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COMMONWEALTH OF MASSACHUSETTS
 COMMISSION ON JUDICIAL CONDUCT
 Complaint Nos. 2006-9; 2006-30

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 IN RE: JUDGE ERNEST B. MURPHY :
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BEFORE: Honorable Peter W. Kilborn

APPEARANCES:

Commission on Judicial Conduct
 (by Howard Neff, Esq.)
 11 Beacon Street, Suite 525,
 Boston, MA 02108, for the Commission on
 Judicial Conduct.

Esdaile Barrett & Esdaile
 (by Michael E. Mone, Esq.)
 75 Federal Street, 16th Floor,
 Boston, MA 02110,
 for Honorable Ernest B. Murphy

ALSO PRESENT:

Gillian E. Pearson, Executive Director,
 Commission on Judicial Conduct

Honorable Ernest B. Murphy

Held at:
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, Massachusetts
Monday, October 15, 2007
9:30 a.m.

(Anne H. Bohan, Registered Diplomate Reporter)

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I N D E X

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2 Letter dated March 23, 2005,
to Jerome C. Schaefer from
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P R O C E E D I N G S

(Court reporter sworn)

MR. MONE: Your Honor, may I see you and Mr. Neff for just a minute?

JUDGE KILBORN: Yes.

(Discussion off the record)

JUDGE KILBORN: We are on the record. This is a hearing conducted in connection with two complaints before the Commission on Judicial Conduct, 2006-9 and 2006-30, concerning Judge Ernest Murphy. I'm going to, just as background, give a very brief, and I hope nonpartial, summary of where we are today.

Judge Murphy filed a lawsuit against the *Boston Herald* and won the lawsuit. After the lawsuit he wrote a letter to the publisher of the *Boston Herald* requesting a meeting. This was on Superior Court letterhead. He followed it up with another letter not on letterhead but in a Superior Court envelope also requesting a meeting.

This led to the filing of a complaint by the *Boston Herald* against the Judge under the statute dealing with judicial conduct, and it was also a complaint instigated by the Committee on

1 Judicial Conduct itself, the two numbered complaints
2 which I listed above.

3 Formal charges against the Judge were filed
4 with the Supreme Judicial Court. He in turn filed a
5 reply which is of record. That's the background of
6 the case. There are many more details, and these
7 will be explained and brought out as we proceed.
8 But I thought for background you might want to know
9 that.

10 The Commission on Judicial Conduct is
11 represented by Attorney Howard Neff who is here.
12 Judge Murphy is represented by Attorney Michael Mone
13 who is here. The Commission -- well, three things
14 are supposed to come out of this hearing: We're
15 supposed to establish the facts relating to these
16 complaints; I'm supposed to make a recommendation to
17 the Commission as to whether the facts as so
18 developed constitute matters which would call for
19 discipline against the Judge; and if that's the
20 case, I will make recommendations as to what that
21 discipline might be. The burden of establishing the
22 case is on the Commission.

23 Now, the first item of business I want to
24 have -- I trust Mr. Neff has it -- the parties have

1 executed a Stipulation of Facts in which the basic
2 facts, which I outlined to you, and some more were
3 established, so they don't have to be brought
4 forward today.

5 Mr. Neff, do you have the court copy of
6 that?

7 MR. NEFF: Yes, I do, Your Honor. I have
8 applied a sticker; I haven't marked it as an
9 exhibit. I'd be happy to if you like.

10 JUDGE KILBORN: Ms. Bohan, you're going to
11 have your choice. Do you want the exhibits numbered
12 or lettered?

13 THE REPORTER: Numbered, please.

14 (Document marked as Exhibit 1
15 in evidence)

16 JUDGE KILBORN: That's Exhibit 1.

17 Mr. Mone.

18 MR. NEFF: Your Honor, for our use, would
19 you like me to leave them on the bench here?

20 JUDGE KILBORN: Ms. Bohan?

21 THE REPORTER: That would be fine, on the
22 bench.

23 JUDGE KILBORN: Now, Mr. Neff, the floor is
24 yours.

1 MR. NEFF: Thank you, Your Honor. Good
2 morning.

3 The first part of the first canon of the
4 Code of Judicial Conduct in Massachusetts states
5 that an independent and honorable judiciary is
6 indispensable to justice in our society. A judge
7 shall participate in establishing, maintaining and
8 enforcing high standards of conduct and shall
9 personally observe those standards, so that the
10 integrity and independence of the judiciary will be
11 preserved.

12 Your Honor, I stand before you here this
13 morning on behalf of the Massachusetts Commission on
14 Judicial Conduct and will present evidence to you
15 that a Massachusetts judge, Judge Ernest B. Murphy,
16 did not live up to the high standards of conduct
17 required of him and which the citizens of
18 Massachusetts rightly expect from their judges.

19 In this case, as you began to outline, the
20 Commission will present evidence, and the evidence
21 will show, that in June of 2002, Judge Murphy, in
22 his personal capacity, filed a libel lawsuit against
23 the *Boston Herald*. The evidence will also show that
24 a little over a year after that lawsuit was filed,

1 Judge Murphy, through his counsel, sought a
2 settlement meeting with the person who was then, and
3 still is, the publisher and majority owner of the
4 *Boston Herald*, Patrick Purcell.

5 The evidence will show that Mr. Purcell
6 agreed to this private one-on-one meeting with Judge
7 Murphy, but that that meeting took place with the
8 full knowledge of the attorneys for each side. In
9 fact, the evidence will show that the attorneys for
10 each side arranged the time, date and location of
11 that meeting.

12 The evidence will show that that first
13 meeting took place on October 10th of 2004 at
14 Patrick Purcell's office at the *Boston Herald*.
15 However, the evidence will show that rather than
16 being a genuine effort at compromise, this meeting
17 on October 10th was really just about an opportunity
18 for Judge Murphy to attempt to persuade Mr. Purcell
19 that the *Boston Herald* could not possibly prevail in
20 its defense against a libel suit he had brought
21 against it and that they should therefore end their
22 defense of the case.

23 The evidence will show that that first
24 meeting lasted for about an hour and that each side

1 departed amiably at the end of that meeting. But
2 the evidence will also show very, very clearly, I
3 suggest, that there was absolutely no agreement
4 between Mr. Purcell and Judge Murphy to have ongoing
5 direct contacts about the case without the knowledge
6 of their attorneys, absolutely not.

7 Consistent with that fact, the evidence
8 will show that when Judge Murphy later sought the
9 second one-on-one private meeting with Patrick
10 Purcell, he didn't do so by contacting Patrick
11 Purcell directly, but he asked for that second
12 meeting through the attorneys for each side.

13 The evidence will show that Patrick Purcell
14 agreed to that second meeting with Judge Murphy
15 one-on-one privately, but that that second meeting
16 also took place with the full knowledge of the
17 attorneys for each side, the time, date, location of
18 that second meeting arranged by the attorneys for
19 each side.

20 The evidence will show that that second
21 meeting took place on April 30 of 2004 at Patrick
22 Purcell's office at the *Boston Herald*. However, the
23 evidence will also show that much like the first
24 meeting, rather than being a conversation about

1 settlement and compromise, this second meeting was
2 really just another opportunity for Judge Murphy to
3 impress upon Patrick Purcell all the reasons why the
4 *Boston Herald* could not possibly prevail in the
5 lawsuit he had brought against it, and therefore
6 they should end their defense of the case.

7 The evidence will show that that second
8 meeting lasted for about an hour, that both sides
9 parted ways amiably at the end of that meeting. But
10 the evidence will also show that there was
11 absolutely no agreement between Judge Murphy and Mr.
12 Purcell to have ongoing direct contacts about the
13 case without the knowledge of their attorneys,
14 absolutely not.

15 Consistent with that fact, the evidence
16 will show that for the ensuing eight to nine months
17 between that April 30, 2004 meeting and the
18 beginning of the trial of the libel lawsuit in
19 January of 2005, there was no direct contact of any
20 kind between Judge Murphy and Patrick Purcell.

21 Now, the evidence will show that in January
22 and then in February of 2005, the libel lawsuit
23 Judge Murphy brought against the *Boston Herald* did
24 go to trial, and on February 18th of 2005, the jury

1 returned a verdict in Judge Murphy's favor, and the
2 jury awarded him \$2.09 million.

3 The evidence will show that when the jury
4 returned that verdict, shortly afterward, if not
5 immediately after the jury returned that verdict,
6 Judge Murphy sought, again not by contacting Patrick
7 Purcell directly but through the attorneys for each
8 side, Judge Murphy sought a four-way meeting. And
9 at that meeting would be Judge Murphy, his attorney,
10 Howard Cooper, Patrick Purcell from the *Boston*
11 *Herald*, and Patrick Purcell's attorney, M. Robert
12 Dushman, from the law firm of Brown Rudnick.

13 When Judge Murphy asked for that settlement
14 meeting right after the verdict, he was told that
15 the other side was not interested in a settlement
16 meeting to discuss ending the case. The evidence
17 will show that after being told that the other side
18 was not interested in the four-way meeting he had
19 proposed, he took it upon himself to write a letter
20 to Patrick Purcell directly anyway, and the letter
21 that he wrote was on February 20th of 2005.

22 And the evidence will show that when Judge
23 Murphy wrote this letter, he used an official
24 Superior Court stationery envelope to do it, he

1 wrote that letter on a piece of official Superior
2 Court stationery, and in that letter Judge Murphy
3 proposed precisely the meeting he had been told the
4 other side was not interested in.

5 In that letter he proposed a meeting to
6 Patrick Purcell, but he imposed upon that meeting
7 some interesting, and I suggest to you improper,
8 requirements for it. In that letter he suggested a
9 meeting, but there would be a price. The price of
10 that meeting was that Patrick Purcell could only
11 bring one person.

12 Judge Murphy then went on to say, he would
13 bring the lawyer who represented him during the
14 libel case, but that under no circumstances could
15 Patrick Purcell bring the lawyer from Brown Rudnick
16 who had represented him during the libel suit. In
17 fact, part of the price of that meeting was that
18 Patrick Purcell couldn't tell his attorney about the
19 meeting, couldn't even show that attorney the letter
20 that Judge Murphy had written to Patrick Purcell.

21 Again, as yet another price of this
22 meeting, Judge Murphy indicated to Patrick Purcell
23 that he should bring a cashier's check payable to
24 Judge Murphy in the sum of \$3.26 million. This is a

1 sum which even with interest exceeded the jury's
2 verdict by half a million dollars, a jury verdict
3 issued just two days before Judge Murphy wrote this
4 letter.

5 Finally, Judge Murphy concluded this
6 February 20th letter with a P.S. And that P.S.
7 concluded somewhat ominously with a warning to
8 Patrick Purcell, and in that P.S. he wrote to
9 Patrick Purcell: "It would be a mistake, Pat, to
10 show this letter to anyone other than the gentleman
11 whose authorized signature will be affixed to the
12 check in question," which the evidence will show
13 would have been the insurer for the Boston Herald.
14 Judge Murphy then goes on to conclude, "In fact, a
15 BIG" -- in capitals, underlined -- "mistake. Please
16 do not make that mistake."

17 Now, the evidence will show that when
18 Patrick Purcell received this first letter, his
19 response was nothing. He didn't respond to this
20 letter; he didn't write back to Judge Murphy. He
21 essentially did absolutely nothing with this letter.

22 The evidence will show that almost a month
23 after Judge Murphy wrote this first letter, and
24 after having received no response from Patrick

1 Purcell to this letter, Judge Murphy took it upon
2 himself to write yet another letter to Patrick
3 Purcell directly. And in this letter, which he
4 enclosed in an official Superior Court stationery
5 envelope, Judge Murphy expressed to Patrick Purcell,
6 in a letter dated March 18th of 2005, his advice to
7 Patrick Purcell about the *Herald's* chances of
8 appeal. And Judge Murphy wrote:

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

14 "And that is....you have a ZERO" --
15 capitals, underlined -- "chance of reversing my jury
16 verdict on appeal.

17 "Anyone who is counseling you to the
18 contrary...is WRONG." Capital letters. "Not
19 5%....ZERO." Capital letters, underlined.

20 Now, one of the things you will notice in
21 both of these letters is that Judge Murphy attempts
22 to cast these letters as settlement negotiations.
23 Let me respectfully suggest to you that the evidence
24 in this case will clearly establish that these

1 letters don't even come close to being settlement
2 negotiations.

3 Let me also suggest to you that even to the
4 extent that you find that this letters might
5 constitute settlement negotiations, Judge Murphy
6 cannot make improper statements, write improper
7 letters, and make improper use of Superior Court
8 stationery, then hide under the cloak of settlement
9 negotiations and escape responsibility for his
10 misconduct.

11 One of the things you'll also hear about in
12 the evidence in this case is that both excerpts and
13 whole copies of these letters were published in both
14 the print and Web editions of the *Boston Herald*, a
15 major Massachusetts newspaper, on December 21st of
16 2005. Now, while the fact that these letters were
17 published in a major Massachusetts newspaper may
18 have contributed to and may have aggravated Judge
19 Murphy's violations of the canons with which he's
20 been charged, let me suggest to you that Judge
21 Murphy committed misconduct the moment he licked the
22 stamps on those envelopes and put them in the mail.
23 The fact that these letters made it into the *Boston*
24 *Herald* only means that more people know about the

1 misconduct Judge Murphy committed.

2 You are asked in this case to evaluate the
3 evidence from the standpoint of a reasonable,
4 objective person, a single person. And it is from
5 the perspective of a reasonable, objective person
6 that you are asked to consider, did Judge Murphy, by
7 sending these letters to the adverse party in a
8 civil lawsuit in which Judge Murphy was personally
9 involved, particularly while he's a sitting Superior
10 Court judge, particularly in light of the things he
11 had to say in those letters, and particularly since
12 he chose to use official Superior Court stationery
13 to send them, did that conduct violate the canons of
14 conduct with which he's been charged?

15 You are asked to consider from the
16 standpoint of that objective, single, reasonable
17 person:

18 Did Judge Murphy fail to maintain an
19 observed high standard of conduct when he sent those
20 letters?

21 Did Judge Murphy, in violation of Canon 2,
22 fail to avoid impropriety and the appearance of
23 impropriety in violation of Canon 2?

24 Did Judge Murphy, in violation of Canon 2A,

1 from the perspective of a reasonable, objective
2 person, fail to act in a manner that promotes public
3 confidence in the integrity and impartiality of the
4 judiciary?

5 Did Judge Murphy, in violation of Canon 2B,
6 lend the prestige of judicial office to advance his
7 own private interests when he sent those letters?

8 Did, from the perspective of an objective,
9 single, reasonable person, Judge Murphy violate
10 Canon 4A(1) by failing to conduct his extrajudicial
11 activities so that they do not cast doubt on his
12 capacity to act impartially as a judge?

13 Finally, you are asked in this case to
14 evaluate, again from the standpoint of a single,
15 objective, reasonable person, did Judge Murphy
16 violate Canon 4D(1) by failing to refrain from
17 financial and business dealings that tend to reflect
18 adversely on his impartiality, interfere with his
19 judicial position, or that may be reasonably
20 perceived to exploit his judicial position?

21 Your Honor, the evidence that you will hear
22 in this case, I will suggest to you from that
23 evidence you will conclude that any reasonable,
24 objective person, looking at the evidence in this

1 case, would conclude that Judge Murphy committed the
2 misconduct with which he's been charged. Thank you.

3 JUDGE KILBORN: Mr. Mone, do you have an
4 opening statement?

5 MR. MONE: Yes, but I'd just like to look
6 at these blowups for a moment.

7 (A pause)

8 MR. MONE: Your Honor, one must understand
9 the letters in context. Because text without
10 context is simply pretext. You must understand the
11 context and the time and where Judge Murphy was at
12 the time --

13 JUDGE KILBORN: Just a second. Can you
14 hear?

15 MR. MONE: You must understand the time and
16 the place that Judge Murphy was when he wrote these
17 letters. And to understand that, we have to go back.
18 to the original story by the Boston Herald. We are
19 fortunate that we're in a courtroom now. We are not
20 on the front pages of a tabloid. We are not under
21 the nonsense of talk radio. We are in a court of
22 law. And the law looks at the facts in the case,
23 and the facts are simply these: That the Boston
24 Herald libeled Judge Murphy.

1 Now, libel is, of course, a way of
2 describing a lie. A lie that is printed. And the
3 *Boston Herald* not only lied, they lied repeatedly,
4 they lied maliciously, and they lied with reckless
5 disregard to the facts. And they put in the
6 newspaper outrageous and untrue statements with
7 regard to Judge Murphy. And when asked to retract
8 those statements, they not only didn't retract them,
9 they continued to make them. Their reporter went on
10 the O'Reilly show and lied about the sources he had
11 for those stories.

12 And what was the result of that on Judge
13 Murphy and his family? You have, and you can take
14 judicial notice of, the opinion by the Massachusetts
15 Supreme Judicial Court in this case. The result of
16 those lies was that Judge Murphy and his family
17 underwent enormous not only physical but mental
18 strain. A reporter for the *Boston Herald* in his
19 blog repeated letters and gave Judge Murphy's
20 address and the letters were about people going to
21 rape Judge Murphy's daughters. That is the context
22 that you have to place this case in. Somebody, a
23 judge, a public official, who was repeatedly lied
24 about by this tabloid paper.

1 What did he do? He didn't go down with a
2 gun. He didn't threaten Pat Purcell's family. He
3 didn't threaten the reporter's family. What he did
4 was what every citizen in this state has a right to
5 do, and that is, he went to court. And the result
6 of him going to court and what happened in that
7 trial has resulted in an unending vendetta by the
8 *Boston Herald*. They follow Judge Murphy, they
9 follow him and his family, they take photographs of
10 him, all because Judge Murphy had the temerity to
11 sue them and not only sue them but sue them
12 successfully.

13 As a public official, Judge Murphy had to
14 show that that article and those statements about
15 him, about the very core of his being as a judge,
16 that is, his impartiality, that is, his judicial
17 temperament, that is, his treatment of people who
18 appear before him, they attacked the very core of
19 who he is. And they attacked him repeatedly with
20 lies. And they continue to tell those lies today.
21 And nothing in Mr. Neff's opening addressed those
22 lies and addressed the context in which these
23 letters were made.

24 Now, Judge Murphy on two occasions met with

1 Pat Purcell before the trial. He met with him first
2 at a time when all they were looking for was a
3 retraction. He met with him. They talked for an
4 hour. Judge Murphy will tell you that the first
5 thing he did when he walked in to Pat Purcell's
6 office is he said, "Pat," he reached out and shook
7 his hand and he said, "everything we say is
8 confidential. Is that our agreement?" And Pat
9 Purcell said "Yes."

10 They had a conversation in which Judge
11 Murphy said -- and by the way, if you have
12 settlement discussions in a case, just because the
13 other side doesn't respond doesn't mean they're not
14 settlement discussions. In order to have a
15 settlement discussion, you have to sit down and say,
16 "This is what I want."

17 Now, if the other side doesn't want to
18 respond at all, that doesn't mean it's not
19 settlement discussions. But that's what Judge
20 Murphy was trying to do, he was trying to settle the
21 case. And he told Pat Purcell that he didn't
22 believe that the *Herald* had a chance of winning the
23 case, that they would prevail, that their evidence
24 was so strong that they had been libeled and lied

1 about by a rogue reporter.

2 Pat Purcell listened to that conversation,
3 and at the end of the conversation he and Judge
4 Murphy shook hands and they went away. There was no
5 offer by the *Boston Herald*, as there never was an
6 offer by the *Boston Herald*. Never, right up to the
7 time they had to write the check for \$3.4 million,
8 did they offer to settle the case.

9 But there was in the interim between those
10 two meetings something that happened in court. And
11 what happened in court? Most public official libel
12 cases are won on motions for summary judgment by the
13 defendant. Judge Johnson, the trial court judge in
14 the *Herald* case, denied the motion for summary
15 judgment.

16 And after the denial of the motion for
17 summary judgment, Judge Murphy sought another
18 meeting with Pat Purcell, because he believed that
19 the only way that he could settle the case was to
20 talk person-to-person, to communicate directly with
21 Pat Purcell, because otherwise everything he said
22 was simply being filtered through the attorneys.
23 And the attorneys had a vested interest in showing
24 that they were right when they not only were wrong,

1 they proved to be wrong over and over and over
2 again.

3 So he sought another meeting with Mr.
4 Purcell. And he sat down with Mr. Purcell and said
5 to him, in essence, "Look, we've won the motion for
6 summary judgment. That means we're going to try a
7 jury case on the *Herald's* lies. You're going to be
8 shown to have lied, and we're going to win. But I
9 don't want to put my family through that. I want to
10 avoid that if I can. My family has gone through
11 enough. I've been through enough. So what I'm
12 asking you is, Can't we sit down as honorable
13 gentlemen and settle this case?" The answer to that
14 was "No."

15 Now, I don't say that the *Herald* couldn't
16 say no. Of course they could say no. But the fact
17 was that Judge Murphy was trying to settle this case
18 and settle it without the agony of a public trial
19 and without all the things that his family was going
20 through including his young daughters.

21 So they went to trial. Everything Judge
22 Murphy said about whether or not they could win the
23 case proved to be true. The *Herald* not only lost,
24 they lost a lot of money. The jury returned a

1 verdict of over \$2 million.

2 Judge Murphy at that point was in this
3 position: He believed that the verdict would be
4 sustained, but that he would go through another
5 years' long process of appeals and have to go
6 through and relive this case and relive what
7 happened to him and what happened to his family.

8 So what did he do? He sought to settle the
9 case. And he sought to settle the case by
10 contacting a man he believed to be honorable, Pat
11 Purcell. He believed he had agreed with Pat Purcell
12 that the channels of communication between them
13 would be kept open.

14 So he wrote to Mr. Purcell, and you have
15 the letters before you, and what he said in those
16 letters all turned out to be true. He told Mr.
17 Purcell that "You're not going to prevail on appeal.
18 You're going to lose the case. And you're going to
19 lose it, and you're going to pay -- there's going to
20 be a much higher judgment."

21 The fact of the matter is, if Pat Purcell
22 had paid \$3.26 million in February of '05, if he had
23 paid it, the *Boston Herald* would have saved almost
24 \$2 million -- I'm sorry -- \$200,000, because

1 ultimately they had to write a much larger check
2 than the 3.2 to Judge Murphy, the \$3.4 million.
3 Because, in Massachusetts, a verdict is simply a
4 statement as to what the jury finds. We know you
5 add prejudgment and postjudgment interest to that
6 verdict. And if you appeal a case in Massachusetts,
7 it's likely to take over two years to have that
8 case heard by the Supreme Court or by the Appeals
9 Court.

10 Indeed, it wasn't until May of 2007, two
11 years after these letters, that the verdict was
12 finally sustained. And what did the *Herald* pay?
13 They paid almost \$200,000 more than what Judge
14 Murphy asked for in those letters. And in the
15 meantime, they probably conservatively spent another
16 million-plus dollars in legal fees. If Pat Purcell
17 had brought the check to a meeting and sat down and
18 talked with Judge Murphy and understood how strong
19 that case was, that case should have been settled,
20 but it wasn't.

21 Again, the *Herald* had the right to do that,
22 but to suggest that Judge Murphy was asking for an
23 extraordinary amount is simply not true. He was
24 asking for less than he ultimately received.

1 Now, most importantly, he made a mistake,
2 and we acknowledge that he made a mistake, and he
3 has apologized for that mistake. He should not have
4 used in the first letter Superior Court stationery,
5 he should not have done that.

6 But Judge Murphy will tell you when he went
7 on the bench he was given stationery, and he was
8 given notepaper, and he was told, "You can use this
9 stationery and you can use the notepaper if you want
10 to write notes." So he had this paper. And when he
11 sat down to write these letters, in the immediate
12 aftermath of that trial, in the position he was then
13 in, he just didn't think. It was wrong, and we
14 acknowledge it was wrong, to use Superior Court
15 stationery.

16 But, please, that was not the first
17 information Pat Purcell had that Judge Murphy was a
18 judge. Most of the cases on the use of judicial
19 stationery involve situations where a judge uses the
20 judicial stationery to inform the other side of a
21 dispute. Whether it's a plumber, or whether it's
22 trying to raise money, or whether it's writing
23 recommendation letters for somebody, they use that
24 letter to confer status on themselves as a Superior

1 Court judge or a judge.

2 Pat Purcell knew that Judge Murphy was a
3 judge. He had been in litigation with him at that
4 point over the lies that they told for over three
5 years. So he knew who Judge Murphy was, and he
6 certainly couldn't have been surprised if he found
7 out in these letters that, Gee, this guy is a
8 Superior Court judge. That's nonsense. Now, we
9 admit he shouldn't have used the letterhead, but
10 that letterhead didn't add anything to what was
11 said.

12 Another thing. What never gets quoted in
13 these letters is the end of the letter, the last
14 three paragraphs of the letter. Mr. Neff didn't
15 mention that in his opening, nor did the Commission
16 put it in their specifications. But what does it
17 say? It says, At the end of this conversation, if
18 you are unwilling to settle the case, I will give
19 you back the check. That is hardly extortion. That
20 is hardly intimidating someone from making an
21 appeal. What it is is an attempt to talk to the
22 other side.

23 And why did Judge Murphy feel it was
24 important that Brown Rudnick not be involved? One,

1 because he wanted to talk in this letter and in this
2 meeting directly with Mr. Purcell. But more
3 importantly, he wanted to not be in a position to
4 have Brown Rudnick, who had apparently given
5 repeated bad advice to the *Boston Herald*, that they
6 were going to prevail on summary judgment, that they
7 were going to win the jury trial, that Judge Murphy
8 didn't have damages -- they had to justify their
9 conduct -- Judge Murphy felt that if he could talk
10 directly, principal to principal, with Mr. Purcell,
11 he could eliminate the pride of authorship of this
12 disaster that Brown Rudnick had.

13 So what he attempted to do was to say to
14 Mr. Purcell, Pat, we've had these conversations. I
15 want to continue this conversation. And he starts
16 off by saying, I trust that we will continue to
17 treat these letters in the same confidential way
18 that we have treated our prior conversations.

19 Mr. Purcell didn't do anything with the
20 letter. Mr. Purcell, weeks after Judge Murphy wrote
21 the first letter, the *Boston Herald* filed their
22 judgment JNOV in the underlying case. There is not
23 a word in those papers for judgment JNOV about these
24 letters, about any attempt by Judge Murphy to

1 prevent the *Herald* from appealing, that is not
2 there.

3 Nor did Mr. Purcell write back to Judge
4 Murphy and say, Stop this, I don't want to have any
5 more communication with you. I don't want to treat
6 anything between us as confidential anymore. He
7 didn't write that letter either.

8 They waited ten months, ten months before
9 putting these letters out, when they changed counsel
10 and they had a Washington counsel who held a press
11 conference, I think with these blowups, held a press
12 conference, and put in and filed an extraordinary
13 motion under Rule 60 to set aside the verdict as a
14 result of these letters, claiming that he was
15 intimidating the *Boston Herald*.

16 That motion was denied by the judge from
17 the bench, Judge Johnson from the bench. And
18 moreover, that denial, the Supreme Court did not
19 even discuss this point beyond saying that it was
20 totally irrelevant to the verdict.

21 So that is the context in which you must
22 understand these letters. You must understand them
23 in the context of a man who had struggled to get out
24 from under a lie for over four years, a lie told by

1 this tabloid with malice, told with actual disregard
2 of the facts.

3 And he believed at that point that Pat
4 Purcell was an honorable man, and that if he could
5 talk with Pat Purcell, Pat Purcell would understand
6 it and would agree to a settlement. That didn't
7 happen. The verdict was sustained by the Supreme
8 Court last June, and the *Herald* continues its
9 vendetta.

10 They are the complainant, in essence, in
11 this case. There are two complaints: one, the
12 complaint that was filed by the *Boston Herald*; the
13 other is the one the Commission started on its own.
14 But the other complaint, they are so biased against
15 Judge Murphy that they cannot let this go. They
16 cannot let it go. Judge Murphy can't go out of his
17 house without having *Herald* spies follow him.
18 That's the context in which you ought to understand
19 this case.

20 And we say that Judge Murphy in this
21 private, confidential communication, that was only
22 made public when the *Boston Herald* thought it was to
23 their advantage to make it public, that that is not
24 a violation of the rules of evidence, that is not a

1 violation of the canons of law, and that Judge
2 Murphy is what he has always been, an honorable,
3 wonderful judge of the Superior Court, who left a
4 substantial income to go to work in public service,
5 and his public service has been rewarded by a
6 newspaper, a tabloid, that cannot let him off, will
7 not let this case, in which they were wrong
8 repeatedly, they won't let it go. And they will
9 continue to write these stories.

10 And all I can hope is that in this court of
11 law, when you listen to these facts and you listen
12 to the context of these letters, you will understand
13 that what Judge Murphy did not only was not improper
14 but is totally understandable given the damage that
15 was done to he and his family by this alleged
16 newspaper.

17 JUDGE KILBORN: Thank you, Mr. Mone.

18 Mr. Neff, we're ready for the first
19 witness.

20 MR. NEFF: Yes, Your Honor. The Commission
21 calls Judge Ernest Murphy.

22 JUDGE KILBORN: Good morning.

23 MR. NEFF: Thank you, Your Honor.

24

1 ERNEST B. MURPHY, Sworn

2 DIRECT EXAMINATION

3 BY MR. NEFF:

4 Q. Good morning.

5 A. Good morning, Mr. Neff.

6 Q. Could you please state your name for the
7 record.

8 A. Ernest B. Murphy.

9 Q. And you are presently employed as a judge
10 in the Commonwealth of Massachusetts in the Superior
11 Court?

12 A. Yes, I am.

13 Q. How long have you been a judge?

14 A. Approximately seven years.

15 Q. What year were you appointed as a judge?

16 A. 2000.

17 Q. You have served as a Superior Court judge
18 continuously since you were appointed in 2000?

19 A. I have.

20 Q. Are you presently sitting as a judge?

21 A. Not presently.

22 Q. Do you plan to return to the bench as an
23 active judge?

24 A. I'm not sure one way or the other about

1 that. It's certainly a possibility.

2 Q. Now, by way of background, in February of
3 2002, the *Boston Herald* did print an article which
4 attributed statements to you in relation to a rape
5 victim in a case that was before you; isn't that so?

6 A. That is correct, sir.

7 Q. As a result of that article, in June of
8 2002 you filed a libel lawsuit against the *Boston*
9 *Herald* and several of its reporters for statements
10 and things that were printed in those articles;
11 isn't that true?

12 A. Technically not true. It was not only that
13 article; it was a number of successive articles
14 repeating and alleging different things and
15 reiterating the first lie that was published, even
16 after my counsel had told the *Boston Herald* to cease
17 and desist.

18 Q. So when you filed the libel lawsuit in June
19 of 2002, it addressed several articles in the *Boston*
20 *Herald*?

21 A. That is correct.

22 Q. As well as several columns that had been
23 written in the *Boston Herald* in response to what was
24 said?

1 A. That is correct, Mr. Neff.

2 Q. Now, when you filed that lawsuit, you
3 personally hired the attorney who filed that
4 lawsuit; isn't that true?

5 A. That is true.

6 Q. And it was you who decided that the
7 attorney you hired would file that libel lawsuit
8 against the *Boston Herald* and several of its
9 reporters?

10 A. Ultimately it was my decision to file or
11 not file, yes.

12 Q. That case went to trial in Suffolk Superior
13 Court in January and February of 2005?

14 A. Yes, sir.

15 Q. Although that was essentially transferred
16 to Chief Justice Johnson for him to oversee that
17 trial?

18 A. Well, it was still in the Superior Court,
19 because that was the only jurisdiction that
20 obtained, but Mr. Justice -- Chief Justice Johnson
21 was appointed a Superior Court judge for the
22 purposes of trying that case.

23 Q. On February 18th of 2005, the jury in that
24 case returned a verdict in your favor for \$2.09

1 million; isn't that true?

2 A. It was either the 18th or the 19th, but
3 substantively, yes, that's true.

4 Q. It was later in October of 2005 that Judge
5 Johnson reduced that judgment to \$2.05 million;
6 isn't that true?

7 A. Yes.

8 Q. Now, before that case, the libel lawsuit
9 against the Boston --

10 A. He reduced the verdict.

11 Q. He reduced the amount of the monetary
12 reward to you?

13 A. No, the verdict. Because there was
14 interest that had accrued --

15 Q. Okay.

16 A. -- both pre verdict and post verdict that
17 was substantial.

18 Q. It was reduced by about \$40,000?

19 A. I believe it was 60.

20 Q. Before the lawsuit we were just talking
21 about went to trial, you personally did take steps
22 to sort of seek out a settlement meeting with
23 someone from the *Boston Herald*, didn't you?

24 A. No. Before the matter went to trial,

1 everything was handled through counsel.

2 Q. Well, did you ask for a meeting with the
3 *Boston Herald*?

4 A. Well, I asked through my attorneys that
5 they attempt to obtain a retraction for the
6 obviously false statements made in the paper, but I
7 did not personally contact either the attorneys or
8 Mr. Purcell at that time. We did ask for a
9 retraction.

10 Q. Did you have a meeting with Patrick Purcell
11 in about October of 2003 about your case?

12 A. I had a meeting. I had two meetings with
13 Mr. Purcell. October 2003 would sound about right.

14 Q. Whoever you spoke to about that meeting
15 proposal, it was sort of you who initiated the idea:
16 Hey, why don't I have a sit-down with Patrick
17 Purcell about this case?

18 A. Absolutely true, Mr. Neff.

19 Q. You did that through your attorney?

20 A. Yes.

21 Q. That attorney was Howard Cooper from Todd &
22 Weld?

23 A. Howard Cooper, David Rich. Owen Todd as
24 well at that time was counsel to me and interfacing

1 with the *Boston Herald* and its counsel.

2 Q. The *Boston Herald* counsel, the sort of
3 counterpart counsel, was M. Robert Dushman from the
4 law firm of Brown Rudnick; is that true?

5 A. Yes.

6 Q. It was the attorneys who set up the
7 meeting itself, where it happen, when it would
8 happen, et cetera?

9 A. As I remember it, I just said, "I'd like to
10 meet with Pat Purcell. I'd be happy to go down to
11 the *Herald*. Can you get us a date to do that, a
12 time agreeable to both of us?" And that was done,
13 and I showed up, and he was there.

14 Q. That was arranged, then, by your attorney
15 and presumably the other side's attorney?

16 A. Yes. I had no communication with Mr.
17 Purcell until I actually met him.

18 MR. NEFF: If I can approach, Your Honor.

19 JUDGE KILBORN: Yes.

20 Q. Judge, I'm just going to show you a
21 document. Do you recognize that document?

22 A. (Witness reviews document) I have seen
23 that document before, yes.

24 Q. That was attached to an affidavit you

1 actually filed related to the libel lawsuit?

2 A. Yes.

3 Q. What's depicted -- well, depicted in that
4 piece of paper is an e-mail message between your and
5 the *Boston Herald's* attorneys discussing the meeting
6 that took place in September or October of 2003; is
7 that true?

8 A. That's a fair characterization.

9 Q. Thank you.

10 MR. NEFF: I move to introduce this into
11 evidence, Your Honor.

12 JUDGE KILBORN: Mr. Mone?

13 MR. MONE: No objection.

14 MR. NEFF: I'm going to mark it with your
15 permission, Your Honor, as Exhibit 2.

16 MR. MONE: Could the court reporter mark
17 it.

18 JUDGE KILBORN: I'm sorry?

19 MR. MONE: Can we have the court reporter
20 do the marking? That's the usual practice.

21 MR. NEFF: That's fine with me.

22 (Document marked as Exhibit 2
23 in evidence)

24 MR. NEFF: I'll leave them all on the bench

1 after you've seen them.

2 Q. Judge, you did have a meeting with Patrick
3 Purcell in September or October of 2003?

4 A. Yes, I did.

5 Q. It is true that at that meeting, you were
6 trying to impress upon Mr. Purcell that the *Boston*
7 *Herald* really didn't stand a chance in winning the
8 libel lawsuit that you brought against it; isn't
9 that true?

10 A. I think that's -- I can't agree with it as
11 phrased, Mr. Neff. I was suggesting to Mr. Purcell
12 that his perception of what the evidence was in the
13 case was false and that he ought to examine it. And
14 I believe at that time even I suggested he ought to
15 obtain an independent counsel to take a look and
16 discuss it with my counsel and me, to ascertain
17 whether or not I was perhaps on a more salient
18 vector than was his retained counsel. So that's
19 what I was trying to do.

