme Judicial Court called

1 Commonwealth versus Lunn in the summer of 2017
2 that addressed this issue. Do you recall that?
3 Were you given notice of that case?

4 A. I could have been. I don't recall it off the
5 top of my head.

6 Q. And then there was a policy that was issued in
7 November of 2017, it was called the Lunn policy.
8 Were you notified of that policy, specific
9 policy, not the case, the policy, by anybody?

10 A. I don't recall.

11 Q. So if you could look with me at -- in your
12 book.

13 A. Okay.

14 Q. It's Tab B. And there's a document there called
15 the Lunn policy, executive office transmittal,
16 dated November 10th of 2017, is what began.

17 MR. HOOPES: Sorry. I'm going
18 to let Giana...

19 (PAUSE)

20 Q. So looking at that, can you tell us, had you
21 ever seen that policy before today?

22 A. I may have. It doesn't look familiar to me
23 but...

24 Q. Okay. And so if you, if you can -- The first
25 page is APP 005.

1 A. Yes.

2 Q. If you can turn to me -- with me to APP 007.

3 And about two-thirds of the way down, there's --
4 halfway down there's a Section III Roman Numeral
5 III, that says, DHS officials taking custody of
6 individuals at a courthouse. Do you see that?

7 A. Yes.

8 Q. And three paragraphs down there's a capital A.
9 It says, individuals over whom the Trial Court
10 has custody.

11 A. Yes.

12 Q. So if you and I can read that together. I'll
13 read it out loud.

14 A. Okay.

15 Q. Consistent with Chapter 2, Sections XIV and XV,
16 of the Court Officer Manual (current edition),
17 when an individual who was brought into court in
18 custody is subject to release after his or her
19 court proceeding, court security personnel shall
20 process that individual out of lockup in the
21 normal course regardless of whether the
22 individual is subject to a civil immigration
23 detainer or warrant.

24 Next paragraph. If, during the
25 processing of an individual subject to release

1 out of the courthouse, a DHS official is present
2 in the courthouse and seeks admission into the
3 courthouse's holding cell area in order to take
4 custody of the individual pursuant to an
5 immigration detainer or warrant, court officers
6 shall permit the DHS official to enter the
7 holding cell area in order to take custody of
8 the individual once Trial Court security
9 personnel have finished processing that
10 individual out of the court security personnel's
11 custody, if a security department supervisor
12 supervisor determines that the DHS official
13 would otherwise take custody of the individual
14 inside or immediately outside of the courthouse.

15 So let's stop there. The first
16 paragraph, Consistent with Chapter 2, Sections
17 XIV and XV of the Court Officer Manual. So you
18 understand -- You know the manual that you're
19 referring to; right?

20 A. Yes.

21 Q. And that's sort of a general manual for court
22 officers; correct?

23 A. Yes.

24 Q. And there's a specific section that it's
25 referring to there that, in subsections XIV and

1 XV, that give direction as to exactly how
2 releases are supposed to be; correct?

3 A. Yes.

4 Q. So if the Hearing Officer will permit, I'm going
5 to approach you and show you one page from that,
6 which at the bottom of 2-9. And in your
7 experience as a court officer, had you reviewed
8 that Court Officer Manual at some point?

9 A. Yes.

10 Q. And it's pretty clear in XIV.B., Prisoners and
11 detainees will be released only from the lockup
12 or holding room unless ordered by the court.
13 Correct?

14 A. Yes.

15 Q. Court officers in the lockup will determine if
16 there are no holds on the prisoner/detainee and
17 is properly identified before the person is
18 released. And just to be clear, that process of
19 clearing holds, in other words, somebody wants
20 the prisoner, that would typically take place
21 downstairs in the lockup.

22 A. Yes.

23 Q. And in D, if the detainee comes from the
24 sheriff's department to the court, from the
25 sheriff's department, House of Correction, or

1 another correctional facility, the court officer
2 in the lockup must call all the records of the
3 department of the facility to determine if there
4 are any other holds before releasing the
5 detainee. Correct?

6 A. Yes.

7 Q. And then in XV, court officers releasing the
8 prisoner that is posting his or her own bail
9 will do the following: They're going to verify
10 the person who's posting the bail, verify the
11 accurate amount. Number 3, verify that the
12 court officer will escort the prisoner out. Is
13 that correct?

14 A. Yes.

15 Q. Now, so is that what they're referring here in
16 the Lunn policy in that first paragraph, this
17 XIV and XV?

18 A. Yes.

19 MR. HOOPES: I offer this page,
20 if I may. If there's any objection?

21 JUDGE FABRICANT: No objection.

22 HEARING OFFICER. Yes. It's
23 received.

24 MR. HOOPES: B1 -- Number 1.
25

EXHIBIT 1

(DOCUMENT MARKED AS EXHIBIT 1)

Q. So the second paragraph that we read, which says that, if the DHS official is there, right, again, going back to your stipulation, okay, where it says 007, that page, --

A. Yes.

Q. -- where it says, if, during the processing of an individual subject to release out of the courthouse, a DHS official is present in the courthouse... That was happening on April 2nd; correct?

A. Yes.

Q. And if we go to the next paragraph on 008, it says, before being granted entry into the holding cell area, DHS officials must present credentials and a copy of the detainer and civil immigration arrest warrant to court security personnel, sign in to the holding cell area, and surrender their weapons. Correct?

A. Yes.

Q. And that would have been, they would have to present their identification to either to you or one of your staff who was there; correct?

A. Yes.

1 Q. And then, lastly, it says, to the extent
2 possible, court security personnel should
3 require that DHS officials transport any
4 individuals taken into custody through the
5 prisoner transport entrance and avoid taking
6 individuals through the public areas of the
7 courthouse. Correct?

8 A. Yes.

9 Q. So that's different than what you were
10 describing for us, though; correct?

11 A. Yes.

12 Q. So you were aware of the general policy for
13 court officers on April 2nd, 2018, but you don't
14 recall being aware of this Lunn policy.

15 A. Not off the top of my head, I don't. Sure I
16 saw it at some point.

17 Q. And so would it be fair to say that there were
18 communications from above you, supervisors and
19 supervisors' supervisors, at various times --

20 A. Oh, yes.

21 Q. -- as to various policies and various policy
22 changes?

23 A. Yes.

24 Q. And was there ever any particular training done
25 with regard to this new policy, that you can

1 recall?

2 A. No, I don't recall any training.

3 Q. So on that day of April 2nd, you recall seeing
4 the ICE officer who was there; correct?

5 A. Yes.

6 Q. And you said to the ICE officer -- you
7 identified yourself.

8 A. Yes.

9 Q. And you knew he was there for Medina Perez;
10 right?

11 A. Yes.

12 Q. The person down in the lockup at that point;
13 right?

14 A. Yes.

15 Q. And you knew from your employee, Mike Walsh, who
16 was what they call per diem, --

17 A. Yes.

18 Q. -- that there was an expectation he was going to
19 be released; right?

20 A. Yes.

21 Q. And there was an expectation he was going to be
22 released into ICE custody.

23 A. Yes.

24 Q. And it's your testimony that you offered the ICE
25 officer the opportunity to go down to the

1 sallyport; is that correct?

2 A. Yes.

3 Q. And he said, if he's coming out the front door,
4 I'm all set.

5 A. Yes.

6 Q. And sitting here today, do you have any
7 knowledge one way or another whether he had
8 spoken to the ICE officer by Clerk Okstein
9 before you arrived?

10 A. I had heard that since.

11 Q. But at that time, you didn't --

12 A. At that time, I had no knowledge of that.

13 Q. And to your recollection, that's what the ICE
14 officer said, I'm all set, and just stayed where
15 he was; --

16 A. Yes.

17 Q. -- is that correct?

18 Did Michael Walsh, the per diem, say anything to
19 you about the ICE officer actually making a
20 request, being able to go down into the holding
21 cell?

22 A. No.

23 Q. So you, after that conversation, went back
24 downstairs, and then you got a call from
25 Clerk Okstein; --

1 A. Yes.

2 Q. -- right?

3 A. (Witness nods head).

4 Q. And that the ICE agent was looking for
5 assistance because there were a number of
6 people, there were friends of Medina Perez.

7 A. Yes.

8 Q. And you went out to probation, probation said
9 that it wasn't needed to report to probation,
10 and you went upstairs.

11 A. Correct.

12 Q. And spoke to the ICE agent.

13 A. Yes.

14 Q. And then had the conversation with MacGregor
15 over your phone transmission; --

16 A. Yes.

17 Q. -- is that right?

18 So can you tell us about, between that
19 conversation that you had on the phone and the
20 next couple of days, how many conversations did
21 you have with MacGregor one on one about this?

22 A. I would guess that we probably had three. I
23 know we had one that day, I believe we had
24 another one that -- a little while after the
25 initial conversation, and then in the morning we

1 went over it again.

2 Q. And so how long were these conversations, if you
3 just estimate?

4 A. Short conversations. He answered my
5 questions quickly.

6 Q. And so, a minute, two minutes, five minutes?

7 A. Two minutes.

8 Q. Okay.

9 A. Two minutes, maybe.

10 Q. And in any one of these three conversations did
11 he ever mention to you the name David Jellinek?

12 A. No.

13 Q. Did he ever say to you that David Jellinek was
14 the person who caused the release to happen?

15 A. No.

16 Q. Did he ever say to you that David Jellinek was
17 the person who planned the release with him?

18 A. No.

19 Q. So now you know David Jellinek from being around
20 the court.

21 A. Yes.

22 Q. And you had seen him there from time to time in
23 his capacity as a bar advocate.

24 A. Almost daily, I believe.

25 Q. Almost daily.

1 A. Right.

2 Q. And so would you say that you had a business --
3 casual relationship or business friendship with
4 him or just business contact relationship?

5 A. Business contact, I would say.

6 Q. And from the time you walked into the courthouse
7 until the time you called MacGregor on the
8 phone, did David Jellinek ever tell you that he
9 was planning to have MacGregor release
10 Medina Perez out the back?

11 A. No.

12 Q. Did you see David Jellinek there the next day?

13 A. I believe it was the next day I saw him.

14 Q. And did David Jellinek come up to you and say, I
15 helped MacGregor, directed MacGregor to release
16 him out the back?

17 A. No.

18 Q. Did he ever say I had the judge's blessing to
19 release him out the back?

20 A. No, he did not.

21 Q. Did you speak to Judge Mary Beth Heffernan at
22 some point right after that?

23 A. Yes. I don't believe it was that day. I
24 don't think she was in that day.

25 Q. And so the next day you spoke to her?

1 A. Shortly after, whether it was the next day or
2 the day after that.

3 Q. And do you recall what that conversation was,
4 what you said to her, what she said back to you?

5 A. Something to the effect of, what the hell
6 happened.

7 Q. You said that or she said that?

8 A. She said that to me.

9 Q. What did you say back to her?

10 A. I told her what I knew happened and I
11 believe --

12 Q. That's what you just told us.

13 A. Yes. Yes.

14 Q. And so the name David Jellinek never came out of
15 her mouth or your mouth to her.

16 A. I don't believe it did.

17 Q. So this party that was for MacGregor, --

18 A. Yes.

19 Q. -- was that in the spring of 2019?

20 A. I believe so.

21 Q. Maybe April of 2019?

22 A. Could have been six months to a year after
23 the incident.

24 Q. In the courthouse.

25 A. Yes.

1 Q. In the basement?

2 A. In the probation.

3 Q. In the probation department.

4 A. Lower level.

5 Q. Attended by how many people?

6 A. I believe there was five of us there.

7 Q. Four court officers and David Jellinek.

8 A. Yes. Some people may have came in to wish
9 him well throughout, grab a piece of cake at
10 some point. But as far as the main group that
11 was there, the court officers and
12 Attorney Jellinek.

13 Q. Can you estimate today how long David Jellinek
14 was there at the party?

15 A. I don't know. I was only in the party for a
16 few minutes.

17 Q. Okay. And while you were there for a few
18 minutes, did you see David Jellinek go over and
19 shake MacGregor's hand?

20 A. I believe everybody did. I don't have a
21 clear memory of them shaking hands.

22 Q. Now, special counsel asked you some questions
23 about a policy that you created after this.

24 A. Yes.

25 Q. So in other words, this policy was your practice

1 of releasing out the front.

2 A. The procedures that we used that were handed
3 down to me.

4 Q. Were handed down to you.

5 A. Yes.

6 Q. So you followed the policies that had been
7 handed down to you.

8 A. Yes.

9 Q. So this Lunn policy, if that wasn't communicated
10 to you by your supervisor, Mr. McPherson, was
11 that ever communicated or addressed to you by
12 Presiding Justice Mary Beth Heffernan?

13 A. No.

14 Q. It was never discussed.

15 A. Policy to release custodies?

16 Q. Yes.

17 A. No, it was never discussed.

18 Q. Specifically to release ICE custodies.

19 A. No, never discussed.

20 MR. HOOPES: So if I can
21 approach the witness.

22 Q. So I'm going to show you this. I ask you to
23 look at that. Can you identify what that
24 document is?

25 A. Yes.

1 Q. And is that a document that you prepared?

2 A. Yes.

3 MR. HOOPES: So if I can offer
4 this as Exhibit 2.

5 Q. Take a minute to get through it.

6 HEARING OFFICER: Any
7 objection?

8 JUDGE FABRICANT: No objection.

9 HEARING OFFICER: Exhibit 2 is
10 received.

11 EXHIBIT 2

12 (DOCUMENT MARKED AS EXHIBIT 2)

13 Q. So can you explain to us how you prepared this
14 document?

15 A. Yes. We had nothing in writing specific to
16 the Newton courthouse, so I put that in writing
17 so there would be no confusion going forward.

18 Q. And is that a document that you prepared by
19 yourself or was that a document you prepared in
20 consultation with Presiding Justice Heffernan?

21 A. I prepared it myself. I believe I gave her a
22 copy as well as Regional Director McPherson.

23 Q. So reading it out loud. It says, Effective
24 Immediately. All custodies of the Newton Court
25 that are scheduled to be released will be

1 released out the front door of the courthouse
2 only, and in all caps. They will be escorted to
3 the lobby from the courtroom or through the
4 Probation Department. If necessary, property
5 will be given back outside of the front door
6 security station. Chief Noe, April 4th, 2018.
7 Am I reading that correctly?

8 A. Yes.

9 Q. So you issued this two days after April 2.

10 A. Yes.

11 Q. And you'd agree with me that what you have here
12 is not what's provided for in the Lunn policy.

13 A. Yes.

14 Q. Okay. And did you pass this up the chain to --

15 A. Yes.

16 Q. Okay. And to Mr. McPherson?

17 A. Yes.

18 Q. And did he agree with this?

19 A. After we talked, he agreed with it.

20 Q. Okay. And did he accept this or was there a
21 modification later?

22 A. He understood. And we had to have a
23 conversation about it, yes.

24 Q. Once you explained it to him.

25 A. Yes.

1 Q. Okay. So from that point on -- Your testimony
2 is, from that point on, this was the policy for
3 the Newton District Court.

4 A. Until I left, yes.

5 Q. Until you left. Regardless of whatever Lunn
6 said.

7 A. Yes.

8 Q. So you've talked a little bit about the doors,
9 you know, with badges. So are you familiar with
10 reports on use of a, use of a badge during a
11 particular day, a badge history report?

12 A. Yes.

13 Q. You've seen one of those? So if I was to show
14 you a history report for that day of April 2nd,
15 could you tell us whether you can identify that
16 as a history report like you've seen before?

17 A. Yes. Thank you.

18 Q. And is it fair to say, -- take your time -- is
19 that a history report for that day, April 2nd?

20 A. Yes, it is.

21 MR. HOOPES: If I could offer
22 this, please. Number 3.

23 JUDGE FABRICANT: No objection.

24 HEARING OFFICER. Exhibit 3 is
25 received.

EXHIBIT 3

(DOCUMENT MARKED AS EXHIBIT 3)

Q. And so that report would show by and large, with restrictions at the top, does that include all events, does it include all events from all devices? Subject to that caveat, this shows all access, use of card, to go through doors that require the badge that day.

A. Yes.

Q. And so somebody, like Officer MacGregor, would have had an access card; correct?

A. Yes.

Q. And his name would appear on the far right-hand column; correct?

A. Yes.

Q. So if we wanted to check out all of Officer MacGregor's entrances and exits using the badge for that day, we simply need to look on the right side; correct?

A. Yes.

Q. And where it says, in the column to the left of that, it says device, that's a description of the area that is accessed; is that correct?

A. Yes.

Q. And to the left of that, it says event, access

1 granted, and then to the left of that there's a
2 column that says time; is that right?

3 A. Yes.

4 Q. Thank you.

5 So also -- So I'm going to show you, --

6 MR. HOOPES: I'll get you a
7 copy.

8 Q. -- I'm going to show you a detainee
9 accountability login. Is that a document that
10 you actually pulled for the day?

11 A. This is the --

12 Q. April 2nd?

13 A. Yes.

14 Q. And that is a, that's a document that logs in
15 who comes in through the back door, brought in
16 to custody?

17 A. This is the custody lockup, yes.

18 MR. HOOPES: So I'd offer this
19 as the next exhibit.

20 JUDGE FABRICANT: No objection.

21 HEARING OFFICER: Okay.

22 Exhibit 4 is received.

23 EXHIBIT 4

24 (DOCUMENT MARKED AS EXHIBIT 4)

25 Q. So this is a sheet that the court officer who's

1 downstairs in the lockup is supposed to complete
2 regarding prisoners coming in and prisoners
3 leaving; is that correct?

4 A. Yes.

5 Q. And at the top it says, detainee accountability
6 daily login for the Newton District Court. And
7 then officer -- Do you recognize this
8 handwriting? That WM?

9 A. That's Wesley MacGregor.

10 Q. And then it says, to the right it says Monday,
11 April 2, 2018; correct?

12 A. Yes.

13 Q. And the first name in there is a woman by the
14 name of Pamela Hodgdon; correct?

15 A. Yes.

16 Q. Identification that says F for female, and then
17 it says Newton. Is that B-O-P? B-O-P?

18 A. I can't tell what those initials are. Newton
19 PD, is what I believe.

20 Q. Okay. And the next column is property received.
21 There's a checkmark.

22 A. Yes.

23 Q. And then there's a docket and the holds. And
24 then there's at disposition ROR. Released on
25 recognizance?

1 A. Yes.

2 Q. And arrival time is 9:00?

3 A. Yes.

4 Q. And departure time is 3:30?

5 A. Yes.

6 Q. So she actually, according to this sheet, didn't
7 leave downstairs lockup until 3:30; right?

8 A. Correct.

9 Q. And the column next to it says property return,
10 Y. Meaning, yes?

11 A. Yes.

12 Q. And then the next person on there is
13 Medina Perez. But before we get there, the
14 third person is Bruce Demelo, who comes in at
15 9:45 and leaves at about 1:50?

16 A. Yes.

17 Q. So that would be even before you arrived.

18 A. I believe so.

19 Q. And then the last person is Crystal Cosme, who
20 arrived at about 10:10 and she leaves at about
21 3:30; correct?

22 Q. Now, going back to Jose Medina Perez. M for
23 male. Police department, comes in from Newton.
24 Property received, there's a checkmark.
25 Correct?

1 A. Yes.

2 Q. Which should mean that he had property; correct?

3 A. Correct.

4 Q. And then disposition, released, came in at 9:05,
5 departure time, 3:00?

6 A. Yes.

7 Q. And property returned has just got right there
8 with I believe a dash; correct?

9 A. Right.

10 MR. HOOPES: Can I just have a
11 moment, Your Honor?

12 (PAUSE)

13 Thank you very much. Those are
14 all the questions I have.

15 HEARING OFFICER: Any redirect?

16 JUDGE FABRICANT: Just a couple
17 of things, if I may.

18 REDIRECT EXAMINATION

19 BY JUDGE FABRICANT:

20 Q. You just went through with Mr. Hoopes the Lunn
21 policy. And he took you through it, pointed out
22 some ways that it might differ from what you
23 were doing.

24 A. Correct.

25 Q. Does that change your memory of what was normal

1 in Newton?

2 A. No.

3 Q. Did you at some point in your conversation with
4 the ICE officer learn that there was a second
5 ICE officer somewhere?

6 A. No. I assumed that there was. I never -- He
7 never mentioned a fellow officer. I assumed
8 he's outside in the --

9 Q. But you didn't see him. You weren't told.

10 A. No. They've always gone in pairs. So I've
11 never seen one by themselves.

12 Q. And when you spoke with Judge Heffernan the next
13 day or the day after and, as you described it,
14 she said what the hell happened, what
15 information did you give her?

16 A. I discussed what I had learned through, in
17 that day, interviewing different people, before
18 I wrote my report on the incident. I spoke with
19 Officer Walsh, I spoke to, spoke to District
20 Attorney Jurgens, I believe I spoke to Clerk
21 Okstein.

22 Q. Did you have any information about what had
23 occurred either on or off the record between the
24 judge and counsel in the courtroom?

25 A. District Attorney, District Attorney Jurgens

1 recalled their conversation at the side bar.

2 Q. And what did she tell you about it?

3 A. She said that Attorney Jellinek requested
4 that custody be released so he can get an
5 immigration attorney.

6 Q. And did she tell you more about that?

7 A. She said -- The district attorney told me
8 that she stated that I don't know how that's
9 going to happen, ICE is right there waiting for
10 him.

11 Q. After this event, did you ever at any time talk
12 with David Jellinek about this event?

13 A. I believe the next day when -- the next day
14 or the day after, I talked to him, I still
15 don't -- I think I said to him I still don't
16 understand what occurred. He shrugged his
17 shoulders.

18 Q. Did he ever at any time tell you anything about
19 the event?

20 A. No.

21 JUDGE FABRICANT: I have
22 nothing further.

23 MR. HOOPES: Neither do I.
24 Thank you.

25 HEARING OFFICER: Thank you.

1 You're complete for today. Thank you very much,
2 sir.

3 If you could call your next
4 witness.

5 JUDGE FABRICANT: Thank you.
6 May the witness be excused?

7 HEARING OFFICER: Yes. Thank
8 you.

9 JUDGE FABRICANT: And we had
10 asked the next witness to come at 11:00. So I'm
11 not sure whether she's here yet.

12 HEARING OFFICER: We can take
13 our morning break now.

14 JUDGE FABRICANT: I've just
15 been told she'll be here at 10:45. So that
16 would work perfectly.

17 HEARING OFFICER: Okay. So
18 we'll resume at 10:45.

19 JUDGE FABRICANT: Thank you.

20 HEARING OFFICER: Thank you.

21 (Recess taken at 10:31 a.m.

22 Proceedings resumed at

23 11:01 a.m.)

24 JUDGE FABRICANT: Commission
25 calls Judge Mary Elizabeth Heffernan.

1 HEARING OFFICER: Thank you.

2

3 HONORABLE MARY ELIZABETH HEFFERNAN,
4 SWORN

5 JUDGE FABRICANT: Mr. McInerney,
6 I wonder if your microphone is on, because that
7 was very soft.

8 HEARING OFFICER: Now it is.

9 JUDGE FABRICANT: That's
10 better.

11 DIRECT EXAMINATION

12 BY JUDGE FABRICANT:

13 Q. Good morning.

14 A. Good morning to you.

15 Q. Would you tell us your name, please.

16 A. Certainly. Mary Elizabeth Heffernan.

17 Q. Great. And you just did exactly what I was
18 going to suggest, just bringing the microphone
19 close. Works better that way.

20 Would you tell us your
21 position.

22 A. Yes. I'm the First Justice of the
23 Newton District Court and the Regional
24 Administrative Justice for Region 4 of the
25 District Court.

1 Q. And is the Regional Administrative Justice role
2 new?

3 A. Yes. The last two years.

4 Q. Would you just go through your professional
5 background, please.

6 A. Certainly. I worked at -- I clerked in this
7 building at the Appeals Court for one year after
8 law school.

9 Q. That is before the Appeals Court moved over --

10 A. Yes.

11 Q. -- out of --

12 A. I'm that old, yes. And I went to the
13 law firm Palmer & Dodge after that, district
14 attorney's office in Middlesex County, ran the
15 Massachusetts District Attorneys' Association
16 for some years, went over to Care Group
17 Healthcare system, Beth Israel Medical Center in
18 the general counsel's office, and then worked in
19 the cabinet of Governor Patrick before I was
20 appointed to the bench.

21 Q. And when were you appointed to the bench?

22 A. February 6, 2013.

23 Q. And when did you become the First Justice of the
24 Newton District Court?

25 A. I was appointed acting in 2015. I believe

1 2016 is when I was appointed permanently.

