

1 Alderson Court Reporting

2 Eileen Monteagudo

3 HVC152550

4

5 COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY,

6 SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC,

7 U.S. HOUSE OF REPRESENTATIVES,

8 WASHINGTON, D.C.

9

10 FRIDAY, MAY 31, 2024

11

12

13 INTERVIEW OF: LINDA LACEWELL

14

15

16

17 The interview of the above matter was held

18 at 565 Fifth Avenue, New York, New York

19 10017, commencing at 10:02 a.m.

20

21

22

23

24

25

51 EXHIBITS

| 52 | Exhibit Number: | Page |
|----|-------------------------------------|------|
| 53 | | |
| 54 | MINORITY EXHIBIT A | 50 |
| 55 | July 6th report | |
| 56 | MINORITY EXHIBIT B | 60 |
| 57 | New York Times article dated | |
| 58 | March 4, 2021 | |
| 59 | MINORITY EXHIBIT C | 75 |
| 60 | Washington Post article dated | |
| 61 | March 24, 2021 | |
| 62 | MINORITY EXHIBIT D | 126 |
| 63 | March 4, 2020 CMS issued nonbinding | |
| 64 | Guidance | |
| 65 | MAJORITY EXHIBIT 1 | |
| 66 | E-mail thread | 84 |
| 67 | MAJORITY EXHIBIT 2 | |
| 68 | E-mail thread | 87 |
| 69 | MAJORITY EXHIBIT 3 | |
| 70 | E-mail | 112 |
| 71 | MAJORITY EXHIBIT 4 | |
| 72 | Entitled statement from Beth Garvey | 130 |
| 73 | | |
| 74 | | |
| 75 | | |

76 MR. EMMER: All right. We can go on the
77 record.

91 THE WITNESS: Linda L-A-C-E-W-E-L-L.

92 MR. EMMER: Thank you, Ms. Lacewell.

93 My name is Jack Emmer, and I am the senior counsel
94 for the majority staff of the Select Subcommittee. I
95 want to thank you for coming in today for this
96 interview. The Select Subcommittee recognizes that you
97 are here voluntarily and we appreciate that.

101 interview.

102 Do you have an attorney representing you in
103 a personal capacity present with you today?

104 THE WITNESS: Yes.

105 MR. EMMER: Will counsel please identify
106 themselves for the record?

107 MS. FOTI: Catherine Foti of Morvillo
108 Abramowitz Grand Iason & Anello on behalf of Ms.
109 Lacewell.

110 MR. ABRAMOWITZ: Elkan Abramowitz from the
111 same firm.

112 MS. VITALE: Mary Vitale from the same
113 firm.

114 MR. EMMER: For the record, starting with
115 the majority staff and the additional staff members,
116 please introduce themselves with their name, title and
117 affiliation.

118 MS. LANGLEY: Anna-Blake Langley,
119 professional staff member for the majority.

120 MS. BENZINE: Mitch Benzine, staff director
121 for the majority.

122 MR. OSTERHUES: Eric Osterhues, chief
123 counsel for the majority.

124 MS. ██████████ ██████████ ██████████ senior counsel for
125 the Democratic staff.

126 MR. [REDACTED] [REDACTED] [REDACTED] Democratic
127 counsel.

128 MR. EMMER: Thank you all.

129 Ms. Lacewell, before we begin I would like to go
130 over the ground rules for this interview. The way this
131 interview will proceed is as follows:

132 The majority and minority staff will
133 alternate asking you questions for one hour per round
134 until each side is finished with their questioning.

135 The majority staff will begin and proceed for an hour
136 and then the minority staff will have an hour to ask
137 questions. We will then alternate back and forth in
138 this manner until both sides have no more questions.

139 If either side is in the middle of a
140 specific line of questions, they may choose to end a
141 few minutes past an hour to ensure completion of that
142 specific line of questioning, including any pertinent
143 follow-ups.

144 In this interview while one member of the
145 staff for each side may lead the questioning,
146 additional staff may ask questions.

147 There is a court reporter taking down
148 everything I say and everything you say to make a
149 written record of this interview. For the record to be
150 clear, please wait until the staffer questioning you

151 finishes each question before you begin your answer,
152 and the staffer will wait until you finish your
153 response before proceeding to the next question.

154 Further to ensure the court reporter can
155 properly record this interview, please speak clearly,
156 concisely and slowly. Also, the court reporter cannot
157 record nonverbal answers such as nodding or shaking
158 your head, so it is important that you answer each
159 question with an audible, verbal answer.

160 Exhibits may be entered into the record.

161 Majority exhibits will be identified numerically.

162 Minority exhibits will be identified alphabetically.

163 Do you understand?

164 THE WITNESS: Yes.

165 MR. EMMER: We want you to answer our
166 questions in the most complete and truthful manner
167 possible so we will take your time. If you have any
168 questions or do not fully understand the question,
169 please let us know. We will attempt to clarify, add
170 context to or rephrase our questions.

171 Do you understand?

172 THE WITNESS: Yes.

173 MR. EMMER: If we ask about specific
174 conversations or events in the past and you are unable
175 to recall the exact words or details, you should

176 testify to the substance of those conversations or
177 events to the best of your recollection. If you recall
178 only a part of a conversation or event, you should give
179 us your best recollection of those events or parts of
180 conversations that you do recall.

181 Do you understand?

182 THE WITNESS: Yes.

183 MR. EMMER: Although you are here
184 voluntarily and we will not swear you in, you are
185 required pursuant to Title 18, Section 1001 of the
186 United States Code to answer questions from Congress
187 truthfully. This also applies to questions posed by
188 congressional staff in this interview.

189 Do you understand?

190 THE WITNESS: Yes.

191 MR. EMMER: If at any time you knowingly
192 make false statements, you could be subject to criminal
193 prosecution.

194 Do you understand?

195 THE WITNESS: Yes.

196 MR. EMMER: Is there any reason you are
197 unable to provide truthful testimony in today's
198 interview?

199 THE WITNESS: No.

200 MR. EMMER: The Select Committee follows

201 the rules on the Committee of Oversight and
202 Accountability. Please note that if you wish to assert
203 a privilege over any statement today, that assertion
204 must comply with the rules of the Committee on
205 Oversight and Accountability.

206 Pursuant to that, committee rule 16-C-1
207 states for the chair to consider assertions of
208 privilege or testimony or statements, witnesses or
209 entities must clearly state the specific privilege
210 being asserted and the reason for the assertion on or
211 before the scheduled date, testimony or appearance.

212 Do you understand?

213 THE WITNESS: Yes.

214 MR. EMMER: Ordinarily we take a
215 five-minute break at the end of each hour of
216 questioning. But if you need a longer break or a break
217 before that, please let us know and we will be happy to
218 accommodate. However, to the extent that there is a
219 pending question, we would ask that you finish
220 answering the question before we take a break.

221 Do you understand?

222 THE WITNESS: Yes.

223 MR. EMMER: Do you have any questions
224 before we begin?

225 THE WITNESS: No.

226 MR. ABRAMOWITZ: Excuse me a minute.

227 Thank you. Sorry.

228 EXAMINATION BY

229 MR. EMMER:

230 Q.Ms. Lacewell, I want to thank you again for
231 taking part in this interview voluntarily and for your
232 work over the years.

233 Let's start by discussing your education and
234 experience.

235 Where did you attend undergraduate school?

236 A. New College affiliated with the University of
237 South Florida.

238 Q.What degree did you graduate with?

239 A.A bachelor of arts.

240 Q. Where did you go to law school?

241 A.University of Miami.

242 Q. Who is your current employer and

243 current job title?

244 A.I am employed by L&F Brown, P.C., a law firm in
245 California and I am the managing attorney for

247 Q. Can you briefly go through your professional
248 career?

240 *Journal of Health Politics, Policy and Law* / March 2005

352 *Scutum. To be added from a couple of localities in the*

251 firms in New York City for a period of time after
252 clerked for a federal judge in Miami.

253 Um, I was in the U.S. attorney's office for
254 the Eastern District of New York as a federal prosecutor
255 for almost 10 years in the criminal division. I was a
256 member of the U.S. Department of Justice Enron task
257 force for a couple of years.

258 Um, and, um, I was at the New York State
259 Attorney General's office for almost four years as
260 special counsel to the attorney general.

261 I worked for the New York governor, Governor
262 Cuomo, when he took office immediately after that. For
263 a period of years in various positions with about under
264 a two-year hiatus where I went to California and worked
265 for a cancer nonprofit foundation, came back to New
266 York, was the superintendent of the New York State
267 Department of Financial Services for about two years or
268 so until the governor resigned and I resigned and moved
269 back to California where I am currently employed as
270 indicated.

271 Q. When you were with the attorney general for New
272 York, was the former governor the attorney general at
273 that time?

274 A. Yes, he was.

275 Q. Let's discuss your role within the New York State

276 Department of Financial Services. What was your
277 position?

278 A.I was the superintendent, which was the top
279 position.

280 Q.Can you briefly describe your duties and
281 responsibilities within that position?

282 A.Yes. I regulated as superintendent New York
283 State licensed financial organizations, including
284 insurance, state banking, fintech, crypto, and other
285 financial entities interacting with New York consumers.
286 It involved trillions of dollars in assets of the
287 various segments of the industry.

288 Q.Who did you report to as superintendent?

289 A.I was cabinet official, so I was nominated by the
290 governor, confirmed by the state senate. So I both was
291 an independent regular but also a cabinet official.

292 Q.Can you briefly describe how your duties and
293 responsibilities changed as a result of the pandemic?

294 A.Yes. When the pandemic first hit New York, the
295 governor assembled a group of people from across state
296 government and some who had formerly been in government
297 to come back and form a team to help address the crisis,
298 and I was one of those individuals.

299 I remained as the superintendent but I was
300 also a part of the chamber-based group addressing the

301 pandemic for the people.

302 Q.I got a little ahead of myself there. I want to
303 just return to pre-pandemic.

304 As superintendent, how much day-to-day
305 interaction did you have with the executive chamber? I
306 know you were previously with the chamber but can you
307 just give us an idea?

308 A.Sure.

309 Um, before the pandemic, my energies were
310 primarily devoted to DFS, the Department of Financial
311 Services. However, from time to time there were
312 initiatives that involved the chamber such as the opioid
313 epidemic and other policy matters that had either a role
314 in the governor's priorities or were cross agency
315 functions where I would interact with the governor's
316 team.

317 I had previously served as a counsel in the
318 chamber for the governor's key agency staff and the
319 executive staff, and from time to time I was asked to
320 provide additional advice in that regard.

321 So I continued to have sort of a role in the
322 chamber while I was the superintendent of DFS, even
323 before the pandemic.

324 Q.Thank you.

325 Now I would like to ask you if you have spoken

326 with or e-mailed with any of the following people
327 regarding COVID-19 and nursing homes between
328 January 1st, 2020 and present?

329 First, former governor Andrew Cuomo?

330 A.Well, he didn't use e-mail.

331 Q.Spoke with or e-mail?

332 A.Spoke with. Oh, thank you. Yes.

333 Q.Former secretary to the governor Melissa DeRosa?

334 A.Yes.

335 Q.Mr. Gareth Rhodes?

336 A.Yes.

337 Q.Mr. Jim Malatras?

338 A.Yes.

339 Q.Rich Azzopardi?

340 A.Yes.

341 Q.Peter Ajemian?

342 A.Yes.

343 Q.Ms. Dani Lever?

344 A.Yes.

345 Q.Ms. Beth Garvey?

346 A.Yes.

347 Q.Ms. Judith Mogul?

348 A.Yes.

349 Q.Ms. Megan Baldwin?

350 A.Yes.

351 Q.Mr. Larry Schwartz?

352 A.Yes.

353 Q.Mr. Robert Mujica?

354 A.Yes.

355 Q.Ms. Annabelle Walsh?

356 A.Yes.

357 Q.Dr. Howard Zucker?

358 A.Yes.

359 Q.Dr. Eleanor Adams?

360 A.Yes.

361 Q.Ms. Sally Dreslin?

362 A.Yes.

363 Q.Mr. Gary Holmes?

364 A.Yes.

365 Q.Mr. Kenneth Raske?

366 A.Yes.

367 Q.Mr. Lee Pearlman?

368 A.I can't remember who that is.

369 Q.Mr. Michael Dowling?

370 A.Yes.

371 Q.Dr. Anthony Fauci?

372 A.No.

373 Q.Dr. Francis Collins?

374 A.Yes.

375 Q.Mr. Alex Azar?

376 A.I don't recall.

377 Q.Ms. Sema Verma?

378 A.Yes.

379 Q.Dr. Deborah Birx?

380 A.I can't remember.

381 Q.Dr. Robert Redfield?

382 A.Yes.

383 Q.Dr. Michael Osterholm?

384 A.I can't recall.

385 Q.David Grabowski?

386 A.I don't remember who that is.

387 Q.So let's start with the former governor.

388 Can you describe the nature of your
389 conversations? Were they in relation to the March 25th
390 order?

391 MS. FOTI: Only to the extent that it is
392 not privileged.

393 A.I'm sorry. Are you asking me generally or with
394 respect to the order?

395 MR. BENZINE: Did you have any discussions
396 with the former governor regarding the drafting,
397 implementation or execution of the March 25th order?

398 EXAMINATION BY

399 MR. BENZINE:

400 A.Hold on a second because that's actually several

401 questions in one.

402 Q.I'll break it up.

403 Any questions, discussions or conversations
404 with the governor regarding the drafting of the
405 March 25th order?

406 A.No.

407 Q.Any conversations with the governor regarding the
408 implementation of the order?

409 A.Not about the implementation.

410 Q.Any conversations with the former governor on the
411 enforcement of the order?

412 A.So I would say more that there were conversations
413 about the fact of the order and any potential changes to
414 the order.

415 Q.Any conversations with the governor surrounding
416 press inquiries regarding the order?

417 A.Yes.

418 Q.Did you have any conversations with the governor
419 surrounding congressional inquiries into the order?

420 A.Not that I recall.

421 Q.Any conversations with the governor surrounding
422 Department of Justice inquiries into the order?

423 A.So I don't recall and, the reason I don't recall
424 is that I frequently would speak to Melissa about those
425 subjects and not necessarily the governor directly.

426 Q.Okay. That's fair. Thank you.

427 I have a few more specifics and then
428 Jack will go back to riding down the list.

429 On the topic of the Department of Justice, did
430 you have any conversations with anyone affiliated with the
431 state of Michigan regarding the Department of Justice?

432 A.I don't recall if I was on any phone calls where
433 there was a state on the phone that had also received
434 some type of inquiry. If I was, that's about all I
435 would -- I don't even recall specifically which states
436 or if there were states on the phone for sure.

437 Q.That answer is to the best of your recollection
438 to go across the states?

439 A.Yes.

440 Q.Thank you.

441 EXAMINATION BY

442 MR. EMMER:

443 Q.Let's move on to Melissa DeRosa.

444 We will get to more specifics regarding the
445 order itself, but did you ever discuss the drafting with
446 Ms. DeRosa?

447 A.When you say "the drafting," are you talking
448 about before it came into existence?

449 Q.Yes. Before issuance?

450 A.No.

451 Q.Same as former governor. Did you talk about the
452 enforcement of the order?

453 A.See, I guess I don't really know what you mean by
454 the enforcement of the order.

455 Q.The enforcement of the order, that would entail
456 directing nursing homes to accept COVID positive
457 patients pursuant to the order itself?

458 A.I had no conversation with Melissa or the
459 governor about the March directive before it was issued.

460 Q.Let's talk about Ms. Baldwin.

461 What role did she have in the response to the
462 pandemic?

463 A.She was the assistant secretary for health, which
464 meant she was the liaison between the executive chamber
465 and the health related state agencies at that time. To
466 my recollection, I think we did not have a deputy
467 secretary for health who would have been her senior, and
468 therefore it fell to her to manage the entire portfolio.

469 So she became a very critical player because
470 of the fact that she was the direct liaison with the
471 Department of Health when the pandemic hit.

472 Q.Did you ever discuss the March 25th order, its
473 origins, with Ms. Baldwin?

474 A.Not to my recollection.

475 EXAMINATION BY

476 MR. BENZINE:

477 Q.What were the nature of the conversations with
478 Mr. Schwartz?

479 A.I'm sorry.

480 Q.What were the nature of the conversations of
481 COVID-19 and the nursing homes with Mr. Schwartz?

482 A.Well, he was part of the group assembled in the
483 executive chamber to manage COVID. So we regularly had
484 conversations with each other in the day-to-day
485 management of the pandemic during that period of time.

486 Q.Anything specific to the directive or nursing
487 homes?

488 MS. FOTI: Again, if it is not privileged,
489 you can talk about it. If it is privileged, maybe just
490 if the topic was discussed.

491 A.Other than privileged conversations, I don't have
492 anything for you.

493 Q.What was the topic of the privileged
494 conversations?

495 MS. FOTI: The topic, I think you can
496 answer.

497 MR. ABRAMOWITZ: (Nodding.) General topic.

498 A.Nursing homes.

499 Q.I think we can get a little bit more specific
500 with that without touching a privileged conversation

501 right now. So --

502 A.I had privileged conversation with Mr. Schwartz
503 about the subject matter of the March directive before
504 it was issued.

505 Q.Okay.

506 EXAMINATION BY

507 MR. EMMER:

508 Q.What were the nature of your conversations with
509 Mr. Raske? Did you have any conversations prior to the
510 issuance of the March 25th order with him?

511 A.I did not have any conversations with Mr. Raske
512 on the March directive or its subject matter. I simply
513 recall there were one or more group phone calls in the
514 governor's office between members of the governor's
515 staff, sometimes the governor, sometimes others who were
516 managing hospitals and they were on the phone.

517 So I didn't have, to my recollection, any
518 individual conversations. There may also have been
519 conversations around the need for ventilators and other
520 supplies for hospitals.

521 Q.That's similar to the testimony we received from
522 Dr. Zucker this past December. Do you
523 recall which staff members would have been in these
524 meetings?

525 A.Um, so I do have specific memory that one or two

526 of these calls were in the governor's conference room.

527 I think he himself, the governor himself, was not always
528 on the phone.

529 And you know, the other attendees were, you
530 know, some combination of Mr. Schwartz, Dr. Zucker, Jim
531 Malatras, Melissa DeRosa. I can't say for sure which of
532 them were on what call, but they were in the nature of
533 coordination and finding out what the hospitals needed
534 and how we could coordinate resources for care and
535 things of that nature. But it had nothing to do with
536 nursing homes.