20 Q. When you approached that meeting, you
21 wanted the *Boston Herald* to essentially end its
22 defense of the suit you had brought, though, didn't
23 you?

24 A. Oh, absolutely. I wanted to settle the

1 case.

2 Q. That's what you wanted to accomplish with
3 that meeting, is to convince Patrick Purcell that
4 the case should end; isn't that true?

5 A. As I stated, that's a little fine-tuned. I
6 didn't want to convince Pat Purcell of anything,
7 other than he ought to obtain an independent counsel
8 to give him advice, after colloquy with me and my
9 counsel about whether or not he was getting the
10 proper advice from his corporate counsel. Because I
11 didn't think he was, and I thought he was going to
12 make a great big mistake.

13 Q. In any event, you agreed that the meeting
14 between you and Mr. Purcell in October of 2003
15 lasted about an hour?

16 A. I would say 45 minutes to an hour.

17 Q. And that meeting did take place at Patrick
18 Purcell's office at the *Boston Herald*?

19 A. It did.

20 Q. You and he did part ways amiably, friendly,
21 at the end of that meeting?

22 A. Absolutely.

23 Q. Is it your testimony that at the end of
24 that meeting, that's when you and Mr. Purcell,

1 again, shook hands amiably and agreed to keep open
2 the lines of communication directly between us, as
3 principals in the case without lawyers, and strictly
4 as a part of confidential settlement discussions?
5 It was at the end of the meeting you made that
6 agreement?

7 A. I can't currently remember that, but I
8 thought that it was before we had said anything that
9 he shook my hand, and I shook his hand, and I said,
10 "Everything is between us, right, Pat?" And he
11 said, "Absolutely." I don't think I would have gone
12 through a whole meeting with him and discussed what
13 I discussed without clearing up the confidentiality
14 issue at the beginning. But my memory could be in
15 error.

16 But certainly before I left I had that
17 agreement with Mr. Purcell, by a handshake, in the
18 words that I stated, "Everything between us is
19 between us, right, Pat?" "Absolutely" was the
20 response.

21 Q. Your feeling was that was clear, that you
22 were going to have direct contact with Patrick
23 Purcell, basically whenever you wanted, in an effort
24 to sort of work out the case?

1 A. And vice versa, principals can talk to
2 principals. I was a principal; he was a principal.

3 Q. Now, let me ask you, so to that end, Mr.
4 Purcell, then, must have given you his personal
5 direct phone number or cellphone number so that you
6 could have that kind of dialogue?

7 A. No. I didn't give him mine either. I knew
8 where he was.

9 Q. Then did Patrick Purcell, to sort of
10 further this agreement that you say you two entered
11 into, give you an e-mail address of any kind so you
12 could have direct contact with that kind of
13 communication?

14 A. No. I didn't ask him for one and he didn't
15 give me one.

16 Q. You did have a second meeting with Mr.
17 Purcell before your lawsuit went to trial in January
18 of 2005, didn't you?

19 A. I did.

20 Q. That was a meeting you wanted to have
21 happen?

22 A. Oh, absolutely.

23 Q. You asked for it. It may have gone through
24 your attorneys, but you sort of got the ball

1 rolling?

2 A. Oh, I was the impetus for the meeting.

3 Q. Would you agree that meeting took place
4 around about April of 2004?

5 A. I can't remember. I know it was subsequent
6 to the issuance of the summary judgment memorandum
7 by Judge Johnson.

8 Q. Are you clear about that, or could it have
9 been --

10 A. No.

11 Q. It was after the argument on the summary
12 judgment motion?

13 A. It could have been after the argument on
14 the summary judgment.

15 Q. That meeting, again, also took place
16 with the knowledge of your attorneys, Howard Cooper
17 and M. Robert Dushman from Brown and Rudnick; isn't
18 that true?

19 A. I can't speak for Mr. Dushman, but I'm
20 confident he knew about it. I am sure my counsel
21 was aware I was going to see Mr. Purcell.

22 Q. It was sort of the lawyers who, probably in
23 a way to make it convenient to you, arranged the
24 time, date and location of that meeting and sort of

1 told you when it would happen?

2 A. Yes.

3 Q. That second meeting, again, took place
4 around about, let's say, the spring of 2004, maybe
5 April of 2004?

6 A. I can't remember exactly, but that's
7 roughly the time frame, Mr. Neff.

8 Q. But that meeting took place at Patrick
9 Purcell's office at the *Boston Herald*?

10 A. Indeed, yes.

11 Q. It is true this meeting was another
12 conversation by you where you were trying to tell
13 Mr. Purcell all the reasons why you felt the *Boston*
14 *Herald* could not win the libel suit; isn't that
15 true?

16 A. I can't remember exactly what we discussed,
17 Mr. Neff, but I'm sure that was part of it. Mostly
18 my attempt in the meetings with Mr. Purcell was to
19 convince him to obtain independent counsel and to
20 mediate the case and to keep it off the train track
21 that it was rolling toward disaster on. And that's
22 what I tried to do consistently throughout my
23 communications with Mr. Purcell.

24 Q. Among other things during the second

1 meeting with Mr. Purcell, you told him that the
2 lawsuit would take down the *Herald*, didn't you?

3 A. I did not say that.

4 Q. You did not say that?

5 A. No.

6 Q. In any event -- well, you would agree this
7 meeting lasted about an hour?

8 A. 45 minutes to an hour. It was a lengthy
9 meeting.

10 Q. You parted ways with Mr. Purcell pretty
11 much amiably again?

12 A. Amiably. Strained but amiably.

13 Q. Again, would it be your testimony that at
14 the end of the second meeting, after shaking hands,
15 you agreed to keep in touch with Mr. Purcell
16 directly whenever either of you wished as part of
17 your personal and private settlement communications?

18 A. I'm not sure we actually said that. That
19 was implicit in our agreement of confidentiality.

20 Q. Well, I already asked you about an
21 affidavit you filed in relation to your lawsuit
22 against the *Boston Herald*.

23 A. Yeah.

24 Q. Do you remember doing that?

1 A. I do remember it.

2 Q. Would looking at what you put in your
3 affidavit possibly refresh your memory?

4 A. It may very well.

5 MR. NEFF: If I could approach, Your Honor.

6 JUDGE KILBORN: You both can approach
7 witnesses without asking.

8 MR. NEFF: Okay.

9 MR. MONE: Thank you.

10 Q. Judge, I've highlighted a certain portion,
11 but feel free to read as much of it as you want.

12 A. Thank you very much. (Witness reviews
13 document)

14 MR. MONE: Could I ask the witness have a
15 chance to review the whole document before he's
16 asked about it. Thank you.

17 A. (Witness reviews document) All right, Mr.
18 Neff.

19 Q. Thank you, Judge.

20 Now, does reading the affidavit you filed
21 refresh your memory that at the end of that second
22 meeting, you and Mr. Purcell agreed to keep in touch
23 directly whenever either of you wished?

24 A. No, it doesn't. It could well have

1 happened.

2 Q. But you would agree that you said that in
3 an affidavit?

4 A. I will agree.

5 Q. That was an affidavit you filed under oath
6 with the Court?

7 A. Yes. How long ago, sir?

8 Q. Well, since I don't want to testify, I'll
9 approach you again and ask you if looking at this
10 refreshes your memory as to when you signed it.

11 A. Yes. January 6, 2006.

12 Q. Now, you gave a statement to the State
13 Ethics Commission in relation to your contacts with
14 Mr. Purcell -- about your contacts with Mr. Purcell
15 in relation to your libel lawsuit, didn't you?

16 A. Yes, I did.

17 Q. That was testimony that you gave under
18 oath?

19 A. Well, I'm a little confused. If I might
20 explain, Mr. Neff.

21 Q. Well, right now my question to you, Judge,
22 is, if you remember, didn't you give that testimony
23 to the State Ethics Commission under oath?

24 A. Well, you see, there's two documents, sir.

1 I wrote the State Ethics Commission a letter, and
2 then they took my deposition. And which document is
3 it to which you refer?

4 Q. You appeared -- well, you had a meeting
5 with the State Ethics Commission at Attorney Mone's
6 office on July 10th of 2006, didn't you?

7 A. I'm going to pick nits with you. It was
8 not with the Ethics Commission; it was with two
9 attorneys representing the Ethics Commission who
10 took my deposition.

11 Q. That meeting did take place on July 10th of
12 2006?

13 A. I'll take your word for it.

14 Q. That meeting took place at your attorney's,
15 Attorney Michael Mone, office, didn't it?

16 A. Yes, it did.

17 Q. The deposition that you gave to attorneys
18 who were there on behalf of the State Ethics
19 Commission, that was a deposition where you
20 testified under oath; is that correct?

21 A. That is correct.

22 Q. When the lawyer -- the lawyers for the
23 State Ethics Commission asked you about your
24 meetings with Mr. Purcell, you told them, "But...at

1 the very beginning I let it be known that I wanted
2 to talk personally with Mr. Purcell, and would Mr.
3 Cooper and Mr. Dushman kindly facilitate that." You
4 told them that that was how the meeting took place?

5 A. If that's what the transcript says, I'd go
6 with the transcript.

7 Q. Do you recollect saying that, sir?

8 A. No.

9 Q. But that statement would be true --

10 A. Yes, sir.

11 Q. -- as far as you remember today?

12 So you were asking for these meetings,
13 again, because you felt you had a strong case and
14 wanted to communicate that to Mr. Purcell, didn't
15 you?

16 A. Yes. It was a case worth settling.

17 Q. So one of the other things you told the
18 State Ethics Commission on July 10th was that at the
19 point --

20 MR. MONE: Excuse me. Could I have the
21 page you read from.

22 MR. NEFF: Page 30.

23 Q. At the point "...when we brought suit, my
24 state of mind was that I was extremely confident

1 that I was going to win this suit because I was
2 libeled falsely, recklessly, maliciously over and
3 over and over again.

4 "And so when we filed suit I knew that as
5 we say in the Irish patois" --

6 A. Patois.

7 Q. -- "them lads was in serious trouble."

8 JUDGE KILBORN: Mr. Neff, I missed that
9 word.

10 THE WITNESS: Patois.

11 MR. NEFF: Patois.

12 JUDGE KILBORN: Oh, patois.

13 THE WITNESS: Yes.

14 JUDGE KILBORN: Okay.

15 Q. "And it was in that context, with that type
16 of mind-set, I didn't want to do this, but if I had
17 to do this, I was going to win, that I first wanted
18 to talk to Mr. Purcell."

19 Do you remember saying that?

20 A. Yes. "Them lads was in serious trouble,"
21 Mr. Neff.

22 MR. MONE: Your Honor, I would request --
23 he's reading from one answer and he's reading from
24 the middle of an answer, not reading the whole

1 answer, and I would request, as a matter of
2 completeness, that they offer the entire answer.

3 JUDGE KILBORN: Where are we going with
4 this, Mr. Neff?

5 MR. NEFF: I'm just establishing statements
6 that I would suggest are helpful to the Commission's
7 case, that's all.

8 JUDGE KILBORN: Well, Attorney Mone is
9 going to have a chance to put the whole thing in
10 context with a larger answer. So why don't you do
11 so right now and save him the trouble.

12 MR. NEFF: Part of what I'm doing -- and,
13 of course, this is a matter of perspective -- is
14 Judge Murphy -- well, there are questions in this
15 transcript and then there are answers, and the
16 answers cover a variety of different subject matters
17 that are not necessarily directly relevant to where
18 I am in my questioning, meaning Judge Murphy, in
19 certain circumstances, not a criticism, answered
20 several questions at once. So if I give the whole
21 context, I'm really getting into information that
22 goes well beyond the scope of sort of the line of
23 questioning I'm in the middle of.

24 MR. MONE: Judge, this is the problem I

1 talked about in my opening. This is text with no
2 context. The next sentence where he stopped reading
3 talks about Judge Murphy's mind-set, quote: "I
4 didn't want to do this. This was killing my family.
5 I wanted to put it out. It was killing me. It was
6 horrible for everybody." That's the context.

7 JUDGE KILBORN: Read that on cross, Mr.
8 Mone.

9 MR. NEFF: Thank you, Your Honor.

10 BY MR. NEFF:

11 Q. I don't remember if I got a chance to ask
12 that, but you would agree you made that statement to
13 the State Ethics Commission?

14 A. If it's in there, I agree I made it, yes.

15 Q. Now, your efforts to persuade the *Herald*
16 that they could not win a libel lawsuit you were
17 bringing against them did not succeed in the sense
18 that this case ultimately did go to trial, didn't
19 it?

20 A. The case went to trial, Mr. Neff.

21 Q. And the jury returned a verdict for you?

22 A. After 19 days of testimony, they did.

23 Q. And on, let's say, February or -- February
24 18th or February 19th of 2002, the jury returned a

1 verdict in the amount of \$2.09 million for you; is
2 that true?

3 A. That's correct, sir.

4 Q. It was at that point, once you got that
5 verdict, your feeling was you really wanted this
6 case resolved, ended, done, put it behind you, did
7 you?

8 A. I did from the pivot, as the saying goes.
9 All the way from the time I saw the newspapers until
10 the trial was over, I was constantly seeking to
11 settle the case. I was desperate to settle the
12 case.

13 Q. You therefore did not want the *Boston*
14 *Herald* to end up pursuing an appeal of the case,
15 which, as your counsel said, can sometimes last a
16 couple of years beyond the verdict?

17 A. Mr. Neff, I was making a thousand dollars a
18 day in interest. I didn't want that money, I wanted
19 the case over. So, of course, I did not want the
20 *Boston Herald* to do something which, in my judgment,
21 was going to be ultimately unavailing and just
22 prolong matters and just make me \$1,000 a day
23 richer. I didn't want the appeal to take place
24 because I wanted the case to be over, sir.

1 Q. So after that jury verdict, to that end,
2 you did seek a meeting with the other side to have a
3 four-way sit-down to talk about ending and settling
4 the case, didn't you?

5 A. I can't remember what the timing was. That
6 was -- if I may just elaborate, and I'm on the
7 point --

8 Q. The question to you, sir --

9 A. I'm on the point, Mr. Neff. I can't
10 remember. It was constantly the ethos between me
11 and my attorneys that we were trying to get the
12 Herald to sit down at a table and smell the coffee
13 in this case, and we constantly were doing that. So
14 I'm sure at any given day, that would have been
15 true, my attorneys and I were trying to get the
16 Herald to mediate, sit down, do whatever.

17 Q: Well, let me ask you, then, this way.
18 Well, let me ask you this first: Do you recall
19 asking for sort of a four-way meeting at some
20 point --

21 A. Oh, yes.

22 Q. -- after the verdict? And at that meeting
23 you would have been present; is that true?

24 A. Yes.

1 Q. And your attorney, probably Howard Cooper,
2 maybe Owen Todd, would have been present?

3 A. Howard Cooper would have been present.

4 Q. And you wanted Patrick Purcell to be
5 present?

6 A. Absolutely.

7 Q. And you would have wanted or part of the
8 four would have been M. Robert Dushman, the *Herald's*
9 attorney from Brown Rudnick?

10 A. If that's what it took, fine. But once
11 again, I would have pressed at all times for an
12 independent counsel, an Ed Barshak, a Bob Muldoon, a
13 Paul Sugarman, somebody outside with impeccable
14 credentials who could evaluate the situation
15 neutrally and make an informed impression and talk
16 to Mr. Purcell about what he had determined. That's
17 what I wanted.

18 Q. M. Robert Dushman from Brown Rudnick was
19 the attorney who represented the *Boston Herald* and
20 Patrick Purcell during the libel suit that had just
21 ended, though?

22 A. There were three attorneys, but he was the
23 principal attorney.

24 Q. Now, on the subject of what you did after

1 the verdict, do you recall the State Ethics
2 Commission asking you about what events transpired
3 after the jury verdict?

4 A. No, not offhand.

5 Q. Let me ask you, do you recall telling the
6 State Ethics Commission --

7 MR. MONE: Your Honor, let's make it clear,
8 he keeps referring to the State Ethics Commission.
9 This was a complaint that was dismissed by the State
10 Ethics Commission.

11 JUDGE KILBORN: You can bring that up.

12 MR. NEFF: Well, after they deferred to the
13 Commission, it was dismissed.

14 JUDGE KILBORN: Mr. Mone, I'm sure whatever
15 the facts are, you'll bring them up.

16 Q. Do you recall telling the lawyer for the
17 State Ethics Commission, "After we had won the case
18 at trial and I had won a verdict against the *Herald*
19 and Mr. Wedge, which, with interest, was
20 approximately 2.8" --

21 MR. MONE: Could you give me the page?

22 MR. NEFF: I did, actually. I'll give it
23 to you again.

24 MR. MONE: I'm getting old.

1 MR. NEFF: 32.

2 MR. MONE: What was it? 32?

3 Q. I'll start again.

4 Did you tell the lawyer for the State
5 Ethics Commission:

6 "And after we had won the case at trial and
7 I had won a verdict against the *Herald* and Mr.
8 Wedge, which with interest was approximately 2.8 at
9 that time, I begged my counsel, and without going
10 into the confidentiality, to try to see if somehow
11 through Mr. Dushman I could get a chance to sit down
12 with the four of them and have a four-way conference
13 and try to see what we could do about this, and the
14 answer was that they were not interested in any
15 four-way conference.

16 "And it was subsequent to that that I said,
17 Well, I'm still a principal in this case and I still
18 can communicate with Mr. Purcell."

19 A. Yes.

20 Q. You made that statement to the lawyer --

21 A. Yes.

22 Q. -- from the State Ethics Commission, as far
23 as you know?

24 A. I made that statement as part of the

1 deposition.

2 Q. So it is true that you asked for a four-way
3 meeting after the verdict, isn't it?

4 A. We wanted a four-way meeting. We asked for
5 a four-way meeting, which was finally granted to us
6 on December 22nd, the day they blew me up with
7 printing these excerpts from the letters, three days
8 before Christmas, in 2006.

9 Q. Let's stick with --

10 A. That same day, Mr. Neff, counsel from Mr.
11 Purcell wrote my counsel and agreed to a four-way
12 mediation.

13 Q. What I actually asked you about, sir, was
14 after the verdict --

15 A. Yeah.

16 Q. -- immediately after the verdict --

17 A. Yeah.

18 Q. -- you asked for a four-way meeting.

19 A. Correct.

20 Q. That meeting, again, would have included
21 Mr. Dushman, according to your statement to the
22 lawyer for the State Ethics Commission; isn't that
23 true?

24 A. I would go to any source as long as Mr.

1 Purcell could sit down and have us put our case in
2 front of him. I didn't want Brown Rudnick there,
3 because I didn't trust Brown Rudnick's advice. They
4 had a lot to justify in terms of a lot of loss. I
5 wanted a Paul Sugarman there, an Ed Barshak there,
6 somebody whose credentials were impeccable that I
7 certainly didn't have any influence over.

8 Q. What you told the lawyer for the State
9 Ethics Commission was: "...I begged my counsel...to
10 try to see if somehow through Mr. Dushman I could
11 get a chance to sit down with the four of them";
12 isn't that true?

13 A. I did that, sir. Yes, I did.

14 Q. And that meeting would have included Mr.
15 Dushman right after the verdict?

16 A. As I say, I take what I can get.

17 Q. And it was subsequent to being told that
18 the other side was not interested in the four-way
19 settlement talk that you said to yourself, "Well,
20 I'm still a principal...and I can still communicate
21 with Mr. Purcell"?

22 A. Yes.

23 Q. Isn't that true?

24 A. Correct.

1 Q. Now, one thing I wanted to ask, the 2.8
2 that you mentioned to the lawyer for the State
3 Ethics Commission when you made the statement, you
4 were referring to \$2.8 million that you were owed by
5 the *Boston Herald* --

6 A. Yes.

7 Q. -- after the verdict?

8 A. Roughly, yes.

9 Q. At that point in time?

10 A. Yes, at that point in time.

11 Q. That was the 2.09 plus interest?

12 A. Correct. As I stated, interest was
13 accumulating at roughly \$1,000 a day.

14 Q. So now after you were told that the other
15 side was not interested in discussing settling the
16 case with you, you wrote a letter to Patrick Purcell
17 directly, didn't you?

18 A. I did.

19 Q. And that was a letter that you sent to
20 him at the main address of the *Boston Herald*, isn't
21 it?

22 A. I believe so, yes.

23 Q. I'm going to approach, Judge.

24 A. Certainly.

1 Q. I'm going to direct your attention to what
2 is marked as Appendix A to Exhibit 1 in this case.

3 JUDGE KILBORN: Mr. Neff, we took some time
4 to write out and go over the Stipulation of Facts.
5 What is in the Stipulation of Facts need not be
6 reintroduced. If the question is going to be, Did
7 you write the letter, he has signed a stipulation
8 saying, Yes, I wrote the letter. So the stipulation
9 was in part designed to keep this hearing shorter
10 rather than longer. So I'm anticipating where
11 you're going and wondering what -- we're not going
12 to go through this whole stipulation.

13 MR. NEFF: I don't disagree with that, Your
14 Honor. As you may have noticed, I have enlarged
15 versions of some of these appendices attached to
16 that exhibit, and I'm going to ask Judge Murphy to
17 testify that they fairly and accurately reflect the
18 exhibit --

19 JUDGE KILBORN: You want to introduce them
20 in evidence, and I'm not going to allow them.

21 MR. NEFF: I don't want them introduced
22 into evidence, Your Honor. I want them marked for
23 identification.

24 JUDGE KILBORN: Well, why?

1 MR. NEFF: Not as exhibits that are going
2 to be introduced into evidence but as items I will
3 use to sort of assist in making things go more
4 quickly, to be honest. So I can stand there with
5 something and show, both you and Attorney Mone and
6 Judge Murphy, what I'm talking about.

7 MR. MONE: Please --

8 MR. NEFF: This is my whole case. You have
9 to let me do this.

10 MR. MONE: Wait a second.

11 JUDGE KILBORN: Attorney Mone, please.
12 Attorney Mone.

13 MR. MONE: I have no problem. They're
14 copies of the letters.

15 JUDGE KILBORN: Attorney Mone, please.

16 MR. NEFF: If we can stipulate that what
17 I'm about to show is essentially fair and accurate
18 copies --

19 JUDGE KILBORN: It certainly looks like it,
20 and I'm sure Attorney Mone will let us know if it
21 isn't.

22 MR. MONE: Had I been asked, I would have
23 agreed.

24 MR. NEFF: I would ask at this point --

1 well, I'll inform the Court as I mark them for
2 identification, then.

3 JUDGE KILBORN: This will sound peculiar to
4 you, but I don't want them marked as identification,
5 because if they're marked for identification, that
6 means I'm going to have to lug them around on the
7 subway or something, and I don't want to do it. So
8 you just refer to them on the stand and on the board
9 there. And if you want, we can refer to the
10 exhibits, but let's keep those big boards out.

11 THE WITNESS: I'm happy to stipulate that
12 every one of those boards is authentic, Judge.

13 MR. NEFF: Thank you, Judge.

14 BY MR. NEFF:

15 Q. Now, in your February 20th of 2005 letter
16 to Patrick Purcell, you wrote that this letter to
17 you was "settlement discussions," didn't you?

18 A. Yes.

19 Q. And you then continued to write, "As you no
20 doubt clearly recollect, ole Mike Ditka here warned
21 you against playing 'the team from Chicago' in this
22 particular Super Bowl." You wrote that too?

23 A. I did, yes.

24 Q. When you make that reference, you're

1 referring to your private meetings with Patrick
2 Purcell before the case went to trial, aren't you?

3 A. Yes, I am.

4 Q. Because at that meeting you were in the
5 guise of essentially, or by analogy as Mike Ditka,
6 warning him, Mr. Purcell, that he wasn't going to
7 win this particular game?

8 A. No, that's not true.

9 Q. Well, this is a reference to your meetings
10 with Mr. Purcell?

11 A. It is.

12 Q. The next thing you write in that letter is:
13 "The reason I write now is that I think you a smart
14 and honorable guy. And since every single thing I
15 told you about what was going to happen in this case
16 thus far has happened, maybe, just maybe, I have
17 some credibility with you at this point." You wrote
18 that too?

19 A. I did.

20 Q. Again, that was a reference to your prior
21 meetings with Mr. Purcell, wasn't it?

22 A. Yes. At that time I thought Mr. Purcell
23 was an honorable man.

24 Q. Well, my question to you, actually, though,

1 sir, is: That statement is a reference to your
2 meetings with Patrick Purcell, wasn't it?

3 A. Well, not the first sentence.

4 Q. No, the second sentence I just read to you.
5 "The reason I write now is that I think you a smart
6 and honorable guy. And since every single thing I
7 told you about what's going to happen in this case
8 thus far has happened, maybe, just maybe, I have
9 some credibility with you at this point."

10 A. No, that doesn't refer to my prior meetings
11 with Mr. Purcell.

12 MR. MONE: Your Honor, my client is in a
13 position of having to peer at this point. Can we
14 put the letters before him so that, as he's quoting,
15 he doesn't have to peer at the board?

16 MR. NEFF: I'm happy to sort of try again.

17 JUDGE KILBORN: Why don't you use the
18 stipulation.

19 THE WITNESS: All set. Thank you.

20 Q. So now, I'll just state -- I'm sorry.

21 A. Um-hum.

22 Q. Now, I'll just refer to Paragraph 4 of that
23 letter. That paragraph is a reference to
24 discussions you had with Mr. Purcell at your private

1 meetings before your case against the *Boston Herald*
2 went to trial, isn't it?

3 A. The portion that says "every single thing I
4 told you about" obviously references prior meetings
5 with Mr. Purcell.

6 Q. So, again, those meetings, you were really
7 trying to persuade Mr. Purcell that the *Herald* just
8 didn't stand a chance?

9 A. I was trying to persuade Mr. Purcell to
10 bring somebody into the case who could independently
11 advise him decidedly to that effect, Mr. Neff.

12 Q. But you're also telling him what things
13 would happen during the case if it went to trial,
14 didn't you?

15 A. Where is that, sir?

16 Q. "And since every single thing I told you
17 about" --

18 A. Where is that?

19 Q. -- "what was going to happen in this case
20 thus far has happened" --

21 A. Right.

22 Q. -- "maybe I have some credibility with you
23 at this point."

24 A. Yeah.

1 Q. So you at those meetings were telling him,
2 This and that and this and that were going to
3 happen --

4 A. Correct.

5 Q. -- didn't you?

6 A. And this and that and this and that
7 happened.

8 Q. And you were telling him, the *Boston*
9 *Herald*, You're going to lose this libel suit, you
10 don't stand a chance, weren't you?

11 A. I don't know if I'd phrase it so far as
12 don't stand a chance at that point, but they were
13 going to lose the libel suit and I knew it. And I
14 was just trying to get Mr. Purcell to wake up and
15 smell the coffee, so that he could know it too and
16 put it out of its misery. That's what happened, Mr.
17 Neff.

18 Q. Well, the State Ethics --

19 A. I said in one of those letters --

20 Q. There's not a question before you.

21 A. Certainly.

22 Q. So the State Ethics Commission asked you
23 about your intent when you sent Patrick Purcell this
24 letter on February 20th of 2005, didn't they?

1 A. I can't remember, sir.

2 Q. Well --

3 A. I'm sure they did.

4 Q. Do you recall being asked by them, "...can
5 you just explain to me what was in your mind at the
6 time that you wrote that letter; what was your state
7 of mind?"

8 A. No.

9 Q. Well, do you remember generally speaking
10 about -- do you think that having a copy of this
11 transcript in front of you might help refresh your
12 memory as to some of these statements?

13 A. I'm sure it would.

14 JUDGE KILBORN: Mr. Neff, unless the Judge
15 says something to the Ethics Commission which
16 contradicts something he's just testified to, why
17 are we getting into that?

18 MR. NEFF: Because this is me calling him.
19 Pursuant to Rule 43(b) I'm allowed to --

20 JUDGE KILBORN: You're not apparently
21 contesting anything he's saying. It isn't a prior
22 inconsistent statement. Every time you've done
23 this, it's been perfectly consistent.

24 MR. NEFF: Well, he can therefore affirm

1 his prior statements.

2 JUDGE KILBORN: Well, just ask him direct
3 questions.

4 MR. NEFF: All right.

5 BY MR. NEFF:

6 Q. Did you tell the State Ethics Commission:

7 "My attempts to resolve the matter through
8 the conventional methodology of sitting down with a
9 guy, who just lost \$2.8 million, with his lawyer to
10 see if we could do something about getting rid of
11 the case because quite frankly it was a lot of
12 money, and I'll use it if I can get it, but it
13 wasn't my primary objective to win money from Mr.
14 Purcell. I had a lot of issues involving me and my
15 family that were much more important to me.

16 "So I was unable to get that meeting, and I
17 had previously tried everything I knew through my
18 counsel and also with Mr. Purcell to beg, borrow,
19 and steal for somebody to assess this case in a
20 different way than it had been assessed because I
21 knew from day one and I knew obviously after the
22 verdict that the way I had assessed it was correct,
23 and I just wanted somebody not affiliated with
24 Brown Rudnick, somebody like a Mr. Mone or a Judge

1 Daher or somebody who's, you know, has eminence
2 gris" -- gris?

3 A. "Gris" means a gray-headed guy with some
4 brains.

5 Q. You go on to say, "...oh, excuse me, has
6 gray hair and some experience and some pedigree in
7 the business to just have Mr. Purcell say, what do
8 you think of it."

9 Do you recall saying that?

10 A. That's entirely consistent with my position
11 on the matter. I'm sure I did say that, Mr. Neff.

12 Q. Now, when you spoke to the lawyer for the
13 State Ethics Commission, you made reference -- now
14 this was the second time -- to Patrick Purcell
15 having just lost \$2.8 million when you sent your
16 February 20th letter?

17 A. He had.

18 Q. The \$2.8 million you reference, you would
19 agree that was the verdict plus about \$640,000 in
20 interest at that point?

21 A. Prejudgment interest.

22 Q. So at about the time when you sent Patrick
23 Purcell this letter, the amount --

24 A. Wait a minute. When I sent Patrick Purcell

1 what letter? We're talking about the State Ethics
2 Commission.

3 Q. When you sent Patrick Purcell the February
4 20th, 2005 letter.

5 A. Okay.

6 Q. The value of the verdict, if the *Herald*
7 sort of just chose to pay you, would have been \$2.09
8 million, plus about \$640,000 in interest; isn't that
9 true?

10 A. I figured 2.8 at that point.

11 Q. So about \$2.8 million, if they had chosen
12 to walk away?

13 A. Correct. That's what they owed me.

14 Q. Now, however, isn't it true when you
15 proposed -- excuse me. When you wrote this letter
16 to Patrick Purcell on February 20th of 2005 and
17 proposed a meeting, you wrote -- and I'm going to
18 start on three, four, five, Paragraph 6, so you can
19 follow along:

20 "I'd like to meet you at the Union Club on
21 Monday, March 7. (No magic to the date.) (But it
22 needs to be early in that week.)

23 "Here's what will be the price of that
24 meeting. You will have one person with you at the

1 meeting. I suggest, but do not insist, that such a
2 person be a highly honorable and sophisticated
3 lawyer from your insurer.

4 "Under NO circumstances should you involve
5 Brown Rudnick in this meeting. Or notify that firm
6 that such a meeting is to take place.

7 "I will have my attorney (either Owen Todd
8 or Howard Cooper) at the meeting. The meeting will
9 be AB-SO-LUTE-LY confidential and 'off the record,'
10 between four honorable men.

11 "You will bring to that meeting a cashier's
12 check, payable to me, in the sum of \$3,260,000. No
13 check, no meeting.

14 "You will give me that check and I shall
15 put it in my pocket."

16 You went on to say:

17 "I will say to you, if, at the end of this.
18 meeting, you can stand before the God of your
19 understanding, and as a man of honor, ask for the
20 return of that check, I'll flip it back to you.

21 "And then, I shall explain to you why it is
22 in your distinct business interest to rise from the
23 table, shake my hand, and let me walk away with that
24 check.

1 "Because it is, Mr. Purcell, in your
2 distinct business interests to do so, in my
3 considered opinion; and I have not the slightest
4 apprehension of failure of my ability to make you
5 (and your insurer) concur in that assessment."

6 That's what you proposed to Patrick
7 Purcell?

8 A. That's what I wrote, sir.

9 Q. So you wanted with Patrick Purcell an
10 off-the-record meeting.

11 A. Yes.

12 Q. According to this letter.

13 A. Yes.

14 Q. According to this letter --

15 A. No, no. I wanted an off-the-record
16 meeting, not according to the letter.

17 Q. In this letter you wrote that the price of
18 the meeting was that Patrick Purcell could only
19 bring one person to that meeting?

20 A. That's right.

21 Q. You told Patrick Purcell under no
22 circumstances could he bring his lawyer from Brown
23 Rudnick.

24 A. Yes.

1 Q. And you understood that person was M.
2 Robert Dushman, didn't you?

3 A. No, no. It could have been Ms. Ritvo or
4 Mr. Hermes, H-e-r-m-e-s, but probably Mr. Dushman.

5 Q. Because, as you said, he was essentially --
6 Mr. Dushman was the principal attorney who had
7 handled *Boston Herald's* libel suit?

8 A. I would think so. I think his firm would
9 have identified him as the lead attorney on the
10 case.

11 Q. You also told him that you would in fact
12 yourself be bringing the attorney who had
13 represented you during the libel lawsuit?

14 A. I didn't want anybody there without
15 counsel, Mr. Neff.

16 Q. The *Boston Herald's* counsel, though, was a
17 lawyer from Brown Rudnick, wasn't it?

18 A. Not the one I wanted him to bring.

19 Q. Right. But you wanted the lawyer who
20 worked for the insurer for the *Boston Herald* to
21 come, didn't you?

22 A. The insurance attorney would have been
23 fine. Anybody who could look at --

24 Q. The insurance attorney was not the attorney

1 for the *Boston Herald*, was it? That was --

2 A. That's arguable, Mr. Neff, to be honest
3 with you.

4 Q. Come on, you're a judge. The attorney for
5 the insurer does not necessarily represent the
6 interests of the *Boston Herald* or Patrick Purcell in
7 a case like this.

8 MR. MONE: I object to that.

9 Q. Does he?

10 MR. MONE: I object to that.

11 JUDGE KILBORN: Your objection?

12 MR. MONE: My objection is it's a
13 misstatement, number one. An insurance company
14 is --

15 MR. NEFF: Your Honor, if I can stop him.
16 If Judge Murphy disagrees with me, that's fine.

17 JUDGE KILBORN: Mr. Neff, Mr. Neff. Mr.
18 Mone has the floor. Go ahead, Mr. Mone.

19 MR. MONE: It's a misstatement. When an
20 attorney for an insurer represents a client, they
21 have an absolute duty of loyalty to that client,
22 even if they may be being paid by an insurance
23 company. So to say that the insurance company
24 lawyer doesn't have a duty of loyalty or isn't

1 representing the *Herald*, that's simply not true.
2 That defies 15 -- 500 years of practice, however
3 long there's been insurance.

4 JUDGE KILBORN: What are you getting at,
5 Mr. Neff?

6 MR. NEFF: Well, one of the proposals is
7 that the lawyer who had represented the *Boston*
8 *Herald* and Patrick Purcell during the entire libel
9 suit was forbidden from attending the settlement
10 meeting by Judge Murphy's letter.

11 JUDGE KILBORN: Well, Judge Murphy says,
12 nobody from Brown Rudnick. That is all he said.
13 Nothing about who represented whom in terms of the
14 insurer. But he didn't want anybody from Brown
15 Rudnick.

16 MR. NEFF: That's all I'm trying to get at.

17 THE WITNESS: Well, I concede that.

18 JUDGE KILBORN: He said that.

19 MR. NEFF: Then I asked him, therefore, if
20 you'll permit me to make my case, that request is a
21 request for Pat Purcell to essentially not bring the
22 attorney who has represented him during the entire
23 libel lawsuit to date.

24 THE WITNESS: I'll concede that, Mr. Neff.

1 That's precisely what I wanted.

2 BY MR. NEFF:

3 Q. One of the things that you told him as
4 part of this letter is that he had to bring a
5 cashier's check payable to you in the amount of
6 \$3.26 million?

7 A. Yes.

8 Q. "No check, no meeting"?

9 A. That's correct. That's what I told him.

10 Q. And you would agree that that request for
11 \$3.26 million was, even with interest on the
12 verdict, about half a million dollars more than the
13 *Herald* would have owed you if they had walked away
14 and not appealed the case that day? And I mean that
15 day, February 20th.