2 Q. Can you explain to us the role of the
3 First Justice?

4 A. The First Justice is the titular head of the
5 court. You know, we have different departments,
6 the probation department, the clerk's
7 department, the maintenance department,
8 security. And the First Justice is the person
9 who brings those folks together, sets the tone
10 for the courthouse, and hopefully manages things
11 so that the business of the courthouse can get
12 done.

13 Q. And is there a First Justice for each division
14 of the District Court?

15 A. Yes.

16 Q. And does "division" refer to, generally, most
17 instances, a particular courthouse?

18 A. Yes.

19 Q. Do you know how many courthouses -- how many
20 divisions there are in District Court?

21 A. I thought there were 62, but I don't -- Don't
22 hold me to that, please.

23 Q. And as the First Justice, you said you're the
24 titular head of the court, you have those
25 administrative roles as you've described. Do

1 you have any disciplinary authority over other
2 judges?

3 A. I do not.

4 Q. Do you view your role as First Justice as
5 including passing on information to the
6 Regional Administrative Justice or to the
7 Chief Justice that, in your view, they should
8 have?

9 A. It is.

10 Q. And what has been your practice during your
11 years as a judge, that's now about 12 years,
12 what has been your practice regarding recording
13 of courtroom proceedings?

14 A. Everything is recorded. We've switched
15 from -- We've switched over to the FTR service
16 right now. We had an old service before. But
17 everything -- Every hearing in Newton is
18 included, including the clerk magistrates'
19 hearing.

20 Q. And the old system that you had, was that JAVS?

21 A. It was.

22 Q. And are you aware of a rule regarding recording?

23 A. I believe there is a rule regarding
24 recording. I learned it anecdotally and, also,
25 from being in the courts, I learned that you

1 never turn the tape off.

2 Q. I'm going to ask you to look at the screen. And
3 you have a binder in front of you. This is
4 Appendix K. Look either way. Whatever is
5 easier for you. Look at Page 122 in the binder,
6 you'll see what's on the screen. Is that the
7 rule that you're referring to?

8 A. Yes.

9 Q. And does it have -- Does it in general require
10 recording of courtroom proceedings?

11 A. My understanding is, yes.

12 Q. And are there some exceptions, some kinds of
13 things that are not required to be recorded?

14 A. I believe it says certain cases that are
15 impounded, sealed, juvenile matters.

16 Q. And some clerk functions, perhaps?

17 A. Yes.

18 Q. So the call of the list, perhaps?

19 A. Yes.

20 Q. And if you look at Page 123, and go down just
21 before that the bold that says see text, just
22 before that, does this tell you when that rule
23 took effect?

24 A. It does.

25 Q. And when did it take effect?

1 A. It was adopted on December 31st, 1987, became
2 effective February 1, 1988.

3 Q. In your years as a judge, when you were a new
4 judge, do you recall any training or advice or
5 communication with more experienced judges about
6 recording?

7 A. Yes. It was anecdotally told that you should
8 never go off the record.

9 Q. Was there any formal training about that?

10 A. I don't recall formal training, but it was
11 certainly engrained in new judges.

12 Q. And in the course of your 12 years, have you
13 ever turned off the recording or directed the
14 clerk to do so?

15 A. I have not.

16 Q. And are you aware of any legitimate reason to do
17 so?

18 A. I do not.

19 Q. In the Newton District Court, you said you're
20 the First Justice and you have been effectively
21 since 2015. Do you sit there every day or some
22 days?

23 A. I was sitting there every day, up until I
24 became the Regional Administrative Justice, and
25 I had moved. Our chief likes us to do that. So

1 I go around my region often. But most of my
2 time is in Newton, yes.

3 Q. So putting your mind back to 2018, which I
4 realize is seven years ago. During that time
5 period, were you sitting there every day or most
6 days?

7 A. I was there Monday, Tuesday, Wednesday,
8 Friday, as I presided over the Quincy drug court
9 on Thursdays.

10 Q. So on Thursday you wouldn't be there. But
11 generally, if there was something taking you out
12 for some reason, you would be there four days a
13 week.

14 A. Yes.

15 Q. And when you were there, which courtroom would
16 you sit in?

17 A. First session. Except for Wednesdays, which
18 was the jury day in Newton. So that was the
19 second session upstairs.

20 Q. And would you sit in the second session on those
21 days?

22 A. Yes.

23 Q. If there was another -- Was there usually
24 another judge in the building?

25 A. When I was there, sometimes, yes. Yes,

1 sometimes.

2 Q. If there was another judge there, would you
3 refer to that as a visiting judge?

4 A. Uh-huh.

5 Q. Where would that person usually sit?

6 A. Upstairs in the judge's lobby on the second
7 floor.

8 Q. And if you were doing a jury trial upstairs, and
9 there was another judge, then where --

10 A. I would be in my lobby down on the first
11 floor.

12 Q. Even though you might be doing a jury trial --

13 A. Yes.

14 Q. -- on the second floor. So the two judges might
15 be sitting in opposite lobbies but sitting in
16 different courtrooms?

17 A. Yes.

18 Q. During -- Again, putting your mind back to
19 April of 2018 up to April 2nd of 2018. What was
20 the usual practice in your experience if a
21 person came into the courthouse in custody and
22 was then released without the need to post bail
23 and without any probation conditions?

24 A. They could either leave right from the dock,
25 which you have displayed there, or if they

1 needed -- if they didn't have to sign conditions
2 or maybe they had some property downstairs, they
3 could go downstairs and retrieve that.

4 Q. So those two -- Those were two approaches that
5 might occur?

6 A. Yes.

7 Q. And had you sometimes seen a person get their
8 property without going back downstairs?

9 A. Yes.

10 Q. How would that happen?

11 A. They would come up with it, or the court
12 officer would bring their property, and they
13 would be released right from the court, from the
14 dock, and go out the front door of the
15 courthouse.

16 Q. And you're pointing to what's on the screen,
17 which is, I believe 508. Why don't we take a
18 look at 509 as well. That just gives you a
19 different angle.

20 A. Yes.

21 Q. Can you see the dock in that one as well?

22 A. I can.

23 Q. And does that show you where the judge, the
24 judge's bench is and the clerk's bench and the
25 tables that the lawyers would use?

1 A. It does.

2 Q. Again, back up to April 2nd of 2018. So, again,
3 a long time ago, but I ask you to put your mind
4 back there. Were there occasions when you had
5 seen ICE come to court?

6 A. Yes.

7 Q. And did you have a practice regarding what
8 should happen when ICE came to court?

9 A. My practice was, with any law enforcement, I
10 ask them to, if they did not have some sort of a
11 warrant, to sit outside and wait or check in
12 with the court officers.

13 Q. And when you say "outside" --

14 A. Not outside the courthouse. In the lobby.
15 We have a generalist lobby. And I would ask --
16 It was a practice that was instituted because,
17 in our second session, which I don't think you
18 have a picture of, it's a very narrow courtroom,
19 as well as the first session is a large
20 courtroom, it's disruptive if law enforcement
21 effectuates service in the courtroom while the
22 service was going on. That happened on two
23 occasions. Not with ICE, but with other law
24 enforcement officers.

25 Q. And so you would ask that they be directed to

1 wait outside the courtroom?

2 A. Yes.

3 Q. And where would they generally wait?

4 A. ICE would wait on the first floor lobby.

5 Q. And "lobby" gets used in two ways.

6 A. In the lobby of the courthouse. Not the
7 judge's lobby. They would wait right outside of
8 the courtroom.

9 Q. And sometime after April 2nd of 2018 did you
10 change that practice?

11 A. It was confusing at the time when we were
12 there. I think a lot of us were confused about
13 what to do. And I understand that more guidance
14 came down after that, yes.

15 Q. Okay. After April 2nd, --

16 A. Yes.

17 Q. -- did you have some e-mail communication with
18 Chief Justice Dawley regarding that practice?

19 A. Yes.

20 Q. And did he suggest that you consult with a
21 lawyer in his office?

22 A. Yes.

23 Q. And did you do that?

24 A. I did.

25 Q. And we're going to come back to that e-mail.

1 On April 2nd, a Monday, April 2nd of 2018, were
2 you at the Newton District Courthouse?

3 A. I was not. I was at a funeral.

4 Q. And wouldn't be answering your cell phone?

5 A. I was not answering my cell phone.

6 Q. Because you were at a funeral?

7 A. Yes.

8 Q. The next day, April 3rd, were you at the
9 Newton District Courthouse?

10 A. Yes.

11 Q. Did anyone come to talk to you about something
12 on April 2nd?

13 A. Attorney David Jellinek did.

14 Q. And can you tell us about that? Where, when,
15 how long? Tell us about that.

16 A. I also have a drug court in the
17 Newton District Court. Attorney Jellinek was
18 one of the attorneys that was in the roundtable
19 that we used to have before the session. And we
20 were having our roundtable upstairs in the
21 second session at the witness table. And after
22 the meeting, he told me that something had
23 occurred in the courthouse yesterday.

24 Q. And did you go somewhere to talk about it or did
25 you stay --

1 A. No. We were right there.

2 Q. And did he tell you more than that?

3 A. He told me that he had a client whose
4 identity was in question, that had a fugitive
5 from justice warrant out of Pennsylvania, that
6 he used the services of an interpreter to go
7 downstairs with his client to talk about
8 clearing up the warrant, because it appeared to
9 be cleared up during the session.

10 Q. Did he say anything about going off the record?

11 A. No.

12 Q. And did he say that he requested that the judge
13 allow him to go downstairs with the defendant?

14 A. I believe he mentioned that, yes.

15 Q. And did he say anything about his conversation
16 with the judge?

17 A. He did not.

18 Q. Did he say why he was telling you this?

19 A. He was -- No, he didn't say why, but I think
20 he was letting me know that it was an incident
21 that he brought to my attention.

22 Q. Did you say anything?

23 A. Probably. I don't remember, though.

24 Q. Had you been told anything by anyone else before
25 you talked with him?

1 A. No.

2 Q. And how did the conversation end?

3 A. I said thank you for letting me know and I
4 went downstairs.

5 Q. That day or the next day, did the Chief Court
6 Officer come to see you?

7 A. I think that day he did, yes.

8 Q. And what did he tell you?

9 A. He told me that someone had gone out the back
10 door of the courthouse and ICE was waiting in
11 the front and they were not happy.

12 Q. Did he show you a memo regarding where
13 defendants should be released?

14 A. Yes.

15 Q. And were you called upon to make any sort of
16 decision about that memo?

17 A. We discussed it, and I said you better post
18 it clearly in the first floor lobby for the
19 public to see.

20 Q. And that day or the next day did Clerk Okstein
21 come to see you?

22 A. Yes. That day, also.

23 Q. And tell us about that conversation.

24 A. The clerk had listened to the tape, and he
25 told me that there were several, he thought,

1 minutes that were -- that the judge had gone off
2 the tape, and he -- That's all I recall him
3 telling me.

4 Q. Okay. Did he say anything about the defendant
5 and his attorney going downstairs?

6 A. He did not, that I recall.

7 Q. On Wednesday, the 4th, so we're now -- April 2nd
8 was a Monday. So Wednesday, the 4th, was
9 Judge Joseph sitting in Newton at the end?

10 A. I think so.

11 Q. At this time was she sitting in the second
12 session?

13 A. Uh-huh.

14 Q. Excuse me. Second session upstairs?

15 A. Yes.

16 Q. Did you go to see her in the lobby?

17 A. Yes.

18 Q. And did you have a conversation with her?

19 A. Yes.

20 Q. Tell us about that conversation.

21 A. My recollection is that I asked her what
22 Attorney Jellinek had told me. I said what
23 happened. And as was -- at the time, it was
24 confusing about policies or practices, et
25 cetera, for her, I think, and so I was just

1 asking her what happened, if she remembers what
2 happened, could you please tell me, and that's
3 all I recall from our discussion.

4 Q. Okay.

5 A. Because I had to prepare a memo for my
6 Regional Justice and for the Chief.

7 Q. And we're going to talk about that in a bit.
8 Did she say anything about going off the record?

9 A. No.

10 Q. Did you ask her anything about that?

11 A. I didn't.

12 Q. Why not?

13 A. I would -- I assume everyone knows that you
14 never go off the record.

15 Q. But you said Clerk Okstein had said something
16 about part of it.

17 A. Yes. He came in and was quite alarmed, as
18 was I, when he told me.

19 Q. But you didn't ask Judge Joseph.

20 A. I did not.

21 Q. Did she say that she had authorized Mr. Jellinek
22 and the defendant to go downstairs after his
23 release?

24 A. She mentioned it, yes.

25 Q. And did she say anything about going to

1 probation?

2 A. I believe so, yes.

3 Q. Would a judge's permission be required for a
4 defendant and his attorney to go downstairs
5 after he's ordered release?

6 A. No.

7 Q. Are there other places -- If an attorney wants
8 to have a conference with a client, are there
9 any places in the courtroom that could --

10 A. Oh, yes, there are. Attorneys move all the
11 time. There are many rooms that one could have
12 a conversation, yes.

13 Q. Is there a way to get to probation through a
14 public access route?

15 A. Yes.

16 Q. How would you do that?

17 A. You would come in the front door of the
18 courthouse, you would make a left, you would go
19 down the stairs to the basement, which is where
20 the probation department is.

21 Q. And if you were coming from the first session
22 court, how would you do that?

23 A. If you were coming from the first session
24 courtroom, you would do the same thing.

25 Q. During these conversations with various people,

1 what was in your mind as to where Judge Joseph
2 was sitting?

3 A. That's -- I thought that she was sitting
4 in -- I thought this all occurred in the second
5 session, because that's where the judges usually
6 sit. And I was not in the building that day. I
7 later learned it was in the first session
8 downstairs.

9 Q. Did that misconception affect your imagining of
10 how the movement occurred?

11 A. I would say -- Yes. Because leaving the
12 second floor session, if you're not in custody,
13 you would go out through the hallway, through
14 the public door. If you were in custody, you
15 would go down with the court officers either in
16 the elevator or there's a back staircase, not
17 accessible to the public, but to employees, that
18 you would go down to probation through.

19 Q. So if you're not in custody, but you wanted to
20 go talk to probation for some reason, could you
21 get there through a public stairway?

22 A. Yes. You would. That's the only way you
23 would.

24 Q. Did Judge Joseph tell you anything about any
25 concerns that ICE might arrest the wrong person?

1 A. I don't recall.

2 Q. Did she say anything about being concerned that
3 ICE wouldn't allow an attorney/client
4 conference?

5 A. I don't recall that.

6 Q. And when you say you don't recall, are you
7 saying you don't recall her saying it --

8 A. I don't recall her saying it. It was seven
9 years ago.

10 Q. And during these -- After your conversation with
11 Judge Joseph, did you talk with the Regional
12 Administrative Justice?

13 A. I believe I did before and after, yes.

14 Q. And who was the Regional Administrative Justice?

15 A. Stacey Fortes.

16 Q. And when you talked with her, did she ask you to
17 do something?

18 A. She did.

19 Q. What did she ask you?

20 A. She asked me to reduce in writing a synopsis
21 of what happened.

22 Q. And did she also ask you to get the recording?

23 A. She did.

24 Q. And did you do both of those things?

25 A. I did.

1 Q. Did you have someone get the recording, make a
2 copy, and listen to it?

3 A. Yes.

4 Q. And who did that?

5 A. Clerk Okstein.

6 Q. And did you learn further from Clerk Okstein
7 about the off the record part of the
8 conversation?

9 A. Yes.

10 Q. What did you learn?

11 A. He told me that it was a blank spot of almost
12 a minute or two.

13 Q. Okay. Did you have further discussion with
14 Regional Administrative Justice?

15 A. After I learned that, yes. No. I didn't
16 after I learned that, I think. I can't remember
17 the sequence. I spoke with her. She asked me
18 to do those two things. I then reduced it in
19 writing. I don't recall speaking with her
20 afterwards.

21 Q. We're going to bring up your e-mail that we
22 have. And if you look in the book at
23 Appendix B, you will find it. So look wherever
24 is the easiest for you. Let's just read through
25 your e-mail. So what's the date of this e-mail?

1 A. Friday, April 20, 2018.

2 Q. So let's go -- If you go to Appendix B,
3 Page 540, you get to the beginning of the
4 series. They all have -- We all know, to our
5 frustration, you have to look at the e-mail
6 backwards.

7 So looking at yours, what's the
8 date of that?

9 A. Thursday, April 5, 2018.

10 Q. And on Thursdays, where would you be?

11 A. Quincy.

12 Q. Not in Newton.

13 A. No.

14 Q. So what were you in the middle of while you were
15 writing this e-mail?

16 A. In Quincy, when I was sitting in the drug
17 court, I would have the first session, do my
18 drug court, including meetings, et cetera. So
19 it was a wicked busy day over there. But I
20 needed to reduce this to writing for my Chief.

21 Q. And let me ask you to make sure you have your
22 mouth close to the microphone.

23 A. I'm sorry.

24 Q. So I'm going to read through and I'm going to
25 stop in a couple places. So it says, on Monday,

1 April 2nd, 2018, a defendant, who had been
2 arrested over the weekend, was in court for
3 arraignment on a drug possession charge and a
4 fugitive from justice charge, as he was also
5 allegedly wanted in Pennsylvania. An ICE agent
6 was in the courthouse as well with a detainer
7 for the individual.

8 That much, what was your source
9 of information for that much?

10 A. That was probably a combination of
11 Attorney Jellinek and Judge Joseph.

12 Q. Okay. And then it says, as is usual practice in
13 Newton Court, the agent was asked to wait
14 outside the courthouse as he did not have a
15 warrant but a detainer. So this says
16 courthouse. You said earlier courtroom. Can
17 you explain?

18 A. I misspoke. I did not ask him -- I did not
19 ask them to step outside the courthouse. I
20 cannot do that. I asked them to step outside
21 the courtroom.

22 Q. So when you say you misspoke, you're talking
23 about in the e-mail?

24 A. Yes.

25 Q. What you said here; is that accurate?

1 A. Yes.

2 Q. Then it says, there was a prolonged discussion
3 at some point regarding defendant's identity
4 involving ICE, the Commonwealth, the defense
5 attorneys and the judge, there is also an
6 interpreter involved in this case.

7 That much, what was your source
8 of that?

9 A. I believe that was also from Judge Joseph,
10 Attorney Jellinek, it may have been
11 Clerk Okstein as well.

12 Q. And then it says, after this discussion, the
13 Commonwealth moved to dismiss the fugitive
14 charge, the judge releases the defendant on
15 PR -- Is that personal recognizance?

16 A. Yes.

17 Q. -- on the possession charge, not sure if bail
18 was requested.

19 That much, what was your source
20 of that?

21 A. Again, the judge and/or Attorney Jellinek.

22 Q. And then it says, the defense attorney asked the
23 judge if he could utilize the services of the
24 interpreter in probation with the defendant to
25 the further investigate the Pennsylvania

1 detainer so it did not hinder his client
2 further.

3 What was the source of that?

4 A. A combination of the judge and
5 Attorney Jellinek.

6 Q. Then the judge agreed, the defendant was brought
7 to probation by a court officer, unclear if he
8 was cuffed or not, via the back stairway.

9 What was the source of that?

10 A. That was also Attorney Jellinek and the
11 judge.

12 Q. And what is the back stairway?

13 A. So that's where, when I thought it was all
14 occurring in the second session.

15 Q. So the back stairway --

16 A. Back stairway.

17 Q. -- from the second session, would that be the
18 public stairway, would that be the one that's
19 within the secure area?

20 A. It's not a public. Within the secure area.

21 Q. And then it says, the interpreter and defense
22 counsel accompanied him.

23 Is this also -- What's the
24 source of that?

25 A. That is also the judge and Attorney Jellinek.

1 Q. And then it says, the ICE agent, now back inside
2 the building, inquired the clerk if there was
3 any other exit for the defendant from the
4 courthouse, told that all persons not in custody
5 exit the court from the front exit, the ICE
6 agent went outside again presumably to wait for
7 the defendant.

8 What's the source of this
9 information?

10 A. Clerk Okstein.

11 Q. And then at some point the defendant was allowed
12 to leave through the back door of the
13 courthouse, unclear if it was via the employee
14 entrance or the probation back entrance.

15 What's the source of that?

16 A. That was Chief Court Officer Scott Noe.

17 Q. And then it says, ICE did not affect your
18 officer, and the defendant was presumed to have
19 left the rear parking lot with his friends, who
20 had been waiting for him.

21 What's the source of that?

22 A. Also Chief Noe.

23 Q. If I learn any additional information, I will
24 report it forthwith. The chief court officer
25 has posted this policy reiterating the only exit

1 to be used from the courthouse, except for
2 custodies, employees, and judges, is the front
3 door. Thank you.

4 Is that all of what you said?

5 A. Yes.

6 Q. And you didn't say anything about the judge
7 going off the record in that e-mail; correct?

8 A. I did not.

9 Q. Why not?

10 A. I don't know if I knew it then.

11 Q. Okay. So this was April 5th. You're not sure
12 whether --

13 A. I don't recall when I heard that.

14 Mr. Okstein told me that there was a gap in the
15 tape. I just don't remember the timing of when
16 I was told that.

17 Q. Okay. And then going further in Appendix B. It
18 has some back and forth in front of
19 Chief Dawley. I just want to get that in front
20 of us. So if you look at Page 539, --

21 A. Yes.

22 Q. -- you have an e-mail from Chief Justice Dawley,
23 and he says this just to you, dated April 20th,
24 he says, there are a couple of issues here, what
25 is the authority to tell the ICE officer to stay

1 outside the courtroom, I'm concerned that such a
2 practice treats ICE officers different from
3 other members of law enforcement and the general
4 public. It seems to me that such a practice
5 runs counter to the requirement that courtrooms
6 are open to the public without exception. I
7 recommend that such a practice end. And then he
8 says, who was the judge that presided over the
9 case. And then he says, who was responsible for
10 allowing the defendant to exit the courthouse
11 via a nonpublic entrance. And then he says, in
12 addition to the notice posted by Officer Noe,
13 was the court staff told and do they understand
14 that this should not happen again.

15 Is that what Chief Justice
16 Dawley sent to you?

17 A. Yes.

18 Q. And with a copy to Regional Administrative
19 Justice then Stacey Fortes?

20 A. Yes.

21 Q. And did you respond?

22 A. I did.

23 Q. And if you turn the page over to 538, you see
24 your response. Judge Fortes, in response to the
25 questions, it has been my practice to politely

1 ask ICE, who had been known to the court
2 security staff, if they are present to detain a
3 defendant whom they know to be in our Newton
4 police or sheriff DOC -- DOC meaning
5 Department of Corrections?

6 A. Yes.

7 Q. -- custody and in the building or arriving soon,
8 to wait outside the courtroom for the defendant
9 to be released in order to minimize disruption
10 in other cases, particularly in the close
11 quarters of our second session.

12 Is that because you thought
13 this happened in the second session?

14 A. Yes.

15 Q. And with the limited court security staff we
16 have here. They have always acquiesced. I have
17 never been shown a warrant in Newton, a detainer
18 occasionally. Often there is no paperwork at
19 all. And then you responded to his question as
20 to who the judge was, and you said Judge Joseph.

21 A. Yes.

22 Q. And then you responded about how it happened.
23 The defense attorney asked the judge after the
24 Commonwealth dismissed the fugitive from justice
25 case if he could, with the interpreter, speak to

1 his client downstairs in probation in order to
2 further explore the open warrant in Pennsylvania
3 which triggered the then dismissed fugitive
4 complaint. Judge allowed it. And the judge
5 believes the defendant was brought downstairs in
6 custody to the probation department. And then
7 you said, in addition to the posted written
8 policy of Chief Noe, the clerk's office and
9 probation have been told that the only exit from
10 the courthouse for defendants released from
11 custody will be the front door of the
12 courthouse, those in custody will exit via the
13 sallyport, employees only will use the two back
14 entrances which are accessed only by ID card
15 entrance and egress. Thank you. And please let
16 me know if you need further information.

17 Is that, is that what you
18 wrote?

19 A. Yes.

20 Q. If you go back to Chief Justice Dawley's
21 questions. Look at his Question Number 3, who
22 was responsible for allowing the defendant to
23 exit the courthouse via a nonpublic entrance.
24 Did you respond to that question in your e-mail?

25 A. No.

1 Q. Is there any reason you didn't respond to that
2 question?

3 A. I don't recall why I did not answer that
4 question. I may not have known.

5 Q. And then on April 20th, a little, just a little
6 bit later in the day, Chief Justice Dawley
7 writes back to you. He says, thanks for the
8 response, I don't think this situation, even if
9 raised by ICE is a problem. It sounds like
10 court personnel were just trying to accommodate
11 the attorney/client relationship by use of the
12 interpreter. On the first issue, asking them to
13 step outside the courtroom, obviously it is your
14 call, and you should exercise your own judgment.
15 My only hesitation is the appearance factor,
16 especially as ICE continues their campaign of
17 attacks on us. I don't know the answer to this.
18 But do any other District, -- DC -- Is that
19 District Court?

