>> PLEASE RISE.

>> FLORIDA SUPREME COURT IS NOW

IN SESSION.

>> WE NOW TAKE UP THE SECOND

CASE ON OUR DOCKET WHICH IS

MEISTER VERSUS RIVERO.

>> MAY IT PLEASE THE COURT, LYNN

WAXMAN REPRESENTING THE

PETITIONER.

>> COULD I ASK JUST A QUICK

QUESTION?

>> CERTAINLY, YOUR HONOR.

>> A LITTLE CONFUSED ABOUT THE

RECORD.

AS YOU KNOW, IN MOAKLEY WE

REQUIRE THAT IN THESE FINDINGS

OF BAD FAITH THAT THE TRIAL

COURT MAKE SPECIFIC, DETAILED,

FACTUAL FINDINGS AS TO THE

BEHAVIOR THAT THE COURT FEELS

WAS --

[INAUDIBLE]

IN THIS CASE ON THE DAY OF THE

EVIDENTIARY HEARING ON THE

MOTION FOR SANCTIONS, THE TRIAL
JUDGE INFORMED THE LAWYERS AND
HANDED THE LAWYERS AN AFFIDAVIT
FROM HIS JUDICIAL ASSISTANT.
AND THEN IN THAT AFFIDAVIT THE
JUDICIAL ASSISTANT MENTIONED
THAT AT 10:33 A.M. ON MAY 13,
2009, SHE LEFT A VOICEMAIL ON
MR. GALENA'S VOICEMAIL.
SHE MAKES NO MENTION OF ANY
SECOND CALL TO MR. GELINAS'
OFFICE, AND THIS IS THE ONLY
RECORD EVIDENCE CONCERNING THE
FACT THAT THE JUDGE'S OFFICE
MADE THE EFFORT TO CONTACT
COUNSEL.
BUT YET IN THE TRIAL ORDER
PREPARED BY THE TRIAL JUDGE, HE
MENTIONED ON THE SECOND PAGE THE
COURT'S JUDICIAL ASSISTANT, WHEN
SHE RECEIVED NO RESPONSE FROM
HER MESSAGE, LEFT FOR DEFENSE
COUNSEL CALLED A SECOND TIME AND
LEFT A SECOND MESSAGE.
THERE IS NO RECORD EVIDENCE OF

THAT.

WHERE DID THAT COME FROM?

>> IT CAME FROM THE JUDICIAL

ASSISTANT'S AFFIDAVIT.

>> IT'S NOT IN THE AFFIDAVIT.

THERE'S NOTHING IN THE AFFIDAVIT

ABOUT A SECOND PHONE CALL.

>> I SEE.

>> A SECOND PHONE CALL MAKES A

BIG DIFFERENCE TO ME HERE.

>> OKAY.

>> OKAY.

IF HE IGNORES ONE CALL, OKAY,

FINE.

SOMETHING HAPPENED.

BUT A SECOND CALL, THAT WOULD

HAVE MADE A BIG DIFFERENCE.

THERE'S NO RECORD EVIDENCE AS

REQUIRED BY MOAKLEY THAT THERE

WAS A SECOND CALL.

THE JUDGE MUST HAVE JUST HEARD

IT FROM THE JA, AND HE JUST

INCLUDED IT IN HIS ORDER.

>> THE FOURTH DISTRICT DID NOT

INCLUDE IT IN ITS RECITATION OF

THE FACTS, AND WE HAVE TO ASSUME
YOU'RE CORRECT AND THERE WAS NOT
A SECOND CALL BECAUSE THERE IS
NO RECORD.
>> MS. WAXMAN, THE MOTION THAT
WAS FILED BY THE PLAINTIFF'S
ATTORNEY SAYS NO CLAIM IS MADE
BY UNDERSIGNED COUNSEL THAT
OPPOSING COUNSEL DID THIS
KNOWINGLY OR WITH INTENT.
MORE IMPORTANTLY TO ME IS THAT,
FIRST OF ALL, I'M NOT HAPPY --
AND OBVIOUSLY THE JUDGE
WASN'T -- WITH HOW THE DEFENSE
LAWYER DIDN'T KEEP HIMSELF
APPRISED.
BUT HE OBVIOUSLY WASN'T
INACCESSIBLE BECAUSE THE JAs
FROM BROWARD WERE ABLE TO REACH
HIM AND WENT TO TRIAL THERE.
SO IT'S NOT LIKE THIS IS A GUY
THAT WENT MISSING FOR A FEW
WEEKS AND WAS IN AFRICA OR
SOMETHING.
WHAT EVIDENCE IS THERE THAT HE

ENGAGED IN DELIBERATE OR

RECKLESS CONDUCT TO AVOID GOING

TO TRIAL?

IS THERE ANY EVIDENCE THAT HIS

MOTIVE IN NOT ANSWERING HIS

VOICEMAIL, NOT CHECKING IT, WAS

TO AVOID GOING TO TRIAL IN THIS

CASE?

>> HARD TO KNOW WHAT HIS

SUBJECTIVE MOTIVE IS --

>> OBJECTIVELY.

>> OBJECTIVELY, THE OBJECTIVE

STANDARD WHICH I'VE ARGUED IN MY

BRIEF TAKES INTO CONSIDERATION

NOT WHAT HE DID WILLFULLY OR NOT

WHAT HE DID INTENTIONALLY.

IT'S HOW DOES HIS CONDUCT

APPEAR.

AND EVEN ASSUMING, JUSTICE

LABARGA, THAT THERE WAS ONLY ONE

PHONE CALL, WHAT THESE LAWYERS

DID HERE WAS INSULATE THEMSELVES

FROM THE NOTICE PROCESS.

>> BUT HOW COULD THAT BE IF THE

SAME LAWYERS WERE NOTIFIED BY

THE PEOPLE IN BROWARD?

I MEAN, MAYBE THIS JA OF THE

JUDGE, YOU KNOW, SHE SAYS

THERE'S A VOICEMAIL.

I MEAN, WAS THIS DURING THE DAY

OR DOES THIS OFFICE HAVE

SECRETARIES?

IS THERE -- I MEAN, IS IT JUST

AN AUTOMATED OFFICE AND THERE

ARE NO LIVE PEOPLE THERE?

I GUESS I'M JUST, YOU KNOW, I'M

CONFUSED ABOUT HOW THESE LAWYERS

MIGHT HAVE CONDUCTED THEMSELVES

TO AMOUNT TO SOMETHING THAT

WE'RE CALLING BAD FAITH.

AND I CAN AGREE WITH YOU THAT

BAD FAITH MAY BE SOMETHING MORE

THAN INTENTIONAL.

IT MAY BE RECKLESS, VEXATIOUS,

THESE THINGS THAT ARE DESIGNED

TO OBSTRUCT THE PROCESS.

BUT NOT SOMETHING THAT IS

CONCEDED TO BE NEGLIGENT.

AND THE JUDGE SAYS THAT'S

NEGLIGENT TOO, BUT THERE WAS NO

CONTEMPT PROCEEDINGS AGAINST

THESE LAWYERS.

SO EXPLAIN TO ME THE POLICY THAT

WOULD BE SO BROAD AS TO INCLUDE

THE CONDUCT THAT WE HAVE IN THIS

CASE THAT IS NOT, YOU KNOW, NOT

BEING WHAT WE HOPE EVERY LAWYER

WILL BE, BUT NOT BEING, YOU

KNOW, A DIRT BAG AND

INTENTIONALLY TRYING TO

FRUSTRATE THE PROCESS.

>> I THINK THE ISSUE YOU'RE

TRYING TO EXPRESS IS CAN LAWYERS

IGNORE -- WHICH IS WHAT WENT ON

HERE -- THEY IGNORED THE

INSTRUCTIONS OF THE COURT.

A JUDGE'S ORDER TO CALL THE

ATTORNEYS AHEAD OF YOU ON THE

DOCKET WHEN THE JUDGE GIVES YOU

THEIR NAMES AND THEIR PHONE

NUMBERS, TELLS YOU TO CALL THEM

BEFORE YOU --

>> SO THEN, THEREFORE, THEY

COULD BE HELD GUILTY OF INDIRECT

OR DIRECT CRIMINAL CONTEMPT?

>> YES, THEY COULD.

>> WOULDN'T THAT BE THE MORE

APPROPRIATE PROCESS IN THIS

CASE?

>> WELL --

>> TO GO THROUGH THAT AND LET

THEM OFFER AND EXPLAIN HOW THEIR

OFFICE OPERATES AND HOW THE

BROWARD JUDGE WAS ABLE TO GET TO

THEM AND CONTACT THEM AND GO TO

TRIAL AND HOW THEY, WHY THEY

DIDN'T DO WHAT THEY DID?

SHOULDN'T THERE BE A FULL

HEARING ON THAT?