537 Q.Dr. Zucker's testimony, and to be fair to him,
538 but effectively his testimony was that senior level
539 staff, task force members were in a meeting with the
540 governor when the governor received a call from the
541 Greater New York Hospital Association asking him to do
542 something related to patients that needed to be
543 discharged back to the nursing homes. You don't recall
544 such a call taking place?

545 A.No, but I was not always in those conversations.
546 In the beginning I was in there more.

547 One of the things that happened was as COVID
548 became so knowingly contagious they started to reduce
549 the number of people who were back there with the
550 governor. And it was a very small group and more on

551 sort of a need basis and I didn't fall into that
552 category.

553 EXAMINATION BY

554 MR. BENZINE:

555 Q.Do you recall the nature of your conversations
556 with Dr. Adams?

557 A.Eleanor Adams?

558 Q.Mm-hmm.

559 A.Um, she was, I think, an epidemiologist, a very
560 knowledgeable, smart, caring person. She was at the
561 Department of Health and most of my conversations with
562 her revolved around obviously infectious nature of
563 COVID, I believe nursing home care, and the -- what is
564 it, the July report?

565 MS. FOTI: July.

566 A.July.

567 Q.She testified to us that in the fall of 2020 she
568 was, like, the only actual conversations she ever had
569 with the governor was a phone call in the fall of 2020
570 and the governor ordered her fired. Were you on that
571 phone call?

572 A.No, I don't think so.

573 Q.Okay.

574 EXAMINATION BY

575 MR. EMMER:

576 Q.What were the nature of your conversations with
577 Michael Dowling?

578 A.Same category as Mr. Raske.

579 Q.Did you ever have conversations about the
580 March 25th order with Dr. Francis Collins?

581 A.I don't think so.

582 Q.What were the nature of your conversations
583 relating to nursing homes with him?

584 A.Well, my memory --

585 MS. FOTI: Is this privileged?

586 THE WITNESS: No.

587 A.No. I -- well hopefully I'm not mistaken about
588 Frances Collins, but with Dr. Zucker I had conversations
589 with certain federal officials about the reporting of
590 COVID numbers, and that's what I was thinking of.

591 So I didn't otherwise interact with federal
592 officials on COVID, to the best of my recollection,
593 about the federal reporting is what I mean, on the
594 reporting of COVID numbers.

595 EXAMINATION BY

596 MR. BENZINE:

597 Q.Is that the same for Ms. Verma and Dr. Redfield?

598 A.Yes.

599 EXAMINATION BY

600 MR. EMMER:

601 Q. When you are referring to the reporting, is that
602 I recall that CMS was reporting numbers and there was
603 seemingly some discrepancy between the numbers CMS was
604 reporting and New York State. Is that what you are
605 referring to?

606 A. Yes.

607 Q. When I say discrepancy, I think there were
608 different numbers they were reporting, but thank you.

609 Ms. Lacewell, since January 2023 have you had
610 any conversations with former Governor Cuomo or Melissa
611 DeRosa about our investigation?

612 A.I have not spoken to the governor. I did speak
613 with Ms. DeRosa.

614 Q. Have you spoken to Ms. DeRosa since the letter we
615 sent you in 2024?

616 A. She wanted to make sure I knew about it.

617 Q. Have you discussed the substance of your
618 testimony with Ms. DeRosa?

619 A. No.

620 EXAMINATION BY

621 MR. BENZINE:

Q. When did the conversation occur?

623 A.Whatever day was in the press.

624 Q.So it was soon to immediately thereafter you
625 recieved a letter from the subcommittee?

626 A.I think she told me before I actually had the
627 letter, which I think was in my e-mail.

628 EXAMINATION BY

629 MR. EMMER:

630 Q.Now I want to ask you if you had any interactions
631 with any of the following institutions related to
632 nursing homes between January 1, 2020, and present.

633 First, the office of the New York State Attorney
634 General.

635 A.Did I have conversations with them?

636 Q.Yes.

637 A.I -- my staff had conversations with them. I
638 don't believe I was personally on any of those calls,
639 but it's possible.

640 Q.The conversations that your staff had with them,
641 was that in regards to their investigations into nursing
642 homes?

643 A.Yes.

644 Q.The Manhattan District Attorney's office?

645 A.No.

646 Q.The New York State comptroller?

647 A.No.

648 Q.The New York State Assembly Judiciary Committee?

649 A.No.

650 Q.The U.S. Department of Justice?

651 A.No.

652 Q.The Greater New York Hospital Association?

653 A.Other than as described.

654 Q.To be clear, that's the answer that you gave for

655 Mr. Kenneth Raske as you previously testified to?

656 A.Yes.

657 MR. ABRAMOWITZ: Excuse me a second.

658 A.And with respect to the justice department or the
659 U.S. Attorney's office, I have been interviewed.

660 Q.Thank you.

661 A.By various entities.

662 Q.And that is in regards to their investigations or
663 inquiry into nursing homes?

664 A.And related matter, yes.

665 Q.Thank you.

666 Northwell Health?

667 A.That's -- isn't that Mr. Raske or Mr. Dowling I
668 mean?

669 Q.Dowling, yes?

670 A.Dowling yes.

671 Q.Finally McKinsey & Company?

672 A.Yes.

673 EXAMINATION BY

674 MR. BENZINE:

675 Q.You said no to AG and I just want to ask a

676 specific question and you just tell me if that's what it
677 is.

678 When they released their report in January of
679 2021, there was a phone call between Ms. DeRosa and the
680 AG's office that morning where there was some -- the
681 transcript of the call is a little rough to read with
682 some expletives. Were you on that phone call?

683 A. You know, before you asked me that question, I
684 didn't remember being on the call. It's possible I was
685 on the call just listening.

686 Q. Mm-hmm.

687 MS. FOTI: Just to be clear, I think she
688 said that the OAG believes she wasn't on those calls
689 and her staff was on those calls. You said no. I
690 don't know if that's accurate.

691 MR. BENZINE: I just meant her personally.

692 MS. FOTI: Yeah. I just don't think she
693 denied being on that call, so I wanted to clear that
694 up.

695 MR. BENZINE: I just meant her specifically
696 on that call.

697 THE WITNESS: I don't think I was doing the
698 talking if I was on that call.

699 MR. BENZINE: Thank you.

700 EXAMINATION BY

701 MR. EMMER:

702 Q.I would now like to ask you some general
703 operational questions.

704 First, how did the governor's team typically
705 communicate with each other?

706 A.Are you talking about during COVID?

707 Q.Yes, specifically COVID.

708 A.Well, in the beginning we all congregated in the
709 executive chamber in Albany on the second floor of the
710 Capitol. We had a lot of phone calls, group calls,
711 daily calls, things of that nature, and e-mails and to
712 some degree, pin-to-pin messages, probably text
713 messages.

714 That probably captures most of it.

715 Q.To be clear, you had a state e-mail account?

716 A.I did, but I think mine was my DFS account, but a
717 state account, yes.

718 Q.Previous testimony we received obviously COVID
719 was a -- well, did you ever have a different state
720 e-mail issued during the pandemic?

721 The reason I ask is, one of the witnesses
722 testified to the governor giving out his e-mail. I
723 believe it was his e-mail or someone's, which ended up
724 warranting getting a new e-mail because then it became
725 public.

726 A.I don't recall the governor communicating with
727 staff on an e-mail account.

728 Q.Okay.

729 EXAMINATION BY

730 MR. BENZINE:

731 Q.Sorry. It was -- Dr. Malatras testified that in
732 one of the press conferences Governor Cuomo put Melissa
733 DeRosa up on a screen --

734 A.Oh.

735 Q.-- and they had to issue her a different
736 e-mail --

737 A.Yes.

738 Q.-- because there was a lot going on.

739 Did that ever happen to you?

740 A.I don't think so.

741 Q.Okay.

742 A.I mean I think he may have put my e-mail up
743 there. He certainly put my name up there, but I don't
744 think that happened to me, no.

745 EXAMINATION BY

746 MR. EMMER:

747 Q.Thank you.

748 Did you ever conduct official executive
749 chamber task force business via personal e-mail?

750 A.I don't think so.

751 Q.Did you have a state-issued cell phone?

752 A.Did I have a state-issued cell phone? I may
753 have, but I don't think I used it.

754 EXAMINATION BY

755 MR. BENZINE:

756 Q.The pin-to-pin messages would be on BlackBerries,
757 right?

758 A.That's true and -- but at some point we stopped
759 using BlackBerries, I think, right? You know,
760 when I was in the executive chamber before I was at DFS,
761 we used the pin to pin a lot. But once I was at DFS,
762 I'm not even sure I had a BlackBerry anymore. Not to my
763 recollection.

764 EXAMINATION BY

765 MR. EMMER:

766 Q.Did you ever conduct official business via
767 personal cell phone?

768 A.Well, I used my personal cell phone also for
769 work, for phone calls.

770 Q.To the best of your recollection did you ever
771 conduct official business via encrypted messaging apps
772 like Signal or WhatsApp?

773 A.I don't think so. I can't say not ever because
774 that would be foolish given the passage of time, but not
775 to the best of my recollection.

776 Q.Ms. Lacewell, are you aware of any executive
777 chamber or task force officials deleting official
778 e-mails or documents?

779 A.No.

780 Q.Do you recall what the chamber's retention policy
781 was?

782 A.I think it varied over time.

783 Q.Do you recall any requests from executive chamber
784 officials to delete e-mails or official documents?

785 A.What period of time are you talking about?

786 Q.During the pandemic.

787 A.I mean during the pandemic I was really not in
788 charge of those issues anymore. I was at DFS.

789 Q.But as far as your interactions with the task
790 force do you recall instructions to delete official
791 records?

792 A.I do not recall that, no.

793 Q.Let's talk about the COVID task force and your
794 role within it.

795 You were a member of the COVID task force,
796 right?

797 A.Yes.

798 Q.Do you recall who the other members of the task
799 force were?

800 A.Well, it varied over time but -- and I remember

801 in the beginning there was an announcement of the task
802 force that included various other cabinet members who
803 going forward were really not so involved. Although,
804 obviously, they were available.

805 But Melissa DeRosa, I don't know if she was
806 formally named, but she was the chief of staff and
807 obviously integral to that effort. Gareth Rhodes, Larry
808 Schwartz, Jim Malatras, Beth Garvey as counselor to the
809 governor.

810 Um, those are the primary ones in my mind.

811 Q.Yeah. To be clear, you said that there were a
812 lot of members who didn't really have a role. So the
813 members that you just listed were the ones who were
814 primarily making decisions?

815 A.Yes.

816 Q.Thank you.

817 Can you -- this is a general question but can
818 you briefly describe what role the task force played in
819 the governor's response to COVID-19?

820 A.Sure. COVID was a crisis and the governor's
821 approach, consistent with his history, was to have a
822 trusted team capable of getting things done quickly and
823 who had the experience to address the crisis and work
824 together cooperatively as a team to come up with the
825 policies and procedures and action items necessary and

826 had some forethought, if possible, around this crisis to
827 help manage this as a statewide operation utilizing all
828 the levers of the state, obviously, including the
829 agencies and interact with the other key players,
830 hospitals, doctors, patient groups, all the interest
831 groups that either had a stake or an interest in how
832 this was going to be managed.

833 Q.This might be a difficult question because I know
834 everything had to move remote, but were you able to meet
835 in person?

836 A.In the beginning, yes, before people realized how
837 contagious it was. There was like a giant conference
838 room on the second floor where a lot of the group
839 gathered. Melissa's office was down the hall. There
840 were some offices right across the hall from the
841 conference room where ultimately Larry Schwartz and Jim
842 Malatras sat, and obviously the governor was right down
843 the hall as well.

844 And a lot of other staff, including the team
845 who put the daily PowerPoint together, they were either
846 in or near that conference room.

847 And yeah, as time went by, people were more
848 and more remote. They would find offices elsewhere to
849 sort of reduce the risk, especially after some team
850 members got sick, to reduce the risk of contagion, and

851 to keep from the governor as much as possible, and even
852 at one point, to stay away from Melissa because she was
853 a key player.

854 Q.So you just brought up staying away from the
855 governor. What were your interactions with him as a
856 member of the task force? Were you meeting with him
857 often or was it on phone calls?

858 A.Yeah. In the beginning he would call us into the
859 conference room to meet with him. As time went by, as I
860 mentioned, it was a smaller group and there were periods
861 of time that I had no contact with him. Obviously he
862 was incredibly busy managing the pandemic on a daily
863 basis.

864 Q.Did members of the task force have specific roles
865 or areas of COVID policy that they were responsible for
866 managing?

867 A.From time to time, yes, of course, you know, the
868 lines could slip given what the needs were.

869 Q.Did you have any specific role?

870 A.Yes. So I was providing legal advice, but I also
871 had some sort of team responsibilities. I did some
872 review of the PowerPoint. Usually almost every day on
873 accuracy issues, especially of the overnight numbers,
874 new hospitalizations, ventilators, fatalities, and the
875 like. And I had a team that worked with me on those

876 numbers.

877 I also was called in on the effort to find
878 ventilators and other resources for the health care
879 facilities. I had a role with the Department of Health
880 looking into some of the individual investigations of
881 nursing homes. And just sort of daily legal advice.

882 For a period of time I directly helped Beth
883 Garvey because resources were low and so forth.

884 Q. We'll discuss the nursing home related data in
885 further detail later on, but we had witnesses that
886 testified that you were one of the people primarily
887 responsible for overseeing nursing home data.

888 Do you agree with that characterization?

889 A. Yes.

890 Q. Can you elaborate on what your role was in the
891 collection and review of the data coming in?

892 A. Yes. So it started because in the early days of
893 the early PowerPoint by the governor, from time to time,
894 the governor early on would do a report and there was
895 some small error in what he was giving to the public,
896 like, had one person died or did two people die, was it
897 really the day before or the day before that, it could
898 be very small.

899 And it was imperative to the governor that the
900 information he was providing to the public on a

901 day-to-day basis was accurate as a matter of maintaining
902 the public trust at a time when they were scared.

903 And he actually personally tasked me with
904 taking over the reporting of the numbers and doing what
905 I could to reduce the risk of error in the reporting of
906 all of this so that we could maintain public trust and
907 as a former federal prosecutor, I am conscious of
908 details and coming up with systems to try and improve
909 the accuracy of various types of government operations.

910 And so it started there and, look, to report
911 daily changes in COVID-related matters was a herculean
912 task for the entire state because it started at the
913 hospitals and when individuals started to die in nursing
914 homes, it was there.

915 And they were in crisis trying to take care of
916 people, and on top of that, we are asking them to give
917 them daily data, and to heighten the accuracy and throw
918 resources at that, also at a time when health-related
919 staff were getting sick themselves and everybody was
920 short-staffed and they were overwhelmed with the number
921 of people dying.

922 But everybody worked really hard and pulled
923 together and between the Department of Health and the
924 health-related facilities, they gathered nightly, and I
925 mean overnight, the numbers of what had changed in the

926 past 24 hours, how many people had gone into hospitals,
927 how many people were on ventilators, how many people had
928 been diagnosed with COVID, how many had died in the
929 hospitals, in nursing homes, relentless, day after day
930 after day, and I actually had a team -- two or three
931 people, dedicated to scrubbing those numbers, verifying
932 them with DOH and DOH was actually on the phone with
933 some facilities because we didn't have full names for
934 health privacy reasons, so we didn't know if names were
935 duplicative if they seemed to be so. 78-year-old male
936 in Rochester, right, if there were two of those, is that
937 the same person?

938 And trying to make sure that what we had was
939 accurate and then in the early hours of the morning when
940 that had all been scrubbed, I got the numbers to the key
941 COVID task force members so that they knew what the day
942 was going to look like and so that it could be put into
943 the PowerPoint, which I then personally reviewed that
944 slide to make sure there were no typos or errors of any
945 kind and the governor could feel confident that what he
946 was saying to the public was accurate.

947 Q.I just want to dissect your answer a little bit.

948 You mentioned that you had a team that would
949 work with you overseeing the data. Can you provide the
950 names of the individuals who assisted you?

951 A.I would have to get you the names afterwards, but
952 they were people who were special counsel within an
953 agency who I kind of called into the chamber. You know,
954 very meticulous lawyers with experience who were detail
955 oriented and could bring that kind of laser focus to the
956 task.

957 Q.Agency, is that the Department of Health or just
958 numerous different agencies that they were a part of?

959 A.I don't think any of them were the Department of
960 Health.

961 Q.Okay. And you mentioned the numbers that you had
962 sent to individuals within the executive chamber to put
963 together the daily PowerPoints.

964 Can you be more specific on who those members
965 were?

966 A.So the numbers were sent to members of the team
967 so that they were aware and so that the numbers could
968 then go into the PowerPoint.

969 Q.Okay.

970 A.They needed to be aware more broadly as well.
971 Melissa DeRosa, Beth Garvey, Gareth Rhodes, Jim
972 Malatras, Larry Schwartz. Um, I can get you more names
973 after this if it's important.

974 Q.That's fine.

975 A.Okay.

976 Q.The daily data that you were reviewing, was that
977 retrieved from the HERD surveys that the DOH was sending
978 out?

979 A.So I have been thinking about that. I think the
980 data went into the HERD system, but because it was
981 overnight I think we may have been getting it sort of in
982 Excel spreadsheets, but it was the same data.

983 Q.And what role did McKinsey play in putting
984 together, retrieving the data that they would use in the
985 PowerPoints every morning?

986 A.I don't think they had any role.

987 Q.Okay. And as far as the HERD surveys go, did you
988 have any role in what questions the health department
989 was asking for those?

990 A.I certainly was in some conversations where the
991 decision was being made to ask for further information.

992 Q.And by "further information" are you referring to
993 just individual inquiries of nursing homes or just the
994 surveys themselves that were being sent out?

995 A.The surveys.

996 Q.Okay. Did you play any role in deciding the
997 methodology in which nursing home fatalities were
998 counted throughout the pandemic or at any point through
999 the pandemic?

1000 Excuse me.

1001 THE WITNESS: Can you read that back,
1002 please?

1003 (Whereupon, the referred to question was
1004 read back by the Reporter.)