20 A. Yes.

21 Q. -- any other DC's do this. If you need any
22 guidance from Zach -- Who's Zach?

23 A. Now Judge Hillman.

24 Q. Who was he then?

25 A. He was in the administrative office in the

1 District Court legal department.

2 Q. If you need any guidance from Zach or our
3 lawyers, let me know, thank you for all you do,
4 have a good weekend.

5 Did you receive that from
6 Chief Justice Dawley --

7 A. I did.

8 Q. -- on the afternoon of April 20.
9 And did you consult with Zach Hillman?

10 A. I believe I did.

11 Q. And later that day, the next e-mail, over at the
12 bottom of Page 537, thank you as well, I will
13 reach out to Zach, thank you for your support.

14 So you did. You just told us
15 at some point with Judge Zach have some
16 consultation and then make some change in the
17 policy --

18 A. Yes.

19 Q. -- practice. That practice, was that ever in
20 writing?

21 A. No. It was a result of a disruption I had up
22 in the second session where a trooper was trying
23 to have a witness to a murder brought -- He was
24 a defendant in our courtroom. It just got very
25 confusing. So I was -- I don't want to disrupt

1 the ongoing daily business of the court, so
2 that's why I asked, anyone, would you please
3 check in with the court officers, ICE, could you
4 wait outside, please. Of the courtroom.

5 Q. And then after your consultation with Zach --

6 A. I changed that.

7 Q. And do they now --

8 A. They do. They check in with the court
9 officers. This was all pre Lunn. So yes.

10 Q. And so your recollection is that this was
11 pre Lunn. Let's, let's take a look at
12 Appendix B.

13 Now, when you refer to Lunn,
14 are you referring to the SJC decision or are you
15 referring to a court transmittal?

16 A. Both.

17 Q. So Appendix B. Just give yourself some time to
18 take a look at that.

19 A. The 0005?

20 Q. Yes.

21 (PAUSE)

22 A. Okay.

23 Q. What was the date of this?

24 A. I don't -- Oh. November 10th, 2017.

25 Q. So it actually was --

1 A. Before.

2 Q. -- before. Was it --

3 A. It was -- This policy came out before
4 April 2nd of 2018, yes.

5 Q. And had you yet incorporated into your practice?

6 A. No.

7 JUDGE FABRICANT: All right.
8 That's all I have. Thank you.

9 HEARING OFFICER: Ms. Mulvey.

10 CROSS-EXAMINATION MS. MULVEY:

11 Q. Good morning, Judge Heffernan. We have never
12 met, have we?

13 A. Oh, yes, we have. You've done evidence
14 programs for us many times and I've met you a
15 couple of times. Nice to see you again.

16 Q. I apologize. Nice to see you. I'm horrible
17 with faces.

18 A. Not a problem.

19 Q. All right. I haven't been before you in the
20 Newton District Court; --

21 A. Not that I recall.

22 Q. -- is that fair?

23 All right. And on April 2nd of 2018, we've
24 heard -- Do you recall that was a Monday?

25 A. Yes.

1 Q. And your clerk's mother had passed away and you
2 were going to the funeral?

3 A. Yes.

4 Q. Okay. And understandably, didn't have your cell
5 phone on?

6 A. Correct.

7 Q. All right. And do you know that there was a
8 time during the morning when Judge Joseph, who
9 was sitting in that day, had a couple of
10 questions and tried to reach you by phone?

11 A. I think I recall that, yes. My phone showed
12 calls missed.

13 Q. All right. And do you understand she had some
14 questions related to a different case that you
15 handled and was looking for some guidance?

16 A. I don't know. Yeah. I don't remember.

17 Q. All right. In any event, you did come to the
18 Newton District Court on the next day, Tuesday;
19 is that right?

20 A. Yes.

21 Q. And Judge Joseph wasn't there?

22 A. No.

23 Q. All right. And you said that at some point that
24 day David Jellinek approached you about this
25 incident; --

1 A. Yes.

2 Q. -- is that right?

3 You said it was in connection with a drug court
4 meeting?

5 A. Yes. He stayed after the roundtable was
6 over.

7 Q. And when does the roundtable take place?

8 A. Noontime.

9 Q. Okay. So this would be sometime 2:00-ish?

10 A. Probably 1:00, closer to 1:00.

11 Q. Okay. The meeting was 12:00 to 1:00?

12 A. Uh-huh.

13 Q. You don't do it during lunch? You do it right
14 before lunch?

15 A. Hopefully.

16 Q. And as of that time, 1:00 or so, nobody had told
17 you anything about this incident; is that true?

18 A. True.

19 Q. Okay. Clerk Okstein didn't come in and say, oh,
20 my God, Judge, we had this happen?

21 A. No, I don't remember him doing that.

22 Q. Scott Noe didn't come in and say, I have some
23 bad news for you, Judge?

24 A. Not that morning, no.

25 Q. All right. And so the first person that told

1 you anything about this incident was
2 David Jellinek?

3 A. Yes.

4 Q. What he told you was frankly benign, wasn't it?

5 A. Benign?

6 Q. Well, he told you that he had a client with an
7 identification issue?

8 A. Yes.

9 Q. And a fugitive warrant?

10 A. Yes.

11 Q. And there's nothing particularly out of the
12 ordinary about either of those things, is there?

13 A. No.

14 Q. He told you that he wanted to speak to his
15 client?

16 A. Yes.

17 Q. Who needed an interpreter?

18 A. Yes.

19 Q. Okay. Nothing unusual about that?

20 A. No.

21 Q. All right. He told you that he asked the judge
22 and she allowed him to go downstairs?

23 A. Yes.

24 Q. To speak with his client?

25 A. Correct.

1 Q. Did lawyers sometimes speak with clients in the
2 lockup?

3 A. When they were in custody? Of course, yes.

4 Q. Okay. And that was pretty much what he told
5 you, wasn't it?

6 A. Yes.

7 Q. Okay. You said he referred to it as an
8 incident?

9 A. Yes.

10 Q. What about that set of facts is an incident that
11 would warrant him coming to talk to you about
12 it?

13 A. I don't know.

14 Q. Did it strike you as odd that he was giving you
15 this information?

16 A. No.

17 Q. Why did you think he was telling you all this?

18 A. I think he was telling me about it because of
19 the ICE involvement.

20 Q. Well, but he didn't tell you about ICE, did he?

21 A. He didn't tell me about ICE. Not that I
22 recall. But I don't know. We had a lot of
23 discussion around the courthouse about issues
24 around that at that time.

25 Q. Is it fair to say -- Yeah. At that time, you

1 know, ICE was sort of a hot topic; right?

2 A. It was.

3 Q. And there was a lot of changing policies and
4 things like that?

5 A. Yes.

6 Q. All right. And even among District Courts, the
7 District Courts in Massachusetts weren't all
8 created with the cookie-cutters, were they?

9 A. No.

10 Q. They're very, very different in physical layout?

11 A. Yes.

12 Q. In entrances and exits and courtrooms?

13 A. Correct.

14 Q. And it's really difficult to make
15 one-size-fits-all policies for the
16 District Courts?

17 A. I don't know if it is or not. You'd have to
18 ask my chief that.

19 Q. Well, have you sat in different courthouses?

20 A. Yes.

21 Q. And do different courthouses do things
22 differently?

23 A. Somewhat.

24 Q. All right. There are different doors, different
25 accesses to lockups, there are all kinds of

1 different things happen; right?

2 A. Yup.

3 Q. And even in Newton, access for custodies is very
4 different in the first session than in the
5 upstairs second session, isn't it?

6 A. Uh-huh. Yes.

7 Q. In the first session, they can bring people
8 directly from the lockup into the dock; is that
9 right?

10 A. Right.

11 Q. And the second session, they have to walk them
12 up the backstairs or take the elevator?

13 A. Or take the elevator.

14 Q. And there's no dock alone in there, is there?

15 A. There isn't.

16 Q. For that reason, the call of the daily list
17 generally takes place in the first session; is
18 that right?

19 A. Yes.

20 Q. Why did you think that Judge Joseph was doing
21 the daily list in the second session?

22 A. I just -- Because the visiting judge
23 generally sits in the second session. And for
24 some reason, it didn't compute in my brain.

25 Q. Okay. But --

1 A. There wasn't a -- you know.

2 Q. Yeah. But the daily list didn't generally
3 happen up there, did it?

4 A. It does if there are small claims going on.
5 Like today is small claims days, so they use the
6 first session because there are more people. So
7 we go upstairs and do our daily list.

8 Q. But that -- This day, that wasn't happening, was
9 it?

10 A. No.

11 Q. Now, fair to say there's been a lot of talk
12 about, not just ICE in general, but this
13 incident over the last seven years?

14 A. Yes.

15 Q. And you've heard lots of different things from
16 of lots of different people?

17 A. I have?

18 Q. Yes.

19 A. Yes.

20 Q. And is it difficult to sort out today, in June
21 of 2025, what you heard from who, when?

22 A. It's challenging.

23 Q. Okay. Is it fair to say that what you told the
24 grand jury back in 2019 is probably closer to
25 accurate than your memory today?

1 A. Probably.

2 MS. MULVEY: All right. Could
3 I approach the witness, Your Honor?

4 HEARING OFFICER: Yes.

5 Q. Just to make things easier, can I give you a
6 copy of your testimony?

7 A. Yeah. Thanks.

8 Q. I'd ask you to look at Page 33, transcript
9 Page 33. There are some Bates numbers. But if
10 you look at transcript Page 33.

11 A. Transcript page 33. Yes.

12 Q. And I should have started, this was given on
13 February 28th of 2019 in the Federal courthouse?

14 A. Yes.

15 Q. And if I ask you to look at Page 33, you were
16 asked, understandably, what did David Jellinek
17 tell you?

18 A. Yes.

19 Q. And this was the conversation after the drug
20 court meeting that you were telling us about?

21 A. Yes.

22 Q. And you said, what I recall him telling me, and
23 I don't, because this e-mail is a compilation of
24 a few after I spoke to, after I spoke to him
25 first, he told me that he had represented a

1 fellow who they didn't know if he was wanted in
2 Pennsylvania, ICE was also in the building
3 wishing to effect service on him, and he had
4 been arrested, and I don't -- I remember him
5 saying something about he asked the judge if he
6 could bring his fellow downstairs after he had
7 been released with the interpreter to talk to
8 probation, something about trying to sort out
9 whether the Pennsylvania warrant was still
10 active. That's my recollection of how it first
11 started with me, and then I said, okay, you
12 know, and I went downstairs, I said, well, thank
13 you for telling me or something, and I went
14 downstairs, and when I went in to my lobby, my
15 chief court officer came in, Scott Noe, with a
16 policy saying -- reiterating that people go out
17 the front door, and I said, okay, we need to
18 reiterate this, and he told me that an incident
19 had happened that someone went out the back
20 door, so then it started like something
21 happened, I knew something had happened, and I
22 said, okay, well, tell me a little bit about it,
23 and he said he understood the court officer had
24 let someone out the back door, so I was alarmed
25 at that, and I listened, and then I think the

1 clerk came in and talked to me, too,
2 Larry Okstein, and I was just kind of getting as
3 much information as I could from those parties.

4 Does that sound like it's
5 probably accurate?

6 A. Yes.

7 Q. Okay. And so did David Jellinek tell you
8 anybody had gone out the back door?

9 A. No.

10 Q. Did he tell you that he talked with the court
11 officer and made an arrangement to let his
12 client out the back door?

13 A. No.

14 Q. Did he tell you that he told Judge Joseph he was
15 going to do this and she said, yeah, go ahead?

16 A. He did not.

17 Q. Did he tell you -- I assume at that point you
18 knew Assistant District Attorney
19 Shannon Jurgens?

20 A. Yes.

21 Q. And she was assigned to your court, so she'd be
22 there pretty much every day?

23 A. Yes.

24 Q. Did he tell you she was upset or angry about
25 anything?

1 A. I don't remember that.

2 Q. That probably would have flagged the matter for
3 you, wouldn't it?

4 A. It may have.

5 Q. And I assume, if he said anything like that, you
6 would have said, well, why, why is she upset?

7 A. Possibly. Yup.

8 Q. Don't remember anything about that?

9 A. I don't.

10 Q. Did you ever talk with Assistant District
11 Attorney Jurgens about this?

12 A. I did not.

13 Q. And so the next thing you recall is Scott Noe
14 coming in and saying, --

15 A. Yeah.

16 Q. -- Judge, here's what happened.

17 A. I think his hair was on fire, basically.

18 Q. Okay. This was kind of a bad day for him;
19 right?

20 A. It was a bad day for all of us.

21 Q. Yeah. And so he told you that the court officer
22 had let the defendant out the back door.

23 A. He did.

24 Q. And that was the first you were hearing about
25 it; right?

1 A. Yes, it was.

2 Q. Okay. And understandably, you, too, were
3 concerned about it.

4 A. Very.

5 Q. All right. And at that point you still didn't
6 know anything about off the record; is that
7 right?

8 A. I did not.

9 Q. All right. And that time or within a day or so
10 did Chief Court Officer Noe have a policy that
11 was in writing?

12 A. Yes.

13 Q. And he told that we're going to put that posted
14 in the front?

15 A. Yes.

16 Q. We want to make sure everybody knows this?

17 A. Yes.

18 Q. Because we want everybody going out the front
19 door?

20 A. Yes.

21 Q. Okay. Now, actually, that policy, at least in
22 terms of ICE custodies, is a little different
23 from what the Lunn policy wanted done, isn't it?

24 A. Yes.

25 Q. Okay. And as judge -- I'm sorry --

1 Special Counsel Fabricant showed you, there was
2 actually -- do you call it transmittal letters?

3 A. Yes.

4 Q. They up there send you out all kinds of things?

5 A. They do.

6 Q. And one of them was this, what we've been
7 calling the Lunn policy, which is here's how you
8 want you do deal with ICE?

9 A. Yes.

10 Q. And actually, dealing with ICE in terms of them
11 taking custody, that's not really the judge's
12 issue, is it?

13 A. It is not.

14 Q. That takes place between the court security
15 personnel and the ICE agents?

16 A. It does.

17 Q. And so you don't usually see that happen?

18 A. I do not.

19 Q. Don't know much about how it happens?

20 A. No. But in the -- During my time in Newton,
21 I have seen ICE effectuate their service from
22 the front of the building, yes.

23 Q. Okay. And this transmittal letter that y'all
24 got in November of 2017 actually said that the
25 court wanted that to happen in the lockup,

1 didn't it?

2 A. Yes.

3 Q. And there could be good security reasons for
4 that; right?

5 A. Yes.

6 Q. Okay. Not all defendants are happy about going
7 into ICE custody?

8 A. Yes.

9 Q. They might put up a fuss?

10 A. I don't know.

11 Q. All right. And certainly, if they have some
12 friends, there's at least the potential for an
13 unpleasant or an unsafe confrontation?

14 A. Very much so, in the courtroom, yes.

15 Q. Okay.

16 A. Not in security. But in the courtroom.

17 Q. No. But in any public area.

18 A. Yes.

19 Q. If there's a scuffle in the front lobby, and
20 there are people there, that's just not the kind
21 of situation anybody wants.

22 A. Absolutely not.

23 Q. And so the actual policy was that, for somebody
24 who had come into the court in custody, was
25 released and was going to ICE, that that should

1 happen in the lockup; right?

2 A. Per Lunn. The policy.

3 Q. Yes.

4 A. Yes.

5 Q. And the policy that Chief -- I'm sorry -- Chief
6 Court Officer Noe developed actually is a little
7 different from that; is that right?

8 A. Yes.

9 Q. Okay. And you said, if you think that's right,
10 go ahead and do it?

11 A. Yes.

12 Q. Okay. And that's one of those examples where a
13 particular District Court may do things a little
14 differently?

15 A. Yes.

16 Q. Now --

17 A. And we weren't told that that was wrong
18 either.

19 Q. You were not told it was wrong.

20 A. No.

21 Q. And the next thing that happened after Chief Noe
22 was -- that you talked to Judge Joseph the next
23 time she was in the courtroom?

24 A. Yes.

25 Q. And I think we heard that was the Wednesday, the

1 4th?

2 A. Yes.

3 Q. Right. And you had a conversation with her?

4 A. Yes.

5 Q. All right. And again, you were still trying to
6 gather information and figure out what happened?

7 A. Yes.

8 Q. Okay. And at that point you still didn't know
9 about the off the record; is that correct?

10 A. I did not.

11 Q. All right. And so you didn't ask her.

12 A. I didn't.

13 Q. And she didn't tell you.

14 A. She did not.

15 Q. Okay. And did she answer your questions?

16 A. Yes.

17 Q. All right. Did you feel like she told you what
18 she thought was important, as far as you
19 remember?

20 A. Yes.

21 Q. Okay. You didn't feel like she was holding back
22 anything or --

23 A. Not that I could tell.

24 Q. All right. And in fact, do you remember that
25 you were the one who told her that he had gone

1 out the back door?

2 A. I don't remember that.

3 Q. Okay. Do you remember her -- you saying to her
4 I want to talk to you about this case, the guy
5 went out the back door, and she said how did
6 that happen, and you said that's what I'm trying
7 to figure out?

8 A. I don't remember that.

9 Q. Does it sound like something that could have
10 happened?

11 A. Probably, yeah.

12 Q. Okay. Because you were trying to figure out
13 what happened; right?

14 A. Absolutely. Yes.

15 Q. You weren't up there to reprimand or scold her
16 for anything, were you?

17 A. No. I wished that I had been in the
18 courthouse on April 2nd.

19 Q. Okay. And why is that?

20 A. Because this would not have happened.

21 Q. Why is that?

22 A. Because I would not have -- I don't know why,
23 but it would not have happened. I can tell you
24 that.

25 Q. Well, do you generally accompany defendants down

1 to the lockup?

2 A. I do not, generally.

3 Q. All right. And if a defendant's down there, and
4 the court officer let him out the back door, is
5 there any way you as the judge could stop that
6 if you didn't know about it?

7 A. I would know about it.

8 Q. How would you know?

9 A. Because I would have been told, I'm sure.
10 They just would not have done it if I had been
11 in the building, whoever was involved.

12 Q. And is that because you're sort of a senior and
13 in charge?

14 A. I believe so.

15 Q. So do you think maybe they thought that this was
16 a situation that could be used to advantage?

17 A. Who?

18 Q. Court Officer MacGregor and David Jellinek?

19 A. I have no idea what they thought.

20 Q. Okay. But you don't think they would have
21 pulled it with you there?

22 A. I do not think so.

23 Q. Now, you also, after your conversation with
24 Judge Joseph, had a phone call with her; is that
25 right?

1 A. I don't remember the phone call.

2 Q. But you know from records that it happened?

3 A. Yes.

4 Q. And in fact, she called you late on Thursday
5 afternoon and then again on Friday, and you
6 finally touched base on Friday morning?

7 A. If you say so, yes.

8 Q. Have you seen records that show that?

9 A. I haven't seen records. I understand that
10 that occurred.

11 Q. And that there was a 10-minute phone call, 10 or
12 11 minutes?

13 A. That's what I've seen. I don't recall.

14 Q. And you don't at this point remember that?

15 A. I don't. I give my phone number to many new
16 judges and they call a lot.

17 Q. But given what was going on at this point, your
18 belief is that that phone call was about this
19 incident; is that right?

20 A. I am not sure what it was about.

21 Q. All right. But you know it happened, you just
22 don't remember what; --

23 A. Yes.

24 Q. -- is that right?

25 All right. Now, you also sent some e-mails and

1 received some e-mails about this situation; is
2 that right?

3 A. Some e-mails?

4 Q. Yes. The e-mails that's what Special Counsel
5 Fabricant was talking about?

6 A. Yes. Oh, yes.

7 Q. And the first e-mail, if we look at, I think
8 it's App 540 and 541. On Thursday, April 5th,
9 at 12:26, you sent Judge Fortes an e-mail? I'm
10 sorry.

11 A. Hold on one sec.

12 Q. Let me wait for you to catch up.

13 A. 541. Yeah. 540 and 541, on Thursday,
14 April 5?

15 Q. Right.

16 A. Yup.

17 Q. You were letting Judge Fortes know that this had
18 happened?

19 A. I was.

20 Q. In fact, had you had a phone call with her
21 before that?

22 A. I did.

23 Q. And she said would you just put it down in an
24 e-mail?

25 A. Yes.

1 Q. And you did that, didn't you?

2 A. I did.

3 Q. And this e-mail was sort of a summary or a
4 compilation of the various people that you
5 talked to?

6 A. It was.

7 Q. And as Judge Fabricant pointed out, it doesn't
8 talk about off the record. Does that suggest to
9 you that you hadn't yet spoken to Clerk Okstein
10 about that part of it?

11 A. Yes.

12 Q. All right. Do you recall what it was that
13 caused him or you to end up talking about that
14 part of it?

15 A. Yes. Because, again, hair on fire, a clerk
16 comes in and tells me that there's a large gap
17 in the tape. Yes.

18 Q. Well, it happened on Monday; right?

19 A. Right.

20 Q. And this is Thursday at noontime.

21 A. Uh-huh.

22 Q. And with his hair on fire, he hasn't come in to
23 tell you that?

24 A. I haven't -- I don't recall exactly when he
25 came in to tell me.

1 Q. All right. But certainly, if you had known that
2 when you were writing to Judge Fortes, you would
3 have included that information.

4 A. I would have. It may have been, you know, I
5 think. You know what I mean? I don't know.

6 Q. So with his hair on fire, he still hadn't told
7 you by Thursday?

8 A. I don't recall him telling me by Thursday.

9 Q. And when he told you, did you know he was
10 sitting in the clerk's chair at that point?

11 A. I don't know if I did know that. I think he
12 told me.

13 Q. All right. Did you say to him, well, why would
14 you do it?

15 A. No. Clerks don't question judges when they
16 tell them what to do.

17 Q. Don't clerks help new judges all the time?

18 A. Clerks help new judges, but they do not tell
19 them what to do.

20 Q. Did you ever actually listen to the tape?

21 A. I believe I listened to it a long time ago.

22 Q. And do you know that the person that asked if
23 they could off the record was David Jellinek?

24 A. Well, he asked, are we on the record, my
25 understanding is, and the judge asked the clerk

1 to take us off the record.

2 Q. But could it be maybe the reverse?

3 A. I don't know that it was.

4 Q. All right. And do you know that the actual gap
5 was 52 seconds?

6 A. I learned that, yes.

7 Q. So it wasn't several minutes?

8 A. Okay.

9 Q. All right. And did you ever talk to anybody
10 about what happened during that time?

11 A. No.

12 Q. Now, whenever you learned that, the way that you
13 saw this is that there were essentially two
14 issues; is that right? One, was the court
15 officer letting the defendant out the back, and
16 the other with Judge Joseph going off the
17 record; is that right?

18 A. At least two, yes.

19 Q. Well, those were the two you were aware of; is
20 that right?

21 A. Well, I don't know how the -- it came to be
22 that the court officer let the defendant out the
23 back door.

24 Q. And you never did any investigation on that; is
25 that right?

1 A. No. That's not mine.

2 Q. And when you reported this to Judge Fortes, that
3 was because she was the Regional
4 Administrative --

5 A. Yes.

6 Q. Right. Now, does she have power to discipline
7 judges?

8 A. No.

9 Q. The only person who could do that would be
10 Chief Judge Dawley?

11 A. I'm not even sure he can discipline judges.
12 I mean, there's a range of -- you know,
13 discipline of judges is not what's within the
14 District Court's purview, my understanding.

15 Q. Is there some time that the judge said something
16 wrong, either intentionally or unintentionally,
17 there's a meeting to discuss it to ensure that
18 doesn't happen again?

19 A. Yeah. I don't know if I call that
20 discipline.

21 Q. Okay. Fair enough. There's attempt made to
22 tell the judge how to do it correctly.

23 A. Well, there's an attempt to discuss what
24 happened and perhaps point out other ways to do
25 things.

1 Q. All right. And that kind of thing happens not
2 infrequent; is that right?

3 A. It does not happen infrequently. Correct.

4 Q. Now, when you and Judge Fortes were
5 communicating, did Judge Fortes pass this on up
6 the chain to Judge Dawley, --

7 A. Yes.

8 Q. -- Chief Judge Dawley? And do you recall why
9 she did that?

10 A. I think she was as alarmed as I was.

11 Q. Would you take a look at Page 540.

12 A. Yes.

13 Q. All right. And the top e-mail there was
14 April 20th of 2018?

15 A. Yes.

16 Q. Which is actually two and a half weeks after
17 this happened?

18 A. Yes.

19 Q. And she says, Chief Judge Heffernan called me
20 about this incident a couple of weeks ago, I
21 asked her at that time to follow up with an
22 e-mail outlining the incident below, I also
23 suggested she pull the tape because there was
24 some indication the judge involved may have gone
25 off the record prior to the defendant going down

1 the back stairwell, I'd spoken to the judge
2 involved, can brief you if you need additional
3 info. Okay. And then she says, informing you
4 about it now because Judge Heffernan called to
5 let me know regional director for ICE may bring
6 up at meeting supposedly scheduled with
7 CJ Carey, I didn't want you or CJ Carey
8 blind-sided by any info. Is that what she
9 wrote?

