

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

IN RE: JUDGE ERNEST B. MURPHY

SJC NO. OE-0119

COMPLAINT NUMBERS 2006-9 AND 2006-30

**REPORT AND RECOMMENDATION OF
THE COMMISSION ON JUDICIAL CONDUCT**

INTRODUCTION

Pursuant to G.L. c. 211C, secs. 7(9) and (10) and Rule 11F of the Rules of the Commission on Judicial Conduct, the Commission on Judicial Conduct ("the Commission") submits to the Supreme Judicial Court its conclusions and recommendations for discipline in the above-captioned matter.

For the reasons described below, the Commission recommends that Judge Ernest B. Murphy be publicly censured, suspended without pay for 30 days, pay a \$25,000 fine, and pay the costs incurred by the Commission in connection with this matter.

I. PROCEDURAL HISTORY

1. On January 10, 2006, the Commission initiated a complaint (Complaint No. 2006-9) against Judge Ernest B. Murphy ("Judge Murphy").¹ A second complaint was filed against Judge Murphy by the *Boston Herald* on February 17, 2006 (Complaint No. 2006-30).² Both complaints alleged that Judge Murphy committed misconduct by sending letters regarding a libel lawsuit he had brought against the *Boston Herald* and several of its reporters to the publisher of the *Boston Herald*, Patrick Purcell ("Mr. Purcell"). The Commission's complaint alleged that it was improper for Judge Murphy to use official court stationery for these letters. The *Boston Herald's* complaint also made various allegations that the tone and content of Judge Murphy's letters were improper.
2. On April 17, 2007, the Commission, acting pursuant to G.L. c. 211C, sec. 5(7) and Commission Rule 6J, found that there was adequate reason to proceed to a

¹ Complaint 2006-9 is enclosed with the Commission's Report as Appendix A.

² Complaint 2006-30 is enclosed with the Commission's Report as Appendix B.

Statement of Allegations in the above complaints and presented those allegations to Judge Murphy.³

3. Under a date of May 8, 2007, Judge Murphy filed with the Commission his written Answer to the Statement of Allegations pursuant to Rule 6L.⁴ Judge Murphy did not request a personal appearance before the Commission.
4. On June 26, 2007, the Commission, acting pursuant to G.L. c. 211C, sec. 5(14) and Commission Rule 7B(4), found sufficient cause to issue Formal Charges in the above complaints and presented those charges to Judge Murphy.⁵
5. In its Formal Charges, the Commission alleged “that Judge Murphy has engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer.”⁶

The Commission charged Judge Murphy with violation of Canons 1A, 2, 2A, 2B, 4A(1) and 4D(1) of the Massachusetts Code of Judicial Conduct (“the Code”).

6. Under date of July 9, 2007, Judge Murphy filed with the Commission his Answer to the Formal Charges.⁷
7. The Commission filed the Formal Charges and Judge Murphy’s Answer with the Supreme Judicial Court on July 10, 2007, requesting the appointment of a hearing officer. The Court appointed retired former Chief Justice of the Land Court, Peter W. Kilborn (“Judge Kilborn”), as Hearing Officer on July 25, 2007.
8. In response to a “Motion for Specifications” filed by counsel for Judge Murphy on August 23, 2007, counsel for the Commission filed a “Notice of Anticipated Evidence and Proposed Standards of Law” on September 12, 2007.⁸
9. In response to motions *in limine* filed by counsel for Judge Murphy and counsel for the Commission, the Hearing Officer conducted a closed hearing on October 4, 2007.

³ The Statement of Allegations is enclosed with the Commission’s Report as Appendix C.

⁴ Judge Murphy’s Answer to the Statement of Allegations is enclosed with the Commission’s Report as Appendix D.

⁵ The Formal Charges are enclosed with the Commission’s Report as Appendix E.

⁶ M.G.L. c 211C, secs. 2(5)(b), 5(d), and (5)(e).

⁷ Judge Murphy’s Answer to the Formal Charges is enclosed with the Commission’s Report as Appendix F.

⁸ The “Motion for Specifications” and the “Notice of Anticipated Evidence and Proposed Standards of Law” are enclosed with the Commission’s Report as Appendices G and H, respectively.

In a ruling dated October 8, 2007, the Hearing Officer ordered that information relating to this hearing remain confidential, but that certain materials relating to this hearing be transmitted to the Commission for it to consider.⁹

10. The Formal Hearing on the complaints took place October 15 and 16, 2007 before Judge Kilborn.¹⁰ The hearing was public. Three witnesses testified under oath: Judge Murphy, Howard M. Cooper, Esq. ("Mr. Cooper"), and Mr. Purcell.

Both days of the hearing were transcribed. The Commission was represented by Staff Attorney Howard V. Neff, III, Esq. and Judge Murphy by Michael E. Mone, Esq. ("Mr. Mone"). Gillian E. Pearson ("Ms. Pearson"), Executive Director of the Commission, was also present, as was Judge Murphy throughout. Five exhibits were introduced and two exhibits were marked for identification.¹¹

11. The Hearing Officer ruled that the Hearing would officially close as of October 30, 2007, to allow counsel time to file proposed findings and conclusions.¹²
12. On November 19, 2007, Judge Kilborn submitted his Hearing Officer's Report to the Commission and to counsel for Judge Murphy.¹³ In his report, Judge Kilborn made proposed findings that Judge Murphy "engaged in conduct prejudicial to the administration of justice and unbecoming a judicial officer," but did not engage in "willful misconduct."

Judge Kilborn also made proposed findings that Judge Murphy violated Canons 1A, 2, 2A, and 2B, but did not violate Canon 4A(1) or Canon 4D(1).

Finally, Judge Kilborn recommended that Judge Murphy be publicly reprimanded and be assessed the costs and expenses of the Commission during the Formal Hearing.

13. On January 8, 2008, the Commission held a public hearing pursuant to Commission Rule 11E, after being notified that both Judge Murphy and the *Boston Herald* wished to be heard before the Commission regarding its recommendation for

⁹The materials the Hearing Officer ordered to be transmitted, including the transcript of the closed hearing, the motions *in limine* (including supporting memorandums of law and exhibits), and Judge Kilborn's ruling are enclosed with the Commission's Report, under seal, as Appendix I.

