

THE COMMISSION ON JUDICIAL CONDUCT

IN RE: JUDGE ERNEST B. MURPHY

COMPLAINT NOS. 2006-9 & 2006-30
SJC NO. OE-0119

DEC 10 2007

COMMISSION'S OBJECTIONS TO THE HEARING OFFICER'S REPORT AND
PROPOSED FINDINGS AND RECOMMENDATIONS

Counsel for the Commission on Judicial Conduct ("the Commission") hereby respectfully submits the following objections to the Hearing Officer's Report and Proposed Findings and Recommendations (the "Report").

I. BACKGROUND

On January 10, 2006, the Commission initiated a complaint against Judge Ernest B. Murphy (Complaint No. 2006-9). A second complaint was filed against Judge Ernest B. Murphy by the *Boston Herald* on February 17, 2006 (Complaint No. 2006-30).

On July 10, 2007, the Commission, acting pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7B(4), found sufficient cause to issue Formal Charges in the above complaints and filed formal charges with the Supreme Judicial Court ("the SJC"). These charges alleged that Judge Ernest B. Murphy ("Judge Murphy") violated the following Canons of the Code of Judicial Conduct:

- a. CANON 1A: FAILURE TO MAINTAIN AND OBSERVE HIGH STANDARDS OF CONDUCT
- b. CANON 2: FAILURE TO AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY
- c. CANON 2A: FAILURE TO ACT IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY
- d. CANON 2B: LENDING THE PRESTIGE OF JUDICIAL OFFICE TO ADVANCE HIS OWN PRIVATE INTERESTS
- e. CANON 4A(1): FAILURE TO CONDUCT EXTRA-JUDICIAL ACTIVITIES SO THAT THEY DO NOT CAST DOUBT ON THE JUDGE'S CAPACITY TO ACT IMPARTIALLY AS A JUDGE
- f. CANON 4D(1): FAILURE TO REFRAIN FROM FINANCIAL

AND BUSINESS DEALINGS THAT TEND TO REFLECT ADVERSELY ON HIS IMPARTIALITY, INTERFERE WITH HIS JUDICIAL POSITION OR THAT MAY BE REASONABLE PERCEIVED TO EXPLOIT HIS JUDICIAL POSITION

In particular, the Commission alleged that Judge Murphy “engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer” by sending two letters (dated February 20, 2005 and March 18, 2005) to the opposing side in a civil lawsuit in which Judge Murphy was personally involved, using official judicial stationery.

A Formal Hearing on these charges took place on October 15 and 16, 2007 and evidence relating to these charges was presented.

After this Formal Hearing, the Hearing Officer, Judge Peter W. Kilborn (“Judge Kilborn”), issued a Report which set forth his proposed findings of fact¹, proposed findings as to violations, and proposed recommendations for discipline (including proposed aggravating and mitigating factors).

II. HEARING OFFICER’S PROPOSED FINDINGS OF FACT

Counsel for the Commission respectfully submits the following objections to the Hearing Officer’s findings of fact:

1. **Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraph 28 of his Report on grounds that these findings are contrary to the weight of the evidence:**
 - a. In Paragraph 28 of his Report, Judge Kilborn made findings with respect to Judge Murphy’s intent when he sought a meeting with Patrick Purcell in October of 2003:

“Judge Murphy’s intent in seeking the meeting was to settle the libel action and, in particular, to convince Mr. Purcell that he should have independent counsel review the case after discussions with the judge and the judge’s counsel as to whether Mr. Purcell was obtaining correct advice from its corporate counsel (Brown Rudnick).”

¹ In Footnote 5 of his Report, Judge Kilborn wrote, “Paragraphs 18 through 24 are primarily based on the decision of the Supreme Judicial Court in *Murphy v. Boston Herald, Inc.*, 449 Mass. 42 (2007).” Although there is certainly no dispute that the SJC’s decision in this case established a binding legal precedent, Counsel for the Commission raises the question whether it is proper for the Hearing Officer to adopt, as evidence in the present case, factual findings made by the SJC in its decision.