>> NO, FOR THE FOLLOWING REASON:

JUDGES, TRIAL COURT JUDGES HAVE

TO HAVE THE ABILITY TO REGULATE

THEIR TRIAL PROCESSES AND THEIR

DOCKETS.

SUPPOSE THIS HAPPENED ANOTHER

TIME.

THIS KIND OF CONDUCT CANNOT GO

ON.

AS YOU STATED, ANY REASONABLE

ATTORNEY WOULD NOT INSULATE

THEMSELVES THE WAY THESE LAWYERS

DID.

>> YOU KNOW, I FIND THAT THE USE

OF THAT ON THIS RECORD,

"INSULATE THEMSELVES," SOMEWHAT

OFFENSIVE.

BECAUSE I DON'T SEE THAT THIS IS

INSULATING.

AS I UNDERSTOOD IN THIS RECORD,

THEY LEFT THE VOICEMAIL ON AN

ATTORNEY BY THE NAME OF GELINAS?

>> YES, YOUR HONOR.

>> AND MR. CROWDER, MR. GELINAS

WAS NOT IN THE OFFICE,

APPARENTLY, FOR THE REST OF THE

WEEK.

AND IT'S MR. CROWDER'S CASE?

>> IT WAS BOTH THEIR CASE.

>> WELL, HELP ME UNDERSTAND.

>> IT WAS MR. CROWDER'S CASE.

MR. GELINAS HAD APPEARED IN THE

CASE.

THEY WERE BOTH LISTED AS

COUNSEL.

>> WELL, MR. CROWDER, I THOUGHT,

GAVE A VERY REASONABLE

EXPLANATION FOR BUSY LAWYERS WHO

ARE CALLED TO TRIAL IN THE SOUTH

FLORIDA AREA FOR DADE, BROWARD

AND PALM BEACH, AND IT HAPPENS

EVERY WEEK.

SO WE'RE GOING TO START IN THIS

KIND OF CATEGORY AND SAY, OH,

NEGLIGENT OR SOME COMMUNICATION

BREAKS DOWN, WE'RE GOING TO END

UP LITIGATING MORE ON ATTORNEY

BEHAVIOR THAN WE ARE ON THE

MERITS OF THE CASE.

AND THE RULE REQUIRES THAT THE

COURT SET A DATE.

NOT A MAYBE YOU'LL GO.

IF YOU READ RULE 1.440, IT

REQUIRES SETTING A DATE.

>> YOUR HONOR, THEY DID SET A

DATE.

>> NO, I'M SORRY, THEY DIDN'T.

WHERE'S THE ORDER THAT SET THE

DATE?

NOT A PERIOD.

IT REQUIRES -- I'LL READ IT TO

YOU.

THE NOTICE SHALL INCLUDE AN

ESTIMATE OF THE TIME REQUIRED

SETTING FOR TRIAL.

IF IT'S READY TO BE SET FOR

TRIAL, IT SHALL ENTER AN ORDER

FIXING A DATE FOR TRIAL.

THAT'S WHAT THE RULE SAYS.

AND WE'VE GONE WITH THESE TRIAL

CALENDARS, THESE CATTLE

CALENDARS.

I'VE PARTICIPATED IN THEM.

IT'S NOT LIKE IT'S SOMETHING

FOREIGN.

AND THERE ARE LAWYERS AND

SCHEDULING PROBLEMS THAT OCCUR.

THIS IS THE REAL WORLD.

THIS IS NOT SOME KIND OF UTOPIA.

AND TO STAND THERE AND SAY THAT

THIS LAWYER -- AFTER WHAT I'VE

READ -- HE APOLOGIZED, HE'S IN

THE TRIAL, HE'S NOT HIDING FROM

ANYONE.

HERE'S A MAN TRYING TO GO WHERE

THE JUDGES TELL HIM.

AND IT HAPPENS, YOU GET THESE

CONFLICTING ORDERS.

I BET YOU EVEN HAVE IN PALM

BEACH COUNTY A LOCAL RULE IF

YOU'RE SCHEDULED FOR TWO, GETS

THE LAWYER, DON'T YOU?

>> WELL, I'M NOT AWARE OF IT,

YOUR HONOR.

>> WELL, IN OTHER CIRCUITS THEY

HAVE THAT, THAT IF TWO GET

CALLED IN THE CIRCUIT, THE

SENIOR JUDGE IS THE ONE YOU GO

TO TRIAL WITH.

AND SO THIS HAPPENS.

AND TO SUGGEST THAT WE'RE GOING

TO USE SOME KIND OF NEGLECT RULE

AS OPPOSED TO WHAT'S ALREADY

BEEN WRITTEN BY THE COURT, BAD

FAITH, I DON'T KNOW WHERE IT'S

GOING TO TAKE US.

>> WELL, YOUR HONOR, BAD FAITH

IS FINE.

BUT THE PROBLEM IS THERE'S

CONFUSION WITH BAD FAITH.

>> I DON'T THINK SO.

I THINK THAT'S A WELL-WRITTEN

OPINION FROM THIS COURT.

IT MENTIONS ALL THE CASES THAT

HAVE BEEN PRESENTED TO THE

COURT, AND IT'S IMPOSSIBLE TO

DEFINE EVERY PRECISE ACT THAT

CAN EVER BE CONCEIVABLE IN THE

COURTS OF LITIGATION TO WHAT

FALLS WITHIN IT.

IF WE CAN DEFINE A RULE TO

COEVER EVERY SITUATION?

>> NO, BUT YOU COULD CLARIFY

MOAKLEY BECAUSE MOAKLEY HAS SOME

INCONSISTENCY, AND THAT'S WHY

WE'RE HERE TODAY.

MOAKLEY SAYS, AND I'M QUOTING

YOU, "THE INEQUITABLE CONDUCT

DOCTRINE PERMITS THE AWARD OF

ATTORNEYS' FEES WHERE ONE PARTY

HAS EXHIBITED EGREGIOUS CONDUCT

OR ACTED IN BAD FAITH."

>> RIGHT.

WHAT WAS THE PROBLEM IN MOAKLEY?

IT WAS A LAWYER THAT SUBPOENAED

ANOTHER LAWYER WHILE KNOWING

THERE WAS NO EVIDENCE IN THAT

LAWYER'S POSSESSION, AND THEY

RAN HIM TO KEY WEST FOR NOTHING.

IS THAT LIKE THIS CASE?

>> TO ME, IT IS, YOUR HONOR.

>> OH, OKAY.

WELL, YOU AND I HAVE A VERY

DIFFERENT VIEW OF WHAT THE

PRACTICE OF LAW IS ABOUT AND HOW

DIFFICULT IT IS FOR ACTIVE

LAWYERS, ACTIVE LAWYERS -- I'VE

BEEN THERE -- TO BE ABLE TO

REPRESENT THEIR CLIENTS AND KEEP

THINGS TOGETHER IN AN ORDERLY

WAY.

YOU CAN'T DO IT BY FIAT AND BY

MONOPOLY MONEY.

I'M GOING TO ASSESS YOU, YOU

KNOW, TEN GRAND SIMPLY BECAUSE

THE PHONE CALL DID NOT GET

FORWARDED.

BECAUSE IF YOU'RE SAYING TO ME

YOU THINK THIS RECORD SUPPORTS

THAT MR. CROWDER HID FROM OR

ATTEMPTED INTENTIONALLY TO

VIOLATE, I'D LIKE TO SEE THAT

EVIDENCE.

BECAUSE I DON'T SEE IT FROM WHAT

I'VE READ.

>> YOUR HONOR?

>> CAN YOU SETTLE THIS FOR ME?

MR. GELINAS AND MR. CRAWFORD --

I'M SORRY, CROWDER --

>> CROWDER.

>> WERE THEY IN THE SAME FIRM?

>> YES.

THERE WAS ONE LAW FIRM WITH THE

TWO OF THEM, AND THEY HAD

APPEARED INTERCHANGEABLY IN THIS

CASE.

THE NAME OF THE LAW FIRM WAS THE

NAME OF JASON GELINAS, IT HAD

ONE PHONE NUMBER.

>> OKAY.

>> THAT WAS THE PHONE NUMBER

THAT THEY SUPPLIED.

>> HANG ON FOR A SECOND.

I'M HEARING YOUR FRIENDLY

QUESTIONS.

SLOW DOWN.

THE DOCKET SHEET --

>> YES.

>> -- THAT IS REFERRED TO IN THE

PLEADINGS HERE, THAT IS THE

CALENDAR THAT THE JUDGE HANDS TO

THE LAWYERS WHEN THEY COME IN

FOR CALENDAR CALL.

>> RIGHT.

>> AND THAT CALENDAR INCLUDES

THE NAMES OF ALL THE LAWYERS

THAT APPEAR ON THE CASE ALONG

WITH THEIR PHONE NUMBER.

