

COMMONWEALTH OF PENNSYLVANIA  
COURT OF JUDICIAL DISCIPLINE

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IN RE:

DAVID W. TIDD, FORMER MAGISTERIAL  
DISTRICT JUDGE, MAGISTERIAL DISTRICT  
03-2-04, THIRD JUDICIAL DISTRICT  
NORTHAMPTON COUNTY

STATUS CONFERENCE

Pages 1 through 33

Conf. Rm., 5th Floor  
PA Judicial Center  
601 Commonwealth Avenue  
Harrisburg, Pennsylvania

Friday, October 7, 2016

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

HONORABLE DAVID BARTON, Judge

APPEARANCES:

HON. ROBERT A. GRACY, Chief Counsel  
ELIZABETH A. FLAHERTY, Deputy Counsel  
MELISSA L. NORTON, Assistant Counsel  
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FORM 2

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C O N T E N T S

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
David W. Tidd	7	9	13	--

E X H I B I T S

<u>NUMBER</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
<u>Board's</u>		
1 (9/4/14 Memorandum from Debra French to President Judge Baratta with Attached 9/3/14 Letter from Judge David Tidd)	9	--

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P R O C E E D I N G S

JUDGE BARTON: Good morning, everybody.

This is the time and the date set for a status conference in the matter of In re: David W. Tidd at this Court's docket number 3 JD 2016.

Let's take a moment to go around the table and ask everyone to introduce themselves.

MR. METZ: Joe Metz, counsel for the Court of Judicial Discipline.

MS. FLAHERTY: Elizabeth Flaherty, Deputy Counsel to the Judicial Conduct Board.

MS. NORTON: Melissa Norton, Assistant Counsel to the Judicial Conduct Board.

MR. GRACI: Robert Graci, Chief Counsel, Judicial Conduct Board.

MR. TIDD: David Tidd.

MR. STRETTON: Sam Stretton, attorney for David Tidd.

MS. KANE: Cathy Kane, Court Administrator.

JUDGE BARTON: I had issued the order and I think it was not yet docketed scheduling this status conference on the same day as the omnibus motion that was filed and the motion for discovery that was filed. So it worked out well that we're going to have this opportunity to cover some of the issues and so forth.

1 I guess the preliminary matter that we ought  
2 to address is raised in the omnibus motion, and that is the  
3 request by the Respondent, David Tidd, that I recuse myself  
4 or I suppose stated alternatively that I would be  
5 disqualified from presiding over the case. I'd like to  
6 sort of learn a little bit of the facts and the basis for  
7 that request.

8 And, Mr. Tidd, if we can place you under  
9 oath in order that we can have that on the record; and I'll  
10 ask the court reporter to swear you in.

11 Whereupon,

12 DAVID W. TIDD,

13 having been duly sworn, testified as follows:

14 JUDGE BARTON: Okay.

15 MR. STRETTON: I just want to just note for  
16 the record I thought long and hard about filing this motion  
17 because I had no problem with you sitting. I mean, we've  
18 been before you and you're -- you know, you really study  
19 the record. You're prepared and plus you're a District  
20 Judge so you have a different perspective. But I thought  
21 it may infringe on -- things may come back to you once you  
22 hear David Tidd's explanation. That's why I thought I had  
23 to raise it.

24 It's not a reflection on you being unfair or  
25 anything of that nature. Just we thought that, because at

1 least in his mind he had a number of conversations with you  
2 and you'll be able to hear that, that some of them may have  
3 touched on some of the issues in this case. That's the  
4 only reason, but no one is saying that you would be unfair;  
5 and no one is saying we don't like you or anything of that  
6 nature.

7                   It's just I thought the circumstances were  
8 such we had to raise it, and then you can make the call.

9                   JUDGE BARTON: Certainly no offense taken.  
10 I understand that we want the process. I respect the  
11 process more than any individual, that any individual  
12 Judge, you know, we're fungible goods in some respect. And  
13 --

14                   MR. STRETTON: I wouldn't say it quite that  
15 way.

16                   (Laughter.)

17                   JUDGE BARTON: That may be a little harsh.

18                   Paragraph 1 in the omnibus motion states a  
19 Conference Judge has been assigned to this case, but Judge  
20 Tidd states that he during pertinent times had sought  
21 ethics advice and opinions from this Conference Judge on  
22 issues involved in this case.

23                   And then paragraph 2 states, based on those  
24 telephone calls and inquiries, David Tidd is requesting  
25 that the Conference Judge recuse himself particularly since

1 the Conference Judge may well be a witness on his behalf.  
2 And, having no recollection of any conversations or ever  
3 having met Judge Tidd before, this came as a surprise to  
4 me; and that's why I thought it would be a good idea to  
5 have Judge Tidd present and to take a little bit of factual  
6 testimony during this status conference.