¹⁰ The transcripts of the Formal Hearing in this matter are enclosed with the Commission's Report as Appendix J.

¹¹ The Exhibits and Identifications introduced during this Hearing are enclosed with the Commission's Report as Appendix K.

¹² The Proposed Findings and Conclusions filed by counsel for Judge Murphy and counsel for the Commission are enclosed with the Commission's Report as Appendices L and M, respectively. Appendix L also includes a "Reply Memorandum on Sanctions" filed by counsel for Judge Murphy.

¹³ The Hearing Officer's Report to the Commission is enclosed with the Commission's Report as Appendix N.

discipline in this matter.¹⁴ At this hearing, Mr. Purcell made a statement on behalf of the *Boston Herald*. Mr. Mone made a statement on behalf of Judge Murphy.

II. FINDINGS OF FACT

The Commission finds, on the basis of the record of the public hearing and the findings of the Hearing Officer in this matter, that the facts are as follows:

1. Judge Murphy was appointed an Associate Justice of the Superior Court Department of the Trial Court on August 31, 2000 and, as of the date of the hearing, had served continuously in that capacity since appointment.¹⁵ As of the date of the hearing, he was not sitting as a judge.¹⁶
2. On February 13, 2002, the *Boston Herald* published the first of several articles about Judge Murphy.¹⁷ The front-page article, written by a reporter for the *Boston Herald*, David Wedge, and another reporter, ran under the headline “Murphy’s law.”¹⁸ Judge Murphy testified that these articles reported that he had “bailed out rapists” appearing before him in court, and that these articles reported that he had said that a 15-year-old rape victim should “get over it.”¹⁹
3. Regarding the profoundly negative public reaction to these articles, Judge Murphy stated, “It was killing me and my family.”²⁰ One of the judge’s daughters was particularly affected.²¹ One of the judge’s daughters was still in therapy at the time of the Formal Hearing.
4. Judge Murphy, acting in his personal capacity, filed a libel lawsuit against the *Boston Herald* and several of its reporters on June 3, 2002.²²
5. As of the date of the Formal Hearing, Mr. Purcell was the publisher of the *Boston Herald* and had served in that capacity since 1984, thus including all times relevant here.²³ Mr. Purcell was also, at the time of the hearing, the “principal owner” of the *Boston Herald*.²⁴

¹⁴ The transcript of this Rule 11E Hearing is enclosed with the Commission’s Report as Appendix O.

¹⁵ Hearing Exhibit 1.

¹⁶ (Tr. Vol. I, 33:15-19)

¹⁷ (Tr. Vol. I, 110:5-8)

¹⁸ (Tr. Vol. I, 110:17-20)

¹⁹ (Tr. Vol. I, 111:3-17)

²⁰ (Tr. Vol. I, 117:21)

²¹ (Tr. Vol. I, 117:3-23)

²² (Tr. Vol. I, 35:2-11) and Hearing Exhibit 1.

²³ (Tr. Vol. I, 172:14-18)

²⁴ (Tr. Vol. I, 172:14-18)

6. Mr. Purcell had been the publisher and principal owner of the *Boston Herald* since initial publication by the *Boston Herald* of the articles concerning Judge Murphy that gave rise to the libel suit Judge Murphy filed in 2002.
7. Mr. Purcell did not attend law school and is not a lawyer.²⁵
8. In his libel action, Judge Murphy was represented by Attorney Howard Cooper, from the firm of Todd & Weld, LLP.²⁶
9. The *Boston Herald* and Mr. Purcell were represented in the libel action by Attorney M. Robert Dushman ("Mr. Dushman"), of the firm of Brown, Rudnick, Berlack, Israels, LLP. ("Brown Rudnick").²⁷
10. Brown Rudnick has been the *Boston Herald's* counsel, on both libel and business matters, since 1982.²⁸ Mr. Dushman passed away prior to the Formal Hearing of this matter.
11. When he filed the libel suit, Judge Murphy had strong feelings that he would win his lawsuit, and that the *Boston Herald* was "in serious trouble."²⁹
12. In September 2003, Judge Murphy sought a private, one-on-one, settlement discussion with Mr. Purcell.³⁰
13. Judge Murphy's intent in seeking the meeting was to settle the libel action and to convince Mr. Purcell that he should have independent counsel review the case to determine whether Mr. Purcell was obtaining correct advice from his counsel (Brown Rudnick).

Judge Murphy's intent in seeking the meeting was also to persuade Mr. Purcell to adopt his legal opinion that the *Boston Herald* could not prevail in its defense of the lawsuit and should settle.

14. Mr. Cooper contacted Mr. Purcell's and the *Boston Herald's* lawyer, Mr. Dushman, by e-mail to arrange this meeting.³¹ In this September 29, 2003 e-mail to Mr. Dushman, Mr. Cooper wrote, "We have agreed that the meeting will not be attended

²⁵ (Tr. Vol. I, 181:22-24)

²⁶ (Tr. Vol. I, 37:21-24)

²⁷ (Tr. Vol. I, 38:2-5)

²⁸ (Tr. Vol. I, 189:2-4)

²⁹ (Tr. Vol. I, 50:23-24; 51:1-21)

³⁰ (Tr. Vol. I, 37:10-18)

³¹ Hearing Exhibit 2.

by counsel and will constitute confidential settlement discussions.” This e-mail confirmed oral understandings between the attorneys to the same effect.³²

15. A private meeting took place between Mr. Purcell and Judge Murphy in October of 2003 at Mr. Purcell’s office at the *Boston Herald*.³³
16. The time and location of this meeting were arranged by the respective counsel for Mr. Purcell and Judge Murphy.³⁴
17. At this October 2003 meeting, Judge Murphy urged Mr. Purcell to check his sources and to seek the advice of independent counsel.³⁵ Mr. Purcell said he was confident in his sources and that he was following the advice of counsel.³⁶
18. At the time of this first meeting, Mr. Purcell was aware that Judge Murphy was a judge.³⁷
19. During the meeting the judge said to Mr. Purcell, “Everything between us is between us, right, Pat?” and Mr. Purcell responded, “Absolutely,” and they shook hands.³⁸ The judge left the meeting thinking he and Mr. Purcell had established a personal line of communications, as principals in the case.
20. Judge Murphy, through Mr. Cooper, sought a second meeting with Mr. Purcell in or about April 2004.³⁹ The timing and location of this meeting were arranged by the attorneys for Judge Murphy and Mr. Purcell.⁴⁰ The understanding from the earlier September 2003 e-mail exchange between the attorneys that the October 2003 meeting would not be attended by counsel and would constitute confidential settlement discussions also applied to the second meeting, which took place at Mr. Purcell’s *Boston Herald* office in April of 2004.⁴¹
21. Around that time, the *Boston Herald* and Mr. Purcell were unsuccessful in a summary judgment motion.⁴² Judge Murphy’s memory is that he sought the second