AM I CORRECT?

>> CORRECT.

>> AND THE JUDGE INSTRUCTED

EVERYONE ON THAT DOCKET IN THAT

CALENDAR CALL TO CALL THE CASE

AHEAD OF THEIRS WHICH IS WHY HE

GIVES THEM THE DOCKET SHEET WITH

EVERYBODY'S NUMBER ON IT TO KEEP

TRACK OF WHERE THEY ARE IN THE

CASE.

AM I CORRECT?

>> YES, CORRECT.

>> NOW, THERE'S ANOTHER THING

HERE.

CALENDAR CALL WAS FOR MARCH

27TH, AND THAT'S WHEN ALL THIS

HAPPENED.

AND ON MAY 13 THAT'S WHEN THE JA

CALLED AND LEFT A MESSAGE FOR

MR. GELINAS.

AM I CORRECT?

>> CORRECT.

>> AND THEN ON MAY 15 ACCORDING

TO MR. CROWDER'S LATER TESTIMONY

DURING THE EVIDENTIARY HEARING,

THAT'S WHEN HE SUPPOSEDLY WAS

NOTIFIED TO APPEAR BEFORE JUDGE

LYNCH IN BROWARD COUNTY.

>> ON MAY 18TH HE WAS --

>> NO, ON MAY 15TH IS WHEN HE

GOT THE CALL THAT HE WAS TO

APPEAR BEFORE JUDGE LYNCH AND

TRY THE CASE.

>> OKAY, YES.

ON MAY 18TH.

>> SO JUDGE McCARTHY HAD TOLD

THE LAWYERS ON MARCH 27TH

CALENDAR CALL THAT THEY WERE THE

SECOND BACKUP ON MAY 18TH.

>> YES.

>> SO ON MAY 15TH WHEN

MR. CROWDER GOT THE CALL FROM

JUDGE LYNCH, HE HAD THREE DAYS

IN WHICH TO INFORM THE JUDICIAL

ASSISTANT IN JUDGE McCARTHY'S

OFFICE THAT HE'S GOING TO BE

GOING TO TRIAL SOMEPLACE ELSE.

>> YES.

>> BUT WHETHER HE GOT A CALL OR

NOT FROM THE JUDGE'S OFFICE, HE

WAS AWARE THAT HE WAS THE SECOND

BACKUP ON MAY 18TH, AM I

CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> AND HE HAD THREE DAYS BEFORE

THAT IN WHICH TO NOTIFY THE

JUDGE'S OFFICE AND OPPOSING

COUNSEL THAT I'M NOT GOING TO BE

ABLE TO GO ON MAY 18TH BECAUSE

I'M GOING TO BE IN COURT IN

BROWARD COUNTY.

>> YES.

>> AND THAT DID NOT HAPPEN.

>> THAT DID NOT HAPPEN.

>> WHAT I'M TRYING TO UNDERSTAND

IS THAT WHEN JUDGE McCARTHY

HAD THE HEARING, AGAIN, AS I

QUOTED FROM THE INITIAL MOTION

CREDITED THE PLAINTIFF'S LAWYER,

DIDN'T TRY TO SAY THIS WAS BAD

FAITH, VEXATIOUS, HE SAID IT

WASN'T INTENTIONAL.

BUT WHEN IT CAME BEFORE JUDGE

McCARTHY, WHEN THEY STARTED TO

TRY TO CLAIM WHAT HAD HAPPENED,

JUDGE McCARTHY SAID, NO, THIS

ISN'T WHETHER I'M GOING TO

IMPOSE SANCTIONS, IT'S HOW MUCH.

THAT'S -- MY CONCERN HERE GOES

BACK TO I AGREE.

I STARTED OUT I THINK THE

LAWYERS, OF COURSE, SHOULD HAVE

FOUND OUT IF THE FIRST CASE HAD

SETTLED AND ALSO INFORMED --

CERTAINLY NOT THE COURT --

OPPOSING COUNSEL THEY WERE BEING

CALLED.

I MEAN, IT'S NOT FAIR.

I AGREE WITH THAT, IT'S NOT

FAIR.

BUT WHAT WE'RE TRYING TO DECIDE

BECAUSE, YOU KNOW, YOU THINK IN

ONE CASE, ALL RIGHT, LET'S GIVE

SOME FEES HERE BECAUSE WE REALLY

DON'T LIKE THE WAY THIS

HAPPENED.

BUT THEN ANNOUNCE THE RULE OF

LAW THE CONCERN IS WITHOUT

DEFINED RULES YOU ALL OF A

SUDDEN HAVE THIS NONRULE USED

FOR ORDINARY SITUATIONS.

AND I THINK WHAT MOAKLEY MADE

CLEAR IS THAT IF IT'S GOING TO

BE INHERENT AUTHORITY, IT'S GOT

TO BE USED IN EXTRAORDINARY

CIRCUMSTANCES.

WHERE THERE'S NO DOUBT THAT THE

CONDUCT, IF IT'S NOT

INTENTIONAL, WAS EXTREMELY

RECKLESS OR AS YOU QUOTED,

EGREGIOUS.

AND I THINK WHAT WE MIGHT HAVE

HERE, AND THIS IS THE PROBLEM,

IT'S IN THE EYE OF THE BEHOLDER.

THE JUDGES ON THE FOURTH

DISTRICT THOUGHT THIS WAS

RECKLESS BEHAVIOR.

JUSTICE LEWIS AND I ARE LOOKING

AT THIS, AND WE'RE GOING, OR I

MIGHT SAY I DON'T LIKE WHAT

HAPPENED, BUT I'M NOT SURE

RECKLESS IS WHAT I WOULD

DESCRIBE IT.

MAYBE THIS IS -- I DON'T KNOW IF

THESE ARE LAWYERS THAT BILL AT

$50 AN HOUR AND THEY JUST HAVE A

TON OF CASES AND THEY DON'T HAVE

A SECRETARY AND THEY DON'T

ANSWER JUDGES' CALLS, WHICH IS

AWFUL.

I DON'T KNOW THAT.

BUT WHAT I KNOW IS THAT THE GUY

OBVIOUSLY HAD ENOUGH, HAD A WAY

FOR PEOPLE TO GET IN TOUCH WITH

HIM, BECAUSE JUDGE LYNCH'S

OFFICE GOT IN TOUCH WITH HIM.

SO IT STARTS TO SAY IS THIS A

$10,000 ERROR, OR IS THIS

SOMETHING THAT'S A

PROFESSIONALISM ISSUE THAT

SHOULD BE ADDRESSED THAT WAY, OR

IF THE JUDGE REALLY FEELS THE

LAWYER'S ACTING IN CONTEMPT AND

INSTITUTE CONTEMPT PROCEEDINGS.

AND WHAT IS THE -- YOU'RE IN

YOUR REBUTTAL -- BUT, SEE,

THAT'S WHAT WE'RE PLAYING WITH.

NOT THAT HERE'S THE WORDS,

HERE'S NOT BAD, NOW WE'RE IN

BETWEEN, AND WE'RE TRYING TO DO

OUR BEST TO REGULATE ATTORNEYS'

CONDUCT AND ALSO MAKE SURE THE

JUDGE IS RESPECTED.

AND I'M NOT SURE HOW THIS CASE

FITS IN THAT CONTINUUM.

SO IF YOU JUST, IN TERMS OF

BEFORE YOU GO INTO THE REBUTTAL

TIME WANT TO TRY YOUR BEST TO

ANSWER THAT.

>> YES, YOUR HONOR.