7 DIRECT TESTIMONY

8 JUDGE BARTON: First, the complaint lists  
9 the dates of commissioned judicial service for Judge Tidd  
10 as beginning on January 4th, 2010, and continuing through  
11 July 25th, 2016. And, Judge Tidd; is that correct?

12 THE WITNESS: Yes.

13 JUDGE BARTON: Can you state what you mean  
14 when you say that you have sought ethics advice and  
15 opinions from this Conference Judge?

16 THE WITNESS: I was referred to you twice,  
17 once by Jane Duncan and once by Walter Gadzicki, on matters  
18 that they couldn't answer; and they referred me to you  
19 directly.

20 JUDGE BARTON: And do you know when those  
21 occasions were?

22 THE WITNESS: I don't have specific dates,  
23 no.

24 JUDGE BARTON: Was there a particular client  
25 as in your law practice that was the genesis of the

1 contacts?

2 THE WITNESS: One contact had to do with  
3 interpretation of Title 42 Section I think 5505 or 5503  
4 regarding vacating a decision and the ability to do so, and  
5 I'm not quite sure what the second one was about.

6 JUDGE BARTON: I'm not sure that's entirely  
7 responsive to my question. The inquiries that you called  
8 me about, were they generated by a client in your law  
9 practice that created a situation that you thought you  
10 needed ethics guidance?

11 THE WITNESS: The one for Title 42 was, yes.  
12 I don't have the specific name on me now.

13 JUDGE BARTON: And can you --

14 MS. FLAHERTY: Judge Barton, if I may  
15 interrupt for a moment?

16 JUDGE BARTON: Sure.

17 MS. FLAHERTY: In reviewing discovery and  
18 preparing for discovery, I did come across a document from  
19 Judge Tidd to Court Administrator Debra French that does  
20 have to do with vacating a decision and transferring a  
21 case. And so if I might share that now?

22 JUDGE BARTON: Please. Absolutely. That  
23 would be helpful.

24 MS. FLAHERTY: Okay. I'll give everybody a  
25 copy. On the third page it does refer to you.

1 (Document distributed by Ms.  
2 Flaherty.)

3 MR. STRETTON: Thank you, Ms. Flaherty.

4 MR. GRACI: Do you want to have this marked,  
5 Your Honor?

6 JUDGE BARTON: Yes. We'll ask the court  
7 reporter to mark that as Board Exhibit 1.

8 (Whereupon, the document was marked  
9 as Board Exhibit Number 1 for  
10 identification.)

11 JUDGE BARTON: Ms. Flaherty, if you want to  
12 authenticate the document and provide some foundation  
13 perhaps through some questions to Judge Tidd.

14 MS. FLAHERTY: Sure.

15 CROSS-EXAMINATION

16 BY MS. FLAHERTY:

17 Q. Judge Tidd, do you recognize this --

18 A. Yes.

19 Q. -- communication? And where have you seen this  
20 document before?

21 A. I wrote it.

22 Q. Okay. And what was the date that you wrote it?

23 A. September 3rd, 2014.

24 Q. And now that you've had an opportunity to -- and  
25 what was the underlying case that is referred to in that

1 letter?

2 A. Commonwealth v. Herceg, H-E-R-C-E-G.

3 Q. And do you recall the facts of that case?

4 A. It's outlined in the letter. I don't recall aside  
5 from what's in the letter right now.

6 Q. If I were to summarize the facts as I understand  
7 them, would you be able to verify if you recollect them?

8 A. You could try, yes.

9 Q. Okay. Did you have a case involving Mr. Herceg  
10 before you where he believed that he had been a client of  
11 your law practice?

12 A. Yes.

13 Q. And did you check with your secretary whether or not  
14 he had been a client?

15 A. Yes.

16 Q. And did she say not to her knowledge?

17 A. Yes.

18 Q. And then did you preside over Mr. Herceg's case?

19 A. Yes.

20 Q. And did you enter a decision in his case?

21 A. Yes.

22 Q. At the time of the decision, did Mr. Herceg again  
23 challenge that he had been a client at your law practice?

24 A. Not at the time I rendered the decision, no.

25 Q. Did that issue come up after your decision?

1 A. Yes.

2 Q. And did you then check with your associate at your  
3 law firm?

4 A. Yes.

5 Q. And what did she advise you?

6 A. That I believe that I had consulted with him in a  
7 private capacity.

8 Q. And what action did you take once you learned that  
9 information?

10 A. I wrote the letter that's the subject of the  
11 discussion.

12 Q. And what did you inform -- what did you tell Ms.  
13 French in your letter? What action did you take once you  
14 learned that you had indeed consulted with Mr. Herceg?

15 A. I vacated the decision after consulting with Judge  
16 Barton and Judge Hinch.

17 Q. And do you now recall any details about your  
18 consultation with either of those Judges?

19 A. No.

20 Q. In what capacity were they serving when you  
21 consulted with them?

22 A. Members of Minor Judiciary Ethics Committee.

23 Q. Looking at page 3 of this document, it's actually  
24 page 2 of your letter, could you read the last paragraph  
25 into the record, please.