³² (Tr. Vol. I, 153:2-9)

³³ (Tr. Vol. I, 41:13-19)

³⁴ (Tr. Vol. I, 38:6-17)

³⁵ (Tr. Vol. I, 121:13-16)

³⁶ (Tr. Vol. I, 121:2-3; 121:12-13)

³⁷ (Tr. Vol. I, 181:19-21)

³⁸ (Tr. Vol. I, 42:7-20)

³⁹ (Tr. Vol. I, 43:16-24; 44:1-24)

⁴⁰ (Tr. Vol. I, 44:22-24; 45:1-2)

⁴¹ (Tr. Vol. I, 45:8-10)

⁴² (Tr. Vol. I, 183:6-14)

meeting shortly after the ruling on the motion (or if not then, at least after the motion had been argued.)⁴³

22. At this second meeting, Judge Murphy's intent was to impress on Mr. Purcell that the judge had a strong case and that the suit should settle or be submitted to mediation.
23. At both meetings, Judge Murphy attempted to explain to Mr. Purcell the adverse effect that the *Boston Herald's* actions were having on him and his family. The judge was "visibly upset, emotional" at the first meeting, and at one point during this first meeting, Mr. Purcell "feared [Judge Murphy] might overreact and do something that might be physically harmful" to Mr. Purcell.⁴⁴
24. Judge Murphy was "even more forceful" during the second meeting with Mr. Purcell.⁴⁵
25. Judge Murphy left this second meeting thinking that he and Mr. Purcell had established a personal line of communications and that the communications were confidential, as settlement discussions.
26. Mr. Purcell did not leave the second meeting with the judge with an understanding that settlement discussions were still in progress or that there was a confidential private line of communication between him and the judge.
27. At neither meeting was there a specific discussion between Judge Murphy and Mr. Purcell regarding continuing to have ongoing direct contact about this libel suit without the knowledge of their respective attorneys.⁴⁶
28. At no point during either meeting did Judge Murphy or Mr. Purcell give the other his phone number or e-mail address.⁴⁷
29. No settlement resulted from these meetings and the libel suit went to trial in January of 2005.⁴⁸
30. There was no direct contact between Judge Murphy and Mr. Purcell between their two meetings or between the second meeting and the beginning of the trial in January of 2005.⁴⁹

⁴³ (Tr. Vol. I, 44:3-14)

⁴⁴ (Tr. Vol. I, 179:13-16)

⁴⁵ (Tr. Vol. I, 184:7-12)

⁴⁶ (Tr. Vol. I, 180:19-24; 181:1; 183:23-24; 185:1-6)

⁴⁷ (Tr. Vol. I, 43:3-15)

⁴⁸ (Tr. Vol. I, 185:12-15)

31. In February of 2005, the libel trial ended and the jury found that Judge Murphy had been libeled by the *Boston Herald*, returning a verdict in Judge Murphy's favor for \$2.09 million.⁵⁰
32. After the jury verdict in his favor, and because of the stress on him and his family, Judge Murphy was "desperate" to settle the libel lawsuit and did not want the *Boston Herald* to appeal the verdict.⁵¹
33. It was with that "desperate" state of mind that, "immediately"⁵² after the jury returned its verdict, Judge Murphy "begged"⁵³ his counsel Mr. Cooper to arrange a "four-way" meeting to discuss settlement of the case.⁵⁴ At this meeting, Judge Murphy, Mr. Cooper, Mr. Purcell and Mr. Dushman would have been present.⁵⁵
34. Judge Murphy hoped that the *Boston Herald's* attorney would be someone other than an attorney from Brown Rudnick, an attorney "who could evaluate the situation neutrally."⁵⁶
35. Judge Murphy was told that the other side was "not interested in a four-way conference."⁵⁷
36. After being told the other side was not interested in a settlement discussion, Judge Murphy then concluded he could still communicate directly with Mr. Purcell, as a principal.⁵⁸
37. The judge continued to believe that, if he could communicate with Mr. Purcell, Mr. Purcell would ultimately understand that the *Boston Herald* would, in all likelihood, lose its appeal, resulting in a greater payment to Judge Murphy than if the case settled at that time. The two letters then ensued.
38. Judge Murphy initiated direct contact with Mr. Purcell by writing a letter to him, dated February 20, 2005, on official Superior Court stationery, upon which was also printed the words, "Ernest B. Murphy, Associate Justice," proposing a meeting.⁵⁹

⁴⁹ (Tr. Vol. I, 182: 8-12; 185:7-11)

⁵⁰ (Tr. Vol. I, 185:16-21)

⁵¹ (Tr. Vol. I, 54:4-12)

⁵² (Tr. Vol. I, 59:16-17)

⁵³ (Tr. Vol. I, 60:8-13)

⁵⁴ (Tr. Vol. I, 55:17-24; 58:4-19; 59:13-24)

⁵⁵ (Tr. Vol. I, 56:1-23)

⁵⁶ (Tr. Vol. I, 56:7-17)

⁵⁷ (Tr. Vol. I, 58:4-19)

⁵⁸ (Tr. Vol. I, 60:17-24)

⁵⁹ (Tr. Vol. I, 61:14-18) and Hearing Exhibit 1.

39. This February 20, 2005 letter included a post-script, dated February 19, 2005, written by Judge Murphy on a separate sheet of the same official Superior Court stationery.⁶⁰
40. Judge Murphy mailed the letter and its post-script in a Superior Court envelope on which he handwrote "Murphy, J." above the printed return address.⁶¹ It was addressed to Mr. Purcell at the newspaper and was received by Mr. Purcell.⁶²
41. This official letterhead stationery was provided to Judge Murphy by the Massachusetts Trial Court at the same time he received official court stationery envelopes and business cards.⁶³
42. Judge Murphy sent this letter to Mr. Purcell at the main address for the *Boston Herald* after Judge Murphy, through his own efforts, determined what the address was.⁶⁴ Mr. Purcell did not provide Judge Murphy with any address at which to contact him.⁶⁵
43. Judge Murphy's intentions regarding the February 20th letter included the following:
 - i. An intent to renew his urgings that Mr. Purcell obtain the advice of new counsel. Judge Murphy knew that Brown Rudnick had represented Mr. Purcell throughout the entire libel suit to date.

