

SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 96-30

Case No. 92,630

RE: RICHARD H. FRANK

**ON REVIEW OF FINDINGS, CONCLUSIONS AND
RECOMMENDATIONS BY THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION HEARING PANEL**

**JUDICIAL QUALIFICATIONS COMMISSION'S
REPLY TO RESPONSE OF RICHARD H. FRANK
TO ORDER TO SHOW CAUSE**

Steven A. Werber
Florida Bar No.: 086466
John S. Mills
Florida Bar No.: 0107719
200 Laura Street
P.O. Box 240
Jacksonville, Florida 32201-0240
(904) 359-2000 (Telephone)
(904) 359-8700 (Facsimile)
Attorneys for the Judicial
Qualifications Commission

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PRELIMINARY STATEMENT

While there are no procedural rules governing the format of this reply, the Commission has elected to file its reply in the format of an appellate brief. The Commission acknowledges that this reply is unusually long and might be burdensome to the Justices of this Court. However, the gravity and nature of the charges against Judge Frank, who is a member of the Commission, Judge Frank's contention that the record contains little or no evidence to support any of the Commission's crucial findings and the sheer length of the record (the transcript is over 700 pages) all demand a thorough reply by the Commission.

In an attempt to ease the burden on this Court, this reply employs as many subheadings as possible, which appear in the Table of Contents, so that each Justice may have quick access to the points he or she deems most important. This is particularly true of the Statement of the Facts section. The subheadings tell the general story and the sections themselves provide the details with pinpoint citations to the record.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case

This proceeding is before this Court pursuant to Article V, Section 12(c), of the Florida Constitution, Rule 2.140 of the Florida Rules of Judicial Administration, and

Rules 20 and 21 of the Florida Judicial Qualifications Commission Rules. The Hearing Panel of the Florida Judicial Qualifications Commission¹ has filed the Findings, Conclusions and Recommendations by the Florida Judicial Qualifications Commission (the "Findings"), in which the Hearing Panel recommends that this Court reprimand Judge Richard H. Frank of the District Court of Appeals, Second District, State of Florida, for violating Canons 1, 2 and 3 of the Code of Judicial Conduct. (See Findings at 34.)

On December 8, 1998, this Court issued its Order to Show Cause commanding Judge Frank to show cause why the Commission's recommendation should not be followed by this Court. In response to this order, Judge Frank filed the Response of Richard H. Frank to Order to Show Cause (the "Response"). The Commission files this reply to the Response.

Course of the Proceedings

On March 20, 1998, after the Investigative Panel of the Commission found probable cause that four formal charges should be filed against Judge Frank, the

¹ This reply refers to the Judicial Qualifications Commission as a whole and as the prosecuting entity as the "Commission" or the "JQC." It refers to the adjudicative body within the Commission as the "Hearing Panel."

Commission filed its Notice of Formal Proceedings pursuant to Rule 6(f) of the Florida Judicial Qualifications Commission Rules with the Clerk of this Court.

Count I alleged that Judge Frank made false or misleading statements first to a newspaper reporter and then, under oath, during a bar grievance proceeding that Judge Frank had initiated against Mark Straley (the "Straley Grievance Proceeding"). Mr. Straley is an attorney whose marriage to one of Judge Frank's daughters, Stacy Frank, ended in protracted divorce litigation (the "Straley Divorce Litigation"). (See Notice of Formal Proceedings at 2-4.)² The statements alleged to be false or misleading were that Judge Frank had "studiously stayed away" from the Straley Divorce Litigation and that he "never discussed" with Judge Chris Altenbernd, a colleague on the Second District, the potential representation of Stacy Frank by George Vaka, an appellate lawyer and former partner of Judge Altenbernd. (See id.)

Count II alleged that Judge Frank's relationship to Mr. Vaka might have caused parties opposing Mr. Vaka in appeals before the Second District reasonably to question Judge Frank's impartiality, but that Judge Frank continued to sit on cases in which Mr. Vaka appeared without disclosing those facts to counsel. (See id. at 4.)

² Stacy Frank is also a member of The Florida Bar.

Count III alleged that Judge Frank improperly interfered with and unreasonably sought to control the Straley Grievance Proceeding by exerting his position as a judge in a manner unbecoming of his office. (See id. at 4.) The count went on to allege that after the majority of Judge Frank's grievance was defeated on summary judgment and the remainder was dismissed by the Florida Bar, Judge Frank improperly complained about the competence of the bar counsel prosecuting the grievance and caused counsel's job to be placed in jeopardy. (See id. at 5.)