1005 A. How they were counted?

1006 Q. How they were being portrayed to the public on a
1007 day-to-day basis.

1008 A. So I had a role in how the COVID-related numbers
1009 appeared in the governor's PowerPoint, as I have
1010 described. I had a role in the governor's office
1011 posting of COVID-related data, um, on the website.

1012 That's what I recall.

1013 EXAMINATION BY

1014 MR. BENZINE:

1015 Q. Did you have any decision making authority on
1016 whether to count in facility deaths or out-of-facility
1017 deaths?

1018 A. To count them where?

1019 Q.To differentiate between only posting nursing
1020 home fatalities as individuals that died within the
1021 facility versus posting nursing home fatalities of
1022 nursing home residents that died in or out of the
1023 facility.

1024 A.Because you see, your first question on counting
1025 them, I don't have a role of counting them.

1026 Q.They are all counted, right?

1027 A.Yes.

1028 Q.But any decision making authority on the
1029 in-facility versus out-of-facility?

1030 A.Those were typically group conversations in what
1031 we were posting. And I would say group decisions, but
1032 yes, I was a part of those conversations.

1033 Q.Who was in the group?

1034 A.Um, well certainly Melissa DeRosa, and beyond
1035 that I don't recall.

1036 Q.Who would have the final authority?

1037 A.Well, Melissa was secretary to the governor so
1038 she was, in essence, the chief of staff and had final
1039 decision making authority either in what was delegated
1040 to her or in what she discussed with the governor, but
1041 if I objected to something that she wanted to do, I
1042 don't recall her ever saying, I'm doing it anyway.

1043 Q.Do you think it would be fair to say nothing got
1044 approved without Ms. DeRosa's approval?

1045 A.Well, actually things did get approved without
1046 Melissa DeRosa, but that wasn't supposed to happen.

1047 Q.Do you have an example of that?

1048 A.I do.

1049 Q.Can you share?

1050 A.I can.

1051 Q. Please go ahead.

1052 MR. ABRAMOWITZ: See? Well trained.

1053 A.Um, the March guidance. The governor and
1054 Ms. DeRosa were not -- let me rephrase that. They were
1055 surprised by the guidance. So to the best of my
1056 understanding, they were not consulted, and she was not
1057 consulted more specifically beforehand because she was
1058 surprised. And from time to time, that did happen.

1059 Q. You said that - I don't want to mischaracterize
1060 so if it's wrong, please correct me - that outside of
1061 maybe one conversation with Mr. Schwartz prior to the
1062 issuance of the guidance, you weren't involved in the
1063 guidance prior to issuance; is that fair?

1064 A. Correct.

1065 Q. Is that fair?

1066 A. Yes.

1067 Q. The guidance was then in the news an awful lot?

1068 A. Yes.

1069 Q. Come April-ish or a little bit before?

1070 A. Yes.

1071 Q. And since Ms. DeRosa and the governor were both
1072 surprised where the guidance came from, did you ever
1073 have any conversations where you figured out the
1074 origination of the guidance?

1075 MS. FOTI: Just the topic.

1076 THE WITNESS: Right but --

1077 A. But your question was did I have any

1078 conversations where I figured out the origin of the

1079 guidance.

1080 Q. From my perspective --

1081 MS. FOTI: Yes or no or maybe we can't get

1082 into it.

1083 THE WITNESS: Can I have a moment?

1084 MR. BENZINE: Yes. We can go off the

1085 record for a second.

1086 (Whereupon, an off-the-record discussion

1087 was held.)

1088 MR. BENZINE: Okay. We can go back on the
1089 record.

Q. Do you want me to rephrase the question?

1091 A. Well, let me try this.

1092 Q. Okay.

1093 A.I didn't learn anything new.

1094 Q. Where did the guidance come from?

1095 A. My conversation with respect to the guidance

1096 before it was issued is privileged.

1097 Q. Without getting into the privilege, which we can
1098 discuss at a later point, you're discussing the
1099 conversation with Mr. Schwartz that you had prior to the
1100 issuance of the guidance was where you learned about the

1101 origination of the guidance?

1102 A.I can't answer that.

1103 Q.Okay. Did the guidance originate outside the New
1104 York State government?

1105 A.Any conversation I had about the origin of the
1106 March guidance was in a privileged conversation that I
1107 cannot disclose.

1108 Q.Okay.

1109 MR. EMMER: We'll go off the record.

1110 (Whereupon, an off-the-record discussion
1111 was held.)

1112 MS. [REDACTED] We can go back on the record.

1113 EXAMINATION BY

1114 MS. [REDACTED]

1115 Q.Good morning, Ms. Lacewell. I want to echo the
1116 thanks of my Republican colleagues. We do appreciate
1117 you being here today and we appreciate that you traveled
1118 voluntarily to speak with us.

1119 I am [REDACTED] [REDACTED] I am senior counsel for the
1120 democratic staff on the select subcommittee.

1121 As an initial matter I would like to talk to
1122 you a little bit more about your role pre-COVID sort of
1123 just in the months before. So fall
1124 2019 transitioning into COVID, how that transition
1125 happened and how your roles and responsibilities

1126 changed.

1127 A.Excuse me. Sure.

1128 So as mentioned, I was a leader at DFS and
1129 continuing the transition from my predecessor, and
1130 focusing on various industry-wide issues for the
1131 regulated issues. And immediately before
1132 COVID, we were especially focusing on connecting with
1133 our peer regulators overseas because we regulated a
1134 number of international entities that used New York as
1135 their U.S. regulated base.

1136 So I actually was in Europe when COVID, um,
1137 hit New York in a way that it was known to the public,
1138 right, because it obviously entered earlier undetected.
1139 And I was in London getting ready to meet top British
1140 regulators on the financial side and head of the Bank of
1141 England and so forth, and I got a phone call from
1142 Melissa telling me that we had our first COVID, um, case
1143 and where was I and I needed to get to Albany.

1144 So I got the first flight out, which was
1145 Gatwick, and I don't even know what airline I flew. It
1146 was some Soviet era, you know, rickety thing with the
1147 door right there thinking I was going to fly out at any
1148 moment. I flew to JFK and went
1149 immediately up to Albany to the Capitol and met with the
1150 team there on COVID and I didn't yet understand the

1151 mission. I don't think anybody did. And I was there
1152 for, like, a few days. A couple weeks later, I was
1153 living in Albany for the pandemic. And I
1154 helped the team, yes, but as every other government
1155 regulator did at the time, or government agency had, I
1156 used my position as the head of DFS to try to deliver
1157 relief to consumers, to people in terms of suspended
1158 various, you know, requirements with the consent of
1159 industry, you know, having to do with, you know, health
1160 insurance and other payments.

1161 And every other type of relief that we could
1162 think of, getting insurance coverage for COVID and for
1163 ultimately vaccines, and doing as much as possible, you
1164 know, waiving bank fees and ATM fees, everything you
1165 could think of because people were home, they couldn't
1166 work and couldn't get paid. What were you supposed to
1167 do? Suspending mortgage payments. Everything everybody
1168 saw on a day-to-day life across the country, DFS was a
1169 lever for that. We did a number of
1170 things. I worked closely with the team at DFS and the
1171 industry because everything we did we got industry
1172 consent.

1173 Q.I apologize for my ignorance for this. You
1174 mentioned being pulled into the task force when New York
1175 had its first positive case of COVID. Do you remember

1176 what date that was?

1177 A.March 1st, I believe.

1178 Q.We have heard from some other witnesses that New
1179 York began to ramp up awareness of COVID earlier when
1180 sort of reports out of China first started.

1181 So when you joined the COVID task force, did
1182 it seem like other people had already been aware of
1183 these issues for some time?

1184 A.Yes.

1185 Q.And did they quickly get you up to speed on what
1186 they were working on?

1187 A.To my understanding, because this was very new,
1188 and New York was trying to learn as much as possible and
1189 anticipating it was going to hit New York and then it
1190 hit New York.

1191 Then at that point, nobody really knew what to
1192 do and they didn't know what was to come, what would the
1193 infection rate be, how fast it would go, were the
1194 hospitals ready, even what the issues were to think
1195 about.

1196 Once you realized how many people were likely
1197 to get sick and end up in hospitals, then you had to
1198 think about did they have the resources they need. Once
1199 you understand people have to be on ventilators, then
1200 you have to see if you have enough ventilators. Guess

49

1201 what? You don't have enough ventilators. Where are you
1202 going to get them from and so on.

1203 Q. And so it sounds like -- and this is what most of
1204 us recall at the beginning of COVID, everyone was flying
1205 by the seat of their pants trying to get as much
1206 information about that virus?

1207 A. Yes.

1208 Q.And I'm sure this led to crazy work hours for you
1209 all?

1218 And what would the peak of that be? How many
1219 people would die before the fatality rate began to go
1220 down and nobody knew. Every day these numbers that we
1221 reported in and that the public learned every day were
1222 going up the mountain.

1223 100 people died. 120 people died. 200. 300.
1224 400. 500. Where does it end?

1225 Finally, we got to like 800, and I remember it

1226 was just such a pressure cooker in the chamber, and I
1227 know for the country as well, but in there every day
1228 with your own people getting sick, and knowing what was
1229 going on in the hospitals and the nurses and the doctors
1230 and everybody getting sick and the morgues being
1231 overwhelmed and not having anywhere to put people and
1232 you're government. What are you doing about it?

1233 And finally, the number got to about 800 and
1234 it was like almost nobody could take it anymore. Was it
1235 going to keep going up? Then the next day, it was 798.
1236 And we're like, is it going to keep going down? Is it a
1237 fluke?

1238 And every day it started to
1239 come down a little bit and what an incredible thing to
1240 think that it was positive that less than 800 people
1241 died the day before until over a period of time, as
1242 everybody saw, that the numbers came down so we could
1243 reach a plateau.

1243 It was incredible.

1244 Q.Thank you.

1245 I'm going to switch topics a little bit.

1246 In the last hour it came up briefly, but I
1247 want to focus a little bit on the Department of Health's
1248 July 6, 2020 report.

1249 So I will introduce that as Minority Exhibit A
1250 and pass around some copies of that.

1251 (Whereupon, July 6th report is marked as

1252 Minority Exhibit A by [REDACTED] [REDACTED]

1253 MS. [REDACTED] (Handing).

1254 MS. FOTI: Thank you. (Handing).

1255 THE WITNESS: (Handing).

1256 MR. ABRAMOWITZ: (Handing).

1257 Q. So as I said, this will be Minority Exhibit A.

1258 It is the report titled Factors Associated with Nursing
1259 Home Infections and Fatalities in New York State during
1260 the COVID-19 Global Health Crisis. It was issued by the
1261 New York State Department of Health on July 6, 2020.

1262 Are you familiar with this report?

1263 A. Yes, I am.

1264 Q. This was the first in-depth analysis of nursing
1265 home data publicly released by the Department of Health,
1266 so I have to assume many eyes were on this report and
1267 very involved in pulling it together.

1268 Do you know who at DOH worked on this report?

1269 A. Yes.

1270 Q. Can you please tell us who those people were?

1271 A. There was a very large group at DOH as you
1272 suggested. And they partnered with McKinsey. Eleanor
1273 Adams, you know, had a role once this effort was already
1274 underway. Um, Sally Dreslin, Dr. Zucker. Other staff
1275 other than Eleanor Adams whose names are not immediately

1276 coming to me. Megan Baldwin for a period of time.

1277 Q.Thank you.

1278 And aside from McKinsey, were others outside
1279 of the Department of Health involved in the drafting of
1280 the report?

1281 A.When you say outside the Department of Health --

1282 Q.Executive chamber, other agencies, those outside
1283 of government?

1284 A.Well, I guess Megan Baldwin was a part of the
1285 chamber.

1286 Um, what happened was, there was a
1287 series -- there were meetings ongoing with the
1288 Department of Health with McKinsey. At some point I got
1289 involved in those meetings, then there were very many
1290 other such meetings, virtual meetings I should say.

1291 As the information, including this report, was
1292 being put together, vetted, enhanced, broadened,
1293 interpreted, and after a period of time, McKinsey and
1294 the Department of Health and myself, Dr. Zucker, had
1295 taken the data about as far as it could go in terms of
1296 what was available and what it showed and then
1297 individuals at the executive chamber reviewed it.

1298 Q.So is it fair to say based on what you just said
1299 that yourself and Ms. Baldwin were two of the first sort
1300 of COVID task member executive chamber team members to

1301 view the report?

1302 A. It wasn't a report.

1303 Q. Okay.

1304 A. There were graphs. There were charts. It wasn't
1305 a report. It was -- what is the data, what does the
1306 data show, what inferences, if any, can be drawn from
1307 the data?

1308 It was very rough. There was no report. It
1309 was an effort to understand the data and what the data
1310 showed about COVID infections with respect to nursing
1311 home residents.

1312 Q. So who ultimately pulled it into the report?

1313 A. I asked Eleanor Adams to work with McKinsey
1314 because the Department of Health people working on it
1315 didn't really have the wherewithal or the capacity to
1316 make it robust and Eleanor was an epidemiologist and she
1317 was very critical of what she first saw.

1318 And my task was to try to make whatever we had
1319 robust and accurate and not have a bunch of graphs and
1320 charts that didn't mean anything or that were being
1321 wrongly interpreted.

1322 So I asked Eleanor to work with McKinsey to
1323 make it more robust and whenever McKinsey was ready with
1324 a new set of graphs we all met on Zoom.

1325 Q. When you say "we all," who does that include?

1326 A.The DOH individuals, McKinsey individuals,
1327 myself, Dr. Zucker when it was ready for him to look at.
1328 He was a very busy man and we didn't involve him until
1329 it was useful to get his input.

1330 Q.And at what stage did other members of the task
1331 force or executive chamber members get involved?

1332 A.So I'm not a statistician. I'm a good project
1333 manager. I can get people together and say what does
1334 this mean? Tell me. What did you do? What did you
1335 look at? What do you need? Let's get it for you, that
1336 type of thing. I can whip that into shape.

1337 And once this effort had gone as far as it
1338 could and we exhausted all the questions, some weeks
1339 before it was ultimately issued - I don't think it was
1340 days, I think it was weeks - the executive chamber took
1341 a look, in particular Jim Malatras is a PhD and does
1342 understand statistics and is expert in what data do you
1343 need with what kind of variables for it to mean anything
1344 to appropriately draw inferences. And he needed to vet
1345 the report in that respect.

1346 Q.Is he the only other member of executive chamber
1347 who was involved?

1348 A.No. I mean, Melissa DeRosa reviewed it and I'm
1349 pretty sure Beth Garvey reviewed it. And I don't recall
1350 who else.

1351 Q.Thank you.

1352 A.But the notion that there was some report that
1353 the DOH generated and then the chamber came in and cut
1354 off a leg of the report is just false.

1355 Q.We actually spoke with Dr. Adams a few weeks ago
1356 and she told us that there were two versions of the
1357 report. One that she and others at DOH worked on. She
1358 described it as data driven, academic, and they intended
1359 it to be placed in a journal of some sort and said then
1360 the report that was released was not the same as the
1361 report she had worked on and that it was not data
1362 focused.

1363 So she is saying there were two versions of
1364 the report. Does that change anything about what you
1365 just said?

1366 A.No. I don't really know what she is talking
1367 about her version. I remember, as I have just stated,
1368 that when she saw what McKinsey had been putting
1369 together with others at DOH, she was upset about it and
1370 I empowered her to improve what had been put together.

1371 Q.Do you recall specifically what she was upset
1372 about?

1373 A.She didn't think they knew what they were doing.
1374 And that they were not making correct inferences, they
1375 didn't know what the data meant, they didn't understand

1376 COVID, how it unfolded, all of that.

1377 Q.And you said you got involved early in the
1378 process, but not at the very beginning. Did someone
1379 direct you to get involved in the process?

1380 A.Melissa asked me to get involved and find out.

1381 Q.Did she give you any indication of why she asked
1382 you to do that?

1383 A.No. It was obviously important if we could draw
1384 inferences from any data about COVID to inform our work.

1385 Q.Do you know if she had seen a draft of the graphs
1386 when she asked you to get involved?

1387 A.I don't think so.

1388 Q.Jim Malatras told us about a call that took place
1389 on June 27, 2020. This was after he had begun being
1390 involved with the report and he said Ms. DeRosa was on
1391 that call and instructed people on the call on what
1392 numbers to include on the report. He said that you were
1393 also on this call.

1394 Do you recall it?

1395 A.I had --

1396 MS. FOTI: Just about --

1397 THE WITNESS: I understand.

1398 MS. FOTI: -- existence of the call.

1399 THE WITNESS: Yeah.

1400 A.I had privileged conversations to include those

1401 individuals about the report. So beyond that, I can't
1402 really comment on what Dr. Malatras says was being said
1403 on those calls.

1404 Q. So are you saying that everyone who was on that
1405 call was part of executive chamber?

1406 A. I don't recall if Dr. Zucker was on the call or
1407 not.

1408 Q. Okay. Who made the final decisions on what
1409 numbers to include in the report?

1410 MS. FOTI: I don't think you can answer
1411 that based on privilege. I don't think you can answer
1412 that.

1413 A. Well, just organizationally, as I previously
1414 addressed. Melissa was the chief of staff. She had
1415 direct authority and whatever delegated authority she
1416 had if she did not confer with the governor.

1417 But she had a team of advisers, including
1418 legal advisers, such as myself, and if anyone said stop,
1419 that would not be something that she would proceed with
1420 anyway. Least of all if she got contrary legal advice.

1421 Q. Were there disagreements amongst all the parties
1422 involved about how to present data in this report?

1423 A. The conversations were privileged.

1424 Q. Okay. Was it normal for the executive chamber to
1425 be this involved in an agency level report?

1426 A. It was not a report. It was not a report when I
1427 started getting involved. The person who had the most
1428 to do with what was in the document before it got to the
1429 chamber was me. I drove the report. Me, a member of
1430 the executive chamber, the head of DFS.

1431 There was no DOH report that landed at the
1432 chamber. It didn't work that way at all. This report
1433 wouldn't exist if it weren't for me.

1434 Q. Is that normal for somebody outside of an agency
1435 to drive an agency report?

1436 A. Is anything normal in the middle of a pandemic?
1437 The pandemic was being run by the governor's central
1438 staff. That was the way it had to be. What should have
1439 been normal was the federal government should have been
1440 running the response to the pandemic and they didn't.
1441 They left it to the states to run it the best they
1442 could. So nothing was normal.