16 A. Yes. They would have saved half a million
17 dollars had they paid me the amount they owed me.

18 Q. You added a P.S. to that letter, didn't
19 you?

20 A. I did, sir.

21 Q. And in the P.S. to that letter, you told
22 Mr. Purcell, "It would be" -- I'm at the very end --
23 "It would be a mistake, Pat, to show this letter to
24 anyone other than the gentleman whose authorized

1 signature will be affixed to the check in question."
2 You wrote that, didn't you?

3 A. Yes.

4 Q. You understood that the person who would be
5 signing that check was the insurer who had
6 indemnified or would have indemnified the *Boston*
7 *Herald* from this judgment; isn't that true?

8 A. I don't want to mince words, but we had
9 been dealing with a Gerald Schaefer, who was an
10 attorney at Mutual of Bermuda. He was the
11 president, chief operating officer and on the board
12 of directors. And he was in Washington, and my
13 attorney was in relatively constant contact with
14 him. So I was assuming that Gerald Schaefer would
15 be the gentleman who would be coming from the
16 insurer. And he is an attorney.

17 Q. But the check you contemplated was a check
18 essentially drafted by the insurer for the *Boston*
19 *Herald*?

20 A. I don't know who was going to write it.
21 And it wasn't real to begin with.

22 Q. Just so we clarify, Mutual of Bermuda,
23 that's the insurance company --

24 A. That was the insurer.

1 Q. -- for the *Boston Herald*?

2 A. Yes.

3 Q. So they did have an insurer who you were
4 dealing with, who your attorney was dealing with --

5 A. Constantly.

6 Q. -- in relation to this libel suit?

7 A. Constantly.

8 Q. That was an insurer who was going to
9 indemnify the *Boston Herald* for any judgment they
10 had to pay in the suit you had brought against them;
11 isn't that true?

12 A. No, that's not true. Because that's why
13 Mr. Cooper was constantly in touch with them,
14 because they would never agree that they owed money
15 on this case, until finally Judge Johnson made them
16 issue a guarantee that they would pay. So they
17 didn't accept any responsibility of payment at that
18 time, Mr. Neff.

19 Q. All right. Let me ask you this: You
20 ultimately were paid a judgment as a result of this
21 libel lawsuit --

22 A. That is correct.

23 Q. -- that you brought. And that amount was
24 \$3.4 million; isn't that true?

1 A. 3.415.

2 Q. Would you agree that that ultimate payment
3 represented the \$2.01 million that you were owed
4 from the verdict after the hearing before Judge
5 Johnson, plus interest?

6 A. Yes.

7 Q. So in the end, in May or June of 2007,
8 about two years -- a little over two years after you
9 wrote this letter, the *Herald* ended up having to pay
10 you about \$140,000 more than you wanted two years
11 prior on February 20th or that you proposed two
12 years prior on February 20th of 2005?

13 A. Yeah. I'll accept it as that. The amount
14 they put in the letter, they paid me \$160,000 more,
15 when all was said and done, yes.

16 JUDGE KILBORN: Mr. Neff, perhaps this will
17 come out, but maybe this is a good time to focus a
18 little bit on these numbers.

19 The reduction in the verdict, that was in
20 October. So what we start out with was a jury
21 verdict of \$2,090,000, correct?

22 MR. NEFF: That's right, Your Honor.

23 JUDGE KILBORN: And you and the Judge
24 talked about an amount, an approximate amount, which

1 was on the table when the letters were written, am I
2 correct?

3 THE WITNESS: No.

4 MR. NEFF: What I would characterize as
5 essentially the present value of the verdict, which
6 would have been --

7 JUDGE KILBORN: The Judge did testify
8 about an amount which he thought was proper at the
9 time --

10 MR. NEFF: Right. \$2.8 million he
11 testified.

12 JUDGE KILBORN: When the letter was
13 written.

14 MR. NEFF: At the time the letter was
15 written, I don't want to characterize it, but I
16 believe the testimony was that the *Herald* owed him
17 \$2.8 million at that point.

18 JUDGE KILBORN: Hold on. So we started at
19 \$2,090,000. Then we come up to \$2.8 million. At
20 what time?

21 MR. NEFF: As of the time that letter was
22 written, February 20th, 2005.

23 JUDGE KILBORN: Is that your testimony?

24 THE WITNESS: If I may, Your Honor, the

1 \$2,090,000 was reduced by \$80,000 by Judge Johnson
2 to become 2.010. So 210.

3 JUDGE KILBORN: But not until October.

4 MR. NEFF: Right. Not until October.

5 THE WITNESS: Shortly after the motions for
6 JNOV and the new trial were decided, incident to
7 that. So we start off with a gross amount owing to
8 me of approximately 2.8 at the time I wrote this
9 letter on February 19th, '05.

10 JUDGE KILBORN: Okay. Did you testify,
11 given that number, how you got to \$3,260,000, which
12 is the amount --

13 THE WITNESS: No one has asked me that. I
14 have not so testified.

15 MR. NEFF: I'm getting there, Your Honor.

16 BY MR. NEFF:

17 Q. One of the things I did want to ask you
18 about first, though, Judge, if I can --

19 A. Sure.

20 Q. -- when you sent this letter on February
21 20th, 2005 to Patrick Purcell, you didn't expect
22 that by telling him that under no circumstances
23 could he involve the lawyers from Brown Rudnick that
24 he would sort of calmly reflect on his decision

1 about meeting with you and settling the case, did
2 you?

3 A. I have to answer that as a collectivity, I
4 can't pick it apart. I can tell you what my mindset
5 was and what I did and why, but it all kind of
6 interweaves into a plan that I had.

7 Q. One of the statements you made to the SEC,
8 to the lawyer for the State Ethics Commission, was
9 about what you were thinking when you wrote that
10 letter, wasn't it?

11 A. Yes, sir.

12 Q. You told that lawyer, "I was" --

13 MR. MONE: Can I have a page?

14 MR. NEFF: I'm on Page 36.

15 Q. You said: "I was taking my gloves off
16 because I wanted to settle this case, and I thought
17 this was the only thing I had left, is to roll up my
18 sleeves with this guy and let him have it, that
19 might possibly precipitate a change in his position
20 that he wasn't going to listen to anybody else other
21 than the people that had led him into a \$2.8 million
22 libel verdict.

23 "And so in that frame of reference, I wrote
24 him what I wrote him, and I agree that it was

1 strong. I agree that it was tough."

2 Did you make that statement?

3 A. Did I say that to that gentleman?

4 Q. Did you say that to the lawyer for the
5 State Ethics --

6 MR. MONE: Please.

7 MR. NEFF: I can finish.

8 MR. MONE: Will you finish the paragraph.

9 MR. NEFF: You'll see why I stopped.

10 Q. "I agree that it can't -- I mean, I state
11 that it can't be read out of the context of my
12 previous associations with Mr. Purcell, and, for
13 example, an exhibit" -- at which point you were
14 interrupted.

15 Did you make that statement to the lawyer
16 for the State Ethics Commission?

17 A. I certainly did.

18 Q. So when you wrote this letter --

19 A. The gloves were off, yes.

20 Q. -- the gloves were off, you were going to
21 get tough. You were trying to do whatever you could
22 to convince Patrick Purcell not to pursue that
23 appeal?

24 A. Absolutely. I didn't want his money.

1 Q. Did you not infer from Mr. Purcell's
2 failure to respond to your February 20th, 2005
3 letter that the open lines of communication you say
4 were in place prior to the trial were no longer in
5 effect?

6 A. I did not so infer, Mr. Neff.

7 Q. Well, now I'm going to get to the second
8 letter.

9 In your second letter, which was March 18th
10 of 2005, you did start out by reminding Mr. Purcell
11 that you were communicating to him as part of
12 "settlement negotiations"; isn't that true?

13 A. No, I did not, Mr. Neff. I started out the
14 letter by saying to him I was sorry of what the
15 Globe was reporting, and I took no pleasure in it.
16 That's how I started off the letter.

17 Q. And you were referring to an article that
18 had been in The Boston Globe on that same day, March
19 18th of 2005?

20 A. Yes, I was.

21 Q. If I can approach you, Judge.

22 A. Yes.

23 Q. I ask you if you recognize this.

24 A. One second, sir. (Witness reviews

1 document) Yes, this is the article. I'm not going
2 to go through it, but this is the article.

3 Q. That's the article or a copy of the article
4 that prompted you to send the March 18th, 2005
5 letter?

6 A. Yes, along with associated articles which
7 had been published contemporaneously all suggesting
8 that the *Herald's* finances were not on very firm
9 footing.

10 MR. NEFF: I would move to introduce this
11 into evidence, Your Honor.

12 MR. MONE: No problem.

13 JUDGE KILBORN: Exhibit 3.

14 (Document marked as Exhibit 3
15 in evidence)

16 Q. So then, Judge, will you agree that
17 essentially the second thing then you've told Mr.
18 Purcell in that March 18th letter is: "I'm going
19 to, once again, principal to principal, as
20 'settlement negotiations'" essentially. You wrote
21 that? You characterized this letter as a
22 "settlement negotiation" letter?

23 A. I can't read it that far away. That's all
24 right, Mr. Neff. I have it right here.

1 MR. NEFF: Do you still have the --

2 THE WITNESS: I've got it, Your Honor, if
3 you'll just give me a second.

4 A. (Witness reviews document) Yeah, I wrote
5 that.

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

11 "And that is....you have a ZERO" --
12 capitals, underlined -- "chance of reversing my jury
13 verdict on appeal.

14 "Anyone who is counseling you to the
15 contrary...is WRONG. Not 5 Percent....ZERO."

16 You told Patrick Purcell that?

17 A. The truth is a defense to everything I
18 know.

19 Q. So in this letter you were pretty strongly
20 expressing your legal opinion about the Boston
21 Herald's chances of prevailing?

22 A. I was pretty strongly expressing that
23 opinion, yes, sir.

24 Q. Of course, the appeal was still pending

1 before the appellate courts at this point, wasn't
2 it?

3 A. It probably was.

4 Q. It was actually, as we've already said,
5 almost really a little more than two years later
6 that the SJC finally rendered a decision on that
7 appeal?

8 A. Yeah. Five-zip.

9 Q. But it was over two years later --

10 A. So what?

11 Q. -- that the decision -- well, my question
12 to you, sir, is: It was over two years later that
13 the appeal was actually resolved after you wrote
14 that letter?

15 A. The timing would be a matter of looking at
16 a calendar. I'll accept your representation.

17 Q. Now, in this letter, which you described as
18 "settlement negotiations" in the beginning, you
19 continued by writing: "AND....I will NEVER, that is
20 as in NEVER, shave a dime from what you owe me."

21 You wrote that too?

22 A. I sure did.

23 Q. So would you define that kind of statement
24 as a "settlement negotiation"?

1 A. Well, yes, sir, I certainly would. Would
2 you like to know why?

3 Q. My question is, do you define that as a
4 "settlement negotiation"?

5 A. Absolutely.

6 Q. So telling the other side, "I will NEVER,
7 that is as in NEVER, shave a dime from what you owe
8 me," you regard as an effort towards settling the
9 case?

10 A. It's a position incident to a settlement.
11 People take positions all the time they don't end up
12 agreeing to. That was my position with respect to
13 settlement at that point. I had won the case. Why
14 should I take a dime less than he owed me? And why
15 should he spend another \$500,000 losing another
16 \$500,000 to me and paying his lawyers another
17 million bucks?

18 Q. So this latest letter on March 18, 2005 was
19 really just your latest effort to persuade Patrick
20 Purcell and the *Boston Herald* that you were right,
21 they were wrong, they were going to lose at every
22 turn and should therefore just pay you; isn't that
23 true?

24 A. I can't say that, because I wasn't asking

1 for what the letters say I was asking for. The
2 letters were strategic; that's what you need to
3 understand, Mr. Neff. And my strategy was -- no,
4 sir, I need to finish the answer to this question --
5 my strategy was to get Mr. Purcell to wake up and
6 smell the coffee.

7 I knew, all my lawyers knew, everybody
8 knew, that if you knew the law in this case, after
9 that jury verdict came down, he was sunk. He was
10 never going to get it flipped by the SJC, and I told
11 him so. And they didn't flip it. They went
12 five-zip in my way, and that's the defense that I
13 offered. Truth is a defense to just about
14 everything.

15 I knew it was going to happen to him. I
16 didn't want it to happen to him. I was trying to
17 get my family out of this thing, and that's why I
18 wrote the letters to him, to blow him up, to see if
19 he could maybe see something different. Pick a
20 lawyer like Ed Barshak, have us sit down, and maybe,
21 just maybe, he could be led to understand that he
22 was in some trouble here. They never offered me a
23 nickel to settle this case after the appeal was
24 over. Even then.

1 Q. There's no question before you.

2 A. I know. I'm sorry.

3 Q. Can I ask you, the February 20th and March
4 18th letters, what address did you send those
5 letters to?

6 A. I sent them to Mr. Purcell at the *Herald*.
7 I didn't have any particularized information, I just
8 believe I used the general address of the *Herald* and
9 marked them "PERSONAL CONFIDENTIAL."

10 Q. How did you get that address?

11 A. I may have called the *Herald* and asked them
12 what their address was.

13 Q. You didn't get that information from
14 Patrick Purcell, then, I take it?

15 A. No, no, I did not.

16 Q. So as part of facilitating your open lines
17 of direct communication whenever you wanted, Patrick
18 Purcell didn't even give you the main address of the
19 *Boston Herald* at which to contact him?

20 A. No, Mr. Purcell didn't give me the main
21 address at the *Boston Herald* at which to contact
22 him.

23 Q. Now, you would agree your February 20th
24 letter to Patrick Purcell -- getting back to this

1 one again --

2 A. Certainly, sir.

3 Q. -- that was on official Superior Court
4 stationery, wouldn't you agree?

5 A. I do agree to that, sir.

6 Q. One of the things that makes it -- one of
7 the things that demonstrates that it is official
8 Superior Court stationery is this little heading
9 right here which says "Commonwealth of
10 Massachusetts, The Superior Court"; is that true?

11 A. I would think that would be appropriately
12 answered yes.

13 Q. One of the things the Trial Court does with
14 its stationery is it actually put your name and
15 title as an Associate Justice on this piece of
16 stationery?

17 A. That is correct.

18 Q. And they would essentially cater stationery
19 to any particular judge who received it, meaning if
20 a different judge owned the stationery, that judge
21 would be where your name is?

22 A. Oh, yes. They were individualized, Mr.
23 Neff, yes.

24 Q. And you did admit when you spoke to the

1 State Ethics Commission that using official Superior
2 Court stationery to send this letter was
3 inappropriate, didn't you?

4 A. Yes, I did.

5 Q. You told the State Ethics Commission:

6 "...I want you to understand because I've
7 already conceded this publicly. To the extent that
8 I used judicial stationery to write to Mr. Purcell
9 on my personal stationery, I concede that was
10 inappropriate."

11 MR. MONE: Can I just object. That's what
12 he just said. He just answered that question "yes."

13 JUDGE KILBORN: Mr. Mone, is that an
14 objection?

15 MR. MONE: Yes, that is an objection.

16 JUDGE KILBORN: I'll sustain it.

17 MR. MONE: Thank you.

18 Q. In any event, you concede, using the
19 stationery for this letter was inappropriate?

20 A. Yes, I do.

21 Q. One of the things that happened after these
22 letters became publicly known is you wrote an
23 apology letter, which you addressed to The Boston
24 Globe, in which you said that you knew or understood

1 that this was inappropriate?

2 A. Immediately upon my finding out that the
3 statute had been changed so that you could no longer
4 use your personal notepaper to write personal notes,
5 that was after I had sent the letters, one of my
6 associate justices told me that you couldn't do it
7 anymore. And I looked up the statute and I agreed.
8 I immediately wrote to The *Boston Globe* and
9 apologized for using the personal stationery and
10 regretted that I had done so. I made a public
11 apology, the next day I believe it was.

12 MR. MONE: I am going to object to this
13 article.

14 JUDGE KILBORN: I have no idea what's in
15 front of anyone.

16 Q. Can I approach you, Judge, with a document
17 and ask you if you recognize this.

18 A. Certainly. (Witness reviews document)
19 Yes, I'm familiar with the letter, Mr. Neff.

20 Q. That's a copy of The Boston Globe article
21 which talked about and included portions of the
22 apology letter you had written to The *Boston Globe*?

23 A. Yes, *inter alia*.

24 MR. NEFF: I move to introduce this into

1 evidence.

2 MR. MONE: I object.

3 JUDGE KILBORN: Your objection?

4 MR. MONE: My objection is that's the first
5 two sentences of the letter -- of the article. The
6 rest of the article goes on to describe the *Boston*
7 *Herald* -- why don't you look at it.

8 JUDGE KILBORN: I'll look at that.

9 MR. MONE: Your Honor, I would ask you to
10 just look and just see. He was referencing the
11 first two paragraphs. Everything else is about the
12 case itself and about the position of the *Boston*
13 *Herald's* attorney.

14 (Document exhibited to Judge Kilborn)

15 JUDGE KILBORN: Well, Mr. Neff, given the
16 concessions made by Mr. Mone in his opening
17 statement and the Judge several times just now, why
18 are we doing this? Why do you want this in here?

19 MR. NEFF: It confirms the testimony, and
20 it's a statement against interest. I'm not asking
21 you to accept it for the truth of the matter
22 asserted, it's just an article that was generated in
23 *The Boston Globe* --

24 JUDGE KILBORN: I'm not allowing it in.

1 You can mark it for identification if you want.

2 (Document marked as Exhibit 1
3 for identification)

4 MR. MONE: Can we take a recess at some
5 point?

6 JUDGE KILBORN: I was going to ask you, how
7 much more do you have?

8 MR. NEFF: I have half an hour.

9 JUDGE KILBORN: In that event, we'll take a
10 ten-minute break.

11 (Recess from 11:19 to 11:33 a.m.)

12 MR. NEFF: All set, Your Honor.

13 THE WITNESS: I recognize, sir, I'm still
14 under oath.

15 MR. NEFF: Thank you.

16 BY MR. NEFF:

17 Q. One of the last things you mentioned before
18 we took our break was a change in the statute
19 governing use of stationery.

20 A. Yes, by judges.

21 Q. Do you recall testifying about that?

22 A. I do.

23 Q. What statute are you referring to?

24 A. I have no idea.

1 Q. So you became aware of the change in
2 statute that you had violated, but you still have no
3 idea what statute you're talking about?

4 A. I did at the time.

5 Q. Isn't it in fact a canon of the Code of
6 Judicial Conduct that governs use or nonuse of
7 judicial stationery?

8 A. Well, I thought it was a statute. I
9 received information from another associate justice
10 that things had changed, can't use our notepaper
11 anymore, and I had inadvertently not known of the
12 change.

13 Q. It's certainly true now you're aware of
14 Canon 2B of the Code of Judicial Conduct which would
15 prohibit a judge from using his or her personal
16 stationery or, excuse me, judicial stationery, for
17 personal business, are you not?

18 A. I am, sir.

19 Q. That's a canon that's always been there
20 since the code was initially drafted; isn't that
21 true?

22 A. It may well be, sir.

23 Q. You're aware of that canon now?

24 A. I am.

1 Q. But you're not aware of the statute that
2 you found out had somehow changed?

3 A. I was told it was a statute.

4 Q. One thing -- I'm going to ask you this:
5 Before you sent these letters on February 20th of
6 2005 and then on March 18th of 2005 to Patrick
7 Purcell, you had been communicated to by the
8 Executive Director of the Commission on Judicial
9 Conduct about proper use of judicial stationery,
10 hadn't you?

11 A. I'm not sure I had received any such
12 communication before I wrote the letters.

13 MR. MONE: I object.

14 JUDGE KILBORN: Again, I don't know what is
15 being -- is something being offered? Do you wish to
16 offer this, Mr. Neff?

17 MR. NEFF: Ultimately I will lay a
18 foundation.

19 JUDGE KILBORN: You will.

20 MR. NEFF: I will, yes.

21 (Document exhibited to Judge Kilborn)

22 JUDGE KILBORN: This date-wise is
23 shortly... This is 2002. The suit commenced in...
24 Do you wish to introduce that?

1 MR. NEFF: Yes.

2 MR. MONE: I object.

3 JUDGE KILBORN: What's the objection?

4 MR. MONE: A number of things.

5 JUDGE KILBORN: I'm sorry, you have got to
6 speak up.

7 (Bench conference off the record)

8 Q. May I approach you, Judge?

9 A. Absolutely. Any time.

10 Q. Thank you, Judge. I ask you to look at,
11 but not read aloud, that letter, if you would.

12 A. (Witness reviews document)

13 Q. Do you remember receiving that letter?

14 A. No, but I'm sure I did.

15 Q. Would you agree that letter was addressed
16 to you?

17 A. Yes.

18 Q. And that letter is dated August 21st of
19 2002?

20 A. Correct.

21 Q. In that letter the Executive Director of
22 the Commission on Judicial Conduct, Gillian Pearson,
23 advised you to consider the appropriateness of using
24 judicial stationery for certain purposes, didn't

1 she?

2 A. Yes, that's true.

3 Q. So you had been advised about thinking
4 about when and how and whether it's appropriate to
5 use judicial stationery three years before you sent
6 these letters, approximately three years before you
7 sent these letters to Patrick Purcell, weren't you?

8 A. Well, it was a different context, Mr.
9 Neff.

10 Q. Right. But at least on your radar screen
11 was thinking about being wary of circumstances where
12 it is and is not appropriate to use the judicial
13 letterhead; isn't that true?

14 A. That's difficult for me to answer yes or
15 no, Mr. Neff.

16 Q. Did you take this letter seriously, sir?

17 A. I always take everything Ms. Pearson writes
18 seriously.

19 MR. MONE: And he replied to her. He
20 hasn't shown him the reply. And I object. I object
21 to this. This simply isn't fair.

22 JUDGE KILBORN: I think we've gone far
23 enough on this, Mr. Neff.

24 MR. NEFF: Yes, Your Honor.

1 Q. Incidentally, who is the justice who told
2 you that there had been a change in the statute?

3 A. My memory, and I may be wrong about that,
4 is it was Mr. Justice Muse.

5 Q. Now, you would agree that you spoke to the
6 SEC after August --

7 A. Commission.

8 MR. MONE: It's not the SEC, please.
9 That's Washington. It's in Boston.

10 MR. NEFF: I'm doing my best.

11 Q. Would you agree you spoke to a lawyer from
12 the Massachusetts State Ethics Commission after
13 August of 2002?

14 A. I don't know when it was. Whenever they
15 took my deposition, I had an opportunity to speak to
16 two lawyers from the Ethics Commission.

17 Q. I'm not going to ask you for the exact date
18 of that deposition, but it was after 2002, wasn't
19 it?

20 A. Whatever the date of the deposition is is
21 the date I talked to the two people from the State
22 Ethics Commission.

23 Q. Would you agree, then, that that date was
24 July 10th of 2006?

1 A. If that's what it says, I would certainly
2 agree with it.

3 Q. Did you tell them:

4 "I was aware of the cannon (sic) regarding
5 stationery, and I believe there's a statute as
6 well" --

7 MR. MONE: Excuse me. You just misread.
8 You just read "I'm aware" --

9 MR. NEFF: I'm sorry. Could you address
10 your objections to the Judge, please.

11 JUDGE KILBORN: Hold on.

12 MR. MONE: He misstated. He just read "I
13 was aware." That's not what it says. It says "I
14 was unaware."

15 MR. NEFF: I'm sorry, I'll start again.

16 MR. MONE: Please read it accurately.

17 Q. "I was unaware of the cannon (sic) quite
18 frankly, and I believe there's a statute as well, I
19 think -- I've never looked at it -- which makes it
20 inappropriate for any state employee to use
21 resources. And that I presume is because we should
22 buy our own paper clips and not take the governments
23 (sic)."

24 Did you say that?

1 A. I believe I did.

2 Q. You told the lawyer for the Massachusetts
3 State Ethics Commission in 2006 that you were
4 unaware of the canon Ms. Pearson had directed your
5 attention to in 2002; isn't that true?

6 A. I guess I did, yes, sir.

7 Q. One last thing I wanted to ask you about,
8 Judge. I'm on Page 49.

9 The lawyer for the State Ethics Commission
10 asked you a specific question about how you had
11 calculated the \$3.26 million you had put in your
12 February 20th letter to Patrick Purcell. Do you
13 recall being asked about that?

14 A. No, I don't, but I'm sure I was.

15 Q. You told the State Ethics Commission --
16 excuse me -- the lawyer for the State Ethics
17 Commission in Massachusetts:

18 "Yeah. I can tell you basically how it was
19 calculated.

20 "First of all, if you don't mind, I will
21 tell you that. I'll tell you why it's in there
22 because I wanted him to get hit in the face with
23 \$3.26 million because he's going to say wait a
24 second, the verdict was only 2.8. What the hell is

1 going on with 3.2?

2 "And if you look at it in terms of, like,
3 the attempt to intimidation, just read on a little
4 bit. And the letter says, Look, if after I've
5 talked to you, if you don't agree with me, I'll flip
6 you back the check. I didn't attempt to, yeah, you
7 don't agree with me, but it's going to take you 3.2.

8 "I wanted him to understand that the price
9 of poker was rapidly, dramatically increasing all
10 with a designed intent to get him to think out of
11 the box. What was I going to do to make this guy
12 think out of the box? So I'll put in 3.26."

13 Did you say that?

14 A. I believe I did.

15 Q. Did you go on to explain:

16 "That's why I used the 3.2, to shake him
17 up. To have this say, well, this guy's crazy, you
18 know, what's he talking, 3.2 million. I only owe
19 him 2.8, but let me call my personal counsel. Let
20 me just say what is this guy trying to do."

21 Did you say something to that effect?

22 A. I said exactly that, I have no doubt.

23 Q. So when you put the \$3.2 million into that
24 February 20th letter, you were trying to shake Mr.

1 Purcell up, weren't you?

2 A. Absolutely.

3 Q. And essentially scare him and make him
4 think the price of poker is dramatically increasing,
5 weren't you?

6 A. No. Because you see, Mr. Neff, if I had
7 done that with an intention to keep Mr. Purcell from
8 pursuing an appeal, and I had added another \$500,000
9 to the amount that he owed me, I would be saying to
10 Mr. Purcell, Mr. Purcell, don't appeal, but pay me
11 another \$500,000. Something is wrong with that
12 picture.

13 What I did, Mr. Neff, was I wrote Mr.
14 Purcell, and I calculated in my own mind that I had
15 a \$2.8 million judgment, which was accelerating at
16 the rate of \$1,000 a day. If Mr. Purcell took an
17 appeal, which I believed, and was proven to be
18 correct in that belief, would be unavailing to him,
19 he would owe me at least another \$500,000. And
20 thus, had I had an opportunity to talk to Mr.
21 Purcell, I would have explained to him how I got
22 where I got and begged him not to pay me an extra
23 \$500,000. That was the methodology. That was the
24 strategy behind using that figure.

1 Q. In your February 20th, 2005 letter to
2 Patrick Purcell, you told him that the price of a
3 meeting with you was that he must bring a check for
4 \$3.26 million to that meeting, didn't you?

5 A. Yes, I did.

6 Q. And you wrote "no check, no meeting,"
7 didn't you?

8 A. Correct.

9 Q. You didn't put anything in that letter
10 about: Or if you want, bring the amount you
11 actually owe me on February 20th, 2005, did you?

12 A. No, I didn't.

13 Q. You were saying: If you want to meet with
14 me to talk about resolving the case, you have to
15 bring a check payable to me in that amount,
16 otherwise no meeting at all?

17 A. That's what the letter said, but you're
18 missing Factor X.

19 Q. What I asked you, sir, is, that's what you
20 put in the letter: 3.26 million, "no check, no
21 meeting," right?

22 A. Absolutely. That's what's in the letter.

23 Q. I wanted to ask you one last thing, Judge.

24 A. Sure.

1 Q. The envelopes you used to send these
2 letters to Patrick Purcell, where did you get these
3 envelopes from?

4 A. I probably took them out of the desk in one
5 of the lobbies that I was sitting in. I can't
6 remember where I was when I wrote these letters,
7 where I was sitting. But every desk in every lobby
8 in every Superior Court in the Commonwealth has
9 drawers that open up that have old stationery and
10 old envelopes.

11 Q. So this was stationery owned by the
12 Superior Court, these envelopes?

13 A. I'm not sure. One of them is owned I think
14 by Walter Timilty as Clerk of the Norfolk Superior
15 Court.

16 Q. Well, you'd agree that at least one of
17 these was a letter with a return address
18 "Commonwealth of Massachusetts Superior Court"?

19 A. I can see that, and I believe it would be,
20 yes.

21 Q. The other envelope that you chose to use
22 was court stationery, but it was the court
23 stationery of the Clerk of Courts in Norfolk County,
24 Walter Timilty; is that true?

1 A. I guess so, yeah.

2 Q. So you would agree, then, that this is
3 stationery that belonged to some level of the court
4 system?

5 A. Or the state, either way.

6 Q. It's the stationery generated by the state
7 for that court system?

8 A. Correct.

9 Q. The stationery, the other stationery you
10 used to write these letters with your name on it,
11 and so forth, that was stationery that was given to
12 you by the Trial Court; is that true?

13 A. Correct.

14 Q. You didn't buy that?

15 A. No, sir.

16 Q. They provided it to you?

17 A. They did.

18 Q. They provided it to you actually at the
19 same time as business cards and envelopes?

20 A. Precisely the same time.

21 MR. NEFF: If I could have one moment.

22 (A pause)

23 MR. NEFF: Thank you, Judge. I have
24 nothing further.

1 THE WITNESS: Thank you, Mr. Neff.

2 JUDGE KILBORN: Cross, Mr. Mone.

3 CROSS EXAMINATION

4 BY MR. MONE:

5 Q. Your Honor, I'd like to go back to the
6 original story in the *Boston Herald*. When was that
7 published?

8 A. I believe it was February 13th, 2002.

9 Q. What did that article accuse you of having
10 done?

11 MR. NEFF: Objection.

12 JUDGE KILBORN: And the objection is?

13 MR. NEFF: As irrelevant to the issue
14 before you today.

15 JUDGE KILBORN: Well, I think he's leading
16 to an impact on the Judge, and I'll allow it.

17 Q. Could you just tell us what that story
18 accused you of having done.

19 A. Well, the front-page headline was "Murphy's
20 Law." And on the front page of that newspaper on
21 that day there were six factual statements made
22 about me. All six were false, and in my view,
23 defamatory. And in my view, motivated by reckless
24 disregard for the truth and/or actual malice.

1 Q. What were the actual statements? What were
2 the actual statements?

3 A. The one that is obviously most destructive
4 that strikes out --

5 MR. NEFF: Objection to the
6 characterization.

7 JUDGE KILBORN: Overruled.

8 A. -- was an allegation that I had said of a
9 15-year-old female rape victim, to "Tell her to get
10 over it." When in fact what I had said was, "How
11 can we help this young woman get over this?"

12 There were also statements in that article
13 to the effect that I had bailed out rapists, and
14 they weren't true because they were only accused of
15 rape, and on and on and on. But the big story was,
16 "Tell her to get over it," and that's what captured
17 the public imagination and demonized me.

18 Q. How long had you been a Superior Court
19 judge at that point?

20 A. Roughly two years.

21 Q. Were you proud of being a Superior Court
22 judge?

23 A. Very much so, sir.

24 Q. What effect did that have on you, to have

1 those misstatements, those lies published about you
2 by the *Herald*?

3 A. Well, I guess -- at the time I remember
4 reacting that this was absolutely bizarre, was my
5 instant take on it. There was no truth to this
6 whatsoever.

7 And then shortly thereafter, after I
8 started getting the thousands of letters that I got
9 from every place, from Temecula, California, to
10 London, England, calling me a monster and accusing
11 me of high crimes and misdemeanors, and the death
12 threats on my life, I began to think that maybe it
13 was a little more serious than that.

14 And I realized that I had been demonized in
15 the public eye by this paper, and I had been
16 libeled. And I didn't say, "Tell her to get over
17 it." I said, "How can we help her to get over it?"
18 And look at the trouble I was in.

19 And I knew at that point that that
20 statement was a statement of fact in quotes, and
21 that that had certain legal ramifications, which I
22 knew because I was a lawyer and a judge, and I knew
23 that there was no source for that statement, because
24 I never made that statement. And so I said to

1 myself, "I need a retraction of this statement. I
2 need it right away."

3 The wrinkle was that I have an annual
4 vacation with my wife and my children in St.
5 Maarten, and we were supposed to get on the plane on
6 Friday, I guess it was. And the first paper was
7 Wednesday, that was the "Murphy's Law" article, I
8 believe, or if it was Tuesday or Wednesday, and I
9 had limited time to do anything.

10 So I called up Owen Todd, the former
11 justice of the court, a friend of mine, and a
12 preeminent lawyer in the Commonwealth, and I said,
13 "Owen, I didn't do any of this. This is crazy. And
14 I want you to stand in for me, at least until I can
15 get back from St. Maarten." And Owen said, "I
16 will."

17 MR. NEFF: Objection.

18 A. And he did.

19 MR. NEFF: I object to testimony regarding
20 statements made by others.

21 JUDGE KILBORN: I'll sustain that.

22 THE WITNESS: Okay.

23 A. Owen did in fact represent me while I was
24 gone, further informed the *Boston Herald* that this

1 was outrageous, it never happened, they should stop
2 printing these, which they didn't.

3 And when I got home, immediately after I
4 got home, what happened was that Howie Carr --

5 Q. He writes for the *Herald*?

6 A. Yes, he does.

7 -- in a column, libeled me, and was found
8 to have libeled me by the jury. Even though he was
9 not a party defendant, the jury found him to have
10 libeled me in this. He set out an article which
11 was, "Perhaps Judge Murphy's daughters ought to feel
12 the way the victim feels," to which the chowderheads
13 that read Howie Carr's column decided to write back
14 in and suggest that maybe my daughters ought to be
15 raped.

16 Q. Were those letters published in a blog the
17 *Herald* had?

18 A. On the Internet, the Howie Carr Internet
19 forum.

20 Q. Let me just stop you.

21 A. May I say one more thing?

22 Q. No. You have to wait until I ask a
23 question.

24 A. All right. It's tough for a judge to do

1 that.

2 Q. I understand. If lawyers are bad
3 witnesses, judges are awful.

4 Judge, tell me the effect it had on your
5 family.

6 A. Well, I was just getting to the fact that
7 as a result of that article, people wrote in on that
8 Internet saying, "Let's go rape Judge Murphy's
9 daughters" and identifying the location of my house.

10 Q. Judge, from the time that you got into the
11 lawsuit with the *Boston Herald*, what was your
12 objective in terms of seeing if it could be settled?

13 A. All I wanted was a retraction, Mr. Mone. I
14 just wanted them to realize that this was not true.
15 And I have to go a little -- if I may, Your Honor, I
16 have to go a little bit below that to develop the
17 context.

18 Once we were refused, I mean collectively,
19 my attorneys and me --

20 MR. NEFF: I'm going to object at this
21 point and ask that the witness answer in response to
22 questions.

23 JUDGE KILBORN: Overruled. Go ahead.

24 A. Once we were in a position where we had

1 tried to interface with a retraction, we did our due
2 diligence. And what we did was, we went out and we
3 took affidavits from the universe of people who
4 could be a percipient source of that quote by David
5 Wedge.

6 So unlike the Ayash case, which was the
7 doctor at Brigham and Women's, we had an limited
8 universe. We knew that the only people who could
9 have said that had to be in one or two lobby
10 conferences. So we got affidavits from every single
11 body there except for one person we knew was what
12 they called C3 in a trial. So we knew who it was
13 that was going to talk, and we knew that I never
14 said anything to him, and we knew that that wasn't
15 going to work.

16 And we knew that there were no three
17 sources, as the *Herald* alleged and would not
18 divulge. There couldn't have been three sources;
19 there could at most have been one source. So we
20 knew what the *Herald* was doing in reality, which was
21 hiding behind sources that didn't exist, and that
22 that was going to come out.

23 So when I went to Mr. Purcell, I went --

24 Q. When was that first -- you testified a

1 little bit -- can I go back for a second?

2 A. Absolutely. Whatever you want, Mr. Mone.

3 Q. What I asked you was, what was the effect
4 on your family about what happened?

5 A. Well, let me just give you two effects. My
6 14-year-old daughter started wetting the bed at 14
7 years old.

8 Q. Did she require therapy?

9 A. She's still in therapy. She was the
10 Massachusetts state champion equitation rider in 14
11 and under before these threats were made, and after
12 they were made she never rode another horse
13 competitively.