1 A. Recognizing the appearance of a conflict of  
2 interest, I immediately instructed my staff to vacate the  
3 disposition --

4 Pardon me?

5 MR. GRACI: Slow down a little bit.

6 THE WITNESS: -- pursuant to 42 Pennsylvania  
7 Consolidated Statute 5505, a copy of which is also attached  
8 for your review. Then I dictated a request for change of  
9 venue. This course of action was retroactively approved by  
10 Magisterial District Judges David Barton -- and I've  
11 included a contact phone number -- and Magisterial District  
12 Judge Lorinda Hinch -- phone number also included, both of  
13 the Minor Judiciary Ethics Committee.

14 BY MS. FLAHERTY:

15 Q. ~~So do you~~ can you please state what you -- strike  
16 that. Do you now recall the conversation that you had with  
17 Judge Hinch?

18 A. No.

19 Q. Do you now recall the conversation that you had with  
20 Judge Barton?

21 A. No.

22 JUDGE BARTON: Ms. Flaherty, pardon me. If  
23 I can ask, is the Herceg case one of the cases which forms  
24 a basis of any of the Board's charges?

25 MS. FLAHERTY: No, it is not and that's why

1 it hadn't been presented up until now. It was just in  
2 review of the discovery and what we were planning to  
3 provide to Mr. Stretton that we came across the letter; and  
4 the fact that this issue was raised in an omnibus motion,  
5 just to be candid with the Court, this was the only other  
6 mention of your name that we saw in any of the discovery.

7 The other the two letters that were issued,  
8 advisory opinions, are referenced within the reply to the  
9 omnibus motion.

10 JUDGE BARTON: Okay.

11 REDIRECT TESTIMONY

12 JUDGE BARTON: Judge Tidd, aside from the  
13 contact involving the case referenced in this letter in  
14 Board Exhibit 1 which is Commonwealth versus Joseph M.  
15 Herceg, H-E-R-C-E-G, did you have any other conversations  
16 with me?

17 THE WITNESS: I believe only one after a  
18 referral by either Judge Gadzicki or the other Judge I  
19 mentioned, Judge Duncan, when they couldn't answer  
20 particular questions I had on some conflict matters.

21 JUDGE BARTON: And do you recall what the  
22 substance of the inquiry was?

23 THE WITNESS: No, not at this time.

24 JUDGE BARTON: As a result of the second  
25 contact that you've referenced, did you seek a written

1 ethics opinion from the Ethics and Professionalism  
2 Committee of the Special Court Judges Association?

3 THE WITNESS: No.

4 JUDGE BARTON: And I think I've asked but I  
5 want to make sure I cover, you're not sure when that  
6 occurred?

7 THE WITNESS: The second or the first?

8 JUDGE BARTON: The second. Let's set the  
9 Herceg matter aside for the moment now and talk about the  
10 second contact.

11 THE WITNESS: I do not.

12 JUDGE BARTON: Was that inquiry generated by  
13 a specific client?

14 THE WITNESS: I don't know.

15 (Phone ringing.)

16 MR. STRETTON: Sorry about that. You think  
17 I would know better after all these years. Forgive me and  
18 I apologize. Next time I'll remember to turn it off.

19 JUDGE BARTON: Have you ever served on any  
20 committees of the Special Court Judges Association of  
21 Pennsylvania?

22 THE WITNESS: No.

23 JUDGE BARTON: Have you ever attended any of  
24 its quarterly business meetings?

25 THE WITNESS: No.

1 JUDGE BARTON: I'll offer the witness to the  
2 Board if you have any questions that you think the Court  
3 left out.

4 MS. FLAHERTY: I have no more questions.  
5 Thank you.

6 JUDGE BARTON: Okay.

7 Mr. Stretton?

8 MR. STRETTON: I have no questions.

9 JUDGE BARTON: Okay.

10 (Witness excused.)

11 JUDGE BARTON: Again, having no recollection

12 --

13 If you need a moment, we'll pause.

14 (Discussion between the witness  
15 and counsel.)

16 MR. STRETTON: Thank you. I just wanted to  
17 get his thoughts on our motion now and particularly after  
18 we saw the letter; and I would tell you that, in my opinion  
19 unless you feel you can't be fair, I have no basis to move  
20 for your recusal based on what I've heard today and seen  
21 the letter.

22 JUDGE BARTON: Well, as I stated at the  
23 outset, as I sit here today I have no recollection  
24 whatsoever of having spoken to then-Judge Tidd.

25 I can tell you that the period that I served

1 on the Ethics and Professionalism Committee, which I  
2 believe began in July of 2013 and continued through May of  
3 2015 and I resigned that upon my appointment to the Court  
4 of Judicial Discipline, I probably received between six and  
5 12 telephone calls from Judges and did not maintain any  
6 notes, any log of those phone calls.