1443 Q. Understood. And we'll be getting into some of
1444 the federal government later on so we look forward to
1445 hearing your views on that.

1446 Do you know if Governor Cuomo reviewed a draft
1447 of the report before it was released?

1448 A. I don't believe so.

1449 Q. I just want to take a quick look at some numbers
1450 in the report. We are going to turn to page 7.

1451 A. (Witness complies.)

1452 Q. And there's only one full paragraph on page 7.

1453 Towards the end of it, it reports -- the paragraph is
1454 talking about residents and workers who have died from
1455 coronavirus at facilities for older adults, and in it
1456 says in New York there were 6,432 at the time of this
1457 report.

1458 Do you see that?

1459 A. (Perusing.) Yes.

1460 Q. So this was the number that New York was publicly
1461 reporting had occurred in nursing homes at this time,
1462 correct?

1463 A. (Perusing). Well, I think it's -- I think it's
1464 describing the New York Times numbers, if I'm not
1465 mistaken.

1466 Q. But the New York Times would have been giving the
1467 numbers from what you were publicly reporting?

1468 A. I don't know.

1469 Q. Is it your understanding that that is the actual
1470 number of nursing home related deaths that had happened
1471 at that time?

1472 A. I have no reason to believe it is not accurate.

1473 Q. Okay. And in the discussions about the numbers
1474 to include in the report, did that include discussions
1475 of in-nursing home or in-facility deaths versus

1476 out-of-facility deaths?

1477 MS. FOTI: Which discussions?

1478 A. Any discussions I had in the executive chamber
1479 about the report were privileged.

1480 Q. Okay. I am going to introduce Minority Exhibit

1481 B.

1482 MS. [REDACTED] (Handing).

1483 MS. FOTI: Sorry.

1484 MS. [REDACTED] It's okay.

1485 MS. FOTI: (Handing).

1486 THE WITNESS: (Handing).

1487 MR. ABRAMOWITZ: (Handing).

1488 (Whereupon, New York Times article dated

1489 March 4, 2021 is marked as Minority Exhibit B by [REDACTED]
1490 [REDACTED].)

1491 Q. This is a New York Times article originally from
1492 March 4, 2021. I'm just going to point out a couple of
1493 specific paragraphs, but if you want a moment to review
1494 it before I get into that, let me know.

1495 MS. FOTI: Why don't you read it?

1496 A. (Perusing).

1497 MS. FOTI: Ready?

1498 THE WITNESS: Yes, I'm ready.

1499 Q. All right. Starting at the very beginning of the
1500 article it reads "Top aides to Governor Andrew M. Cuomo

were alarmed. A report written by state health officials had just landed and it included a count of how many nursing home residents in New York had died during the pandemic. The number, more than 9,000 by that point in June, was not public and the governor's most senior aides wanted to keep it that way. They rewrote the report to take it out according to interviews and documents reviewed by the New York Times."

1509 So just as an initial matter, 9,000 or more
1510 than 9,000 is a higher number than the 6,432, which was
1511 included in the DOH report, correct?

1512 A.Well, they are not the same thing. They are not
1513 the same measure, so I'm not sure what you mean. The
1514 number in the nursing report was the number of people
1515 who died in nursing homes and it was explicit about
1516 that.

1517 Q. And the 9,000 number includes something --

1518 A. People dying in hospitals.

1519 O. But who were nursing home residents, correct?

1520 A. Yes, had been.

1521 Q. Was there an effort to keep that over 9,000
1522 number out of public reporting?

1523 A. That's -- I can't answer that question. I don't
1524 even understand it. Was there an effort? This article
1525 should have been headlined, Cuomo aide wrote nursing

1526 home report with DOH and it was edited before release by
1527 other Cuomo aides. I mean come on, give me a break.

1528 Q.We can turn to the second page. The paragraph
1529 right above the picture block.

1530 A.(Witness complies.)

1531 Q.It reads, "The changes sought by the governor's
1532 aides fueled bitter exchanges with health officials
1533 working on the report. The conflict punctuated an
1534 already intense and devolving relationship with
1535 Mr. Cuomo and his health department."

1536 Were there disagreements with the health
1537 department regarding the report?

1538 A.Not to my knowledge.

1539 Q.Is this an accurate depiction of Governor Cuomo's
1540 relationship with the Department of Health?

1541 MS. FOTI: If you know.

1542 A.The relationship was fraught from time to time as
1543 the governor sought to address the pandemic and the
1544 health department was more of a regulatory deliberative
1545 body not used to acting quickly during a crisis.

1546 Q.Thank you.

1547 And we'll turn to the next page.

1548 A.(Witness complies.)

1549 MS. FOTI: I'm sorry. Give me one second.

1550 Okay. Yes. Sorry.

1551 MS. [REDACTED] No, no problem.

1552 Q. It's the third full paragraph.

1553 A. I'm sorry?

1554 Q. We are going to look at the third full paragraph.

1555 A. Mm-hmm.

1556 Q. It reads, "The aides who were involved in
1557 changing the report included Melissa DeRosa, the
1558 governor's top aide, Linda Lacewell, the head of the
1559 state's Department of Financial Services, and Jim
1560 Malatras, a former top advisor to Mr. Cuomo brought back
1561 to work on the pandemic. None had public health
1562 expertise."

1563 You mentioned all of you being involved in the
1564 report, so I believe you would agree with the listing of
1565 your three names as being involved in the report?

1566 A. That's not what the paragraph says. It says the
1567 aides were involved in changing the report, right?

1568 That's what it actually says.

1569 Q. And --

1570 A. I was involved in helping draft the report.

1571 Q. Okay.

1572 A. Right? The whole premise of the article is
1573 mistaken. It was not a DOH report that landed in the
1574 executive chamber and was then changed.

1575 Q. If you were responsible for the report, why was

1576 it issued as a DOH report?

1577 A.I didn't say I was responsible for a report.

1578 Q.Okay. What word would you use?

1579 A.That's really your question. I described what I

1580 did with respect to the report.

1581 Q.You mentioned --

1582 A.But I'm not McKinsey doing the data and I'm not
1583 DOH weighing in and I'm not Dr. Zucker weighing in and
1584 I'm not a statistician.

1585 Q.But you said the report wouldn't have happened
1586 but for you?

1587 A.Correct, and it wouldn't have happened but for
1588 McKinsey, but my point there was, I'm executive chamber.
1589 I'm executive chamber. The DOH report wouldn't exist
1590 without me, executive chamber.

1591 Why does that matter? Because a false
1592 dichotomy is being drawn between DOH and the chamber
1593 when it comes to this report. But if I'm directing the
1594 report with DOH, that is a false dichotomy.

1595 Q.As I mentioned we have heard from Dr. Adams, who
1596 did not take responsibility for this final report. It
1597 seems you do take some responsibility for the final
1598 report.

1599 So the question is --

1600 A.I would appreciate you not characterize my views,

1601 which you have done several times.

1602 Q.I'm repeating words back that you have said
1603 today.

1604 A.Not really.

1605 Q.Then I welcome you to correct me and tell me
1606 which words you prefer to use.

1607 A.If I could have a question, I would appreciate
1608 it.

1609 Q.How would you characterize your involvement with
1610 the report?

1611 A.As I described, I helped direct the creation of a
1612 draft analysis and potential report with McKinsey,
1613 Eleanor Adams and others at DOH, Dr. Zucker and so
1614 forth. When that draft reached a critical mass and I
1615 didn't feel I could do anything further, others in the
1616 chamber reviewed it.

1617 Q.Okay. It seems that the final approval for the
1618 report came from executive chamber and not the
1619 Department of Health; is that correct?

1620 A.Well, the Department of Health issued it, right?

1621 Q.Yes. And my question is, why?

1622 A.You know, I can't answer a why question. They
1623 wouldn't have issued it if they didn't feel good about
1624 putting their name on it. Dr. Zucker is the head of the
1625 health department. He not only put it out but issued

1626 all sorts of statements about it.

1627 I don't think there was anything wrong with
1628 the report. The report described what it described and
1629 it was transparent in doing so. It was so transparent
1630 that the same day it was issued, there was a media
1631 uproar that it didn't include data involving people who
1632 died in hospitals.

1633 It was all transparent. And if you include
1634 the people who died in the hospitals, the inferences
1635 were all exactly the same. Even the New York State
1636 Attorney General who issued a highly politicized report
1637 on nursing homes said in the report the March directive
1638 had nothing to do with fatalities in nursing homes and
1639 no inferences should be drawn from that.

1640 So I told you what I know.

1641 Q.Was the Department of Health directed by the
1642 executive chamber to release the report?

1643 A.I don't really know.

1644 Q.Okay.

1645 You just mentioned the New York Attorney
1646 General report. The New York Attorney General conducted
1647 an investigation and issued a report titled Nursing Home
1648 Response to COVID-19 Pandemic.

1649 This report was released on January 28, 2021.
1650 I assume that you are familiar with that report.

1651 A.I am familiar with the report.

1652 Q.And I just want to be clear that in New York the
1653 attorney general does not report to the governor,
1654 correct?

1655 A.She is an independent elected official.

1656 Q.The report found "discrepancies remain over the
1657 number of New York nursing home residents who died of
1658 COVID-19. Data obtained by OAG shows that DOH
1659 publicized data vastly undercounted the deaths."

1660 And the report also recommended that DOH
1661 "ensure public reporting by each nursing home as to the
1662 number of COVID-19 deaths of residents occurring at the
1663 facility -- and those that occurred during or after
1664 hospitalization of the residents -- in a manner that
1665 avoids creating a double counting of resident deaths at
1666 hospitals in reported state COVID-19 death statistics."

1667 So contrary to what you just asserted, that
1668 does seem to allege that the attorney general found
1669 discrepancies in the data whether or not they were
1670 related to the March 25th order.

1671 MS. FOTI: I have to disagree with that
1672 characterization. It's not contrary to what she said.

1673 A.There is another part of the report where she
1674 talks specifically about the March directive.

1675 Q.I am not --

1676 A.I didn't comment on whether there were
1677 discrepancies.

1678 Q. Okay. Thank you.

1679 A. Furthermore, she blamed the nursing homes. She
1680 said the nursing homes didn't accurately report. That's
1681 who she blamed.

1682 Q. Okay.

1683 A. And she said DOH, as a regulator, should do
1684 something about it.

1685 By the way, she was also a regulator of the
1686 nursing homes under the Medicaid Fraud Control Unit.

1701 report, highly politicized, full of errors, false, sham,
1702 misleading to the public, alarmist that she had to
1703 correct.

1704 Q.Despite that, on February 11, 2021, so just about
1705 two weeks after the release of the attorney general
1706 report the New York Department of Health released an
1707 updated version of the July 6, 2020, report.

1708 Are you aware of that update that was released
1709 in February?

1710 A.I am aware that at some point that the report was
1711 updated, I think to address this other data and to show
1712 the analysis that it made no difference in the
1713 conclusions of the report.

1714 Q.Was that update in response to the attorney
1715 general's report?

1716 A.No. I don't believe so.

1717 Q.So the timing was just a coincidence?

1718 A.Is that a question or a comment?

1719 Q.Question.

1720 A.I don't know what the timing was. There was a
1721 lot going on.

1722 Q.Okay.

1723 A.It was probably more related to the March report
1724 than to the attorney general report. And I don't even
1725 know if the numbers that the attorney general put in her

1726 report were accurate or not. I didn't really vet those.

1727 Q. When you say March report, which report are you
1728 referring to?

1729 A. I'm sorry. I mean the July report.

1730 Q. Okay. Do you agree that it is important to
1731 report accurate public health data to the public?

1732 A. I believe I have already stated that, yes.

1733 Q. And why is that?

1734 A. Well, it's the public's data. And this was a
1735 pandemic and to maintain the public trust, and comply
1736 with our obligations as public officials, of course we
1737 wanted the data to be accurate, and as I expressed, the
1738 governor charged me with that exact task early on.

1739 Q. Thank you.

1740 Going to change topics now, but we haven't
1741 really talked about how testing became involved as a
1742 mitigation measure for COVID spread.

1743 Were you at all involved in New York's COVID
1744 testing programs?

1745 A. Yes.

1746 Q. What was your involvement?

1747 A. Well, early on there was no test or it could only
1748 be done by Wadsworth, the state testing facility that
1749 had very limited capacity and certainly did not have the
1750 capacity to do the kind of widespread state testing that

1751 was going to be needed.

1752 And so I worked with some other members of the
1753 team to help credential other larger labs, including
1754 commercial labs, so that they could do COVID testing.

1755 And to my recollection, this involved -- I
1756 didn't do it myself personally but, you know, working
1757 with federal officials to relax some of the regulatory
1758 requirements so that the labs could address this need
1759 and I think various requirements were suspended for
1760 emergency reasons.

1761 And then other people sort of operationalized
1762 that. In particular, I think Gareth Rhodes had a very
1763 significant role. A very talented guy operationally in
1764 trying to make that happen across the state.

1765 And then there were also community programs
1766 especially to address underserved getting access to
1767 testing, you know, around the state, particularly the
1768 city, where COVID was very concentrated and so forth.

1769 Q. And in the early days, as you alluded to, there
1770 was a limited supply in testing, correct?

1771 A. Yes.

1772 Q. Were you involved in directing where testing
1773 supplies went?

1774 A. I was involved in conversations about
1775 distributing testing supplies around the state, yes.

1776 Q.Okay. Through public reporting there had been
1777 allegations that there was a VIP or preferential testing
1778 program involving those close to Governor Cuomo.

1779 Are you aware of these allegations?

1780 A.Yes.

1781 Q.Do you have any knowledge related to these
1782 allegations?

1783 A.Yes.

1784 Q.Were you aware of a VIP or preferential testing
1785 program?

1786 A.I was aware that certain people were being
1787 tested. I didn't think of it as VIP or preferential
1788 anything.

1789 Q.Okay. I do want to point out that we recognize
1790 the difference between ensuring that individuals close
1791 to the governor in a working relationship and other key
1792 government officials may need to be tested to minimize
1793 disruptions to government operations, particularly
1794 during a crisis like the COVID-19 pandemic.

1795 So I do want to make a distinction between
1796 testing those individuals for continuity of government
1797 operations and testing others who may be personally
1798 close to the governor being given access to preferential
1799 testing.

1800 So are you aware of DOH staff being tasked

1801 with administering COVID tests to individuals who had a
1802 personal relationship with Governor Cuomo?

1803 A. You would have to be more specific.

1804 Q. I believe some public reporting mentioned Kenneth
1805 Cole and Chris Cuomo receiving preferential COVID tests?

1806 A. Well, those are members of his family, which I
1807 thought you were excluding.

1808 Q. Those who are necessary for continuation of
1809 government operations. Neither of them lived with the
1810 governor, did they?

1811 A. No.

1812 Q. So were they given preferential access to the
1813 testing?

1814 A. I was not aware at the time, to the best of my
1815 recollection, that they received tests other than what I
1816 read in the media.

1817 Q. Are you aware of DOH staff being diverted from
1818 their normal duties in order to give tests to those who
1819 had a personal relationship with Governor Cuomo?

1820 A. I'm not aware of anyone being diverted. People
1821 were working around the clock on COVID, period, and this
1822 is part of COVID. And I don't know who you mean by
1823 people close to the governor.

1824 Look, from time to time we had calls from
1825 people who needed testing or access to testing and

1826 frequently they would divert it to the nearest and
1827 closest testing center. Some of the hospitals put out
1828 testing centers where you could drive in and so forth
1829 and they just needed to have the information.

1830

1831 I don't really view this as any different than
1832 constituent relations. I don't think there is anything
1833 wrong with making testing available to people. There
1834 was no preferential treatment in the sense of well, we
1835 have six tests so we are going to give five to one set
1836 of people and everybody else has to just fight for the
1837 one.

1838 Q. So how --

1839 A. There were members of the legislature. There
1840 were members of the media. There were all kinds of
1841 people and I'm sure the same thing was happening in
1842 every state in the nation and probably with the federal
1843 government.

1844 Q. We acknowledge that there was a limited supply of
1845 COVID tests at the beginning of testing availability --
1846 there was a limited supply of tests, correct?

1847 A. Coupled with limited information about where to
1848 get such a test.

1849 Q. Absolutely.

1850 How did the government, the New York State

1851 government, determine how to disperse that limited
1852 supply of tests?

1853 A. Testing kits were sent around the state typically
1854 based on need, which could depend on the infection rate,
1855 what they expressed they needed. They would typically
1856 send centrally so they could be dispersed by somebody
1857 with more knowledge of the needs for that area.

1858 But I think we are mixing a lot of different
1859 things here about the testing history.

1860 Q. Okay. I'm going to introduce Minority Exhibit C.

1861 MS. [REDACTED] (Handing).

1862 MS. FOTI: Thanks. (Handing).

1863 THE WITNESS: (Handing).

1864 MR. ABRAMOWITZ: (Handing).

1865 (Whereupon, Washington Post article dated
1866 March 24, 2021 is marked as Minority Exhibit C by
1867 [REDACTED] [REDACTED].)

1868 Q. This is a Washington Post article from March 24,
1869 2021, titled Andrew Cuomo's family members were given
1870 special access to COVID testing according to people
1871 familiar with the arrangement.

1872 I will give you a few moments to review the
1873 article.

1874 A. (Perusing). Okay.

1875 Q. I just want to draw your attention to the third

1876 page.

1877 A. (Witness complies.)

1878 Q. The fifth paragraph down reads "Around mid-March,
1879 the State quietly began the VIP program that benefitted
1880 Cuomo family members and other high profile figures,
1881 according to three people familiar with the operation.
1882 Adams, a public health expert, had to spend a number of
1883 days testing the governor's family members, the people
1884 with knowledge of the matter said."

1885 Skipping to the next paragraph after that, it
1886 reads "Separately, nurses working for the State were
1887 dispatched in two-person swabbing teams to test dozens
1888 of VIPs, some living in penthouses in Manhattan,
1889 according to one person with direct knowledge."

1890 So that sounds to me like a VIP testing
1891 program and not people being directed to their nearest
1892 testing facility.