Counsel for the Commission submits that the weight of the evidence does not support a finding that Judge Murphy’s “intent in seeking the meeting was to settle the libel action and . . . convince Mr. Purcell to have independent counsel review the case.” The following evidence was presented at the Formal Hearing of this matter:

It was Judge Murphy who sought a private, one-on-one, settlement discussion with Patrick Purcell in October of 2003.²

Judge Murphy had very strong feelings that he would win the libel lawsuit he had filed and his intent was to convey to Patrick Purcell his legal opinion that the *Boston Herald* could not prevail in its defense of the lawsuit. Judge Murphy knew he was going to win the lawsuit, and that the *Boston Herald* was “in serious trouble,” and Judge Murphy’s intent was to sit down and convey that to Patrick Purcell.³

Counsel for the Commission submits that the evidence supports a finding that Judge Murphy sought the October, 2003 meeting, not to convince Patrick Purcell to “have independent counsel review the case,” but to persuade Patrick Purcell to adopt Judge Murphy’s legal opinion that the *Boston Herald* could not win the libel suit and should settle.

2. Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraphs 31 and 35 on grounds that these findings are contrary to the weight of the evidence.

- a. In Paragraph 31 of his Report, Judge Kilborn made findings with respect to the October, 2003 meeting between Judge Murphy and Patrick Purcell:

“During the meeting the judge said to Mr. Purcell ‘Everything between us is between us, right, Pat?’ Mr. Purcell responded ‘Absolutely’ and they shook hands.⁴ The judge left the meeting thinking he and Mr. Purcell had established a personal line of communications, as principals in the case.”

- b. In Paragraph 35 of his Report, Judge Kilborn made findings with respect to the April, 2004 meeting between Judge Murphy and Patrick Purcell:

“The judge left the meeting thinking that he and Mr. Purcell had established, and could continue, a personal line of communications, as principals in the case and that his relations with Mr. Purcell were confidential, as settlement discussions.”

² (Tr. 37:10-18)

³ (Tr. 50:23-24; 51:1-21) and (40:20-24; 41:1-12)

⁴ (Tr. Vol. 1, 42:7-20)

Counsel for the Commission submits that the weight of the evidence supports a finding that the parties did not, in fact, agree to keep their communications confidential. The following evidence was presented at the Formal Hearing of this matter:

Patrick Purcell was, in June of 2002, the Publisher and majority-owner of the *Boston Herald*. Patrick Purcell served continuously in that capacity up to, and including, the date of his testimony during the Formal Hearing of this matter.⁵

Patrick Purcell's attorney, M. Robert Dushman, never told him anything about his meetings with Judge Murphy prior to trial being confidential settlement discussions.⁶

Patrick Purcell testified that never, during either the October, 2003 meeting or the April, 2004 meeting, did he and Judge Murphy discuss that they would consider their direct communications to be confidential settlement discussions.⁷

Attorney Howard Cooper had no percipient knowledge that M. Robert Dushman ever told Patrick Purcell that his direct meetings with Judge Murphy would constitute confidential settlement discussions.⁸

Judge Murphy included a post-script with his February 20, 2005 letter in which he wrote, "It would be a mistake, Pat, to show this letter to anyone other than the gentleman whose authorized signature will be affixed to the check in question. In fact, a BIG mistake. Please do not make that mistake."

Counsel submits that the fact that Judge Murphy felt it necessary to include a strongly-worded warning that "[i]t would be a mistake" to show the letter to anyone suggests that there was no pre-existing agreement to keep their communications confidential.

3. Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraph 39 on grounds that these findings are contrary to the weight of the evidence.

- a. In Paragraph 39 of his Report, Judge Kilborn made findings with respect to Judge Murphy's intent when he sent Patrick Purcell the February 20, 2005 and March 18, 2005 letters:

"Judge Murphy then concluded he could still communicate directly with Mr. Purcell, as a principal. The judge continued to believe that if he could communicate with Mr. Purcell, that Mr. Purcell would ultimately

⁵ (Tr. 172:14-18)

⁶ (Tr. 221:16-22)

⁷ (Tr. 181:2-14 and 184:13-18)

⁸ (Tr. 161:13-24; 162:1-24; 163:1-12)

understand that the *Herald* would in all likelihood lose its appeal and end up paying Judge Murphy far more money than if the case settled then. The two letters then ensued.”