10 A. Yes.

11 Q. Okay. And so the event that prompted her to
12 tell Chief Judge Dawley about this was a meeting
13 with ICE.

14 A. I'm not sure that -- I think that may have
15 been one of the motivations, but I don't know.

16 Q. Do you see any other motivation in this e-mail?

17 A. Oh, I think --

18 Q. She said informing you about it now because
19 Judge Heffernan called to let me know the
20 regional director for ICE may bring up at
21 meeting supposedly scheduled with CJ Carey, I
22 didn't want you or CJ Carey blind-sided by --

23 A. I don't know if Chief Justice Fortes told
24 Chief Justice Dawley on the phone or something.
25 That looks like this is the first writing, yes.

1 Q. Okay. Now, we've also gone through or
2 Special Counsel Fabricant went through some of
3 Chief Justice Dawley's responses and the back
4 and forth; is that right?

5 A. Yes.

6 Q. And one of the things that he said was on the
7 top of 538.

8 A. Yes.

9 Q. He was responding to your e-mail, answering some
10 of his questions?

11 A. Yes.

12 Q. All right. And he said, Mary Beth, thanks for
13 the response, I don't think that this situation,
14 even if raised by ICE, is a problem. Right?

15 A. He did.

16 Q. Okay. So he wasn't concerned about it other
17 than perhaps with consequences with ICE; right?

18 A. I don't know what he was concerned about.

19 Q. That's what he wrote; right?

20 A. He did write that.

21 Q. Okay. And is it fair to say that at this point
22 relationships between the state court and ICE
23 were a bit frosty?

24 A. It was challenging, yes.

25 Q. Strained?

1 A. I believe so. I don't know. I have never
2 talked with ICE about it. I don't know.

3 Q. And then he said, it sounds like the court
4 personnel were just trying to accommodate the
5 attorney/client relationship by use of the
6 interpreter; right?

7 A. Yes.

8 Q. And that certainly would be an appropriate thing
9 to do, wouldn't it?

10 A. What would be an appropriate --

11 Q. Well, to give a defendant a chance confer with
12 his counsel?

13 A. Yes.

14 Q. And to allow the interpreter to do his job if
15 the client needed an interpreter?

16 A. Yes.

17 Q. All right. And in the downstairs courtroom,
18 there isn't any private meeting space for a
19 lawyer and a client within a courtroom; is
20 that --

21 A. No.

22 Q. So if you need to have a private conversation,
23 it's hard for a lawyer and an interpreter to sit
24 in the courtroom and do that; true?

25 A. I think it's hard to do in any courthouse in

1 the state.

2 Q. Okay. ICE was waiting in the front lobby?

3 A. Yes. So I was told.

4 Q. Okay. And --

5 A. I wasn't there.

6 Q. Having had experience with ICE, do you have some
7 expectation of what would happen if a lawyer
8 said, ICE, don't take him yet, I want to talk to
9 my client?

10 A. I don't have any expectation.

11 Q. Do you think it would be reasonable for the
12 lawyer to be concerned that maybe ICE wouldn't
13 honor that request the way a stable judge might?

14 A. I don't know.

15 Q. And the other place that conferences took place,
16 especially for clients in custody, was in the
17 lockup; right?

18 A. Yes.

19 Q. And again, if the client needs the interpreter,
20 the interpreter has to go to lockup for that; is
21 that right?

22 A. Yes.

23 Q. And so this was a pretty complicated situation
24 from both what you heard and what you now know
25 about this defendant situation; right?

1 A. Complicated how?

2 Q. Well, he had state court charges; right?

3 A. Yeah. Which were dismissed.

4 Q. Well, they weren't dismissed that day.

5 A. The possession charges? He was released on
6 personal. The fugitive was dismissed.

7 Q. Right. So he had pending state court charges;
8 right?

9 A. Yes.

10 Q. He had this warrant that might or might not be
11 outstanding from Pennsylvania; right?

12 A. Yes.

13 Q. And he had ICE looking for him.

14 A. Yes.

15 Q. Right. And it would be reasonable for his
16 defense lawyer to want to kind of run through
17 those issues and what would happen next; right?

18 A. Yes.

19 Q. And it would be reasonable to do that in the
20 lockup, wouldn't it?

21 A. Not if he was released from custody.

22 Q. Well, doesn't the Lunn policy say that he's
23 supposed to go downstairs to the lockup to get
24 processed?

25 A. For ICE?

1 Q. Yes.

2 A. Oh, maybe, yes. I don't know.

3 Q. Well, if that's what it says, then that would be
4 a perfectly reasonable thing for the lawyer and
5 the client and the judge to do; right?

6 A. The lawyer, the client, and the judge? I
7 don't know why the judge would be involved in
8 that.

9 Q. Well, in saying to the interpreter you can go
10 down to the lockup?

11 A. Going down to the lock up with the
12 interpreter or probation is fine.

13 Q. Okay. All right.

14 A. I don't get the question. Sorry.

15 Q. So there would be nothing at all wrong with a
16 judge allowing the defense counsel to confer
17 with his client and the interpreter in the
18 lockup.

19 A. Unless -- If the person were out of custody,
20 it would be unusual.

21 Q. All right. But if he's being -- If ICE is there
22 for him, he's supposed to be processed out of
23 custody in the lockup.

24 A. Right.

25 Q. Isn't that the Lunn policy?

1 A. And that did not happen. Right. So...

2 Q. Right. But that's what was supposed to happen.

3 A. Apparently, according to the Lunn policy,
4 yes.

5 Q. Right. He was supposed to go downstairs in
6 custody and get processed out there; is that
7 right?

8 A. That is what Lunn says, yes.

9 MS. MULVEY: May I have moment?

10 (PAUSE)

11 MS. MULVEY: I have nothing
12 else. Thank you, Judge Heffernan.

13 REDIRECT EXAMINATION

14 BY JUDGE FABRICANT:

15 Q. Judge, who was it that came in with his hair on
16 fire?

17 A. A couple of people. Chief Court Officer
18 Scott Noe and Larry Okstein.

19 Q. Each of them separately.

20 A. Correct.

21 Q. Do you know when each of them came in?

22 A. Scott came in first.

23 Q. Okay.

24 A. And then I don't remember when Larry came in.

25 Q. You don't remember when that happened.

1 A. Yes.

2 Q. Okay. You said in answer to one of Ms. Mulvey's
3 questions, or you adopted her phrasing, dealing
4 with ICE is not really the judge's issue.

5 A. No.

6 Q. So you, as the judge, would you, if a lawyer
7 makes an argument to you that ICE is going after
8 him but he's the wrong person, how would you
9 respond to that as a judge?

10 A. How would I respond to that as a judge?
11 Well, if he was represented, I would ask his
12 lawyer to look into it.

13 Q. And if the lawyer had looked into it, and had
14 not succeeded in persuading the ICE officer, and
15 the ICE officer still wanted to take custody --

16 A. Yeah. It has nothing to do with me. I would
17 certainly not get involved.

18 Q. So not the judge's role.

19 A. Absolutely not.

20 Q. And would you be making suggestions regarding
21 how this problem might be solved?

22 A. I would not.

23 Q. Would you be suggesting, well, we could detain
24 him overnight?

25 A. I would not.

1 Q. Would you be suggesting, would you be suggesting
2 anything about how to solve this problem?

3 A. I would not.

4 Q. Would you tell the lawyer, the lawyers, ICE is
5 not my responsibility?

6 A. I'm not sure I would phrase it that way, but
7 I would just say -- I would not get involved.

8 Q. Is that how you would phrase it?

9 A. Yes.

10 Q. The Lunn policy. We've talked about the Lunn
11 policy.

12 A. Yes.

13 Q. As you look at it now, and as you talked about
14 earlier, what the normal practice was in Newton
15 at the time, was Newton doing something
16 different from Lunn policy at the time?

17 A. I think so, but I don't believe it was
18 outside of the Lunn policy.

19 Q. Okay.

20 A. I believe it was allowed.

21 Q. But as you've described, the normal practice in
22 Newton was, if a defendant's released from
23 custody, goes out through the courtroom in the
24 first session.

25 A. Correct.

1 JUDGE FABRICANT: All right.
2 That's all I have. Thank you.

3 MS. MULVEY: I just have
4 another question or two.

5 RECROSS-EXAMINATION

6 BY MS. MULVEY:

7 Q. Are you aware that, during the morning, there
8 were multiple calls on the Medina Perez case?

9 A. I'm not aware of that.

10 Q. All right. And if I told you that his defense
11 lawyer, who at that point was
12 Elizabeth Bostwick, not David Jellinek, was
13 asking for time to investigate his identity, and
14 Judge Joseph acquiesced, is that an appropriate
15 thing for a judge to do?

16 A. Sure. Second call all the time for cases.

17 Q. Or a third call sometimes or --

18 A. Many calls.

19 Q. -- come back in the afternoon.

20 A. Yes.

21 Q. Because it's important to give a defense lawyer
22 time to do his job, isn't it?

23 A. His or her job. Absolutely.

24 Q. All right. I went to school when it was all
25 his. Sorry about that.

1 And if in the afternoon
2 David Jellinek wanted more time to try to
3 persuade ICE that this was the wrong guy, would
4 it be appropriate for a judge to give him that?
5 A. The time that is required by the defense and
6 the assistant DA for any case is liberally given
7 by me.
8 Q. Okay. Because you want to make sure everybody's
9 rights are protected.
10 A. That's my job, to make sure.
11 Q. Right. And to make sure each side has time to
12 do its job.
13 A. Yes.
14 Q. All right. You would never say to a lawyer, I'm
15 not going to let you investigate that; right?
16 A. I don't know that I would never say that.
17 Q. Within reason.
18 A. I'm not sure I would even within reason. I'm
19 not sure. I would have to look at it
20 individually.
21 Q. All right. And certainly, even though ICE isn't
22 your issue, you wouldn't want ICE to take the
23 wrong person, would you?
24 A. Certainly not.

25 MS. MULVEY: Thank you.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

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Q. Would you detain somebody overnight because of a question about ICE?

A. How could I? There's nolle pros. Unless they bailed on the person. No.

Q. And so there's fugitive from justice warrant -- fugitive from justice charge. It's dismissed.

A. Yes.

Q. What you then have is two misdemeanor drug charges.

A. Correct.

Q. In the normal course of things in April of 2018, on a misdemeanor drug charge, would you be setting a bail that someone can't make?

A. No.

Q. And if somebody has no criminal record?

A. No.

Q. And is there a statutory presumption in the District Court on release on personal recognizance?

A. Yes. There is now. Certainly.

Q. Was there then?

A. At the time there was. But it's more solid now with granting and all those case laws.

1 Q. But there's statutory provisions --

2 A. For sure, yes.

3 Q. -- that establishes a presumption, and that was
4 in effect at the time, --

5 A. Yes.

6 Q. -- of release on personal recognizance.

7 A. Correct.

8 Q. And that applies to the District Court. Doesn't
9 apply to the Superior Court because of the
10 different kinds of cases.

11 A. Oh, yes.

12 Q. Oh, yes, it's different?

13 A. The -- I don't know about the Superior Court.
14 I'm often told about them, but I don't know
15 about them.

16 JUDGE FABRICANT: Thank you.

17 THE WITNESS: You bet.

18 JUDGE FABRICANT: That's all I
19 have. Thank you.

20 MS. MULVEY: I have nothing
21 else. Thank you.

22 HEARING OFFICER: Thank you.
23 The witness is excused. Thank you, Judge.

24 JUDGE FABRICANT: I hope we
25 have our next witness perhaps waiting out in the

1 hallway.

2 (PAUSE)

3 HEARING OFFICER: Good

4 afternoon.

5 HONORABLE STACEY FORTES, SWORN

6 HEARING OFFICER: Please have a

7 seat. Be as close to the microphone as

8 possible. That would be much appreciated.

9 DIRECT EXAMINATION

10 BY JUDGE FABRICANT:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Please state your name.

14 A. My name is Stacey Fortes.

15 Q. And are you now the Chief Justice of the
16 District Court?

17 A. I am.

18 Q. And back in 2018, what was your role?

19 A. I was a Regional Administrative Judge.

20 Q. And would you just go back through your
21 professional background, starting from when you
22 started practicing law, and run through the
23 sequence of your professional history.

24 A. Sure. So out of law school, my first
25 position was as an assistant attorney general, I

1 was an assistant district attorney when
2 Ralph Martin was the District Attorney.

3 Q. So tell us years, if you can remember.

4 A. I think it was 1991 or '92 I started in the
5 AG's office, around 1994 or so, maybe, I went
6 over to the District Attorney's Office. I'm not
7 completely sure on the dates. I was in the
8 District Attorney's Office under Ralph Martin
9 until maybe around '97. And then I went over to
10 the MBTA as a labor attorney in the labor
11 department. Dan Conley called me one day, who
12 was a new Suffolk district attorney, and he
13 asked me to be Chief of the District Court
14 prosecution in Suffolk County. I went back to
15 Suffolk County. I was appointed to the bench in
16 December of 2006, and have been an
17 Associate justice since then, and now
18 Chief Justice of the District Court.

19 Q. And when did you become the Regional
20 Administrative Justice?

21 A. Let's see. I was a Regional Administrator
22 Justice... Maybe in -- I'm not positive of the
23 dates.

24 Q. Sometime before April of 2018?

25 A. Yes.

1 Q. And did you also, sometime around then, become
2 the First Justice of the Lowell District Court?

3 A. Yes.

4 Q. Did you hold those roles simultaneously?

5 A. I did.

6 Q. Describe for us, please, the role of a
7 Regional Administrative Justice.

8 A. Okay. So the District Court is split, given
9 in size, into six regions. The Regional
10 Administrative Judge is appointed by the
11 Chief Justice to help the Chief Justice with the
12 administration of the District Court. So as
13 Regional Administrative Judge, I was responsible
14 for scheduling judges, approving the schedule in
15 my region, dealing with day-to-day issues that
16 came up, try to keep things off the
17 Chief Justice's plate, so dealing with those
18 issues, bringing things to his attention that
19 needed to be brought to his attention, and
20 anything that the Chief Justice designated the
21 Regional Administrative Justice.

22 Q. Does the Regional Administrative Justice have
23 disciplinary authority over other judges?

24 A. No.

25 Q. Does the Chief Justice, now that you're in that

1 role, have disciplinary authority over other
2 judges?

3 A. Unfortunately now, yes.

4 Q. And is there a statutory provision that gives
5 the Chief Justice that authority?

6 A. Yes.

7 Q. Are you aware of a rule regarding recording of
8 proceedings in the District Court?

9 A. Yes. There's a District Court rule,
10 Rule 211, requires all, all courtroom
11 proceedings to be recorded.

12 Q. And you've noticed the monitor, Rule 211 is
13 being displayed on the monitor. Also in front
14 of you on the witness stand is a binder. That
15 binder has hard copies of a whole set of
16 appendices. So everything we're going to
17 display on the monitor is also in that binder.
18 And you can look on the monitor or in the
19 binder, whichever is easier for you.

20 This is Appendix K. And after
21 the cover page, starts at Page 122 of the
22 appendix and goes over to Page 123. What is
23 your understanding of the substance of this
24 rule?

25 A. The rule requires all courtroom proceedings

1 to be recorded.

2 Q. And are there some exceptions?

3 A. Administrative matters. But everything that
4 happens in court needs to be recorded.

5 Q. So call of the list, for example, the clerk is
6 calling the list, the judge isn't sitting on the
7 bench yet.

8 A. Yes.

9 Q. Is that an exception?

10 A. That's an exception.

11 Q. But anything the judge is doing, is that
12 required to be recorded?

13 A. Yes, it is.

14 Q. And if you look on Page 123, go down the page to
15 just before the bold capital letter line, just
16 before that.

17 A. Yes.

18 Q. Does it tell you when this rule was adopted?

19 A. Yes. Adopted December 31st, 1987, effective
20 February 1st, 1988.

21 Q. And in your -- You've been a judge since 2006.
22 So now 18 and a half years, perhaps. You said
23 December of 2006. During the course of your
24 career as a judge, have you ever during that
25 time gone off the record?

1 A. No.

2 Q. In your view, is there any legitimate reason to
3 do that?

4 A. No, there's no legitimate reason to do it.
5 There are times I would say where someone has
6 forgotten to turn the recording machine on, but
7 not to require that it be turned off.

8 Q. So have there been times when it came to your
9 attention that not, at the direction of the
10 judge, but through some inadvertence or error,
11 some proceeding wasn't recorded?

12 A. Yes.

13 Q. And have you had occasion to deal with that in
14 terms of reconstructing the record?

15 A. Yes.

16 Q. If you receive information to indicate that some
17 of the proceeding or some part of some
18 proceeding wasn't recorded, do you -- upon that
19 information, is it automatic in your mind that
20 that means the judge turned it off or is there
21 another possibility?

22 A. There is another possibility.

23 Q. What's the other possibility?

24 A. Well, the possibilities that I just went
25 through. So you could come back from a recess,

1 the clerk could forget to turn it on, it could
2 be malfunctioning. There are other reasons.

3 Q. Are you familiar with the Lunn policy?

4 A. Yes.

5 Q. And recently there's been a new Lunn policy.

6 A. Yes.

7 Q. I want to take you back to April of 2018.

8 A. Yes.

9 Q. So put the recent one out of your mind.

10 A. Okay.

11 Q. And focus on the one that was in effect in
12 April of 2018, and that's behind Tab B in the
13 binder, and what you see in front of you here is
14 the policy on the monitor.

15 Do you have a sort of capsule
16 summary of the central theme of that policy?

17 A. The policy boils down to not to help or
18 hinder ICE officials from performing their
19 duties based on the Lunn holding.

20 Q. So be neutral.

21 A. Yes.

22 Q. How did you first hear about an event in Newton
23 on April 2nd of 2018?

24 A. I got a phone call from the First Justice
25 Mary Beth Heffernan informing me that there had

1 been a situation in Newton when she wasn't there
2 involving the covering judge.

3 Q. And who was the covering judge?

4 A. Judge Joseph.

5 Q. And do you know when you got that phone call?

6 A. I don't recall today, no.

7 Q. You just told us in the short version what the
8 substance of that call was, but was there more
9 to that call?

10 A. Yes, yes.

11 Q. So tell us what you can remember.

12 A. So Judge Heffernan told me that there was an
13 individual before the court being arraigned,
14 that individual had been arraigned on a fugitive
15 from justice charge, I believe a drug charge as
16 well, and that there was also an ICE detainer,
17 civil detainer, for the defendant, that ICE was
18 there in the building to effectuate that
19 detainer, that the fugitive charge had been
20 dismissed, I believe the defendant was released
21 on personal recognizance, and that somehow the
22 defendant had gone out the back door and ICE had
23 not been able to effectuate.

24 Q. And in the course of this conversation, did you
25 say anything about some part of the proceeding

1 having been recorded.

2 A. Yes. Well, yes. Because I said, well, how
3 did that happen. And she said, well, that's the
4 problem, there's a portion of it that was not
5 recorded, she said the judge involved went off
6 the record.

7 Q. And did she tell you how she knew that?

8 A. My memory was she knew it from the clerk, her
9 clerk.

10 Q. And did you ask her to do something?

11 A. I did. I said, Mary Beth, how do you know
12 that, you weren't there, did you listen to the
13 tape, the portion of the tape that you could
14 listen to. And she said, no, should I do that,
15 and I said yes.

16 Q. And did you ask her to do something else as
17 well?

18 A. I also asked her to send an e-mail of what
19 transpired.

20 Q. Summarize it in an e-mail?

21 A. Yes.

22 Q. All right. And let's look at, in your binder,
23 Tab V. You'll see behind Tab V, you'll see on
24 the monitor here we have what appears at
25 Page 540 behind Tab V, and your e-mails of

1 course, as we all know, much to our annoyance,
2 start at the back and work forward.

3 So at Page 540 you see an
4 e-mail from, it says Mary Heffernan. Is she
5 referred to as Mary Beth?

6 A. Yes.

7 Q. You see an e-mail from Mary Heffernan to you,
8 Thursday, April 5th, 2018, 12:26 p.m. And I
9 believe, again, because we read it earlier, what
10 you have in front of you, is this the summary
11 that she sent you in response to your request?

12 A. Yes.

13 Q. And then if you go further up Page 540 is there
14 then an e-mail from you, April 20th, 2018, at
15 12:21 p.m., from you. And it's a little
16 confusing, but do you remember who this was to?

17 A. Chief Justice Dawley.

18 Q. And so you said to Chief Justice Dawley, Chief,
19 Judge Heffernan called me about this incident a
20 couple of weeks ago, and I asked her at the time
21 to follow up with an e-mail outlining the
22 incident below, I also suggest that she pull the
23 tape because there was some indication the judge
24 involved may have gone off the record prior to
25 the defendant going down the back stairway, I've

1 spoken to the judge involved, and can brief you
2 if you need additional info. Informing you
3 about it now because Judge Heffernan called to
4 let me know regional director for ICE, question
5 mark -- So did you have uncertainty about
6 whether that was the right title?

7 A. Yes.

8 Q. We can bring up the meeting supposedly scheduled
9 with CJ Carey. Who is CJ Carey?

10 A. The Chief Justice of the Trial Court,
11 Paula Carey.

12 Q. And I didn't want you or CJ Carey to be
13 blind-sided by any info. The Chief Justice of
14 the Trial Court. So the Trial Court, is it
15 accurate to describe it as, there are seven
16 departments, each department has a chief,
17 appointed by the Chief Justice of the
18 Trial Court, and there's one Chief Justice of
19 the Trial Court that oversees all of those seven
20 departments?

21 A. Yes.

22 Q. Is that accurate?

23 A. Yes, that is.

24 Q. At the time, the Chief Justice of the
25 Trial Court was Paula Carey.

1 A. Yes.

2 Q. Chief of the District Court was Paul Dawley.

3 A. That is correct.

4 Q. You were Regional Administrative Justice.

5 A. Yes.

6 Q. And the First Justice is Mary Beth Heffernan.

7 Mary Beth Heffernan was the First Justice.

8 A. That's correct.

9 Q. So you said you had spoken to the judge
10 involved. So do you know when that happened?

11 A. I'm not sure when that happened. It would
12 have been obviously before I sent this e-mail
13 and after I talked to Judge Heffernan.

14 Q. So sometime between April 5th and earlier that
15 day on April 20.

16 A. That's right.

17 Q. And do you know how it came about -- Where,
18 first of all, was this conversation?

19 A. With Judge Joseph?

20 Q. Yes.

21 A. In the Lowell District Court on Hurd Street.

22 Q. And Lowell was where you were sitting.

23 A. That's correct.

24 Q. Do you know how it came about that she was
25 sitting in the Lowell District Court?

1 A. I think that I said to Judge Heffernan that
2 Judge Joseph was either scheduled to be sitting
3 with me or I would schedule her to sit with me
4 so I could ask her what happened, talk to her
5 about it.

6 Q. And you, as the original administrative justice,
7 had authority over the schedule.

8 A. That's correct.

9 Q. So one way or the other, she was scheduled to
10 sit there on some day between April 5th and
11 April 20.

12 A. Correct.

13 Q. And I want to just go back to this e-mail
14 from -- before we talk about the conversation
15 with Judge Joseph. I want to go back to this
16 e-mail from Judge Heffernan. And you'll see
17 somewhere in here that there's a reference to
18 the defendant and his lawyer going down to
19 probation regarding the Pennsylvania warrant.
20 And we'll find that.

21 So on Page 541, a little above
22 the middle of the page, the defense attorney
23 asked the judge if he could utilize the services
24 of the interpreter in probation so the defendant
25 can further investigate the Pennsylvania

1 detainer so it did not hinder his client
2 further. That make sense to you?

3 A. Not to me, no.

4 Q. And why did it not make sense to you?

5 A. Because there wouldn't have been anything
6 that probation could do about the Pennsylvania
7 matter.

8 Q. So probation would be the keeper of the
9 Triple I.

10 A. Yes.

11 Q. And so if there's a charge pending in
12 Pennsylvania, would that show up on the
13 Triple I?

14 A. Yes.

15 Q. Can probation change the Triple I?

16 A. No.

17 Q. Triple I comes from Federal.

18 A. That's right.

19 Q. All right. Now, on whatever day it was, between
20 April 5th and April 20th, Judge Joseph is
21 sitting in Lowell, you're sitting in Lowell, and
22 you had a conversation.