Judge Murphy believed that Brown Rudnick would necessarily have to defend the advice the firm had given the *Boston Herald* and, accordingly, he wanted to exclude them from the proposed meeting.
 - ii. An intent to persuade the *Boston Herald* to pay him a settlement amount greater than the amount Judge Murphy knew he was entitled to as of that date.

⁶⁰ Hearing Exhibit 1.

⁶¹ Hearing Exhibit 1.

⁶² Hearing Exhibit 1 and (Tr. Vol. I, 193:22-24; 194:1-2)

⁶³ (Tr. Vol. I, 109:9-20)

⁶⁴ (Tr. Vol. I, 92:3-12)

⁶⁵ (Tr. Vol. I, 92:13-22)

In his letter to Mr. Purcell, Judge Murphy told Mr. Purcell that part of the “price” for this meeting was that Mr. Purcell had to bring a cashier’s check to the meeting payable to Judge Murphy. Judge Murphy wrote, “No check, no meeting.” In this letter, Judge Murphy proposed a settlement amount of \$3.26 million.

Judge Murphy was aware that, at this point in time, the *Boston Herald* owed him only \$2.8 million dollars (the \$2.09 million jury verdict plus statutory interest as of that date).⁶⁶

Judge Murphy calculated that pre-and post judgment interest brought the amount he was owed by the *Boston Herald* to around \$2,800,000 and he calculated that the *Boston Herald* would owe him “at least another \$500,000” after they pursued an appeal of the libel verdict.⁶⁷

How Judge Murphy calculated the specific monetary figure of \$3.26 million is not clear.

iii. An intent to intimidate Mr. Purcell.

Judge Murphy proposed the higher settlement amount, \$3,260,000, as part of a strategy designed to “hit [Mr. Purcell] in the face with \$3.26 million”⁶⁸ and make “him think out of the box.”⁶⁹ Judge Murphy intended to “shake [Mr. Purcell] up” and have “[Mr. Purcell] say this guy’s crazy.”⁷⁰

The intentional use of official court stationery for this letter, as well as the tone of this letter and the choice of words and punctuation in this letter, were intimidating.

Judge Murphy acknowledged that the tone of his correspondence was strong and that the tone was deliberate: “I was taking my gloves off because I wanted to settle this case, and I thought this was the only thing I had left, is to roll up my sleeves with this guy and let him have it, that might possibly precipitate a change in his position.”⁷¹

Judge Murphy further admitted with respect to his February 20th letter, “I

⁶⁶ (Tr. Vol. I, 72: 3-13; 78:10-17)

⁶⁷ (Tr. Vol. I, 106:13-16)

⁶⁸ (Tr. Vol. I, 104:18-23)

⁶⁹ (Tr. Vol. I, 105:10-11)

⁷⁰ (Tr. Vol. I, 105:17)

⁷¹ (Tr. Vol. I, 84:15-24; 85:1-17)

agree that it was strong. I agree that it was tough.”⁷²

- iv. An intent to exclude Mr. Purcell’s counsel from Brown Rudnick from any knowledge of the meeting Judge Murphy proposed and, therefore, to exclude Mr. Purcell’s counsel from Brown Rudnick from providing any legal advice regarding the settlement Judge Murphy proposed in this letter.
 - v. An intent, by referring to “ole Mike Ditka” in this letter, to remind Mr. Purcell that he had, in the two meetings with Mr. Purcell, warned him that the judge would win his case.⁷³
44. Mr. Purcell did not respond in any way to Judge Murphy’s February 20, 2005 letter and there was no contact of any kind between Judge Murphy and Mr. Purcell between February 20, 2005 and March 18, 2005.⁷⁴
45. On March 18, 2005, the *Boston Globe* published an article alleging financial difficulties at the *Boston Herald*.⁷⁵ That and associated articles prompted Judge Murphy to send the March 18, 2005 letter.⁷⁶ Judge Murphy knew that his libel suit against the *Boston Herald* was being covered by the media.⁷⁷
46. Judge Murphy wrote the March 18, 2005 letter on plain stationery but enclosed it in an official court stationery envelope.⁷⁸ On the envelope, Judge Murphy crossed out “Walter F. Timilty, Clerk of Courts” and handwrote “Murphy, J. Superior Court” above the Norfolk County court return-address. Judge Murphy addressed this letter to Mr. Purcell at the *Boston Herald*, where Mr. Purcell received it.⁷⁹
47. Mr. Purcell did not provide Judge Murphy with any address at which to contact him and Judge Murphy, therefore, sent this letter to Mr. Purcell at the main address for the *Boston Herald* after Judge Murphy, through his own efforts, determined what the address was.⁸⁰
48. Judge Murphy’s intentions in his March 18th letter included the following:
- i. An intent to renew his urgings that Mr. Purcell obtain the advice of new counsel.

⁷² (Tr. Vol. I, 84:15-24; 85:1-17)

⁷³ Hearing Exhibit 1.

⁷⁴ (Tr. Vol. I, 86:1-6; 191:20-24; 192:1-15)

⁷⁵ (Tr. Vol. I, 87:3-9) and Hearing Exhibit 3.

⁷⁶ (Tr. Vol. I, 86:13-20)

⁷⁷ (Tr. Vol. I, 86:13-20) and Hearing Exhibit 3.

⁷⁸ Hearing Exhibit 1.