Counsel for the Commission submits that the weight of the evidence does not support a finding that “Judge Murphy then concluded he could still communicate directly with Mr. Purcell, as a principal.” The following evidence was presented at the Formal Hearing of this matter:

Judge Murphy, acting in his personal capacity, filed a libel lawsuit against the *Boston Herald* in June of 2002.⁹

The libel suit Judge Murphy brought against the *Boston Herald* went to trial in January and February of 2005 and the jury awarded Judge Murphy \$2.09 million.

Judge Murphy was “desperate” to settle the libel lawsuit after the jury verdict and did not want the *Boston Herald* to appeal the verdict.¹⁰

It was with that “desperate” state of mind that, “immediately” after the jury returned its verdict, Judge Murphy “begged” his counsel Howard Cooper to arrange “four-way” meeting to discuss settlement of the case. At this meeting Judge Murphy, Attorney Howard Cooper, Patrick Purcell and Attorney M. Robert Dushman would have been present.¹¹

Judge Murphy was told that the “other side was not interested in a four-way settlement talk.” After being told the other side was not interested in a settlement discussion, Judge Murphy initiated direct contact with Patrick Purcell anyway by writing a letter to him on February 20, 2005.¹²

Counsel for the Commission submits that the weight of the evidence supports a finding that Judge Murphy was told that the “other side was not interested in a four-way settlement talk.” Judge Murphy knew this “other side” included Patrick Purcell and, therefore, knew that Patrick Purcell did not want to communicate with him.

4. **Counsel for the Commission objects to so much of the factual findings of the Hearing Officer in Paragraph 40 as address Judge Murphy’s intent on grounds that these findings are contrary to the weight of the evidence.**
 - a. In Paragraph 40 of his Report, Judge Kilborn made specific findings with respect to Judge Murphy’s intent when he sent Patrick Purcell the February 20, 2005 letter and proposed a meeting:

⁹ (Tr. 35:2-11)

¹⁰ (Tr. 54:4-12)

¹¹ (Tr. 59:13-24) and (Tr. 60:8-13) and (Tr. 58:4-19) and (Tr. 55:17-24; 56:1-23)

¹² (Tr. 60:17-24)

“Judge Murphy’s further intent as to a meeting with Mr. Purcell was to renew his urgings that Mr. Purcell obtain the advice of new counsel. The interest in new counsel was behind the judge’s warning not to ‘involve Brown Rudnick in this meeting.’ The judge acknowledges that Brown Rudnick had represented Mr. Purcell throughout the entire suit to that date. Judge Murphy believed that Brown Rudnick would necessarily have to defend the advice the firm had given the *Herald*, and accordingly he wanted to exclude them from the proposed meeting.”

Counsel for the Commission submits that the weight of the evidence does not support a finding that “Judge Murphy’s further intent as to a meeting with Mr. Purcell was to renew his urgings that Mr. Purcell obtain the advice of new counsel and that “[t]he interest in new counsel was behind the judge’s warning not to ‘involve Brown Rudnick in this meeting.’” The following evidence was presented at the Formal Hearing of this matter:

Judge Murphy knew that, throughout the libel suit, Patrick Purcell and the *Boston Herald* had been represented by the law firm Brown Rudnick, specifically Attorney M. Robert Dushman.¹³

Patrick Purcell did not attend law school and is not a lawyer.¹⁴

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

Patrick Purcell and Attorney Dushman both felt that the best interests of the *Boston Herald* were served by pressing forward and appealing the jury verdict.¹⁵

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

In his letter to Patrick Purcell, Judge Murphy proposed a settlement of \$3.26 million. Judge Murphy offered no alternative monetary settlement option at this meeting. The only alternative to a settlement amount of \$3.26 million was that, if Mr. Purcell could “stand before the God of [his] understanding, and as a man of honor, as for the return of that check,” Judge Murphy would “flip it back” to Mr. Purcell.