1893 A. Is that a question?

1894 Q. No, that is not my question yet.

1895 My question is, do you have knowledge of these
1896 types of activities happening?

1897 A. I wouldn't rely on a news story to accurately
1898 depict anything that was happening during the pandemic.

1899 First of all, they don't have complete access
1900 to information. What they typically have is a person

1901 calling them up and giving a version of events and that
1902 person may not have complete information.

1903 To my recollection, Eleanor Adams was pretty
1904 enthusiastic of doing this and if she could have tested
1905 every New Yorker, she would have done it.

1906 Second, there were other people who got tested
1907 whose names you would never even have recognized.

1908 So I reject any question that is based on a
1909 reading of this article.

1910 Q.I'm not asking you to give us the names of the
1911 people we wouldn't recognize, but are you also saying
1912 these people had DOH staff come to their homes and give
1913 them the tests?

1914 A.I remember during the time when everything had to
1915 come up to Wadsworth and the troopers were driving them
1916 up, there were also kinds of people being tested and the
1917 stuff was coming up to Wadsworth.

1918 I mean, this was a crisis environment. Nobody
1919 knew anything and if you could do something to help
1920 somebody, that's what you did.

1921 Q.Yes, but there's a difference between sending
1922 somebody to a testing facility and sending staff to
1923 their homes to test them?

1924 A.I really don't want to argue with you. If you
1925 have a question for me, please ask me.

1926 And it would have been a lot easier if the
1927 federal government was running a testing program and
1928 then the states wouldn't have to do anything except be
1929 questioned and criticized about the efforts that they
1930 made.

1931 Q.And the question is, when you talk about people
1932 getting tested, you are not being specific on if it's a
1933 testing site or if they are being tested at their homes.
1934 So I'm just trying to tease out that difference.

1935 A.Your questions don't differentiate and you often
1936 switch back and forth. Why don't you ask me your
1937 question and let me see if I can help you.

1938 Q.Were the people who were getting tested at the
1939 beginning where there was limited supply of tests, were
1940 they being tested at their homes or at facilities?

1941 A.I'm not sure, but their results were being driven
1942 up to Wadsworth by the state troopers.

1943 Q.Okay. And was the governor directing who should
1944 be tested?

1945 A.I don't know.

1946 Q.Okay. Thank you.

1947 A.I think Dr. Zucker, the health commissioner of
1948 the State of New York, was overseeing who was being
1949 tested and I trust his judgment.

1950 Q.Thank you.

1951 MS. [REDACTED]: With that, we can go off the
1952 record.

1953 (Whereupon, an off-the-record discussion
1954 was held.)

1955 MR. BENZINE: We can go on the record.

1956 I'm going to start this hour and ask a
1957 couple of questions and just succinctly and in a row
1958 based off our last hour, specifically about the
1959 conversation with Mr. Schwartz and I'm going to try to
1960 phrase them that they are yes or no, so it doesn't get
1961 into any furnishing of legal advice.

1962 EXAMINATION BY

1963 MR. BENZINE:

1964 Q. Do you know who drafted the March nursing home
1965 directive?

1966 A. No.

1967 Q. Do you know who approved the March nursing home
1968 directive?

1969 A. No.

1970 Q. Do you know when the March directive was
1971 beginning to be drafted?

1972 A. No.

1973 Q. Do you know that Ms. DeRosa did not approve the
1974 March directive?

1975 A. Well, as I testified, it was a surprise to her,

1976 so I don't believe she was involved in drafting it.

1977 Q.Do you know that Governor Cuomo did not approve
1978 the March directive?

1979 A.I don't believe he did.

1980 Q.You do not know who drafted it, but do you know
1981 where the March directive came from?

1982 MS. FOTI: Do you understand that? I don't
1983 understand that question.

1984 A.Can you specify what you mean by came from?

1985 Q.Yes. So the idea of the policy -- do you know
1986 who crafted the idea of the policy versus actually
1987 having the pen of drafting the order?

1988 A.I -- the idea of the policy. I only have
1989 privileged information.

1990 Q.When did you first learn of the March directive?

1991 A.The directive itself, after it was issued when
1992 the press asked about it.

1993 Q.When did the conversation with Mr. Schwartz
1994 occur?

1995 A.Hmm. Before that, but I can't say when this was.

1996 Q.Days, weeks, a month?

1997 A.Well, it was certainly no more than that.

1998 Probably less than a month.

1999 Q.Okay. That's it on that one.

2000 Did you ever have any conversations with

2001 Giorgio DeRosa regarding the March directive?

2002 A.I don't believe so.

2003 Q.Okay.

2004 EXAMINATION BY

2005 MR. EMMER:

2006 Q.Ms. Lacewell, do you recall the administration

2007 arguing that the March 25th order was consistent with

2008 CMS and CDC guidance?

2009 A.Yes.

2010 Q.Do you know if anyone from the executive chamber

2011 task force for health department consulted with CMS or

2012 CDC prior to the order?

2013 A.I don't know.

2014 Q.Do you recall whether anyone from the federal

2015 government ever told the State of New York that the

2016 March 25th order was consistent with federal guidance?

2017 A.Um, I have no knowledge of anything before the

2018 order was issued. I -- it's possible there were

2019 discussions after it was issued, but I don't have a

2020 specific recollection.

2021 Q.Do you know who within the executive chamber

2022 would have made any determination in regards to the

2023 applicability to CDC and CMS?

2024 A.You mean who would have decided that it was

2025 consistent with their guidance?

2026 Q.Correct.

2027 A.Well, I don't know who was involved in drafting
2028 it ahead of time, but that would have fallen to -- that
2029 may have fallen to the health department.

2030 Q.Thank you.

2031 Do you recall how long the March 25th guidance
2032 was in effect?

2033 A.I think in early April there was some other
2034 guidance issued that clarified the March directive, but
2035 I think the administration's position was, it didn't
2036 actually refute the March guidance. They may have just
2037 clarified operationally what was supposed to occur.

2038 Q.Would you characterize that as an amendment to
2039 the initial order?

2040 A.Clarification.

2041 Q.What prompted the administration to issue this
2042 clarification?

2043 A.The media outcry because I believe the
2044 administration's position was that the nursing homes
2045 well understood how to apply the March guidance and
2046 didn't need clarification. But to the degree that the
2047 media thought that there needed to be a clarification,
2048 there's no harm in providing that.

2049 Q.Did you play any role in the amendment
2050 clarification -- I'm just trying to characterize it

2051 correctly -- the characterization of the order that
2052 required tests or -- scratch that.

2053 Did you play any role in the subsequent
2054 clarification of the order to require tests prior to
2055 discharge?

2056 A.I was part of discussions about it. I did not
2057 draft it.

2058 I think by the time of the clarification,
2059 testing was more widely available and so that could be
2060 included in the guidance.

2061 Q. And you said you had no role in the drafting. Do
2062 you know who did have a role in the drafting?

2063 A.I do not.

2064 Q. Do you recall who the individuals were that were
2065 involved in the discussions related to this
2066 clarification?

2067 A.Um, Dr. Zucker, Melissa DeRosa, I believe Beth
2068 Garvey. Other than that, I don't recall.

2069 Q. Do you know why the March 25th order was removed
2070 from the Department of Health's website prior to this
2071 clarification?

2072 A.T. do not

2073 Q.Are you aware that it was removed from the
2074 website?

2075 A. I think I heard something about that

2076 Q. Do you recall who would have told you that it was
2077 removed from the website?

2078 A. No.

2079 EXAMINATION BY

2080 MR. BENZINE:

2081 Q. Do you recall if it was within the government or
2082 press reported?

2083 A. I can't remember.

2084 MR. EMMER: We can go off the record for a
2085 moment.

2086 (Whereupon, an off-the-record discussion
2087 was held.)

2088 MR. EMMER: We can go back on the record.

2089 EXAMINATION BY

2090 MR. EMMER:

2091 Q. At this time, I would like to introduce what will
2092 be marked as Majority Exhibit 1.

2093 MR. EMMER: (Handing).

2094 MR. BENZINE: (Handing).

2095 MS. LANGLEY: (Handing).

2096 (Whereupon, an e-mail thread is marked as
2097 Majority Exhibit 1 by Mitch Benzine.)

2098 Q. I'll give you some time to review the e-mail, but
2099 this is an e-mail thread forwarded to you started by Ms.
2100 Stephanie Benton to Jim Malatras, Gareth Rhodes, Melissa

2101 DeRosa and Dr. Zucker on June 7, 2020.

2102 MS. FOTI: Thank you. (Handing).

2103 THE WITNESS: (Handing).

2104 MR. ABRAMOWITZ: (Handing).

2105 A. (Perusing). Okay.

2106 Q. And we're specifically focused on Ms. Benton's
2107 e-mail, which I will read into the record.

2108 "This is going to be the great debacle in the
2109 history books. The longer it lasts, the harder to
2110 correct. We have a better argument than we made. Get a
2111 report on the facts because this legacy will overwhelm
2112 any positive accomplishment. Also how many COVID people
2113 were returned to the nursing homes in that period? How
2114 many nursing homes? Don't you see how bad this is or do
2115 we admit error and give up?"

2116 First, who is Ms. Benton?

2117 A. Stephanie Benton was the governor's assistant.

2118 Q. Do you recall being forwarded this e-mail?

2119 A. Yes.

2120 Q. When she writes "get a report on the facts," do
2121 you think she is referring to the July 6th report?

2122 A. No.

2123 EXAMINATION BY

2124 MR. BENZINE:

2125 Q. What do you think she is referring to?

2126 A. Assemble -- assemble the facts. In other words,
2127 I do think this was unrelated to the DOH report, which I
2128 don't have the dates, but that may have been ongoing
2129 already.

2130 EXAMINATION BY

2131 MR. EMMER:

2132 Q. Do you have a rough idea of when the DOH report,
2133 you would have started to collect data that would be
2134 used in the DOH report?

2135 A. What's the date on the report again?

2136 MR. BENZINE: July 6th.

2137 MR. ABRAMOWITZ: The report is July 6th.

2138 A. July 6th? Early. It went on for a while but I
2139 don't have the exact date to confirm that it's before
2140 this.

2141 Q. The e-mail, "Don't you see how bad this is? Do
2142 we admit error and give up?"

2143 Do you recall discussions related to the idea
2144 that the March 25th order was a mistake?

2145 A. No.

2146 Q. Furthermore --

2147 A. I think that was tongue in cheek.

2148 Q. Okay.

2149 EXAMINATION BY

2150 MR. BENZINE:

2151 Q.Do you think Ms. Benton wrote this e-mail?

2152 A.I doubt it.

2153 Q.Do you think the governor dictated it to her or
2154 otherwise instructed her to write it?

2155 A.So I don't know, but probably.

2156 EXAMINATION BY

2157 MR. EMMER:

2158 Q.Further up the page Ms. DeRosa writes in response
2159 to Tracy, "Please set up a call in this room the day
2160 after the press conference."

2161 Do you recall participating in a call in
2162 response to this e-mail?

2163 A.We had calls almost every day. So we likely had
2164 such a call. I don't specifically remember it.

2165 Q.At this time I would like to introduce what will
2166 be marked as Majority Exhibit 2. (Handing).

2167 (Whereupon, e-mail thread is marked as
2168 Majority Exhibit 2 by Mitch Benzine.)

2169 MR. BENZINE: (Handing).

2170 MS. LANGLEY: (Handing).

2171 MS. FOTI: Thanks. (Handing).

2172 THE WITNESS: (Handing).

2173 MR. ABRAMOWITZ: (Handing).

2174 Q.This is the same e-mail thread except Dr. Zucker
2175 replied directly to Stephanie Benton, and I'll read this

2176 into the record as well.

2177 "The data showing that the March 25th memo was
2178 not the cause of the nursing home deaths was reviewed on
2179 Thursday with a meeting that went overseas. Linda asked
2180 for a follow-up meeting on Monday with additional
2181 information. Rich A. has a team working on messaging on
2182 this."

2183 The e-mail only refers to Linda, but you would
2184 presume that is referring to yourself?

2185 A.Yes.

2186 Q.And in our previous hour we discussed your
2187 responsibility in reviewing the data. Do you think
2188 that's what he is referring to here?

2189 A.Yes.

2190 Q.And again, within the previous hour you talked
2191 about there was a group that you oversaw, which you
2192 didn't recall the name. This is the name group, right?

2193 A.Yes.

2194 Q.What data was he referring to, to the best of
2195 your recollection?

2196 A.(Perusing). I would read this as referring to
2197 analysis of nursing home related fatalities.

2198 Q.Would that analysis be the data that was
2199 retrieved by McKinsey and later used for the July 6th
2200 report?

2201 A.Um, well, to be clear, McKinsey did not retrieve
2202 the data. We provided them with the data.

2203 Q.So the data that McKinsey used for DOH surveys --

2204 A.I'm sorry. What was the rest of the question? I
2205 forgot it.

2206 Q.I was asking you whether the data that you were
2207 reviewing --

2208 A.Mm-hmm.

2209 Q.-- or pursuant to e-mail, whether it was data
2210 that was retrieved through HERDS surveys that McKinsey
2211 subsequently used for the July 6th analysis?

2212 A.Yes.

2213 Q.Okay.

2214 EXAMINATION BY

2215 MR. BENZINE:

2216 Q.Do you recall specific discussions to distance
2217 the March 25th directive from nursing home fatalities?

2218 A.No. The data showed that the March directive
2219 could not have influenced the fatality rate for nursing
2220 home residents based on the incubation period. The
2221 fatality rates, when they were rising and when they were
2222 not rising, and none of it connected to the timing of
2223 the March directive.

2224 Q.When was the decision made to do an analysis on
2225 the March directive and its correlation, or lack

2226 thereof, to fatalities?

2227 A.I don't know how the analysis started that I then
2228 got involved with. Um, but the focus of the analysis
2229 was could any factors be identified as to correlate or
2230 be causative with respect to the incidence of nursing
2231 home fatalities.

2232 And you know, was it -- was there -- was it
2233 possible to identify anything? Was it the size of the
2234 facility, how much staff they had, how large they were,
2235 was it staff infection rates, and um -- yes, it
2236 included, could it be people coming back from hospitals.

2237 But that was kind of more at the end of the
2238 analysis because you could look at these other factors
2239 more directly.

2240 You know, what we found, unfortunately, which
2241 was true across the country, was that COVID was in New
2242 York much earlier than people thought and the staff that
2243 worked closely with nursing home residents, which
2244 includes being close with them and touching them and
2245 moving them and caring for them, unfortunately were
2246 infected. And were coming into very vulnerable
2247 environments and nobody knew this, including the staff.

2248 It was really tragic for everybody. And it
2249 was already there and people started dying. And given
2250 the incubation period and the staff infection rate,

2251 which I think people looked at the antibodies and how
2252 many people were out sick, it was clearly -- COVID was
2253 here before we knew it and people were infected.

2254 Given the incubation rate, the rate at which
2255 people were getting infected and dying in nursing homes
2256 was more attributable to staff than anything else and
2257 the timeline did not work vis-a-vis the March directive.

2258 Q.And I appreciate that and I guess I'm just trying
2259 to get the e-mail from Ms. Benton, but probably written
2260 in some form or fashion by the governor, seems to imply
2261 the purpose of the analysis is to distance the directive
2262 from the nursing home deaths, a great debacle in
2263 history, we have a greater story than what we have been
2264 telling.

2265 I'm just trying to figure out if that was ever
2266 beyond a normal statistical view of the situation, if
2267 there were ever any discussions specifically about
2268 attempting to not correlate the directive to the deaths?

2269 A.Well, no. I thought you were actually showing me
2270 this because it answered my question about whether we
2271 had started working on what became the report before
2272 this comment from Ms. Benton. We were already working
2273 on it.

2274 Q.Okay.

2275 A.So -- and that in the back of my mind, I have a

2276 vague memory of, that this came in and we were already
2277 working on analyzing the data.

2278 Q.Okay.

2279 EXAMINATION BY

2280 MR. EMMER:

2281 Q.Last thing I want to ask in regards to this
2282 e-mail is the last sentence, "Rich A. has a team working
2283 on messaging for this," would it be your opinion that is
2284 referring to Mr. Rich Azzopardi?

2285 A.Yes.

2286 Q.And I should have asked this earlier, but can you
2287 briefly describe the role he played in the
2288 administration and in the response to COVID?

2289 A.Media relations.

2290 Q.He never had a role as far as policy decisions?

2291 A.Other than as it connects to media, no.

2292 Q.Thank you.

2293 Let's move on to discussing nursing home data
2294 and how it was presented to the public during the
2295 pandemic.

2296 First question, do you think the
2297 governor -- the former governor presented accurate data
2298 throughout the pandemic?

2299 A.To the best of our ability.

2300 Q.Do you think the data presented to the public was

2301 fully transparent?

2302 A. As much as possible, with the understanding that
2303 during a pandemic you can build in an error rate on data
2304 for sure, which actually I learned from Dr. Zucker, who
2305 had been through numerous pandemics and he is the one
2306 who taught me, in the fog of war during a pandemic in a
2307 crisis environment the data really won't be accurate
2308 until post-crisis when the experts can come in and
2309 review everything with time and calmness and the benefit
2310 of hindsight.

2311 For example, nobody was reporting how many
2312 people died at home or out on the street or other
2313 venues, right? So you are not going to get a complete
2314 picture until after the fact and the ability to look at,
2315 you know, human error and whatever else may have been
2316 built in there, because as I described, the nursing
2317 homes and the hospitals themselves were short-staffed
2318 and in crisis mode while they were providing this
2319 information to us.

2320 But for us, what was important in the
2321 governor's daily reporting was to be consistent with the
2322 kind of data that we were reporting so that the picture
2323 and the inference of what it meant would be reliable so
2324 that however you measure deaths, you are going up the
2325 mountain, you are still going up, it's based on the same

2326 type of data.

2327 And then at some point, you start to come down
2328 based on the same type of data. If you start switching
2329 it around, you are going to lose some of that
2330 reliability factor and that was actually really critical
2331 to us.

2332 Q.I'm going to walk through the methodologies in
2333 which the administration published data to the public
2334 and how they categorized nursing home fatalities, but
2335 first, do you recall the administration using different
2336 methodologies to present death data?

2337 A.For the PowerPoint, we tried to be almost
2338 religiously consistent, for the reasons that I have
2339 expressed. There was some media push for other data,
2340 especially when we started putting data up on a website.