14 Q. Was it because of the effect on you and
15 your family that you wanted to talk with Mr. Purcell
16 and see if he could end this?

17 A. It was always -- thank you. It was always
18 my -- from day one I wanted to kill this beast at
19 the lowest common denominator. I didn't do what
20 they said I did, I could prove I didn't do what they
21 said. It was killing me and my family. And I did
22 whatever the hell I had to do to try to stop it,
23 because my family was dying.

24 Q. You set up a meeting with Mr. Purcell; is

1 that correct?

2 A. That's correct.

3 Q. Why did you want to talk with him directly?

4 A. Because he was the man who had the power to
5 make the decisions.

6 Q. Did you believe that by talking, as you
7 referred earlier this morning, principal to
8 principal that he would understand what you and your
9 family were going through and what the *Herald* had
10 done to you?

11 A. Yes. I believed that that information to
12 him would make a difference in the way he assessed
13 what ought to be done by his newspaper thereafter,
14 yes.

15 Q. Did you understand in the meeting with Mr.
16 Purcell that everything was to be absolutely
17 confidential?

18 A. That was indeed my understanding.

19 Q. And there were e-mails that set that up,
20 weren't there, that it would be confidential?

21 A. Yes, there were.

22 Q. When you met with Mr. Purcell, would you
23 just tell us about the meeting. What was the
24 meeting like? Let me put it this way: Was there a

1 frank exchange of views?

2 A. Oh, yes.

3 Q. Fine. You gave him your view, as you've
4 expressed here today, and at other times, correct?

5 A. Correct.

6 Q. And he listened to you?

7 A. He did.

8 Q. And what did he say? By the way, let me
9 make this clear: You have always honored this
10 confidentiality, haven't you?

11 A. I have, sir.

12 Q. And it's only when these charges were made,
13 and really in this courtroom today, you're going to
14 testify as to what he said?

15 A. I had a gentleman's agreement with Mr.
16 Purcell. The first thing I did when I walked in to
17 his office was shake his hand and introduce myself
18 to him. And I held his hand, and I said to him,
19 "All this is between you and me, Pat, right?" And
20 he said, "Absolutely, Judge."

21 Well, that's the best I can do. So I
22 proceeded on that assumption, and I have never
23 divulged anything that Mr. Purcell and I discussed
24 in either of the meetings that we had.

1 Q. Tell me, then, what was discussed. If not
2 the precise language, what was discussed at the
3 meeting?

4 A. Well, I told Mr. Purcell that: "This never
5 happened. Let's start out, Mr. Purcell. I didn't
6 do this. Therefore, you can't prove I did this,
7 because I didn't do it. Number one, I have a ton of
8 people who were there who will say, He didn't do it.

9 You claim to have sources. You don't have
10 those sources. You have to go back. You have to
11 retake your steps and ascertain, who says they have
12 what sources that heard me say this?" Because we
13 knew they didn't have sources. They couldn't have
14 sources. It was mathematically impossible for them
15 to have sources.

16 And I didn't blow our strategy, our
17 -deliberation strategy, but I did tell him, "Listen,
18 you have got to go back and you have to find out
19 what these sources are and make sure that they are
20 sources that are countenanced under the law to give
21 this kind of material to a reporter so that he can
22 publish it without violating somebody's rights and
23 without libeling him." I wanted him to check on the
24 story, because the story couldn't hold up, it

1 couldn't hold up.

2 And he said essentially, "We're confident
3 in our sources." And I said, "Well, okay. All
4 right." That was the substance of that particular
5 part of the exchange. I said, "I can't make you do
6 anything, but, you know, this isn't true, and you're
7 not going to be able to prove it is. And I don't
8 want to take it any further, I just want a
9 retraction. My wife and my family are half dead
10 over this already from being threatened with rape
11 and everything else, I just want out of here."

12 He said, "Well, I've got to do what my
13 lawyers tell me to do." And I said, "Well, I can't
14 stop you from doing that, but I might ask you to
15 check with an independent lawyer and have him
16 consult with my attorney."

17 And so from the get-go I was trying to turn
18 him off of relying on the corporate lawyers who were
19 representing him, because they were giving him,
20 quite frankly, lousy advice and I knew it.

21 Q. Now, you had another meeting; is that
22 correct?

23 A. I did.

24 Q. And that was at or about the time of the

1 summary judgment either argument or decision; is
2 that correct?

3 A. In my recollection, it was after the
4 decision. But it could be after it was argued,
5 because you hate to sound too, you know, prescient
6 about things. But if you know the law, you know, a
7 summary judgment decision --

8 MR. NEFF: Objection. This is not
9 responsive to the question.

10 JUDGE KILBORN: What?

11 MR. NEFF: The question was just when.

12 Q. Okay. Why did you talk to him again at the
13 summary judgment stage?

14 A. Because summary judgment is a big deal in a
15 libel case, a public figure libel case. 80 percent
16 of the public figure libel cases that are brought go
17 for the defendant on some kind of First Amendment
18 basis at the summary judgment stage. And when they
19 don't go for the defendant at the summary judgment
20 stage, in my opinion, that's a wake-up call, or
21 ought to be a wake-up call, that maybe, just maybe,
22 you could be in a little trouble here, because the
23 court said, "No, this case goes to trial."

24 So that's what I wanted to tell him. I

1 wanted to say, "Pat, summary judgment. We won.
2 That's a problem. For goodness sake, start thinking
3 about this from another perspective."

4 Q. I take it there had been discovery done on
5 the case by then?

6 A. Absolutely.

7 Q. Did you know by this time that as stated in
8 the Supreme Court opinion that the reporter who
9 alleged to have talked to these sources had
10 destroyed his notes after he was informed of your
11 contention that the case wasn't true?

12 A. Absolutely. We knew everything. We caught
13 him in 20 or 30 lies at his deposition.

14 Q. So you went to Mr. Purcell again; is that
15 correct?

16 A. Yes.

17 Q. And I know this is emotional --

18 A. I'm trying.

19 Q. Okay. Do a little better.

20 Just tell us, as calmly as you can, what
21 happened at the next meeting? You believed this was
22 in furtherance of the confidential settlement
23 discussions; is that correct?

24 A. Well, I would only tell you, we discussed

1 mediating the case, and I would consider that to be
2 in furtherance of settlement discussions, yes.

3 Q. And did the *Herald* agree to mediate the
4 case?

5 A. No. He said he would have to check it out
6 with his attorneys. And I believe that shortly
7 thereafter, Mr. Dushman wrote to Mr. Cooper by
8 e-mail and said, "We're not interested in
9 mediating."

10 But I said to him, I can remember saying to
11 him, "Pat, you really ought to mediate this. We
12 don't want to go to trial. You don't want to go to
13 trial, I don't want to go to trial."

14 Q. You thought you were going to win the case.
15 Why didn't you want to go to trial?

16 A. Because I didn't want any more impact on my
17 family. I had two kids in psychotherapy, a wife who
18 was grinding her teeth all night long, and I was in
19 trouble trying to hold that family together. I
20 can't take you through the kitchen door, but just
21 appreciate what it was like. I had kids run into my
22 room at 2:30 in the morning telling me there was
23 somebody outside that they thought was going to jump
24 through the window and rape them.

1 Q. Did you have a police car assigned?

2 A. I did. I had a state police assigned car.
3 I had local assigned cars. They were looking at
4 them every day when they were walking in the
5 driveway, an uncomfortable feeling, I'm sure.

6 Q. So you had another discussion
7 face-to-face --

8 A. Yes.

9 Q. -- is that correct? Pat/Ernie; that's the
10 way you talked, isn't it?

11 A. That's correct.

12 Q. So you had another face-to-face discussion
13 with the publisher?

14 A. He may have called me "Judge," but I called
15 him "Pat." We got on a colloquial basis right away.

16 Q. Now, after these meetings, you then go to
17 trial, correct?

18 A. After these meetings.

19 Q. After the second meeting, there's no
20 settlement, they don't make an offer?

21 A. They won't mediate.

22 Q. They won't mediate. They just won't do
23 anything. They're going to go to trial, take their
24 chances with the jury, right?

1 A. That's what happened.

2 Q. The jury proved -- or the jury did what you
3 said they did, didn't they?

4 A. They certainly did.

5 Q. What you told Mr. Purcell, that he was
6 going to lose.

7 A. He lost.

8 Q. And he lost at that point somewhere on the
9 order of 2.1 reduced to -- let's call it 2 million.
10 He lost around \$2 million, correct?

11 A. Yes, sir. That is correct.

12 Q. You still wanted to settle the case, didn't
13 you?

14 A. Absolutely.

15 Q. Just why? You had won. Why did you want
16 to settle the case at that point?

17 A. Because I didn't want any more of his
18 money, I wanted him to stop traumatizing my family.
19 Because every time they libeled me -- and they
20 libeled me after summary judgment in this case.
21 They libeled me in October of 2005. Libeled me.
22 And was found to have libeled me. They wouldn't
23 stop.

24 And every time obviously that they would do

1 something like this to me, it would get on the talk
2 show circuit with the usual suspects, trying to have
3 me convicted for criminal extortion over these
4 letters, when in fact there's no civil extortion, so
5 maybe we can just call it "extortion." But it gives
6 you the type of understanding they had of the
7 situation. But they're all over it.

8 My daughter thought I was going to jail.
9 She cried inconsolably in her room. She wouldn't
10 even stay -- after they published the headline
11 "Willful Misconduct," as if I had already been
12 proven to have willful misconduct, my daughter
13 thought I was going to jail. And she went away for
14 the weekend with her grandmother out of the
15 Commonwealth so that she wouldn't have to see my
16 picture on the television screen. That's how
17 traumatized my daughters were by this. . .

18 Q. Now, you're already testified to Mr. Neff
19 about these letters and why you wrote these letters,
20 but is it fair to say that what you were trying to
21 do was to get Mr. Purcell to take a fresh look at
22 the case, and you were concerned if that work was
23 filtered through the lawyers, they would give him
24 bad advice. Is that your reasons?

1 A. Precisely, Mr. Mone. It was a strategical
2 move on my part in the context of the litigation.

3 Q. Now, after you sent the first letter to Mr.
4 Purcell on February 20th of 2005, did Mr. Purcell
5 call you and say, "Judge, no more letters. No more
6 confidential communications. I don't want to
7 communicate"? Did he ever say that?

8 A. He never said anything. He never called me
9 back about anything.

10 Q. Did you ever hear through his lawyers to
11 your lawyers that they didn't want you to be
12 communicating with him?

13 A. I'm unaware that my lawyer had any
14 information.

15 Q. And in fact --

16 A. I certainly didn't hear anything.

17 Q. After these letters were filed, the *Herald*
18 filed postjudgment motions, their initial
19 postjudgment motions to set aside the verdict; is
20 that correct?

21 A. That is correct. They filed a JNOV and a
22 motion for new trial.

23 Q. And that was after you wrote these letters
24 that have been characterized by the Commission as

1 somehow intimidating; isn't that correct?

2 A. Months afterwards.

3 Q. Did they put anything in those papers? You
4 read those papers.

5 A. They filed approximately 100 pages of
6 memoranda supporting the motions.

7 Q. Is there a word in there about Mr.
8 Purcell's concern about being intimidated over that
9 meeting?

10 A. Not a word.

11 MR. NEFF: Objection. Objection.

12 JUDGE KILBORN: What's the objection?

13 MR. NEFF: Both hearsay and it's not
14 relevant to this hearing.

15 MR. MONE: It is absolutely relevant.

16 MR. NEFF: Your Honor, as I've already said
17 at the outset, what matters is not Mr. Purcell's --
18 subjectively what his reaction would be to these
19 letters. What's relevant for you --

20 JUDGE KILBORN: It's certainly relevant,
21 but I want to talk about hearsay. What is this now
22 you're talking about?

23 MR. MONE: What I'm asking him -- I have
24 the papers here, I can offer them. What I'm asking

1 him is that after this alleged letter -- after this
2 alleged letter intimidating Mr. Purcell was sent by
3 Judge Murphy, they filed motions in the case, and
4 they did not mention at all these letters. There is
5 not a word in those motions about these letters.

6 JUDGE KILBORN: Well, as far as I'm
7 concerned, they're not offered for the truth, so
8 they're in.

9 Q. Is that correct?

10 A. They did -- not a word. Months after the
11 letters were written, they filed everything they
12 could possibly think of, Brown Rudnick, in an
13 attempt to get a new trial or a JNOV, and this
14 intimidation aspect of things wasn't raised by a
15 single semicolon.

16 JUDGE KILBORN: Okay.

17 Q. Now, let's go forward to December of 2005.
18 Now, this is approximately ten months after you
19 wrote the first letter; is that correct?

20 A. Correct.

21 Q. And the publisher of this tabloid has had
22 these letters for all that length of time; is that
23 correct?

24 A. I presume he had.

1 Q. And there was a period of time just before
2 Christmas of 2005 when there was an attempt to set
3 up a meeting again between the sides to discuss
4 settlement; is that correct?

5 A. We were once again requesting a four-way
6 meeting, a conventional four-way meeting: Mr.
7 Purcell, his lawyer, Mr. Dushman, Mr. Cooper and me.

8 Q. And in fact, to your knowledge, there was
9 an e-mail from Mr. Dushman attempting to set up such
10 a meeting; is that correct?

11 A. Correct.

12 Q. Or schedule such a meeting?

13 A. Correct.

14 Q. Now, on the same day, for the first time
15 new counsel for the *Herald* appears; is that correct?

16 A. Yes.

17 Q. And it was at that time, for the first time
18 that the *Herald* ever raised, ten months after you
19 wrote the letter, it was at that time they raised
20 for the first time this allegation that you were
21 attempting to intimidate; is that correct?

22 A. That is correct, sir.

23 Q. They had the letters for ten months at that
24 point?

1 A. Correct.

2 Q. And they filed I think a motion under Rule
3 60, wasn't it, to set aside the judgment?

4 A. Correct. 60(b)(6).

5 Q. Attorney Neff was referring you this
6 morning to an affidavit that you made; is that
7 correct?

8 A. I believe he did.

9 Q. And that affidavit was made in connection,
10 was it not, with your response to the motion by new
11 counsel to set aside the verdict; isn't that
12 correct?

13 A. On the basis of the letters.

14 Q. On the basis of the letters.

15 A. Right.

16 Q. And it was at that time that -- that was
17 the first time you knew that Mr. Purcell had
18 violated what you believed to be the confidential
19 man-to-man agreement that you had between the two of
20 you?

21 A. You mean when I read it in the paper?

22 Q. Right.

23 A. Correct.

24 Q. And up to that point, after these two

1 letters, nobody ever said to you, from either Mr.
2 Purcell or from the lawyers, that these letters were
3 inappropriate and they weren't in furtherance of
4 discussions?

5 MR. NEFF: Objection.

6 JUDGE KILBORN: Sorry?

7 MR. NEFF: He's testifying as to the
8 statements of others. It's hearsay.

9 MR. MONE: He's testifying as to what he
10 knew. I'm asking what he knew.

11 MR. NEFF: I'm sorry, I'm directing my
12 statements to the Judge.

13 JUDGE KILBORN: We can hear what
14 communications the Judge received from whom.

15 Q. Did you ever receive any communication
16 from Mr. Purcell? Prior to the time that the
17 tabloid ran these on the front page, did you ever
18 receive any communication that he was not going to
19 honor what you believed to be the agreement of
20 confidentiality?

21 A. I never received any communication from Mr.
22 Purcell after my last meeting with him.

23 Q. Now, I think you've already testified that
24 in fact this letter in which you asked for the \$3.2

1 million, the letter ends, does it not, by saying
2 essentially, That's the price of the meeting. In
3 other words, that's the price to get a meeting;
4 isn't that right?

5 A. Yes. That was the ploy I used to wake
6 up --

7 Q. It was strategic?

8 A. Yes.

9 Q. It may have been the wrong strategy, but
10 you had a strategic reason to do it; isn't that
11 correct?

12 A. As I have said --

13 Q. No.

14 A. Yes.

15 Q. All right. The strategy, the strategy was,
16 as you've told Mr. Neff, the strategy was to get him
17 to take a second look at the advice he was getting
18 that everything was fine and it was going to be
19 sustained; is that correct?

20 A. That's absolutely true.

21 Q. And in fact, in fact, everything that you
22 said in all these letters, everything you said in
23 your meetings with Mr. Purcell to him, where you
24 told him what was going to happen, you were right

1 100 percent of the time, weren't you?

2 A. I was.

3 Q. And so 100 percent of the time you had told
4 him that you had a strong case, that they had no
5 defense, that they were going to lose, they were
6 going to lose the Motion for Summary Judgment, they
7 were going to lose at trial. All of that was true;
8 they lost all the way, didn't they?

9 A. The record speaks for itself, Mr. Mone.

10 Q. It went to the Supreme Court, the Supreme
11 Judicial Court, correct?

12 A. Correct, sir.

13 Q. The *Herald* was represented by eminent First
14 Amendment counsel from Washington at that hearing;
15 is that correct? You were there.

16 A. I would say by reputation he was eminent.

17 Q. And in fact, you won five-to-nothing?

18 A. You can look at the scoreboard, Mr. Mone.

19 Q. Just as you told Mr. Purcell when you were
20 trying to settle the case two years earlier that you
21 were going to win, right?

22 A. Correct.

23 Q. Now, the *Herald* continues to publish
24 stories about you, correct?

1 A. I'm not sure about this morning's edition,
2 but last week, the week before, the week before
3 that, yeah.

4 Q. They follow you around, don't they?

5 MR. NEFF: Objection.

6 A. I think --

7 MR. NEFF: Relevance.

8 MR. MONE: It goes to the bias of the
9 complainant.

10 JUDGE KILBORN: I'm allowing the question.

11 Q. The *Herald* continues to follow you around;
12 is that correct?

13 A. That is correct.

14 Q. They take photographs of you?

15 A. Evidently.

16 Q. Well, you've been on the front page of the
17 *Boston Herald*?

18 A. They look like me.

19 Q. Okay. They followed your wife?

20 A. Absolutely. And put my wife in the
21 newspaper --

22 Q. And so --

23 A. -- for the felony of the company --

24 MR. NEFF: Objection.

1 A. -- of her husband. Go ahead.

2 Q. So from the time this happened, when they
3 published those first lies, they have never, ever,
4 ever expressed to you any sorrow for what they've
5 done to you and your family?

6 A. Absolutely not. They libeled me two weeks
7 ago.

8 Q. They paid you the money, but they've never
9 said they're sorry?

10 A. No. They've done worse, they've libeled me
11 as late as two weeks ago.

12 MR. MONE: Thank you. That's all I have.

13 JUDGE KILBORN: Redirect?

14 MR. NEFF: Just a few things, Judge.

15 REDIRECT EXAMINATION

16 BY MR. NEFF:

17 Q. Good afternoon again, Judge.

18 A. Good afternoon, Mr. Neff.

19 Q. A few minutes ago your attorney, Mr. Mone,
20 asked you about conversations your attorneys had
21 with the *Boston Herald* attorneys about settlement
22 around about the same time your letters to Patrick
23 Purcell, these letters, were placed into or
24 published in the *Boston Herald*. Do you recall that

1 line of questioning?

2 A. Well, I do. And also I'm just trying to be
3 -- I also recall the testimony about seeking
4 mediation, which was agreed to the day that the
5 *Herald*, three days before Christmas, blew me up with
6 the excerpts from the letters.

7 Q. Well --

8 A. I don't know which one you're referring to,
9 Mr. Neff.

10 Q. I'm going to approach you.

11 A. Any time, Mr. Neff.

12 Q. I show you a document and ask you if you
13 recognize that.

14 A. (Witness reviews document) I have no
15 present recollection of ever having seen that
16 e-mail, but I may well have. And what it says I
17 think is -- I'll concede that it's true.

18 Q. Do you recall -- let me see if I can maybe
19 help you -- do you recall that that e-mail was
20 attached to an affidavit you filed with the Court in
21 relation to your libel lawsuit?

22 A. I do not recall that. It may well have
23 been.

24 Q. That does appear to be an e-mail between

1 your attorney, Howard Cooper, and the *Boston*
2 *Herald's* attorney, M. Robert Dushman?

3 A. I think there are two e-mails there. The
4 one on the top appears to be a response to the one
5 on the bottom, which is from Mr. Cooper.

6 Q. Let's start with the e-mail message sort of
7 on the bottom of that piece of paper. Do you know
8 what is being talked about there?

9 A. I believe I do, yes.

10 Q. What is being talked about there?

11 A. Well, first of all, we had no objection to
12 Attorney Sanford come into the case, and we wanted
13 to convey that to Mr. Dushman, who had requested
14 that information.

15 Q. The next paragraph, what does that talk
16 about?

17 A. That's my counsel indicating to Mr. . .
18 Dushman that we would want to meet with Mr. Purcell
19 and discuss about the appeal. Mr. Sanford, of
20 course, would be welcome to participate, and we
21 would like it if he could be there. Because he was
22 another country to be heard from, he was a new kid
23 on the block, and that's exactly what we were
24 looking for.

1 Q. So Mr. Cooper had e-mailed Mr. Dushman that
2 message, which concluded, "Please let me know if and
3 when this meeting can take place"?

4 A. It looks like it's in conclusion, yes.

5 Q. It appears he sent that e-mail message to
6 Mr. Dushman on December 12, 2005?

7 A. It doesn't say when he sent it. Maybe it
8 does. Yes, indeed, sir, it does.

9 Q. Mr. Dushman appears to have replied on
10 December 20th of 2005?

11 A. Correct.

12 Q. His response is, "We have no" -- well, the
13 third sentence of his response is, "We have no
14 objection to meeting but only if it's likely to lead
15 somewhere"?

16 A. That's what it says, yes.

17 MR. NEFF: I'm going to move to introduce
18 this into evidence, Your Honor.

19 JUDGE KILBORN: Mr. Mone?

20 MR. MONE: I have no objection.

21 (Document marked as Exhibit 4
22 in evidence)

23 Q. Judge, I wanted to ask you, you mentioned
24 you were libeled by the *Boston Herald* just two weeks

1 ago?

2 A. Yes, I was.

3 Q. How is it that you were libeled by the
4 *Boston Herald*?

5 A. The *Boston Herald* published an article that
6 I had skipped a North Carolina speeding ticket and
7 that I was in default in the state of North
8 Carolina. A, I had not skipped a speeding ticket.
9 I had retained counsel in December to represent my
10 interests in the matter.

11 Q. Is --

12 A. I'm not through, Mr. Neff, with all due
13 respect. You asked me how, and I'd like to tell you
14 how.

15 Q. By all means, go ahead.

16 A. Thank you.

17 At the time the *Boston Herald* published
18 that fact, it was false. It was obviously
19 defamatory, and it required, especially in the
20 context of what the *Boston Herald* has relentlessly
21 done to me over the past six years, that somebody do
22 due diligence to investigate the truth or falsity of
23 that article.

24 Therefore, the appearances of my attorneys

1 were on the docket of that case from, as I
2 understand it, last December. My attorneys have not
3 been contacted by any representative of the *Boston*
4 *Herald* at any time.

5 It is my view that a publication of a false
6 and defamatory statement, it's my view of the law, I
7 might state, requires a reporter to interview all
8 known sources who may be able to contribute to the
9 veracity or the falsity of that article.

10 My attorneys were on the docket; they
11 never got called. In the context of what's happened
12 to me by the *Boston Herald*, I think that's malicious
13 and at least a total disregard, a reckless disregard
14 for the truth. So that's the basis on which I
15 conclude I was libeled by the *Boston Herald* two
16 weeks ago.

17 Q. Isn't it true in that *Boston Herald*
18 article, which you clearly are familiar with, they
19 indicate the fact of your default was confirmed by
20 four court officials in North Carolina?

21 A. I don't care.

22 Q. Well, I'm asking you, isn't it true that in
23 that same article --

24 A. That's what they said.

1 Q. And isn't it true that before the *Boston*
2 *Herald* published the article you're referring to,
3 they attempted to contact your attorney, Mr. Mone,
4 to confirm whether or not that was true and he did
5 not provide a response?

6 MR. MONE: Excuse me. Mr. Mone was in
7 Italy when the reporter called. So this is crazy.

8 MR. NEFF: I really would like it if the
9 witness could answer.

10 MR. MONE: You knew I was in Italy then.

11 JUDGE KILBORN: Mr. Mone --

12 MR. NEFF: I have no idea what efforts they
13 took to contact you.

14 JUDGE KILBORN: -- address the bench, not
15 counsel.

16 What's your question again.

17 Q. Isn't it true that the *Boston Herald*, at
18 least in the article, indicated that they had
19 attempted to contact your attorney, Mr. Mone, and
20 his firm several times before they published that
21 article and did not receive any return phone calls?

22 A. That's what they said. They also said they
23 had three sources in the first go-round.

24 Q. And subsequent to that article being

1 published, isn't it true that they contacted Mr.
2 Mone and did speak to him, and he refused to speak
3 to them about what had happened --

4 A. I know how he was quoted in the newspaper;
5 that's all I know.

6 Q. And that's what the article says, isn't it?

7 A. Well, the article says Mr. Mone said, "I
8 refuse to comment on anything written by the *Boston*
9 *Herald*."

10 Q. Isn't it also true that what you're
11 referring to as the speeding appearance in North
12 Carolina was actually a criminal charge of reckless
13 driving in North Carolina, in addition to the
14 speeding charge?

15 A. There were two charges. There was a
16 speeding charge and a reckless driving charge.

17 Q. Which is a criminal charge in North
18 Carolina.

19 A. Criminal offense. Traffic offense but
20 criminal indeed.

21 Q. Since that time you have in fact pled
22 guilty --

23 MR. MONE: Wait a second. Wait a minute.
24 I object. It has nothing to do with this case. He

1 asked him what the libel was. The libel was that he
2 was in default. He never denied the other thing.
3 So this goes way beyond this, and I've had no notice
4 they were going to ask these questions.

5 JUDGE KILBORN: Why are we getting into
6 this North Carolina case?

7 MR. NEFF: Because it was brought up by
8 Judge Murphy's attorney on his cross-examination.

9 MR. MONE: No, it was not brought up.

10 MR. NEFF: They libeled him two weeks ago
11 was.

12 MR. MONE: It was not brought up by Judge
13 Murphy's attorney. I made no reference to North
14 Carolina. I made no reference to the speeding
15 ticket. I made no reference to the fact that they
16 published what was demonstrably untrue, that he was
17 in default. I made no reference to any of those
18 things. To now put before -- this is sort of he's a
19 bad guy, we're going to prove he's a speeder.
20 Please. They never alleged that; they didn't say
21 anything about that. This simply is unfair.

22 MR. NEFF: The final question is going to
23 be --

24 MR. MONE: Wait. Can I get a ruling on the

1 question that's on the table?

2 MR. NEFF: To give you a sense of where I'm
3 going, which is not to prove Judge Murphy is a bad
4 guy, because I don't think he's a bad guy. What I'm
5 trying to establish is that after the guilty plea,
6 he agreed to pay a fine, which he didn't pay and was
7 actually in default.

8 THE WITNESS: Didn't pay?

9 MR. MONE: We have a receipt of money.

10 THE WITNESS: I'm sorry --

11 MR. NEFF: I'm asking the question --

12 MR. MONE: We have a receipt.

13 THE WITNESS: I'm sorry, sir. I paid it
14 and I have receipts for the payment.

15 Q. Isn't it true the *Boston Herald* published
16 an article where they indicated you hadn't paid --

17 A. Well, that's more libel, Mr. Neff. What
18 can I tell you?

19 Q. I just asked the question, Judge --

20 A. I'm sick of the *Boston Herald* libeling
21 me, Mr. Neff. That's what I'm trying to tell you.
22 It never ends. It's front-page news that my wife
23 goes to the bathroom at the Saratoga racetrack.
24 Please.

1 Q. I asked the question, Judge. You're
2 perfectly welcome to say that these things are not
3 true.

4 JUDGE KILBORN: We're way off the track.

5 MR. MONE: I thought I had an objection
6 pending.

7 JUDGE KILBORN: I'm not clear; is there
8 still a question that you feel is unanswered?

9 MR. NEFF: Along that line, I don't have
10 any other questions.

11 JUDGE KILBORN: Fine.

12 MR. NEFF: I don't have any further
13 questions, Your Honor.

14 JUDGE KILBORN: Recross, Mr. Mone?

15 RECROSS EXAMINATION

16 BY MR. MONE:

17 Q. Is there some concern in your mind as to
18 whether or not the *Boston Herald*, this tabloid,
19 would ever be fair to you in anything they write?
20 Do you have that concern?

21 MR. NEFF: I'm sorry, I can't hear Attorney
22 Mone when he walks up like that.

23 Q. Is there some concern in your mind that the
24 *Boston Herald* will never treat you fairly no matter

1 what the actual facts are?

2 MR. NEFF: Objection.

3 Q. Is there a concern of yours?

4 JUDGE KILBORN: Overruled. Go ahead.

5 A. No, there's no such concern, Mr. Mone. I
6 know that the *Boston Herald* will never leave me
7 alone.

8 Q. Is that the reason you were reluctant to
9 talk to someone who identifies themselves as a
10 reporter for that tabloid?

11 A. I wouldn't dignify that newspaper at this
12 point with a comment to one of its reporters, sir.

13 MR. MONE: Thank you.

14 JUDGE KILBORN: Reredirect?

15 MR. NEFF: Nothing further, Your Honor.

16 JUDGE KILBORN: Mr. Mone, are you all
17 through?

18 MR. MONE: I'm done.

19 JUDGE KILBORN: Thank you, Judge.

20 THE WITNESS: Thank you, Mr. Kilborn.

21 MR. MONE: Your Honor, I have Attorney
22 Cooper here. He's in court all day tomorrow. I
23 would like to use him at some point today. He's not
24 going to be long. Can I put him on out of order?

1 JUDGE KILBORN: Well, do you have any
2 problem with that?

3 MR. NEFF: I don't. Actually, can we
4 approach and discuss some planning things that would
5 help me at least?

6 JUDGE KILBORN: Sure. We're off the
7 record.

8 (Discussion off the record)

9 JUDGE KILBORN: Back on the record. This
10 is your witness, Mr. Mone.

11 MR. MONE: Yes.

12 HOWARD COOPER, Sworn

13 DIRECT EXAMINATION

14 BY MR. MONE:

15 Q. Can you give me your name and your
16 professional address.

17 A. - Certainly. Howard Cooper, I'm a partner at
18 Todd & Weld in Boston located at 28 State Street.

19 Q. You're a member of the bar of the
20 Commonwealth?

21 A. I am.

22 Q. Did you represent Judge Murphy in the libel
23 trial against the *Boston Herald*?

24 A. Yes.

1 Q. Did there come a time early on in the case
2 when efforts were made to contact the *Herald* about
3 settlement?

4 A. Yes.

5 Q. Would you tell his Honor, starting at the
6 very beginning, what those discussions were and what
7 was initially the effort to settle the case.

8 A. I may be off a month or so, Your Honor.

9 MR. NEFF: I'm going to object to this
10 manner of questioning, Your Honor, where this is
11 direct examination. Attorney Mone is essentially
12 inviting a long narrative explanation.

13 JUDGE KILBORN: Overruled.

14 A. Your Honor, I have a little bit of a cold,
15 so I'll try and keep my voice up.

16 In March and early April of 2002, I was
17 actually in Bogota, Colombia, adopting a little
18 girl, and I didn't get involved until after I came
19 back.

20 When I came back and after I had spoken
21 with Judge Murphy and my partner Owen Todd, a series
22 of efforts were made to collect statements from
23 people who we believed had been in lobby
24 conferences that might be in issue. At some point I

1 initiated communications with Bob Dushman at Brown
2 Rudnick.

3 Q. Was this before a suit had been filed?

4 A. It was within days of before or even maybe
5 the day of or the day after. I know I met with Bob
6 at his office, and I gave him a copy of the lawsuit.
7 And candidly, what I don't remember is whether it
8 was to give it to him to tell him it was going to be
9 filed or had just been filed.

10 Q. Did you attempt to get from the *Boston*
11 *Herald* at that time either a retraction or begin to
12 talk about settlement?

13 A. I did. The point of my meeting with Bob
14 Dushman at Judge Murphy's instruction was twofold:
15 Number one, to tell him about the evidence that we
16 had collected, which I was very up front in
17 disclosing to him. And number two, to me the more
18 important thing, was to tell him what this was doing
19 to Judge Murphy's family and to let him know that
20 Judge Murphy needed to get this resolved, because I
21 very much remember the situation with his daughters
22 in particular.

23 Q. I take it that those discussions did not
24 result in any settlement of the case?

1 A. Well, Bob was a very nice man, and I don't
2 want to say that he put me off, but he would usually
3 make it very clear to me that he felt that the case
4 was a public figure defamation case. I remember him
5 telling me the statistics. And I think, in a very
6 nice way, he was telling me about his level of
7 experience compared at the time to my lack of
8 experience in the area, and the message was,
9 basically, that they didn't regard the case
10 seriously at all.

11 Q. Did there come a time when Judge Murphy
12 expressed a desire to see if he could set up a
13 meeting with Mr. Purcell and they could talk
14 principal to principal?

15 A. Yes.

16 Q. And how did you arrange those meetings?

17 A. Well, I called Bob Dushman, and I told him
18 that there was a desire on Judge Murphy's part to
19 talk directly to Pat Purcell. I think by that time
20 I had taken Mr. Purcell's deposition and the
21 conversation had been cordial. So, in my judgment,
22 I thought that maybe it was a good idea to let the
23 lawyers stay out of it.

24 And I asked Bob if he would have any

1 objection to the two of them meeting, it's not an
2 uncommon thing, and I simply wanted to assure that
3 we had an understanding between the lawyers that
4 these were confidential settlement discussions. So
5 at some point, after a couple of communications, I
6 know that I -- either he sent to me or I sent to him
7 an e-mail in which we confirmed that they would
8 meet directly and that it would all be off the
9 record.

10 Q. And they met twice; we've heard testimony
11 about that, correct?

12 A. Yes.

13 Q. And the results, as we know, were that the
14 case did not get settled; is that right?

15 A. In connection with the second meeting, I
16 had understood that I was to be charged to go find a
17 mediator. And I actually had some communications
18 with Bob about some names, and I wish I could
19 remember all of them.

20 Q. This is Mr. Dushman?

21 A. Yes. I'm sorry.

22 After Judge Murphy's second meeting with
23 Pat Purcell, my understanding was that I was to try
24 to find a mediator, a high-caliber, very experienced

1 lawyer in Boston, someone with trial experience I
2 remember thinking was important. And I gave Bob a
3 set of names, and I remember it included Paul
4 Sugarman, and I can't remember who else. And
5 actually may even have asked him for names, but I
6 can't remember what he gave me.

7 Bob, Mr. Dushman, then called me back and
8 said, "I just want to make it clear that the *Herald*
9 doesn't intend to do anything at this mediation."
10 And I said, "Well, why are we having it?" And he
11 said "Well" --

12 MR. NEFF: Objection. It's the statement
13 of another.

14 MR. MONE: We've heard -- this whole case
15 is about the context of these letters, and this goes
16 to what Judge Murphy knew the context was of these
17 letters.

18 JUDGE KILBORN: What's the objection?

19 MR. NEFF: Well, I'm going to object to an
20 answer to this question and to the answer to the
21 last question, at least as it goes to the truth of
22 the matter asserted, meaning Mr. Cooper's testimony
23 that Mr. Dushman said, This is what the *Herald* said
24 -- what the Herald's approach was to this meeting is

1 true.

2 If it goes to state of mind somehow, I have
3 no objection to that, or a nonhearsay purpose. But
4 I object and ask that from this record anything be
5 stricken that amounts to Mr. Cooper testifying about
6 Mr. Dushman's statements for the truth of the matter
7 of what they assert.

8 JUDGE KILBORN: But I don't think they are
9 for the truth, so I'm allowing it.

10 MR. MONE: Let me ask what he wrote.

11 JUDGE KILBORN: I'm allowing it.

12 MR. MONE: Okay.

13 A. Well, the long and short of it was that I
14 had sensed some optimism after the second meeting,
15 at least on the part of my client. I was asked to
16 set up a mediation, and then, to my surprise, the
17 word came back from the *Herald* that they really
18 weren't interested in doing anything. And by
19 "anything" I mean, first and foremost, even
20 discussing the possibility of issuing any type of
21 retraction, correction or apology. The message,
22 very politely, from Bob Dushman was simply, "They're
23 doing nothing." So I determined that it would be a
24 waste to continue to try to float names or find

1 somebody.