23 A. Yes.

24 Q. And you said that that conversation was in her
25 lobby or your lobby?

1 A. No. In my lobby. She wouldn't have had a
2 lobby there because she wasn't sitting there on
3 a regular basis.

4 Q. How did that conversation come about?

5 A. I asked to talk to her over the lunch recess.
6 So I think we, you know, sat down, the two of
7 us, had lunch, regular chitchat about how things
8 were going, and then I said, Shelley, Mary Beth
9 called me about a situation in Newton, went
10 through it with her and asked her, and I said
11 there's a portion of it, my understanding is, it
12 wasn't recorded, and asked her what happened, if
13 she recalled it.

14 Q. And what did she say?

15 A. She recalled it. She told me that, again,
16 that the defendant had been before the court for
17 an arraignment. She told me that the defendant
18 was charged with a drug offence, fugitive
19 offense. There was confusion she said about the
20 defendant's identity, and she was concerned
21 about that and concerned about people in the
22 audience hearing whatever confusion was about
23 the identity, and had the parties at side bar,
24 and there were some conversation about how the
25 equipment in Newton worked as opposed to other

1 courts that she had been in. Newton was still
2 on an old recording system. It hadn't moved to
3 the FTR system yet. And so there was some
4 conversation about that with specific details.
5 Beyond that, I don't recall.

6 Q. Did she talk about an incident that occurred in
7 another court that was still on an old recording
8 system?

9 A. She may have. I just don't recall.

10 Q. Did she ever, in the course of this
11 conversation, did she ever directly tell you
12 that she had told the clerk to turn off the
13 recording system?

14 A. No. And I didn't, I didn't ask her directly
15 either, no.

16 Q. But she never directly told you that.

17 A. No.

18 Q. Did she tell you anything that in your view
19 would be an acceptable reason for going off the
20 record?

21 A. No.

22 Q. When she talked about concern about people in
23 the audience hearing a discussion of the
24 defendant's identity, did she explain why that
25 was a concern?

1 A. I don't recall.

2 Q. In your view, is a discussion of a defendant's
3 identity something that should happen off the
4 record?

5 A. Not in my view but...

6 Q. And is it an exception to Rule 211?

7 A. It is, it is not.

8 Q. Did she say anything about being concerned that
9 ICE would take the wrong person?

10 A. No. I don't recall us getting that far into
11 the conversation about ICE and what happened
12 because I still was just trying to figure out
13 why there was a portion that wasn't recorded.

14 Q. And you were trying to figure why there was a
15 portion that wasn't recorded. She never said
16 there was a portion that wasn't recorded because
17 I told the clerk to turn the recording off.

18 A. No. I didn't hear that in the meeting with
19 me.

20 Q. Did she say anything about ICE?

21 A. Not that I can recall. But again, I was
22 focused in the first part of the why there's no
23 recording.

24 Q. So you don't recall her saying anything about
25 ICE.

1 A. No. I mean, obviously, in the beginning of
2 the conversation with her, when we were talking
3 about what happened in Newton, I think there was
4 a preliminary conversation about it, but not
5 into details, because, again, I was focused
6 on...

7 Q. Did she say anything about wanting the attorney
8 to have an opportunity to explain the
9 defendant's rights to him before ICE would take
10 him to custody?

11 A. I don't recall anything like that.

12 Q. Did she say anything about wanting to pause ICE
13 taking the defendant into custody?

14 A. No.

15 Q. How did the meeting end?

16 A. I recall that I had made a copy of Rule 211
17 for her prior to the meeting. I also made a
18 copy of the ICE policy. I gave her a copy.
19 Reviewed 211 with her. Told her, Shelley, you
20 know all courtroom proceedings have to be
21 recorded. She said she knew that. I also
22 believe I gave her a copy of the Trial Court ICE
23 policy, and I think she said that she had it
24 because she called the administrative office.
25 And she said she understood everything, so we

1 went back to work.

2 Q. She told you she knew about Rule 211, that all
3 things need to be recorded.

4 A. I don't think she said specifically I know
5 about Rule 211. But she said I know. All court
6 proceedings need to be recorded. Yes, I know,
7 she said.

8 Q. And was that the end of the conversation?

9 A. Yeah. As I recall it, yes.

10 Q. And after that meeting with Judge Joseph, did
11 you have any further conversation about this
12 with anybody before you sent your e-mail to
13 Chief Justice Dawley?

14 A. I, at some point I talked to Judge Heffernan.
15 I think I called her. And I said I talked to
16 Shelley and she did not tell me she instructed
17 the clerk to turn off the recording, Mary Beth.
18 And Judge Heffernan by that time I think had
19 listened to the recording, because she said,
20 yes, she did, Stacey. And I said, well, I
21 talked to her, and that was it.

22 Q. At that point were you satisfied that it
23 wouldn't happen again, that she wouldn't go off
24 the record again?

25 A. I was satisfied that, with her answer to me,

1 that she knew what the Trial Court policy was.

2 Q. And so you then sent this e-mail to
3 Chief Justice Dawley.

4 A. Yes.

5 Q. What was the next thing you heard about this?

6 A. After the e-mail from Chief Justice Dawley, I
7 think Chief Justice Dawley asked to meet with me
8 and Judge Joseph.

9 Q. Did you get any help from his assistants in
10 setting up the meeting?

11 A. Yes.

12 Q. And did you -- In preparation for that meeting,
13 did you send an e-mail from Joseph Jackson in
14 Chief Justice Dawley's office --

15 A. Yes.

16 Q. -- requesting that he get a copy of the
17 recording for Chief Justice Dawley?

18 A. Yes.

19 Q. And that is at Page 532, starting at the bottom
20 of the page. Hi, Joe, hope is all is well,
21 Chief Justice Dawley asked me to forward this to
22 you for Newton recording, and what you were
23 forwarding was the name of the case,
24 Commonwealth versus Jose Medina Perez,
25 April 2nd, 2018.

1 A. Yes.

2 Q. And you sent that to Joe Jackson. And then you
3 sent a further e-mail. You said, Joe, as you
4 know, there is no FTR in Newton yet. Judge
5 Heffernan's copy of the recording is in the
6 lobby if someone needs to pick it up for the
7 Chief.

8 A. Correct.

9 Q. Was there then a meeting in Chief Justice
10 Dawley's office on May 8th of 2018?

11 A. Off the top of my head, I don't recall the
12 date, but I'm sure there's something referencing
13 the date. There was a meeting in Chief Justice
14 Dawley's office.

15 Q. Do you remember that meeting?

16 A. Yes.

17 Q. And who was there?

18 A. My memory is, Chief Justice Dawley,
19 Judge Joseph, and I.

20 Q. So three people in the room.

21 A. That I recall.

22 Q. What was your role in the meeting?

23 A. As the Regional Administrative Judge, you
24 have to go to a meeting with the Chief usually
25 there as another witness to fill in anything, if

1 you had a prior conversation with the judge,
2 that was my purpose, but it's the Chief's
3 meeting.

4 Q. Was he running the meeting?

5 A. Yes.

6 Q. Tell us please everything you remember about
7 that meeting, what he said, what she said.

8 A. Well, he -- My memory is he had notified both
9 of us what the meeting was about, and he asked
10 her, I think at the beginning of the meeting,
11 did you have an opportunity to listen to the
12 recording, and then he said there was some
13 things that he was concerned about in the
14 recording, I think things like lack of formality
15 in the beginning, professionalism, and then the
16 instruction, did she instruct the clerk to go
17 off the record, and Judge Joseph in that meeting
18 right away said, yes, I did, and I shouldn't
19 have done that.

20 Q. And had you heard her say that at any time
21 before?

22 A. No.

23 Q. This is the first time you heard her directly
24 acknowledge?

25 A. She didn't say it to me. She said it to him,

1 yes.

2 Q. And beyond that conversation about going off the
3 record, what else do you recall of this meeting?

4 A. So I remember, I remember not specifics,
5 because it was his meeting, I remember him going
6 through the incident with her, telling her it
7 was a serious matter, very serious matter,
8 making sure again that she understood the rule
9 with regard to recording, that she understood
10 the ICE policy. But the specifics of who said
11 what -- beyond, you know, beyond that, I don't
12 know.

13 Q. Did she explain in any way why she went off the
14 record?

15 A. I don't recall.

16 Q. Did she say anything about ICE, that you recall?

17 A. Not, not that I can recall, no.

18 Q. So do you recall her saying anything about being
19 concerned that ICE would take the wrong person?

20 A. I don't recall.

21 Q. Do you recall her saying anything about being
22 concerned that ICE would take custody of the
23 defendant before his attorney had a chance to
24 confer with him?

25 A. I don't.

1 Q. Did she say anything about wanting to pause ICE
2 taking him into custody?

3 A. No.

4 Q. Did she say anything about wanting his attorney
5 to have a chance to explain his rights to him
6 before ICE would take him into custody?

7 A. Not that I can recall.

8 Q. How did the meeting end?

9 A. My memory is it ended similar to the meeting
10 with me, her being very apologetic about going
11 off the record, saying she understood the
12 policies, that she was apologetic for taking
13 everyone's time, and that's the way the meeting
14 ended.

15 JUDGE FABRICANT: All right.
16 That's all I have at this point.

17 CROSS-EXAMINATION

18 BY MS. MULVEY:

19 Q. Good afternoon, Chief Justice Fortes.

20 A. Good afternoon.

21 Q. My name is Liz Mulvey. Certainly, I've never
22 appeared before you; is that fair?

23 A. That's fair.

24 Q. Okay. This rule against going off the record or
25 requiring that all proceedings be recorded has

1 been in effect probably longer than you've been
2 practicing?

3 A. I think that's probably fair to say, yeah.

4 Q. Is it also fair to say that over the years it's
5 sometimes been honored in breach?

6 A. Not, not in my experience.

7 Q. I understand that. But would you be surprised
8 if other judges had at various times gone off
9 the record?

10 A. No. I mean, you know, I don't know what
11 other judges do and, you know, do necessarily
12 unless it's brought to my attention.

13 Q. Fair enough. And you don't, even as Chief, go,
14 you know, around surveying people, do you?

15 A. No, no.

16 Q. So if other lawyers, judges, clerks testified
17 that that, you know, happens for one reason or
18 another, that wouldn't surprise you, would it?

19 A. When you say it would surprise me --

20 Q. You would believe that.

21 A. I would, I would not not believe it.

22 Q. Right.

23 A. Yes.

24 Q. Right. You would accept that that happens.

25 A. It would surprise me, but I would accept that

1 it happens, yes.

2 Q. Okay. And that rule, like other rules, for
3 various reasons sometimes may not be honored;
4 right?

5 A. Like any rule, yes.

6 Q. For example, the Lunn policy as issued in
7 November of 2017 actually says that, if for
8 somebody who came in in custody, ICE should take
9 custody in the lockup.

10 A. That's correct.

11 Q. And that's, among other things, a security
12 thing, right, because you don't want a scuffle
13 in the public area of the courthouse?

14 A. No. That's correct.

15 Q. And you know, in Newton, that wasn't the policy;
16 right?

17 A. I learned that after, during this incident,
18 yes.

19 Q. So that's another example of, just because
20 there's a rule, doesn't mean everybody always
21 follows the rule.

22 A. That's right. That's right.

23 Q. And when you had this meeting with Judge Joseph,
24 that was sort of an informal lunchtime meeting;
25 is that right?

1 A. Correct. Correct.

2 Q. And your main purpose was to make sure she
3 understood you really can't go off the record.

4 A. That's right.

5 Q. You weren't suggesting to her that she had
6 something to do with this. You wanted to make
7 sure, don't turn off the tape.

8 A. That's right. And she did say that that in
9 fact happened. I wanted to first find out what
10 happened from her. I was hearing what happened.

11 Q. Okay. And your understanding was, she hadn't
12 had a chance to listen to the recording; right?

13 A. When she met with me.

14 Q. You were just sort of raising it at that point.

15 A. Yes. She didn't know anything about the
16 meeting.

17 Q. And you didn't take any notes because this was a
18 lunchtime --

19 A. Yes.

20 Q. -- conversation, trying to help her understand
21 don't do this.

22 A. That's correct.

23 Q. All right. And as a RAJ and now as a chief,
24 that's part of your role, is to help people do
25 the right thing.

1 A. That's correct.

2 Q. All right. And you started out the meeting by
3 saying, I understand you may have gone off the
4 record.

5 A. Yes.

6 Q. And she didn't say, no, that's not true; right?

7 A. Well, I started off the meeting by saying
8 that Mary Beth called me about this situation in
9 Newton, and part of what she's telling me is
10 that there was a portion of the hearing that
11 wasn't recorded. I didn't say to her did you
12 go -- because I didn't know and Mary Beth didn't
13 know at that time.

14 Q. And you didn't ask her, did you?

15 A. No. I did not say, did you go off the
16 record.

17 Q. All right. And you said I understand some of it
18 was off the record?

19 A. Yes. Do you know what happened.

20 Q. And she didn't say, no, that's not true, did
21 she?

22 A. No, she didn't say, no, that's not true.

23 Q. That was sort of the assumption everybody was
24 working on?

25 A. What was?

1 Q. That part of it is off the record.

2 A. Yes.

3 Q. All right.

4 A. Yes.

5 Q. And if she remembers that you showed her or read
6 her the rule, that would be accurate; right?

7 A. The rule on recording. 211. Yes.

8 Q. All right. And there was some conversation, and
9 you don't recall it directly, about an incident
10 in Waltham? Do you recall her telling you about
11 something like had happened in Waltham?

12 A. I don't recall that.

13 Q. Do you remember in general some conversation
14 about Waltham?

15 A. I don't know, no.

16 Q. So is it possible that you asked her, have you
17 ever gone off the record before, and she started
18 talking about something that had happened in
19 Waltham?

20 A. It's possible.

21 Q. Do you know that now there actually was an
22 incident in Waltham where a side bar was getting
23 broadcast to the gallery?

24 A. I don't know.

25 Q. All right. But at that point was it Waltham and

1 Newton that still had JAVS instead of FDR?

2 A. It was definitely Newton. I don't recall
3 Waltham as well.

4 Q. All right. And she, when you gave her the rule,
5 said, I'm sorry, I won't ever do it again,
6 basically?

7 A. I -- In the meeting with me, she didn't say
8 anything about going off the record. So it
9 wasn't directing that. It wasn't, to me, I'm
10 sorry, I'll never do that again. That was with
11 Chief Justice Dawley. I never heard from her or
12 anything in the meeting with me about
13 confirmation one way or another that there was a
14 portion of the proceeding that wasn't recorded.

15 Q. Well, you had started out by saying, I
16 understand this happened; right?

17 A. Right.

18 Q. And she didn't dispute it; right?

19 A. She didn't dispute it.

20 Q. Okay. And so given that you already knew it,
21 did you understand that she was agreeing with
22 you?

23 A. Again, I didn't already know it. Because I
24 was hearing it, and it hadn't been confirmed
25 from Judge Heffernan yet. So I didn't already

1 know it. I was telling her what I heard, and
2 then at the end of the meeting I was saying to
3 her, you know all courtroom proceedings have to
4 be recorded. She didn't say to me I'm sorry
5 because at that point I don't -- it wasn't clear
6 to me that she was acknowledging anything about
7 the portion of the recording not being recorded,
8 for lack of a better word. So I heard that
9 first with Chief Justice Dawley.

10 Q. Well, if you said to her I understand it was off
11 the record and that didn't happen, wouldn't you
12 have expected her to say, no, that didn't
13 happen?

14 A. No. I didn't say to her -- I said to her, my
15 understanding from Judge Heffernan is there's a
16 portion of the hearing that wasn't recorded. I
17 didn't know whether the machine wasn't working,
18 I didn't know what happened, why there was a
19 portion that was not recorded.

20 Q. Did you ask her?

21 A. No, I didn't say, I didn't say to her, did
22 you turn off the recording, no.

23 Q. Okay. Did you say why, was it off the record?

24 A. Again, it wasn't clear to me, other than what
25 I was hearing from Judge Heffernan, no one had

1 listened to the tape yet that there was a
2 portion that wasn't recorded. I was telling her
3 that when I spoke to her this is what I heard --

4 Q. Okay.

5 A. -- and do you remember this incident --

6 Q. All right.

7 A. -- and was there -- did something happen --

8 Q. All right.

9 A. And letting her talk to me about the
10 incident.

11 Q. And did she say to you, no, I didn't go off the
12 record?

13 A. No.

14 Q. Okay. Did you ask her directly, did you go off
15 the record?

16 A. I did not.

17 Q. Okay. So you gave her the Rule 211?

18 A. I did.

19 Q. And you gave her the Lunn policy?

20 A. Yes.

21 Q. Which actually Newton wasn't follow; right?

22 A. Well, yes. Based on what we just talked
23 about, yes.

24 Q. Okay. And then the focus of this meeting was
25 not ICE and the defendant escaping, it was going

1 off the record, wasn't it?

2 A. The focus of the meeting was trying to figure
3 out what happened. Mary Beth was saying one
4 thing. Mary Beth wasn't there. So I said, let
5 me talk to Shelley and see if I can piece
6 together what happened.

7 Q. All right. And did you try to piece together
8 what had happened with ICE?

9 A. I didn't get that far because, again, I was
10 trying to figure out --

11 Q. The tape.

12 A. -- the tape.

13 Q. You were concerned about the tape; right?

14 A. Exactly.

15 Q. All right. And then there was this meeting with
16 Chief Judge Dawley; right?

17 A. Yes.

18 Q. And again, he's running the show because he's
19 the Chief.

20 A. That's correct.

21 Q. You didn't take any notes again, --

22 A. No.

23 Q. -- did you?

24 A. No.

25 Q. And she said it, yes, I did it, I'm sorry, --

1 A. That's right.

2 Q. -- I'll never do it again.

3 A. Exactly.

4 Q. All right. And there was some conversation
5 about what had happened with the actual
6 proceedings.

7 A. Yes.

8 Q. Okay. But again, the focus was making sure she
9 understood don't go off the record; right?

10 A. In his meeting?

11 Q. Yes.

12 A. The focus for him was making sure she doesn't
13 go off the record and making sure she understood
14 the Trial Court policy, the ICE policy.

15 Q. Okay. Which -- Do you know she actually called
16 and got a copy during the day that day?

17 A. During the day of the --

18 Q. The day of the hearing.

19 A. I believe so. Yeah. Because I think when I
20 handed her a copy, she said she had gotten it
21 from the administrative office.

22 Q. Right. She actually called and had them tell
23 her about the policy; right?

24 A. Based on what she was saying, yes.

25 Q. And do you know there's actually an e-mail

1 showing that they sent it to her?

2 A. I don't dispute that.

3 Q. So that was a perfectly appropriate thing for
4 her to do, try to get help.

5 A. Absolutely.

6 MS. MULVEY: I have nothing
7 else. Thank you, Judge.

8 JUDGE FABRICANT: I have
9 nothing further for this witness. Thank you.

10 HEARING OFFICER: Thank you
11 very much. You're excused.

12 JUDGE FABRICANT: We have our
13 next witness scheduled at 2:00. So if we could
14 take a lunch break now, that would be great.

15 HEARING OFFICER: That's fine.
16 We'll recess until 2:00. Thanks All.

17 (PAUSE)

18 Can I just confirm, do you have
19 another witness after that or is that going to
20 be the last one?

21 JUDGE FABRICANT: The witness
22 after that will be Judge Joseph.

23 HEARING OFFICER: Okay. And
24 that would be for tomorrow?

25 MR. HOOPES: Yes. We talked

1 about that yesterday.

2 HEARING OFFICER: Okay.

3 JUDGE FABRICANT: I think the
4 next witness will not take two hours. If that's
5 how we want to proceed, that's fine.

6 HEARING OFFICER: That's fine.
7 And then if you could give thought over the
8 break so that by the end of the day we can talk
9 a little bit more about plans for after
10 Judge Joseph's testimony, you can let us know
11 what you're thinking is on that.

12 MR. HOOPES: Yes.

13 HEARING OFFICER: All right.
14 Thanks very much.

15 JUDGE FABRICANT: Thank you.
16 (Luncheon recess taken at
17 12:52 p.m.

18 (Proceedings resumed at
19 2:01 p.m.)

20 JUDGE FABRICANT: The
21 Commission calls former Chief Justice
22 Paul Dawley.

23 HEARING OFFICER: Good
24 afternoon.

25

1 former CHIEF JUSTICE
2 PAUL C. DAWLEY, SWORN
3 HEARING OFFICER: Thank you.

4 Please be seated.

5 DIRECT EXAMINATION

6 BY JUDGE FABRICANT:

7 Q. Good afternoon, Chief Justice Dawley.

8 A. Good afternoon.

9 JUDGE FABRICANT: Is that on?

10 THE WITNESS: Not sure.

11 JUDGE FABRICANT: I think it
12 is.

13 HEARING OFFICER: No.

14 (PAUSE)

15 Q. Would you state your name, please.

16 A. My name is Paul Dawley. Last name is spelled
17 D-a-w-l-e-y.

18 Q. Thank you.

19 And what do you do now?

20 A. Presently work as the general counsel to the
21 University of Massachusetts Foundation.

22 Q. Were you -- In your previous role, were you the
23 Chief Justice of the District Court?

24 A. Yes.

25 Q. Would you tell us, please, go back to when you

1 became a lawyer, and just give us a brief
2 overview of your professional background.

3 A. I became an attorney in 1989. I worked for
4 approximately 12 years as an assistant district
5 attorney in Plymouth County. I was the Deputy
6 First Assistant District Attorney. In 2001, I
7 was appointed as an associate justice of the
8 Brockton District Court. I served as the
9 Regional Administrative Justice and the
10 First Justice of the Court. And then in 2013 I
11 was appointed as the Chief Justice of the
12 District Court. In 2018, I was reappointed to
13 additional five-year term. And then, in 2022, I
14 retired from the bench.

15 Q. Can you tell us what the role is of the
16 Chief Justice of the District Court?

17 A. The duties of the Chief Justice are set forth
18 in the statute, Chapter 211B, Section 10. And
19 essentially, it is to oversee the operation of
20 the District Courts. There are 62
21 District Courts across the Commonwealth. And
22 primarily the duties are to implement policies
23 from the Trial Court and the Supreme Judicial
24 Court. There are budget and personnel
25 responsibilities. There's work, working with

1 probation, for example, to implement recidivism
2 reduction program, such as specialty courts,
3 drug courts, mental health courts, implementing
4 training, professional development, not only for
5 judges, but for court personnel, including
6 clerks, implementing information technology
7 enhancements. Case load management is a
8 significant part of it. And there's a public
9 outreach aspect in terms of working with the bar
10 associations. The duties are wide ranging.
11 Those are some of them.

12 Q. And does the statute authorize the Chief Justice
13 to discipline judges of the District Court?

14 A. Yes, it does.

15 Q. Does it give you much guidance about exactly how
16 you would go about that?

17 A. The statute I think is somewhat vague. The
18 practice is, in an instance of judicial
19 misconduct, the Chief Justice will report that
20 to the Chief Justice of the Supreme Judicial
21 Court, Chief Justice of the Trial Court, and
22 then the referral to the Commission on Judicial
23 Conduct would take place.

24 Q. And before you would report it, do you do some
25 investigation?

1 A. Yes.

2 Q. Would you talk with the judge involved?

3 A. Typically, there would be some type of
4 investigation. In some instances, the
5 information is just provided to you. In other
6 instances, it required some investigation on my
7 part, and ultimately, a report to the court.

8 Q. You said that there are 62 divisions of the
9 District Court. And does that -- Does a
10 division refer usually to a particular
11 courthouse?

12 A. Yes. There are 62 separate District Courts
13 in the Commonwealth. Attached to those are
14 158 judges, 26 clerk magistrates, one clerk
15 magistrate appointed by the governor to each
16 court, and then this court sets approximately a
17 thousand employees across those 62 courts.

18 Q. And you said 158 judges?

19 A. Yes.

20 Q. And 62 clerks.

21 A. Yes.

22 Q. And are those -- Are the divisions located
23 everywhere except Boston?

24 A. That's correct.

25 Q. And what serves the equivalent function in

1 Boston?

2 A. The Boston Municipal Court.

3 Q. And what kinds of cases does the District Court
4 hear?

5 A. It hears both criminal and civil cases, would
6 be civil damage thresholds, approximately
7 \$50,000 by rule of the SJC. The criminal
8 matters are generally matters for which a person
9 can be incarcerated for up to two and a half
10 years. In addition, the District Court, the
11 subject matter jurisdiction is very wide ranging
12 because it also includes mental health,
13 involuntary mental health commitments, domestic
14 abuse, 209A orders, landlord/tenant matters, and
15 there's a whole host of administrative appeals
16 that an individual would have a right to appear
17 in court to challenge an administrative finding.