2341 And so, from time to time we published
2342 additional forms of data that did not affect the
2343 PowerPoint but in response to this push for additional
2344 kinds of data.

2345 Q.So I want to start with how data was presented
2346 between April 15th to May 2nd and I'll ask you if you
2347 agree with my characterization. The department added
2348 reporting of presumed deaths by county as well as both
2349 presumed and confirmed deaths by an individual facility.

2350 Can you first explain the difference between a

2351 confirmed and a presumed death for the purposes of this
2352 discussion?

2353 A.To my understanding, confirmed involved a COVID
2354 test. And presumed is some health professional, based
2355 on the circumstances, their inference that COVID was
2356 likely either the factor or a factor. And that probably
2357 was during a time when testing was not widely available.

2358 Q.And you may have already answered this
2359 previously, but that same timeline, April 15th to
2360 May 2nd, do you recall deaths not being reported
2361 if -- from facilities that have less than five
2362 fatalities?

2363 A.I remember there was a concern that if you got
2364 too specific -- because we would give the location, so
2365 there was only one nursing location in a particular area
2366 and, for example, one person died. If you now put out
2367 in the public someone died of COVID yesterday, you may
2368 have essentially identified that person.

2369 Five was a number that I think came from the
2370 health department or Dr. Zucker as a number they were
2371 comfortable without potentially violating HIPAA.

2372 THE WITNESS: H-I-P-P --

2373 THE REPORTER: I got it. Thanks.

2374 THE WITNESS: Yeah.

2375 EXAMINATION BY

2376 MR. BENZINE:

2377 Q.And clarification on it, and we have asked
2378 everybody this, but as you just said, the concern was if
2379 you put two deaths in this nursing home and there is
2380 only two deaths in the county and everybody knows the
2381 two people who died in the county recently, so they
2382 would be able to identify the individuals.

2383 So on the public reporting it would say
2384 nursing home X, less than five, something like that.

2385 A.Mm-hmm.

2386 Q.But then the total at the bottom would still
2387 include all the deaths; is that correct?

2388 A.That's a good question. I don't remember.

2389 Q.Okay. I guess that's why we are asking that and
2390 trying to figure out. We completely understand the need
2391 for HIPAA and privacy, but if it is not going to be
2392 totaled then it is still, you know, under five and a
2393 couple hundred nursing homes can add up quite a bit.

2394 And --

2395 A.But I don't think it really did. I understand
2396 your question. It would have been one way to do it is
2397 to have the total include them but then when the numbers
2398 don't add up -- I mean the media was relentless. So I
2399 don't remember if we did it that way or not or if we
2400 even thought to do it that way.

2401 Q. Okay.

2402 A. It certainly wasn't intentional. It was not
2403 meant to be a way to suppress the numbers.

2404 EXAMINATION BY

2405 MR. EMMER:

2406 Q. Moving on from May 3rd to February 3, 2021, the
2407 nursing home fatalities did not include out-of-facility
2408 deaths; is that a fair characterization?

2409 A. The nursing home fatalities where?

2410 Q. The total number of nursing home fatalities as
2411 presented to the public did not include -- only included
2412 fatalities that occurred in facility and excluded
2413 out-of-facility deaths?

2414 A. So I just want to make sure that I answer your
2415 question correctly. Do you mean on PowerPoint? Do you
2416 mean on the website? What do you mean?

2417 Q. Well let's start with the PowerPoint. We'll just
2418 ask, your understanding of both.

2419 A. So the PowerPoint started with people who died in
2420 hospitals because that's where people were known to be
2421 dying first. And then when nursing homes got added, we
2422 included people who died in nursing homes.

2423 Now of course if you are already reporting who
2424 died in hospitals and then you add who died in nursing
2425 homes, it wouldn't really make sense to have the number

2426 of nursing home people who died in the hospitals because
2427 now you are overcounting.

2428 And as I said, we tried to be consistent over
2429 time with the number of people who died in hospitals and
2430 number of people who died in nursing homes so we could
2431 track up the mountain and hopefully back down. And we
2432 stayed consistent with that, to the best of my
2433 recollection, in the PowerPoint.

2434 Q.What about the website?

2435 A.I think for the website, it was taking -- you had
2436 to also feel confident in the numbers and it was a
2437 herculean effort just to make sure the nursing home
2438 numbers were correct. And now you are going to add on
2439 who died in hospitals that came from nursing homes, and
2440 if those numbers are correct, and is anybody going to
2441 look at them?

2442 And I think at some point Gareth Rhodes went
2443 down to vet some of this information. And we could
2444 never get to a place where the health department or
2445 Dr. Zucker was willing to stand behind the numbers.

2446 So one thing that we did not want to do was
2447 add new data that we couldn't stand behind. And we
2448 couldn't stand behind it if the health department
2449 couldn't stand behind it. And at some
2450 point it became possible to feel comfortable about that

2451 and new data was posted. But the website was really not
2452 meant to be some kind of be all end all of data
2453 reporting. It was mid crisis, what we can get out to
2454 the public, what they are asking for, what we can
2455 include, can we really count it? And
2456 you know, we tried to make the site more easily
2457 accessible with, like, a link and, you know, I think we
2458 built a dashboard and -- but, you know, this is all
2459 while managing an all-consuming crisis.

2460 And yeah, it's true that the media from time
2461 to time criticized what we were doing. It is part of
2462 their job to critique government, but this was
2463 alongside -- like, a side project of actually managing
2464 the day-to-day of the crisis. So with everybody working
2465 around the clock.

2466 Q. Who would have made the decision to exclude
2467 out-of-facility deaths after May 3rd, as far as the
2468 website is concerned?

2469 A. To exclude it? You mean it was included and then
2470 somebody took it out?

2471 Q. According to public reporting, after May 3rd the
2472 way that the data related to nursing home fatalities was
2473 presented excluded deaths that occurred at hospitals or
2474 other locations?

2475 A. But had been on the website before that?

2476 Q.That's my understanding.

2477 A.I don't remember data being up there and then we
2478 took it down, but if it -- I mean, I genuinely don't
2479 recall that. If it did happen, it would be because
2480 somebody had a concern that it wasn't accurate.

2481 EXAMINATION BY

2482 MR. BENZINE:

2483 Q.What you have said has been consistent throughout
2484 of the danger of double counting for tracking back a
2485 nursing home resident through a nursing home and not
2486 counting them as both a nursing home death and a
2487 hospital death.

2488 Do you recall conversations about if it was
2489 feasible to do that backtracking and separate them out
2490 or was it always just, you know, like you said, a fog of
2491 war, got to keep going on, this is the easiest way to
2492 present this?

2493 A.You know, good question.

2494 I do remember bandwidth conversations. You
2495 know, the press was pushing hard for certain
2496 information. That meant somebody who was working
2497 actively on the COVID pandemic had to take time aside on
2498 this question and it's not that it wasn't a public good
2499 to provide data, more data, check the accuracy of data.

2500 It's just, we only had so many people and

2501 so much bandwidth and how are we allocating our
2502 resources? And if it was May, that was pretty active
2503 time in terms of the pandemic.

2504 Q.So I don't want to mischaracterize anything, but
2505 there were discussions about whether or not you could
2506 track it back and the outcome of them was there was a
2507 more important thing to do right now and it's respond
2508 to, I guess it would have been, like, the delta wave or
2509 something like that?

2510 A.I remember that was part of the discussion.

2511 Q.Okay. Were there any other parts of the
2512 discussion?

2513 MR. ABRAMOWITZ: There you go.

2514 A.I don't recall.

2515 Q.Okay.

2516 EXAMINATION BY

2517 MR. EMMER:

2518 Q.Do you recall -- and I don't have the exact
2519 timeline but April-May, learning that deaths that
2520 occurred after 5:00 p.m. weren't being included in
2521 nursing home fatality data?

2522 A.That sounds familiar. When you say not being
2523 included, in my head that's the nursing homes were not
2524 including them.

2525 Q.Well, can you elaborate on that?

2526 A.So, I mentioned before how burdensome this was
2527 for the system -- the health system, and these were
2528 24-hour catch-ups. And so if they gave us the data at
2529 midnight, when did their analysis end and was this a
2530 real 24-hour period or not? And did that have any
2531 implications?

2532 Now as I mentioned, for the PowerPoint as long
2533 as you are consistent day-to-day, fine. But if it's
2534 the -- because of the purpose of the PowerPoint is the
2535 numbers -- but if it's going on a website with dates on
2536 it, you know, as much as you can you want to be accurate
2537 about that, even including the day that people die.

2538 Number one, it's not accurate, and number two,
2539 it can be criticized and make people think the numbers
2540 are not accurate across the board. So there are going
2541 to be issues like that.

2542 And as I said, people were overwhelmed. It
2543 certainly wasn't anything being driven from the chamber.
2544 It's that we were relying on the facilities to get us
2545 the data and they only had the resources they had and,
2546 you know, we couldn't micromanage how they were getting
2547 us the data.

2548 And if there was an issue that was potentially
2549 problematic, obviously we would talk it through with it.

2550 Q.Do you --

2551 A. And they were doing their best.

2552 Q. To be clear, you don't recall any discussions
2553 related to the data not including fatalities that
2554 occurred after 5:00 p.m.?

2555 A. So if it wasn't included today, it would be
2556 included tomorrow. I don't believe any data was being
2557 skipped.

2558 So if the PowerPoint, for example, had always
2559 been based on as of 5:00 p.m., then in a perfect world
2560 you would want to continue that so that you are
2561 preserving as much as possible integrity of the graph.

2562 Of course, if you could go back and design it
2563 up front, you know, you might do things differently, but
2564 once you have already been doing it that way, you know,
2565 it's better to continue doing it that way for the
2566 PowerPoint.

2567 EXAMINATION BY

2568 MR. BENZINE:

2569 Q. The way Dr. Malatras kind of described it is that
2570 it wasn't then included in the next day if a resident
2571 died at 5:02, it was lost in space.

2572 A. Well, he was generally in charge of the
2573 PowerPoint so...

2574 Q. Do you recall anyone bringing the potential
2575 discrepancy to your attention?

2576 A. You know, I have a general recollection of
2577 data-related issues and the conclusion always was, we
2578 have got to stay with the integrity of what we are
2579 doing.

2580 Now obviously, the website disclosure would be
2581 a different matter.

2582 Q. Do you recall Ms. Baldwin bringing this issue to
2583 your attention?

2584 A. She may have. I know she sometimes brought
2585 issues to my attention with respect to COVID to try to
2586 be helpful.

2587 Q. Do you recall any conversations about trying to
2588 rectify the potential discrepancy?

2589 A. My recollection is discussions around changing
2590 our practice, but that would affect our ability to track
2591 the virus and with the metrics that we already had, it
2592 would be more harm than good.

2593 Q. Did you express that concern?

2594 A. I believe that was Dr. Malatras's concern.

2595 Q. Do you recall anyone --

2596 A. In fact, I think he was a little bit mad at me.

2597 Q. Do you recall anyone expressing the concern about
2598 the, kind of, all of a sudden a couple hundred deaths
2599 data dump?

2600 A. Sometimes I think the nursing homes went back and

2601 said oh, I think we forgot to tell you about these other
2602 fatalities.

2603 EXAMINATION BY

2604 MR. EMMER:

2605 Q.I believe you brought this up in a previous
2606 answer, but I want to fast forward to August 3, 2020
2607 when Dr. Zucker testified in your legislature and
2608 declined to provide the total number of nursing home
2609 fatalities.

2610 Do you recall him testifying in August of
2611 2020?

2612 A.Yes.

2613 Q.Why couldn't he provide a total number for the
2614 legislature at that time?

2615 A.He said DOH was still working to verify the
2616 numbers, to the best of my recollection.

2617 Q.And you brought up Gareth Rhodes, he conducted an
2618 audit in August of 2020. Do you recall who ordered him
2619 to conduct that audit?

2620 A.Well, I wouldn't call it an order but, I mean, we
2621 are not the military, but Melissa asked him to go take a
2622 look at the data and see if he could see if it appeared
2623 regular or not, to go down and look at some files.

2624 Q.Do you recall what the audit uncovered?

2625 A.I remember, to the best of my recollection, he

2626 was concerned that he saw discrepancies. What the
2627 discrepancies were, I can't tell you. I was aware this
2628 was happening, but I don't think I was as centrally
2629 involved in that as other things.

2630 Q. So you didn't -- the discrepancies that he
2631 uncovered in his audit you never reviewed in any sort of
2632 presented document or presentation from Mr. Rhodes?

2633 A. I think he did send something around.

2634 EXAMINATION BY

2635 MR. BENZINE:

2636 Q. I'm just trying to refresh numbers. He said he
2637 found around 600 discrepancies. Does that sound right,
2638 to your recollection?

2639 A. Out of how many files, do you know?

2640 Q. The total nursing home --

2641 A. Oh, out of thousands?

2642 Q. Yeah.

2643 A. I don't know the number, but I know he was
2644 concerned.

2645 Q. Okay.

2646 EXAMINATION BY

2647 MR. EMMER:

2648 Q. Do you recall the task force member recommending
2649 that the full nursing home data be released in August of
2650 2020?

2651 A.That's a bit general for me to recall.

2652 Q.Do you recall Mr. Rhodes recommending that
2653 data -- the full nursing home data be released after his
2654 audit in August of 2020?

2655 A.I think my conversations there are privileged.

2656 EXAMINATION BY

2657 MR. BENZINE:

2658 Q.This is just a clarifying question on the
2659 privilege, so I don't know if you want to answer it or
2660 not.

2661 How does whether or not to release data equate
2662 to furnishing legal advice?

2663 A.I was typically in those conversations as a legal
2664 counselor and given this inquiry and the many others
2665 that resulted, that was probably a good idea.

2666 Q.We are not asking whether you provided advice on
2667 releasing the data, just whether or not Mr. Rhodes
2668 advised to release the data. He was not --

2669 MR. ABRAMOWITZ: But if they did or if they
2670 didn't, it would be part of the conversation that's
2671 privileged.

2672 MR. BENZINE: The privilege only applies to
2673 the furnishing of legal advice between the lawyer and
2674 the client. I'm not asking what advice she furnished.
2675 I'm asking if someone --

2676 MR. ABRAMOWITZ: No, you are asking about
2677 the conversations that they had.

2678 MR. BENZINE: Okay.

2679 MR. ABRAMOWITZ: Or may have had.

2680 Q. Do you recall if anyone opposed releasing the
2681 full numbers?

2682 A. Same answer.

2683 Q. Do you recall if Melissa DeRosa opposed releasing
2684 the full numbers?

2685 A. My conversations with her are privileged.

2686 Q.Did you oppose releasing the full numbers?

2687 A. My positions are privileged.

2688 Q. Do you recall the rationale for not releasing the
2689 full numbers?

2690 A.Well, I'll just say generally, as I have
2691 expressed, there were concerns about the accuracy of the
2692 data up to a certain point.

2693 Q. How long did you work with Mr. Rhodes and
2694 Dr. Malatras?

2695 A. You mean generally?

2696 Q. Yeah.

2697 A.Um, years before COVID.

2698 Q. Do you trust them?

2699 A.I'm not sure exactly what you mean.

Q. If they were both advising on releasing the full

2701 numbers and you worked with them for years, your view of
2702 their character and then the eventual not release of the
2703 full numbers is relevant?

2704 A.I believe the premise of your question requires
2705 me to put in privileged information and may not even be
2706 accurate, which is not your fault.

2707 MR. ABRAMOWITZ: I might state for the
2708 record that disagreements may not reflect on bad
2709 character.

2710 MR. BENZINE: I understand that too. I'm
2711 just -- if they are advising on releasing the numbers
2712 and they feel comfortable with it, understanding of why
2713 it isn't released, that is relevant to our inquiry.

2714 MR. ABRAMOWITZ: May not have anything to
2715 do with the character.

2716 MR. BENZINE: Yeah.

2717 EXAMINATION BY

2718 MR. OSTERHUES:

2719 Q.I was just going to ask -- you worked with them
2720 for years. Do you trust their professional judgment,
2721 Rhodes and Malatras?

2722 A.Yeah. Professional judgment is broad.

2723 And by the way, in any organization, with
2724 trusted colleagues, you can have a healthy debate with
2725 people you trust, and come at it from different

2726 perspectives, disagree and some decision is made. It
2727 doesn't mean because I respect you that I'm going to do
2728 everything that you want or vice versa.

2729 EXAMINATION BY

2730 MR. BENZINE:

2731 Q.Regarding the release of the full numbers, were
2732 you ever a part of a conversation where the public
2733 relations implications were a factor in not releasing
2734 them?

2735 MS. FOTI: Is that part of the
2736 conversation?

2737 A.Any conversations I had on this topic were
2738 privileged.

2739 Q.Again, I'm just trying to clarify what the
2740 privilege is. PR advice is not legal advice.

2741 A.No, but you could have a conversation about
2742 should we do X and there are five different factors all
2743 being discussed at the same time.

2744 Q.And just because the legal advice is secondary
2745 does not mean that the privilege extends to the non-
2746 legal advice.

2747 A.I don't think here it is possible to separate it.

2748 Q.Okay.

2749 EXAMINATION BY

2750 MR. EMMER:

2751 Q.Let's return to the July 6th report.

2752 Do you recall the administration arguing that it
2753 was peer reviewed?

2754 A.No.

2755 Q.And I just want to clear up stuff that was talked
2756 about with the minority in the previous hour, but do you
2757 recall whether any individuals or organizations outside
2758 of the executive chamber and the Department of Health
2759 were involved with the July 6th report?

2760 A.Other than McKinsey?

2761 Q.Correct.

2762 A.Not to my knowledge.

2763 Q.And you testified in the previous hour that
2764 Dr. Adams, the draft that you would have reviewed, it
2765 wasn't a report; is that right?

2766 A.Yes. And more specific to Dr. Adams, I remember
2767 being in one of these sessions with DOH and McKinsey
2768 personnel and we were going over what the team had so
2769 far and Dr. Adams started to criticize portions of what
2770 had been drafted and I asked her why and she started
2771 explaining and obviously she is very knowledgeable.

2772 So I asked her to go work directly with
2773 McKinsey to improve what they had at that time and she
2774 did on more than one occasion, because this was the kind
2775 of thing where you meet today, you go over what you

2776 have, people have a discussion, and then we turn to
2777 McKinsey and say, all right, we can go back and
2778 incorporate that. Let us know when you have a fresh
2779 draft. It could be the next day. Sometimes they needed
2780 a couple days, but this went on and on.