⁷⁹ Hearing Exhibit 1 and (Tr. Vol. I, 193:22-24; 194:1-2)

⁸⁰ (Tr. Vol. I, 92:3-22)

- ii. An intent, through his use of court stationery and through his use of language, capitalization, and underlining, to intimidate Mr. Purcell and to improperly urge him to substitute Judge Murphy's legal opinion for the opinion of his own attorneys.
49. Judge Murphy sent these letters to Mr. Purcell after being warned about the use of official court stationery. Judge Murphy had received a letter, dated August 21, 2002, from the Executive Director of the Commission on Judicial Conduct, Gillian Pearson. In this letter, Judge Murphy was advised to "consider the appropriateness of using judicial stationery for certain purposes."⁸¹
50. Mr. Purcell thought both letters were strange, coming from a judge, and that they were akin to "ransom notes" and an attempt to intimidate him and the *Boston Herald*.⁸²
51. Mr. Purcell did not feel threatened or intimidated by the letters.
52. Mr. Purcell alerted his counsel, Mr. Dushman, to these two letters from Judge Murphy. Mr. Purcell and Mr. Dushman decided not to respond in any way to the February 20th and March 18th letters from Judge Murphy, preferring to await the results of the appeal.⁸³
53. Attorney Bruce Sanford ("Mr. Sanford") argued the appeal of the libel case for the *Boston Herald*. He came into the case in early December 2005. There was then discussion between Mr. Cooper and Mr. Dushman about a possible four-way meeting, but nothing came of that.⁸⁴
54. In December of 2005, Judge Murphy's attorney filed a motion "to freeze the assets of the *Herald*."⁸⁵
55. When Judge Murphy's lawyer filed this motion, the response from the *Boston Herald*, in Mr. Purcell's words, was as follows: "[W]e decided that something else had to be done. The efforts on Judge Murphy's part to work out a settlement, and then these letters in combination with the movement to freeze our assets, basically made us say, 'We cannot go on with this,' and so we had to fight back."⁸⁶

⁸¹ (Tr. Vol. I, 100:10-24; 101:1-18)

⁸² (Tr. Vol. I, 187:16-22; 194:3-9)

⁸³ (Tr. Vol. I, 194:10-22)

⁸⁴ Hearing Exhibit 4.

⁸⁵ (Tr. Vol. I, 195:7-8)

⁸⁶ (Tr. Vol. I, 195:6-16)

Mr. Purcell and the *Boston Herald* perceived Judge Murphy's letters to be part of a concerted effort by Judge Murphy and his lawyers to intimidate and pressure the *Boston Herald* not to pursue an appeal of the libel verdict.

56. On December 20, 2005, copies of Judge Murphy's letters were filed in support of an unsuccessful motion by the defendants in the lawsuit to vacate the judgment.⁸⁷
57. The lawyers for the *Boston Herald* filed Judge Murphy's February 20th and March 18th, 2005 letters as part of a court filing to "demonstrate that this was an effort on the part of Judge Murphy to get us to not pursue our rights, what our legal rights were."⁸⁸
58. When these letters were filed with the court on December 20, 2005, the Editor of the *Boston Herald* was notified and provided with a copy of the court submission.⁸⁹ Mr. Sanford and Mr. Purcell also held a press conference relating to Judge Murphy's letters on December 20, 2005.⁹⁰
59. Mr. Cooper learned about the letters Judge Murphy sent to Mr. Purcell on December 20 or 21, 2005, when asked about them by a reporter, who had just attended the press conference held by Mr. Sanford, disclosing the letters.⁹¹
60. On March 23, 2005, Mr. Cooper wrote a letter to Jerome Schaefer, the CEO of Mutual of Bermuda. Mutual of Bermuda was the insurer for the *Boston Herald*.⁹² In his letter, Mr. Cooper referred to an offer to meet he had made in a prior letter and then wrote:

"The offer to meet was solely so you and your client could hear directly from the plaintiff why there is little chance of the jury's verdict being set aside, since no doubt to date you have heard only from defense counsel (if anyone). There is a track record here on this case, and it is surprising that you would so quickly and cavalierly reject a genuine offer to hear from us. My client, as you know, is a sitting Superior Court judge. I would think you would be interested in what he has to say."

Mr. Cooper sent a copy of this letter to the *Boston Herald's* counsel, Mr. Dushman. A copy was also sent to Judge Murphy.

⁸⁷ (Tr. Vol. I, 199:21-24; 200:1-4; 200:11-21) and Hearing Exhibit 1.

⁸⁸ (Tr. Vol. I, 199:21-24; 200:1-4)

⁸⁹ (Tr. Vol. I, 200:22-24; 201:1-12)

⁹⁰ (Tr. Vol. I, 200: 11-21) and Hearing Exhibit 1.

⁹¹ (Tr. Vol. I, 164:5-18)

⁹² This letter is enclosed with the Commission's Report as Identification 2 in Appendix K.

61. The *Boston Herald* had a reasonable basis to perceive that Judge Murphy's letters were part of a concerted effort by Judge Murphy and his lawyers to intimidate and pressure the *Boston Herald* not to pursue an appeal of the libel verdict.
62. On December 21, 2005 the *Boston Herald* published an article in its print edition about Judge Murphy's February 20, 2005 and March 18, 2005 letters. This print article included excerpts from the February 20th letter (including the entire text of the post-script to this letter), and all of the text of the March 18th letter.⁹³
63. On December 21, 2005, the *Boston Herald* published the full text of these letters and actual copies of these letters in its online web edition.⁹⁴
64. As of December 21, 2005, the print edition of the *Boston Herald* had a circulation of about 230,000 to 240,000 readers.⁹⁵ As of December 21, 2005, the *Boston Herald's* website had "roughly 3 million unique visitors per month."⁹⁶
65. After a \$500,000 deductible, the insurance company for the *Boston Herald*, Mutual of Bermuda, had to bear the cost of the jury verdict and any legal fees that were incurred by the *Boston Herald*. Therefore, when the *Boston Herald* decided to pursue an appeal rather than settle after the jury verdict, the *Boston Herald's* financial liability remained limited to the same \$500,000 deductible.⁹⁷
66. The *Boston Herald* went forward with its appeal of the jury verdict and the Supreme Judicial Court affirmed the judgment, Murphy v. Herald, 449 Mass. 42 (2007).

III. FINDINGS AND CONCLUSIONS AS TO VIOLATIONS

The Commission makes the following findings and conclusions regarding the above facts:

1. Judge Murphy improperly used court stationery for personal business.

Though he admitted that his use of court stationery was improper, Judge Murphy also testified that at the time he sent the letters at issue in this case, he was unaware that the Code of Judicial Conduct prohibited the use of judicial stationery for personal business.