Finally, Count IV alleged that during the divorce proceedings between Hillary Frank Weber, another of Judge Frank's daughters, and Craig Weber, Judge Frank telephoned Mr. Weber's father and threatened to use his authority as a judge to have Mr. Weber arrested or committed to a psychiatric facility. (See id. at 6.)

On April 8, 1998, Judge Frank, through counsel, filed the Answer of the Honorable Richard H. Frank to Notice of Formal Proceedings (the "Answer"), attempting to refute all four counts. Judge Frank admitted many of the factual allegations, but contended that they did not constitute violations of the Code of Judicial Conduct or did not warrant discipline. He also denied many of the allegations, primarily under Count IV.

Beginning September 28, 1998, the Hearing Panel conducted a two-day hearing on the charges, taking testimony and evidence from the Commission and Judge Frank, through their respective counsel.

Disposition Before the Hearing Panel

The Hearing Panel found Judge Frank guilty of Counts I, II and III, but dismissed Count IV. Specifically, it found under Count I that Judge Frank's sworn testimony to the Straley Grievance Committee was untrue and misleading, though it declined to make specific findings regarding his unsworn statements to the newspaper reporter. (See Findings at 26-27.) As to Count II, the Hearing Panel found that Judge Frank was not required automatically to recuse from cases in which Mr. Vaka appeared, but that his failure at least to disclose facts concerning Mr. Vaka's representation of Stacy Frank violated Canon 3 of the Code of Judicial Ethics. (See id. at 27-32.) The panel found under Count III that Judge Frank's interference in the Straley Grievance Proceeding was an abuse of his power and tended to lessen the confidence of the public in the judiciary. (See id. at 32.) Finally, the panel found that the testimony of Mr. Weber and his parents on the one hand and Judge Frank and his family on the other was directly contradictory and that it was unable to reach a conclusion by clear and convincing evidence as to who was telling the truth. (See id. at 32-33.)

Standard of Review

Before reporting its findings of fact to this Court, the Commission must conclude that its findings are supported by clear and convincing evidence. See, e.g., In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). This Court must review the Commission's findings to determine if this standard is met. See id. The clear and convincing evidence standard requires more than a preponderance of the evidence, but does not require a finding beyond a reasonable doubt. See id.

The Commission's findings regarding the evidence and testimony presented to it "are of persuasive force and should be given great weight" by this Court because the Commission is able to evaluate the evidence and testimony first-hand and is better situated to evaluate the demeanor and credibility of witnesses testifying live before it than this Court, which is limited to a cold record. See id. "However, the ultimate power and responsibility in making a determination rests with this Court." Id. Thus, this Court is "obligated to study the record and independently assess the factual findings and recommendations of the JQC." Id.

Statement of the Facts

Although Judge Frank did not ultimately deny, either in the Answer or at trial, the vast majority of the facts, as opposed to legal conclusions, alleged and ultimately found by the Hearing Panel, and although the Hearing Panel has recommended the lowest level of discipline available, Judge Frank contends in the Response that there

was "no evidence" to support many of the Hearing Panel's findings and insufficient evidence to support others. He also contends that the Findings do not sufficiently refer to the record. In light of this tact by Judge Frank and to assist this Court in its obligation "to study the record and independently assess the factual findings and recommendations of the JQC," the Commission provides a detailed account of the record evidence supporting its findings.

Stacy Frank needed an appellate lawyer.

In the summer of 1991, the Fifth District Court of Appeal, sitting en banc and by designation as the Second District, decided an appeal in the Straley Divorce Litigation adverse to Stacy Frank .³ (See T1:56:10-13; T2:266:12-18.⁴) Stacy Frank's lawyer suggested that she retain an appellate lawyer to represent her on an appeal to this Court. (See T5:645:2-4.) After finding that a particular appellate lawyer with expertise in the matrimonial field could not represent her due to a conflict of interest, she decided that she would prefer a strong appellate specialist, even if he or she did not have experience with matrimonial cases. (See T5:647:10-T5:648:2.) Encountering difficulty

³ See Straley v. Frank, 585 So. 2d 334 (Fla. 2d DCA 1991). All of the Second District judges had recused themselves. See id. at 335.

⁴ The trial transcripts of the proceedings before the Hearing Panel are cited herein by volume, page and line number. Thus, "T1:2:3-T1:4:5" refers to the testimony appearing beginning on line 3 of page 2 of the first volume of the transcripts and ending on line 5 of page 4 of that volume.

finding someone on her own, she consulted with Judge Frank, who recommended Mr. Vaka. (See T1:86:8-15; T5:648:10-18.)