I THINK IT'S A POLICY ISSUE, AND

I THINK, FIRST OF ALL, JUDGE

McCARTHY SAID IN THE MIDDLE OF

THE HEARING AFTER MR. CROWDER
WAS GIVING ALL HIS EXPLANATIONS
AND THE JUDGE KEPT SAYING, THAT
DOESN'T WORK, GIVE ME SOMETHING
ELSE, GO ON.
AND THE MORE HE HEARD ABOUT IT,
THE MORE INCENSED THE JUDGE
BECAME.
SO THAT'S NUMBER ONE.
HE GAVE HIM THE OPPORTUNITY.
BUT YOU HAVE TO LOOK TO POLICY
IF YOU TAKE AWAY THE RIGHT FOR
TRIAL COURT JUDGES TO ALLOW THIS
TO HAPPEN.
JUDGE McCARTHY SAID IN THE
ORDER HE WAS VERY FRUSTRATED
BECAUSE THIS LEFT THREE DAYS OF
HIS DOCKET TOTALLY EMPTY
THAT HE COULDN'T FILL.
THAT THEY WASTED THE COURT'S
TIME, THE COURT PERSONNEL TIME,
THE JURORS' TIME AND OPPOSING
COUNSEL WHO PREPARED, AND HIS
CLIENT.
IF YOU SEND THIS JUST TO THE

CONTEMPT ORDER, TO A CONTEMPT
PROCESS, CERTAINLY THE COURT HAS
THE AUTHORITY.
IT'S MORE EXACTING, THERE HAS TO
BE A CHARGING DOCUMENT, THERE
HAS TO BE A HEARING.
BUT YOU'RE TAKING AWAY THE
REMEDY, FIRST OF ALL, OF THE
JUDGE TO HAVE AN ORDERLY PROCESS
OF CONDUCTING TRIALS BECAUSE
THIS HAPPENED EVERY WEEK --
SUPPOSE THIS HAPPENED EVERY
WEEK?
WHAT WOULD HAPPEN TO JUDGE
McCARTHY'S DOCKET OR ANY OTHER
LAWYER?
JUDGES CANNOT ALLOW THIS TO
HAPPEN, NUMBER ONE, AND THERE
SHOULD BE A FINANCIAL REMEDY FOR
A LAWYER WHO SPENDS A LOT OF
TIME DOING THIS.
SUPPOSE THEY DO IT AGAIN?
IT'S UNFAIR TO THE COURT.
IT'S UNFAIR TO LITIGANTS.
>> YOU'RE NOW DOWN TO --

[INAUDIBLE]

>> THANK YOU.

>> GOOD MORNING, YOUR HONORS,

CHIEF JUSTICE, AND MAY IT PLEASE

THE COURT --

>> CAN YOU TELL ME HOW DOES THIS

HAPPEN?

HOW DOES A LAWYER WHO IS A TRIAL

LAWYER WHO HAS BEEN TOLD TO DO

THE FOLLOWING: MAKE SURE YOU'RE

THE SECOND BACKUP, CHECK WITH

THE FIRST BACKUP, IF YOU HAVE TO

GO TO TRIAL SOMEPLACE ELSE,

YOU'D BETTER LET ME KNOW, AND

GIVE ME A NUMBER.

WE'RE GOING TO GO TO TRIAL, HERE

IS THE NUMBER I'M GOING TO

REACH, AND THEN HAS A SETUP

WHERE IT'S A VOICEMAIL AND NEVER

CHECKS THE VOICEMAIL?

YOU THINK THAT IF

PROFESSIONALISM, YOU KNOW, WE'RE

TALKING ABOUT PROFESSIONALS --

DOCTORS, LAWYERS -- THAT THAT'S

THE WAY WE WANT TO THINK THAT

SOMEONE CONDUCTS THEIR PRACTICE?

KIND OF -- WHAT'S THE SETUP

THERE?

>> YOUR HONOR, WE DON'T WANT TO

THINK THAT PROFESSIONALS CONDUCT

THEMSELVES THAT WAY, AND

MR. GELINAS -- AND THIS WAS IN

THE RECORD -- SAID THAT IT WAS A

"REGRETTABLE ACT."

I WOULD LIKE TO ADDRESS YOUR

QUESTION AND THE QUESTION ABOUT

THE CONTINUUM OF CONDUCT AND

JUSTICE LABARGA'S QUESTION ABOUT

HOW THIS HAPPENS WHEN THERE'S A

DOCKET FOR PEOPLE TO CALL WITH

TWO FOLKS IN FRONT OF THEM.

AND I THINK PART OF THAT

ANSWER'S IN THE RECORD AND PART

OF IT IS, BASICALLY,

SPECULATION.

IT'LL BE OUTSIDE THE RECORD, BUT

I'LL ANSWER TO THE EXTENT I CAN

YOUR QUESTION, YOUR HONOR.

IN THE RECORD MR. CROWDER SAID

THAT HE DID NOT GET THE MESSAGE

UNTIL TWO DAYS LATER.

I THINK WHAT YOUR HONOR IS

WORRIED ABOUT IS HOW DOES THAT

HAPPEN IN AN OFFICE SETUP WHEN

YOU'RE A PROFESSIONAL.

YOU'RE PRACTICING LAW, YOU'RE

OUTSIDE THE OFFICE, YOU'RE

RUNNING BACK AND FORTH.

I DON'T KNOW, YOUR HONOR, WHAT

THE TYPE OF SETUP IS, WHETHER

IT'S AN OFFICE FOR SEVERAL

ATTORNEYS AND THEY DON'T REALLY

HAVE A DEDICATED LEGAL

ASSISTANT.

>> EVERYBODY IN THE STATE, YOU

KNOW, WHEN I WAS STILL

PRACTICING, I THINK WE WERE JUST

GETTING CELL PHONES.

SO IT WOULD BE PRETTY TOUGH.

I DON'T KNOW, YOU KNOW, AN

8-YEAR-OLD THAT DOESN'T HAVE A

CELL PHONE SO THAT EVERY MOMENT

YOU'RE IN TOUCH.

I MEAN, SO EVEN IF THEY DIDN'T

HAVE A SECRETARY, OKAY, SO --

>> MY CONCERN -- AND ANSWER MY

QUESTION.

LET'S FORGET ABOUT THE

VOICEMAIL.

FORGET ABOUT -- PUT THAT ASIDE,

PUT IT IN YOUR POCKET, ALL

RIGHT?

ON MAY 15TH WHEN THE LAWYERS

WENT TO CALENDAR CALL, THEY WERE

TOLD YOU'RE THE SECOND BACKUP ON

MAY 18TH.

IT WAS A SPECIAL SETTING.

EVERYBODY KNOWS HOW IT WORKS.

NUMBER ONE IS GOING TO SETTLE,

NUMBER TWO'S GOING TO SETTLE,

AND YOU'RE GOING TO BE UP.

THAT'S THE WAY ANYBODY

PRACTICING PERSONAL INJURY LAW

KNOWS THAT.

SO THEY HAD A SPECIAL SETTING

FOR MAY 18TH, THEY KNEW THEY HAD

TO BE THERE, AND THERE WAS A

LIKELY POSSIBILITY THEY WERE

GOING TO BE CALLED.

YET ON MAY 15, THREE DAYS BEFORE

THEY WERE TO APPEAR IN COURT,

MR. CROWDER GOT THE CALL FROM

JUDGE LYNCH IN BROWARD COUNTY, I

GOT TO YOU FIRST.

YOU COME TO BROWARD AND TRY THE

CASE.

WHY COULDN'T HE HAVE CALLED OR

HAVE HIS SECRETARY CALL, I KNOW

IT'S AT THE COURTHOUSE, HAVE HIS

SECRETARY CALL THE JUDGE'S

OFFICE AND TELL THEM, GUYS, I

CAN'T MAKE IT, I'M GOING TO BE

IN BROWARD COUNTY TRYING ANOTHER

CASE?

THAT WOULD HAVE SOLVED

EVERYTHING.

IN MY CASE I RECALL BEING ON

FOUR -- ONE-HOUR CALL IN FOUR

DIFFERENT COUNTIES AT ONE TIME.

I HAVE FOUR ROWS OF BOXES.

WHOEVER GOT TO ME FIRST GOT ME.

BUT MY SECRETARY WAS INSTRUCTED

THAT WHOEVER GOT ME, SHE WAS

GOING TO CALL THE OTHER THREE

PARTIES AND THE OTHER THREE

JUDGES AND TELL 'EM I'M GONE.

SO THEY CAN MAKE OTHER PLANS.

THAT'S MY CONCERN HERE.

AND THAT'S WHAT I WOULD HAVE

DONE, I THINK THAT'S WHAT

JUSTICE PARIENTE AND JUSTICE

LEWIS WOULD HAVE DONE.

WHY WASN'T THAT DONE HERE?

>> YOUR HONOR, TWO THINGS.

THE SANCTIONING ORDER ACTUALLY

RESIDES THAT TWO OTHER CASES

WERE ASSIGNED AHEAD OF THE CASE,

WHICH IS NOT A SPECIAL SETTING

PER SE.

SO IT MAY BE THAT MR. GELINAS

AND MR. CROWDER DID NOT

NECESSARILY THINK -- AND IT

TURNS OUT THEY WERE WRONG --

THAT THEY WERE GOING TO GO TO

TRIAL IN THIS CASE.

I DON'T KNOW, AND IT'S NOT IN

THE RECORD WHETHER THEIR CASE

WAS A SPECIAL SETTING.