¹³ (Tr. 38:2-5)

¹⁴ (Tr. 181:22-24)

¹⁵ (Tr. 217:2-9)

On February 20, 2005, Judge Murphy proposed \$3.26 million as the only amount for which the case could be settled, despite the fact that Judge Murphy was fully aware that, at the point in time, the *Boston Herald* only owed him \$2.8 million dollars. (The \$2.09 million jury verdict plus statutory interest as of that date).¹⁶

Judge Murphy proposed the \$3.26 million settlement despite knowing the *Boston Herald* owed him less money because he “wanted [Patrick Purcell] to get hit in the face with \$3.26 million because [Patrick Purcell] was going to say wait a second, the verdict was only 2.8.”¹⁷

Judge Murphy further admitted that he put the \$3.26 million amount in the February 20, 2005 letter to “shake [Patrick Purcell] up.”¹⁸

After a \$500,000 deductible, the insurance company for the *Boston Herald* had to bear the cost of the jury verdict and any legal fees that were incurred by the *Boston Herald*. When the *Boston Herald* decided to pursue an appeal rather than settle after the jury verdict, the *Boston Herald*'s financial liability remained limited to the same \$500,000 deductible.¹⁹

Judge Murphy understood that there was an insurance company for the *Boston Herald* that should indemnify the *Boston Herald* against the jury verdict.²⁰ Judge Murphy also understood that “Gerald Schaefer” was the president, CEO and a Board Member for Mutual of Bermuda.²¹

Finally, Judge Murphy admitted, “So I was assuming that Gerald Schaefer would be the gentleman who would be coming from the insurer. And he is an attorney.”²²

Counsel for the Commission submits that the weight of the evidence supports a finding that Judge Murphy’s intent went beyond a simple desire to have Patrick Purcell “obtain the advice of new counsel” and not “involve Brown Rudnick in this meeting.”

This letter was an intentional effort by Judge Murphy to pressure Patrick Purcell not to notify his counsel from Brown Rudnick of this settlement meeting. Judge Murphy sought to exclude Mr. Purcell’s counsel from Brown Rudnick from any knowledge of this meeting and, therefore, sought to exclude Mr. Purcell’s counsel from Brown Rudnick from providing any legal advice regarding this settlement offer.

¹⁶ (Tr. 72: 3-13 and 78:10-17)

¹⁷ (Tr. 104:15-24; 105: 1-14)

¹⁸ (Tr. 105:15-22)

¹⁹ (Tr. 238:7-24; 239:1-5)

²⁰ (Tr. 79:22-24; 80:1-7)

²¹ (Tr. 79:8-16)

²² (Tr. 79:14-16)

Counsel for the Commission submits that the weight of the evidence suggests that Judge Murphy either intended to prevent Patrick Purcell from having the benefit of the advice of counsel while evaluating the settlement proposal altogether, or Judge Murphy intended to ensure that Patrick Purcell would be counseled only by the attorney for the *Herald's* insurer, Mutual of Bermuda.

Counsel for the Commission submits that the weight of the evidence supports a finding that, at this same time, Judge Murphy intended, through this February 20, 2005 letter, to pressure the *Boston Herald*, to pay him a settlement amount greater than the amount Judge Murphy knew he was entitled to, as of that date.

5. **Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraph 41 on grounds that these findings are contrary to the weight of the evidence.**
 - a. In Paragraph 41 of his Report, Judge Kilborn made findings with respect to Judge Murphy's intent when he sent Patrick Purcell the March 18, 2005 letter:

“On March 18, 2005 the *Boston Globe* published an article alleging financial difficulties at the *Herald* (exhibit 3). That and associated articles prompted Judge Murphy to send the March 18, 2005 letter. The judge's intent and strategy as to the second letter were the same as for the first.”

Counsel for the Commission submits that the weight of the evidence does not support a finding that, as with the February 20, 2005 letter, “Judge Murphy's further intent ... was to renew his urgings that Mr. Purcell obtain the advice of new counsel.” The following evidence was presented at the Formal Hearing of this matter:

Judge Murphy sent a second letter to Patrick Purcell that was dated March 18, 2005. This letter was written on plain stationery but was enclosed in an official court stationery envelope.

In this second letter, Judge Murphy expressed, in very strong language, his legal opinion of the *Boston Herald's* chances of successfully appealing the jury verdict in the libel suit.