2 Q. Did Judge Murphy continue to want to end
3 the case?

4 A. From the moment I met Judge Murphy.

5 MR. NEFF: Objection.

6 JUDGE KILBORN: The objection is?

7 MR. NEFF: Testifying to the intent of
8 another person or the feelings of another person.

9 JUDGE KILBORN: Well, I'm going to allow
10 the question.

11 A. Let me just say that it isn't every day --

12 MR. NEFF: Objection. It is nonresponsive
13 to the question.

14 JUDGE KILBORN: Overruled.

15 A. When you're asked by a sitting Superior
16 Court judge, who you know only on a limited
17 professional basis -- because I didn't know Judge
18 Murphy personally before then -- I paid very careful
19 attention to everything that he told me, the
20 instructions that he gave me. He was very involved
21 in this case. He was very involved, both not just
22 as a judge and a litigant but as a father, and
23 particularly as a father. I listened very
24 carefully, and at every turn in this case, my

1 instructions, in terms of the communications to
2 opposing counsel, were to try to resolve the case.

3 The constant message from me to Bob Dushman
4 was that Judge Murphy doesn't want to put his family
5 through this, because they're suffering. And he
6 also said repeatedly he doesn't want to put the
7 court through this, and it won't be good for
8 anybody. So, yes.

9 Q. Now, you tried the case in January and
10 February of 2005; is that correct?

11 A. Yes.

12 Q. And the jury found that the *Herald* had
13 repeatedly lied about Judge Murphy; is that correct?

14 A. In over 20 statements.

15 Q. Not only did they find they had lied, they
16 found that they had lied maliciously, correct?

17 A. Yes.

18 Q. With reckless disregard of the truth?

19 A. Knowing or reckless.

20 Q. Knowing or reckless disregard for the
21 truth.

22 And after that verdict came down, Judge
23 Murphy still wanted to settle the case, didn't he?

24 A. While the jury was deliberating, I joked

1 with Bob Dushman -- they were out for five days --
2 "Maybe we can settle the case now." Yes, Judge
3 Murphy wanted to resolve the case.

4 Q. Now, after the case trial was over, Judge
5 Murphy wrote these letters; is that correct?

6 A. Well, I learned later, yes, he had written
7 these letters.

8 Q. He was communicating not through you but
9 what he believed to be principal to principal?

10 A. As I regarded it, Judge Murphy was
11 continuing the conversation that Bob Dushman and I
12 had understood him and Pat Purcell had begun and had
13 had two meetings to pursue.

14 Q. Now, after February -- I'm sorry. After
15 the first letter, which is dated February the 20th,
16 I believe, of 2005, did anyone from the *Boston*
17 *Herald* call you up, either the *Herald* or from Brown
18 Rudnick, and say, "Please, these conversations are
19 over, Judge Murphy should not communicate directly
20 with Pat Purcell"? Did anyone tell you that?

21 A. No.

22 Q. Did you have occasion after the verdict and
23 before the *Herald* published these letters and just
24 before Christmas of 2005, did you have occasion to

1 be with Mr. Purcell and Mr. Dushman?

2 A. Yes.

3 Q. Where?

4 A. At Anthony's Pier IV.

5 Q. What was that occasion?

6 A. I was asked, along with a lawyer named Jon
7 Albano, to address -- I believe the correct name is
8 either the Massachusetts Newspaper Association or
9 the Massachusetts Publishers Association, something
10 like that.

11 Q. Jon Albano is a lawyer at Bingham
12 McCutchen; he's a lawyer for *The Boston Globe*,
13 correct?

14 A. Yes.

15 Q. So Mr. Purcell was there; is that correct?

16 A. Yes.

17 Q. Did you talk with him?

18 A. I did.

19 Q. What was the tenor of the conversation?

20 A. I noticed while I was making my
21 presentation, Mr. Purcell, I believe Ken Chandler,
22 Ms. Ritvo, maybe Mr. Hermes -- I can't remember if
23 he was there, but Bob Dushman was there -- were
24 sitting in the front row. When I was done I walked

1 over; we exchanged pleasantries.

2 A little bit later, as I was going to sit
3 down to have something to eat, I found myself
4 directly with Mr. Purcell, and we shook hands. And
5 I recall he said to me, "You know, the invitation
6 for you to come talk was a little bit
7 controversial, but I think the people should hear
8 what a plaintiff's lawyer has to say," something
9 like that.

10 Q. When was this in time, the best you can
11 recall?

12 A. My memory is that it was the spring of
13 2005, maybe the summer.

14 Q. When you were with Mr. Purcell on that
15 occasion, did he say anything to you about the fact
16 that Judge Murphy was continuing -- that Judge
17 Murphy shouldn't continue these private letters that
18 he was writing?

19 A. No.

20 Q. Did he raise the letters at all with you?

21 A. No.

22 Q. Did he say he was intimidated by the
23 letters?

24 A. No.

1 Q. Did he say someone was trying to force him
2 not to appeal the case?

3 A. No.

4 Q. Did he say anything like that?

5 A. No.

6 MR. MONE: That's all I have.

7 JUDGE KILBORN: Cross?

8 MR. NEFF: Just a couple of things.

9 CROSS EXAMINATION

10 BY MR. NEFF:

11 Q. Good afternoon, Mr. Cooper.

12 A. Good afternoon.

13 Q. Now, you testified that you had
14 conversations with Mr. Dushman about the meetings
15 that would take place between Mr. Purcell and Judge
16 Murphy directly, and that those would be
17 confidential settlement negotiations?

18 A. Yes.

19 Q. That was a conversation you had with
20 Attorney Dushman, right?

21 A. Yes.

22 Q. You don't know whether he communicated some
23 or all or any of that to Mr. Purcell, do you?

24 A. Well, in 20-plus years of litigation

1 practice, I will say --

2 Q. My question is --

3 A. -- I believe I do know. Because if Bob
4 Dushman told me I had his agreement that these were
5 privileged settlement communications, I could trust
6 his word. The man was a complete professional and a
7 gentleman, and I believed him.

8 Q. Your conclusion that Mr. Dushman would have
9 communicated those things was not based, then, on
10 any actual knowledge that he had but on Mr.
11 Dushman's reputation --

12 A. Respectfully, Mr. Neff, that's not
13 accurate, because he actually provided me, as I
14 recollect, a date, a time and a place for the
15 meeting. So from that I took that he had spoken to
16 Mr. Purcell. And if Mr. Dushman said to me that we
17 had an agreement and his client understood it as
18 such, it would be inconceivable for me to believe
19 that he felt otherwise. He was a very genuine,
20 decent and excellent lawyer.

21 Q. But you have no actual knowledge from
22 observing or hearing this conversation that Mr.
23 Dushman communicated these things to Mr. Purcell?

24 A. I would not have been present for Mr.

1 Purcell's privileged communications with his
2 client.

3 Q. So the answer to that question, then, is
4 no, you do not have any actual knowledge that those
5 things were said to Mr. Purcell?

6 A. Again, I don't want to quibble over words,
7 but I know what Bob Dushman told me, so I really
8 believe --

9 Q. You don't have any percipient knowledge
10 that those things were said to Mr. Dushman?

11 A. That's fair. I was not percipient to that
12 conversation.

13 JUDGE KILBORN: Mr. Neff, I know when I
14 read this record, I'll have a little trouble knowing
15 what date we're talking about in this series of
16 questions.

17 MR. NEFF: Well, I'm speaking -- this line
18 of questioning is about the meetings that were
19 contemplated --

20 MR. MONE: This would be the fall -- the
21 first meeting was in the fall of 2003. The second
22 meeting was I believe in --

23 JUDGE KILBORN: This is meetings that in
24 fact took place?

1 MR. MONE: Right.

2 JUDGE KILBORN: Okay. That's all I want to
3 know.

4 BY MR. NEFF:

5 Q. Now, one thing you did say that you were
6 aware of are the letters that Judge Murphy wrote to
7 Patrick Purcell on February 20th and then again on
8 March 18th of 2005?

9 A. I was made aware of those letters, as I was
10 sitting at my desk, on I believe December 20th or
11 21st of 2005, when I got a telephone call from an
12 Associated Press reporter who told me that he had
13 just attended a news conference held by Bruce
14 Sanford at Herald Square disclosing these letters.
15 And I asked, "What letters?"

16 Q. So you didn't learn about these letters
17 until long after they had been sent?

18 A. That's true. Although I should add, it
19 doesn't surprise me in the least that there were
20 continued communications, because as it was left
21 after the second meeting between Bob Dushman and I,
22 they could continue to talk to each other.

23 Q. As of February 20th of 2005, did you
24 represent Judge Murphy in the libel suit he had

1 brought against the *Boston Herald*?

2 A. Yes.

3 Q. And did you continue to represent Judge
4 Murphy as of March 18th of 2005 in his lawsuit
5 against the *Boston Herald*?

6 A. Yes.

7 Q. And he, Judge Murphy, told you nothing
8 about these letters he was sending to Patrick
9 Purcell about the very case you were representing
10 him in?

11 A. First off, you're asking me --

12 Q. The question here is, sir --

13 A. You're asking me about attorney-client
14 communications.

15 Q. I'd really like you to just answer the
16 question, which is, Judge Murphy told you nothing
17 about the letters he had sent to Patrick Purcell
18 about the case you had represented him in?

19 MR. MONE: I object. It's attorney-client
20 privileged.

21 JUDGE KILBORN: Sustained.

22 Q. Well, you've already said, haven't you,
23 that you didn't know anything about these letters
24 until they were essentially being published in the

1 newspaper?

2 A. I didn't see the letters until they were
3 published in the newspaper.

4 Q. That was about ten months after they were
5 dated as written?

6 A. It was ten months after I had been
7 repeatedly with Bob Dushman, who said nothing about
8 them. I had been with Pat Purcell who had said
9 nothing.

10 Q. I don't remember asking you about other
11 people who said something about them. I'm asking
12 you, you didn't hear anything about these letters
13 from Judge Murphy, did you?

14 MR. MONE: Objection.

15 A. I can't answer that. That's privileged.

16 JUDGE KILBORN: Sustained.

17 Q. Now, you wrote a letter five days after
18 Judge Murphy's March 18, 2005 letter to the insurer
19 of the *Boston Herald*, didn't you?

20 A. I did.

21 Q. That letter addressed the case you were
22 bringing against the *Boston Herald*, or had brought
23 against the *Boston Herald*, alleging libel by them
24 against Judge Murphy?

1 A. Well, I don't know what you're looking at,
2 and I haven't looked at the correspondence in some
3 time, but I had numerous communications with the
4 Herald's insurer about their bad-faith tactics, yes.

5 (A pause)

6 MR. MONE: I object.

7 JUDGE KILBORN: Nothing has been offered so
8 far.

9 MR. MONE: I understand that, but my
10 understanding was, I had a clear understanding with
11 the Commission that they were not going to rely on
12 anything done by Judge Murphy's lawyers as evidence
13 of Judge Murphy's breach of the canons. And I'm
14 concerned that this letter could be used -- it's a
15 demand letter to an insurance company, and I don't
16 think it has any role in this litigation, and I
17 don't think he should even be asked about it.

18 JUDGE KILBORN: I've not been told that
19 anybody wishes to introduce it into evidence, nor
20 have I been shown anything, so I can't respond to
21 it.

22 Q. If I can approach you. I'm going to show
23 you a letter dated March 23rd, 2005 and ask you if
24 you recognize that document.

1 A. (Witness reviews document) I wrote this
2 letter.

3 Q. So that is a letter you wrote? Yes?

4 A. Yes.

5 Q. And that letter is dated March 23rd of
6 2005; isn't that true?

7 A. Yes.

8 Q. That's a letter you wrote to the attorney
9 for the insurer for the *Boston Herald*?

10 A. He's more than the attorney.

11 Q. Who else is he?

12 A. I believe he also -- and my memory may be
13 off -- he has an officer's title with Bermuda
14 Mutual, and I believe he's on their board, but he
15 is effectively their representative in Washington,
16 D.C.

17 Q. In that letter you express your view that
18 they should give special weight to Judge Murphy's
19 opinion because he's a Superior Court judge --

20 MR. MONE: Objection.

21 Q. -- don't you?

22 MR. MONE: Objection.

23 JUDGE KILBORN: Hold on just a second. I'd
24 like to see the letter, please.

1 (Document exhibited to Judge Kilborn)

2 JUDGE KILBORN: What's the point of all
3 this, Mr. Neff?

4 MR. NEFF: It just goes to the witness'
5 bias and his opinion of what the letters from Judge
6 Murphy mean.

7 JUDGE KILBORN: This witness?

8 MR. NEFF: Yes.

9 MR. MONE: I object.

10 MR. NEFF: Also, while I would certainly
11 not hold Judge Murphy responsible for Mr. Cooper's
12 writings, it does corroborate my presentation that
13 these letters were an effort to persuade the *Herald*
14 to drop its appeal.

15 JUDGE KILBORN: Well, I think this goes too
16 far afield, so I'm not going to allow it.

17 MR. NEFF: I ask that it be marked for
18 identification, please.

19 JUDGE KILBORN: Sure.

20 (Document marked as Exhibit 2
21 for identification)

22 MR. NEFF: I don't have any further
23 questions, Judge.

24 JUDGE KILBORN: Any redirect?

1 MR. MONE: No, I have nothing. No, let me
2 ask one.

3 REDIRECT EXAMINATION

4 BY MR. MONE:

5 Q. You're a trial lawyer?

6 A. Yes.

7 Q. Been a trial lawyer for how long?

8 A. 23 years.

9 Q. You knew Bob Dushman well, right?

10 A. Through this case, yes.

11 JUDGE KILBORN: Counsel, it may become
12 relevant, I don't know. Mr. Dushman is deceased,
13 right?

14 MR. NEFF: He is, Your Honor.

15 MR. MONE: He is. I'm sorry.

16 Q. You knew the late Bob Dushman?

17 A. Yes.

18 Q. When Bob Dushman told you something, was it
19 your opinion that you could bank on it?

20 A. Yes.

21 Q. His word was as good as gold, wasn't it?

22 A. Yes.

23 MR. MONE: Thanks.

24 MR. NEFF: Nothing further, Your Honor.

1 JUDGE KILBORN: Thank you.

2 THE WITNESS: Thank you, Your Honor.

3 JUDGE KILBORN: We'll break for an hour for
4 lunch.

5 (Luncheon recess from 1:01 to 2:06 p.m.)
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1 AFTERNOON SESSION

2 MR. NEFF: The Commission now calls Patrick
3 Purcell to the stand.

4 Thank you, Your Honor.

5 PATRICK PURCELL, Sworn

6 DIRECT EXAMINATION

7 BY MR. NEFF:

8 Q. Good afternoon.

9 A. Good afternoon.

10 Q. Could you please tell us your name.

11 A. Patrick Purcell.

12 Q. What city or town do you live in?

13 A. Weston, Massachusetts.

14 Q. What do you do for work?

15 A. I'm publisher of the *Boston Herald*.

16 Q. How long have you been the publisher of the
17 *Boston Herald*?

18 A. Since 1984.

19 Q. Can you just briefly describe for us what
20 are your job responsibilities or what are your
21 responsibilities as the publisher of the *Boston*
22 *Herald*.

23 A. I oversee all of the operations of the
24 *Boston Herald*. My background is essentially based

1 on the business side of the newspaper business, I
2 came up through the advertising sales department.
3 And in 1984, after having worked at the *New York*
4 *Daily News* for about 11 years -- and then I'd joined
5 the News Corp. in 1980, I worked with *The Village*
6 *Voice*, the *New York Post* -- and in 1984 I was asked
7 to become publisher of the *Boston Herald* by Rupert
8 Murdock and News Corp.

9 Q. In your role as the publisher of the
10 *Boston Herald*, do you have any active role in the
11 actual content of the newspaper when it's
12 published?

13 A. I set policy and the editorial direction
14 for the paper, and in that capacity I make sure that
15 the paper does what we believe it should be doing.
16 And then I allow the editors and reporters to
17 execute that policy.

18 Q. But in terms of the day-to-day
19 decision-making about what will and won't be
20 published at a particular time, on a particular page
21 or whatever, are you involved in that?

22 A. That's the primary responsibility of the
23 editor.

24 Q. Now, in June of 2002 a libel lawsuit was

1 filed against the *Boston Herald*; is that true?

2 A. Yes.

3 Q. Who filed that libel lawsuit against the
4 *Boston Herald*?

5 A. Judge Ernest Murphy.

6 Q. Did you meet Judge Ernest Murphy after
7 that libel lawsuit was filed against the *Boston*
8 *Herald*?

9 A. Yes.

10 Q. Do you see the person you know to be Ernest
11 Murphy in the courtroom here with us today?

12 A. Yes.

13 Q. Could you point that person out, describe
14 what he is wearing.

15 A. Sitting there (indicating).

16 MR. NEFF: Can the record reflect the
17 witness identified --

18 MR. MONE: I'm sorry. What was the
19 necessity of that? I object.

20 MR. NEFF: So there is a clear record --

21 MR. MONE: That's like a criminal case. I
22 object to that. There's no dispute that that's
23 Judge Murphy.

24 MR. NEFF: He can say that.

1 JUDGE KILBORN: I think we all know who
2 Judge Murphy is. So let's go ahead.

3 Q. The libel lawsuit that Judge Murphy brought
4 against the *Boston Herald*, that went to trial in
5 January and February of 2005; is that true?

6 A. Yes.

7 Q. Before that case went to trial, did you
8 meet Judge Murphy?

9 A. Yes.

10 Q. When was the first time, as far as you
11 remember, that you met Judge Murphy?

12 A. I believe it was October of 2003.

13 Q. How was it that that meeting came about?

14 A. There was a meeting arranged through
15 counsel.

16 Q. When you say "arranged through counsel,"
17 were you and the *Boston Herald* represented by an
18 attorney in the libel suit --

19 A. Yes.

20 Q. -- at that time? Okay. Who was the
21 attorney?

22 A. Bob Dushman from Brown Rudnick.

23 Q. Do you know who Judge Murphy's attorney was
24 at that point?

1 A. Howard Cooper.

2 Q. The counsel discussed a meeting or began
3 discussions about a meeting between you and Judge
4 Murphy prior to time you actually had a meeting in
5 October of 2003?

6 MR. MONE: Your Honor, this is his witness.
7 Could he ask direct questions of his witness. He's
8 leading the witness.

9 JUDGE KILBORN: Everybody has his own
10 style, Mr. Mone.

11 MR. MONE: That's true, but I thought
12 leading was against the rules.

13 JUDGE KILBORN: Well, I'm not going to
14 cramp Mr. Neff's style. So you go right ahead.

15 MR. NEFF: Thank you, Judge.

16 Q. So those conversations took place just
17 prior to that first meeting in October of 2003?

18 A. Yes.

19 Q. How was exactly that orchestrated? Strike
20 that. Who first proposed, as far as you know, the
21 idea of you having a direct meeting with Judge
22 Murphy about the case?

23 A. I'm not sure my recollection is clear on
24 that. I think Bob said that he had arranged this

1 meeting and that we should meet, that I should meet
2 with Judge Murphy, which I agreed to.

3 Q. How long before that October 2003 meeting
4 did Mr. Dushman first mention to you the possibility
5 of this meeting happening?

6 A. I don't recall.

7 Q. Are we talking weeks, months, days?

8 A. Probably weeks.

9 Q. Did he tell you anything about what the
10 meeting would be? Did Mr. Dushman, excuse me, tell
11 you anything about what the meeting would be like or
12 about?

13 A. No. Just that Judge Murphy wanted to meet
14 with me to talk about the stories. He wanted to
15 talk to me about it.

16 Q. What did you understand the -- well, who
17 set up the location of the meeting?

18 A. I forget the details; all I know is that we
19 met at my office.

20 Q. In October of 2003?

21 A. Yes.

22 Q. When you met with Judge Murphy, had you
23 been provided with any instructions from Mr. Dushman
24 about what would happen during that meeting or how

1 that meeting would proceed?

2 A. No.

3 Q. What was the status of Judge Murphy's
4 lawsuit against the *Boston Herald* as of the time of
5 that meeting in October 2003, if you remember?

6 A. That was prior to the case being heard.

7 Q. When you met with Judge Murphy, if you
8 know, did Mr. Dushman know that that meeting was
9 happening?

10 A. Bob knew. He was instrumental in setting
11 it up.

12 MR. MONE: I can't hear him at all.

13 JUDGE KILBORN: I can't either.

14 MR. MONE: Could you speak up?

15 THE WITNESS: Sure.

16 A. Bob set it up, so he knew it was taking
17 place.

18 Q. When you met with Judge Murphy in your
19 office in October of 2003, was that the first time
20 you had met Judge Murphy at all, or had you met him
21 in other settings?

22 A. No, that was the first time.

23 Q. How long did this meeting in October of
24 2003 between you and Judge Murphy last?

1 A. My recollection is that it was about half
2 an hour.

3 Q. How would you describe the tenor of that
4 meeting?

5 A. We were cordial. At various times, as
6 Judge Murphy was describing the impact that the
7 story had on him, he was emotional. He was quite
8 emphatic in trying to demonstrate how upset he was
9 about this whole incident, and so he was visibly
10 disturbed about it.

11 I was -- this having been the first time
12 that I actually met with Judge Murphy, I wasn't
13 quite sure what to expect. He was visibly upset,
14 emotional, and I at one point feared he might
15 overreact and do something that might be physically
16 harmful. But that was not -- that didn't happen.
17 But I distinctly remember thinking that it could
18 happen.

19 But we ended on a cordial note and --

20 Q. When you say Judge Murphy was emphatic
21 during this meeting, what kind of things did he say
22 that cause you to describe him that way?

23 A. Well, he was describing -- the emotional
24 part was in his description of what effect it was

1 having on him, on his family. He emphasized the
2 Howie Carr article and how disturbing that was, and
3 he was visibly and emotionally upset by what was
4 going on. And so that was, I think, a key part of
5 my recollection, one of the things I remember most
6 distinctly about the meeting.

7 And the idea that he wanted to settle this
8 somehow came up. And there was no discussion of any
9 kind of dollar figure or there wasn't going to be --
10 I have no recollection of him talking about a
11 specific amount of money to settle, but he said, "We
12 should settle this," so that, A, he doesn't have to
13 go through this again, and I don't have to continue
14 to pay lawyer's fees because I'm not going to win
15 this case.

16 Q. Did Judge Murphy indicate to you what it
17 would take to settle the case?

18 A. No.

19 Q. When you parted ways on that day, was
20 there any mention between you and Judge Murphy of
21 having ongoing contact directly between the two of
22 you?

23 A. No. I simply said I was going to -- I
24 would talk to counsel about the meeting, but there

1 was no agreement on anything further.

2 Q. Did you hear -- was there any conversation
3 during that meeting about the fact that your talk
4 with Judge Murphy that day would constitute a
5 confidential settlement talk?

6 A. In my mind, no. My understanding of that
7 meeting was we were to sit down and see if there was
8 some way that we could resolve this. He was a
9 judge, and this was highly unusual for me, to be
10 sitting and talking about a case with a judge. This
11 was unusual. But in the back of my mind, all I
12 thought I was going to be doing is talking to my
13 attorneys about the meeting and we would see where
14 we would go from there.

15 Q. But there was no conversation that you and
16 he would continue to talk directly without involving
17 your attorneys during that meeting?

18 A. No, not that I recall.

19 Q. Incidentally, you were aware that Judge
20 Murphy was a judge when you met with him?

21 A. Yes.

22 Q. Do you have a law degree, or are you a
23 lawyer, anything like that?

24 A. No.

1 Q. Did you have any contact -- strike that.
2 At some point in time you learned that Judge Murphy
3 wanted a second meeting with you about the case?

4 A. Correct.

5 Q. Before you first heard that Judge Murphy
6 wanted the second meeting, but after that first
7 meeting ended -- strike that.

8 After the first meeting ended, was there
9 any contact between you and Judge Murphy before the
10 second meeting between you and Judge Murphy took
11 place?

12 A. No.

13 Q. How did you first learn that Judge Murphy
14 wanted a second meeting with you?

15 A. I believe, once again, that was through Bob
16 Dushman.

17 Q. Was there any explanation of the nature of
18 the meeting or what the parameters would be?

19 A. Just he wanted to talk to me again about
20 the case.

21 Q. Your understanding was this was going to be
22 maybe talking about compromise, settlement, that
23 sort of thing?

24 A. I don't remember the specifics of that. My

1 distinct memory is the second meeting.

2 Q. Where did that second meeting take place?

3 A. In my office.

4 Q. When did that take place?

5 A. I think that was April of '04.

6 Q. If you remember, what was the status of the
7 lawsuit Judge Murphy had brought against the *Herald*
8 as of that meeting in April of 2004?

9 A. It was still before the actual trial.

10 Q. Was there any sort of summary judgment
11 motion being heard or acted upon around that time of
12 the meeting, if you remember?

13 A. It might have been right after we lost the
14 summary judgment.

15 Q. How would you describe the tenor of this
16 second meeting in April of 2004 with Judge Murphy?

17 A. This one I thought he was a little bit more
18 aggressive about settlement discussions. He said
19 this would be -- if it went much further, that once
20 it goes to trial, it would be hard for me to get a
21 settlement, that I was not going to be able to win
22 this case, and that it was in both of our interests
23 to make a deal now to end this. He wanted it to be
24 over.

1 And it was at this meeting that he first
2 clarified what he said about the case. It was at
3 this moment he said that what he really said in
4 those chambers was that "We have to help this young
5 lady get over it." There was never any mention of
6 that in the first meeting.

7 Q. When you say Judge Murphy was even more
8 forceful during this meeting, what kinds of things
9 did he say?

10 A. Just that if it went to trial, there
11 wouldn't be a settlement, and I would waste a lot of
12 money on legal fees, and we would not win.

13 Q. Was there any conversation at any point
14 during this second meeting among you and Judge
15 Murphy that the meeting itself would constitute a
16 confidential settlement negotiation or
17 communication?

18 A. That's not my understanding.

19 Q. And there was no such agreement, as far
20 as you recall, for the first meeting either, was
21 there?

22 A. No.

23 Q. Was there any agreement at the end of the
24 second meeting that you and Judge Murphy would

1 continue to have ongoing direct contact about the
2 case without attorneys being involved?

3 A. No. All I said at the end was that I would
4 convey what we talked about to my attorneys, and we
5 would decide what our next course of action was
6 going to be.

7 Q. Between that meeting in April of 2004 and
8 the beginning of the trial of the lawsuit Judge
9 Murphy brought in January of 2005, did you have any
10 kind of direct contact with Judge Murphy at all?

11 A. No.

12 Q. The lawsuit Judge Murphy brought against
13 the *Boston Herald* did go to trial in January and
14 February of 2005; is that true?

15 A. Yes.

16 Q. And on February -- well, at some point in
17 February of 2005, the jury returned a verdict in
18 Judge Murphy's favor?

19 A. Yes.

20 Q. For \$2.09 million; is that true?

21 A. Yes.

22 Q. You were aware of all those events as they
23 were taking place?

24 A. Yes.

1 Q. After that verdict was rendered by the
2 jury, did you receive information that Judge Murphy
3 wanted sort of a four-way sit-down with you and your
4 attorney at that point to talk about settlement of
5 the case?

6 A. No.

7 Q. Did you receive any correspondence from
8 Judge Murphy after the jury returned that verdict?

9 A. Yes. I received a letter in the mail.

10 Q. Was that the first kind of contact of any
11 kind that you had gotten from Judge Murphy or his
12 side of the case --

13 A. Yes.

14 Q. -- after the verdict? Okay.

15 I'm going to approach you, Mr. Purcell,
16 with a document that's been marked Exhibit 1 and
17 ask you to look at Appendices A and B to Exhibit
18 1 and ask you if you recognize those documents.

19 A. (Witness reviews document) Yes.

20 Q. What do you recognize those documents to
21 be?

22 A. The letters that I received from Judge
23 Murphy.

24 Q. That's the letter you received from Judge

1 Murphy first right after the jury verdict?

2 A. Yes.

3 Q. Did you read these letters when you
4 received them?

5 A. Yes.

6 Q. How was it exactly that they came into your
7 possession?

8 A. My assistant opened them, and then I read
9 them, and I couldn't believe what I was reading. I
10 have no legal background but --

11 MR. MONE: This is not in response to any
12 question. I object.

13 JUDGE KILBORN: I overrule that objection.
14 Go ahead.

15 MR. NEFF: Thank you, Your Honor.

16 A. I just couldn't believe I was getting this
17 from a judge; to me, it looked like a ransom note,
18 and that -- it was very strange. And so I called my
19 attorney and said that "I have to show this to you."
20 And I sent it over, and we just decided that we
21 wouldn't do anything with it, but it was very
22 strange.

23 Q. What did you feel was going on when you got
24 this letter in the mail?

1 MR. MONE: I object.

2 JUDGE KILBORN: I'm sorry, I didn't hear
3 the question.

4 Q. What did you feel was going on?

5 MR. MONE: I object to "feel."

6 JUDGE KILBORN: Overruled. Go ahead.

7 A. That this was, once again, very strange,
8 and that this kind of correspondence, quite
9 honestly, I've never gotten in my life. And I guess
10 it seemed to be a continuation of kind of the idea
11 that I should try to settle somehow. But the idea I
12 shouldn't discuss it with anyone at Brown Rudnick
13 seemed to me to be not something that a judge should
14 be saying.

15 Q. Brown Rudnick --

16 MR. MONE: May that go out? That last
17 line; where he makes a judgment -- I ask that it be
18 stricken, his judgment as to what a judge should do.
19 That's not a judgment for him to make. I ask that
20 go out.

21 JUDGE KILBORN: Well, I'll allow that.

22 MR. NEFF: Thank you, Your Honor.

23 Q. What was your relationship to Brown Rudnick
24 as of the time you received this letter from Judge

1 Murphy?

2 A. Brown Rudnick has been the *Herald's*
3 counsel, on both libel and business matters, since
4 1982.

5 Q. Brown Rudnick had been essentially the firm
6 representing you and the *Boston Herald* in the libel
7 suit Judge Murphy had brought?

8 A. Right.

9 Q. More specifically, Attorney Dushman had
10 been involved?

11 A. Yes.

12 Q. Now, can I ask you -- if I could approach,
13 I show you what's been marked Appendix A in Exhibit
14 1, just to follow along.

15 Did you understand what Judge Murphy meant
16 when in his February 20, 2005 letter he wrote: "As
17 you no doubt clearly recollect, ole Mike Ditka here
18 warned you against playing 'the team from Chicago'
19 in this particular Super Bowl"? Do you know what he
20 was referring to, what that reference was in
21 reference to?

22 A. It sounded like, you know, we are going to
23 be -- Chicago is going to roll over us. And I don't
24 know if it was a reference to the Patriots/Bears

1 Super Bowl or whatever back in the '80s, but the
2 fact of the matter is, once again, it seemed to me a
3 second note that I characterized as essentially
4 ransom notes.

5 Q. Flipping to Page 2 of this letter, what was
6 your reaction to the proposal that you bring a
7 cashier's check payable to Judge Murphy in the
8 amount of \$3.26 million to that meeting?

9 A. The -- and I think it's in this letter --
10 the reference "Because it is, Mr. Purcell, in your
11 distinct business interests to do so, in my
12 considered opinion," once again, seemed to be a bit
13 of a threat, more than a bit of a threat. And it
14 seemed to me that this was more intimidation. And
15 the idea that I would show up and take this check
16 without discussing it with counsel and without
17 pursuing what legal rights I still had seemed to me .
18 I wasn't going to agree with.

19 MR. MONE: Judge, I want to object again to
20 his characterization of these words, the use of such
21 words as "ransom notes," using such words as a
22 "threat." He should not be allowed to testify to
23 that.

24 JUDGE KILBORN: Well, I'm overruling the

1 objection. So go ahead.

2 MR. NEFF: Thank you, Your Honor.

3 Q. Finally, Mr. Purcell, included with that
4 letter from Judge Murphy dated February 20th was a
5 P.S. Do you remember receiving that?

6 A. Yes.

7 Q. What was your reaction when you read the
8 P.S. part of this letter? What was your feeling?

9 A. That I had never agreed, and wasn't going
10 to agree, to not discuss this with my attorneys; and
11 that I was going to make sure that the *Herald's*
12 interests and the *Herald's* business was protected;
13 and that our position on this story was that we
14 believed it and we believed it to be accurate.

15 Q. So from your point of view, there was
16 nothing in your past or in these letters that made
17 them part of any sort of settlement negotiation?

18 A. No.

19 Q. Now, you've already sort of alluded to it,
20 but when you got this letter, what action, if any,
21 did you take with that letter?

22 A. I spoke to our attorneys about both of
23 them, and we decided that we would not do anything
24 with them. And we were in the midst of a trial, and

1 that we were not going to do anything, we wanted to
2 see how the trial played out. The trial had already
3 played out. We were evaluating whether or not we
4 were going to appeal.

5 There were some other legal -- there was
6 another legal step in between the actual filing of
7 an appeal, I believe, and so that was -- that may
8 have been in process before we made a decision to
9 actually appeal. So we just didn't do anything.

10 Q. You didn't respond to Judge Murphy's
11 letter, did you?

12 A. No.

13 Q. You didn't write him back or his attorney
14 back in response to that letter?

15 A. No.

16 Q. Other than to your attorney, did you
17 mention that letter even to anyone?

18 A. Obviously I discussed it with my family.

19 Q. Now, at some point -- well, did you
20 receive any further correspondence from Judge
21 Murphy --

22 A. No.

23 Q. -- after that February 20th letter?

24 A. No.

1 Q. Did you receive a letter from Judge Murphy
2 dated March 18th of 2005?

3 A. Yes. That's the second one.

4 Q. So you did receive a second letter from
5 Judge Murphy?

6 A. Yes.

7 Q. Do you recall when you received that?

8 A. Within a couple of days.

9 Q. Of the date March 18th?

10 A. Of the letter.

11 Q. If I can approach.

12 Showing you Appendix D to Exhibit 1 in this
13 case. Is that the second letter that you received
14 from Judge Murphy --

15 A. Yes.

16 Q. -- a little after March 18th, 2005?

17 A. (The witness nods)

18 Q. If you recall, what kind of envelope did
19 that second letter come in?

20 A. I think one of them came in the court
21 stationery, court envelope.

22 Q. How did that letter arrive? How did you
23 end up receiving that letter?

24 A. The same way, my office.

1 Q. Your assistant opened it --

2 A. Yes.

3 Q. -- and basically left it for you. Okay.

4 How did you feel when you received this
5 second letter from Judge Murphy?

6 A. Once again, there's a distinct appearance
7 of a ransom note. And once again, basically saying,
8 I have no chance and that... I have no chance of
9 winning this case.

10 Q. Did you do anything with this letter after
11 you received it?

12 A. The same thing I did with the first one,
13 I alerted my counsel. And in the same vein, he just
14 said, "Well, let's just wait and see what happens."

15 Q. You didn't write back to Judge Murphy or
16 his attorney or really respond in any way to that
17 letter?

18 A. No.

19 Q. Did you have any other kinds of further
20 direct contact with Judge Murphy after this second
21 letter?

22 A. No.

23 Q. Now, in December of 2005, both excerpts and
24 full copies of these letters were published in the

1 *Boston Herald*; is that true?

2 A. Yes.

3 Q. What was the status of the lawsuit
4 involving the *Boston Herald* and Judge Murphy around
5 that same time, December 2005?

6 A. We recently had been notified that a motion
7 was being -- a motion had been filed to freeze the
8 assets of the *Herald*, and that we were prohibited,
9 according to this filing, from entering into any
10 contracts over \$5,000.

11 So that as backdrop, we decided that
12 something else had to be done. The efforts on Judge
13 Murphy's part to work out a settlement, and then
14 these letters in combination with the movement to
15 freeze our assets, basically made us say, "We cannot
16 go on with this," and so we had to fight back.

17 MR. MONE: Your Honor, would you just note
18 my objection, because they have already stipulated
19 that nothing Judge Murphy's attorneys did can be
20 used, and their attempt to get security cannot be
21 used against Judge Murphy. I don't mind getting the
22 context of this, but I want to make sure it's not
23 used in some fashion against Judge Murphy.

24 Those were actions of his lawyers, those

1 were actions in response to the fact that the
2 insurance company didn't file an unequivocal letter.
3 And I just want to make sure -- I understand putting
4 this so we can get a context -- that this cannot be
5 used against Judge Murphy.