Judge Frank asked Judge Altenbernd about Mr. Vaka handling Stacy Frank's appeal.

At some point later, Judge Altenbernd happened to be in Judge Frank's chambers for reasons unrelated to this case. (See T2:231:17-25.) During this meeting, Judge Frank "brought up the subject of an interest in hiring ... an appellate lawyer to handle a domestic matter." (T2:232:14-16.) Judge Frank asked Judge Altenbernd to recommend a good appellate lawyer to handle a matrimonial matter. (See T1:84:18-22; T2:233:5-7.)

Judge Frank denies that he ever mentioned Stacy Frank by name, (see Answer at 6), and Judge Altenbernd could not recall whether her name was specifically raised. (See T2:226:9-10; T2:240:2-7, 17-25.) Nonetheless, Judge Altenbernd testified that it was very clear that Judge Frank was discussing representation for his daughter. (See T2:232:19-T2:233:4; T2:240:25-T2:241:1; T2:243:2-18; T2:245:2-7.) While Judge Frank denied telling Judge Altenbernd that the representation was "for Stacy," he admitted that he was in fact referring to Stacy Frank's representation and that Judge Altenbernd must have deduced this fact. (See T2:188:10-16). The Hearing Panel concluded from this evidence that both Judge Frank and Judge Altenbernd "fully

understood that the appellate representation of Stacy Frank was being discussed." (Findings at 26.)

Judge Altenbernd responded by recommending three appellate lawyers with experience in matrimonial law. (See T1:84:18-T1:85:3; T2:233:5-21; T2:244:9-14.) Judge Frank indicated that "he wasn't excited about any of the three names," (T2:244:17-19), and then raised Mr. Vaka's name on his own, asking Judge Altenbernd if Mr. Vaka "could handle a matrimonial matter." (T1:81:24-T1:82:1; see also T1:T2:233:22-24.) Judge Frank knew that, before taking the bench, Judge Altenbernd had practiced with Mr. Vaka and that the two were good friends. (See T2:233:24-T2:234:9.) Through their discussion, it became apparent to Judge Altenbernd that Judge Frank wanted Mr. Vaka to represent his daughter before this Court. (See T2:235:8-9.) Pat Frank, Judge Frank's wife, testified that Judge Frank "asked Chris Altenbernd to ask George Vaka if he were capable of handling a marital law case, knowing that they had worked together, that it would be more delicate for the conversation to take place between Chris Altenbernd and George Vaka than for [Judge Frank] to say, 'Are you competent?' " (T4:603:9-15.)

Judge Altenbernd told Judge Frank that he would call Mr. Vaka to see if he would be interested in accepting the representation. (See T2:235:25-T2:236:4; Answer at 7.) Judge Altenbernd offered to call, rather than Judge Frank or Stacy Frank calling

directly, so Mr. Vaka would not feel unduly pressured to take the case due to Judge Frank's stature as an appellate judge. (See T2:235:10-23.)

Judge Altenbernd and Mr. Vaka discussed whether Mr. Vaka should represent Stacy Frank.

Judge Altenbernd then returned to his chambers and called Mr. Vaka. (See T2:236:5-8.) He told Mr. Vaka that Judge Frank was interested in Mr. Vaka representing Stacy Frank. (See T2:236:20-22; Commission's Exhibit 9 at 8.⁵) Mr. Vaka, who had no experience with matrimonial cases, asked Judge Altenbernd if Stacy Frank's case was "something that I could handle." (See T1:57:1-3.) Judge Altenbernd assured Mr. Vaka that he could decline the representation if he did not want to take it on and that "no one was going to think less of him if he said no." He also warned Mr. Vaka that there was a lot of personal animosity in the case. (See T2:236:25-T2:237:3; T2:237:8-11.) Judge Altenbernd further suggested that Mr. Vaka should think carefully about billing Stacy Frank and should not take the case on a pro bono basis. (See T2:237:14-25.) They discussed how the fact the case was "high-profile" might help

⁵ Due to the time lapse of roughly seven years, Mr. Vaka was unsure whether he had one or two conversations with Judge Altenbernd. (See T1:57:10-13; T1:58:12-20.) He testified that Judge Altenbernd might not have mentioned that the matrimonial matter was for Stacy Frank until a second call. (See T1:59:15-10; T4:497:8-13.)