⁹³ Hearing Exhibit 1.

⁹⁴ (Tr. Vol. I, 202:5-14)

⁹⁵ (Tr. Vol. I, 202:20-22)

⁹⁶ (Tr. Vol. I, 202:23-24; 203:1-24)

⁹⁷ (Tr. Vol. I, 238:7-24; 239:1-5)

However, in August 2002, less than three years before he sent these letters, Judge Murphy had been warned by the Executive Director of the Commission on Judicial Conduct, Gillian Pearson, to “consider the appropriateness of using judicial stationery for certain purposes.”

Moreover, when Ms. Pearson wrote her letter in 2002, Canon 2B (the present Code provision whose Commentary expressly prohibits the use of “judicial letterhead and the judicial title” for personal business) was essentially the same as current Canon 2B. Though there was no commentary to the old Code, Canon 2B had always been interpreted as prohibiting the use of official judicial stationery for personal business.

2. The Commission concludes that Judge Murphy’s misconduct went beyond improper use of court stationery for personal business.

Judge Murphy, an experienced judge who had been previously warned about proper use of judicial stationery, knew that using official judicial stationery to send personal letters was improper and lent the prestige of the judge’s office to their content.

The Commission concludes that, in using judicial stationery, Judge Murphy improperly intended to inject his judicial position into his communications with Mr. Purcell.

3. The form, tone and content of Judge Murphy’s letters to Mr. Purcell were improper.

A judge may communicate directly as a litigant with the opposing party in the judge’s personal litigation. The mere sending of letters is not misconduct. A judge may also, in his own lawsuit, try to persuade the opposition not to appeal.

A danger exists, however, that, if the judge is not mindful of the form, tone and content of the communication, such communications by a judge may appear, to a reasonable person, to cross a line of propriety and imply that they carry special significance or weight because they come from a judge.

The Commission concludes that Judge Murphy’s letters to Mr. Purcell crossed that line.

In these letters, Judge Murphy sought to pressure Mr. Purcell, a non-lawyer, not to appeal the jury verdict in a civil lawsuit in which Judge Murphy was personally involved as the plaintiff. Judge Murphy's expression of his own legal opinion had greater weight and was more intimidating and threatening not just because the letters were written by a sitting Superior Court judge to a non-lawyer, but also because of the overall tone of the letters, the intentionally intimidating use of punctuation and capitalization, the choice of words, and because the letters were written using official court stationery.

4. The Commission concludes that it was improper for Judge Murphy to attempt to freeze the *Boston Herald's* counsel out of the meeting he proposed, indeed to require that they be kept in the dark about the meeting proposed in the first letter.

Mr. Purcell and the *Boston Herald* had been represented by the law firm Brown Rudnick throughout the libel suit, specifically Mr. Dushman, and Judge Murphy knew that.⁹⁸

Judge Murphy's letter required that Mr. Purcell not bring his lawyer from Brown Rudnick to this settlement meeting, tell his lawyer from Brown Rudnick that the meeting was going to take place, or show his lawyer from Brown Rudnick the February 20, 2005 letter from Judge Murphy.

The "price" of the meeting Judge Murphy proposed in his February 20th letter included conditions designed to prevent Mr. Purcell, a non-lawyer, from seeking advice about Judge Murphy's proposed settlement meeting from the counsel at Brown Rudnick who had represented him throughout the libel suit.

5. The Commission concludes that a reasonable objective person would perceive that the overall content and tone of Judge Murphy's letters to Mr. Purcell improperly suggest that Judge Murphy has special insight into the court system and special influence over it.
6. The Commission concludes that Judge Murphy's letters were improperly intimidating and threatening in tone.

A reasonable objective person, viewing the letters Judge Murphy sent to Mr. Purcell, might reasonably have apprehended that Judge Murphy might engage in some form of retribution against Mr. Purcell if his advice was not taken or his instructions were not followed.

⁹⁸ (Tr. Vol. I, 75:1-10)

Judge Murphy's February 20, 2005 letter concluded with a warning to Mr. Purcell that it would be a "mistake. In fact, a BIG mistake" to show the letter to anyone other than "the gentleman whose authorized signature will be affixed to the check in question." The language of this warning, coupled with the use of punctuation and capitalization, and the use of official court stationery, took on a threatening tone.

In the legal arena, at least, the power disparity that existed between Judge Murphy, a Superior Court judge, and Mr. Purcell, a non-lawyer, allowed a reasonable objective observer to believe that Judge Murphy could bring about negative consequences for Mr. Purcell. There was no need for Judge Murphy specifically to spell out what consequences might flow from the "BIG mistake" he warned Mr. Purcell not to make in order for the threat to be communicated. To a reasonable ordinary reader, the tone of this letter was ominous and implied that Judge Murphy could bring about negative consequences if his instructions were not followed.

Judge Murphy admitted that the tone of his letters was intentional: "I was taking my gloves off because I wanted to settle this case, and I thought this was the only thing I had left, is to roll up my sleeves with this guy and let him have it, that might possibly precipitate a change in his position." Judge Murphy further admitted with respect to his February 20th letter, "I agree that it was strong. I agree that it was tough." ⁹⁹

In his March 18, 2005 letter, Judge Murphy improperly "pretty strongly expressed"¹⁰⁰, his legal opinion of the *Boston Herald's* chances of successfully appealing the jury verdict in the libel suit. In this letter, Judge Murphy wrote:

"I'm going to, once again, principal to principal, as 'settlement negotiations' - off the record - just between you and me - tell you something which may help you in your decision-making. Something for nothing.

And that is . . . you have ZERO chance of reversing my jury verdict on appeal.

Anyone who is counseling you to the contrary . . . is WRONG.
Not 5% . . . ZERO.

⁹⁹ (Tr. Vol. I, 84:15-24; 85:1-24)

¹⁰⁰ (Tr. Vol. I, 88:22-23)

AND . . . I will NEVER, that is as in NEVER, shave a dime from what you owe me.”

Judge Murphy’s misconduct does not lie in the mere expression of his legal opinion in his own lawsuit. It is the language of this warning, coupled with the bizarre use of punctuation and capitalization and the use of an official court stationery envelope to send this letter that cause this letter to take on an improperly intimidating and threatening tone.