6 MR. NEFF: I agree. This is attempting to
7 essentially lay out the context and background,
8 which you'll hear ultimately leads to these letters
9 becoming public and published.

10 JUDGE KILBORN: Then there's no
11 disagreement. But could you keep your voice up.

12 MR. NEFF: Oh, sure. I'm sorry.

13 BY MR. NEFF:

14 Q. So what was going on with the legal case
15 between Judge Murphy and the *Boston Herald* is that
16 this latest motion for postjudgment security was
17 seen by you and your legal team as an attempt to
18 pressure the *Boston Herald* into not pursuing an
19 appeal?

20 MR. MONE: Now I object to that. I really
21 do. I thought we just said that's not what we're
22 going to do. I agreed there was a motion filed, but
23 to load that question, and especially in a leading
24 form, I object to it. It just shouldn't be done.

1 JUDGE KILBORN: Why don't you rephrase the
2 question.

3 Q. Did the letters that Judge Murphy sent to
4 you on February 20th and March 18th of 2005 end up
5 becoming important as part of a court filing --
6 important to you as part of a court filing in the
7 case between your paper and Judge Murphy?

8 A. Yes.

9 Q. What importance did they hold for you and
10 the *Boston Herald* that caused you to be filing in
11 court in December of 2005?

12 A. It created I think a pattern of
13 intimidation --

14 MR. MONE: I object.

15 A. -- trying to get us to relinquish our --

16 MR. MONE: I object. We just said the
17 motions cannot be used in this fashion, and now
18 we're going to allow him to testify that this
19 constituted intimidation? Not on Judge Murphy's
20 part. Those were filed -- those motions were filed
21 by his lawyers. We have an agreement that nothing
22 his lawyers did is going to be used against Judge
23 Murphy. To allow this kind of evidence in --

24 JUDGE KILBORN: Why are you putting in this

1 evidence?

2 MR. NEFF: All that's going to happen here,
3 Judge, is I expect Mr. Purcell is going to explain
4 that his attorneys for the *Boston Herald* ended up
5 filing a motion in court which sought redress
6 because of what they felt was unfair pressure being
7 applied on them at this point where this
8 postjudgment security motion was filed. That they
9 viewed the letters as part of that, and therefore
10 they were going to be filed with the Court. And
11 that because they were going to be filed with the
12 Court --

13 JUDGE KILBORN: I think we have on the
14 record that there was a motion for security. Then
15 what's the next -- well, all you have to tell me is
16 what the next motion is, what the next -- I don't
17 need to know what went through the minds of anybody.
18 I can put A in front of B and take the next step.

19 MR. NEFF: I think it's important,
20 particularly given the way Attorney Mone is casting
21 the *Boston Herald* in this whole scenario, for you to
22 understand -- and the only reason I'm going to seek
23 this evidence -- is that the letters ended up being
24 in the public arena, because they were filed,

1 whether the motion succeeded or not, they were filed
2 in good faith on behalf of the *Boston Herald* by its
3 attorneys as part of a motion related to the
4 lawsuit. It essentially is incidental that they
5 ultimately became published in the *Boston Herald*.

6 JUDGE KILBORN: Well, I think all of that
7 is almost a matter of record, isn't it?

8 MR. NEFF: Well, it's not, respectfully,
9 Judge. And I mean it when I say it, I'm not trying
10 to hold Judge Murphy responsible for writing those
11 letters. I'm trying to establish that the *Boston*
12 *Herald*, or the *Herald's* attorneys, their perception,
13 correctly or incorrectly, was that the letters were
14 relevant to a motion they were filing that suggested
15 to the Court that inappropriate pressure was being
16 applied to get him to drop the appeal.

17 JUDGE KILBORN: I think that is a question
18 to the witness and I'll allow it.

19 MR. NEFF: Thank you.

20 BY MR. NEFF:

21 Q. Let me just sort of ask simply again, what
22 was the point of using these letters that Judge
23 Murphy sent on February 20th and March 18th, 2005
24 with the court at that point from the standpoint of

1 the lawyers for the *Boston Herald*?

2 A. To demonstrate that this was an effort on
3 the part of Judge Murphy to get us to not pursue our
4 rights, what our legal rights were.

5 Q. If you know, how was it -- strike that.

6 So as part of that, those letters that
7 Judge Murphy sent were going to be filed with the
8 Court and essentially would then therefore be
9 available to the public?

10 A. That's right.

11 Q. So now, if you know, how did it happen that
12 the material, the letters Judge Murphy sent to you,
13 which were filed in court, ultimately ended up being
14 published in your newspaper, the *Boston Herald*?

15 A. We knew that this filing -- we anticipated
16 that it would get media attention that would be
17 covered because of the high-profile nature of the
18 case. And in that context, and because it was such
19 a well-publicized case, we arranged for a press
20 conference the night before the articles would
21 actually appear.

22 Q. Do you know how essentially your newspaper,
23 the newspaper the *Boston Herald*, obtained copies of
24 the letters that Judge Murphy had sent to you?

1 A. They were part of the entire package that
2 was submitted to the Court, and that was all turned
3 over to our editors.

4 Q. So at the same time you all submitted this
5 motion to the Court, you essentially let the editor
6 of the paper know that you were submitting this?

7 A. Yes.

8 Q. And they had a copy?

9 A. Yes.

10 Q. And this was a document that as of that
11 moment was publicly available?

12 A. Yes.

13 Q. Did you have any role in deciding -- after
14 that document was handed to the editor, did you have
15 any role at all in what, if anything, the editor did
16 with that document?

17 A. The editor makes his decision. Obviously
18 it was a high-profile case and we both understood
19 that this would be in the paper. I do not get
20 involved directly in how it gets treated or where
21 the story will appear, that's up to the editor,
22 based on what other stories he has to deal with that
23 day.

24 Q. But you are aware that on December 21st of

1 2005, essentially both excerpts and the full text of
2 Judge Murphy's letters made it into both the print
3 and Web editions of the *Boston Herald*?

4 A. Yes.

5 Q. It was the full text of Judge Murphy's
6 letters that ended up in both editions, as far as
7 you know?

8 A. I know online the full text appeared. I'm
9 not sure if the full text appeared in the paper.

10 Q. Were there essentially copies, like actual
11 copies of Judge Murphy's letters made available
12 through the Web site, if you know, the *Boston Herald*
13 Web site, if you know?

14 A. Yes.

15 Q. Do you know how long those letters would
16 have been available to a member of the public who
17 sort of hit the right link on your Web site looking
18 for those letters?

19 A. I don't remember how long we left them up.

20 Q. As of December 21st of 2005, approximately,
21 what was the circulation of the *Boston Herald*?

22 A. Probably 240, 230,000 readers.

23 Q. If you know, what was the hit count on a
24 daily basis for the *Boston Herald's* Web site?

1 A. The --

2 Q. When I say "hit count," I mean how many
3 people visited the Web site?

4 MR. MONE: I object. This is wholly
5 irrelevant.

6 JUDGE KILBORN: First of all, these are
7 using words that are your generation's and not mine.
8 What was that word?

9 MR. NEFF: First I said "hit count." What
10 I really mean --

11 JUDGE KILBORN: Hit count.

12 MR. NEFF: Which is how -- well, it's sort
13 of a description of how many people visited a
14 particular page on a Web site.

15 JUDGE KILBORN: All right. And you object
16 to the question?

17 MR. MONE: Yes. Totally-irrelevant.

18 JUDGE KILBORN: I'll allow it.

19 MR. NEFF: Thank you.

20 Q. If you know, approximately how many people
21 visited?

22 A. It has been approximately the same for the
23 last several years, and right now what we measure is
24 roughly 3 million unique visitors per month.

1 Q. What was the public response like, as far
2 as you know?

3 MR. MONE: I object.

4 JUDGE KILBORN: Well, where are we going
5 with this, Mr. Neff?

6 MR. NEFF: Just what the public response
7 was.

8 JUDGE KILBORN: I'm going to allow that
9 objection.

10 Q. The lawsuit Judge Murphy brought against
11 the *Boston Herald* ultimately was resolved or settled
12 in May/June of 2007; is that true?

13 MR. MONE: Please, please. I object to the
14 word "settled" as a result of a payment made after
15 the Supreme Court ruled five-to-nothing against
16 them. That could hardly be characterized as a
17 "settlement."

18 JUDGE KILBORN: I think you want to
19 rephrase the question.

20 MR. MONE: "Payment" perhaps.

21 JUDGE KILBORN: It was "concluded" perhaps.

22 Q. The lawsuit Judge Murphy brought against
23 the *Boston Herald* was concluded in -- well, was the
24 lawsuit Judge Murphy brought against the *Boston*

1 *Herald* at some point concluded?

2 A. Yes.

3 Q. When was that concluded approximately?

4 A. The spring of this year.

5 Q. Do you know what the payment to Judge
6 Murphy was?

7 A. With interest, over \$3 million.

8 Q. About \$3.4 million?

9 A. Yes.

10 Q. About \$140,000 more than he had asked for
11 from you two years prior?

12 A. Yes.

13 MR. NEFF: Thank you. I don't have any
14 further questions.

15 JUDGE KILBORN: Cross.

16 CROSS EXAMINATION

17 BY MR. MONE:

18 Q. You've testified that you are the publisher
19 of the *Boston Herald*; is that correct?

20 A. Yes.

21 Q. You are also the principal owner; is that
22 correct?

23 A. Yes.

24 Q. So a verdict against the *Boston Herald*

1 could have had a potential impact not only on the
2 *Herald* but you personally, correct?

3 A. No.

4 Q. Well, you had to pay a lot of legal fees,
5 didn't you?

6 A. Yes.

7 Q. And you paid millions of dollars in legal
8 fees, didn't you?

9 A. I don't know the exact amount.

10 Q. Would you agree with me, it was probably in
11 excess of \$2 million?

12 A. I don't know that.

13 JUDGE KILBORN: Mr. Mone, I'm having
14 trouble hearing you.

15 MR. MONE: I'll keep my voice up.

16 Q. When Judge Murphy wrote in these letters --
17 strike that. Let's go back.

18 First of all, as the person who sets the
19 policy for the *Boston Herald* and who is the
20 principal owner of the *Boston Herald*, can you tell
21 me how long your reporters will continue to follow
22 Judge Murphy around?

23 MR. NEFF: Objection.

24 MR. MONE: It goes to bias.

1 JUDGE KILBORN: Allowed.

2 A. We -- I don't know day-to-day what stories
3 our reporters are assigned to, and we assign our
4 reporters based on what stories they can produce.
5 If there is no story to be produced, they're not
6 going to be covering people for issues that are not
7 in the news or have no potential to get in the
8 paper.

9 Q. Well, this summer did you follow Judge
10 Murphy to Saratoga, New York?

11 MR. NEFF: Objection.

12 MR. MONE: It goes to bias.

13 MR. NEFF: He already testified he didn't
14 have any involvement.

15 MR. MONE: Wait a minute. He's the
16 principal owner.

17 JUDGE KILBORN: Hold on here. I overruled
18 the objection.

19 Q. Did your reporters follow Judge Murphy to
20 Saratoga this summer?

21 A. My understanding is that we were given a
22 tip that he was there and --

23 Q. So you went there; is that right?

24 A. A photographer and a reporter went, yes.

1 Q. A photographer? A reporter and a
2 photographer, correct?

3 A. Yes.

4 Q. They were there for two days; is that
5 correct?

6 A. I don't know.

7 Q. They photographed Judge Murphy over two
8 days, didn't they?

9 A. Yes.

10 Q. They ran pictures of he and his wife in the
11 Herald; is that correct?

12 A. Yes.

13 Q. You ran a front-page story in the Herald on
14 that day; is that correct?

15 A. Yes.

16 Q. Do you know what else was happening in the
17 world that day that might have warranted front-page
18 coverage?

19 MR. NEFF: Objection.

20 JUDGE KILBORN: Well, I'm going to allow
21 the objection.

22 Q. I take it there were other things happening
23 in the world that day?

24 MR. NEFF: Objection.

1 JUDGE KILBORN: Mr. Mone, I allowed that
2 objection.

3 Q. You told us, I think, that you didn't
4 understand that your meetings with Judge Murphy were
5 to be confidential settlement discussions? You
6 didn't understand that?

7 A. No.

8 Q. Were you represented by Robert Dushman?

9 A. Yes.

10 Q. Can I show you the e-mail between Mr.
11 Cooper and Mr. Dushman setting up the meeting?

12 A. Yes.

13 Q. Would you read it.

14 A. "Bob."

15 Q. No, no. Just read it to yourself.

16 A. (Witness reviews document)

17 Q. So it's clear in this e-mail, isn't it, Mr.
18 Dushman, that Mr. Cooper said to him that these
19 would constitute, in the words of Exhibit 2, "they
20 will not be attended by counsel and will constitute
21 confidential settlement discussions," correct?

22 A. That was never conveyed to me.

23 Q. Well, if Mr. Dushman, your attorney -- he
24 was an honorable man, wasn't he?

1 MR. NEFF: Objection.

2 JUDGE KILBORN: We've heard a lot about his
3 reputation, so I'm allowing the question.

4 Q. He was an honorable man, wasn't he?

5 A. He worked for us for a long time, yes.

6 Q. And if he gave his word about something,
7 you would expect that he would follow through on it?

8 MR. NEFF: Objection.

9 Q. Isn't that correct?

10 JUDGE KILBORN: Overruled.

11 A. My understanding of that meeting did not
12 include any agreement --

13 Q. That's not what I asked you. That's not
14 what I asked you. I asked you whether or not you
15 expected if Mr. Dushman gave his word, representing
16 the *Herald*, that they would follow -- the *Herald*
17 would follow through on it. That was my question.

18 A. It was never conveyed to me.

19 Q. I didn't ask you that. I asked you whether
20 or not on behalf of the *Herald* your attorney gave
21 assurances that these discussions would be treated
22 as confidential settlement discussions, that one
23 could expect the *Herald* to stand behind that? Your
24 attorney.

1 A. Yes.

2 Q. Incidentally, you were represented by Brown
3 Rudnick in this matter; is that correct?

4 A. Yes.

5 Q. You were represented in addition to Mr.
6 Hermes -- I mean, in addition to Mr. Dushman by Ms.
7 Ritvo and Mr. Hermes; is that correct?

8 A. Yes.

9 Q. They're in the courtroom now, aren't they?

10 A. Yes.

11 Q. During the break are you aware of the fact
12 that Mr. Hermes has been consulting with Mr. Neff?

13 A. No --

14 MR. NEFF: Objection.

15 JUDGE KILBORN: What's the point of this
16 question?

17 MR. MONE: The point of it is that I think
18 it shows what's going on here, that this is the
19 Herald's crusade and that their lawyers are working
20 with the lawyers from the Commission.

21 MR. NEFF: I told Mr. Hermes that I needed
22 Mr. Purcell at two o'clock. That's the only role he
23 has in my communications.

24 JUDGE KILBORN: I'm going to sustain the

1 objection. We could go on forever on that.

2 Q. Who is paying for the lawyers from Brown
3 Rudnick to be here?

4 A. The *Boston Herald*.

5 Q. So they're here to advance the interests of
6 the *Boston Herald*?

7 A. Yes.

8 Q. And you -- the *Boston Herald* is in fact the
9 complainant in this case, aren't they?

10 A. Yes.

11 Q. So that the *Boston Herald* elected to file
12 this complaint with the Commission; is that correct?
13 Isn't that correct?

14 A. Yes.

15 Q. Your lawyer, Mr. Sanford from Washington,
16 D.C., filed this complaint on behalf of the *Herald*;
17 is that correct?

18 A. Yes.

19 Q. So you have an interest in how this comes
20 out, don't you?

21 A. Not a financial interest.

22 Q. Not anymore. And let's go back to the
23 financial interest for a minute.

24 Everything Judge Murphy told you in each

1 one of these meetings with you turned out to be
2 true, didn't it?

3 A. Yes.

4 Q. So when he told you that the *Herald* was
5 unlikely to win the case, he proved to be very
6 correct, didn't he?

7 A. Yes.

8 Q. When he told you that this case had had
9 tremendous impact on his family, he and his family,
10 the jury found that impact, didn't it?

11 A. Yes.

12 Q. When he told you that your reporter didn't
13 have the sources for this material, he proved to
14 be correct -- the jury found that was true too,
15 didn't it?

16 A. Yes.

17 Q. When he told you that he would win a
18 substantial verdict, that turned out to be true too,
19 didn't it?

20 A. Yes.

21 Q. And you characterized him as being
22 "emotional" about this; is that correct?

23 A. Yes.

24 Q. And particularly when he discussed the

1 effect on his children, he was emotional with you,
2 wasn't he?

3 A. Yes.

4 Q. And you understood, did you not, that your
5 reporter on this story, when asked whether or not he
6 considered the impact on Judge Murphy's family, said
7 he didn't care? Were you aware he testified that
8 way at the trial?

9 MR. NEFF: Objection.

10 JUDGE KILBORN: What's the objection?

11 MR. NEFF: To Mr. Purcell testifying about
12 the statement of another. It's hearsay.

13 MR. MONE: It's in the Supreme Court
14 opinion. It's in the transcripts.

15 Q. He said it, didn't he?

16 MR. NEFF: Objection.

17 JUDGE KILBORN: Well, hold on here. Mr.
18 Neff, I will, if you wish me to, read such pages of
19 the SJC opinion as contained in this case. But
20 let's move on.

21 Q. Did you read the SJC opinion?

22 A. Yes.

23 Q. Did you see in the opinion that that's what
24 Mr. Wedge testified to, that he didn't care about

1 the impact?

2 A. I don't recall that.

3 Q. Now, do you remember, you said you never
4 met Judge Murphy before he came to your office to
5 talk with you about this case?

6 A. Yes.

7 Q. Do you recall being with Judge Murphy and
8 Dave Cowens at the Super Bowl in New Orleans in
9 1986?

10 A. I was at the Super Bowl in 1986.

11 Q. Do you remember being at a breakfast -- you
12 remember who Dave Cowens is?

13 A. Yes.

14 Q. Do you remember being there with Dave
15 Cowens and Judge Murphy was there as well?

16 A. I don't remember Judge Murphy.

17 -Q: Do you remember when he talked to you about
18 Mike Ditka and the Super Bowl that he made a
19 reference to the fact that he had seen you in New
20 Orleans?

21 A. I don't remember that.

22 Q. You don't remember. But you're not saying
23 he didn't, are you?

24 A. I don't remember ever meeting Judge Murphy

1 prior to meeting him in my office.

2 Q. Now, you understand, do you not, that the
3 *Herald* published a series of facts about Judge
4 Murphy that was proved to be lies? You know that,
5 don't you?

6 A. That was the decision.

7 Q. That was the decision of the jury, they
8 were lies; isn't that correct?

9 MR. NEFF: Objection. Asked and answered.

10 JUDGE KILBORN: Well, the jury found
11 whatever they found, Mr. Mone.

12 MR. MONE: They found they were published
13 with reckless disregard for the truth.

14 Q. You remember seeing that, don't you?

15 MR. NEFF: Objection.

16 JUDGE KILBORN: How much more of this do
17 you have?

18 MR. MONE: A little bit.

19 JUDGE KILBORN: Well, we know that there
20 was a jury verdict in favor of the Judge. Let's
21 move on.

22 Q. Now, Judge Murphy wrote to you after the
23 verdict and he told you that he wanted a check for
24 \$3.26 million, correct?

1 A. Yes.

2 Q. And if you had paid him \$3.26 million, or
3 entered into discussion with him to pay him less
4 than that amount, you would have saved a substantial
5 amount of money; isn't that correct?

6 A. We anticipated, A, that we would prevail,
7 and if we didn't prevail in the initial trial, that
8 we had a chance to prevail in the appeal. And I
9 still to this day believe our reporter.

10 Q. But the fact that you would prevail at
11 trial proved to be absolutely not the case, correct?

12 A. That's what the verdict was.

13 Q. You lost the summary judgment, right?

14 A. Yes.

15 Q. You lost at the trial?

16 A. Yes.

17 MR. NEFF: Objection.

18 MR. MONE: Wait.

19 MR. NEFF: It's been asked and answered.
20 Twice actually.

21 JUDGE KILBORN: Well, I'll allow it.

22 Q. And when Judge Murphy was writing to you in
23 February, in February of 2005 after the verdict, you
24 understood that in addition to the verdict there

1 would be postjudgment interest. You understood
2 that, didn't you?

3 A. Yes.

4 Q. You understood that postjudgment interest
5 would be approximately -- would be 12 percent a year
6 on the judgment; is that right?

7 A. Yes.

8 Q. You understood that if the case were
9 settled that you wouldn't have to pay postjudgment
10 interest, correct?

11 A. Yes.

12 Q. And you understood that what -- you
13 understood Judge Murphy -- one of the things Judge
14 Murphy was saying to you was in those letters, I
15 don't want to receive the interest, I want to settle
16 the case? You understood that, didn't you?

17 A. Yes.

18 Q. You understood -- you understood that the
19 emotion he had shown when he met with you was
20 reflected in those letters? He had a deep emotional
21 desire to settle that case, didn't he?

22 A. I never got that impression.

23 Q. You didn't get the impression he was
24 emotional about it?

1 A. He was emotional. I didn't --

2 Q. You didn't get the impression he wanted to
3 settle the case?

4 A. For a lot of money.

5 Q. For a lot of money. A lot less than you
6 had to pay him.

7 A. That's after the fact.

8 Q. But a lot less than you paid him, correct?

9 A. That's after the fact.

10 Q. Would you answer my question. A lot less
11 than you paid him?

12 A. Not a lot.

13 Q. And you also spent legal fees for two years
14 on appeal, correct?

15 A. Yes.

16 Q. Brought in a whole new legal team to handle
17 the appeal, correct?

18 A. Yes.

19 Q. Now, these letters that you got in February
20 and March of 2005, there was a filing by The Boston
21 Globe after these letters were received. Do you
22 recall that? I think you alluded to it earlier,
23 that there was a judgment JNOV and for a new trial.
24 Do you remember a motion like that was filed?

1 MR. NEFF: Objection. In his preface
2 Attorney Mone referenced the Boston Globe.

3 MR. MONE: Oh, did I? I would never make
4 that mistake. The *Boston Herald*.

5 Q. You were aware that the *Herald* filed
6 motions for judgment JNOV and for a new trial; that
7 was the first step before you filed the appeal; is
8 that correct?

9 A. Yes.

10 Q. And were you aware that that was filed
11 after these letters were received, and you had given
12 them to your lawyers?

13 A. I don't remember the exact dates.

14 Q. Well, they were filed -- they were filed
15 after. Accept for a second they were filed after
16 that. Do you know that there's not a word about
17 these letters in that filing?

18 A. I don't.

19 Q. Did you ever read it?

20 A. I didn't see that actual -- I don't recall
21 seeing the actual filing.

22 Q. You didn't see that pleading. But if I
23 handed it to you and asked you to read it, would you
24 be surprised to learn there's not a word in there

1 about these letters?

2 A. I'll take your word for it.

3 Q. Did you ever say to Judge Murphy -- did you
4 ever write him or ask your attorneys to write him
5 when you saw his letters that said back off? I
6 trust that you will treat these as a furtherance of
7 our confidential settlement negotiations. When you
8 saw that did you tell your lawyers to call up
9 Murphy's lawyers and tell them that was not the
10 deal, stop it? Did you ever tell them that?

11 A. No.

12 Q. Did you ever -- did you ever write to Judge
13 Murphy and say, "Please, stop this"? You never did
14 that, did you?

15 A. No.

16 Q. Is it your testimony today that you did not
17 consider the meetings that you had at the *Boston*
18 *Herald* to be confidential settlement negotiations,
19 as your attorney had agreed?

20 A. That's right.

21 Q. He never told you that?

22 A. No.

23 Q. You didn't publish what Judge Murphy said
24 when he came to talk to you?

1 A. That's correct.

2 Q. And you understand -- by the way, when you
3 printed these letters, Mr. Neff has asked you that
4 you printed excerpts of the letters, didn't you, in
5 December?

6 A. Yes.

7 Q. And you first held a press conference,
8 didn't you?

9 A. Yes.

10 Q. Over at Herald Square, right?

11 A. No.

12 Q. Where was it?

13 A. It was in another location; I forget where
14 it was.

15 Q. Were you there?

16 A. No.

17 Q. Were your lawyers there?

18 A. I believe Mr. Sanford was there.

19 Q. Was he there with blowups of these letters;
20 do you recall that?

21 A. Yes.

22 Q. And do you recall that that press
23 conference actually happened before the motions were
24 actually filed in court, they were filed the next

1 day?

2 A. They were going to be filed, yes.

3 Q. They were going to be filed. So you
4 weren't publishing at that point something that had
5 already been filed in court; you were publishing
6 something that you intended to file at some point,
7 maybe the next day but in the future?

8 A. I don't recall the exact dates.

9 Q. But you weren't simply repeating something
10 that had already been filed in open court; you were
11 injecting them into the public media for the first
12 time yourself, weren't you?

13 A. Yes.

14 Q. Now, when you printed these excerpts, if
15 someone wanted to read the whole letters, they would
16 have had to go to the Web site, right?

17 A. Yes.

18 Q. And when 3 million people contact your Web
19 site, you don't know how many of them click onto a
20 specific story, do you?

21 A. We can ascertain that over time.

22 Q. But you can't tell us how many people
23 clicked on and read the letters, can you?

24 A. No.

1 Q. You have no information on that; is that
2 right?

3 A. I think we can get it --

4 Q. I didn't ask you that. I'm asking you, as
5 you sit there today, you have no idea as to how many
6 people went into the Web site to read the actual
7 letters, do you?

8 A. No.

9 Q. And in order to read the part of the letter
10 that says, Pat, at the end of this meeting, if you
11 and I can't agree, I'll give you back the check,
12 that was not in the excerpts you published, was it?

13 A. I don't recall.

14 Q. Would you be surprised to know that it
15 wasn't?

16 A. No.

17 Q. And that's in the letter, isn't it?

18 A. Yes, it is.

19 Q. It says right in the letter, if, at the end
20 of this meeting, we can't come to some kind of an
21 agreement, we'll part as honorable men, and I'll
22 give you the check back; isn't that what it says?
23 "I'll flip it back to you"?

24 A. It also says that I will hand you back --

1 Q. Wait a minute. I get to --

2 MR. NEFF: I ask, Your Honor, that Mr.
3 Purcell be allowed to answer.

4 Q. I get to ask the questions. If you can't
5 answer my question yes or no, would you let me know?

6 MR. NEFF: Well, Mr. Purcell is trying to
7 answer his questions and he's being interrupted.

8 JUDGE KILBORN: Why don't we slow it down a
9 bit and ask the question over again, Mr. Mone.

10 MR. MONE: Sure.

11 Q. In the letter Judge Murphy said that at the
12 end of the meeting, if you couldn't get together, he
13 would give you back the check, didn't he?

14 A. That's in the letter, yes.

15 Q. And that wasn't published as part of the
16 excerpts of this, was it?

17 A. I don't have it in front of me so I --

18 Q. Would you be surprised to know that it
19 wasn't?

20 MR. NEFF: Objection. We covered that. If
21 Mr. Mone wants to introduce the article, he
22 obviously has got it, I have no objection to that.

23 Q. Let me ask you this. Another slow news day
24 apparently on June 11th, 2007. Is that the front

1 page of the *Herald*?

2 MR. NEFF: I object. If Mr. Mone wants to
3 introduce this into evidence, it speaks for itself.
4 I can't see it. It's not before the Court.

5 MR. MONE: I'm sorry, I'm cross-examining.
6 I thought I was allowed to use material for
7 cross-examination. I'll show it to him.

8 MR. NEFF: It speaks for itself.

9 MR. MONE: Well, no, I want to ask him some
10 questions, so we'll see how it speaks.

11 (Document exhibited to Mr. Neff)

12 Q. Is that the *Herald* for Wednesday, July the
13 11th, 2007?

14 A. It's a copy of it, yes.

15 Q. Well, obviously it's a copy. You don't
16 publish an independent paper.

17 So on Wednesday, July 11th, you published
18 on the front page of the *Herald* the story about this
19 complaint, the one you originally made, being
20 brought by the Judicial Conduct Commission? You
21 published that story, didn't you?

22 A. Yes.

23 Q. In this you excerpted on the front page a
24 portion of the letter, didn't you?

1 A. Yes.

2 Q. And it says: "You will bring to that
3 meeting a cashier's check, payable to me, in the sum
4 of \$3,260,000. No check, no meeting. You will give
5 me that check and I shall put it in my pocket." Is
6 that what it says?

7 A. Yes.

8 Q. Now, on the inside -- by the way, you
9 devoted the front page and three other pages to this
10 story. And are you telling us that the fact that
11 this man clipped you for \$3.4 million has nothing to
12 do with your decision to publish these things?

13 A. At this point in time we were still
14 evaluating an appeal.

15 Q. It does affect you just a little, doesn't
16 it? You had already paid him by then.

17 MR. NEFF: Objection. Asked and answered.

18 Q. Excuse me. You paid him, didn't you, in
19 May? Didn't you?

20 A. Yes.

21 Q. Okay. And this article was published on
22 July the 11th, 2007, wasn't it?

23 A. Yes.

24 Q. So my question is, isn't the fact that

1 this man took in excess of \$3 million out of your
2 pocket or the insurer's pocket, that has just a
3 little to do with your interest in Judge Murphy,
4 doesn't it?

5 MR. NEFF: Objection.

6 JUDGE KILBORN: Overruled.

7 MR. NEFF: Already asked and answered.

8 A. My interest has always been to keep Boston
9 a two-newspaper town, to provide an alternative
10 opinion. There are so many other cities in this
11 country that only have one voice. And we make
12 decisions every single day about what stories we're
13 going to cover, how we're going to cover them, and
14 we're an important voice in this community. And
15 our editors have done an amazing job of giving us
16 a distinct voice and presence in this community
17 that has allowed us to continue to serve this
18 community.

19 And so what we do on a day-to-day basis
20 with individual stories is what really drives us.

21 Q. My question is, does the fact that the
22 *Boston Herald* had to pay a very public libel
23 judgment against Judge Murphy have an effect on how
24 Judge Murphy is covered in your newspaper?

1 MR. NEFF: Objection.

2 JUDGE KILBORN: Overruled.

3 A. As a public figure and as a story of public
4 interest, having to do with a lot of issues, having
5 to do with freedom of the press, the way a judge
6 conducts himself, any judge conducts himself, those
7 decisions are made based on individual relevance.
8 So that is what drives our decision-making.

9 Q. So are we left to understand that the fact
10 that Judge Murphy took \$3.5 million -- \$3.4 million
11 away from you in a public libel judgment, that that
12 has nothing to do with the fact that he winds up on
13 the front page of your paper?

14 A. No.

15 Q. It has a little bit to do with it?

16 MR. NEFF: Objection.

17 JUDGE KILBORN: Overruled.

18 Q. Doesn't it?

19 A. No.

20 Q. So your editors over there don't have any
21 idea about the fact that this was the guy who
22 clipped us for \$3.5 million?

23 MR. NEFF: Objection.

24 Q. \$3.4 million?

1 JUDGE KILBORN: I sustain this. We already
2 have the answer.

3 MR. MONE: Okay.

4 Q. Let me go to the actual story. Would you
5 look at the excerpts that are published of the
6 letters. Would you read them to yourself, please.

7 MR. NEFF: I'm going to object to Mr.
8 Mone's question. I had a chance to look at them.
9 Those aren't excerpts; the entire copies of those
10 letters are in that article. It's a
11 mischaracterization --

12 MR. MONE: That's nonsense.

13 MR. NEFF: -- to refer to them as excerpts.
14 Excerpts are highlighted in the article, but the
15 entire letters are printed there.

16 Q. Let me ask you this: You have published
17 the highlighted excerpts of these letters; is that
18 correct?

19 A. Some of the sentences are highlighted.
20 There is another copy there that is not highlighted.
21 I don't know that that doesn't contain a complete
22 note in its entirety.

23 Q. Well, find me the reference to the fact
24 that I'll give you back the check.

1 A. (Witness reviews document) It doesn't.

2 Q. It's not there. It's not there, is it? Is
3 it?

4 A. No.

5 Q. It's not there.

6 A. No.

7 Q. Another example of the fair and balanced
8 reporting of the *Boston Herald*?

9 MR. NEFF: Objection.

10 JUDGE KILBORN: I'll sustain that
11 objection.

12 Q. Your reporter in the *Herald* was found to be
13 responsible for lies told about Judge Murphy,
14 correct?

15 MR. NEFF: Objection.

16 MR. MONE: I'm almost done.

17 MR. NEFF: I object to the question whether
18 he's almost done or not, Your Honor.

19 JUDGE KILBORN: We know there was a
20 verdict, Mr. Mone.

21 Q. Well, you know that 12 men and women of
22 Suffolk County found that you had lied about Judge
23 Murphy?

24 MR. NEFF: Objection.

1 JUDGE KILBORN: The objection is?

2 MR. NEFF: Well, the objection, first of
3 all, is that we have covered that probably about a
4 dozen times already, and second to the wording,
5 which is that Mr. Purcell lied.

6 JUDGE KILBORN: I agree with you, Mr. Neff.

7 MR. NEFF: Well, he said "you lied."

8 JUDGE KILBORN: I agree with you, so you
9 have to rephrase that.

10 Q. The *Herald* and its reporter was found to
11 have lied about Judge Murphy's conduct; isn't that
12 correct?

13 A. The *Herald* was found to have libeled Judge
14 Murphy.

15 Q. You know "libel" is a misstatement. It's a
16 lie, isn't it?

17 MR. NEFF: Objection.

18 JUDGE KILBORN: Sustained.

19 Q. Have you ever apologized to him?

20 MR. NEFF: Objection.

21 JUDGE KILBORN: Overruled.

22 Q. Have you ever apologized to him?

23 A. No.

24 Q. And you don't intend to?

1 A. No.

2 MR. MONE: Thanks.

3 JUDGE KILBORN: Redirect?

4 MR. NEFF: Just a couple of things, Your
5 Honor.

6 REDIRECT EXAMINATION

7 BY MR. NEFF:

8 Q. The \$3.4 million -- the \$3.4 million you
9 ultimately paid Judge Murphy, who wrote the check?
10 Who ended up paying that amount of money?

11 A. The bulk of it was mutual insurance.

12 Q. It was the insurance company that
13 indemnified the *Boston Herald* that ended up
14 paying --

15 A. Yes.

16 Q. -- basically almost all of that \$3.4
17 million?..

18 MR. MONE: Wait a minute, excuse me. He
19 said the bulk of it, not all of it. The bulk.

20 Q. Let me ask you, how much of the \$3.4
21 million was paid by the insurance company?

22 A. I forget exactly what our minimum is on
23 coverage of that suit. There was some amount that
24 the *Herald* had to pay out of pocket.

1 Q. Can you give me a rough estimate of how
2 much? What would you say?

3 A. I think about half a million dollars.

4 Q. One of the things you were just asked about
5 is postjudgment interest, and if you had acceded to
6 Judge Murphy's suggestion, I guess we'll call it,
7 you would have saved money. What did you understand
8 the *Herald* to owe Judge Murphy if it did decide not
9 to pursue an appeal as of the date Judge Murphy
10 wrote that first letter to you, February 20th of
11 2005?

12 A. Would you repeat the question.

13 Q. Sure. On February 18th of 2005, the jury
14 returned a verdict in Judge Murphy's favor; is that
15 true?

16 A. Yes.

17 Q. How much was the jury verdict at that
18 point?

19 A. Slightly over \$2 million.

20 Q. So between February 18th and February 20th
21 of 2005, what was your sense of what the -- if the
22 *Herald* had decided to walk away on February 20th and
23 pay Judge Murphy on that verdict, what did you
24 understand the *Herald* to owe Judge Murphy? The

1 judgment plus interest, what was that total?

2 A. \$3,260,000.

3 Q. That's what Judge Murphy was asking for.

4 A. Right.

5 Q. What did you understand the true value to
6 be?

7 A. We were on the hook for \$2 million, and
8 then if we decided not to pursue it, it would have
9 been however many days it took us, plus interest for
10 that. So conceivably it could have been less than
11 the \$3.2 million.

12 Q. Fair to say quite a bit less?

13 A. Yes.

14 MR. MONE: Wait a second. Less.

15 Q. Why didn't you write back to Judge Murphy
16 when you got these letters?

17 A. I never expected to get another one. I
18 never expected to get the first one. And there
19 was -- I didn't see any need in my communicating
20 with him directly, because I was evaluating our
21 legal options. I am not a lawyer; I did not feel
22 comfortable directly communicating with a judge or
23 someone with legal training.