7                   And typically my pattern was I wanted to  
8 make sure that the inquiring Judge had considered all of  
9 the applicable rules to the factual scenario presented; and  
10 then I would always ask them, look, if you want to get the  
11 Rule of Reliance, you have to submit a formal written  
12 inquiry to the Ethics and Professionalism Committee.  
13 Absent that there's no Rule of Reliance certainly.

14                   I certainly don't, insofar as I don't recall  
15 ever having spoken to Judge Tidd, I see no problem from my  
16 end with being fair and impartial in this case. I  
17 certainly will ask both of the parties if they're  
18 comfortable as well based upon where we are factually this  
19 morning?

20                   MS. FLAHERTY: Yes. The Board is  
21 comfortable with you remaining as Conference Judge.

22                   JUDGE BARTON: Mr. Stretton?

23                   MR. STRETTON: And, as I noted a second ago,  
24 we are comfortable now it's been explored. I don't see any  
25 basis really to ask you to step aside unless something

1 triggered in your brain and you thought I couldn't be fair.

2 JUDGE BARTON: Okay. We'll proceed today as  
3 if and I think it's likely that I'm going to continue on in  
4 the case. I will issue a written decision after having  
5 given this some sustained connected thought to make sure  
6 that I'm comfortable with proceeding, but I see no reason  
7 as of right now.

8 The second argument listed in the omnibus  
9 motion is a motion to dismiss based upon the claim of a  
10 violation of the Pennsylvania Wiretap Law.

11 Mr. Stretton, if you want to --

12 MR. TIDD: Can I have a minute with him?

13 MR. STRETTON: Hold on one second.

14 (Discussion between Mr. Tidd and  
15 Mr. Stretton off the record.)

16 MR. STRETTON: Would you mind if I went  
17 outside?

18 JUDGE BARTON: Absolutely. That's fine.

19 MR. STRETTON: Thank you.

20 (Whereupon, a brief recess was  
21 taken.)

22 JUDGE BARTON: We're back on the record.

23 Mr. Stretton.

24 MR. STRETTON: Two things. I'm really not  
25 prepared to argue the omnibus --

1 JUDGE BARTON: Okay.

2 MR. STRETTON: -- for two reasons. One,  
3 this was a status conference; but particularly this issue  
4 in the discovery which we're going to get today a couple  
5 boxes that will keep me up at nights for a while, they have  
6 how they got this material. That may negate our argument.  
7 I threw it out because I was concerned how they got it. I  
8 was concerned what else was there.

9 So, I mean, I'll be glad to argue with a  
10 little bit of knowledge right now, but I probably wouldn't  
11 be very beneficial to you. So I would like to defer  
12 argument on that and/or withdrawal of that once I see how  
13 they got this material, and that may negate that matter.

14 The one issue that may come up, though, just  
15 from discussions with Ms. Flaherty, remember, we all get  
16 along here. So it's not like they're hiding, they're bad  
17 and we're good, and that kind of thing; but it might be an  
18 issue of us getting the other tapes.

19 During the deposition I think there were  
20 three or two -- I forget now -- tapes shown about they were  
21 primarily about yelling at secretaries during the course of  
22 it. In our discovery motion, I asked for all tapes -- and  
23 maybe I might not wish I get that because I could spend the  
24 rest of my life listening to them.

25 And, when Ms. Flaherty and I talked

1 informally, she indicated that they don't really have all  
2 the tapes. They just have a certain select number, and  
3 that may create an issue down the line because I don't know  
4 if we can get the rest of the tapes. And again, once I  
5 read the discovery, maybe there's no need for the tapes. I  
6 don't know but I just wanted to alert you that's an issue.

7                   And the other issue I wanted to discuss  
8 today -- and again we're going to get the discovery so it's  
9 a little like talking through my hat here -- when I talked  
10 to Ms. Flaherty, in my discovery I had asked for any and  
11 all witnesses they interviewed or even had names of who may  
12 have some knowledge.

13                   Their position is I only really am entitled  
14 to the ones they're going to use and the names, but again  
15 they sent me just the last two or three weeks about ten, 12  
16 very good statements that are exculpatory. I presume that  
17 they weren't going to call them anyway because we may call  
18 them but we may not. And, remember, we're all friends so  
19 this is not like, oh, they're hiding evidence and they're  
20 bad and things of that nature.

21                   But I would like some sense from you today  
22 as Conference Judge, assuming you stay on, as to whether or  
23 not I can get all statements they have because apparently  
24 they did a fairly extensive investigation over two years.  
25 And I would like to see any statements they have even

1 though they may never intend to call these people, and  
2 maybe in their mind the information wouldn't be of any  
3 value to us anyway.

4                   But I'd like to be able to make that choice  
5 or call as his counsel in this matter. So that's the one  
6 issue I really wanted to discuss today, all the tapes and  
7 all witnesses and all statements. Again maybe I'll regret  
8 having it. If I get it, God knows how many hours of  
9 reading I'll have or how many CD disks I'm going to have to  
10 go through; but I think I have to make that request.