AND IT'S NOT IN THE RECORD

EXCEPT FOR MR. CROWDER'S

TESTIMONY, AGAIN, ABOUT WHEN HE
GOT THE MESSAGE WHY THIS
OCCURRED.
EVERYBODY ADMITS, AND
MR. CROWDER ADMITTED AND
MR. GELINAS ADMITTED USING THE
WORD "REGRETTABLE."
THIS IS NOT SOMETHING THAT
SHOULD HAVE OCCURRED.
MR. GELINAS ACTUALLY SAID IN THE
TRIAL COURT THAT HE DID PROBABLY
OWE -- NO, THAT HE DID OWE
PLAINTIFF'S ATTORNEY SOME TYPE
OF -- HE SAID IT WAS NOT THE
$10,000, BUT THE AMOUNT THAT THE
PLAINTIFF'S ATTORNEY --
>> THINK ABOUT THIS FOR A
SECOND.
WHAT IF THERE WAS ONE OF THESE
MASSIVE MEDICAL MALPRACTICE
CASES WHERE YOU HAVE, LIKE, SIX,
SEVEN DEFENDANTS AND THE JUDGE'S
OFFICE CALLS AND EVERYBODY FLIES
IN AND THE LAWYERS FROM OUT OF
TOWN, THEY MAY FLY IN JURY

SELECTION EXPERTS ON THE CLOCK,

AND THEY BRING THEIR PARALEGALS,

EVERYBODY INTO THE OFFICE ALL

WEEKEND LONG.

AND THEN MONDAY MORNING

EVERYBODY SHOWS UP WITH THEIR

BOXES READY TO GO, AND THIS ONE

LAWYER DOESN'T SHOW UP.

OH, I DIDN'T CHECK MY ANSWERING

MACHINE.

AND THE JUDGE'S OFFICE CALLED

THE ONLY NUMBER HE GAVE THEM TO

CALL.

HOW, I MEAN, HOW ARE THESE

PEOPLE TO BE COMPENSATED?

SHOULD THEIR CLIENTS PAY FOR

FLYING IN ON JURY SELECTION

EXPERTS?

>> WAS THIS A CASE WITH HUNDREDS

OF EXPERTS AND WITNESSES FROM IF

ALL OVER THE WORLD?

>> YOUR HONOR, IT WAS AN AUTO

NEGLIGENCE CASE.

JUSTICE LABARGA --

>> DID THE ATTORNEY HAVE

VOICEMAIL FORWARDING ON HIS

PHONE?

>> JUSTICE --

>> CALL FORWARDING, I MEAN.

>> DID HE HAVE CALL FORWARDING?

I DON'T KNOW THE ANSWER TO THAT,

JUSTICE, AND IT'S NOT IN THE

RECORD.

BUT IF I MAY SPECULATE ABOUT THE

RECORD, I DON'T THINK HE DID,

BECAUSE HE GOT THE MESSAGES TWO

DAYS LATER.

MR. CROWDER SAID THAT.

SO IT WOULD SEEM AS IF THEY WERE

ABLE TO GO TO HIM, HE WOULD HAVE

GOTTEN THE MESSAGE.

>> MY POINT IS, BUT THAT WAS

AVAILABLE TO HIM, WAS IT NOT?

I MEAN, IT'S AVAILABLE TO

EVERYBODY, ISN'T IT?

>> IT'S AVAILABLE TO EVERYBODY

THAT --

>> OKAY.

>> AS I UNDERSTAND.

JUSTICE LABARGA, TO GET BACK TO

YOUR QUESTION.

SOMETHING, THAT TYPE OF CASE IT

WOULD MAKE WHAT HAPPENED MORE

INCONVENIENT TO ALL INVOLVED,

BUT IT WASN'T -- THE CRUX OF THE

MATTER WOULD STILL BE THAT THERE

WAS A NEGLIGENT ACT BY

MR. GELINAS AND MR. CROWDER, AND

NOBODY CLOSE TO THE CASE -- THE

PLAINTIFF'S ATTORNEY,

MR. GELINAS OR THE TRIAL

COURT -- SAID THAT THIS WAS

ANYTHING BUT NEGLIGENT.

THE FOURTH DCA --

>> I GUESS IN MY ESTIMATION,

RESPECTFULLY, WHETHER IT'S A

MEDICAL MALPRACTICE CASE OR A

SIMPLE NEGLIGENCE CASE, THE

PRINCIPLE IS STILL THE SAME, AND

THAT IS THAT THE ATTORNEYS WERE

TOLD THAT THEY NEEDED TO MAKE

SURE THAT THE OTHER CASES IN

FRONT OF THEM WERE GOING TO GO,

OR OTHERWISE THEY WERE GOING TO

BE RESPONSIBLE FOR GOING TO

TRIAL ON THE 18TH.

IT WAS THEIR RESPONSIBILITY TO

TAKE SOME KIND OF STEP TO

DETERMINE IF THEY WERE, IN FACT,

IN LINE TO BE TRIED ON THE 18TH.

NOBODY, I CAN'T DEFEND THE FACT

THAT THIS OCCURRED, AND I DON'T

THINK THAT IF HE WERE HERE

MR. GELINAS WOULD, BECAUSE IN

THE TRIAL RECORD HE SAID WHAT HE

HAD DONE WAS "REGRETTABLE."

AND I THINK BY VIRTUE OF THE

FACT HE WAS SANCTIONED, BY

VIRTUE OF THE FACT THERE IS THIS

WITH HIS NAME IN IT, IT'S NOT

LIKELY TO OCCUR AGAIN WITH THIS

ATTORNEY AND PUTS OTHER

ATTORNEYS ON NOTICE THAT THIS

KIND OF CONDUCT IS NOT SMILED

UPON BY THE COURTS.

BUT, JUSTICE QUINCE, TO ADDRESS

YOUR QUESTION FURTHER AND TO GET

INTO SOMETHING JUSTICE PARIENTE

SAID, I THINK THIS IS THE TYPE

OF THING THAT CAN BE ADDRESSED

THROUGH THE INHERENT -- THROUGH

THE CONTEMPT POWER OF THE COURT

BECAUSE THERE WAS A TRIAL ORDER.

>> WELL, UNDER THAT HOW DOES THE

PARTY BECOME MADE WHOLE?

AS I UNDERSTAND THIS RECORD

OR -- THE PLAINTIFF ACTUALLY

LOST A DAY OF WORK TO COME TO

TRIAL, THE LAWYERS ACTUALLY

EXPENDED SOME TIME AND ENERGY TO

PREPARE TO BE READY FOR TRIAL ON

THE 18TH, AND I DON'T THINK THAT

A CONTEMPT PROCEEDING IS, WOULD

MAKE THOSE PEOPLE WHOLE.

OR ATTEMPT TO MAKE THEM WHOLE.

>> THE CONTEMPT PROCEEDING WOULD

BE AN ORDER FINDING THAT

MR. GELINAS --

>> IT VINDICATES THE AUTHORITY

OF THE COURT.

>> AND SAYING YOU SHOULD HAVE

COMPLIED WITH THE COURT ORDER,

AND YOU SHOULD HAVE APPEARED FOR

TRIAL.

THEN PERHAPS THE MOTION FOR

SANCTIONS UNDER THE INHERENT
SANCTIONING POWERS OF THE COURT
COULD BE THAT MR. MEISTER HAD TO
APPEAR AT COURT, AND HE WAS
DEMOTED.
HE WAS OUT $350 FOR APPEARING
THAT DAY AND NOT GETTING HIS
WAGES.
AND, IN FACT, MR. GELINAS
ADMITTED THAT HE OWED OR NEEDED
TO PAY THAT AMOUNT TO THE
PLAINTIFF.
>> WELL, LET'S GO BACK TO THAT.
WHETHER, YOU KNOW, AGAIN -- AND
THIS COULD HAVE BEEN AFTER THE
$10,000 WAS ASSESSED -- THEY
COULD HAVE MEDIATED SOMETHING
AND COME UP WITH SOMETHING IF
THEY WERE SO ANXIOUS TO GET THIS
RESOLVED AND NOT PUT THIS IN THE
SUPREME COURT OF FLORIDA.
MOAKLEY WAS THE ONLY CASE THAT
THE JUDGE HAD, AND IT'S VERY
CLEAR THAT THERE'S GOT TO BE
EXPRESS FINDING OF BAD FAITH

CONDUCT SUPPORTED BY DETAILED,
FACTUAL FINDINGS DESCRIBING THE
SPECIFIC ACTS OF BAD FAITH
CONDUCT THAT RESULTED IN THE
UNNECESSARY OCCURRENCE OF
ATTORNEYS' FEES.
BAD FAITH MUST BE PREDICATED ON
A HIGH DEGREE OF SPECIFICITY IN
THE FACTUAL FINDINGS.
NOW, WHAT I WANT TO ASK YOU, THE
FOURTH DISTRICT CERTIFIED TO US
WHETHER RECKLESS CONDUCT IS
INCLUDED WITHIN BAD FAITH.
I'D LIKE YOU TO ASSUME THAT IF
IN MOAKLEY THE BAD FAITH, AS FAR
AS I KNOW IT, YOU KNOW, IN AN
INSURANCE CONTEXT DOESN'T
NECESSARILY HAVE TO BE
INTENTIONAL.
IT CAN BE HIGHLY RECKLESS, YOU
KNOW, CONDUCT THAT'S VEXATIOUS.
THE FOURTH DISTRICT SEEMED TO
ASSUME THAT THE CONDUCT HERE --
A, B, AND C -- AMOUNTS TO
RECKLESS, VEXATIOUS, WOULD FIT

