

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.

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
Tuesday, October 16, 2007
9:58 a.m.

(Anne H. Bohan, Registered Diplomate Reporter)

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I N D E X

E X H I B I T

EX. NO.

EVID.

5 Exemplars of Superior Court
stationery given to Judge Murphy
being notepaper and envelopes

2-4

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1 P R O C E E D I N G S

2 JUDGE KILBORN: Let's go on the record.

3 This is day two of the hearing in the matter of two
4 complaints of the Commission on Judicial Conduct
5 against Judge Ernest Murphy.6 I believe where we left off last night was
7 what's left is closing statements and such arguments
8 as you want to make.9 MR. MONE: Your Honor, could I just bring
10 one matter up before we do that. I would like, just
11 as a matter of reopening, to just offer you
12 exemplars of the stationery that Judge Murphy
13 referred to that he was given when he first went on
14 the bench. It consists of the notepaper and the
15 envelopes he was first given.16 MR. NEFF: I don't have any objection to
17 that, Your Honor.

18 JUDGE KILBORN: Make it an exhibit.

19 MR. MONE: It's actually four pieces of
20 paper, but I guess we can just mark them as a group.21 (Documents marked as Exhibit 5
22 in evidence)23 MR. MONE: There's one other matter I would
24 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 Diplomate 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 Diplomate Reporter

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