2781 EXAMINATION BY

2782 MR. BENZINE:

2783 Q.This is a process question.

2784 Do you recall how the editing process went?

2785 Was it track changes in Word? Sitting in meetings
2786 taking notes? Dictated? All of the above?

2787 A.I think they just came back with a new draft. I
2788 don't think it was the kind of thing that you could
2789 really, you know, do track changes.

2790 Q.Even the July 6th report itself?

2791 A.It's possible. I don't remember.

2792 EXAMINATION BY

2793 MR. EMMER:

2794 Q.At this time I would like to introduce what will
2795 be marked as Majority Exhibit 3. This is an e-mail sent
2796 from Dr. Adams to Dr. Zucker on June 7, 2020 that you
2797 are not a part of. It summarizes the key points of this
2798 e-mail.

2799 I'll give you a moment to review it.

2800 (Whereupon, an e-mail is marked as Majority

113

2801 Exhibit 3 by Mitch Benzine.)
2802 MR. EMMER: (Handing).
2803 MR. BENZINE: (Handing).
2804 MS. LANGLEY: (Handing).
2805 MS. FOTI: (Handing).
2806 THE WITNESS: (Handing).
2807 MR. ABRAMOWITZ: (Handing).
2808 A. (Perusing). Okay. I read the e-mail. Is that
2809 enough?

Q.If you can review the graphs?

2811 MR. BENZINE: Or just flip through the
2812 graphs for recollection. You don't need to review all
2813 the data.

2814 A. (Witness complies.) Okay.

2815 Q. For the record, we have not received any drafts
2816 of the July 6th report, but does this appear to be the
2817 draft document and information that would have been used
2818 for the July 6th report?

2819 A. For sure, at least some of it. I mean, the
2820 second page of the document, 7404, I do specifically
2821 recall this graph where the nursing home fatality rate
2822 is put in the context of the larger state-wide fatality
2823 rate and pretty dramatically shows that nursing home
2824 fatalities followed the same rise and fall pattern of
2825 the state as a whole, which tended to suggest that there

2826 was not an external factor at work, such as the
2827 March 25th directive. I do remember that specifically.

2828 I don't think all of these charts were
2829 ultimately used. I could be wrong, but there was a lot
2830 of stuff that we put together that may have been too
2831 granular or wasn't needed or wasn't too clearly
2832 depicted. So it may have been simplified.

2833 Q.Thank you.

2834 A.Sure.

2835 Q.In the previous hour with the minority, they
2836 talked about the data that was included in the report.

2837 For our record, we are going to have to ask
2838 some of the same questions so we appreciate your
2839 patience.

2840 So isn't it true that the data that was
2841 presented in the report excluded deaths that occurred
2842 out of the facility?

2843 A.Yes.

2844 Q.And what necessitated not including those
2845 fatalities?

2846 A.So I can't get into privileged conversations, but
2847 what was important to me was that the report be clear on
2848 what it did include and didn't include. And that there
2849 was no difference in the results if the data was
2850 included.

2851 And as I have mentioned, the report says what
2852 it's based on and how you know that was clear was the
2853 media reaction that criticized the report pretty
2854 vehemently for not including the data. And DOH
2855 confirmed -- I think Dr. Zucker confirmed that if the
2856 data were included, the outcome was the same.

2857 Q. And I don't want to mischaracterize your
2858 testimony or any of our other witnesses, but it sounds
2859 like this decision to exclude these certain fatalities
2860 occurred around June 27th.

2861 Do you recall you, yourself, reviewing drafts
2862 prior to that date that included deaths that occurred
2863 outside of the facility?

2864 A. Yes.

2865 Q. To the best of your recollection, up until that
2866 point do you recall who was involved in the drafting of
2867 the report?

2868 A. McKinsey, DOH and myself.

2869 Q. Any individuals within the executive chamber?

2870 A. At some point, Dr. Malatras. But I thought you
2871 were talking about before it came to the chamber.

2872 EXAMINATION BY

2873 MR. BENZINE:

2874 Q. Prior to June 27th?

2875 A. I don't remember exactly when it came to the

2876 chamber. If that was the date -- in any event, before
2877 the draft report came to the chamber, it was myself,
2878 McKinsey, DOH, maybe Megan Baldwin who could be
2879 considered to be part of the chamber.

2880 EXAMINATION BY

2881 MR. EMMER:

2882 Q.I guess my question is more so, at the
2883 date -- and I understand you don't recall the exact date
2884 that the decision would have been made to exclude
2885 fatalities, to exclude deaths that occurred outside of
2886 the nursing homes. Who was included up until that
2887 point?

2888 A.The report with the out-of-facility data came to
2889 the chamber. There were a series of discussions with a
2890 group of people that I was involved with that are
2891 privileged.

2892 EXAMINATION BY

2893 MR. BENZINE:

2894 Q.Do you recall who?

2895 A.Melissa DeRosa, Dr. Malatras, in at least some of
2896 them, Dr. Zucker. Maybe Beth Garvey. I can't remember
2897 who else was involved.

2898 Q.The discussions beyond the June 27th phone call?

2899 A.I think there were a couple of calls close in
2900 time.

2901 Q. Okay.

2902 A. Because Dr. Zucker was on at least one but he was
2903 not on at least one of the others.

2904 Q. So sometime between one and three in late June,
2905 does that sound right?

2906 A. Yes.

2907 Q. Okay. One-ish with Dr. Zucker and one-ish
2908 without Dr. Zucker?

2909 A. Yes.

2910 Q. Okay. It has been touched on a little bit, the
2911 June 27th call.

2912 Q. Do you recall that one specifically?

2913 A. Yes.

2914 Q. Do you recall who specifically was on that call?

2915 A. Okay. So is that the last phone call that you
2916 have?

2917 Q. I believe so.

2918 A. I think the last phone call that I was on that
2919 Dr. Malatras was on and Dr. Zucker was not and Melissa
2920 and myself were.

2921 Q. Do you recall if Ms. Garvey was on that call too?

2922 A. Probably.

2923 Q. I don't know other names but you, Dr. Malatras,
2924 Ms. Garvey, Ms. DeRosa?

2925 A. Yes.

2926 Q. And the series of phone calls in late June that
2927 we just talked about, were they related to the decision
2928 making of which number to include in the report?

2929 MS. FOTI: Can we hear that again, please?

2930 THE REPORTER: Sure.

2931 (Whereupon, the referred to question was
2932 read back by the Reporter.)

2933 MS. FOTI: Yes or no.

2934 A. The topic was the draft report and its issuance.
2935 I don't think I should get any more specific than that.

2936 Q. And Jack kind of asked this.

2937 As you were going through the drafts up to the
2938 series of phone calls in late June, was the 9,844 number
2939 in the drafts?

2940 A. Yes.

2941 Q. And then after the series of phone calls in late
2942 June was that number downgraded to the 6,000 number?

2943 A. Well, leaving aside the characterization, yes.

2944 Q. Prior to the phone calls, 9,844, after the phone
2945 calls, 6,000 and some change?

2946 A. Yes.

2947 Q. You testified earlier that outside of maybe one
2948 large example Ms. DeRosa was the final check on decision
2949 making unless she felt like it needed to go to the
2950 governor; is that fair?

2951 A. So Melissa was in charge but she consulted widely
2952 and deeply -- the received wisdom of the group and legal
2953 advice of the group typically before making a decision
2954 that was either hers to make or which she needed to
2955 confer with the governor.

2956 Q. And as any good leader does taking in the wisdom
2957 of the advice but someone has to be the final check.
2958 Was it consistent that Ms. DeRosa was the final arbiter
2959 on those decisions? It's just a general question across
2960 decision making.

2961 A. It was her decision to make but --

2962 Q. Overall. Not specific --

2963 A. But in the team -- I never knew her to contradict
2964 or to act against legal advice.

2965 Q. That's not what I'm asking. I'm just saying
2966 someone has to make a decision.

2967 A. Yes.

2968 Q. We can't govern by committee everywhere. Was the
2969 decision to be made Ms. DeRosa's?

2970 THE WITNESS: I think I said that.

2971 A. It was her decision to make unless the governor
2972 was making the decision.

2973 Q. Okay. And Ms. DeRosa was on the three phone
2974 calls in late June?

2975 A. Yes.

2976 Q. And before the phone call it was 9,000 and after
2977 the phone call it was 6,000?

2978 A. Are you going to make me answer that again?

2979 Q. Yes.

2980 A. Yes.

2981 Q. Okay.

2982 MR. EMMER: We'll go off the record.

2983 (Whereupon, an off-the-record discussion
2984 was held.)

2985 MS. [REDACTED]: We can go back on the record.

2986 EXAMINATION BY

2987 MS. [REDACTED]:

2988 Q. Ms. Lacewell, I wanted pick up on something you
2989 actually brought up in the last hour we were talking,
2990 which is the federal government's response to the
2991 COVID-19 pandemic. I think you alluded to the need for
2992 more guidance from the federal government and how that
2993 would have helped ease the state's resources in dealing
2994 with the issues that were facing them.

2995 So I just want to talk about that a little bit
2996 with you.

2997 During a public health crisis what would you
2998 expect the role of the federal government to be?

2999 A. Well, a public health crisis, but especially a
3000 pandemic, crosses borders. And the federal government

3001 should lead the nation and should coordinate with other
3002 nations in the preparation, where possible, and in the
3003 response.

3004 Here, the federal government did not do so.
3005 And so, unfortunately, on a state-by-state basis, for
3006 example, states had to scramble for resources and
3007 compete with each other to get ventilators, protective
3008 equipment known as PPE and other items to help
3009 individuals who were sick.

3010 And if the federal government had used its
3011 mighty economic power and resources to get resources and
3012 distribute them appropriately to states based on need, I
3013 believe that the crisis could have been better managed
3014 and lives could have been saved.

3015 It took a long time for the federal government
3016 to put out any real guidance. Again, states had to
3017 scramble. So I appreciate the work of individual
3018 agencies -- federal agencies that did take some
3019 measures, but just as a governor took over the state,
3020 the president and his key staff should have taken over
3021 for the nation so that each state didn't have to
3022 scramble. North Carolina shouldn't have to be competing
3023 with California or New York.

3024 And as a result, each state had to act like a
3025 nation. New York had better resources than most, but it

3026 left a lot of states scrambling and it was to the
3027 detriment of the people.

3028 So I hope whether it's through this measure or
3029 others, that there would be recommendations for how the
3030 federal government, with the benefit of hindsight and
3031 experience of this pandemic, can better protect the
3032 nation in the future.

3033 Q.I think one of the missions of the democrats on
3034 the Select Subcommittee throughout the Congress has been
3035 how we can learn how to better improve going forward.

3036 Hearing your perspective as someone on the ground is
3037 helpful in those efforts and through the investigations
3038 we have done so far, I'm reiterating some of your
3039 points.

3040 We have seen there was a lack of federal
3041 response particularly with securing PPE, testing were
3042 all issues where the federal government did not take the
3043 leadership role that sounds like many states would have
3044 depended on them for and that this led to competitions
3045 between the states, which hampered everybody's response,
3046 which may have potentially cost more money than what
3047 otherwise might have happened.

3048 And it seems like New York felt this
3049 particularly acutely because it was an epicenter so
3050 early on in the pandemic; is that correct?

3051 A.Yes.

3052 Q.During a Select Subcommittee hearing last May, we
3053 heard from Dr. David Grabowski, who was a professor of
3054 healthcare policy at Harvard Medical School, and he said
3055 that community spread was a driving force of COVID-19
3056 entering nursing homes and other congregate care
3057 facilities, not just in New York but across the country.

3058 Is that consistent with your understanding?

3059 A.Yes.

3060 Q.And when we talk about community spread, would
3061 things like adequate supply of PPE and testing have
3062 mitigated that community spread?

3063 A.Yes.

3064 Q.So having the federal government coordinate more
3065 of a response would have led to fewer deaths in nursing
3066 homes?

3067 A.Yes.

3068 Q.As you may or may not be aware, in 2019 the Trump
3069 Administration proposed to relax a federal requirement
3070 that nursing homes employ on-site infection prevention
3071 specialists. According to public reporting, former
3072 President Trump's proposal led some facilities to cut
3073 corners in infection control.

3074 Is the maintenance of firm infection standards
3075 and compliance with those standards important in

3076 preventing viral infection and spread in nursing homes?

3077 A.Yes, it's critical.

3078 Q.And does relaxing those standards in nursing
3079 homes hinder protection for residents of those nursing
3080 homes in future pandemics?

3081 A.Assuming the nursing homes do relax the
3082 standards, yes, it does.

3083 Q.Thank you.

3084 And I want to turn our attention to later in
3085 the pandemic when President Biden entered office in
3086 January of 2021, he made a federal government initiative
3087 for a national vaccination campaign.

3088 Are you aware of that?

3089 A.Yes.

3090 Q.Did New York also participate in a vaccination
3091 campaign when vaccines became widely available?

3092 A.Yes.

3093 Q.And did vaccines reduce the threat of COVID-19
3094 posed to nursing home residents and staff?

3095 A.Yes.

3096 Q.For vaccines to be most effective, the majority
3097 of the population needs to get vaccinated, correct?

3098 A.Yes. It is the principle of herd immunity.

3099 Q.And would vaccine hesitancy impact that?

3100 A.Potentially.

3101 Q.Did New York see vaccine hesitancy?

3102 A.Yes, and we tried to address it.

3103 Q.Do you know what caused that vaccine hesitancy?

3104 A.Well, the message from the White House was anti
3105 vaccine.

3106 Q.Which White House?

3107 A.The Trump White House.

3108 Q.Thank you.

3109 What did New York do to try and combat vaccine
3110 hesitancy?

3111 A.I think we did social media campaigns, we tried
3112 to use celebrities and social media influencers, we
3113 tried to utilize leaders in whatever communities were
3114 hesitant, we tried to make the vaccines readily
3115 available, we tried to, you know, counter the anti-
3116 vaccine message.

And the governor

3117 personally, and he had a lot of influence at the time,
3118 talked about the purpose of vaccines every day, he
3119 publicly got vaccinated himself.

3120 We did everything we could.

3121 Q.It sounds like that took a lot of effort and time
3122 that may not have been needed if there hadn't been the
3123 anti-vaccination message in the first place?

3124 A.That's true.

3125 Q.Thank you.

3126 Switching gears a little bit but still on
3127 federal guidance, I know you were not involved in the
3128 March 25th drafting of the order, but I'm going to ask
3129 you a little bit about it.

3130 Recognizing that in March 2020 everyone was
3131 working with limited information about how COVID-19
3132 spread, with that being sort of the background
3133 information, I assume, and we have mentioned this
3134 before, but those in the executive chamber on the COVID
3135 task force were looking everywhere for information to
3136 guide decision making?

3137 A.Yes.

3138 Q.Would that include looking to federal guidance
3139 that existed?

3140 A.Yes.

3141 Q.I'm going to introduce Minority Exhibit D.

3142 MS. ████: (Handing).

3143 MS. FOTI: Thanks. (Handing).

3144 THE WITNESS: (Handing).

3145 MR. ABRAMOWITZ: (Handing).

3146 (Whereupon, a March 4, 2020 CMS issued
3147 nonbinding guidance is marked as Minority Exhibit D by
3148 ████████.)

3149 Q.This is a March 4, 2020 CMS issued nonbinding
3150 guidance regarding infection control and prevention of

3151 COVID-19 for nursing homes. I do not expect that you
3152 are familiar with this; is that correct?

3153 A.I remember after the March order was issued that
3154 we did go back -- some of us did go back and look at
3155 what preexisted at the time, so I may have reviewed it
3156 then.

3157 Q.Okay. I want to draw your attention to a
3158 specific section, which is on page 3.

3159 A.(Witness complies.)

3160 Q.It is the second bolded header, which reads when
3161 should a nursing home accept a resident who was
3162 diagnosed with COVID-19 from a hospital. Do you see
3163 that?

3164 A.Yes.

3165 Q.I'm just going to read it into the record.

3166 "A nursing home can accept a patient diagnosed
3167 with COVID-19 and still under transmission-based
3168 precautions for COVID-19 as long as it can follow CDC
3169 guidance for transmission-based precautions. If a
3170 nursing home cannot, it must wait until these
3171 precautions are discontinued."

3172 Do you agree that this federal guidance from
3173 the Trump Administration does not bar the readmission of
3174 COVID-19 positive patients to nursing homes?

3175 A.That is correct.

3176 Q.And on the flip side, do you agree this federal
3177 guidance establishes a premise that COVID-19 positive
3178 hospital patients could be readmitted to nursing homes
3179 under certain circumstances?

3180 A.Correct.

3181 Q.And that was -- it left it up to the nursing
3182 homes to determine if they were able to maintain
3183 infection control measures?

3184 A.Yes.

3185 Q.So this type of guidance seems likely that it
3186 would have been reviewed by anyone who was drafting New
3187 York's guidance?

3188 A.Presumably.

3189 Q.Thank you.

3190 MS. ████: We can go off the record.

3191 (Whereupon, an off-the-record discussion
3192 was held.)

3193 MR. EMMER: We can go back on the record.

3194 EXAMINATION BY

3195 MR. EMMER:

3196 Q.Ms. Lacewell, I want to ask you if you can
3197 briefly describe the difference between a readmission
3198 and admission for the purposes of the March 25th order.

3199 A.(Perusing).

3200 MS. FOTI: No, no. She wants the

3201 March 25th order. The New York one?

3202 MR. EMMER: Generally the March 25th order
3203 and July 6th report.

3204 A. Readmission is someone who comes from a nursing
3205 home to a hospital and then goes back.

3206 Q. Admission is an individual who is admitted as a
3207 new resident, right?

3208 A. Yes.

3209 Q. In the July 6th report do you know whether it
3210 considered both readmissions and admissions?

3211 A. I believe so, given that it was a count of
3212 individuals who died in nursing homes no matter where
3213 they came from, whether or not the patient was from a
3214 nursing home.

3215 Q. So the number of reported admitted residents in
3216 the report was 6,326. That number did not include 2,279
3217 individuals who were readmitted. You weren't aware that
3218 the July 6th report did not include readmitted
3219 residents?