11                   Did I summarize our conversation correct or  
12 am I off base on that?

13                   MS. FLAHERTY: No, you did. And you  
14 summarized my responses as well which are the same  
15 responses I have here today.

16                   I think the standard approach here in the  
17 Court of Judicial Discipline is when it's time for our  
18 pretrial memoranda that we list all the witnesses that we  
19 intend to call and a list of the appropriate exhibits, and  
20 our standard procedure is that in discovery we provide you  
21 with evidence that's pertinent to the charges filed in the  
22 complaint.

23                   And that's what we have done in terms of  
24 exculpatory which we've already provided and what we have  
25 prepared to deliver to you today in the two banker's boxes

1 of discovery. We are not in possession of all tapes that  
2 were ever made at Judge Tidd's office. We have just a few  
3 tapes, and the ones that were pertinent to the charged  
4 conduct are being provided today to you as well.

5 MR. STRETTON: There was one other issue  
6 when you were talking that triggered my mind. In our  
7 discovery we've asked for the files of each of the  
8 defendants or plaintiffs who are subject of some of the  
9 complaints here that would have been in the District  
10 Judge's office. Now, of course, I don't have the discovery  
11 yet. Maybe it's in there.

12 When Ms. Flaherty and I spoke or maybe it's  
13 in her response -- sometimes I get them mixed up in my  
14 brain -- there was some suggestion that Judge Tidd had the  
15 right to get those when he was there when he was still a  
16 Judge. He's no longer the Judge. As you know he resigned  
17 this summer. But I would still like to get those files  
18 because they would trigger for us or at least for Judge  
19 Tidd perhaps some ideas.

20 JUDGE BARTON: Does the Board have those  
21 files?

22 MS. FLAHERTY: Yes. In response we have  
23 those files prepared and will be delivered to you today.

24 MR. STRETTON: Oh, thank you.

25 JUDGE BARTON: So you're producing those?

1 MS. FLAHERTY: Yes.

2 JUDGE BARTON: With respect to the tapes, do  
3 I understand that you are producing all of the tapes in the  
4 Board's possession?

5 MS. FLAHERTY: No. We're producing the  
6 tapes that are charged in the Board complaint.

7 JUDGE BARTON: Aren't they entitled to all  
8 of the recordings?

9 MS. FLAHERTY: The only -- the Board  
10 possesses one other recording besides the three that will  
11 be provided today, and it was not relevant to the charged  
12 conduct.

13 MR. STRETTON: Perhaps this could be  
14 resolved by her giving you the fourth tape, assuming you're  
15 staying on, and you listen to it in limine and make a  
16 decision; but I --

17 JUDGE BARTON: Judges as a rule don't like  
18 to examine discovery in limine because it places the Judge  
19 in a somewhat precarious position. If it's not relevant,  
20 then what does it matter if the Board turns it over?

21 MS. FLAHERTY: Well, may I confer for a  
22 moment, please.

23 JUDGE BARTON: I'm not going to require a  
24 decision right now.

25 MS. FLAHERTY: Okay.

1 JUDGE BARTON: So we're going to give the  
2 parties some time to brief on both sides of this issue. So  
3 there's the issue of the tapes, and I guess you're getting  
4 three of four and the question as to the one remaining one  
5 which we're going to resolve at some point in the near  
6 future.

7 And then, with respect to case files, copies  
8 of the paper case files of all the cases referenced in the  
9 Board's complaint, is the Board in possession of those and,  
10 if so, are you producing them as a part of the discovery?

11 MS. FLAHERTY: Yes. They are prepared and  
12 ready to go today.

13 JUDGE BARTON: So that's not an issue?

14 MS. FLAHERTY: No.

15 JUDGE BARTON: Mr. Stretton, anything else  
16 you have an issue or concern with?

17 MR. STRETTON: Well, the other thing --

18 JUDGE BARTON: Let me speak before you  
19 answer my question. I think the other things, look, if you  
20 want other tapes, can't you subpoena from the Judicial  
21 District involved?

22 MR. STRETTON: Well, it's an interesting  
23 question here. Judge Baratta has written me the letter  
24 suggesting that only Judge Tidd had the right to release  
25 the tapes; and, of course, that's not --

1 JUDGE BARTON: Well, I don't want to get  
2 into the admissibility of the tapes today. As you  
3 indicated, the issue is not ripe for argument just yet.

4 MR. STRETTON: I just don't know who has the  
5 authority to say give them to us because that would be the  
6 person I would subpoena. Maybe it will be clear when I get  
7 the discovery.