IN IF MOAKLEY WAS CLARIFIED TO
INCLUDE SOMETHING MORE THAN
INTENTIONAL AND THAT THEY'RE
LOOKING AT THE FEDERAL MODEL.
MY QUESTION TO YOU IS, ASSUMING
THE THINGS THAT ARE ASSUMED
HERE, THAT THEY DIDN'T KEEP
APPRISED OF THE CASES AHEAD OF
THEM, THEY DIDN'T CHECK THEIR
VOICEMAIL, AND THEY DIDN'T
NOTIFY THE PLAINTIFF'S LAWYER OR
THE TRIAL COURT THAT THEY WERE
GOING TO TRIAL.
IF WE CLARIFIED THAT MOAKLEY
INCLUDES RECKLESS CONDUCT, DO
THOSE THREE THINGS AMOUNT TO
RECKLESS CONDUCT?
>> YOUR HONOR, I WOULD ARGUE
THAT THEY AMOUNT TO NEGLECT.
>> OKAY.
TELL ME ABOUT THE DIFFERENCE
BETWEEN -- WHAT WOULD RECKLESS
BUT NOT INTENTIONAL CONDUCT BE
IN THIS SITUATION?
VERSUS EXCUSABLE -- WELL, IT'S

NOT EXCUSABLE NEGLECT.

IT'S NEGLECT.

>> NEGLECT.

IF MR. CROWDER AND MR. GELINAS

HAD NEVER LISTENED TO THE

MESSAGES, HAD NEVER GOTTEN IN

TOUCH WITH THE COURT, SOMETHING

HAPPENED THAT THEY REALIZED

AFTER THE FACT, MY GOODNESS,

THIS OCCURRED.

AND WE NEED TO ADDRESS THIS.

>> OKAY.

THE MORNING COMES.

IT'S MONDAY MORNING,

MR. BERKSHIRE'S UP WITH HIS

CLIENT.

THEY CALL THE CASE, MR. BROOKS

IS THERE.

WHERE'S GELINAS AND CROWDER,

JUDGE McCARTHY ASKS, AND

NOWHERE TO BE SEEN.

SO DOES McCARTHY TRY TO

CONTACT THEM?

>> ON THAT DATE?

THERE'S NOTHING IN THE RECORD

SAYING THAT, BUT THERE WAS A

MOTION FOR SANCTIONS FILED WHICH

FINALLY CAUGHT THEIR ATTENTION,

YOUR HONOR.

AND THEY FOUND OUT LATER THAT

WEEK WHAT HAD OCCURRED.

>> THEY NEVER -- SO WHEN'S THE

FIRST TIME THEY CHECKED THEIR

VOICEMAIL?

>> TWO DAYS AFTER THE MESSAGES

WERE LEFT.

I THINK THE 17TH, YOUR HONOR.

I THINK.

>> WELL, IF THEY CHECKED THEIR

VOICEMAIL BEFORE THEY WENT TO

TRIAL, THAT CAN'T -- I MEAN,

THEN IT WOULD BE, THEN IT WOULD

BE INTENTIONAL MISCONDUCT.

IN OTHER WORDS, IF THEY KNEW

THAT THEY WERE CALLED FOR TRIAL,

THERE WOULD BE NO QUESTION HERE.

WE'D BE DEALING WITH BAD FAITH

IN DOING NOTHING.

DO WE AGREE WITH THAT?

>> YES, YOUR HONOR.

BUT IT WAS NOT THE CASE.

IT WAS TWO DAYS AFTER THE TRIAL

STARTED.

>> I THOUGHT THE RECORD

INDICATED THAT THEY REACHED THEM

IN JUDGE LYNCH'S CHAMBERS.

IS THAT NOT CORRECT?

I MEAN, IN JUDGE LYNCH'S

COURTROOM.

THAT'S WHERE HE WAS WHEN THEY --

>> IN HIS OFFICE, YOUR HONOR,

BUT THEY WERE BOTH OFF AT TRIAL.

>> OKAY.

SO JUDGE McCARTHY WAS ABLE TO

CALL, AND THERE WAS ACTUALLY AN

OFFICE, AND SOMEONE ANSWERED THE

PHONE.

>> A SECRETARY OR SOMEBODY, YOUR

HONOR.

>> I MEAN, AND THIS IS

SOMETHING, AND I DON'T WANT

TO -- YOU KNOW, THERE ARE JAs,

AND THERE ARE JAs, YOU KNOW?

I DON'T KNOW, I WASN'T A TRIAL

JUDGE, BUT I GUESS THE QUESTION

I'D ASK IF MY JA CAME AND SAID I

LEFT A MESSAGE ON SO AND SO'S

VOICEMAIL, I MIGHT SAY, YOU

KNOW, GIVE ANOTHER CALL HERE,

YOU KNOW?

LEAVING A VOICEMAIL IS, YOU

KNOW, YOU'RE NOT SO -- YOU KNOW,

HOW ABOUT SENDING AN E-MAIL, HOW

ABOUT ANOTHER CALL JUST TO MAKE

SURE?

AGAIN, BECAUSE AS MS. WAXMAN

SAID, YOU KNOW, YOU DON'T WANT

TO BE SITTING THERE ON MONDAY

AND NOT HAVE TWO LIVE BODIES

THERE TO TRY A CASE.

SO, YOU KNOW, AGAIN, I DON'T

KNOW HOW JAS DO -- I KNOW

THEY'RE VERY BUSY, BUT IS THERE

ANYTHING ABOUT THAT IN THE

RECORD ABOUT THE PRACTICE ABOUT

WHETHER, YOU KNOW, YOU CALL

AGAIN AND TRY TO GET SOMEBODY,

AN ACTUAL SECRETARY, TO ANSWER

THE PHONE?

>> THERE'S ACTUALLY THE

FACTUALLY UNCLEAR MATTER THAT

THE JA CALLED ONE TIME, AND THE

JUDGE SAYS TWO MESSAGES WERE

LEFT IN THE ORDER.

WHICH MEANS THAT THE ORDER IS

NOT ENTIRELY CLEAR.

FAR FROM MAKING THE CLEAR

FINDINGS REQUIRED BY MOAKLEY, IT

HAS SORT OF AN UNCLEAR --

>> BUT THERE IS NO QUESTION WHEN

McCARTHY CALLS ON MONDAY, HE'S

ABLE TO GET --

>> HE'S ABLE TO GET SOMEBODY.

AS OPPOSED TO THE JA.

YES, YOUR HONOR.

>> ON THE QUESTION OF HAVING THE

JA CALL A NUMBER OF TIMES, THE

SITUATION WITH ME -- AND I WAS A

TRIAL JUDGE IN PALM BEACH COUNTY

FOR 13 YEARS, THIS HAPPENS ALL

THE TIME.

AND A LOT OF PEOPLE, A LOT OF

LAWYERS HAVE ANSWERING MACHINES.

THERE'S NO ONE ANSWERING THE

PHONE.

SO THE NUMBER WE CALL, THAT IS

THE ONLY NUMBER WE HAVE.

USUALLY IT GETS AN ANSWERING

MACHINE.

SO I'LL GO AWAY, I'LL TELL MY

SECRETARY, CALL ONE, TWO, AND

THREE FOR TRIAL MONDAY.

I COME BACK FROM LUNCH, I LEFT

MESSAGES ON THE MACHINE FOR SO

AND SO.

TRY AGAIN LATER.

TRY US AGAIN LATER.

ANSWERING MACHINE AGAIN.

MONDAY MORNING, I'LL SEE THE ONE

SIDE SHOW UP WITH A CARD WITH

THE BOXES READY TO GO, THE OTHER

SIDE IS NOT THERE.

I'LL PICK UP THE PHONE FROM THE

BENCH ON THE RECORD, CALL THAT

LAWYER'S NUMBER AGAIN.

I GET AN ANSWERING MACHINE.

NOW, HOW IS A COURT SUPPOSED TO

CONTROL HIS OR HER DOCKET WITH

THAT KIND OF BEHAVIOR?

AND I DID NOT GET AHOLD OF THAT

PERSON FOR TWO OR THREE DAYS.

AND THE SAME THING, I WASN'T

CHECKING MY MESSAGES.

HOW ARE WE SUPPOSED TO CONDUCT

BUSINESS?

>> THROUGH THE CONTEMPT ORDERS

OF THE COURT.