7. The Commission concludes that, in his February 20th letter to Mr. Purcell, Judge Murphy improperly attempted to coerce Mr. Purcell into settling the libel suit and not pursuing an appeal. The Commission also concludes that, as part of this coercion, Judge Murphy improperly sought to pressure the *Boston Herald* to settle the case for an excessive settlement amount of \$3.26 million.

In his February 20th letter, Judge Murphy instructed Mr. Purcell to bring a cashier’s check to the proposed settlement meeting for \$3.26 million and added, “no check, no meeting.”¹⁰¹ Judge Murphy proposed \$3.26 million as the only amount for which the case could be settled, despite the fact that Judge Murphy was fully aware that, at that point in time, the *Boston Herald* only owed him \$2.8 million (the \$2.09 million jury verdict plus statutory interest as of that date).¹⁰²

In this letter, Judge Murphy also offered to return the check or “flip it back” to Mr. Purcell if Mr. Purcell asked for its return. In his testimony during the Formal Hearing, Judge Murphy argued that his offer to settle the case for \$3.26 million was part of a settlement strategy.¹⁰³

However, Judge Murphy’s misconduct does not lie in the mere offer to settle his case for \$3.26 million. A judge may, in his own personal litigation, pursue a settlement. Judge Murphy’s violation of the Code lies in the form and content of the letter in which he proposed an excessive settlement and in the conditions he imposed on this offer to settle.

Judge Murphy proposed the \$3.26 million settlement in a letter that he wrote and addressed directly to Mr. Purcell. Judge Murphy intentionally injected his position as a judge into this communication with Mr. Purcell by using official judicial stationery to write and send the letter.

Judge Murphy proposed this \$3.26 million settlement in a letter whose tone and content were intentionally intimidating and whose tone and content intentionally

¹⁰¹ Hearing Exhibit 1.

¹⁰² (Tr. Vol. I, 72:3-13 and 78:10-17)

¹⁰³ (Tr. Vol. I, 134:15-20)

suggested that Judge Murphy had a special insight into and influence over the court system because of his position as a judge.

Moreover, as described above, the “price” of the settlement meeting Judge Murphy proposed in his February 20th letter included conditions that were designed to force Mr. Purcell, a non-lawyer, to evaluate this settlement proposal without advice from the counsel at Brown Rudnick who had represented him throughout the libel suit.

Judge Murphy wrote a letter whose form and content were designed to both isolate Mr. Purcell from his counsel at Brown Rudnick and also to intimidate and pressure Mr. Purcell into settling the case and accepting the excessive settlement proposed.

8. The Commission concludes that Judge Murphy failed to use reasonable care in choosing to send the letters at issue in this case to the publisher of a major metropolitan newspaper.

Judge Murphy knew that his libel suit against the *Boston Herald* had already been the subject of media coverage. He sent letters relating to that suit to Mr. Purcell despite the strong possibility that they would be published. In doing so, Judge Murphy aggravated his misconduct and greatly increased the damage to the image of the court system.

Immediately after his victory with the jury and motivated by his desperation to avoid a prolonged appeal process, Judge Murphy took steps to stop an appeal by the *Boston Herald*. He sought a four-person meeting, with Mr. Purcell and lawyers for both sides. He was told the other side was not interested in such a meeting.

Judge Murphy believed that he could still communicate with Mr. Purcell directly as a principal. However, Judge Murphy had the proper model for such communications before him, from his earlier meetings with Mr. Purcell.

Instead, Judge Murphy chose to send the letters to Mr. Purcell that gave rise to the present complaints.

Judge Murphy testified that he believed that, when he wrote the letters to Mr. Purcell, a mantle of confidentiality covered them.¹⁰⁴

The Commission concludes that repeated references in the letters to confidentiality and settlement negotiations show, at the very least, unease on Judge Murphy’s part that these letters were, in fact, covered under the prior confidentiality agreement he had with Mr. Purcell. Although the Commission reaches no conclusion as to Judge Murphy’s veracity on this issue, the Commission notes that when the idea of a

¹⁰⁴ (Tr. Vol. I, 132:9-23)

second four-way meeting surfaced in December 2005, the contacts were between the attorneys.¹⁰⁵

In any event, the Commission concludes that the letters were not covered by a mantle of confidentiality. The Commission further concludes that any belief Judge Murphy had that his letters to Mr. Purcell were covered by an earlier confidentiality agreement was unreasonable.

When the judge wrote the first letter, nine to ten months had passed since the last meeting, with no communication between the judge and Mr. Purcell. The judge knew that the two meetings he did have with Mr. Purcell had been arranged by their respective attorneys. The landscape between them had dramatically altered since his last meeting with Mr. Purcell: a trial had taken place and a verdict had been rendered in Judge Murphy's favor. In that context, it was unreasonable and reckless for Judge Murphy to send the letters on the assumption that they would be considered confidential.

IV. CONCLUSIONS AS TO FORMAL CHARGES

The Commission concludes, in light of the violations described above, that Judge Murphy violated the following Canons of the Code of Judicial Conduct:

1. CANON 1A

Judge Murphy's conduct in sending the letters at issue in this case failed to uphold the integrity of the judiciary and failed to observe high standards of conduct so that the integrity of the judiciary may be preserved, in violation of Canon 1A.

2. CANON 2, 2A, 2B

When Judge Murphy sent letters, dated February 20, 2005 and March 18, 2005, to Mr. Purcell, using official court stationery, Judge Murphy failed "to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "len[t] the prestige of judicial office for the advancement of the private interests of the judge" in violation of Canons 2, 2A and 2B.

3. CANON 4A(1), 4D(1)

In its Formal Charges, the Commission alleged that Judge Murphy failed "to

¹⁰⁵ (Tr. Vol. I, 131:1-13) and Hearing Exhibit 4.

conduct [his] extra-judicial activities so that they do not cast doubt on the judge's capacity to act impartially as a judge" in violation of Canon 4A(1).

The Commission concludes that Judge Murphy did not violate Canon 4A(1).

However, the Commission concludes that Judge Murphy's pursuit of the financial settlement of a civil lawsuit in which he was a party, and from which he would receive a personal financial benefit, did constitute a "financial dealing" as defined in Canon 4D(1).