Judge Murphy admitted that, in his March 18, 2005 letter, he “pretty strongly expressed”²³, his legal opinion of the *Boston Herald's* chances of successfully appealing the jury verdict in the libel suit.

²³ (Tr. 88:22-23)

When he received this second letter from Judge Murphy, Patrick Purcell felt “there’s the distinct appearance of a ransom note. And once again, basically saying, I have no chance and that . . . I have no chance of winning this case.”²⁴

Counsel for the Commission submits that the weight of the evidence supports a finding that, through this letter, Judge Murphy improperly intended to intimidate and apply pressure to Patrick Purcell, and to improperly urge Patrick Purcell to substitute Judge Murphy’s legal opinion for the opinion of his own attorneys.

6. Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraph 42 on grounds that these findings are contrary to the weight of the evidence.

- a. In Paragraph 42 of his Report, Judge Kilborn made findings with respect to a statement in Judge Murphy’s February 20, 2005 letter:

“By referring to ‘ole Mike Ditka’ the judge meant to remind Mr. Purcell that he had, in the two meetings with Mr. Purcell, warned him that the judge would win his case.”

Counsel for the Commission submits that the weight of the evidence supports a finding that, when he made this statement, Judge Murphy intended to suggest that he has a special insight into the court system and a special influence over it.

7. Counsel for the Commission objects to the factual findings of the Hearing Officer in Paragraph 52 on grounds that these findings are contrary to the weight of the evidence.

- a. In Paragraph 52 of his Report, Judge Kilborn made findings with respect to Judge Murphy’s intent when he sent Patrick Purcell the February 20, 2005 and March 18, 2005 letters using judicial stationery:

“When he sent the letters, Judge Murphy was not aware that the Code of Judicial Conduct contained an express prohibition against the use of judicial stationery. He characterizes that as a change. Immediately after having been told by a colleague of the prohibition, he wrote a letter of apology to the Globe. In using judicial stationery, Judge Murphy did not intend to inject his judicial position into his communications with Mr. Purcell.”

Counsel for the Commission submits that the weight of the evidence does not support a finding that “[i]n using judicial stationery, Judge Murphy did not intend to inject his judicial position into his communications with Mr.

²⁴ (Tr. 194:3-9)

Purcell.” The following evidence was presented at the Formal Hearing of this matter:

When he sent the February 20, 2005 letter, Judge Murphy used an official Superior Court stationery envelope to send it and this letter was written using Judge Murphy’s own official Superior Court letterhead.

This stationery was provided to Judge Murphy by the Trial Court. Judge Murphy was provided with Superior Court letterhead, envelopes and business cards at the same time.²⁵

Judge Murphy admitted that when he wrote the February 20th letter, “I was taking my gloves off because I wanted to settle this case, and I thought this was the only thing I had left, is to roll up my sleeves with this guy and let him have it, that might possibly precipitate a change in his position.” Judge Murphy further admitted that his February 20th letter, “I agree that it was strong. I agree that it was tough.”²⁶

Judge Murphy sent a second letter to Patrick Purcell that was dated March 18, 2005. This letter was written on plain stationery but was enclosed in an official court stationery envelope.

Judge Murphy sent these letters to Patrick Purcell after being warned about the use of official stationery. Judge Murphy received a letter, dated August 21, 2002, from the Executive Director of the Commission on Judicial Conduct. In this letter, Judge Murphy was advised to “consider the appropriateness of using judicial stationery for certain purposes.”²⁷

Judge Ernest B. Murphy was appointed a judge in the Massachusetts Superior Court in the year, 2000. Judge Murphy served continuously in that capacity up to, and including, the date of his testimony during the Formal Hearing of this matter.²⁸

When Judge Murphy sent these letters, Judge Murphy had served as a judge for approximately five years. Judge Murphy was warned to “consider the appropriateness of using judicial stationery for certain purposes” nearly three years before he wrote these letters to Patrick Purcell.

Counsel for the Commission respectfully submits that the weight of the evidence supports a finding that an experienced judge who had been previously warned about proper use of judicial stationery would know that

²⁵ (Tr. 109:9-20)

²⁶ (Tr. 84:15-24; 85:1-24)

²⁷ (Tr. 100:10-24; 101:1-18)

²⁸ (Tr.33:15-19)

using his official stationery to send these letters was improper and would lend the prestige of his office to their content.