24 Q. You're aware that in addition to the

1 complaint filed against Judge Murphy by the *Boston*
2 *Herald*, there was a second complaint, which is part
3 of the case here today, initiated by the Commission
4 itself, aren't you?

5 A. Yes.

6 Q. In fact, you're aware, aren't you, at this
7 point at least, that the Commission on Judicial
8 Conduct had actually initiated a complaint against
9 Judge Murphy before the *Herald* submitted another
10 complaint against him; isn't that true?

11 A. Yes.

12 Q. I ask you, how was it, or why is it that
13 you feel so strongly that you do not feel like it's
14 appropriate to apologize to Judge Murphy for the
15 *Herald* doing its job?

16 A. I had believed all along that we did our
17 job, and that we had the story correct, and I had
18 the utmost faith in our reporting and our coverage
19 of the story. And I stand by it to this day.

20 Q. Just to clarify, have you had any role,
21 direct role, whatsoever in decisions by the editors
22 at the *Boston Herald* when they published any of --
23 any of the articles that have been published in the
24 *Boston Herald* over the past few years about Judge

1 Murphy? Have you had any role in deciding that will
2 happen and in deciding how that would be sort of
3 portrayed to the public?

4 A. No.

5 MR. NEFF: Thank you. I have nothing
6 further.

7 JUDGE KILBORN: Recross.

8 RECROSS EXAMINATION

9 BY MR. MONE:

10 Q. So you stand by the reporting of Mr. Wedge,
11 whose response to being contacted about the
12 inaccuracies in the story was to destroy his notes?
13 That's the reporter you stand behind, right?

14 MR. NEFF: Objection.

15 JUDGE KILBORN: What's the objection?

16 MR. NEFF: Well, Your Honor, it goes beyond
17 the scope of my redirect of this witness.

18 MR. MONE: It doesn't.

19 JUDGE KILBORN: Overruled.

20 Q. That's the reporter you stand behind, isn't
21 it, the reporter who, when contacted about this
22 story, destroyed his notes of his conversation?

23 A. I stand by that reporter; I stand by the
24 fact that our reporters routinely discard their

1 notes; and I stand by our coverage of the story.

2 Q. So you stand by the person who destroyed
3 his notes?

4 MR. NEFF: Objection. Asked and answered.

5 Q. That's the way you want to leave it, right?

6 A. Yes.

7 Q. Now, you were asked on redirect about how
8 much the *Boston Herald* actually had to pay, and I
9 guess the sum that I heard was \$500,000. Of the
10 3.4, \$500,000 was a direct payment by the *Herald*; is
11 that correct?

12 A. Once again, I'm guessing at the exact
13 amount.

14 Q. Approximately.

15 A. But we had to pay a substantial amount.

16 Q. And you would agree with me, \$500,000 is a
17 substantial amount?

18 A. Yes.

19 Q. Further, you will agree with me that Judge
20 Murphy cost the *Herald* millions of dollars in legal
21 fees that you had to pay, the *Herald* had to pay?

22 A. That's, in part, covered by the insurance.

23 Q. What?

24 A. It's covered by the insurance as well.

1 Q. Isn't there a deductible?

2 A. The deductible is approximately \$500,000.

3 Q. Don't you have to pay the legal fees up to
4 the deductible?

5 A. Yes.

6 MR. MONE: Thank you.

7 JUDGE KILBORN: Mr. Neff?

8 MR. NEFF: Nothing further, Your Honor.

9 JUDGE KILBORN: Thank you very much.

10 THE WITNESS: Thank you.

11 JUDGE KILBORN: Mr. Neff, your next
12 witness.

13 MR. NEFF: Your Honor, no further evidence
14 for the Commonwealth -- sorry. No further evidence
15 for the Commission.

16 JUDGE KILBORN: So the Commission has
17 rested.

18 MR. MONE: We rest. I rest.

19 JUDGE KILBORN: Are we done?

20 MR. MONE: We're done.

21 JUDGE KILBORN: All right. Now, I'm trying
22 to -- any time, Mr. Mone.

23 MR. MONE: I'm sorry, Your Honor. I was
24 just asking him a question.

1 JUDGE KILBORN: What I'm trying to think of
2 a little bit now is what's next. I could conceive
3 of several things that might be next. One is final
4 statements. The second is briefing. I need to know
5 -- well, where do you think we are?

6 MR. NEFF: Can we approach?

7 JUDGE KILBORN: No, I think this can be on
8 the record.

9 MR. NEFF: Well, as I see it, we do have
10 remaining closings in the case. It is consistent
11 with Rule 11 that -- well, it is at least within
12 your purview pursuant to Rule 11 to request from
13 both myself and Attorney Mone that we submit to you
14 proposed findings relative to the evidence in this
15 case after those closings take place. And of course
16 once this hearing is over, you have 30 days to
17 submit your final report to the Commission:

18 Mixed up in that a little bit, in my mind,
19 is the question of when or if you want an oral
20 argument relative to sanction, in the event that you
21 do find misconduct based on the evidence presented.

22 JUDGE KILBORN: Well, let's see whether --
23 one thing that could happen, perhaps this afternoon,
24 is each of you could make a closing statement. Are

1 you prepared to do that now?

2 MR. MONE: I'd prefer I do it tomorrow
3 morning. I'm old, I'm tired. I'd like to have a
4 chance to organize my thoughts.

5 JUDGE KILBORN: Is this a sympathy vote?

6 MR. MONE: No, not at all.

7 MR. NEFF: Respectfully, my feeling is the
8 same, Your Honor.

9 JUDGE KILBORN: Well, I think that probably
10 I would agree. Overnight give some thought to --
11 obviously, Step A is: Has there been a violation or
12 ultimate violations? Step B, if there have been,
13 what are the sanctions?

14 Now, I would appreciate any briefing or
15 arguments you want to make on either one of those
16 questions, and we can do that tomorrow.

17 MR. NEFF: Can I suggest, Your Honor, that
18 we make essentially oral statements to you tomorrow
19 relative to the question of whether or not
20 misconduct has taken place and then essentially set
21 a date by which we can submit to you proposed
22 findings, which could include, in the event you find
23 misconduct, our various recommendations relative to
24 sanctions.

1 JUDGE KILBORN: What do you think, Mr.
2 Mone?

3 MR. MONE: That's fine. That's fine.

4 JUDGE KILBORN: Is there any reason for us
5 to be here before ten tomorrow?

6 MR. NEFF: That's fine with me.

7 MR. MONE: That would be fine.

8 JUDGE KILBORN: So we're adjourned until
9 ten o'clock tomorrow morning.

10 (Hearing adjourned at 3:28 p.m.)
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C E R T I F I C A T E

I, Anne H. Bohan, Registered Diplomat
Reporter, do hereby certify that the foregoing
transcript, Volume I, is a true and accurate
transcription of my stenographic notes taken on
October 15, 2007.

Anne H. Bohan

Registered Diplomat Reporter

Volume II
Pages 2-1 - 2-69
Exhibit 5

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT
Complaint Nos. 2006-9; 2006-30

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IN RE: JUDGE ERNEST B. MURPHY
:
:
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BEFORE: Honorable Peter W. Kilborn

APPEARANCES:

Commission on Judicial Conduct
(by Howard Neff, Esq.)
11 Beacon Street, Suite 525,
Boston, MA 02108, for the Commission on
Judicial Conduct.

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for Honorable Ernest B. Murphy

ALSO PRESENT:

Gillian E. Pearson, Executive Director,
Commission on Judicial Conduct

Honorable Ernest B. Murphy

Held at:
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, Massachusetts
Tuesday, October 16, 2007
9:58 a.m.

(Anne H. Bohan, Registered Diplomate Reporter)

* * *

I N D E XE X H I B I TEX. NO.EVID.

5 Exemplars of Superior Court
6 stationery given to Judge Murphy
7 being notepaper and envelopes

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JUDGE KILBORN: Let's go on the record.

This is day two of the hearing in the matter of two complaints of the Commission on Judicial Conduct against Judge Ernest Murphy.

I believe where we left off last night was what's left is closing statements and such arguments as you want to make.

MR. MONE: Your Honor, could I just bring one matter up before we do that. I would like, just as a matter of reopening, to just offer you exemplars of the stationery that Judge Murphy referred to that he was given when he first went on the bench. It consists of the notepaper and the envelopes he was first given.

MR. NEFF: I don't have any objection to that, Your Honor.

JUDGE KILBORN: Make it an exhibit.

MR. MONE: It's actually four pieces of paper, but I guess we can just mark them as a group.

(Documents marked as Exhibit 5
in evidence)

MR. MONE: There's one other matter I would like to raise, Your Honor. If the Commission

1 intends this morning to argue sanction, what the
2 sanction should be, I would request an opportunity
3 to be able to respond. I have no idea, nor have
4 they shared with me, what they're going to request
5 by way of sanction. So under those circumstances,
6 it's hard for me to argue about sanction until I've
7 heard what they're suggesting is the sanction.

8 JUDGE KILBORN: I've told you all along,
9 Mr. Mone, nobody is going to get surprised.

10 MR. MONE: Well, I must say to you that no
11 one may have been surprised, but I was shocked
12 yesterday when I heard the question asked of Judge
13 Murphy about whether or not he paid a fine --
14 whether or not he failed to pay a fine in North
15 Carolina, a fact which, if I had ever been asked
16 about, they would have known was not true.

17 MR. NEFF: I don't know what that has to do
18 with the sanction, Your Honor.

19 MR. MONE: It has to do with surprise.

20 MR. NEFF: Your Honor --

21 JUDGE KILBORN: Counsel, please. Mr. Mone,
22 you know perfectly well what I meant was, you're not
23 going to get surprised by any ruling of mine.

24 MR. MONE: Oh, I understand that.

1 JUDGE KILBORN: All right.

2 MR. NEFF: Maybe could I at this point
3 inquire what your preference is, Your Honor, in
4 terms of, what I proposed yesterday, which I thought
5 was understood and acceptable to everyone, was that
6 we would present closing arguments today which would
7 essentially only address the question of misconduct
8 before you. And that to the extent that you wanted
9 them, when we submitted proposed findings to you at
10 a date to be determined, we would include in that
11 document recommendations relative to the sanction to
12 be imposed.

13 JUDGE KILBORN: Well, any way you want to
14 do it, just so that -- we want to avoid having to
15 come back into public hearing.

16 MR. NEFF: I will tell you, Your Honor,
17 that you would need to make a decision today when
18 the public hearing will end: Does it end today or
19 when those documents are filed?

20 JUDGE KILBORN: I appreciate that. But
21 what I'm saying is, to the extent to which anything
22 you wish to address to me doesn't get addressed
23 today, it ought to be coming in in writing.

24 MR. NEFF: And that's what I am

1 contemplating, that I would submit written findings,
2 where he and I, we both at some point in the
3 document suggest to you that in the event you do
4 find misconduct that you impose X sanction.

5 JUDGE KILBORN: Okay.

6 MR. NEFF: And that's how I plan to go
7 forward, unless you suggest I should do something
8 different.

9 JUDGE KILBORN: Fine.

10 MR. NEFF: Thank you.

11 JUDGE KILBORN: Well, I'll be on a 30-day
12 clock as soon as we close this hearing, so you won't
13 be long, I hope, in producing whatever it is you're
14 going to produce.

15 MR. NEFF: No, I'm happy to produce --
16 well, obviously I'll do something by the date that
17 you decide you want to set for that to happen. So
18 I'm certainly not going to -- I'm going to do
19 whatever I can not to delay the report.

20 JUDGE KILBORN: Now, is this method of
21 proceeding okay with you, Mr. Mone?

22 MR. MONE: Your Honor, I understand we're
23 on a short clock, and I obviously want to get it
24 within 30 days. I would like, though, to get a

1 transcript before we write suggested findings.

2 MR. NEFF: The one suggestion I can pose to
3 you, Judge -- and I think it's about a week for us
4 to get a transcript -- is that -- and I don't know
5 if this meets Attorney Mone's needs, but you can set
6 a date by which we have to submit the proposed
7 finding/sanction recommendation, and you can today
8 decide that when you set that date as a filing date,
9 that that will be the date where the hearing itself
10 is closed. And under the rules, your 30 days for
11 follow-through to do a report would start to run at
12 that point.

13 That might afford both myself and Attorney
14 Mone the opportunity to get a transcript before we
15 submit that to you, but also, of course, give you
16 the time you need to review those things and make
17 your own report.

18 MR. MONE: That's fine with me.

19 JUDGE KILBORN: Okay. Surely you don't
20 want to proceed without a transcript.

21 MR. NEFF: Right.

22 JUDGE KILBORN: Fine.

23 MR. MONE: Did I hear Your Honor say that
24 we would have two weeks after receipt of the

1 transcript to submit the finding and then a public
2 hearing? Because I would like to accelerate it as
3 much as possible. After all, the transcript is only
4 a day. So if we had the transcript, I would be
5 prepared to submit findings within two weeks of that
6 date, and then that would start the clock running on
7 disposition.

8 MR. NEFF: Well, Your Honor, my preference
9 would be to move things a little more quickly than
10 that.

11 MR. MONE: Fine.

12 MR. NEFF: It basically means about seven
13 weeks, or really more like eight weeks probably from
14 now we would get your report.

15 MR. MONE: I would do it in a week. I was
16 trying to give you more time. I'll do it in a week.

17 MR. NEFF: I'm not trying to be combative
18 about this; I'm just expressing my opinion. You can
19 make your judgment. I am just suggesting eight
20 weeks may be on the longer side.

21 JUDGE KILBORN: Let's settle this right
22 now. I'm going to set a date by which your
23 submissions to me come to me. Is that correct?

24 MR. NEFF: Okay.

1 JUDGE KILBORN: And that starts the 30 days
2 running.

3 MR. NEFF: Yes, it would, if you ordered
4 the hearing closed as of that date.

5 JUDGE KILBORN: All right.

6 Now, what would you like to say as to when
7 that date is? How long will it take you, Ms. Bohan,
8 to get the transcript?

9 (Discussion off the record)

10 MR. MONE: I will pay to have it expedited.

11 MR. NEFF: I appreciate Attorney Mone's
12 statement, but I think it's the responsibility of
13 the Commission to handle that.

14 JUDGE KILBORN: Surely you can produce the
15 transcript in a week. So that comes to you in a
16 week, and then how much time do you two want to --

17 MR. NEFF: If I could have a week after I
18 receive the transcript.

19 MR. MONE: That's fine.

20 JUDGE KILBORN: So we're going to say,
21 then, that the hearing -- so that's a week to get
22 the transcript, a week to have the materials, and
23 when I get the materials is when the hearing closes
24 is what you're saying.

1 MR. NEFF: Yes, Your Honor.

2 JUDGE KILBORN: So the hearing closes --
3 today is October 16th -- October 30th.

4 MR. NEFF: Okay.

5 MR. MONE: Thank you, Your Honor.

6 JUDGE KILBORN: This is necessarily going
7 to involve at least you, Mr. Neff, on the assumption
8 I'm going to find some kind of sanctions are
9 required. That is, if you're going to address
10 sanctions in your brief, you're going to have to
11 make that assumption.

12 MR. NEFF: Right.

13 JUDGE KILBORN: And so are you, Attorney
14 Mone. Obviously you don't know if there will be
15 sanctions.

16 Now, do you want to make a closing
17 statement?

18 MR. NEFF: Yes, although my understanding
19 of the rules is that Attorney Mone will go first.

20 JUDGE KILBORN: I guess that's right.
21 Attorney Mone.

22 MR. MONE: Thank you, Your Honor.

23 The burden is on the Commission to show you
24 by clear and convincing evidence, not just by the 51

1 percent burden but by clear and convincing evidence,
2 that my client, Judge Murphy, violated the canons of
3 ethics in his correspondence with Pat Purcell. I
4 say that he violated no canons of ethics.

5 I do admit, however -- and it is for your
6 eventual consideration as to what is an appropriate
7 response to that -- I do admit he should not have
8 sent those letters on official stationery. Judge
9 Murphy admitted that. Judge Murphy has apologized
10 for that.

11 In addition to that, I think it is
12 important to understand, however, that even with
13 regard to that matter, as inappropriate as it may
14 have been, that Judge Murphy was not injecting into
15 a matter his status as a judge.

16 If you look at almost all the cases
17 involving the use of judicial stationery, they
18 involve situations where a judge writes on judicial
19 stationery in a situation where the person would
20 otherwise not have known that the person was a
21 judge. In other words, they write a fund-raising
22 letter on judicial stationery; or they write letters
23 of recommendation on judicial stationery; or they're
24 in a matter where they're stopped by a police

1 officer and they hand the police officer their card,
2 it's judicial stationery; or they're involved in a
3 dispute with their plumber over a bill and they
4 write to them on judicial stationery. Those are the
5 kinds of matters that traditionally have involved
6 use of judicial stationery.

7 As Mr. Purcell testified yesterday, he knew
8 that Judge Murphy was a judge. He could not have
9 not known he was a judge, since they had attacked
10 him in his position as a judge, since they had lied
11 about him in his position as a judge. So,
12 therefore, they knew he was a judge.

13 And as I heard his testimony yesterday, he
14 did not put any weight on the fact that this was
15 written to him on judicial stationery. He had a
16 problem with the language used, but it wasn't the
17 fact it was on judicial stationery that concerned
18 him.

19 Now, let's go back, because, as I said at
20 the very beginning of the case, to look at this
21 correspondence in abstract, one could come to
22 different conclusions than if one put it into
23 context. And as I said at the beginning, text
24 without context is simply pretext.

1 And my view of this evidence is that the
2 Commission has vastly overcharged Judge Murphy in
3 connection with what he did in this case. Because I
4 would submit to you that Judge Murphy had every
5 reason to believe, both because of his contact with
6 his lawyers and his previous contact with Mr.
7 Purcell, that he was pursuing a confidential
8 communication with Mr. Purcell.

9 And I think it is important for you to
10 understand that the reason why Mr. Purcell cannot
11 admit that even the first two meetings were
12 confidential, the reason he can't admit that is
13 because once he admits that, he admits the fact that
14 there was confidential communication, and that he
15 got a letter labeled "Confidential" communication,
16 and he is the one who breached the confidence.

17 I think there is an important fact for you
18 to look at as to whether or not Judge Murphy could
19 have reasonably believed that he was in confidential
20 communications with this gentleman and could not
21 have expected that the letters that he sent in
22 confidence would be printed on the front page of the
23 newspaper.

24 First of all, they were in envelopes marked

1 "PERSONAL & CONFIDENTIAL." Secondly, the letters
2 themselves referenced the confidentiality. And most
3 important, and I think it's a very telling fact, you
4 heard Howard Cooper, and Howard Cooper said: I made
5 an agreement with Bob Dushman, and my agreement with
6 Bob Dushman was that all communications between
7 Judge Murphy and Pat Purcell would be confidential,
8 and would be principal to principal, and would be in
9 the nature of settlement discussions. That's what
10 Howard Cooper said yesterday. Did Howard Cooper
11 impress you as someone who would lie about that?

12 The e-mail that you have, the e-mail that
13 finally Mr. Purcell, when he was confronted with
14 it -- and even Mr. Purcell has to read the printed
15 word -- when he was confronted with it, he
16 eventually said, Yes, Mr. Dushman had the
17 authorization of the *Herald* to make such an
18 agreement. No trial lawyer, no trial lawyer would
19 make that kind of agreement without the
20 authorization of his client. And no trial lawyer
21 would have not told his client that there was a
22 confidentiality agreement regarding the
23 communication.

24 And most telling about this is this: They

1 never breached the confidentiality as long as Bob
2 Dushman was the one who was calling the shots. They
3 went ten months after these letters were given to
4 Bob Dushman, and they never printed them, they never
5 referred to them. They filed copious court
6 documents, and they never said a single word about
7 the fact that these letters had been sent.

8 It was only when they changed counsel, and
9 Mr. Dushman, who had made this agreement -- it was
10 only when they changed counsel, that for the first
11 time when a lawyer from Washington, D.C. came up,
12 that they not only breached the confidentiality of
13 these documents, they put them on the front page of
14 their newspaper.

15 And contrary to the questions that Mr. Neff
16 asked him yesterday, they didn't publish these after
17 they were filed in court; they held a press
18 conference, put the documents up on blowups like
19 these -- these may be the same blowups as far as I
20 know -- put them up on blowups, and then Mr.
21 Purcell, Mr. Purcell says, as the principal owner of
22 the paper, as the publisher of the paper: I went
23 down and handed them to my editor, and surprise,
24 surprise, they put them on the front page of the

1 paper. They're the ones who breached the
2 confidentiality agreement.

3 And the problem is, Bob Dushman died. And
4 I would tell you that if Bob Dushman was here, Bob
5 Dushman would have testified that there was a
6 confidentiality agreement, and he understood there
7 was a confidentiality agreement. And the lawyers
8 who sat here from Brown Rudnick all day yesterday,
9 if there was a shred of evidence that they hadn't
10 agreed to a confidentiality agreement, they could
11 have testified, but they weren't called.

12 So I think all of the evidence points to
13 the fact that not only was there a confidentiality
14 agreement, not only was there an agreement that
15 everything be confidential, but that in fact, in
16 fact, Judge Murphy had every reason to believe, when
17 he sat down to write these letters, that these
18 letters would be treated in confidence.

19 They weren't. When the *Herald* saw or
20 thought it was to their advantage to overturn the
21 verdict against them, when they saw that, when they
22 had new counsel, not the one who had made the
23 agreement, they breached the confidentiality and put
24 the letters on the front page of the paper.

1 But in keeping with the great tradition of
2 the ethics of the *Boston Herald*, they never
3 published all of the letter. They never published
4 it. They published the part about bringing the
5 check for \$3.4 million -- \$3.2 million, but they
6 never published the last line: If at the end of
7 this conversation, you and I haven't agreed as
8 honorable men -- this is the substance -- I will
9 give you back the check and we will part. They
10 never published that, and they didn't publish it
11 this morning.

12 And you watched Mr. Purcell sit on the
13 stand and read through, and after he was told by Mr.
14 Neff that it was in the newspaper, he sat there and
15 read through the entire newspaper and said, "No, I
16 was right. That part of the letter was never
17 published." Again, if you don't have the whole
18 context of these letters, all you have is the
19 pretext of this charge.

20 And let's go beyond that, because you've
21 got to understand in evaluating what Judge Murphy
22 did -- and Judge Murphy is bigger than life. He has
23 his own way of expressing himself. And he expressed
24 himself in very strong terms in these letters, which

1 he believed to be confidential.

2 But let's look at where he was at that
3 point. Let's understand what was in his heart and
4 his mind at that point. Because if you don't
5 understand that, you can't understand the totality
6 of the circumstances. If you don't understand the
7 totality of the circumstances, you can't understand
8 the facts of the case.

9 This is where he was. Judges have a
10 horrible problem in this state. They're not allowed
11 to comment on things newspapers publish. They can't
12 get into a spitting contest with a newspaper. So a
13 newspaper, particularly one with the great tradition
14 of ethics of the *Boston Herald*, can publish anything
15 they want about a judge. And who responds? Does
16 the Court have a system? Do they have a committee,
17 a truth committee that can stand up and say: Hey,
18 wait a minute. No, that didn't happen?

19 So every time a judge makes a decision in a
20 case, every time he bails somebody, every time he
21 sentences someone, he has to have in the back of his
22 mind that some newspaper, probably the *Herald*, will
23 print a totally unfair version of that article. It
24 will become the subject of the talk shows and the

1 nitwits who call in to the talk shows. And that
2 judge will be pilloried and nobody will respond,
3 nobody.

4 But what did Ernie Murphy do? Ernie Murphy
5 said: I'm not going to take that. If they publish
6 something that is demonstrably untrue, that is a
7 series of outrageous lies, that go to the very heart
8 of who I am as a judge -- that I am fair, that I am
9 compassionate and that I follow the law -- if they
10 publish a story containing multiple lies about me, I
11 am going to sue them.

12 He first tried to get a retraction, and
13 their answer about a retraction is consistent with
14 what Mr. Purcell said yesterday: We're not
15 apologizing. We think we were right. We think our
16 reporter, who threw away his notes, was just
17 following the policy at the *Boston Herald*. And
18 incidentally, if they print this kind of stuff that
19 they printed about Judge Murphy, their reporters
20 ought to throw away their notes so they can't be
21 contradicted. So he's the one who sets the policy
22 and the policy is, throw away your notes.

23 So Judge Murphy went in, and he took on the
24 very, very difficult task that no other judge in

1 this state has ever done. He challenged power. He
2 challenged the power of this rogue newspaper to
3 publish whatever they wanted. And he challenged
4 them by going not to the public streets, not to an
5 auditorium, not to a press conference, he went into
6 a court of law, where the law applies, and where
7 everybody, he and the *Boston Herald*, is held to a
8 standard of law.

9 A public figure has to prove that the
10 matter was not simply not true, which everybody now
11 knows it wasn't true, but they have to prove it was
12 printed with malicious disregard or willful
13 disregard for the facts or knowingly they were not
14 true.

15 He put his family through two years of hell
16 in order to prove that what they said about him was
17 not right. And he came into a courthouse, with no
18 special privileges because he was a judge. He came
19 into a courthouse, and they put 12 people in the
20 box, and those 12 people unanimously held that the
21 *Boston Herald* had libeled him in 20 statements --
22 different reporters, different columns -- that they
23 had libeled him. They found they had libeled him,
24 lied about him -- "libeled" is a polite word for

1 lied -- that they had lied about him with willful
2 disregard for what the truth of the matter was.

3 Now, he won the case, but as he said to you
4 yesterday -- and by the way, I want to comment
5 specifically on his credibility. Did you hear
6 anything yesterday that didn't have the ring of
7 truth to you? Did you hear anything that he said
8 that was ever contradicted in any of the letters or
9 the transcript that Mr. Neff showed him? Ernie
10 Murphy has consistently told the exact same set of
11 facts. Because facts are stubborn things; you can't
12 change facts.

13 And the facts are that Ernie Murphy after
14 that verdict was desperate to get that case over.
15 He told you the reasons. Not the effect on him; he
16 can be a tough guy. But he's got young children,
17 and although the *Herald* doesn't care about them, he
18 did. And his wife cared about them. And they
19 wanted to end it.

20 And so he wrote these letters to the
21 *Herald*, and what he said in these letters was: Come
22 to a meeting, bring a check. Come to a meeting.
23 Come to a meeting and come with someone who is
24 independent, someone who can take a view of the case

1 that is not colored by the fact that your lawyers up
2 to now have given you bad advice.

3 Now, they're entitled to give him that
4 advice, and lawyers give advice all the time that
5 can be wrong, and it was disastrously wrong in this
6 case. But come with an independent view. And as he
7 said, I wanted to somehow shock them into realizing
8 where he was at this point and what was at risk at
9 this point.

10 And what was at risk at this point was that
11 not only would the *Herald* continue to spend a lot of
12 money, they would be paying enormous amounts of
13 interest. And he said, Bring a check for \$3.2
14 million. But as he said on his testimony, I wanted
15 to discuss the case with them, principal to
16 principal, with someone there who could look at the
17 case with a new look. Because obviously the lawyers
18 at Brown Rudnick, to some extent having been the
19 author of this disaster, it was going to be very
20 difficult for them to say to their client, you
21 know, Look, we were wrong and he's going to win this
22 case.

23 He told Pat Purcell in the first meeting he
24 met him: I'm going to win this case, Pat, but all I

1 want is a retraction. He said at the second meeting
2 with him -- as Mr. Purcell said yesterday, he
3 thought it was after they had lost summary
4 judgment -- he said to him, You're going to lose.
5 80 percent of these cases are won on summary
6 judgment. The cases that are not won on summary
7 judgment, the newspaper loses. You're going to
8 lose. You're going to pay me a lot of money.

9 But it's not in my interest, it's not in
10 the Court's interest, it's not in my family's
11 interest, to go ahead with this matter. So, please,
12 can we sit down, as honorable men, and talk about
13 it. The answer was, We're going to try the case.

14 So they tried it. Now they're sitting
15 with a huge judgment against them, and again Judge
16 Murphy wanted to end it, so he wrote letters. As I
17 say, he has a way of expressing himself; but again,
18 he was absolutely right in what he said in the
19 letters. The "threat," quote, "threat," the "ransom
20 note," quote, is a predictor of the future, all of
21 which happened: that the verdict would be
22 sustained, that it wouldn't be cut down, and that
23 they would owe him far more than what they were
24 doing now, and they would spends millions of dollars

1 defending the case.

2 The *Herald* had every right to go ahead and
3 continue to appeal the case, but Judge Murphy felt
4 that at least if they could know where he was on
5 this matter, at least if they could know that, they
6 would understand that they had a real problem and
7 that they should talk about it.

8 And then as pointed out before, these
9 letters were never mentioned in the postjudgment
10 filings that they made thereafter. They were never
11 mentioned. And I think that goes to two points: It
12 goes to the point of, it didn't intimidate them. It
13 didn't intimidate them from doing it, they filed an
14 appeal. It didn't prevent them from going out and
15 eventually hiring new counsel.

16 And when Mr. Dushman filed his postjudgment
17 filings in this case, he did not, he did not, put
18 anything in about these letters. Why? Because I
19 think the inference is quite clear: Bob Dushman, an
20 honorable man, knew that there was a
21 confidentiality agreement with regard to these
22 letters, and he knew that the Judge thought they
23 were confidential, and he wasn't going to use them
24 without at least talking to counsel on the other

1 side first about the letters. Never. So he didn't
2 do it. New counsel, who had different standards,
3 went ahead and did it.

4 So what you have here is somebody who has
5 not brought the judiciary into disrepute, who has
6 not used his judicial office for personal gain, who
7 has not done any of the things that the Commission
8 has charged him with, other than he inadvertently
9 used judicial stationery in the first letter and he
10 sent the other letters in envelopes, one of which he
11 crossed out the official name.

12 He in fact was fighting for the integrity
13 of the judiciary. He was fighting for the
14 independence of the judiciary. And he was doing
15 that not because he wanted the money; he was doing
16 that because he believed that if a judge is
17 attacked, that if a judge is libeled, by a newspaper
18 that has no ethics, by a newspaper that wants to
19 be -- listen to Mr. Purcell's testimony: We need a
20 two-newspaper town. We do need a two-newspaper
21 town, but we'd like to have both newspapers publish
22 the truth, and they didn't about Judge Murphy.

23 So what Judge Murphy did was to go ahead
24 and try to uphold not only his personal integrity,

1 which is important to all of us. What more can
2 anyone say about someone, that he's an honest man,
3 he's a man with integrity. And what the *Herald*
4 attacked him for was to say that he was not a man of
5 integrity and he was not a man of compassion. So
6 when that attack was made at his very being, he
7 fought to uphold his integrity, but in doing so, he
8 was upholding the independence of the judiciary.
9 Because no one else would speak the power. No one
10 else would tell this newspaper what they did was
11 wrong.

12 And it took a jury of 12 citizens, and it
13 took the Supreme Court of this state, to unanimously
14 tell the *Herald* that they were wrong, that they
15 lied, and that they lied maliciously about this man.
16 And if he hadn't taken the steps to bring that case
17 to court, the *Boston Herald* could continue on, could
18 continue doing what it does without ever thinking
19 about it, whether or not to ever check the sources
20 of a story. Maybe they'd become a little more
21 careful.

22 But they're not going to let Judge Murphy
23 off. They're not going to let him off. They're
24 going to follow him; they're going to harass him;

1 they're going to put him on the front page of the
2 paper. You know, war could be declared, they could
3 be declare war on this country; they could find a
4 cure for cancer; the Red Sox could win the pennant;
5 but if they have something they want to say about
6 Judge Murphy, guess who is going to be on the front
7 page of the newspaper, Judge Murphy.

8 That shows their ethics. And if someone
9 like Judge Murphy didn't hold those up to a mirror
10 and didn't make them look at themselves and look at
11 what they are, it would be even far worse in this
12 state. At least every other judge in this state
13 knows someone stood up, not only for himself but
14 stood up for all of you when he brought that case
15 against the *Herald* and Mr. Purcell.

16 So his attempt at the end in this case to
17 get an honorable settlement, to give what he
18 believed -- to sit down with someone he believed was
19 an honorable man, to sit down with Mr. Purcell and
20 pursue the settlement, it didn't work. As he said,
21 I had a strategy, I had a plan. It didn't work.
22 But how could we criticize someone for that?

23 And remember, he was not doing this as a
24 member of the judiciary. Almost every case

1 involving sanctions against a judge involved cases
2 where the judicial office itself was involved. This
3 was not an act -- this was not an attack on the
4 judicial office. As I say, he shouldn't have used
5 the stationery, but it was not acting as a judicial
6 officer. He was acting as a person; he was acting
7 as a father; he was acting as a husband; he was
8 acting to try to end this horrible agony he had been
9 put through by this newspaper.

10 And that's the context of these letters.
11 That's the context of these letters. And unless you
12 understand where he was, you can't understand that.
13 And moreover, he had every reason to believe that
14 these letters would be kept in confidence, because
15 he thought he was dealing with honorable men. He
16 wasn't. He wasn't dealing with honorable men; he
17 was dealing with men who, when they thought it was
18 to their advantage, ten months after the letters
19 were written, when they thought it was to their
20 advantage, they put the letters on the front page of
21 the newspaper.

22 Judge Murphy had every reason to believe
23 that these letters would never be shown to anyone
24 else. But he also had every reason to believe that

1 at least if they published them, they'd publish the
2 whole letter. They'd publish the whole letter.
3 They published the part about, I'll give you back
4 the check, but they never published that. And you
5 know what, in keeping with the great tradition of
6 this newspaper, they didn't publish it this morning
7 either. They published the part about bringing a
8 check for such and such, but they, again, never
9 published the fact that there was a line that he
10 said in the letter: If we don't agree, Pat, if we
11 can't agree as honorable men, I'll give you the
12 money back.

13 So what I would submit to you at the end of
14 the day is that -- and later on, I think it's
15 appropriate when we file our papers that I say
16 something about what's appropriate in terms of the
17 fact he used judicial stationery. But let me
18 suggest to you, what Judge Murphy has gone through
19 ever since the *Herald* first published these letters,
20 he has been held up by this newspaper for further
21 public ridicule, and he's gone through an awful lot.
22 And when we talk about whether or not there should
23 be some sanction, some minor sanction, some
24 admonition for what he did in using the stationery,

1 I think you also have to weigh that on the scale, as
2 to what he has gone through and what the *Herald* has
3 put him through.

4 So I do these cases -- I think there's been
5 five -- four public hearings, I've been a lawyer in
6 two of them -- I do it because I believe very
7 strongly that the judiciary is entitled to defense.
8 And maybe I don't do it very well, but I try.

9 And I try because I have enormous faith in
10 the system. I have enormous faith in the fact that
11 I am now in a court of law. And I have an enormous
12 faith in the ability of impartial judges like you,
13 impartial judges like Judge Murphy, to make
14 decisions that may be unpopular, but they're right.
15 These decisions are made every day by judges. I've
16 gone in and out of courtrooms in the state for 40
17 years, and I've appeared before an awful lot of
18 judges, and I've never questioned the fact that I
19 was before an independent judge with great
20 integrity.

21 This newspaper would make every one of
22 those judges look over his shoulder every time they
23 make a decision. Of course, newspapers are entitled
24 to criticize decisions. They have every right in

1 the world. Citizens have every right in the world.
2 But they're not entitled to lie. They're not
3 entitled to lie. Because that goes to the very
4 heart of what we do. That goes to the very heart of
5 whether or not we have a system of laws or whether
6 we just have a system of newspaper publicity.

7 So what I would ask of you, taking all of
8 this into consideration, and particularly having
9 listened to Judge Murphy, I want you to find he's a
10 man of integrity. I want you to find he's an honest
11 man. He may have made a mistake, but it was a
12 mistake of the heart. It was a mistake of a father
13 and a husband and someone who had been grievously
14 damaged by this newspaper. And if he made any
15 mistake, you have to put it in that context.

16 In that context, I would ask you to find
17 that Judge Murphy did not violate these canons, that
18 he did not violate the judicial code of conduct,
19 that he did not bring his office into disgrace or
20 disrepute. He, as I said before, upheld the
21 integrity of his office. Thank you.