8 JUDGE BARTON: I would imagine the Court  
9 Administrator for the Third Judicial District.

10 MR. STRETTON: I don't believe so according  
11 to Judge Baratta but who knows. He's the President Judge  
12 out there. He and I have been having a little friendly  
13 dispute on some of those issues. He's quite a character.  
14 I don't mean to say anything bad about him, but sometimes  
15 he can get his high horse up I guess would be the best way  
16 of saying it.

17 But the other issue is those witnesses.  
18 Remember when you said -- I would like all, any witness  
19 they've ever interviewed even if they think it's irrelevant  
20 or they have no intention of calling. That's what I would  
21 like to see if they can give it to me.

22 JUDGE BARTON: Is that attorney work  
23 product?

24 MR. STRETTON: I don't believe so. That  
25 would be a part of their investigation. They have

1 statements and they're making a decision not to give it;  
2 but, I mean, what they think's irrelevant I have might have  
3 a different opinion.

4 JUDGE BARTON: Of course. Of course. The  
5 issue of relevance, you know, it might be important to you  
6 and unimportant to them. I certainly appreciate that.  
7 Let's give the Board a chance to confer.

8 (Discussion among Board counsel  
9 off the record.)

10 MS. FLAHERTY: In response to Mr. Stretton's  
11 request, the request for the Board to provide all  
12 interviews conducted in the course of its investigation is  
13 overly broad, and it's beyond the confines of normal  
14 discovery. It is standard proceedings, whether it's by the  
15 Board or by a prosecutor's office, to conduct many  
16 interviews and decide whether or not the evidence or the  
17 information collected is relevant to the charged conduct.

18 So it's at the Board's discretion to  
19 determine to review what the investigation has entailed to  
20 determine what evidence would be exculpatory, and that has  
21 been done and what evidence is pertinent or relevant to the  
22 charges and to the trial going forward. And so I would ask  
23 that this Court deny the request that the Board provide all  
24 of its investigatory materials.

25 JUDGE BARTON: Okay. What I'm going to do

1 with respect to this issue and I suppose as to the fourth  
2 tape recording is ask both parties to file a brief within  
3 seven days from today setting forth their position and the  
4 authority for that position. The Court thereafter will  
5 make a prompt determination based upon the submissions of  
6 counsel.

7 MR. STRETTON: I just raise one issue as to  
8 the -- one of the reasons we're pushing so hard is we've  
9 been approached by at least two witnesses who were  
10 interviewed by them and they gave signed statements who at  
11 least they tell us were favorable to us, Corporal Andre and  
12 a Ken Striker.

13 Now, of course, you know, maybe they're  
14 telling us that because they just don't want to tell us  
15 that they said something that we'll regret. And again, who  
16 knows, maybe their statements are in the box or two boxes  
17 I'm getting. That's the one reason it caught my attention.  
18 I'm not saying they're hiding stuff. I'm not suggesting  
19 that.

20 But there's a lot of material and, for at  
21 least those two if they're not misleading us, apparently  
22 gave some useful information; and that's why I'm very keen  
23 to at least see what they have. And maybe there's a middle  
24 ground initially giving the names of all the other  
25 witnesses that I'd be able to contact information and I can

1 call some of them and see what they say.

2 But I honestly don't see any harm; and, if  
3 this was a civil proceeding, I'd get it all. And I think  
4 in a criminal proceeding any person they've interviewed, I  
5 mean, it's always fair game at least from my experience.  
6 I've tried a lot of criminal cases in my life. I've had  
7 seven or 800 criminal juries with a verdict, but we'll just  
8 brief it and you'll use your wisdom and --

9 JUDGE BARTON: Let's set the due date for  
10 submissions of counsel. Seven days might be a little  
11 abrupt. How about October 20th?

12 MR. STRETTON: What day of the week is that;  
13 do you know?

14 MR. GRACI: Thursday.

15 JUDGE BARTON: I think that's a Thursday.

16 MR. STRETTON: That's fine.

17 JUDGE BARTON: By way of status conference  
18 issues and organizational identifying some potential dates,  
19 I wanted to see whether counsel might be available for the  
20 pretrial conference on Wednesday, December 14th in the  
21 morning here in Harrisburg?

22 MR. STRETTON: Assuming there's not a  
23 snowstorm, that's a yes.

24 JUDGE BARTON: It might be a little early  
25 for snowstorms but you never know.

1 MS. NORTON: If it's like last year, we'll  
2 still be wearing T-shirts and sneakers.

3 MR. STRETTON: Wednesday, the 14th is fine  
4 with me.

5 Is that all right with you?

6 MR. TIDD: Yes.

7 JUDGE BARTON: Tentatively identifying it at  
8 this point.

9 MS. FLAHERTY: Did you state the time?

10 JUDGE BARTON: I didn't state the time. I  
11 said in the morning.

12 MR. STRETTON: I'm going to pencil that in,  
13 though, and then if you could attach me. My position is  
14 the Court of Judicial Discipline takes priority over  
15 everything but a Supreme Court argument, but a lot of other  
16 Judges don't agree with that position.