8. **Counsel for the Commission objects to the characterization in Paragraph 56 of the Hearing Officer's Report that the settlement amount Judge Murphy offered was "substantially less" than the amount that *Boston Herald* ultimately paid.**

- a. In Paragraph 56 of his Report, Judge Kilborn made findings which characterized the ultimate settlement amount in the libel suit:

"Of the amount that the *Herald* and its insurers ultimately had to pay Judge Murphy, \$3,415,000, and the amount of its own legal fees, 'millions of dollars'²⁹, all but a deductible paid by the *Herald* (approximately \$500,000), was paid by the *Herald's* insurer. The amount that Judge Murphy asked for in the February 2005 letter (\$3,260,000) thus was substantially less than the amount ultimately paid by the *Herald* and its insurer as a judgment for legal fees."

The following evidence was presented at the Formal Hearing of this matter:

After a \$500,000 deductible, the insurance company for the *Boston Herald* had to bear the cost of the jury verdict and any legal fees that were incurred by the *Boston Herald*. When the *Boston Herald* decided to pursue an appeal rather than settle after the jury verdict, the *Boston Herald's* financial liability remained limited to the same \$500,000 deductible.³⁰

Counsel for the Commission submits that the weight of the evidence supports a finding that the *Boston Herald* would not have been responsible for any more than \$500,000 for the jury verdict and legal fees whether the *Herald* pursued an appeal of the jury verdict or not. Any remaining amount owed on the verdict or legal fees would have been the responsibility of the insurer for the *Boston Herald*.

Counsel for the Commission submits that if the *Boston Herald* did not pursue an appeal and paid the settlement amount Judge Murphy proposed in February of 2005, the insurer would have paid only 4.5% less than they ultimately paid over two years later.

9. **Counsel for the Commission objects to so much of the factual findings of the Hearing Officer in Paragraph 57 as address whether Patrick Purcell was intimidated by the judge's conversations or letters.**

- a. In Paragraph 57 of his Report, Judge Kilborn made the following findings:

²⁹(Tr. 238)

³⁰(Tr. 238:7-24; 239:1-5)

“Mr. Purcell was at no point intimidated by the judge’s conversations or letters. He did not leave the second meeting with the judge with an understanding that settlement discussions were still in progress or that there was a confidential private line of communication between him and the judge; I come to no conclusion as to Mr. Dushman’s thoughts about those matters – there is evidence that would support an inference either way.”

The following evidence was presented at the Formal Hearing of this matter:

In describing the first letter he received from Judge Murphy, Patrick Purcell testified:

“I just couldn’t believe I was getting this from a judge; to me, it looked like a ransom note, and that –it was very strange. And so I called my attorney and said that “I have to show this to you.” And I sent it over and we decided that we wouldn’t do anything with I, but it was very strange.”³¹

Describing the settlement amount Judge Murphy proposed in this same February 20, 2005 letter, Patrick Purcell testified:

“The ---and I think it’s in this letter – the reference “Because it is, Mr. Purcell, in your distinct business interest to do so, in my considered opinion,” once again, seemed to be a bit of a threat, more than a bit of a threat. And it seemed to me that this was more intimidation.”³²

In describing the second letter he received from Judge Murphy, Patrick Purcell testified:

“Once again, there’s a distinct appearance of a ransom note. And once again, basically saying, I have no chance and that . . . I have no chance of winning this case.”³³

Counsel for the Commission respectfully submits that the weight of the evidence does support a finding that Patrick Purcell was socked and intimidated by Judge Murphy’s letters.