18 Q. And you refer to 209A. Is that a statute
19 relating to restraining orders arising out of
20 domestic abuse situations?

21 A. Yes.

22 Q. Can you talk a little about the process when a
23 new judge is appointed to the District Court?

24 A. The District Court has a formal judicial
25 orientation program. Every newly-appointed

1 judge for the first four weeks is assigned to
2 sit on a daily basis with a different judge, a
3 more senior judge, with a particular focus on a
4 particular subject matter.

5 The curriculum, if you will, is
6 established by the District Court Committee on
7 Education. That's comprised of judges, clerks,
8 and probation officials. And what they do is
9 identify substantive areas of the law that we
10 anticipate are going to require judicial
11 decision-making.

12 So, for example, on the
13 criminal side, a new judge would sit with
14 somebody to review arraignments and bail. Bail
15 revocation, probation violation matters, jury
16 empanelment, sentencing, case disposition on a
17 criminal side. On the civil side, you may sit
18 with somebody to review landlord/tenant cases,
19 debt collection. And then, of course, the
20 involuntary commitments for substance abuse
21 disorder Section 35, domestic violence 209A.

22 So in the first four weeks, a
23 judge is assigned to sit with a specific other
24 judge to review these matters and gain obviously
25 the experience and the perspective of the more

1 experienced judge.

2 Q. Is it a different judge each day for those four
3 weeks?

4 A. For the most part. Occasionally somebody
5 will sit on a pro bono one day with another
6 judge. But it's designed -- There's quite a bit
7 of travel involved, because a new judge is
8 moving around and meeting a lot of different
9 judges.

10 Q. And did you also meet with the new judge when
11 you were the Chief Justice?

12 A. I did. The practice is, once somebody is
13 confirmed by the governor's council, a meeting
14 is set up in the administrative office where a
15 new judge would meet with me as the
16 Chief Justice as well as the administrative
17 office staff, the lawyers and the other staff.

18 Q. And did your office also provide materials for
19 each new judge?

20 A. Yes. Every new judge is provided materials,
21 frankly, a large box of books, as well as
22 electronic materials, and the materials not only
23 come from the administrative office of the
24 District Court, they come, some instances, the
25 Supreme Judicial Court, Flaschner Judicial

1 Institute, the administrative office of the
2 Trial Court. So people would be inundated with
3 materials to receive.

4 Q. Is one of the things that each new judge would
5 be provided with a copy of the Massachusetts
6 Rules of Court, this book that I'm holding up?

7 A. Yes, it is.

8 Q. And every year does Thomson Reuters come out
9 with a new version of this?

10 A. I believe so.

11 Q. Does Flaschner send a copy of the new version to
12 every judge every year?

13 A. I believe so.

14 Q. Did the District Court in your time as
15 Chief Justice also have educational conferences
16 at various times?

17 A. We had at least one annual conference
18 court-wide. But after I became Chief Justice,
19 we instituted orderly regional meetings, they
20 were referred to, where judges would -- first
21 would be the clerks would gather in the morning,
22 and there'd be presentation on development in
23 the law, circuit areas of the law, and then the
24 afternoon we'd do that same program -- or
25 different program but the same type of approach

1 to judges. So every three or four months we
2 were meeting and it was an education program
3 presented.

4 Q. And were there on occasion a special conference
5 on a particular topic, such as race and bias?

6 A. Yes.

7 Q. And all of these various conferences and
8 programs, if a judge couldn't attend for some
9 reason, was there a process to make sure that
10 whatever materials might have been handed out at
11 a conference would be sent to the judge who
12 couldn't attend?

13 A. That's correct.

14 Q. How --

15 A. We would have a process where, for varying
16 reasons, whether they were on trial, whether
17 there was a personal commitment they had, people
18 couldn't make it. So they would identify the
19 administrative staff or identify who was not
20 present and they would send them the materials.

21 Q. Can you tell us what a transmittal is or was
22 when you were Chief Justice?

23 A. It was a communication from me on a variety
24 of subjects, to all judges, all clerk
25 magistrates, all chief probation officers,

1 essentially all court staff. And within the
2 transmittal, it could be about a development in
3 the law, it could be a policy from the
4 Trial Court or the SJC, could be personnel
5 announcements. The announcements, for instance,
6 of new judges or the announcements of
7 retirements. It was a way to communicate with
8 the whole District Court system.

9 Q. Did you keep track of them so each one has a
10 number so --

11 A. I didn't, but somebody did.

12 Q. Somebody on your staff did that?

13 A. Yes.

14 Q. I'm going to ask you to look at Appendix C. And
15 you have in front of you a binder, and we're
16 displaying on the monitor here, so you can look
17 at either way, whether it's in the binder or on
18 the monitor, Appendix C. And in that binder you
19 have all of the appendices. So if you look at
20 the first page of Appendix C, you see the front
21 page of it, which is what's on the monitor.

22 A. Yes.

23 Q. Is that what a transmittal coming from the
24 District Court looks like or did look like at
25 the time?

1 A. Yes.

2 Q. Were there also transmittals that would come
3 from the Trial Court as well?

4 A. Yes.

5 Q. And would they look somewhat similar?

6 A. Yes.

7 Q. But would it indicate that it was coming from
8 the executive office of the Trial Court and the
9 name of the Chief Justice of the Trial Court
10 and/or the court administrator?

11 A. It would. At the top it would be clear that
12 it was from Chief Justice Carey, for example.

13 Q. So looking at this one, and this is numbered
14 transmittal number 1222, do you see it up in the
15 right upper part of the page? Do you see that?

16 A. Yes. Yup.

17 Q. And let me ask you to go over to Page 10 in the,
18 Page 10 in the -- using the pages on the -- I'm
19 sorry -- Page 13, using the page numbers at the
20 upper right corner of the page. Do you see
21 that?

22 A. Yes.

23 Q. Okay. And -- I'm sorry.

24 HEARING OFFICER: Is it 12?

25 Q. I told you the wrong thing.

1 JUDGE FABRICANT: Yes, 12.

2 Thank you.

3 Q. Page 12.

4 A. Yes.

5 Q. If you look at Paragraph 6 on Page 12, do you
6 see that that says updated immigration bench
7 card?

8 A. Yes.

9 Q. And do you see that it says that at the
10 December 13th, 2017, conference? And was there
11 a conference on December 13th, 2017,
12 specifically on the subject of race and bias?

13 A. Yes. It was a court-wide conference on that
14 subject for all District Court judges.

15 Q. And although specifically on that subject, were
16 there some materials handed out on other
17 subjects?

18 A. Yes.

19 Q. And you see it says here at the December 13th,
20 2017, conference, we distributed a revised
21 information and immigration matters bench card
22 dated 12/17 -- Does that mean December of '17?

23 A. Yes.

24 Q. -- to note the Supreme Judicial Court's holding
25 in Lunn versus Commonwealth, that Massachusetts

1 court officers do not have the authority to hold
2 an individual in custody solely on the basis of
3 a Federal civil immigration detainer beyond the
4 time that the individual would otherwise be
5 entitled to a release from state custody. Do
6 you see that?

7 A. Yes.

8 Q. And do you see that it says, consistent with
9 District Court Transmittal 1209? Is that a past
10 transmittal that had been issued earlier?

11 A. Yes.

12 Q. Which was issued after the Lunn decision and
13 rescinded prior District Court transmittals on
14 that subject, this revised bench card replaces
15 the bench card dated 10/16 -- Does that mean
16 October of 2016?

17 A. Yes.

18 Q. -- and should be discarded.
19 So is this telling the recipient that here's a
20 new bench card on immigration matters, anything
21 you have from before this you should discard?

22 A. Yes, it does.

23 Q. And then please contact Jackie Lawson. Is she a
24 person in the administrative office --

25 A. She's an administrative assistant.

1 Q. If you do not receive the updated bench card.
2 And then the electronic version, -- Was this
3 sent electronically by e-mail?

4 A. Yes.

5 Q. -- the electronic version of the new bench card
6 is attached so you can replace Pages 125 to 126
7 in your 90-day guide. What's a 90-day guide?

8 A. 90-day guide is put together by the
9 Education Committee. It's a condensed version
10 of the significant amount of materials a judge
11 receives, and it's designed by the committee to
12 be a quick resource for judges on the things
13 that they're most likely to encounter in their
14 first 90 days on the bench.

15 Q. So is the idea that it would be a good idea for
16 the judges to have that with them --

17 A. We recommend they bring it on the bench with
18 them.

19 Q. And then it says, additional guidance on
20 responding to request from the
21 Department of Homeland Security can be found in
22 the Trial Court's policy and procedure regarding
23 courthouse interactions with the
24 Department Homeland Security issued by executive
25 office transmittal 1713 dated November 10th,

1 2017.

2 So this is advising the
3 recipient that's where you look to get more
4 information on the subject?

5 A. Yes.

6 Q. And we're going to look at that in just a
7 minute. But if you go over to Tab D. We'll
8 pull it up here on the monitor. Is this -- At
9 Pages 15 and 16. Is this the updated bench
10 card?

11 A. Yes, it is.

12 Q. And if you look in the bottom right-hand corner
13 of each page, do you see where it says AODC
14 revised 12/17?

15 A. Yes.

16 Q. Does that tell the reader that this comes from
17 the administrative office of the District Court
18 and that it was revised in December of 2017?

19 A. Yes, it does.

20 Q. So it should replace anything earlier on the
21 subject?

22 A. Yes.

23 Q. And if you look at the last box on the second
24 page, so within the box, and if you look at the
25 bottom paragraph, do you see where it says, for

1 guidance on the manner in which Trial Court
2 employees and in particular court officers shall
3 respond to request from Department of Homeland
4 Security to provide information about and take
5 custody -- And I'm just going to skip a little
6 bit. See Executive Office Transmittal 1713
7 dated November 10th, 2017, which contains the
8 Trial Court's policy and procedure regarding
9 courthouse interactions with the Department of
10 Homeland Security. Do you see that?

11 A. Yes.

12 Q. So what did you expect judges and other court
13 personnel in the District Court to do when they
14 got Transmittal 1222 and the attached electronic
15 bench card?

16 A. The expectation was, this would replace the
17 prior one and would be put in the 90-day guide
18 or available as a resource for the judges.

19 Q. And did you expect them to read it?

20 A. Yes.

21 Q. And see the reference to Trial Court Transmittal
22 1713?

23 A. Correct.

24 Q. And let's take a look at that just so we know
25 what it's referring to. And that is Appendix B

1 in your book. You will see that this is a
2 transmittal issued by the Executive Office of
3 the Trial Court dated November 10, 2017,
4 Executive Office Transmittal 1713.

5 A. Yes.

6 Q. Was this document commonly referred to as the
7 Lunn policy after the Lunn decision?

8 A. Yes, it was.

9 Q. And is that what your transmittal was telling
10 judges they should look to for more information
11 on the subject?

12 A. Yes. This was the document that was referred
13 to in the bench card.

14 Q. And in your time as District Court Chief, were
15 you familiar with District Court Special Rule
16 211?

17 A. Yes.

18 Q. We're going to pull that up. You were familiar
19 with that.

20 A. (Witness nods head).

21 Q. This is Appendix K. And it's in your book
22 behind Tab K and at Pages 122 to 123. What is
23 your understanding of what this rule requires?

24 A. The Rule 211 is entitled Quarterly Court
25 proceedings, and it sets forth the requirement

1 that all courtroom proceedings be recorded
2 electronically.

3 Q. Are there some exceptions?

4 A. There are. They're listed in the first
5 paragraph. They exclude the call of the list
6 and similar matters of an administrative nature,
7 proceedings that are being recorded by a court
8 reporter appointed by the court, and proceedings
9 conducted by a magistrate other than a judge.

10 Q. And if you go over to the second page of it,
11 Page 123 in the appendix, and you look at the
12 line right above near the bottom of the page,
13 right above the part that's in capitals and in
14 bold, do you see that it tells you when this
15 rule was issued and took effect?

16 A. It was issued December 31st, 1987, and
17 effective February 1st, 1988.

18 Q. In your experience as a sitting judge and as
19 Chief Justice, were there any circumstances
20 that, in your view, when it's permissible to go
21 off the record?

22 A. I think there were some circumstances. And I
23 can -- I'll only speak for myself.

24 Q. Please.

25 A. When I was a judge, there were some

1 circumstances that I thought it was appropriate
2 to go off the record.

3 Q. And what were those?

4 A. When somebody clearly wanted to speak to me
5 about a personal matter.

6 Q. Personal to who?

7 A. Personal to the lawyer. Something non-case
8 related. In addition, I can particularly
9 remember an area that was challenging, but when
10 lawyers or members of law enforcement were in
11 the courtroom, and they wished to bring to your
12 attention that the individual who was the
13 subject of the arraignment perhaps or the
14 sentencing was a cooperating witness or an
15 informant, and then it became more difficult to
16 have that information in a public setting.
17 There are obvious dangers attached to that. So
18 those would be instances I can clearly remember
19 when I sat in Brockton District Court dealing
20 with a couple of those and being very cautious
21 not to record those.

22 Q. And was there something that you would observe
23 in the courtroom that would tip you off that
24 that was what somebody wanted to talk about if
25 somebody asked to go off the record?

1 A. Well, it was -- some instances would be, an
2 assistant district attorney, it would sometimes
3 be the defense lawyer, in some instances a
4 member of the law enforcement would be there,
5 and they informed the clerk that they wanted to
6 talk to you.

7 Q. And did the presence of law enforcement give you
8 some indication?

9 A. In some instances.

10 Q. And was there another type of proceeding that
11 you would do, not necessarily off the record,
12 but not on the regular record?

13 A. There could be an in-camera review of certain
14 information. Particularly, I think there was a
15 Martin proceeding which is when an individual
16 wishes to assert constitutional right, that the
17 SJC make sure be done, and not in a courtroom,
18 but an in-camera setting, I also believe that
19 that they suggest that that be recorded and the
20 recording -- I'm not sure if it's impounded, but
21 be kept separate and apart from the case.

22 Q. And you say constitutional right. So a right
23 not to testify, for example.

24 A. Yes.

25 Q. So if someone is subpoenaed to a trial and wants

1 to say I have a right not to testify, and you
2 need to rule about whether the person does in
3 fact have that right. Is that --

4 A. Yes. Because sometimes you're going to
5 inquire as to whether there's a legitimate basis
6 on which the person is asserting the privilege.
7 For instance, self-incrimination. That
8 obviously has potential implications to that
9 individual, so that's the type of proceeding you
10 would do it in.

11 Q. And you call that a Martin proceeding. Is that
12 after the name of a SJC decision?

13 A. Yes.

14 Q. Are you aware that some judges in past years
15 used to do so-called lobby conferences off the
16 record?

17 A. Yes.

18 Q. And what's a lobby conference?

19 A. It's a conference among the parties with the
20 judge in the judge's chambers.

21 Q. And what would such a conference be about?

22 A. Most likely a disposition in the case.

23 Q. So a potential plea.

24 A. Correct.

25 Q. Are you aware of any SJC decisions on that

1 subject?

2 A. I am. The SJC, I'm not sure what year it
3 was, but it was probably early 2000's, they
4 issued a clear directive that unrecorded lobby
5 conferences should not take place.

6 Q. And would that be perhaps the case of
7 Murphy versus the Boston Herald?

8 A. Yes.

9 Q. And what do you view as the lesson of that case?

10 A. Perhaps the importance of ensuring that the
11 proceedings are recorded. It's a complete and
12 accurate record established of what is being
13 said.

14 Q. In 2015, did the SJC take some action to end the
15 practice of lobby conferences off the record? A
16 rule change, for example?

17 A. I believe they may have amended -- I forget
18 what rule it is, but I know that there was an
19 amendment to one of criminal rules in which they
20 emphasize that proceedings should be done in
21 open court on the record.

22 Q. So let's take a look at Appendix L. So you have
23 in front of you Rule 12 of the Rules of Criminal
24 Procedure. Are the Rules of Criminal Procedure
25 established by the SJC?

1 A. Yes.

2 Q. And if you look at Rule 2B, -- do you see it --
3 it says --

4 A. I'm sorry. Did you say 2B?

5 Q. 2. I'm sorry. It's not 2B. It's 12B2. It
6 says, plea discussions, and then it says, the
7 judge may participate in plea discussions at the
8 request of one or both of the parties if the
9 discussions are recorded and made part of the
10 record.

11 A. Yes.

12 Q. Do you see where it says that?

13 A. Yes.

14 Q. And we have the reporter's notes that tell us
15 when that change was made. So I think we'll
16 find that at Page 143 to 144. Do you see at the
17 bottom of Page 143 it says reporter's notes
18 January of 2015?

19 A. Yes.

20 Q. And then it has a whole discussion of the
21 changes made in 2015 and has a big paragraph
22 about 12B2 and it tells us that that's when that
23 change was made in substance. Take your time to
24 look at it if you have any uncertainty about it.

25 A. Yes. And it cites Murphy versus the

1 Boston Herald.

2 Q. In 2018, -- and I know it's nearly seven years
3 ago -- what recording system did the
4 District Court use?

5 A. The District Court was in the middle, I think
6 the Trial Court generally was, too, in the
7 middle of changing to the recording systems.
8 The new version, if you will, of the recording
9 system was something called For the Record, FTR.
10 They, I think in 2018 they were in the process
11 of implementing it across the state. My memory
12 is they picked the largest courts first to
13 implement that system. So there was some courts
14 that had it, some courts did not.

15 Q. And the older system, was there -- The courts
16 that didn't yet have FTR, was there consistency
17 in those courts about what they did have?

18 A. I forget what it's called, but it's
19 essentially a cassette recording. It was some
20 type of recording that played. And when you
21 wanted to listen to it, you would gather the
22 cassette and put it in a system, put on
23 headphones and listen to it.

24 Q. And did some of the courts have what they call
25 JAVS?

1 A. Yes.

2 Q. What did you have to do to get a recording from
3 JAVS?

4 A. I would have to say I don't know. Because if
5 I needed a cassette, I would give it to the
6 administrative staff and they would request it
7 of the court and then I received a cassette.

8 Q. Was it sometimes a CD --

9 A. Yes.

10 Q. -- instead of cassette? And do you know what
11 the Newton District Court was using at the time
12 in April of 2018?

13 A. They were not -- They did not yet have the
14 FTR system. They had the old system.

15 Q. Did Judge Joseph become a judge of the
16 District Court in November of 2017?

17 A. Yes.

18 Q. And at that time had you had any previous
19 acquaintance with her?

20 A. No. The first time I met Judge Joseph was
21 after she was appointed, and she come in to meet
22 me and administrative staff as part of the
23 judicial orientation.

24 Q. And did you follow the usual practice in
25 providing orientation with Judge Joseph as you

1 do with other new judges?

2 A. Yes.

3 Q. Did you have your staff send her or give her the
4 usual materials for a new judge?

5 A. Yes.

6 Q. And did you assign her a mentor?

7 A. I did.

8 Q. Can you talk a little bit about the judicial
9 mentor program, what that is and how it works or
10 did work in 2018?

11 A. So every judge in the Trial Court, every
12 newly-appointed judge receives a mentor for a
13 two-year period. The mentors go through
14 specific training, generally, the more
15 experienced the judges have been on the bench
16 longer. And the program is designed to provide
17 support with guidance to newer judges,
18 essentially a vehicle for their support that
19 they can speak to and review matters with and
20 gain the support.

21 Q. Does the Chief Justice choose the mentors?

22 A. Yes.

23 Q. And do the mentors get some training in being a
24 mentor?

25 A. Yes. I think several times a year they

1 attend sessions and there's mentor training.

2 Q. Is part of the role of a mentor that they're
3 trained to do, that they should be available to
4 their mentee or mentees for phone consultation
5 pretty much at any time?

6 A. Yes. The whole idea is to building a system
7 where there's somebody available to provide a
8 support to the newly-appointed judge.

9 Q. Now, I want to turn your attention to April 20th
10 of 2018. Did you receive an e-mail from
11 Judge Fortes about an incident in Newton?

12 A. Yes.

13 Q. And let's look at Appendix B. And Howard has up
14 on the screen what I think is Page 540. The top
15 of the page I'm showing on the monitor, is this
16 the e-mail that you received from Judge Fortes?

17 A. Yes.

18 Q. And was Judge Fortes at the time the
19 Regional Administer Justice for the region that
20 included Newton?

21 A. Yes, she was.

22 Q. When you got this e-mail from Judge Fortes, was
23 this the first you had heard about the incident
24 that she describes in Newton?

25 A. Yes.

1 Q. And I'm just going to read it. Chief Judge
2 Heffernan called me about this incident a couple
3 of weeks ago. I asked her at that time to
4 follow up with an e-mail outlining the incident
5 below, that is the e-mail from Judge Heffernan.
6 I also suggested she pull the tape because there
7 was some indication the judge involved may have
8 gone off the record prior to defendant going
9 down the back stairwell. I've spoken to the
10 judge involved. I can brief you if you need
11 additional info. Informing you about it now
12 because Judge Heffernan called to let you know
13 regional director for ICE, question mark, may
14 bring it up at meeting supposedly scheduled with
15 CJ Carey. I didn't want you or CJ Carey
16 blind-sided by any information. Judge Heffernan
17 can fill in anything I left out.

18 Did you read that e-mail when
19 you got it?

20 A. Yes, I did. And attached -- Well, not
21 attached, but I think forwarded to that e-mail
22 was Judge Heffernan's e-mail.

23 Q. And did you read Judge Heffernan's e-mail?

24 A. Yes.

25 Q. Did you expect that a Regional Administrative

1 Justice would bring to your attention the
2 matters that needed to come to your attention?

3 A. Yes.

4 Q. Did you also expect that a Regional
5 Administrative Justice or a First Justice or
6 some combination of them would handle matters
7 that they could handle so you didn't have to
8 handle everything?

9 A. That's accurate. Oftentimes the
10 First Justice or the Regional Administrative
11 Justice, they'll deal with things and, you know,
12 attempt to solve problems before they reach a
13 higher level.

14 Q. And was there a meeting scheduled with the
15 regional director for ICE or somebody in some
16 similar role?

17 A. There was. From time to time Chief Justice
18 Carey would meet with different areas of law
19 enforcement. Some of those meetings I would
20 attend with her, whether they were with the
21 Colonel or the state police, the attorney
22 general. It was an attempt to reach out and
23 engage in a discussion about different policies
24 or different issues. So she often would set up
25 meetings that I saw for other Chief Justices

1 would attend.

2 Q. And at around this time, do you recall that
3 there was a meeting scheduled?

4 A. I do -- I'm not sure of the time, but I do
5 remember a meeting scheduled with the, I think
6 it was the director of the Boston office of ICE.

7 Q. And this being April of 2018, was there some
8 tension in the relationship between state
9 authorities and Federal authorities particularly
10 related to ICE?

11 A. I'm not sure I'd describe it as tension,
12 other than I think the point of the Trial Court
13 was we were trying to -- I think we were trying
14 to educate law enforcement about this policy and
15 the decision that the Supreme Judicial Court had
16 made in Lunn and what that meant for everyday
17 activity in the courthouses. I think her intent
18 was to collaborate with them, make them aware of
19 the legal restrictions we faced and inform them
20 what we were going to do about it.

21 Q. When you got this, did you read the attached
22 forwarded e-mail from First Justice Heffernan?

23 A. Yes, I did.

24 Q. Was that -- Had you had any previous awareness
25 of what she refers to as the usual practice in

1 Newton Court, the agent was asked to wait
2 outside the courthouse as he did not have a
3 warrant but a detainer? Was that something you
4 had any previous awareness of?

5 A. No, not before this e-mail.

6 Q. What was your reaction to it?

7 A. Well, I responded to it by asking essentially
8 what authority the court had to exclude an ICE
9 agent from being in the courtroom and expressed
10 a little bit of concern in terms of whether that
11 was permissible.

12 Q. And is that the e-mail that appears at Page 539
13 that you sent on April 20th at 12:31 p.m.?

14 A. Yes.

15 Q. So really just 10 minutes after the e-mail from
16 Stacey Fortes.

17 A. Correct.

18 Q. Did you ask a series of questions?

19 A. I did. I essentially asked four questions.
20 The first related to what was the authority of
21 the court to exclude a Homeland Security agent
22 from being in the courtroom. Secondly, who was
23 the judge who handled this matter. Third was,
24 who was responsible for the defendant being
25 allowed to leave the courthouse through the

1 non-public exit. And fourth is, what steps had
2 we taken so that the staff understands this
3 should never happen again.