>> WELL, I NEVER ORDER -- WHEN

YOU GET INTO CONTEMPT, YOU'RE

TALKING ABOUT CRIMINAL CONTEMPT,

AND YOU'RE TALKING A VERY HIGH

STANDARD, AND YOU'RE TALKING

ABOUT REASONABLE DOUBT, ALL

RIGHT?

NOW, WE'RE TALKING ABOUT

SANCTIONS HERE WHICH IS A

DIFFERENT MATTER.

I DON'T KNOW THAT YOU CAN PROVE

CONTEMPT IN THIS CIRCUMSTANCES.

AM I GOING TO HAVE TO ISSUE A

WRITTEN ORDER?

YOU HAVE TO SIT BY YOUR PHONE,

OTHERWISE WHEN I CALL, I CAN

HOLD YOU IN CONTEMPT?

NOT POSSIBLE.

>> YOUR HONOR, THERE'S A VERY

HIGH STANDARD FOR --

>> [INAUDIBLE]

>> IT MAY NOT BE AS HIGH AS A

CONTEMPT ORDER, YOUR HONOR, BUT

HERE IT WAS NOT REACHED BY TRIAL

COURT'S ORDER, AND, IN FACT,

TRIAL COURT MADE NO ATTEMPT TO

SAY IT WAS BAD FAITH.

AND GETTING BACK TO SOMETHING

JUSTICE PARIENTE SAID, SHE

WANTED ME TO DEFINE THAT.

BUT THE FACT THAT THEY DID THAT

EVEN KIND OF WENT BEYOND WHAT

THE TRIAL COURT DID -- NOBODY

USED THE WORD "RECKLESS" IN THE

TRIAL COURT.

NOT EVEN THE PEOPLE MOVING

FOR --

[INAUDIBLE]

SO THE EXTENSION FROM NEGLIGENCE

TO RECKLESS AND THEN WE WOULD

LIKE TO BUILD BAD FAITH

INTENTIONAL UPON THAT IS WHAT

CONCERNS ME WHEN WE GET TO HOW

CLOSELY DEFINED THE ACTIONS ARE
TO BE UNDER MOAKLEY.
>> WELL, WE NEVER REALLY DEFINED
BAD FAITH IN MOAKLEY.
IN FACT, ACCORDING TO THE
CONCURRENT OPINION, JUSTICE
WELLS AND, I BELIEVE, JUSTICE
LEWIS, THERE WAS NO DEFINITION.
I THINK JUSTICE WELLS MENTIONED
THERE WAS NO DEFINITION OF BAD
FAITH IN THE OPINION, AND THAT
WOULD LEAVE A FREE-FOR-ALL OR
DIFFERENT JUDGES TO APPLY
DIFFERENT STANDARDS.
>> IT WAS NOT DEFINED, AND
THAT'S WHY THE DECISION ITSELF
SAYS THAT THE CONCEPT SET FORTH
IN IT HAS TO BE APPLIED SO
SELDOMLY AND SO RARELY BECAUSE
IT'S UNDEFINED, AND IT'S ALREADY
AN EXTENSION OF THE COURT'S
AUTHORITY TO SANCTION UNDER
57105 UNDER COURT RULES AND
UNDER THEIR CONTEMPT POWER.
AND IT'S TO BE USED WHEN NONE OF

THOSE APPLY.

AND HERE I WOULD ARGUE THAT IF

IT WERE TO BE USED AT ALL, IT

SHOULD ONLY BE USED TO

RECOMPENSE THE PLAINTIFF FOR

MISSING WORK WHICH MR. GELINAS

DID AGREE TO.

>> IT DOES STRIKE ME, AGAIN, AND

I THINK WHAT JUSTICE WELLS WAS

SAYING IN THE OPINION IS HE

DIDN'T WANT TO EXTEND IT AT ALL

BECAUSE YOU START TO GET INTO --

I HATE TO USE THE WORD, BUT

SLIPPERY SLOPE.

WHEN DO YOU USE IT, WHEN DON'T

YOU?

AND IT SEEMS TO BE THAT MOAKLEY

WAS REALLY THERE WHEN WE TALK

ABOUT BAD FAITH CONDUCT, YOU

KNOW, STRIKING -- CONDEMNING AS

UNPROFESSIONAL TACTICS

UNDERTAKEN SOLELY FOR BAD FAITH

PURPOSES ON INSURING ATTORNEYS

WILL NOT BE DETERRED FROM

PURSUING LAWFUL CLAIMS.

AND SO I'M SORT OF WONDERING
BACK TO WHERE MOAKLEY WAS, AND I
WANT TO GO BACK TO THE
UNDERLYING OPINION, WHETHER IT
WAS INTENDED AS WHAT NOW IS SORT
OF BEING -- IF YOU CAN'T CALL
THEM IN CONTEMPT, WE'LL JUST
HAVE SOMETHING ELSE FOR
SANCTIONS.
AND IT SEEMS TO ME, AND THIS IS
SORT OF A FRIENDLY QUESTION TO
YOU, THE ANSWER HAS TO BE
THROUGH SOME OTHER RULE.
JUST LIKE THERE'S RULES FOR
DISCOVERY VIOLATIONS, AND SOME
IS INTENTIONAL, SOME IS NOT.
THIS IS PERVASIVE WHERE JUSTICE
LABARGA SAYS CONCERNS ME
GREATLY.
IF IT'S PERVASIVE, THEN WE OUGHT
TO DEAL WITH IT, TO ME, TO
SPECIFIC RULES TO MAKE SURE THIS
NEVER HAPPENS TO ANOTHER JUDGE
OR ANOTHER SIDE.
BUT I'M JUST NOT SURE WHETHER IT

EVEN FITS INTO WHAT WE WERE

INTENDING TO BE THE BAD FAITH

CONCEPT IN MOAKLEY.

>> YOUR HONOR, I DON'T THINK IT

DOES.

THIS WAS NOT A SPECIFIC PLAN OR

DESIGN OF MR. GELINAS, AND

NOBODY SAID THAT IT WAS.

IT MAY BE THERE NEEDS TO BE A

RULE PUT INTO PLACE TO KEEP IT

FROM HAPPENING AGAIN, BUT THIS

DOESN'T QUITE FIT UNDER WHAT

MOAKLEY WAS DESIGNED HAPPENING.

IT MAY BE THAT IT WAS NOT

LAWYERING AT IT FINEST.

>> SOME OF IT'S LOWEST IS WHAT

JUSTICE LABARGA'S SAYING.

THIS IS NOT THE WAY THE LAWYER

SHOULD BE OPERATING HIS OFFICE.

I MEAN, THERE'S JUST NO QUESTION

ABOUT THAT.

>> IT SEEMS ODD TO ME TO BE

REQUIRING A RULE TO REQUIRE A

LAWYER TO BE SHOWING UP IN COURT

WHEN THEY'RE SUPPOSED TO.

>> WHERE HE'S SUPPOSED TO BE.

AND THAT IS WHY MR. GELINAS SAID

IT WAS "REGRETTABLE" WHAT

HAPPENED, AND HE ADMITTED THAT

HE, PERHAPS, COULD BE

SANCTIONED, BUT IT WAS THE

AMOUNT OF THE SANCTION, AND IT

WAS THE FACT THIS WAS NOT

INTENTIONAL THAT I'M CONCERNED

THAT THAT IS WHY THE FOURTH

REVERSED.

IN OTHER WORDS, BECAUSE IT WAS

NOT INTENTIONAL, AND THE TRIAL

COURT SANCTIONED HIM UNDER THE

WRONG RULE.

THEY BASED IT UPON MOAKLEY, AND

JUSTICE PARIENTE SAID THAT WAS

THE ONLY CASE THEY BASED IT ON,

BUT THEY ALSO BASED IT UPON

ROSENBERG WHICH ALSO TALKS ABOUT

THAT CONDUCT.

IT'S SIMPLY IN THIS CASE THE

SANCTION ORDER WAS NOT WELL

FOUNDED.

I THINK THAT NOBODY THINKS THAT

WHAT OCCURRED WAS RIGHT, AND I
THINK THAT THIS LAWYER'S NOT
LIKELY TO DO THE SAME TYPE OF
THING AGAIN, AND ANYONE READING
THE DECISION WOULD NOT THINK
THIS IS SOMETHING THAT THE COURT
WOULD SUPPORT.
>> YOU ARE A MINUTE OVER TIME AT
THIS POINT.
YOU CAN FINISH IN ABOUT 15
SECONDS.
>> THANK YOU FOR YOUR TIME, YOUR
HONORS, AND I WOULD JUST ASK
THAT THE COURT SEE THE DECISION
REVERSING THE SANCTION ORDER BE
UPHELD.
>> CAN I -- I DO HAVE -- THE
FOURTH DISTRICT ORDER WOULD
ALLOW US TO GO BACK FOR THE
TRIAL COURT TO TRY TO MAKE
FINDINGS IN KEEPING WITH
MOAKLEY.
>> THEY CERTIFIED THE QUESTION
IN THE COURT, AND THEY REVERSED
BECAUSE THERE HAD BEEN NO

EVIDENTIARY BASIS UNDER MOAKLEY.