22 JUDGE KILBORN: Mr. Mone, I'd like to focus
23 a little bit, in a general discussion, as to what
24 you think the role of confidentiality is here. And

1 my specific question is, if a judge -- I'm not
2 saying this happened here -- but let's assume that
3 there's a judge who used intemperate language, an
4 explicit threat, for instance, and he or she did so
5 under an acknowledged blanket of confidentiality.
6 In other words, the judge says to the other party:
7 Is this discussion confidential? Yes, it is. Will
8 you sign a piece of paper that says it is? Yes, it
9 is. And then goes again and makes intemperate
10 remarks.

11 MR. MONE: That's a threat. If you don't
12 do this, I'm going to kill you. I think that's an
13 entirely different matter. I think that if Judge
14 Murphy, working under a confidentiality agreement
15 such as he did, such as he had every reason to
16 believe that he had, that if he had made -- if he
17 had made physical threats on Mr. Purcell, if he
18 hadn't discussed the merits of the case -- this is
19 actually what this is. It may be in very colorful
20 language, but what he's doing is he's discussing the
21 merits of the case.

22 I think if it goes beyond that, if he made
23 explicit threats, I think that's a different case.
24 But we have to deal with the facts. The facts of

1 this case are, this language may be colorful, this
2 language may be a way of expressing things that you
3 or I would not have used, but it is in fact a
4 discussion of the merits of the case and an attempt
5 to settle the case. That's what it is. And it was
6 done under a confidentiality agreement.

7 So I agree with you. I agree with you.
8 The role of confidentiality, as applied to this
9 case, is different than if you applied it to the
10 hypothetical you proposed.

11 JUDGE KILBORN: What I'm getting at is, and
12 I think I have your answer, is that even the
13 acknowledged fact of confidentiality is not a blank
14 check.

15 MR. MONE: Absolutely, Your Honor.

16 JUDGE KILBORN: You still have to look at
17 what the language is.

18 MR. MONE: But you have to look at the
19 context of the language.

20 JUDGE KILBORN: I understand.

21 MR. MONE: You have to look at all of that.

22 But I agree with you. I agree with you.
23 It is absolutely not a blanket threat. After all,
24 if you wrote someone and said, Do we have a

1 confidentiality agreement? Yes, we do. And he
2 said, Well, that's good, I'm glad we have that,
3 because I just put a bomb under your front porch.
4 Obviously you'd be able to call up the police and
5 say, There's a bomb under my front porch.

6 So, obviously, those are different facts.
7 The facts in this case are entirely different. The
8 fact in this case is it was a furtherance of a
9 discussion. As Mr. Purcell said yesterday, when he
10 met Judge Murphy, Judge Murphy was very emotional
11 and very charged up about the case. And these
12 letters are emotional, and they are charged up about
13 the case. But they're about the case, that's what
14 they're about. And they don't say anything that
15 wasn't true, which is, that you can lose a lot of
16 money if we don't settle this now.

17 So I think those are different cases.

18 JUDGE KILBORN: Well, you've answered my
19 question. Thank you.

20 MR. MONE: Thank you.

21 JUDGE KILBORN: Mr. Neff.

22 MR. NEFF: Thank you, Your Honor.

23 At the outset, I just want to say, as is my
24 practice, I permitted opposing counsel the courtesy

1 of not interrupting during opening and closing. But
2 I would ask that you not consider -- to the extent
3 Attorney Mone suggested or presented facts not in
4 evidence during his closing that you not consider
5 them.

6 Some of the topics that he mentioned that I
7 would suggest and highlight to you are what was or
8 was not in the newspaper today, for instance. What
9 the deceased attorney, Mr. Dushman, would have said
10 if he came in and testified in this case. And
11 whether or not there's redress for a judge in the
12 Supreme Judicial Court and in the Trial Court.
13 There's no testimony about that. And in fact,
14 Attorney Mone, as you probably know, has stated that
15 there are media committees within the Trial Court
16 that do help judges address those sorts of
17 scenarios.

18 Having said that, what you've heard a lot
19 about from Attorney Mone and in the evidence in this
20 case is reasons why the *Boston Herald* is a bad
21 actor, is out to get Judge Murphy, is unfair towards
22 Judge Murphy, prints unfair articles about Judge
23 Murphy, and has generally engaged in this apparently
24 vast conspiracy against Judge Murphy.

1 Let me suggest to you that Patrick Purcell
2 when he came in here yesterday did testify in a
3 credible and frank fashion. When he knew certain
4 things, he told us what they were. When he didn't
5 remember certain things, he readily volunteered: I
6 don't remember exactly what the answer is to that
7 question.

8 I would suggest to you he did not come off
9 as a prepared witness who was sitting there with an
10 agenda, who wanted to get a particular point across.
11 And he said he was never told about any sort of
12 confidential settlement negotiations by his
13 attorney. Now, that's what he said. I suggest to
14 you he said that credibly.

15 And in this case, despite Attorney Mone's
16 suggestion about what Mr. Dushman would have
17 testified about, if Mr. Mone could somehow resurrect
18 him, there was no evidence presented by a percipient
19 witness to any conversation between Mr. Purcell and
20 Mr. Dushman to contradict Mr. Purcell's assertion
21 that, He didn't mention that to me. Now, did Mr.
22 Dushman just forget, or think he had communicated
23 it, or Mr. Purcell just didn't hear him say that,
24 who knows, but Mr. Purcell, I suggest to you

1 respectfully, credibly testified yesterday, he was
2 shocked. He had no memory of that whatsoever.

3 So now I'll address the settlement question
4 you just asked Attorney Mone. A lot was made --
5 well, something was made of that during the trial.
6 I mentioned it in my opening and you just asked
7 about it again.

8 Let me respectfully suggest that what you
9 get from Attorney Mone's answer is that he believes,
10 just as he's always believed, these letters are not
11 misconduct, that the statements in these letters
12 are not inappropriate, improper or are not
13 misconduct.

14 And I'll suggest to you now, as I did at
15 the beginning of the trial, that to the extent that
16 you believe that what Judge Murphy put into these
17 letters is misconduct, the fact that these letters
18 or what was going on at the time was somehow cast
19 as settlement negotiations, does not offer Judge
20 Murphy any protection from a finding by you that
21 these letters constitute misconduct. It's a
22 complete red herring. It's irrelevant to your
23 consideration.

24 One of the things you also heard a lot

1 about in the evidence and from Mr. Mone on Judge
2 Murphy's behalf in the case is the libel by the
3 *Boston Herald*. Not only was the *Boston Herald*
4 painted as a bad actor, but they libeled Judge
5 Murphy, and they printed only portions of the
6 newspaper articles, and it's sort of been suggested
7 at least that somehow this case coming before you is
8 part of this grand conspiracy the *Boston Herald* has
9 against Judge Murphy.

10 And in light of that, I think it's worth
11 repeating what I said yesterday morning, which is, I
12 appear before you here today on behalf of the
13 Massachusetts Commission on Judicial Conduct, not on
14 behalf of the *Boston Herald*. You have before you
15 this morning two complaints, first of which was
16 brought by the Massachusetts Commission on Judicial
17 Conduct against Judge Murphy before the *Boston*
18 *Herald* filed its complaint.

19 I'm also not going to stand here and try to
20 make an argument that the treatment Judge Murphy and
21 his family -- the threats Judge Murphy and his
22 family received after those articles were printed by
23 the *Boston Herald* are anything other than absolutely
24 reprehensible, indefensible, disgusting,

1 unjustified. Even if he had made the statements
2 that the *Boston Herald* put in its paper, there's no
3 defense of the treatment and the threats that went
4 against Judge Murphy's family and Judge Murphy
5 himself. And I'm certainly not going to suggest
6 anything to the contrary.

7 But the settlement stuff, the libel stuff,
8 the bad actor, the *Herald* is the bad actor, the
9 horrible -- and I admit it, it was horrible
10 treatment that his family received -- that is all
11 evidence that is merely a distraction from the real
12 issue in this case. That whole context may inform
13 your decision-making or thinking about some of the
14 behavior Judge Murphy engaged in, but none of that
15 history provides Judge Murphy with an excuse for his
16 later misconduct.

17 And I'd suggest to you that what happened
18 in this case is Judge Murphy, appropriately and well
19 within his rights, felt like he had been libeled and
20 filed a lawsuit against the *Boston Herald*. But he
21 was so desperate, so badly needed after that lawsuit
22 was filed to have that lawsuit resolved, to have
23 this whole matter behind him, that he went from
24 engaging in appropriate conduct and crossed the line

1 and began to commit misconduct.

2 And what happened in this case is Judge
3 Murphy, as he said, was absolutely sure he was
4 right, the *Boston Herald* was wrong. He had been
5 libeled and the *Herald* should admit that he had been
6 libeled. And so he filed that lawsuit. And when
7 over a year later that lawsuit was still pending,
8 Judge Murphy wanted a one-on-one meeting with the
9 publisher of the *Herald* to try to persuade him that
10 he, Judge Murphy, was right, the *Herald* was wrong,
11 and he was going to win that libel suit.

12 And the evidence you saw is that Judge
13 Murphy did get two meetings with Patrick Purcell:
14 the first in October of 2003, the second in April of
15 2004. And you heard testimony about those two
16 meetings. And what you heard was that Judge Murphy
17 approached Patrick Purcell, a nonjudge, a nonlawyer,
18 had these one-on-one meetings. He was very
19 emotional during these meetings, according to Mr.
20 Purcell, was very intimidating, and throughout the
21 course of these two meetings increased the pressure
22 on him to drop the appeal.

23 You've heard testimony that Judge Murphy,
24 in very strong terms, informed Mr. Purcell that he

1 did not believe the *Herald* stood a chance of
2 successfully defending against the libel lawsuit he
3 had brought against it and in fact suggested that
4 Mr. Purcell was getting bad advice from his
5 attorney, who at that point was Robert Dushman from
6 the firm Brown Rudnick, and should consider
7 consulting other attorneys.

8 That was Judge Murphy's agenda, real
9 agenda, when he sought those settlement meetings.
10 He needed to get this case resolved, he was
11 desperate to get this resolved, and he approached
12 those two meetings as an opportunity to persuade
13 Patrick Purcell that these cases needed to end right
14 then and there.

15 What you learned yesterday is Patrick
16 Purcell is a career businessman, a career newsman, a
17 man of principle. And he stood behind that story,
18 and he stood behind that reporter, and he stood
19 behind that reporting. And he made a decision that
20 he was going to accept the advice of the person who
21 was his attorney, whom he trusted and relied on,
22 Robert Dushman from Brown Rudnick. And what you
23 heard was that advice was, You should go ahead to
24 trial.

1 So the evidence was that they did go ahead
2 to trial, and in January and February of 2005, the
3 libel lawsuit Judge Murphy brought against the
4 *Boston Herald* went to trial and the jury came back
5 in Judge Murphy's favor.

6 Now, the evidence was that Judge Murphy,
7 when that verdict came down, and faced with the
8 prospect of the case being dragged out for another
9 two years, if the *Boston Herald* decided to pursue
10 its right to appeal, immediately sought a four-way
11 meeting to discuss ending the case right then and
12 there, at which Patrick Purcell and his lawyer,
13 Attorney Dushman, would be present.

14 And what you then heard is the other side
15 said, No, not interested. What you heard Mr.
16 Purcell say is that the advice he was getting at
17 that point from Mr. Dushman is that they had a good
18 chance on appeal and should therefore press forward.

19 Judge Murphy didn't take "no" for an answer
20 and wrote these letters. And I'd suggest to you,
21 that's when he crossed the line from appropriate
22 conduct to misconduct, when he wrote these letters,
23 when he couldn't take "no" for an answer. He so
24 needed this case to end, he was so desperate for it

1 to end, that he did whatever he could to resolve it.
2 And the only option that he saw as left available
3 to him was to write these letters to Patrick
4 Purcell.

5 Now, the testimony you heard -- well,
6 strike that. Part of what was -- I suggest to you
7 the evidence is, part of what happened in Judge
8 Murphy's mind is, he had no options left. The
9 verdict's come back. Oh, my God, I can't go through
10 another two years of this.

11 So what happens, he either forgets or
12 ignores the warning that came from the Executive
13 Director of the Commission on Judicial Conduct in
14 August of 2002 to be mindful of his use of official
15 Superior Court stationery. He either decides to
16 forget or ignore the warning or guidance in the
17 commentary of Canon 2A which says that a judge must
18 accept restrictions on the judge's conduct which an
19 ordinary citizen might consider burdensome.

20 If ordinary Joe Citizen involved in a civil
21 suit pulled a couple of pages of normal notebook
22 paper out of a notebook and wrote these exact same
23 letters, I suggest to you someone might look at
24 these letters and say, Well, these are strange; or

1 These are overzealous; or maybe even would say,
2 Well, these letters are threatening.

3 But when Judge Murphy, a sitting Superior
4 Court judge, writes these letters, one of which is
5 on Superior Court stationery, both of which are
6 enclosed in Superior Court stationery envelopes, to
7 the opposing side in a civil lawsuit in which Judge
8 Murphy was personally involved, to a person who is
9 not a judge, not a lawyer, these letters carry extra
10 weight. They carry a different meaning than when
11 ordinary Joe Citizen sent these letters.

12 When Judge Murphy sent these letters,
13 particularly given that they were on court
14 stationery, they carried with them, whether he
15 wanted them to or not, the authority of his office.
16 And it was when he did that that he violated the
17 canons of conduct with which he's been charged.

18 In these letters Judge Murphy strongly
19 expresses to Patrick Purcell, again a nonlawyer,
20 Judge Murphy's legal opinion about the *Boston*
21 *Herald's* chances on appeal.

22 In this first letter on February 20th,
23 Judge Murphy proposes that Patrick Purcell attend
24 the very meeting Judge Murphy had already been told

1 they were not interested in, except, outrageously,
2 and I suggest inappropriately, the conditions Judge
3 Murphy puts on this meeting between himself and
4 Patrick Purcell are that Patrick Purcell cannot
5 bring the lawyer from Brown Rudnick who had
6 represented him during the libel case, could not
7 tell that lawyer that this meeting was going to take
8 place, could not show that lawyer this letter.

9 And if there was any doubt left in Patrick
10 Purcell's mind about whether or not Judge Murphy
11 wanted Patrick Purcell to show his lawyer this
12 letter, he includes again the rather ominous PS:
13 "It would be a mistake, Pat, to show this letter to
14 anyone other than the gentleman whose authorized
15 signature will be affixed to the check in question,"
16 which you heard was the insurer. "In fact, a BIG
17 mistake. Please do not make that mistake."

18 Judge Murphy, I suggest the evidence shows,
19 knew full well that the person that Patrick Purcell
20 was getting advice from, Robert Dushman, said that
21 they should continue to pursue an appeal and not
22 meet for a settlement communication.

23 Judge Murphy's response to that was, he
24 didn't take "no" for an answer. Instead he sent

1 this outrageous letter in which he gives, again,
2 Patrick Purcell, the nonlawyer, advice, tells him
3 that the only way he can attend the meeting to talk
4 to Judge Murphy about settling this case is by
5 specifically excluding the lawyer Judge Murphy knew
6 was representing him and the *Boston Herald* in this
7 case from that meeting. He made sure Patrick
8 Purcell, or he tried to make sure, Patrick Purcell
9 wouldn't bring that person, tell that person, or
10 show that person this letter. And I suggest to you
11 that was outrageous and I suggest to you that was
12 improper.

13 Now, Patrick Purcell when he testified
14 about these letters testified that they did
15 intimidate him. He was a nonlawyer; he got these
16 letters; he didn't know what to do with them. I
17 suggest to you his answers to questions about what
18 he did with them was perfectly credible. He didn't
19 do anything except give them to Attorney Dushman,
20 the lawyer who was representing him, the lawyer whom
21 he had come to rely on, the lawyer he had come to
22 trust. And I suggest to you it's perfectly
23 reasonable and credible that Patrick Purcell would
24 take that kind of action.

1 I'd also suggest to you that that kind of
2 action is inconsistent with him being the villain
3 that Attorney Mone wants to portray him as. There
4 was no reason to wait. If he wanted to embarrass
5 Judge Murphy with these letters, there was no reason
6 at all to wait at that particular point in time. He
7 could have published these right away.

8 Having said that, while the fact that
9 Patrick Purcell testified he was intimidated by
10 these letters can inform your judgment about whether
11 or not Judge Murphy committed misconduct, I would
12 today, as I did at the outset, suggest to you that
13 the standard by which you evaluate the evidence and
14 whether Judge Murphy committed misconduct in this
15 case is from the standpoint of a reasonable,
16 objective person, not from Pat Purcell's subjective
17 standpoint, but from your belief of what a
18 reasonable, objective person would think, how that
19 person would react to this conduct.

20 I would respectfully suggest to you that if
21 a reasonable, objective person, who, like Pat
22 Purcell, is a nonlawyer, received these letters from
23 a sitting Superior Court judge on Superior Court
24 stationery, he would, as I suggest you should,

1 conclude that Judge Murphy had violated Canon 1A by
2 failing to maintain and observe high standards of
3 conduct; had violated Canon 2 by failing to avoid
4 impropriety and the appearance of impropriety; had
5 violated Canon 2A by failing to act in a manner that
6 promotes public confidence in the integrity and
7 impartiality of the judiciary; had violated Canon 2B
8 by lending the prestige of judicial office to
9 advance his own private interests; had violated
10 Canon 4A(1) by failing to conduct extrajudicial
11 activities so that they do not cast doubt on the
12 Judge's capacity to act impartially as a judge.

13 And I would suggest to you any reasonable,
14 objective person who had to deal with this kind of
15 conduct coming from a sitting Superior Court judge
16 would conclude that in violation of Canon 4D(1)
17 Judge Murphy failed to refrain from financial and
18 business dealings that tend to reflect adversely on
19 his impartiality, interfere with his judicial
20 position, or maybe more specific to this case that
21 may be reasonably perceived to exploit his judicial
22 position.

23 It is on the basis of that evidence and the
24 law, as I have briefly outlined it, that I would

1 suggest to you that you should find that Judge
2 Murphy committed the misconduct with which he's been
3 charged.

4 JUDGE KILBORN: Thank you.

5 I have a couple of "what ifs" for you too.

6 MR. NEFF: All right.

7 JUDGE KILBORN: Do you think -- and these
8 are real life questions, these are not just
9 rhetorical questions -- do you think that whatever
10 Judge Murphy did was aggravated by the fact that
11 these letters were sent to a publication, in
12 essence?

13 MR. NEFF: I do. I will tell you, and I
14 want to stay consistent about this, that I believe,
15 as a threshold question for your consideration, as I
16 said a little colorfully yesterday, Judge Murphy
17 committed the misconduct he's been charged with the
18 moment he put those envelopes into the mail to
19 Patrick Purcell. The fact that those letters ended
20 up in the *Boston Herald* does not matter for purposes
21 of your consideration of whether he violated canons.
22 Those letters getting into the *Herald* just means
23 that lots of people know about it, know about the
24 misconduct that he committed.

1 There is law outside of our jurisdiction
2 that addresses the canons with which Judge Murphy
3 has been charged that does suggest, and I would
4 continue to suggest to you, that a judge in his
5 personal dealings has a duty to exercise reasonable
6 care.

7 And I would suggest to you that while it
8 may not be a threshold requirement for you to find a
9 violation of the canons, Judge Murphy did contribute
10 to and aggravate his already existing violation by
11 failing to exercise reasonable care when he chose to
12 send these letters to the publisher of a major
13 Massachusetts newspaper.

14 And I'd suggest to you that -- and
15 although I didn't get into it too much in my closing
16 -- part of the basis for that would be that I
17 respectfully would sort of resubmit what I've
18 already said, which is that although I don't think
19 he's protected, even if you find that these are
20 settlement negotiations, these letters, I don't
21 think that protects him.

22 I would suggest that there's no reason for
23 him to believe, given what the procedural status of
24 the case was and the conversations there had been to

1 date, that these letters were part of any sort of
2 private and confidential settlement communication.

3 JUDGE KILBORN: Well, I think what I've
4 heard in your answer to my question was that if
5 indeed the letters were inappropriate, they were
6 more inappropriate because they were addressed to a
7 publication.

8 MR. NEFF: I believe that misconduct rests
9 within the four corners of -- let me put it to you
10 this way -- and this is just my opinion, of course.
11 My opinion of the law with the facts as you see them
12 is that if Judge Murphy had in fact entered into a
13 confidential settlement agreement with Patrick
14 Purcell and sent him these letters, and Patrick
15 Purcell received these letters and said to himself
16 and Attorney Dushman, Hey, these letters seem to me
17 to be threatening and inappropriate, and had sent
18 them off to the Commission, we would be dealing with
19 the exact same case here today.

20 The only difference between a case where
21 Patrick Purcell received those letters and forwarded
22 them directly on to the Commission and the case we
23 have today is that those letters ended up getting
24 published and therefore more people know about that

1 misconduct.

2 JUDGE KILBORN: And what do we derive from
3 your very last statement? Supposing more did know.
4 Is that relevant?

5 MR. NEFF: Well, it is relevant in the
6 sense that -- again, this is outside the
7 jurisdiction, and I'm happy to include this in my
8 submission to you later, and it's actually in my --
9 this case law is in the specifications I filed.

10 The law that governs the canons that we use
11 in Massachusetts, although it's outside our
12 jurisdiction, is that a judge has a duty to exercise
13 reasonable care in his dealings, both on and off the
14 bench. And I would respectfully suggest to you that
15 while publication in a newspaper was not a threshold
16 requirement for these letters to become misconduct,
17 the fact that they were aggravated and sort of
18 contributed to Judge Murphy's violation and the
19 reason you hold him responsible for essentially the
20 actions of a third party, in this case the *Boston*
21 *Herald* or the editor of the *Boston Herald*, is that,
22 I would suggest to you, Judge Murphy failed in his
23 obligation to exercise reasonable care, because he
24 not only wrote these letters and sent them out, but

1 he sent them to the publisher of a major Boston,
2 Massachusetts, newspaper.

3 It's one thing just to send it to another
4 litigant; he sent it to the publisher of a newspaper
5 and should have, in his exercise of reasonable care,
6 considered the possibility that it might get out.

7 And I respectfully suggest to you that
8 Judge Murphy's own language in these letters sort of
9 suggests that Judge Murphy was contemplating that
10 possibility. He felt it necessary to state and
11 restate and essentially overstate that he considered
12 these letters to be settlement negotiations, and he
13 warned repeatedly, in at least the first letter,
14 that Patrick Purcell should not show that letter to
15 anyone.

16 So clearly Judge Murphy contemplated the
17 possibility that these would not be considered
18 settlement communications, that there was no clear
19 agreement, which is why he needed to keep repeating
20 that he considered these settlement communications
21 and keep repeating that he didn't want Patrick
22 Purcell to show them to anyone.

23 JUDGE KILBORN: Well, okay. Another
24 "what if." Supposing Judge Murphy had reached into

1 that drawer to pull out that piece of stationery,
2 and lo and behold, there wasn't any left. Now all
3 he found on the table was this (indicating), from
4 Universal paper manufacturer. And he sat down and
5 he wrote the very same letter, and he reached in the
6 drawer for an envelope, no envelopes left, but he
7 had a couple of envelopes from Staples. And he
8 wrote on the front and just wrote to Mr. Purcell,
9 put the letter in it and sent it. Both letters. No
10 stationery, no court stationery, no court letters.
11 Where would we be?

12 MR. NEFF: I believe we would be
13 essentially -- well, I don't want to necessarily
14 concede in an offhand dialogue. But to give you the
15 best answer I can at this point, I would say that we
16 would essentially be in the same place, with the
17 exception probably of Canon 2B, which seems to
18 directly address the question of stationery but
19 really not anything else that would be contained in
20 those letters.

21 But I would suggest to you, and I tried to
22 suggest just now in my closing statement, that for a
23 sitting Superior Court judge to send letters that
24 said these things to the opposing side in a civil

1 lawsuit in which that judge was personally involved,
2 the opposing side who, again, was not a judge, not a
3 lawyer, obviously an experienced businessman but
4 just a businessman with no legal training. For
5 Judge Murphy to do that and say the things he did,
6 and give the legal opinions he did, and make what I
7 would characterize as the arguably threatening
8 statements he did, and suggest what I would also
9 continue to suggest is a meeting with outrageous and
10 inappropriate conditions was misconduct.

11 The stationery adds to that misconduct, and
12 it does add for purposes of your consideration here
13 the Canon 2B violation. But I would say while the
14 stationery is more than a Canon 2B violation, these
15 letters, even written without stationery, would be a
16 violation of each of the canons with which Judge
17 Murphy has been charged without probably, although I
18 don't want to commit to that, Canon 2B.

19 JUDGE KILBORN: Well, this situation we're
20 in here today is a delicate one, isn't it, because
21 perhaps you would concede, if this were an ordinary
22 litigant who sent this letter, it would be, however
23 you might want to characterize the language, it
24 would be unobjectionable. It's part of a settlement

1 discussion.

2 MR. NEFF: And I would agree. That's why
3 one of the things I said --

4 JUDGE KILBORN: You don't agree with what I
5 just said?

6 MR. NEFF: No, I do agree. That's why one
7 of the things I said to you is, and I said it sort
8 of colorfully, but if an ordinary citizen wrote
9 these letters, we would probably characterize them
10 as sort of strange and overzealous.

11 But at the risk of repeating myself, I
12 think the commentary in Canon 2A is instructive,
13 which is, a judge must accept restrictions on the
14 judge's conduct which an ordinary citizen might
15 consider burdensome.

16 And that's what we have here. Ordinary Joe
17 Citizen can send these letters and maybe it doesn't
18 become anything at all. But when a judge, a sitting
19 Superior Court judge, sends letters like this,
20 particularly when he sends letters like this making
21 use of the marks of office, the judicial stationery
22 and envelopes, those letters mean something
23 different and they carry a much greater weight.

24 Again, it's those canons that sort of say,

1 judges don't get to behave, as much as they might
2 like to, as burdensome as it may be, judges don't
3 get to behave the way ordinary people do. And
4 that's part of the price of the office and the
5 authority and prestige that they receive from the
6 citizens.

7 JUDGE KILBORN: All right. Let me ask
8 another question. Let's say for the moment that
9 someone was going to say, Judge Murphy's language
10 was a little bit intemperate. Supposing Judge
11 Murphy instead had addressed the same letters but
12 with very decorous, non perhaps intemperate language
13 but making the same suggestions, the exact same
14 substance but in very flowery, kind of court-type
15 language. Where would we be?

16 MR. NEFF: Well, I have a little hard time
17 parsing through that, although I'll try.

18 JUDGE KILBORN: What I'm getting at is, if
19 there is intemperate language in there, what is the
20 impact of the intemperateness is what I'm getting
21 at.

22 MR. NEFF: Well, I think that -- the fact
23 that it's a Superior Court judge making those
24 intemperate comments does contribute to his

1 violations of the canons. And I'm not sure that I
2 can sort of separate out wording from sort of the
3 arguments I've already made.

4 But I would tell you that -- again, this
5 is, of course, your discretion to decide whether you
6 want to agree -- that in the language Judge Murphy
7 used, I would suggest there is language which would
8 be reasonably perceived by an objective, reasonable
9 person to have an arguably threatening tone to it,
10 and that is the language that Judge Murphy chose to
11 use, I guess we must assume. And might there have
12 been a more flowery way to say, Please don't show
13 this letter to your lawyer, that would have seemed
14 less threatening, yes, but I think the impact of
15 that is the same.

16 Part of what I would suggest the misconduct
17 in these letters is, -it wasn't that Judge Murphy
18 wasn't polite enough when he asked Patrick Purcell
19 to exclude the attorney who represented him during
20 the case from this meeting; it was the suggestion,
21 the effort, the attempt to persuade Mr. Purcell, the
22 nonlawyer, that he should meet with Ernest Murphy,
23 the Superior Court judge.

24 And Judge Murphy's effort to convince him

1 to cut out of that conversation the person Judge
2 Murphy knew Patrick Purcell had relied on throughout
3 that trial and was presently relying on for legal
4 advice, I would respectfully suggest however
5 flowery, whatever way Judge Murphy had said that,
6 any language in that letter by Judge Murphy from
7 which you could infer an intent to try to talk
8 Patrick Purcell into no longer accepting advice from
9 the attorney who was representing him and cutting
10 him out of a settlement meeting, was an improper
11 violation of the canons.

12 JUDGE KILBORN: All right. I guess the
13 last question I have, there have been suggestions
14 that there was some kind of threat involved here.
15 What would Judge Murphy have to threaten him with?

16 MR. NEFF: Well, I mean -- and I don't mean
17 to --

18 JUDGE KILBORN: He cannot appeal the jury
19 verdict. He can't appeal. What was he going to
20 threaten him with?

21 MR. NEFF: I don't mean to sort of be
22 preaching to someone who probably has a better sense
23 of it than even I do, but judges are bestowed by the
24 citizens of the Commonwealth with a great deal of

1 authority and power. And I don't think Judge Murphy
2 had to, in a concrete sense, write in a letter: It
3 would be a big mistake. Please don't make that
4 mistake. And if you do, I'm going to issue orders
5 against you. I don't think that was required.

6 I think that merely having what can be
7 reasonably perceived as threatening language coming
8 to you, a person who, albeit a successful
9 businessman, is essentially powerless with respect
10 to our system of government, being told by a person
11 in whom a great deal of power and authority is
12 vested by government, that if you do what common
13 sense and probably good judgment would require you
14 to do, which is show this letter to your lawyer, it
15 would be a big mistake. In fact, don't make that
16 mistake. It would be a "BIG mistake," capitals,
17 underlined. "Please do not make that mistake."

18 I suggest to you language like that, he
19 didn't have to go the next step in order for it to
20 meet the threshold of being threatening, given the
21 power disparity that exists between Judge Murphy, a
22 sitting Superior Court judge, and Patrick Purcell,
23 who, again, while a successful businessman, is
24 really just another citizen of the Commonwealth of

1 Massachusetts.

2 JUDGE KILBORN: While we're on that, don't
3 you think if Judge Murphy were on the bench in any
4 matter in the future where the *Herald* comes up he's
5 going to have to recuse himself?

6 MR. NEFF: Well, I don't want to
7 necessarily be in a position of giving Judge Murphy
8 that advice. That is, as is always the case, for
9 him to decide. I will say, to sort of get at what I
10 think you're asking, I don't think that to the
11 extent Judge Murphy is perceived by Patrick Purcell
12 to be making threats or to be suggesting that there
13 would be consequences against Patrick Purcell as a
14 result of failure to abide by the conditions that
15 Judge Murphy is placing in these letters, I don't
16 think Patrick Purcell needed to have communicated to
17 him for the threat to be there that Judge Murphy was
18 going to order X or Judge Murphy was going to be
19 hearing this later case.

20 Judge Murphy is in the system a powerful
21 person. One of the first things he mentions in the
22 letters is to characterize himself as "ole Mike
23 Ditka," coach of "the team from Chicago," warning
24 him that -- warning Mr. Purcell against playing this

1 particular team in the Super Bowl.

2 That to me, and I think, again, to a
3 reasonable, objective person, not necessarily Mr.
4 Purcell, that to me says, I'm just a lowly citizen
5 of Massachusetts. This is a big, powerful judge,
6 and he's suggesting to me that there might be
7 consequences. And how do I know what he's capable
8 of doing? Does that mean he'll issue orders? Does
9 that mean he'll sit on my cases? Does that mean he
10 has other friends on the bench whom he has influence
11 over and can accomplish things that way?

12 I don't think the end part of the threat
13 has to be there, just the perceived consequence due
14 to the power disparity is enough to make that
15 improper comment and misconduct.

16 JUDGE KILBORN: Thank you very much. Mr.
17 Mone, has any of this generated an interest to you
18 to speak about?

19 MR. MONE: Well, it's interesting to
20 characterize this to be a power disparity between
21 Judge Murphy and Mr. Purcell. The *Herald* has not
22 acted as though there is a power disparity.

23 Two things. I mentioned Attorney Dushman
24 for this reason: I think you can draw an inference.

1 I think you can draw an inference that when Dushman
2 was shown these letters, he didn't do any -- he
3 didn't do anything. He didn't call up the other
4 side and say, "Stop this." And the reason he didn't
5 do that, and the inference you can draw, is because
6 he knew that there had been an agreement that these
7 contacts between these two gentlemen would be
8 treated as confidential settlement discussions.
9 That's the inference I'm asking you to draw.

10 I'm asking you to draw the inference that
11 when he was shown these letters and did not
12 immediately that day contact Howard Cooper and say,
13 Your client has written an inappropriate letter,
14 please tell him not to write another letter, it is
15 because he knew that these letters were in
16 furtherance of these discussions. And in fact, the
17 letters do not -- and I think this goes to the very
18 heart of the Commission's problem with the
19 Commission's case -- there is no threat in these
20 letters.

21 What is the threat? The threat is that if
22 you don't listen to me, you're going to have to pay
23 this verdict, you're not going to overturn it.
24 That's not a threat. That's a statement of probable

1 fact that turned out to be correct. He didn't
2 threaten with any judicial conduct. He didn't
3 threaten he was going to do something.

4 What the threat was, if we don't sit down
5 on this, this agony for both of us is going to
6 continue, and you're going to have to pay a lot more
7 money, as they did. It probably cost them a million
8 and a half dollars; that's what it cost them. And
9 what Judge Murphy was doing was trying to end that.

10 So I think you have to look very carefully.
11 You have to read these letters very carefully to
12 find a threat, and there is no threat there, because
13 he doesn't threaten him with any conduct. All he
14 says is, I want to talk to you as we did before, man
15 to man, and I don't want to have my statements
16 filtered through a lawyer, and I particularly don't
17 want to have it filtered through lawyers who, as I
18 said before, were the authors of this mistake.

19 Now, strategy, that may have been an
20 incorrect strategy. It may have been an incorrect
21 strategy, Your Honor, on his part, but it wasn't a
22 threat in any fashion. It turned out to be a very
23 percipient analysis of what would happen.

24 JUDGE KILBORN: Mr. Neff made quite a point

1 about the attempt to exclude Mr. Dushman. Do you
2 have anything to say about that?

3 MR. MONE: No, because Mr. Dushman was not
4 present in any of the other meetings between Judge
5 Murphy and Mr. Purcell. And I think, again as I
6 said, the strategy may have been wrong, but I think
7 what Judge Murphy felt and what he testified to, he
8 may have been wrong, but being wrong is in
9 hindsight. Having been wrong does not mean you
10 acted inappropriately.

11 He felt -- he felt that because Brown
12 Rudnick had essentially given him the advice, it was
13 what Purcell said to him at the last meeting -- and
14 by the way, Mr. Neff just characterized the first
15 two meetings as trying to persuade the *Boston Herald*
16 from dropping its appeal. My God, the trial hadn't
17 taken place at the time those two meetings occurred.
18 So it wasn't asking them to drop any appeal; what
19 they're asking him to do at that point was, can we
20 settle this case? Can we retract it, can we reach
21 some kind of a settlement.

22 But the last thing Mr. Purcell said, what
23 he said to Judge Murphy was, My lawyers advise me to
24 go to trial. So having known that they were the

1 people who were giving this advice, I think it was
2 appropriate for him to try to, as he had at the
3 other meetings, be able to talk to them, talk to
4 them direct, person-to-person, without having the
5 lawyer, who had advised and who had been the author
6 of this disaster, to be there. They'd have to
7 justify their conduct. They'd have to continue to
8 say, Oh, no, no. We're going to win. We're going
9 to win.

10 What Judge Murphy said to you was, I wanted
11 to get somebody, a Bob Muldoon, a Paul Sugarman, an
12 Eddie Barshak, I wanted to get someone to sit and
13 actually look at the case and say to him, who didn't
14 have prior knowledge, who wasn't directly involved
15 in these decisions, to sit down and say: Look, Mr.
16 Purcell, you've got a real problem. You've got a
17 real problem here. You've got jury findings and
18 they're going to be very, very hard to overturn.

19 So I think the matter of strategy may have
20 been wrong, but it was not misconduct on his part to
21 try to settle that case.

22 JUDGE KILBORN: Mr. Neff, do you have
23 anything further?

24 MR. NEFF: I'd be happy to answer any

1 questions, but I don't have anything further.

2 JUDGE KILBORN: I have no further
3 questions.

4 So we have a date, and we're off the
5 record.

6 MR. NEFF: Thank you, Your Honor.

7 (Hearing concluded at 11:21 a.m.)
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C E R T I F I C A T E

I, Anne H. Bohan, Registered Diplomat
Reporter, do hereby certify that the foregoing
transcript, Volume II, is a true and accurate
transcription of my stenographic notes taken on
October 16, 2007.

Anne H. Bohan

Registered Diplomat Reporter

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