³¹ (Tr. 187:16-22)

³² (Tr. 190:9-18)

³³ (Tr. 194:6-9)

III. HEARING OFFICER'S FINDINGS AS TO VIOLATIONS

Counsel for the Commission respectfully submits the following objections to the Hearing Officer's findings as to violations:

1. **Counsel for the Commission objects to the findings as to violations of the Hearing Officer in Paragraph 80 on grounds that persuasive case law in other jurisdictions and the evidence in the present case support a contrary finding:**

a. In Paragraph 80 of his Report, Judge Kilborn made findings that:

“Judge Murphy’s suit against the *Herald* was an ‘extrajudicial’ activity within the meaning of Canon 4. The Commission charges that the two letters ‘cast reasonable doubt on the judge’s capacity to act impartially as a judge.’ The Commentary to Section 4A shows that its target is ‘bias or prejudice.’ The judge’s letters are improper, but if impartiality is to mean anything different than impropriety, the letters do not suggest the judge cannot or will not act without bias or prejudice. I find that Judge Murphy did not violate Section 4A(1) of Canon 4.”

Counsel for the Commission respectfully submits that, although the letters at issue in this case do not necessarily suggest that Judge Murphy has a particular bias or prejudice, the law does support a finding that where a Judge “is ‘unable to distinguish his judicial activities from his personal ones, **this failure to maintain separate interests could lead a reasonable person to believe that petitioner’s judicial decision-making ability similarly might be flawed.**” In the Matter of Donald M. Mosley, 102 P.3d 555, Nevada Supreme Court (May 17, 2001), quoting Inquiry Concerning a Judge, 822 P.2d 1333, 1336 (Alaska 1991) (emphasis added).

Counsel for the Commission respectfully submits that Judge Murphy’s failure to distinguish his judicial and personal activities by sending the letters at issue in this case would lead a reasonable person believe “that [his] judicial decision-making ability similarly might be flawed” and, therefore, “cast[s] reasonable doubt on the [Judge Murphy’s] capacity to act impartially as a judge.”

2. **Counsel for the Commission objects to the findings as to violations of the Hearing Officer in Paragraph 81 on grounds that the law and the evidence support a contrary finding:**

a. In Paragraph 81 of his Report, Judge Kilborn made findings that:

“The Commission charges that Judge Murphy has failed “to refrain from financial and business dealings that tend to reflect adversely on the judge’s

impartiality, that may interfere with the proper performance of the judge's judicial position [or] that may reasonably be perceived to exploit the judge's judicial position", as proscribed in Section 4D(1) of Canon 4. Insofar as that section deals with impartiality, I reach the same conclusion as I did with respect to Section 4A(1). But there is a larger problem. Does the Code cover the judge's lawsuit when it speaks of "financial and business dealings"? If it does, the sending of the letters "may reasonably be perceived to exploit the judge's judicial position." However, I conclude that the lawsuit is not a "financial or business dealing" within the meaning of the canon. Surely, the lawsuit is about money, or stated differently, about honor as partly vindicated through money. But Section 4D deals with investments, compensation, service in a business, and gifts, and thus I find it does not reach the libel suit. Therefore there is no violation of Section 4D(1) of Canon 4."

The following evidence was presented at the Formal Hearing of this matter:

In his February 20, 2005 letter, Judge Murphy wrote:

"You will bring to that meeting a cashier's check, payable to me, in the sum of \$3,260,000. No check, no meeting. You will give me that check and I shall put it in my pocket."

In the conclusion to the post-script of his February 20, 2005 letter, Judge Murphy wrote:

"I am simply trying to exit this matter NOW, to my maximum advantage, and what I believe, Pat, is yours as well. It would be a mistake, Pat, to show this letter to anyone other than the gentleman whose authorized signature will be affixed to the check in question. In fact, a BIG mistake. Please do not make that mistake."

In his March 18, 2005 letter to Patrick Purcell, Judge Murphy wrote:

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

And that is . . . you have ZERO chance of reversing my jury verdict on appeal. Anyone who is counseling you to the contrary . . . is WRONG. Not 5% . . . ZERO.

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

Counsel for the Commission respectfully submits that Judge Murphy’s aggressive pursuit of the financial settlement of a civil lawsuit in which he was a party, and from which he would personally benefit, constituted a “financial dealing” as defined in Canon 4.

Counsel for the Commission respectfully submits that Judge Murphy wrote that he was pursuing a settlement to his own “maximum advantage.” Judge Murphy wrote these letters using official judicial stationery.