4 Q. And did you get a response from --

5 A. Yes.

6 Q. -- First Justice Heffernan?

7 A. She gave me a detailed response to each one
8 of them.

9 Q. Is that what appears starting on Page 538 and
10 going over to Page 539?

11 A. Yes.

12 Q. And did you respond back --

13 A. I did.

14 Q. -- at the top of Page 538?

15 A. I did. I want to point out something.

16 Q. Yes.

17 A. Because, I think, in fairness to
18 Judge Heffernan. As this went on -- Because my
19 original reaction was, this is impermissible,
20 you can't keep people out of the courtroom,
21 there's constitutional implications to an open
22 court. And the more I discussed this with the
23 legal counsel both in my office and the
24 Trial Court, particularly the people who worked
25 on the policy, they felt that a judge had

1 discretion to do so if they thought that the
2 presence could be disruptive. So I'm not sure
3 if it was at the time or shortly thereafter, I
4 backed off somewhat and felt that
5 Judge Heffernan had the discretion to take that
6 action if she felt it was warranted.

7 Q. And going over to your e-mail, the same day,
8 1:17 p.m., did you advise her to confer with
9 Zachary Hillman?

10 A. Yes. Zach Hillman was the general counsel in
11 the District Court administrative office, and I
12 suggested that she connect with him.

13 Q. And is he now a judge?

14 A. Yes, he is.

15 Q. Did you hear later that she had conferred with
16 Zach Hillman and that she had made a change in
17 the practice?

18 A. That's correct.

19 Q. After you received the e-mail from Judge Fortes,
20 did you get the recording from the proceeding in
21 the Newton District Court?

22 A. Yes. I requested a copy of the tape
23 recording of the, of the case in particular.

24 Q. And did you listen to it?

25 A. I did.

1 Q. And when you got the recording, was it in the
2 form that the District Court produces a
3 recording, that is, as opposed to any sort of
4 enhancement?

5 A. No. I do remember this. I do remember
6 listening to it. And what I remember about it
7 is having to ask for a set of headphones so I
8 could attempt to listen more closely, because
9 there was good deal of inaudible statements. I
10 could figure out some of it, but there was a
11 number of inaudibles I couldn't understand.

12 Q. So it was hard to make sense of it.

13 A. Yes.

14 Q. And are you aware that there has ever been an
15 enhanced version that is sent to a vendor who
16 has expertise in enhancing a recording?

17 A. I think at some point somebody told me that.
18 I'm not sure who. But ultimately, I saw a
19 transcript. I'm not sure when it was produced.
20 But it was clear that this was enhanced or
21 somebody had the ability to more closely listen
22 to it than the original tape.

23 Q. At that time, did you have an enhanced version?

24 A. No.

25 Q. And did you have a transcript at that time?

1 A. No.

2 Q. So you were playing the original version of the
3 recording and listening as best you could.

4 A. Correct.

5 Q. All right. We're going to play that recording
6 now, and we're just going to listen to it
7 without the transcript, just so we hear what the
8 original sounds like.

9 (RECORDING PLAYING)

10 Q. After you listen to the recording, do you have
11 any concerns?

12 A. The concern I had was to the tape being shut
13 off.

14 Q. Was that the only concern?

15 A. At that time.

16 Q. And what did you do?

17 A. I, after I listened to it, I requested to
18 meet with Judge Joseph and Judge Fortes.

19 Q. And did your assistant set up a meeting for
20 May 8th?

21 A. That's correct.

22 Q. And did you have a meeting with Judge Joseph and
23 Joseph Fortes?

24 A. Yes, I did.

25 Q. Where was the meeting?

1 A. That was in the administrative office in the
2 District Court in my office.

3 Q. In your office. Was anyone present other than
4 Judge Joseph and Judge Fortes and you?

5 A. No.

6 Q. And going into that meeting, did you have any
7 information about this incident other than the
8 recording and the e-mail from Judge Fortes with
9 the forwarded e-mail from Judge Heffernan?

10 A. No.

11 Q. Tell us about that meeting. Who said what?

12 A. I set the meeting up because our concern that
13 the tape had been shut off and Judge Joseph was
14 a new judge. So when she come in and we met
15 with her, I told her I had listened to the tape
16 and I had a couple of concerns that I wanted to
17 talk to her about. I started by discussing the
18 tape being shut off. Shortly after I discussed
19 that, the fact that it appears the tape was shut
20 off, Judge Joseph said to me, she acknowledged
21 that she had directed the clerk to do that. She
22 apologized. She indicated to me she was not
23 aware that there was a rule that required the
24 tape to be on. And she essentially said it
25 would not happen again. She had been made aware

1 of it, she had thought about it, and wouldn't
2 happen again.

3 Q. Did she tell you anything about why she went off
4 the record?

5 A. Well, we were talking about the importance of
6 the rule. And I asked her, I said why did you
7 shut the tape or direct the clerk to shut the
8 tape off, and she stated something to the effect
9 of the defense lawyer wanted to speak to her off
10 the record because the defense lawyer was
11 concerned that the identity of his client was
12 not the same individual of whom there was an out
13 of state warrant. I think it was Pennsylvania,
14 if I'm not mistaken. There was a warrant. And
15 the lawyer was trying to convey to Judge Joseph
16 it was not the same person.

17 Q. And did she give you any indication of why a
18 discussion about identity with respect to the
19 Pennsylvania warrant should be off the record?

20 A. No. I don't think we discussed that part of
21 it as much as we discussed the rule, the
22 importance of adhering to the rule, and we
23 focused more on the rule and the importance of
24 maintaining a full, complete record. I remember
25 specifically speaking to her about, just by the

1 nature of the position I had, we get a large
2 number of complaints about judges and clerks,
3 and I remember telling her that it was my
4 experience that the most favorable piece of
5 evidence always in terms of these things is the
6 tape itself, because there are people who make
7 accusations about failure to get due process and
8 then you listen to the tape and realize, well,
9 that's not accurate. So we spent a lot of time
10 talking about the rule, the importance of it,
11 and then she acknowledged it, she apologized,
12 and said wouldn't happen again.

13 Q. Did she tell you anything about what was said
14 off the record?

15 A. My memory is that it was, it was the same.
16 It was the issue of the defendant's identity and
17 his warrant that was out of state.

18 Q. Did she say anything about any discussion about
19 ICE?

20 A. No, not that I recall.

21 Q. When you listened to the recording, you could
22 hear some reference to ICE, could you?

23 A. I think you could. But frankly, I'd want to
24 sit once again to really listen word for word.

25 Q. And that, of course, if you could hear it, it

1 was the part that was on the record.

2 A. Right.

3 Q. Not the part that was off the record. Did she
4 say anything about being concerned, her being
5 concerned that ICE would take the wrong person?

6 A. No.

7 Q. Did she say that she thought she had a
8 responsibility to determine the defendant's
9 identity with respect to the ICE detainer?

10 A. No. We never got to that level of
11 discussion, and it was more about the tape being
12 shut off, the importance of the rule.

13 Q. Did she say anything about being concerned that
14 ICE wouldn't allow an attorney/client
15 conference?

16 A. No.

17 Q. Did she say anything about wanting to pause ICE
18 taking the defendant into custody?

19 A. No.

20 Q. Did you ask her directly whether she had
21 anything to do with the defendant going out
22 back?

23 A. Yes. So we addressed the issue of the tape,
24 the recording being shut off first, and then I
25 raised with her the issue of the fact that the

1 defendant was let out this side entrance while
2 ICE was waiting for him. And I asked her if
3 she, first of all, if she was responsible for
4 that, if she was aware of it, if she had any
5 knowledge whatsoever of it, and she strongly
6 denied each and every one of that. The final
7 question, I said, did you have anything at all
8 to do with him leaving the courthouse that way,
9 and she very strongly and adamantly denied that.

10 Q. And did you accept her denial?

11 A. Yes, I did.

12 Q. And did she say that she had inadvertently or
13 unintentionally facilitated it?

14 A. No.

15 Q. How did the meeting end?

16 A. The remainder of the meeting was a discussion
17 about training and the importance -- the issues
18 that new judges deal with, the importance of
19 engagement, particularly with other judges who
20 are more experienced, particularly knowing what
21 you don't know and you can rely on other sources
22 of support to get that knowledge. And so the
23 first part of the meeting, if I could describe
24 it, it was somewhat stern. It was, it was right
25 to the point. And then the rest of the meeting

1 I would describe as more positive because it was
2 a focus on how we -- where are we going to go
3 from here and how do we get on a positive path.

4 Q. And when the meeting ended, what was your view
5 of the matter of that situation at that time?

6 A. I viewed it, the whole meeting I viewed it as
7 really a training issue. I certainly didn't
8 view it based on what I knew at that time as a
9 disciplinary matter. And I can tell you, I
10 conducted disciplinary matters. If I had viewed
11 it that way, I would have had legal counsel with
12 me, we would have been memorializing everything
13 that was said, I probably would have advised at
14 the outset that there may be a need for counsel.
15 None of that was present here because the
16 circumstances that I knew didn't warrant that.

17 Q. Now, speaking of training and going back to the
18 subject of what training was provided for new
19 judges. Was there any training specifically
20 provided about Rule 211 and the requirement of
21 recording?

22 A. I don't think there was. Because after this,
23 I asked the District Court Committee on
24 Education to incorporate it into the training
25 going forward.

1 Q. And why wasn't there training about that
2 requirement?

3 A. Well, first of all, it's somewhat a
4 procedural method. And most of the training was
5 really bearing on substance of law so that you
6 put a judge in a position that they can make
7 judicial decisions based on the substance of
8 law. It was more procedural. And my view is
9 that people knew about it and it was kind of
10 self-evident. It turns out over time that was
11 not the case.

12 Q. Later in, within the month of May, still within
13 the month of May, did you change her mentor
14 assignment so as to provide her with more
15 focused attention?

16 A. Yes.

17 Q. After these events, sometime later on, did you
18 receive information about any practices
19 regarding going off the record?

20 A. To the court generally?

21 Q. Yes.

22 A. It was --

23 Q. In the District Court.

24 A. In the District Court, I think it was
25 sometime in the fall, there was a, there was a

1 news report that essentially wrote about the
2 Federal grand jury investigation of this matter.
3 And in reading that, I spoke with a number of
4 people in the Trial Court, and one of the
5 Trial Court lawyers, somebody I have great
6 respect for, told me, you know, there is a lot
7 of noise out there that this isn't the only time
8 this has happened, this is a practice.

9 So what I did was, I asked the
10 Regional Administrative Justices to survey each
11 and every one of the courts and have a
12 discussion on two issues; one, whether people
13 were aware of the rule and complied with it and,
14 secondly, whether they also understood that
15 unrecorded lobby conferences were prohibited
16 under an SJC decision. So the RAJs did that,
17 and in short order they reported to me that this
18 practice is not happening. And of course, their
19 response was based on what people were reporting
20 to them.

21 Q. Were you satisfied with the response you got?

22 A. You know, I was glad with the response
23 because, again, it's important that full
24 recordings be made.

25 JUDGE FABRICANT: Thank you.

1 That's all I have at this time.

2 HEARING OFFICER: Mr. Hoopes.

3 MR. HOOPES: Thank you,
4 Mr. Hearing Officer. I got to mic up.

5 CROSS-EXAMINATION

6 BY MR. HOOPES:

7 Q. Good afternoon, Chief Dawley. I got to make
8 sure I got your title correct.

9 Judge Dawley, you know that I
10 represent Judge Joseph; correct?

11 A. Yes, I do.

12 Q. And I'd like to go back to an area first that
13 was covered by special counsel, which is the
14 e-mails. So if you look at the e-mails which
15 should be in V.

16 MR. HOOPES: If we could pause
17 for one second.

18 A. Did you say B?

19 Q. V as in Victor.

20 (PAUSE)

21 A. Yes.

22 MR. HOOPES: Give me one sec,
23 so we got to hook up.

24 (PAUSE)

25 Q. So if you could -- It's Page 540. And I believe

1 you read it a little bit, but I'd like to go
2 back to it.

3 A. Yes.

4 Q. This is an e-mail from Stacey Fortes on
5 April 20th at about 12:21 p.m.

6 A. Yes.

7 Q. Correct?

8 A. Yes.

9 Q. Yeah. And it says, to read it again, it says,
10 Chief. Now she's one of your Regional
11 Administrative Justices.

12 A. Yes. Correct. There are six Regional
13 Administrative Justices in the state, and she's
14 one.

15 Q. And so she's one of the people you rely on being
16 in communication with you if there was anything
17 that's important that is happening within her
18 region; right?

19 A. Yes.

20 Q. And you would have expected her to not only
21 manage the judges who were under her to the
22 benefit of the court but also keep you posted on
23 any sort of incident that might cause a problem;
24 correct?

25 A. Yes.

1 Q. Okay. And so here she says on April 20th,
2 Chief Judge Heffernan called me about this
3 incident a couple of weeks ago. I asked her at
4 that time to follow up with an e-mail about the
5 incident. Below. I also suggested she pull the
6 tape because there was some indication that the
7 judge involved may have gone off the record
8 prior to the defendant going down the back
9 stairwell. I've spoken with the judge involved
10 and can brief you if you need additional
11 information. Informing you about it now because
12 Judge Heffernan called to let me know regional
13 director for ICE may bring up this incident at
14 the meeting supposedly scheduled with
15 Chief Justice Carey, and I didn't want you or
16 Chief Justice Carey to be blind-sided by any --

17 Have I read that correctly?

18 A. Yes.

19 Q. And Judge Heffernan can fill in anything I left
20 out.

21 So you learned subsequently
22 just by reading below that the date of the
23 incident was April 2 of 2018; correct?

24 A. Yes.

25 Q. And so you received this e-mail on April 20th;

1 is that right?

2 A. That's correct.

3 Q. And so that's approximately two and a half weeks
4 after the incident; --

5 A. Yes.

6 Q. -- is that right?

7 Now, would it be fair to say that there had been
8 a couple of issues with ICE at the
9 Newton District Court in the year or year and a
10 half prior? Isn't that correct?

11 A. I remember at least one.

12 Q. Yup. And so -- And that would have involved
13 some press on Judge Heffernan; correct?

14 A. Yes.

15 Q. And you did not take the date that you received
16 this as an indication that Judge Fortes was in
17 any way trying to not raise this issue so you'd
18 be alerted to it any sooner.

19 A. No. I read it in terms of a delay as she
20 knew that there was a potential meeting with the
21 ICE officials and probably that prompted her to
22 notify us.

23 Q. And she got that information from
24 Judge Heffernan.

25 A. Looks like Judge Heffernan.

1 Q. Who Judge Heffernan apparently was concerned
2 enough to call Judge Fortes; correct? The
3 suggestion was, we better alert Chief
4 Justice Dawley.

5 A. Yes.

6 Q. So that Chief Justice Dawley or Chief
7 Justice Carey are not blind-sided at the
8 meeting.

9 A. That's correct.

10 Q. So clearly by now, both Judge Heffernan and
11 Judge Fortes are concerned that this might be an
12 issue.

13 A. It certainly seems that way.

14 Q. And might have thought it was an issue prior to
15 that; right?

16 A. It could.

17 Q. Now, you indicated that you had asked four
18 questions on Page 539.

19 A. Yes.

20 Q. And you ran through the questions. And one was,
21 what was the authority. And you told us that's
22 in this e-mail that you got a response and the
23 response was it had been my practice and
24 eventually that practice was changed with --

25 A. Yes. Correct.

1 Q. And the second was, who was the judge that
2 presided over the case. You got an answer to
3 that.

4 A. Correct.

5 Q. The third one, who was responsible for allowing
6 the defendant to exit the courthouse via a
7 non-public entrance. Let's put a pause on that
8 one -- put a pin in that for a second.

9 And fourth, in addition to the
10 notice posted by Officer Noe, was the court
11 staff told, and do they understand that this
12 should not happen again?

13 A. Correct.

14 Q. Yup. And so there was a policy in place to
15 prevent that from happening, right, which was
16 the Lunn policy?

17 A. The Lunn policy.

18 Q. We'll come back to that.

19 Now, as to Number 3, who was responsible for
20 allowing the defendant to exit the courthouse
21 via a non-public entrance. The e-mail's sort of
22 deafening in the silence. Nobody ever responded
23 to Question Number 3 to you; correct?

24 A. Directly, that's correct.

25 Q. Okay. Now, eventually you set up a meeting, and

1 the meeting was with Judge Joseph and
2 Judge Fortes; correct?

3 A. Yes.

4 Q. And it was in your office?

5 A. Correct.

6 Q. And the three of you sat and the three of you
7 talked, as you just described.

8 A. Yes.

9 Q. But there was nobody writing down notes.

10 A. That's correct.

11 Q. And you explained that nobody was writing down
12 notes as part because you viewed it as just
13 educational, informational but educational sort
14 of meeting; is that correct?

15 A. That's correct.

16 Q. Now, it would be fair to say that you took no
17 notes, no one took notes on that day, and there
18 were no notes that were created by you or
19 Judge Fortes regarding the meeting at a later
20 time; is that correct?

21 A. That's correct.

22 Q. So in other words, there's no notes available at
23 this point for you to refresh your recollection.

24 A. That's correct.

25 Q. So your testimony here today and your testimony

1 before in any other proceeding regarding this
2 was unaided by any notes to refresh your memory.

3 A. That's correct.

4 Q. Now, at the end of the meeting -- If you can go
5 to Page 534, please, at the very top of the
6 page.

7 A. Yes.

8 Q. It's two days later, on May 10th. It says from
9 you to Judge Joseph, Shelley, Judge Joseph, I
10 appreciate meeting with you and your
11 consideration of the issues we discussed. As I
12 mentioned, the best part of this job is that
13 every day is a learning experience. I look
14 forward to seeing you at the conference. Thanks
15 and take care, Paul Dawley. That's the first
16 one; correct?

17 A. That was in response to her e-mail to me.

18 Q. Okay.

19 A. Yeah.

20 Q. And below that is her e-mail to you two days
21 before. Shelley Joseph to Judge Dawley, thank
22 you for meeting with me today. I've learned and
23 understand all that we've discussed. I look
24 forward to seeing you at the conference next --
25 That's what that says; right?

1 A. That's correct.

2 Q. And as to the sentence above that, which is, I
3 appreciate your concern, your consideration of
4 the issues we discussed, as mentioned, the best
5 part of this job is that every day is a learning
6 experience. Now, I take it that you thought
7 that your impression was, when she left, that
8 she had been candid with you; correct?

9 A. Yes.

10 Q. Thank you.

11 Now, we can go to -- We talked a little bit
12 about Rule 211, the off the record.

13 A. Yes.

14 Q. And spend a little time. So Judge Fabricant
15 asked you some questions about training
16 materials, books that happened, things that are
17 provided to new judges. And you explained as
18 sort of a predicate to that, that every judge --
19 every new judge is important to you, which is
20 why you give them a mentor for up to two years.

21 A. Yes.

22 Q. And so it would be fair to say that in your mind
23 every judge needed a mentor just to make sure
24 that they had somebody guiding them as they
25 went.

1 A. I think for the most part that's true. I
2 mean, people have different levels of
3 experience, they bring different qualities to
4 the bench, but it's a very different job than,
5 for instance, where I came from being a
6 prosecutor or a defense lawyer. Much different
7 role. So it requires I think support from
8 somebody with more experience to help you
9 navigate some of the issues.

10 Q. And one of the ways you also provided support
11 was providing written materials; is that
12 correct?

13 A. Correct.

14 Q. And so it would be the 90-day guide; is that
15 correct?

16 A. Correct.

17 Q. And that's probably as big as that stipulation
18 book that you got there?

19 A. It's actually very similar to this. It's a
20 live binder.

21 Q. It's just a lot of material, be fair to say?

22 A. It is. They're constantly trying to condense
23 it because we ask people to bring it on the
24 bench with them.

25 Q. And in fact, is that the same as a benchbook or

1 is there a separate book called the benchbook
2 that Judge Rooney --

3 A. Judge Rooney's Benchbook is I think a
4 condensed version of the 90-day guide.

5 Q. And so new judges get two of these books, both
6 about that size.

7 A. Yup.

8 Q. And Judge Fabricant, Special Counsel Fabricant
9 showed you the West Publishing Company book
10 called Rules. You've looked at that in the
11 past.

12 A. Yes, I have.

13 Q. And you know that's about 1,500 pages of small
14 type; right?

15 A. Very voluminous. Correct.

16 Q. And so you've been a new judge before; correct?

17 A. Was.

18 Q. And I assume that it's different being a judge
19 than being a lawyer. You have different things
20 that you have to pay attention to, I assume.

21 A. Yes.

22 Q. And so I assume that you must have felt, when
23 you were a new judge, that it was a little bit
24 like drinking from a fire hose, maybe; yes?

25 A. Correct.

1 Q. And you were trying to grasp the key concepts
2 every day that were going to be in front of you
3 and grow that experience; is that right?

4 A. Yes.

5 Q. So you would -- Would you agree with me that
6 it's not reasonable to expect a new judge that's
7 been in six months to have read every page of --
8 1,500 pages of the West book?

9 A. That's correct.

10 Q. Okay. Now, it would be fair to say that, as to
11 this Rule 211, which was passed and became
12 effective in May 1988, that it was, for a long
13 time it was honored more as a breach than in
14 fact -- by some people; correct?

15 A. Correct.

16 Q. And over time things have slowly morphed a
17 little bit because of the SJC decision. There's
18 a little less of that and less of that and less
19 of that over time.

20 A. I think that that's accurate.

21 Q. So when you were a young assistant district
22 attorney in Plymouth County --

23 A. Yes.

24 Q. -- area, I assume that there were judges going
25 off the record; yes?

1 A. That is correct. Particularly as to most of
2 my time was Superior Court, and it was a
3 frequent occurrence.

4 Q. And in fact, in Superior Court, there was no
5 rule about going off the record until after this
6 incident in 2018; is that correct?

7 A. I couldn't speak to that. But the other
8 difference is Superior Court at that time was
9 stenographers as opposed to a recording system.

10 Q. But it wouldn't be unusual for some judge to
11 motion to the stenographer to talk with the --

12 A. I've seen that occur.

13 Q. Okay. And in fact, sometimes there were lobby
14 conferences with the assistant district
15 attorneys and even with private counsel over
16 cases, for various reasons, plea discussions,
17 what are we going to do next, all kinds of
18 things; correct?

19 A. Yes. That's correct.

20 Q. Now, you told us that, even though the practice
21 has been tightening up, there hadn't been an
22 issue really until this case that caused you to
23 put into effect after 2018 the new training; is
24 that right?

25 A. Can I ask you, what do you mean by "there

1 hadn't been an issue?"

2 Q. Well, let me phrase it another way.

3 A. Yup.

4 Q. You indicated, when special counsel asked you
5 questions, that there was nothing in the 90-day
6 guide and nothing in the benchbook that
7 referenced 211, be on the record all the time,
8 nothing like that; correct?

9 A. Right.

10 Q. And so this was a wake-up call that you wanted
11 to educate all your new judges right up front;
12 is that right?

13 A. Correct.

14 Q. And so now, every judge, every young judge,
15 every new judge who comes on the bench in what
16 used to be your court, and now is Chief Justice
17 Fortes court, is told this right up front.

18 A. I believe it's part of the, --

19 Q. The pack.

20 A. -- the 90-day -- Yup. Yes.

21 Q. Now, this Lunn case -- Before I go there, if I
22 could just ask you one thing, which is -- I'm
23 going to show you one document, and this is an
24 e-mail exchange back in December 2018. One,
25 two, three, four pages. And the bottom of the

1 string, going up to February 19, there's an
2 e-mail exchange with you and Paula Carey. Just
3 look at that. And could you just read to
4 yourself from the bottom there.

5 (PAUSE)

6 A. Yes. I recall this.

7 Q. And Paula Carey was the Chief Judge of all the
8 Trial Court at that point.

9 A. Correct.

10 Q. She was the supervising judge of all seven
11 departments; correct?

12 A. That's correct.

13 Q. And on that last page, Judge Carey actually
14 says, I don't know if there's a rule about going
15 off the record in the District Court. Correct?

16 A. She said I do not recall a rule but my
17 suggestion would be to look at statutes to
18 determine whether there's anything in the law
19 that requires recording everything. We also may
20 want to locate rule, standards, et cetera that
21 indicate that the judge is in charge of her
22 courtroom. And Chief Justice Dawley would be
23 able to tell you if there are any specific
24 District Court standards.

25 Q. Okay. And so the date of this e-mail exchange

1 is February 4th, 2019. There's many other
2 things in there. So --

3 A. Yes.

4 Q. -- it may not be necessary to admit the whole
5 thing. But the content is the Chief Judge of
6 all the courts, in the Trial Courts in
7 Massachusetts was not at that time aware of this
8 rule; correct?