17 JUDGE BARTON: So, if we attached you, that  
18 would --

19 MR. STRETTON: That usually works.

20 JUDGE BARTON: Okay. And then identifying a  
21 potential date for trial of January 12th.

22 MR. STRETTON: Now, we may need a little --  
23 remember, this is going to be a massive trial. We estimate  
24 it will probably take two to four weeks, and that's if we  
25 don't sit down and work -- don't get scared because we're

1 going to stipulate a lot. I certainly don't want to sit  
2 here. I mean, I like everyone here, but I don't want to be  
3 here for four weeks.

4 I believe this case will take about, once we  
5 slim it down, stipulate, and everything else, I'm guessing  
6 five to six days. That's just a rough estimate. It could  
7 be a little more, a little less. So I might need a little  
8 more time between December 14th and January to get  
9 subpoenas out and work on this. So I was thinking maybe  
10 February or March, but again whatever you say. You're the  
11 boss in this situation.

12 JUDGE BARTON: We could potentially move it  
13 to late January or early February. I didn't bring a  
14 calendar.

15 MR. GRACI: What was the date that you first  
16 said, Judge?

17 JUDGE BARTON: My first inclination was  
18 January 12th. And actually, before we burn through more  
19 pages of court reporting, are there any other issues that  
20 counsel thinks we ought to continue with on the record?

21 MR. GRACI: Judge, I had one and I hope that  
22 Mr. Stretton at this point would see the wisdom of  
23 withdrawing any suggestion -- and we've challenged it as  
24 impertinent and scandalous -- where he's accused the  
25 Board's attorneys of violating Rule 4.2 of the Rules of

1 Professional Conduct, and there's absolutely no basis for  
2 it. There's no factual basis for it.

3 So I would hope that he would have the  
4 wisdom and foresight to take that off the table.

5 MR. STRETTON: That was -- the 4.2 issue  
6 arose in my mind when secretarial staff and others were  
7 contacted by investigators. As you know, under 4.2 in an  
8 organization, you can't contact -- if someone's represented  
9 by counsel, you can't contact their staff or other people.  
10 Let me say it this way. Judge whispered -- Mr. Tidd  
11 whispered in my ear and I understand not to withdraw that  
12 at this time. But, if you just let me look at the  
13 discovery, that may be the end result.

14 I'm not saying this was intentional and  
15 malicious, but what I'm saying is it may violate the rule.  
16 And, since he's fighting for his really professional life  
17 because depending on what this Court finds it could reflect  
18 adversely on his law license depending on issues, I'd just  
19 like to read the discovery and see what's there. But this  
20 isn't a 4.2, yes, they're bad and they should be suspended  
21 and take away their license. I'm not suggesting that.

22 It's more an intellectual issue. It rises  
23 from the concept of informants being put in jail cells with  
24 a criminal defendant by a DA which you know now they don't  
25 do. When I first started and when you first started and

1 Joe started, they did those kind of things.

2 I wasn't sure who was orchestrating. I  
3 think I might have a better idea based on their answer, but  
4 who was orchestrating what the secretaries were doing  
5 because the secretaries apparently weren't loyal to him and  
6 were keeping records which they only formed the basis of  
7 this complaint.

8 I wanted to know who was talking to them or  
9 if they were now agents of the Conduct Board or maybe they  
10 were doing it as they suggest in their answers pursuant to  
11 Judge McFadden or Judge Baratta, the two President Judges  
12 during this time; and that's why I raised it. It's more of  
13 an intellectual issue and trying to not waive anything;  
14 but, once I read the discovery and based on their tentative  
15 answers, that may not be an issue.

16 I just prefer not waiving it yet or  
17 withdrawing it until I read it, but I wanted it in the  
18 context that I'm not suggesting they were unethical. It  
19 would be an interesting intellectual argument if they were  
20 the ones who were meeting with the secretaries during this  
21 time period or encouraging complaints. That's how I saw it  
22 and I thought that may have some legs to it, but I don't  
23 know yet and that's why I filed it.

24 But I just found and you probably saw some  
25 articles just the other day, this whole concept -- and

1 maybe it's the AOPC's fault, I don't know -- of secretaries  
2 not being loyal to their Judge. And I don't know how you  
3 -- you've got the same staff. You don't have to comment,  
4 but it's very worrisome.

5 I see a lot of District Judges and in this  
6 case it's very worrisome in my mind, but it may not have  
7 any remedy and it may not be of any value to this case.

8 JUDGE BARTON: Mr. Graci, I think as I  
9 understand Mr. Stretton's answer, he's not yet withdrawing  
10 it but perhaps he hopes to. So we're getting a little far  
11 afield.

12 Anything else that needs to be on the record  
13 for the purpose of today's status conference?

14 (No response.)

15 JUDGE BARTON: If not that will conclude the  
16 record in this matter.

17 (Whereupon, at 10:14 a.m., the hearing  
18 was adjourned.)