In his first letter, Judge Murphy told Mr. Purcell that the “price” of a settlement meeting was a cashier’s check for \$500,000 more than the *Boston Herald* owed him. In his second letter, Judge Murphy warned Mr. Purcell that he would “not shave one dime” from what the *Boston Herald* owed him.

By writing letters, using judicial stationery, which aggressively sought the financial settlement of a civil lawsuit in which Judge Murphy was a party, a settlement from which he would personally benefit, Judge Murphy failed “to refrain from financial and business dealings that tend to reflect adversely on the judge’s impartiality, that may interfere with the proper performance of the judge’s judicial position [or] that may reasonably be perceived to exploit the judge’s judicial position.”

- 3. Counsel for the Commission objects to so much of the findings as to violations of the Hearing Officer in Paragraph 82 as find that “Judge Murphy has not engaged in ‘willful misconduct’” on grounds that the law and the evidence support a contrary finding:**

- a. In Paragraph 82 of his Report, Judge Kilborn made findings that:

The Commission charged generally (based on subsections (5)(c) and 5(d) of G.L. c. 211C, sec. 2, “Grounds for discipline”) “that Judge Murphy has engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer.” Counsel have not focused on those general charges and I do not understand that they do more than say in general terms what the more specific charges say. Be that as it may, I conclude that Judge Murphy has not engaged in “willful misconduct” but has engaged in “conduct prejudicial to the administration of justice and unbecoming a judicial officer.”

Counsel for the Commission respectfully submits that, as described in more detail above, the weight of the evidence supports the following findings and, therefore, a finding that Judge Murphy’s misconduct was willful:

1. **Judge Murphy knew the letters he sent to Patrick Purcell were not part of a still-existing confidentiality agreement.**

2. **Through these letters, Judge Murphy intended to imply that he had a special knowledge and influence over the court system with references such as calling himself “ole Mike Ditka.”**
3. **Judge Murphy intended to intimidate Patrick Purcell through these letters.**
4. **Judge Murphy knew he was using judicial stationery to send the letters to Patrick Purcell. Judge Murphy had been previously warned about the use of judicial stationery. Judge Murphy intended to inject his judicial position into his communications with Mr. Purcell.**
5. **In his February 20, 2005 letter, Judge Murphy knew he was asking Patrick Purcell to settle the libel suit for more than Judge Murphy was entitled to. Judge Murphy intended to pressure Patrick Purcell into settling the suit for this excessive amount and intended that Patrick Purcell would not have the benefit of advice from his counsel at Brown Rudnick in evaluating whether to accept this settlement proposal.**

Counsel for the Commission respectfully submits that Judge Murphy’s improper conduct was intentional and, therefore, constituted “willful misconduct.”

IV. HEARING OFFICER’S RECOMMENDATIONS

Counsel for the Commission respectfully submits objections to the following recommendations of the Hearing Officer:

1. **For the reasons already stated in Section III(3), counsel for the Commission objects to so much of the recommendations of the Hearing Officer in Paragraph 84 as find that Judge Murphy’s actions were not willful.**
2. **Counsel for the Commission objects to the Hearing Officer’s consideration of “the Commission’s Report to the Supreme Judicial Court dated January 20, 2006,” as indicated in Paragraph 87, in making his recommendations.**

Counsel for the Commission objects on grounds that the report Judge Kilborn cited was not intended as an exhaustive survey of all discipline of all judges for all misconduct for the period of time indicated.

This report only contained information relating to complaints and discipline against judges in cases that were already public. Moreover, the information regarding the discipline in these public complaints did not include any details regarding the history of discipline, if any, of these particular judges.

3. **Counsel for the Commission objects to so much of the recommendations of the Hearing Officer in Paragraph 90 as find that Judge Murphy's actions merit a public reprimand.**

Counsel for the Commission respectfully submits that, based on all of the evidence presented to the Hearing Officer after the initiation of Formal Charges, a more stringent sanction is appropriate.

V. CONCLUSION

For the foregoing reasons, the Counsel for the Commission respectfully requests that the foregoing objections to the Hearing Officer's Report be sustained.

Respectfully Submitted
For the Commission on Judicial Conduct

by:



Howard V. Neff, III
Staff Attorney

Dated: December 10, 2007