9 A. Correct.

10 Q. Thank you.

11 Now, moving back to the Lunn policy. So if we
12 can set the context here a little bit for the
13 Lunn policy. Some part of it everybody probably
14 knows, which is in 2017, then Chief Justice
15 Gants wrote this decision that was called
16 Commonwealth versus Lunn; correct?

17 A. Lunn versus Commonwealth.

18 Q. Lunn versus -- Thank you.

19 A. Correct.

20 Q. And it was a case that tried to balance the
21 interest of the state and the Federal
22 authorities; correct?

23 A. That's correct.

24 Q. And it was a very cutting edge case in a sense,
25 was it not?

1 A. It was a very significant case.

2 Q. Significant.

3 And as you've described, striking the balance is
4 delicate. And having it on paper is different
5 than executing the decision; correct?

6 A. That's correct.

7 Q. And Chief Justice Carey led the committee that
8 ended up issuing this executive office
9 transmittal that you were shown on
10 November 10th, 2017, probably, four or five
11 months after the decision came down, and it's
12 one, two, three, four pages. I mean, somebody
13 put a lot of thought and work into what the
14 execution was going to look like.

15 A. I think they had a working group, members of
16 each department, Chief Justice Carey, and
17 primarily it's driven by the security
18 department.

19 Q. Thank you.

20 So the working groups would be security, would
21 be the judiciary. Anybody else that you can
22 recall? Maybe the clerk's office?

23 A. I'm sure. I'm sure they were included.

24 Q. And maybe probation?

25 A. I would think so.

1 Q. And so -- And this was the fruit of their labor,
2 the product; correct?

3 A. Yes.

4 Q. And this went out from the executive office to
5 everybody, to judges, clerks, registers -- That
6 would be registers of probate?

7 A. I would think so, registers of probate. They
8 have registers of Land Court. I don't think
9 that would apply.

10 Q. Land Court. Probation, chief probation, and all
11 staff. And it would be fair to say that at this
12 point in time there was a nationwide issue with
13 regard to ICE and immigration; correct?

14 A. Certainly -- Yes.

15 Q. And this was meant to provide guidance that
16 provided the balance so nobody was going to be
17 left guessing in the District Courts as to how
18 they were supposed to handle these issues, this
19 issue, ICE comes, ICE wants to take somebody in
20 custody, what do we do, this is the guidance.
21 Is that correct?

22 A. My sense is that that policy attempted to
23 implement the SJC decision and answer questions
24 that court personnel would deal with frequently,
25 try to give them direction and guidance.

1 Q. Thank you.

2 And so did you have a sense that, besides
3 sending it out by e-mail, zing out it goes, that
4 there was training that accompanied this in any
5 way?

6 A. I'm sure. I would assume it was covered in
7 terms of security. It was a matter that would
8 have --

9 Q. For your court, meaning, you got these judges
10 who are -- have to be intelligent to get on the
11 bench, they can read, they can read the whole
12 thing; right?

13 A. So when the decision issued, my office issued
14 a legal bulletin that outlined this is the
15 decision. In fact, I think we issued it the
16 next day saying this decision was made,
17 significant changes, and this is the holding of
18 the court. Thereafter, it was subject to
19 coverage in some of our trainings over the next
20 several months.

21 Q. Thank you.

22 And you expected, I assume you expected the
23 presiding justice at the very least to read the
24 transmittal; correct?

25 A. Yes.

1 Q. Of each one of the -- How many District Courts?

2 A. 62.

3 Q. Of each one of the 62, which is a lot of courts
4 for you to be controlling, and this was a means
5 to control it; right?

6 A. Well, I'm not sure I'd use the word
7 "control." But it's more to support them in
8 implementing this. And guidance.

9 Q. But it wasn't meant to be, I'm going to follow
10 it if I want to follow it. This came from the
11 top; correct?

12 A. Correct.

13 Q. There was an expectation that the SJC was run of
14 the show here, was through her acting and all
15 the justices were supposed to be --

16 A. I should put, compliance with this is
17 required. It's not an option. Courts are
18 required to implement the SJC decision.

19 Q. Thank you.

20 And can I ask you to go to the third page of
21 this policy, which would be -- and if you look
22 at -- It's Page 7, I'm told.

23 A. Yes.

24 Q. And there's a Roman Numeral III that says,
25 DHS officials taking custody of individuals at a

1 courthouse.

2 A. Yes.

3 Q. And then there's a Paragraph 1, Paragraph 2,
4 Paragraph 3.

5 A. Yes.

6 Q. The first sentence of Paragraph 3 says, the
7 security supervisor or designated officer shall
8 inform the First Justice, or Regional
9 Administrative Justice of the department with
10 the jurisdiction over the person if DHS
11 officials are present in the courthouse with the
12 intent of arresting or taking anyone into
13 custody, i.e a party or other participant in a
14 case before a judge or magistrate or a person
15 intending to business in the courthouse.

16 So we can talk it through. So
17 if Medina Perez, which is the name of the
18 individual later on on April 2nd, in question
19 here, was in the Newton District Court, and ICE
20 was there to take custody of him, then a
21 security supervisor or designated officer was
22 supposed to inform either the First Justice or
23 the Regional Administrative Justice; is that
24 correct?

25 A. Right literally, yes. Now I would say

1 there's a lot of these courts, the First Justice
2 is only there a couple of days a week. So
3 whoever is sitting. I would be First Justice to
4 me. Whatever judge is sitting should be
5 informed.

6 Q. Okay. And in addition to that, you are relying
7 on the, I assume the policy for implementation,
8 relying on security supervisor to have knowledge
9 of this policy.

10 A. Yes.

11 Q. And would you have expected that a presiding
12 justice would have had some discussion with a
13 security supervisor in each individual court so
14 that they were sort of on the same page on this?

15 A. I think that would certainly be a best
16 practice.

17 Q. Okay. As you sit here today, did you know
18 whether or not the Newton District Court
19 actually implemented the Lunn policy on or by
20 April 2nd, 2018?

21 A. I couldn't -- I'd defer to the security
22 officials over there to tell you the answer to
23 that.

24 Q. Okay. And if the presiding justice testified
25 earlier this morning that it was not in effect

1 on April 2nd of 2018, we'd take her word for it;
2 right?

3 A. Yes.

4 Q. And so as you've just said, as I understood it,
5 this is a requirement of the SJC, and failure
6 after having noted that this policy is a
7 violation of the expectation of the SJC;
8 correct?

9 A. Well, I'll reiterate. This was not optional.
10 The SJC made a decision courts are required to
11 implement. One of the holding court, the
12 holding was clear, this policy is pretty clear.
13 It should have been implemented.

14 Q. As you sit here today, do you have any
15 information that anybody has reported
16 Judge Heffernan to the CJC because of this
17 violation?

18 A. No. But I would strongly disagree if
19 somebody made that suggestion. I would very
20 strongly reflect at it.

21 Q. Okay. And why is that?

22 A. Because the court -- These courts, these
23 courts are made up of joint leadership. So when
24 you implement policies like this, it's typically
25 the clerk magistrate, the first justice, the

1 chief probation officer, and the chief court
2 officer that works as a team. And respectfully,
3 to suggest that there's some type of misconduct
4 by not implementing that, and I'm not sure
5 you're suggesting that, if you were, I would
6 strongly disagree with it.

7 Q. If I were to suggest to you that it's very
8 probable that Judge Heffernan was trying to do
9 the best she could, the best way she could?

10 A. No question. That was my experience with her
11 at all times.

12 Q. And it may certainly have been that Judge Joseph
13 was doing the best she could as best she could.

14 A. That may well be true.

15 MR. HOOPES: Thank you. Just
16 have one moment, please?

17 (PAUSE)

18 MR. HOOPES: Nothing further.
19 Thank you.

20 HEARING OFFICER: Special
21 counsel.

22 JUDGE FABRICANT: Very briefly.

23 REDIRECT EXAMINATION

24 BY JUDGE FABRICANT:

25 Q. Chief Justice Dawley, the chief of the

1 Trial Court, is that person appointed by the SJC
2 among one of the judges of the seven Trial Court
3 departments?

4 A. That's correct.

5 Q. And so is that person, while serving as chief of
6 the Trial Court, also not sitting but also a
7 judge of one of the seven Trial Court
8 departments?

9 A. That's correct.

10 Q. Which of those departments was Paula Carey a
11 judge of?

12 A. She was a justice of the Probate Court,
13 Probate and Family Court.

14 Q. Probate and Family Court. Had she ever been a
15 judge of the District Court?

16 A. No.

17 Q. Is Rule 211 a rule of the District Court?

18 A. It's a rule of the District Court and the
19 Boston Municipal Court.

20 Q. Does it apply to Probate and Family Court?

21 A. No.

22 Q. Do you know whether the Probate and Family Court
23 had or has a rule regarding recording?

24 A. I have no idea.

25 Q. The Lunn policy and the Lunn decision,

1 Lunn verse Commonwealth decision of the SJC, are
2 those the same thing or two different things?

3 A. I'm sorry. Could you repeat.

4 Q. The Lunn policy --

5 A. Yes.

6 Q. -- was a document that we referred to, executive
7 office transmittal 1713.

8 A. Correct.

9 Q. And the SJC decision in Commonwealth versus
10 Lunn -- Lunn versus Commonwealth, are those the
11 same thing or two different things?

12 A. Well, they're two distinct things. The
13 decision of the SJC was a court issuance of a
14 decision on the matter and the policy is the
15 Trial Court's implementation of that.

16 Q. The SJC decision. Was the holding of that
17 decision that Trial Courts, court personnel,
18 court officers, cannot hold a person beyond the
19 time that that person would otherwise be held in
20 state custody for purposes related to an ICE
21 detainer?

22 A. Correct. They distinguish a civil detainer.

23 Q. So as opposed to a judicial warrant.

24 A. Yes.

25 Q. So a judicial warrant is a different story.

1 A. Very different.

2 Q. But as to a civil detainer, the holding, if I
3 understand correctly, was that, if you get
4 notice of a detainer, but you're otherwise --
5 the person is otherwise being released on
6 personal recognizance, on bail, whatever,
7 however they're being released, you got to
8 release them.

9 A. Correct.

10 Q. You can't hold them. If ICE calls you up and
11 says I'm going to be there in two hours, you
12 can't hold them for two hours.

13 A. That's correct. The whole Lunn decision was
14 the defendant was held with trial, the trial
15 judge dismissed the case, and the court held
16 him, Lunn, longer, until ICE got there on the
17 civil detainer. His lawyer filed a petition,
18 emergency petition with the SJC saying this is
19 likely to recur. The court heard the matter,
20 and then made it clear, you cannot hold somebody
21 any longer than they would be held on the state
22 charge, for example.

23 Q. And was that a matter of authority in the sense
24 that state law does not give a court authority
25 to hold somebody unless there is state law

1 authority --

2 A. It has been a while since I've read the
3 decision. But I believe the SJC had noted that
4 this is a matter that the legislature could
5 address or may address, but that based on
6 essentially Fourth Amendment precedent, the
7 state constitution, that there was no right to
8 hold somebody based on the civil detainer.

9 Q. Now, the Lunn policy, executive office of
10 Trial Court transmittal 1713, did the SJC issue
11 that?

12 A. No.

13 Q. Was that a policy to tell courts what they're
14 supposed to do given that they can't hold
15 somebody, under the SJC decision, they can't
16 hold somebody beyond the time that the person
17 would otherwise be held on state court charges,
18 was it a policy to tell them, okay, now what are
19 we supposed to do?

20 A. It was, as is stated, it's to provide clear
21 guidance to judges, clerks, probation and
22 security and all court staff on responding to
23 DHS requests and in the presence of DHS officers
24 in the courthouses.

25 Q. And what did you understand -- It may be a while

1 since you've read it, but what did you
2 understand to be the essence of the Lunn policy?
3 It's a number of pages. Was there --

4 A. That's a hard question. There's a lot of
5 different aspects of this. And for instance, it
6 deals with when ICE makes a request for
7 information. It addresses that. It deals with
8 situations in which a person is in custody
9 versus not in custody. So there's a whole
10 series of different scenarios. It also I think
11 imposes requirements on security to record the
12 interactions with ICE when ICE comes to the
13 courthouse and seeks to take someone.

14 Q. Record not in the sense of a recording system --

15 A. Record in the sense as a record, a login I
16 think it references.

17 Q. Was it your understanding that a judge is
18 supposed to be neutral regarding ICE?

19 A. Of course.

20 Q. Not help, not hinder.

21 A. That's correct.

22 Q. Is that a fair summary?

23 A. That is correct.

24 Q. And also, if ICE wants to go to the lockup,
25 supposed to allow them to go to the lockup.

1 A. The guidance clearly is a provision where, I
2 believe that's the preference, if somebody's in
3 custody, then that exchange should take place
4 being in the lockup.

5 Q. Now, if ICE is going to take somebody, if the
6 person that's in the lockup, if that person is
7 still being held on state court charges, they
8 haven't posted bail yet or bail hasn't been set
9 yet or being detained without bail, and so
10 they're go to back in the sheriff's custody, to
11 the House of Corrections, jail, whatever, can
12 ICE take the person?

13 A. No. The person remains in the custody of the
14 state law enforcement where they came.

15 Q. So in order for ICE to take somebody, that has
16 to be a person who is eligible for release.

17 A. Release. Right.

18 Q. But you can't hold somebody longer than somebody
19 would otherwise be held, according to the SJC.

20 A. That's correct.

21 Q. So you got to somehow do this in a matter of
22 seconds; right? They're in the courtroom, the
23 judge says he's released --

24 A. So this Section III, I read this to
25 essentially to try to address that issue and

1 talk about how the hand-off will occur, and
2 that's where it speaks to the lockup provision.

3 Q. And what's your understanding of how the lockup
4 is supposed to occur? Take your time to read
5 whatever you want to read.

6 A. Section 3A, second paragraph, a DHS official
7 is present in the courthouse and seeks admission
8 into the courthouse's holding area in order to
9 take custody of the individual pursuant to an
10 immigration detainer warrant, court officers
11 shall permit the DHS official to enter the
12 holding cell area in order to take custody of
13 the individual once the Trial Court security
14 personnel finish processing an individual out of
15 the court security personnel's custody.

16 Q. So the word is "permit."

17 A. Correct.

18 Q. If they want to go to lockup, you got to let
19 them go to lockup.

20 Now, suppose you have a court where the normal
21 practice -- and maybe this isn't the practice in
22 lot of places. But suppose in a particular
23 courthouse the normal practice is that, if
24 somebody's being released, if the judge says, I
25 order a release on personal recognizance, if the

1 normal practice is, and what happens then is,
 2 the court officer takes off the restraints and
 3 opens the door to the dock and the person walks
 4 out into the courtroom and out the door, if
 5 that's the normal practice, what do you
 6 understand the implication of that -- this
 7 policy to be?

8 A. It would seem to be inconsistent with the
 9 policy.

10 Q. That practice.

11 A. Correct.

12 Q. But if that is normal practice, what is supposed
 13 to happen in terms of ICE?

14 A. Now let me qualify this. I'm not security
 15 expert. A lot of times just left that to the
 16 court officers. That's their expertise. When
 17 you get involved sometimes, you make it more
 18 confusing. But I would think the ultimate goal
 19 is that there be a seamless hand-off so that
 20 there's not incidents in the public area of the
 21 courthouse.

22 Q. So it's a little confusing of how this is
 23 supposed to happen under this policy, isn't it?

24 A. Correct.

25 Q. If you go to that paragraph, just above the

1 paragraph we just talked about, there's a line
2 that says, court security personnel shall
3 process that individual out of lockup in the
4 normal course regardless of whether the
5 individual is subject to a civil immigration
6 detainer or warrant.

7 Do you understand that to mean
8 that they're supposed to do whatever is normal
9 there, supposed to do what they normally do with
10 regard to processing the individual --

11 A. I think you can make a strong argument in
12 support of that interpretation.

13 Q. So there's room for interpretation here.

14 A. One thing is, throughout the state, the
15 62 courts, you get very different lockup sizes,
16 you get very different situations in terms of a
17 staffing at some of these courthouses. So
18 there's some unique situations for every court,
19 and you would think that, you know, the
20 leadership of the court, the chief court
21 officer, work those issues out.

22 Q. So you would expect some coordination within the
23 court among security, the first justice, the
24 clerk, whoever else is involved in the
25 leadership of the court.

1 A. No question.

2 Q. And as you read this, you wouldn't be expecting
3 a uniform application of this policy exactly the
4 same in every courthouse.

5 A. You would think there's got to be some
6 flexibility, because not all these courthouses
7 are the same.

8 JUDGE FABRICANT: All right.

9 Thank you.

10 I have nothing further.

11 RECROSS-EXAMINATION

12 BY MR. HOOPES:

13 Q. So it's fair to say, I assume, that out of
14 62 District Courts, --

15 A. Correct.

16 Q. -- that most of them have a lockup.

17 A. There may be one or two out west that don't.
18 They use the local police department.

19 Q. Okay. So that would mean almost 60 probably do;
20 right?

21 A. I think so.

22 Q. And if you read the last page of this policy,
23 labeled Page 8, it's the paragraph above B, it
24 says, to the extent possible, court security
25 personnel should require that DHS officials

1 transport any individuals taken into custody
2 through the prisoner transport entrance and
3 avoid taking the individual through the public
4 areas of the courthouse. To the extent
5 possible.

6 A. Correct.

7 Q. And so you would assume that every presiding
8 justice would make a good faith effort to try to
9 comply with this and only not comply to the
10 extent it wasn't possible; correct?

11 A. Correct.

12 Q. Now, just one other small matter, if I can,
13 which was raised by special counsel.
14 So in Massachusetts practice, the district
15 attorney's office has a particular power, not in
16 the Federal Court, they have the power to file
17 what is called a nolle pros; correct?

18 A. That's correct.

19 Q. So the district attorney's office has the
20 executive branch authority to prosecute or not
21 prosecute regardless of the judge; correct?

22 A. Correct.

23 Q. On the one hand. On the other hand, if the
24 system district attorney or prosecutor says,
25 Your Honor, I'd like to dismiss, the judge has

1 the sole power to dismiss, and it's the DA's
2 responsibility to move for dismissal; correct?

3 A. That's correct.

4 Q. And so with regard to governor's warrants, the
5 governor's warrant is in the form of a
6 complaint, so to speak, in the District Court;
7 correct?

8 A. Yes.

9 Q. And the governor's warrant, the individual can
10 be held without bail, bail can be set, or
11 released in the unlikely circumstance on
12 personal; correct?

13 A. Correct.

14 Q. And so that warrant is live or alive with that
15 authority from the presiding justice until that
16 complaint governor's warrant is actually
17 dismissed; correct?

18 A. Yes.

19 MR. HOOPES: Thank you. No
20 other questions.

21 JUDGE FABRICANT: Just one
22 more.

23 REDIRECT EXAMINATION

24 BY JUDGE FABRICANT:

25 Q. Can an assistant district attorney nolle pros

1 the charge of fugitive from justice?

2 A. I think under -- this is off the top of my
3 head -- I think Rule 17, if I'm correct -- of
4 the Rules of Criminal Procedure, set forth the
5 authority of a nolle pros, and I don't think
6 there are any restrictions on the type of case
7 that a prosecutor can file a nolle pros on. I
8 might be wrong on 17. But I always thought the
9 prosecutor retains the sole and exclusive
10 decision whether or not to charge in the
11 nolle pros authorities exclusively theirs.

12 Q. Rule 16. Entry of a -- And it's a latin term.
13 Nolle prosequi. But it's usually called nolle
14 pros. Correct? A prosecuting attorney may
15 enter a nolle pros pending charges at any time
16 prior to the sentence. A nolle pros shall be
17 accompanied by written statements on nolle pros
18 prosecuting attorney setting forth the reasons
19 for that disposition. In practice, do people
20 tend to use nolle pros or dismissal
21 interchangeably?

22 A. It varies by county. It's an interesting
23 legal issue. The source of some dispute in a
24 number of counties where some judges have
25 declined to act on motions to dismiss so they'll

1 utilize the nolle pros authority. It really
2 varies across the state.

3 Q. And this requirement of a written statement,
4 does that tend to be done in the form of a
5 checkbox form?

6 A. It's usually a form, and a lot of times I've
7 seen in the state in which it happens determine
8 that procedure.

9 JUDGE FABRICANT: All right.
10 Thank you.

11 MR. HOOPES: Thank you.

12 HEARING OFFICER: Okay. Thank
13 you very much, Judge. You're excused.

14 JUDGE FABRICANT: Can the
15 witness be excused?

16 HEARING OFFICER: Yes.

17 JUDGE FABRICANT: Thank you.

18 What remains of the
19 Commission's case is Judge Joseph. And I
20 understand we're going to wait until tomorrow
21 morning.

22 HEARING OFFICER: Yes.

23 MR. HOOPES: You wanted to
24 address --

25 HEARING OFFICER: Yes. And so

1 I was hoping that we can understand what you
2 expected after Judge Joseph's testimony.

3 MR. HOOPES: So I was hoping --
4 Can you hear me or do I need
5 the mic?

6 HEARING OFFICER: I can hear
7 you.

8 MR. HOOPES: So I was
9 expecting, based on our conversation, that after
10 her testimony, we would the begin a case for the
11 respondent on Friday morning. With one
12 exception. But I believe we're probably going
13 to call anywhere up to six witnesses. But just
14 so the court knows, I think it's probably two
15 hours total max. I mean, these witnesses are
16 going to hopefully flow.

17 There is one possible
18 exception. One of the witnesses is a retired
19 judge who's also a mediator. And if she can
20 move her mediation ever so slightly on Friday
21 morning, she'll be here at 9:00. But she may
22 not be able to. We may have to ask your
23 permission to have her come over after
24 Judge Joseph testifies.

25 HEARING OFFICER: Meaning

1 tomorrow.

2 MR. HOOPES: Meaning tomorrow.

3 HEARING OFFICER: That's fine.

4 MR. HOOPES: And my second
5 question would be, if that's our time slot,
6 meaning a couple of hours, would you be looking
7 for us -- when would you be looking for us to
8 have briefs done?

9 HEARING OFFICER: Well, I was
10 thinking about that. And from my perspective,
11 to the extent that both counsel would appreciate
12 the weekend to prepare for that, that's fine
13 with me. We can discuss the issues on Monday.

14 MR. HOOPES: That would be
15 wonderful. And if I can ask, could we do
16 summations at 9:00 a.m.? Mr. Keating has an
17 issue at 11:00.

18 MR. KEATING: I have a doctor's
19 appointment, Judge, if I can possibly keep at
20 11:00 on Monday. I'd like to. I don't want to
21 interrupt the proceedings if that's not
22 possible. But if it's possible --

23 MR. HOOPES: I won't be an
24 hour.

25 HEARING OFFICER: Okay. Is

1 that -- So it sounds like we could do it on
2 Monday, the summations Monday morning.

3 JUDGE FABRICANT: My
4 preference, frankly, would be to do it on
5 Friday, but whatever you prefer is fine.

6 MR. HOOPES: That would be
7 great. I appreciate it.

8 HEARING OFFICER: Yeah. I
9 think giving both sides the weekend to prepare
10 their summations is in everybody's interest,
11 frankly. So I think we can do that. And I
12 think we can certainly be complete by 11:00
13 based on everything.

14 JUDGE FABRICANT: And just to
15 be clear, respondent goes first on closing.

16 HEARING OFFICER: Yes.

17 JUDGE FABRICANT: And so our
18 expectation, then, just so we're clear about
19 timing is, tomorrow we're going to have
20 Judge Joseph and perhaps Judge MacLeod. On
21 Friday, we'll have --

22 MR. HOOPES: Four or five.
23 Quick, quick.

24 JUDGE FABRICANT: And you think
25 that's a total of two hours.

1 MR. HOOPES: Yes.

2 JUDGE FABRICANT: And so we're
3 probably off Friday afternoon, it sounds like.

4 HEARING OFFICER: Yes.

5 JUDGE FABRICANT: Very good.

6 Thank you.

7 HEARING OFFICER: Anything
8 else?

9 JUDGE FABRICANT: That's it.

10 HEARING OFFICER: Thanks All.
11 We'll see you tomorrow.

12 (The proceedings adjourned
13 at 3:47 p.m.)
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C E R T I F I C A T E

I, LISA L. CROMPTON, Registered
Professional Reporter, hereby certify that the
foregoing is a true and accurate transcript of my
stenographic notes of the proceedings in this
matter on the date and time specified in the
caption hereof.

IN THIS WITNESS WHEREOF I have hereunto
set my hand this 27th day of August, 2025.



LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

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