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I hereby certify, as the Notary Reporter,  
that the foregoing proceedings were taken stenographically  
by me and thereafter reduced to typewriting by me or under  
my direction; that this transcript is a true and accurate  
record to the best of my ability; that the witness whose  
testimony appears on the foregoing pages was duly sworn by  
me; that I am neither counsel for, related to, nor employed  
by any of the parties to the action in which this  
proceeding was taken; and further that I am not a relative  
or employee of any attorney or counsel employed by the  
parties hereto, nor financially or otherwise interested in  
the outcome of the action.

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By: Judith E. Shuller  
Judith E. Shuller  
Notary Reporter

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
Judith E. Shuller, Notary Public  
Newberry Twp, York County  
My commission expires July 07, 2019

FORM 2

**COUNTY OF NORTHAMPTON - COURT OF COMMON PLEAS  
THIRD JUDICIAL DISTRICT  
INTERNAL CORRESPONDENCE**

**TO:** President Judge Stephen Baratta  
**FROM:** Debra C. French, Deputy Court Administrator *DCF*  
**DATE:** September 4, 2014  
**RE:** Change of Venue

---

MDJ Tidd requested a change of venue for a case involving a former client. You sent the case to MDJ Romig-Passaro. When she got the case information from MDJ Tidd's office, there was a note indicating that MDJ Tidd had heard the case and then after he made disposition, requested his staff to remove the disposition and request a change of venue.

This is something that is highly unusual and once MDJ Romig-Passaro brought the matter to my attention, I asked MDJ Tidd to provide a written explanation for his actions. His letter and documentation pertaining to the case are enclosed for your review.

Please advise if MDJ Romig-Passaro should schedule the hearing and enter a new disposition.

*10/1/14 - Judge Baratta got back to me + said MDJ Romig-Passaro should hear the case since Tidd vacated his disposition. Referred to Danielle Bantz.*

## COMMONWEALTH OF PENNSYLVANIA



COUNTY OF NORTHAMPTON

HELLERTOWN BOROUGH  
LOWER SAUCON TOWNSHIP

DAVID W. TIDD, ESQ.

Magisterial District Judge

Magisterial District 03-2-04  
1404 Walter Street  
Bethlehem, PA 18015-5340OFFICE:  
TEL 610-865-4010  
FAX 610-865-4361

September 3, 2014

**VIA FACSIMILE ONLY: 610-559-6702**Debra French, Deputy Court Administrator  
Court Administration  
Northampton County Government Center  
669 Washington Street  
Easton, PA 18042**RE: Commonwealth vs. Joseph M. Herceg**  
**Citation No.: C1639788-3**  
**Docket No.: TR-1658-14**

Dear Ms. French:

I am writing in response to your September 2, 2014 request for an explanation as to why the above-referenced defendant's hearing was held, disposition entered then vacated, and request made for change of venue.

On or about June 23, 2014, Defendant appeared in person to plead not guilty to Citation No. C1639788-3, a copy of which is attached for your review. Defendant refused to post collateral, claiming I previously represented him and allegedly owed him money. My staff informed me of Defendant's appearance and I, in the presence of staff, contacted my private office for a conflicts check as I had no recollection of Defendant. My private office secretary informed me that there was no record whatsoever of Defendant as a private client. I personally contacted Defendant by telephone to discuss these matters. During the conversation, Defendant and I resolved the collateral issue - collateral was waived - and the conflict issue was never reached. A hearing was then scheduled for July 28, 2014 and rescheduled to August 26, 2014.

Defendant received a full hearing on the matter and was found guilty. Defendant did not raise the conflict issue until after the hearing had concluded. Defendant raised the matter indirectly by wanting to discuss a refund of his alleged deposit with my firm. I replied that I would research the matter in an effort to dispatch him more readily as the hearing was quite contentious, all the while confident that there was no conflict.

Shortly thereafter, I contacted my private office to assure myself that there was no conflict; I was made uneasy that Defendant mentioned a financial relationship. I spoke with my associate and not the secretary I originally checked with. My associate immediately recalled

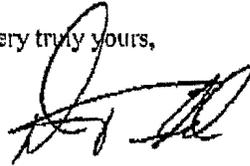
Debra French  
Deputy Court Administrator  
September 3, 2014  
Page 2.

Defendant's name and recognized him as an inactive client from sometime in 2013.

Recognizing the appearance of a conflict of interest, I immediately instructed my staff to vacate the disposition pursuant to 42 Pa. C.S. §5505, a copy of which is also attached for your review. Then I dictated a request for a change of venue. This course of action was retroactively approved by Magisterial District Judges David Barton (412-885-2111) and Magisterial District Judge Lorinda Hinch (724-662-5230), both of the Minor Judiciary Ethics Committee.

Should you need any further information, please do not hesitate to contact this office.  
Thank you.

Very truly yours,



David W. Tidd, Esquire

DWT/bsa  
Attachments