3220 A. You are saying the July report did not include
3221 fatalities of people who died in nursing homes if they
3222 had come from the hospital?

3223 Q. Not considering fatalities, just the number of
3224 readmitted and admitted residents. I'm asking, was it
3225 your understanding that the July 6th report did not

3226 include the 2,279 patients who were readmitted into the
3227 facility?

3228 A. It was my understanding that the July report
3229 included all individuals who died of COVID in the
3230 nursing home no matter where they came from. That's
3231 what I believed it included. What it did not include is
3232 people who died in hospitals.

3233 Q. We'll move on.

3234 I want to make sure the record is clear.
3235 During the minority's hour you testified that you do not
3236 recall whether the governor himself had any role with
3237 the July 6th report?

3238 A. I have no information that he was involved. I
3239 mean, he was pretty busy.

3240 Q. At this time I would like to introduce what will
3241 be marked as Majority Exhibit 4.

3242 MR. EMMER: (Handing).

3243 (Whereupon, entitled statement from Beth
3244 Garvey is marked as Majority Exhibit 4 by Mitch
3245 Benzine.)

3246 Q. This is an entitled statement from Beth Garvey,
3247 special counsel to the governor, for March 5, 2021, and
3248 I will give you a moment to review the document.

3249 A. (Perusing). Okay.

3250 Q. Do you recall this statement?

3251 A.Yes.

3252 Q.Do you recall what necessitated Ms. Garvey making
3253 this statement?

3254 A.Is this date accurate, March 2021?

3255 Q.I believe that this is March 5, 2021.

3256 A.March 5th. (Perusing).

3257 MR. ABRAMOWITZ: Do you want the report?

3258 THE WITNESS: No, I'm okay.

3259 A.I don't recall what was happening at that time.

3260 I would have expected this to be closer in time to the
3261 report.

3262 Q.Dr. Malatras testified that this statement was
3263 made in response to a statement that he made in response
3264 to the New York Times article Minority Exhibit B in
3265 which he effectively said what was being reported in
3266 relation to your and Ms. DeRosa's involvement was true.

3267 Do you recall that taking place?

3268 THE WITNESS: Can you please read that back?

3269 THE REPORTER: Sure.

3270 (Whereupon, the referred to question was
3271 read back by the Reporter.)

3272 A.A statement to whom?

3273 EXAMINATION BY

3274 MR. BENZINE:

3275 Q.The New York Times article that's Minority

132

3276 Exhibit B?

3277 A. Yes.

3278 Q.On page 3 of 6, the third full paragraph down
3279 that starts with the A2 were involved.

3280 A. (Perusing). Okay.

3281 I didn't know of any connection between the
3282 two, if that's your question.

3287 Q. Our understanding from Dr. Malatras -- and I'll
3288 read the portion of the New York Times article on page
3289 3.

3296 And according to Dr. Malatras when he was the
3297 chancellor of the State University of New York at that
3298 time, if that title is correct, when this came out, he
3299 stated that portion of the New York Times article was
3300 correct but he was not the one who changed the articles.

3301 It was Ms. DeRosa and you.

3302 And then he testified that after he put out
3303 that statement he received a phone call from Ms. Garvey,
3304 Ms. DeRosa and you asking him to retract the statement
3305 and he did not. And then Ms. Garvey put out this
3306 statement.

3307 A.Well, let me say this, which is not privileged.

3308 As I have testified, I was involved in a series of
3309 conversations that included Melissa DeRosa and
3310 Dr. Malatras about the report before it was issued. And
3311 then Melissa DeRosa had a subsequent conversation with
3312 Dr. Malatras with or without Dr. Zucker that I was not
3313 involved in.

3314 Q.Do you recall any discussion with Dr. Malatras
3315 regarding his statement in the New York Times?

3316 A.I don't remember if I spoke to him about it
3317 directly.

3318 Q.Do you recall taking part in a conversation?

3319 A.But certainly the statement that he was not
3320 involved, it was Ms. DeRosa and myself, is inconsistent
3321 with the fact that they had a conversation after my last
3322 conversation on the topic.

3323 Q.Do you recall a phone call taking place between
3324 Ms. DeRosa, Ms. Garvey and Dr. Malatras after he issued
3325 a statement in the New York Times?

3326 A.I believe that's accurate. I don't have a very
3327 specific recollection of how the whole thing unfolded.

3328 Q.Do you recall the contents of that phone call?

3329 A.No.

3330 Q.Do you recall who told Ms. Garvey to issue this
3331 statement?

3332 A.No.

3333 Q.Do you recall who drafted this statement?

3334 A.Ms. Garvey's statement?

3335 Q.Mm-hmm.

3336 A.I don't recall. I think she took the lead on it
3337 though.

3338 Q.Do you recall any conversations where Ms. DeRosa
3339 pressured Dr. Malatras to revoke his previous statement?

3340 A.I wouldn't say she pressured him. I would say
3341 that she believed his statement was not true.

3342 Q.Did Ms. DeRosa ask Dr. Malatras to revoke his
3343 statement?

3344 A.I don't know. I don't recall.

3345 Q.You said that she believed his statement to be
3346 untrue. He obviously didn't revoke the statement, and
3347 again, please correct me, but you said that at least
3348 your belief that his statement was untrue was that he
3349 was involved in the July 6th report and saying he wasn't
3350 was untrue.

3351 Do you recall any conversations about how to
3352 respond to Dr. Malatras's claims?

3353 A.Other than what we have just discussed, no.

3354 Q.Okay. I want to --

3355 A.I mean, the New York Times put three people in
3356 the story. Dr. Malatras took himself out. That was
3357 either true or not true. And if it wasn't true, it
3358 should be corrected.

3359 Q.That specific phone call with Ms. Garvey and
3360 Ms. DeRosa, you and Dr. Malatras, do you recall anyone
3361 else being on that phone call?

3362 A.Which phone call are you talking about now?

3363 Q.The one after the New York Times article and
3364 after Dr. Malatras's statement where Ms. DeRosa
3365 expressed concern regarding Dr. Malatras's --

3366 A.Yeah. I don't even remember being on that phone
3367 call.

3368 Q.Okay.

3369 Apologies. I want to go back in time a little
3370 bit, back to Dr. Zucker's testimony before the New York
3371 State senate in August of 2020.

3372 According to the impeachment investigation he
3373 was remotely testifying over Zoom and there were other
3374 individuals in the room while he was testifying and in
3375 the impeachment report it said there was a senior

3376 executive chamber official who was in the room who wrote
3377 a message on a whiteboard suggesting Dr. Zucker testify
3378 to the effect that the March 25th directive was authored
3379 by the Department of Health and the executive chamber
3380 was not involved.

3381 Do you have any recollection of that?

3382 A.Of the report saying that?

3383 Q.Were you in the room with them?

3384 A.No.

3385 Q.The report continued, "This statement was not
3386 true and the senior DOH official, who was Dr. Zucker,
3387 didn't make such a statement in his testimony. The
3388 executive chamber official who was instructing him to
3389 say that the executive chamber was not involved was
3390 Melissa DeRosa.

3391 Do you have any recollection of that?

3392 A.I couldn't see what was happening. I was
3393 watching it on a screen like everybody else.

3394 Q.Okay. And to the best of your knowledge, and if
3395 it invokes the conversation with Mr. Schwartz, you can
3396 say so, was the executive chamber involved in the
3397 drafting of the March 25th directive?

3398 A.I don't know.

3399 Q.Okay.

3400 EXAMINATION BY

3401 MR. EMMER:

3402 Q.Ms. Lacewell, when did you become aware that the
3403 governor was planning to write a book?

3404 A.Well, sometime before he actually wrote it or
3405 issued it. I don't remember exactly when though.

3406 Q.And to clarify, the answer -- you are referring
3407 to before its publication or before it was publicly
3408 announced that you learned about it?

3409 A.Both.

3410 Q.Did you know the governor was writing a book
3411 prior to the issuance of the March 25th order?

3412 A.I can't remember.

3413 Q.Did you know that the governor was writing a book
3414 prior to the issuance of the July 6th report?

3415 A.I can't remember.

3416 Q.While the administration was drafting the
3417 July 6th report were you aware that the governor was
3418 planning to write a book?

3419 A.I just can't remember when I learned. I'm sorry.

3420 Q.Did you have any involvement with the governor's
3421 book?

3422 A.No.

3423 Q.Do you know who was involved with the drafting,
3424 development, publication of the governor's book?

3425 A.I think he asked some personnel to review it for

3426 accuracy or Melissa may have asked people to do that.

3427 There was a meeting up in Albany. I think at that point

3428 I may have been based in New York City and maybe that

3429 was why I wasn't invited, but I wasn't there.

3430 EXAMINATION BY

3431 MR. BENZINE:

3432 Q.The meeting you are referring to was at the

3433 executive mansion?

3434 A.Yes.

3435 Q.And to your recollection about that meeting,

3436 understanding you weren't there, it was when a close to

3437 done-ish manuscript was submitted to staff for fact

3438 checking and editing?

3439 A.I think that is right.

3440 EXAMINATION BY

3441 MR. EMMER:

3442 Q.Did you ever discuss the book with the governor?

3443 A.Um, to the best of my recollection, only on

3444 ethics-related legal issues that emerged later.

3445 Q.Did discussions --

3446 EXAMINATION BY

3447 MR. BENZINE:

3448 Q.When a public official writes a book in New York,

3449 do they need to submit it to JCOPE?

3450 A.If you are going to earn over a certain amount of

3451 money as a public official, you need ethics approval to
3452 include a book.

3453 Q. When does the approval need to take place?

3454 A. Typically before receipt of the income.

3455 Q. Before receipt of the income?

3456 A. Well, ideally before a contract is actually
3457 written, but if you do it before the receipt of income I
3458 think that's probably fine.

3459 Q. And to the extent you know, and I don't, so it's
3460 actually a question, if the public official is receiving
3461 an advance, does that count as receipt of income or
3462 would it just be after there's enough sales of the book
3463 to pay back the advance?

3464 A. It would cover the advance.

3465 Q. Penguin House was the publisher for Governor
3466 Cuomo's book and reached out on March 19th to the
3467 governor.

3468 Understanding you don't know exactly, when you
3469 heard, when was the ethics requirement filed with JCOPE?

3470 A. I don't recall.

3471 EXAMINATION BY

3472 MR. EMMER:

3473 Q. Did you have any communications with the
3474 publisher?

3475 A. No.

3476 Q.Did you have any knowledge of the book deal or
3477 what would eventually become the book deal that the
3478 governor had with the publisher?

3479 A.Very late for purposes of dealing with ethics
3480 questions.

3481 EXAMINATION BY

3482 MR. BENZINE:

3483 Q.Were you the primary ethics lawyer for the
3484 executive chamber?

3485 A.No.

3486 Q.Who would that have been?

3487 A.Um, well, Beth Garvey was counsel and there was
3488 an ethics lead. Her name is escaping me.

3489 Q.Why were you tapped to be the -- if this is a
3490 mischaracterization, please correct me. Why were you
3491 tapped to be the ethics Sherpa for this project?

3492 A.Because I had been involved on ethics issues on
3493 the governor's first book and most people didn't know
3494 how to handle the issue.

3495 Q.In your experience, were you brought in late to
3496 this process?

3497 A.I didn't feel it was too late.

3498 Q.Okay. Do you have any direct knowledge of
3499 executive chamber employees on official time working on
3500 the book?

3501 A.No.

3502 EXAMINATION BY

3503 MR. OSTERHUES:

3504 Q.Understanding you were maybe late out of the
3505 ordinary in terms of when you were brought in for the
3506 ethics, any concerns about an appearance of impropriety,
3507 including writing the book when the pandemic response
3508 was still going on?

3509 A.Well, the first important question was who was
3510 the publisher and they were not a lobbyist and had no
3511 contracts or business before the State. So that almost
3512 completely eliminated the ethics question on the
3513 analysis. Um, issues about writing a book
3514 when the pandemic is underway is really not a legal or
3515 ethics question. It's a political question.

3516 EXAMINATION BY

3517 MR. EMMER:

3518 Q.Do you feel the governor's book deal may have
3519 influenced the governor's staff's decisions during the
3520 pandemic?

3521 A.Absolutely not.

3522 EXAMINATION BY

3523 MR. BENZINE:

3524 Q.I'm going to ask some questions regarding your
3525 specific roles and responsibilities as it pertains to

3526 attorney-client privilege. I'm not going to ask
3527 anything that is privileged, but I'm going to ask
3528 questions about your role in the state government during
3529 the time of the questions we have been asking about.

3530 We are going to put aside whether or not
3531 common law privileges apply to congressional
3532 investigations, but the first prong of a privilege is to
3533 establish an attorney-client relationship.

3534 During your applicable time period of January
3535 2020 through your resignation in August of 2021, what
3536 was your job title?

3537 A. Superintendent of DFS and, I guess, I was
3538 announced as a COVID task force member.

3539 Q. Do you recall or know if the superintendent of
3540 financial services is statutorily required to hold a
3541 Juris Doctor degree?

3542 A. I don't think so.

3543 Q. The qualifications section is actually pretty
3544 small because it's a state-confirmed position.

3545 New York State law Chapter 18 A, Section 2,
3546 Subsection 202, the requirements of the position
3547 are "The head of the department shall be the
3548 superintendent of financial services who shall be
3549 appointed by the governor by and with advice and consent
3550 of the senate, and who shall hold the office at the

3551 pleasure of the governor."

3552 Just for clarity, does that section list Juris
3553 Doctor as a requirement?

3554 A.No.

3555 Q.Do you recall your statutory duties as
3556 superintendent of financial services?

3557 A.Well, there are very many.

3558 Q.There are seven. I'll read them.

3559 "According to New York State law Chapter 18 A,
3560 Section 2, the statutory duties of the superintendent of
3561 financial services are:

3562 Number 1: Foster the growth of the financial
3563 industry in New York and spur state economic development
3564 through judicious regulation and digital supervision.

3565 Number 2: To ensure the continued solvency,
3566 safety, soundness and prudent conduct of the providers
3567 of financial products and services.

3568 Number 3: Ensure fair, timely and equitable
3569 fulfillment of the financial obligations of such
3570 providers.

3571 Number 4: Protect users of financial products
3572 and services from financially impaired or insolvent
3573 providers of such services.

3574 Number 5: Encourage high standards of
3575 honesty, transparency, fair business practices and

3576 public responsibility.

3577 Number 6: Eliminate financial fraud, other
3578 criminal use and unethical conduct in the industry.

3579 And Number 7: Educate and protect users of
3580 financial products and services and ensure that users
3581 are provided with timely and understandable information
3582 to make responsible decisions about financial products
3583 and services.

3584 Does this statute list provide legal advice to
3585 the governor or executive chamber as a statutory duty of
3586 your position as superintendent?

3587 A.No.

3588 Q.Putting aside your position as superintendent,
3589 did you hold any other voluntary positions with official
3590 state government positions where your duties were to
3591 provide legal advice to the governor?

3592 A.I mean, I had other positions, but they did not
3593 require advice to the governor. I was on various boards
3594 and so forth.

3595 Q.Did you have a personal attorney-client
3596 relationship with the governor?

3597 A.I'm not sure what personal means.

3598 Q.Did you have a retainer with him outside of your
3599 position as Superintendent of Financial Services?

3600 A.No.

3601 Q.Did you have any agreement with the governor to
3602 provide legal advice to him or the executive chamber?

3603 A.Not a written agreement, but my role as counsel
3604 to the governor, the staff, the agencies, was
3605 historically derived from when I was in the chamber and
3606 I had such titles and it was factually based in that the
3607 client treated me as their lawyer and believed that they
3608 were having privileged conversations with me and relied
3609 on that.

3610 So there were discussions about giving me a
3611 second title.

3612 Q.Were you ever given a second title?

3613 A.No. It was really not deemed to be necessary,
3614 but factually, I was counsel.

3615 Q.This is a little redundant because factually you
3616 were counsel, did you ever have any official position
3617 where your responsibilities were to provide legal advice
3618 to the governor?

3619 A.Prior to being at DFS. Otherwise, no.

3620 Q.So during the time period of questioning today,
3621 2020 through your resignation in 2021, you did not have
3622 an official responsibility to provide legal advice to
3623 the executive chamber?

3624 MS. FOTI: Give me a second.

3625 Do you want to read it back?

146

3626 THE WITNESS: No.

3627 MS. FOTI: Okay.

3628 A. It's in the context, though, of being part of the
3629 COVID task force where I am not acting as the
3630 superintendent. I am acting in some other capacity.

3631 And the capacity there included as counsel to this group
3632 and on a day-to-day basis. That's how it unfolded.

3633 Q. Okay. I appreciate that and I want to go through
3634 just a couple more kind of structural questions.

3635 You are here voluntarily today. Everyone has
3636 appreciated that. I appreciate that you flew all the
3637 way from California.

3641 A. Yes.

3642 Q. Are you aware that if you continue to refuse to
3643 answer questions pursuant to privilege unrecognized by
3644 Congress while compelled, the chairman may compel your
3645 answer?

3646 A.I am not aware of what his authority is, but I am
3647 very aware of my responsibilities as an attorney and my
3648 license supervision if I were to evade privilege matters
3649 simply because I am being asked questions when I have
3650 not been directed by my client of any waiver.

3651 Q. Just so you know, in a deposition if you were to
3652 refuse to answer a question based on a privilege
3653 unrecognized, the chairman could direct you to answer
3654 the question.

3655 If you continue to refuse the question, are
3656 you aware you may be held in contempt of Congress?

3657 A. I am aware now.

3658 Q. All right. Thank you.

3659 MR. BENZINE: We can go off the record.
3660

3661 C E R T I F I C A T E

3662

3663

3664 STATE OF NEW YORK)

3665 : SS.:

3666 COUNTY OF SUFFOLK)

3667

3668 I, EILEEN MONTEAGUDO, a Notary Public for and within
3669 the State of New York, do hereby certify:

3670 That within the transcript is a true record of the
3671 proceedings taken on March 22, 2024.

3672 I further certify that I am not related to any of
3673 the parties to this action by blood or by marriage and
3674 that I am in no way interested in the outcome of this
3675 matter.

3676 IN WITNESS WHEREOF, I have hereunto set my hand this
3677 31st day of May 2024.

3678

3679

3680

3681

3682

EILEEN MONTEAGUDO