The Commission also concludes, therefore, that by writing the letters at issue in this case using judicial stationery, Judge Murphy failed "to refrain from financial and business dealings . . . that may interfere with the proper performance of the judge's judicial position [or] that may reasonably be perceived to exploit the judge's judicial position" and violated Canon 4D(1).

4. M.G.L. c. 211C, secs. 2 (5)(c) and 2(5)(d)

In its Formal Charges, the Commission charged, under G.L. c. 211C, that Judge Murphy engaged in "willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer."

When he sent the letters at issue in this case, Judge Murphy knowingly and intentionally used language, imposed conditions, and used official court stationery in support of an excessive settlement proposal in order to intimidate Mr. Purcell.

Judge Murphy knew he was making improper use of judicial stationery to send these letters and he intended to inject his judicial position into his dialogue with Mr. Purcell.

When he wrote the letters at issue in this case, Judge Murphy knew Mr. Purcell and the *Boston Herald* owed him less money than he was demanding. Judge Murphy intended to pressure Mr. Purcell into settling for more money than Judge Murphy was entitled to. Judge Murphy knew that his demand was one of several coercive elements in the letters by which he intended to pressure Mr. Purcell into settling the case.

Judge Murphy knew Mr. Purcell and the *Boston Herald* had been represented throughout the libel suit by Mr. Dushman. Judge Murphy intentionally placed conditions on the meeting he proposed which were designed to prevent Mr. Dushman from knowing about this offer of settlement or offering Mr. Purcell or the *Boston Herald* any advice regarding this proposal.

The Commission concludes that Judge Murphy has engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer.

V. RECOMMENDATIONS AS TO DISCIPLINE

After careful deliberation, the Commission respectfully recommends that Judge Murphy be publicly censured, suspended without pay for thirty days, fined \$25,000, and assessed the costs incurred by the Commission in connection with this matter.

The reasons for this recommendation are as follows:

1. Judge Murphy's misconduct breached his duty to the public to observe high standards so that the integrity of the judiciary may be preserved and his duty to avoid creating an appearance of impropriety.

"A judge . . . must be sensitive to the impression which his conduct creates in the minds of the public."¹⁰⁶ As was true in *In the Matter of Bonin*, Judge Murphy "has manifested an unacceptable degree of insensitivity to those special obligations which are imposed on a person in his position. He has failed to perceive that the public often does not distinguish between a . . . [j]ustice as a judge and a . . . [j]ustice as a person."¹⁰⁷ To use his official judicial stationery to repeatedly attempt to persuade the other side not to appeal and then to expect that Mr. Purcell or the *Boston Herald* "should view his actions merely as that of a private citizen, shows an inclination to accept the benefits of his office unaccompanied by any of its burdens."¹⁰⁸

2. Judge Murphy's misconduct was willful.

The act of letter writing is time-consuming and, therefore, involves a degree of reflection and contemplation regarding the appropriateness of the statements that are made, the propositions that are put forward, and the words that are chosen. It was in this context that Judge Murphy chose to write the letters at issue, letters whose tone and content are improper, and it was in this context that Judge Murphy chose to use official court stationery for these letters, knowingly and intentionally injecting his judicial position into his dialogue with Mr. Purcell.

¹⁰⁶ In the Matter of Robert M. Bonin, 375 Mass. 680, 711 (1978).

¹⁰⁷ Id.

¹⁰⁸ Id.

3. In sending the letters at issue in this case to the publisher of the *Boston Herald*, Judge Murphy failed to exercise reasonable care and aggravated the damage his misconduct inflicted on the public's confidence in the honesty and integrity of the judiciary.

The Commentary to Rule 2A of the Massachusetts Code of Judicial Conduct warns, "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen."

In Massachusetts, the Supreme Judicial Court has held that judges have an obligation to "take reasonable precautions," both on and off the bench, "to avoid having a negative effect on the confidence of the thinking public."¹⁰⁹ In *In the Matter of Morrissey*, the Supreme Judicial Court held that a "careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety" was sufficient to support a finding of misconduct.¹¹⁰

Judge Murphy's decision to send the letters at issue in this case to the publisher of a major newspaper with a daily circulation of 230,000 to 240,000 readers constituted a "careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety."

Judge Murphy failed in his duty to "[take] 'reasonable precautions' to avoid having 'a negative effect on the confidence of the thinking public in the administration of justice.'"¹¹¹

4. In connection with its recommendations for discipline, the Commission considered the following aggravating factors:
 - a. Despite a prior warning about the use of judicial stationery, Judge Murphy used official judicial stationery to send the two letters at issue in this case.

Judge Murphy had been previously advised by Ms. Pearson, the Executive Director of the Commission on Judicial Conduct, in August of 2002, to "consider the appropriateness of using judicial stationery for certain purposes."

¹⁰⁹ *In the Matter of Robert M. Bonin*, 375 Mass. 680, 706 (1978)

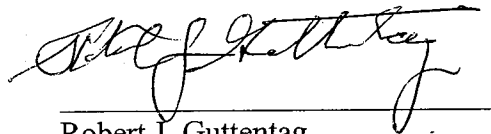
¹¹⁰ *In the Matter of Morrissey*, 366 Mass. 11, 16 (1974).

¹¹¹ *Inquiry Concerning a Judge*, 532 P.2d 716 (Alaska 1990), quoting *In the Matter of Bonin*, 375 Mass. 680 (1978).

- b. The Commission submits herewith, under seal, additional information that it considered in connection with its recommendations for discipline. The Commission encloses these materials with its Report as Appendix I.
 - c. When he wrote the letters, Judge Murphy had been on the bench for about four and a half years. He was not a newcomer.
5. In connection with its recommendations for discipline, the Commission considered the following mitigating factors:
- a. Judge Murphy and his family were under very substantial stress as a result of the *Boston Herald's* articles in February 2002 and the aftermath that flowed from those articles.
 - b. None of Judge Murphy's conduct in this matter involved his activities as a judge. The conduct was part of his private, not judicial, life.

For all the above reasons, the Commission respectfully recommends that the Supreme Judicial Court impose a sanction in this matter of public censure, suspension without pay for thirty days, a \$25,000 fine, and an assessment of the costs incurred by the Commission in connection with this matter.

For the Commission,

A handwritten signature in dark ink, appearing to read "Robert J. Guttentag", written over a horizontal line.

Robert J. Guttentag
Chairman

Dated: March 31, 2008