I THINK THAT THAT SUPPOSITION

COULD BE READ INTO, BUT IT DID

NOT REVERSE AND REMAND, YOUR

HONOR, SO I WOULD ASK THAT THE

ORDER BE UPHELD.

>> YOUR HONOR, I THINK IT'S

IMPORTANT TO LOOK AT WHAT JUDGE

McCARTHY DID SAY.

HE SAID THE COURT POSSESSES THE

INHERENT AUTHORITY TO IMPOSE

SANCTIONS FOR CONDUCT SUCH AS

OCCURRED HERE CITING MOAKLEY.

SO JUDGE McCARTHY WAS JUST

ABOUT THERE.

HE MISSED TWO WORDS.

HE DID MAKE DETAILED ACTUAL

FINDINGS, BUT THE PROBLEM WAS IN

THE LAST PARAGRAPH HE ADDED THE

SENTENCE, "THIS SITUATION WAS

CAUSED BY THE NEGLIGENCE OF THE

LOSS OF JASON GELINAS."

SO THAT CAUSED THE PROBLEM.

>> SO IF WE SAY DISCHARGE, BUT

IF IT GOES, IF FOURTH DISTRICT

STANDS, WOULD THE IDEA BE IT

GOES BACK, JUDGE McCARTHY ADDS

SOME MAGIC WORDS, AND THEN

THERE'S A SANCTION IMPOSED UNDER

MOAKLEY?

>> I DIDN'T SAY THAT.

>> I'M ASKING --

>> NO, IT DIDN'T REVERSE AND

REMAND.

THAT'S THE PROBLEM.

>> DOESN'T THE FOURTH DISTRICT

BY ACKNOWLEDGING THAT IT'S NOT

BAD FAITH AS THEY READ MOAKLEY

ALREADY ANSWER THE QUESTION AND

THE ISSUE OF WE DISAGREE THAT IT

WOULD ACTUALLY AMOUNT TO

RECKLESSNESS UNDER MOAKLEY?

DON'T WE HAVE TO SAY THAT?

THIS IS NOT, THIS DOES NOT

DEFINE -- THIS IS NOT THE KIND

OF CONDUCT THAT WAS ANTICIPATED

TO BE SANCTIONED UNDER MOAKLEY.

>> IF YOU SAY THAT, THAT THIS

TYPE OF CONDUCT WAS NOT THE TYPE

OF CONDUCT ANTICIPATED, YES.

THEN THIS WOULD BE --

>> AND LET ME SAY, BY THE WAY,

I'M NOT -- THE RULE I'M

SUGGESTING ISN'T A RULE THAT

WOULD SAY YOU SHOULDN'T DO THIS,

IT'S JUST LIKE, YOU KNOW, IN

DISCOVERY, PEOPLE VIOLATE

DISCOVERY, AND THERE ARE, AND

THERE ARE LOTS OF SANCTIONS THAT

YOU CAN IMPOSE.

SO, I MEAN, IF THE PROBLEM IS IN

SETTING CASES FOR TRIAL PEOPLE

AREN'T SHOWING UP, YOU SAY

THERE'S A RULE, YOU KNOW,

SIMILAR RULE OF PROCEDURE THAT

WOULD ALLOW FOR SANCTIONS UNDER

THOSE CIRCUMSTANCES.

THAT'S, YOU KNOW, THAT'S --

WHICH MIGHT BE MORE FRIENDLY TO

RATHER THAN TRY TO SPREAD SOME

INHERENT AUTHORITY THING TO

WHERE IT'S NOT INTENDED TO GO.

>> THE FINDINGS ON PAGE 1164

WHERE THE FOURTH DCA WENT

THROUGH THE CERTAIN FACTS AND

THEN SAID THAT CONSTITUTED

RECKLESS BEHAVIOR, WERE THOSE

FACTS THAT THEY CITED THERE

FOUND BY THE TRIAL JUDGE?

>> YES.

THE TRIAL JUDGE JUST FOUND ONE

ADDITIONAL, AND THAT WAS THAT

THEY ADVISED INITIALLY THAT THEY

HAD NO CONFLICT ORIGINALLY WHICH

IS SOMETHING WE HAVEN'T

DISCUSSED TODAY.

BUT THAT IS ANOTHER ACTION OF

CONDUCT --

>> DO WE KNOW WHEN THEY WERE SET

FOR TRIAL WITH JUDGE LYNCH?

DOES THE RECORD SHOW THAT?

>> NO, YOUR HONOR.

>> THEN YOU MAKE ARGUMENTS THAT

ARE NOT SUPPORTED BY THE RECORD

WHEN THEY SAY THEY KNEW THEY HAD

A CONFLICT.

HOW CAN YOU STAND THERE AND MAKE

THAT ARGUMENT IF YOU DON'T KNOW?

>> BECAUSE THAT'S WHAT THE YOUNG

WROTE.

>> WHERE'S THE EVIDENCE?

>> I DON'T KNOW THAT, YOUR

HONOR.

>> YOU'RE ARGUING EVIDENCE TO

SUPPORT FINDING, WHERE'S THE

EVIDENCE?

>> THEY DIDN'T TAKE EVIDENCE ON

THAT ISSUE.

IT'S IN THE JUDGE'S ORDER.

>> YOU WOULD AGREE THAT THE

EVIDENCE FOUND IN THE

EVIDENTIARY HEARING WAS REALLY,

IT DID NOT MEASURE UP TO THE

REQUIREMENTS OF MOAKLEY, THAT IT

REQUIRES SPECIFIC DETAIL AND

FINDING?

WE HAVE AN AFFIDAVIT THAT WAS A

PAGE AND A HALF, ACTUALLY A PAGE

ON THE JUDICIAL SYSTEM.

AND WE HAVE THE TRIAL JUDGE

MAKING FACTUAL FINDING THAT ARE

NOT SUPPORTED BY FACTS PRESENTED

IN THE COURT.

SO WOULD YOU AGREE THAT THE

FACTS UPON WHICH THE COURT

RELIED TO MAKE THIS BAD FAITH
FINDING, ACTUALLY NEGLIGENT
FINDING DO ID NOT SUFFICE
ACCORDING TO MOAKLEY?
>> NO, YOUR HONOR, I WOULDN'T
AGREE.
BECAUSE THE FACTS THAT WERE
CITED IN THE FOURTH DISTRICT IN
MY UNDERSTANDING ARE SUFFICIENT
LIKE THE FOURTH DISTRICT SAID,
TO BE WILLFUL CONDUCT.
>> I WOULD HAVE LIKED TO HAVE
HEARD FROM THE JUDICIAL
ASSISTANT AS TO THE EFFORTS THAT
SHE MADE TO CONTACT MR. GELINAS'
OFFICE, AND PERHAPS EVEN AFTER
THE SECOND EFFORT THAT THE COURT
MENTIONED IN HIS ORDER, PERHAPS
SHE COULD HAVE EXPLAINED THAT,
HOW SHE TRIED TO CALL AGAIN --
I THINK THAT WOULD HAVE BEEN
HELPFUL, AND THAT WOULD HAVE
BEEN, OBVIOUSLY, MORE IN LINE
WITH WHAT MOAKLEY REQUIRES IN
DETAILED FINDINGS.

I JUST DON'T KNOW THAT THE

FINDINGS ARE HERE.

>> WELL, I UNDERSTAND WHAT

YOU'RE SAYING, BUT AS YOU SAY,

YOUR EXPERIENCE AS A TRIAL

JUDGE, COULD YOU IMAGINE EVERY

TIME THIS HAPPENED --

>> YEAH, BUT MY EXPERIENCE IS

NOT FACTUAL FINDINGS.

I HAD TO RELY ON THE FACTS OF

THIS PARTICULAR CASE.

>> YES.

WELL, THE FACTS OF THIS CASE

WARRANT THE IMPOSITION OF

SANCTIONS.

THERE'S NO QUESTION THAT --

>> YOUR, YOUR TIME HAS --

>> OKAY.

BRIEFLY, BRIEFLY, WE WOULD JUST

ASK THAT YOU ADOPT A STANDARD OF

THE 11TH CIRCUIT WHICH IS THAT

BAD FAITH INCLUDES SUBJECTIVE

BAD FAITH FROM WHICH RECKLESS

CONDUCT IS INFERRED AND RECKLESS

CONDUCT WHICH IS THE SAME AND

TANTAMOUNT TO BAD FAITH.

>> THANK YOU.

>> THANK YOU.

>> WE THANK BOTH SIDES FOR YOUR

ARGUMENT.