Judge Altenbernd only testified as to a single call in which he directly spoke about Stacy Frank. (See T2:236:6-T2:38:10.)

Mr. Vaka expand his appellate practice to matrimonial cases. (See T1:57:17-23; T2:237:6-11.)

Mr. Vaka told Judge Altenbernd that he would consider the representation. (See T2:238:1-3; T1:57:23-T1:58:2; T1:59:19-21.) Mr. Vaka testified during a deposition in the Straley Divorce Litigation as to why he was willing to take the representation: "Maybe I'm naive, but to be asked by somebody who I consider to be a well-known and well-respected judge to represent a family member, I was more than happy to do so." (See T1:60:21-T1:61:4.) He acknowledged this motivation in his deposition taken by the Commission as well, but added that he thought the case also provided a good opportunity "to make a name for myself." (See T1:64:10-T1:65:1.) While Mr. Vaka could not recall whether Judge Altenbernd specifically told him that Judge Frank asked Judge Altenbernd to call, he strongly believed that Judge Frank must have done so because Judge Altenbernd would have no other reason for becoming involved. (See T1:62:8-14; T1:63:19-T1:64:11; T4:497:14-22.)

Judge Altenbernd told Judge Frank that Mr. Vaka would consider representing Stacy Frank.

After his conversation with Mr. Vaka, Judge Altenbernd either returned to Judge Frank's chambers or called Judge Frank on the phone and told him that Mr. Vaka would consider the representation and that Stacy Frank, Pat Frank or Judge Frank should contact Mr. Vaka directly. (See T2:238:11-19.) Judge Altenbernd clearly remembered telling Judge Frank that Mr. Vaka would consider representing Stacy Frank (as opposed to handling a generic matrimonial matter), (see T2:243:9-17), and Judge Frank admitted that Judge Altenbernd specifically told him that Mr. Vaka was willing to consider representing her and that she should contact him, (see T1:77:22-T1:78:4; T1:78:20-23; T1:83:9-11; Answer at 7.) Pat Frank also confirmed that Judge Altenbernd reported back that Mr. Vaka was willing to speak to Stacy Frank. (See T4:604:1-7.)

Stacy Frank decided to retain Mr. Vaka, who agreed to a reduced fee and to bill no fees or costs until the end of the Straley Divorce Litigation.

Judge Frank in turn told Stacy Frank that Judge Altenbernd had spoken with Mr. Vaka and that Mr. Vaka was willing to speak with her. (See T5:637:17-19; T5:648:22-T5:649:12.) She met with Mr. Vaka and, feeling comfortable with him, retained him. (See T5:638:1-7.) She told him that she did not have the ability to pay him, if at all, until the conclusion of the Straley Divorce Proceedings when she could liquidate any

assets awarded to her. (See T5:638:8-T5:639:25.) At that point she owed her trial counsel over \$100,000 in fees and interest, and he had filed a charging lien for over \$145,000. (See T5:645:7-18; Commission's Exhibit 3.)

Mr. Vaka testified that he knew she did not have the money to pay him anything pending the litigation and was unsure if he "anticipated she was going to get some assets" with which to pay him in the future. (See T4:489:25-T4:490:7.) Mr. Vaka, whose normal billing rate was up to \$250 an hour, agreed to charge \$100 an hour, the reduced rate he charged insurance clients who provided him with a lot of business. (See T4:488:21-T4:489:20.) He also agreed not to invoice her until the end of the divorce proceedings. (See T4:489:21-23.) By the time of the hearing, she had paid some but not all of his fees. (See T4:491:1-3.) She testified that she had paid him approximately \$30,000 as of the date of the hearing and, "as coincidental as it may be," she planned to pay off the balance the day after the hearing. (See T5:641:6-14.)

Judge Frank loaned Stacy Frank \$30,000 to pay her attorney's fees in the Straley Divorce Litigation.

Stacy Frank's entitlement to attorney's fees was one of the major issues on appeal in the Straley Divorce Litigation when she retained Mr. Vaka. (See T1:117:11-15.) Due to the multiple appeals taken in the case,⁶ the amount of attorney's fees claimed by

⁶ Mr. Straley described the tortuous path of the litigation as follows:

the litigants exceeded the value of the entire marital estate. (See T2:267:16-21.) At some point, Stacy Frank borrowed approximately \$30,000 from Judge Frank and his wife to pay her attorney's fees.⁷ (See T4:595:23-T4:596:3; T4:599:2-5.) Judge Frank was aware of this loan, although his wife handled the loan directly, as she did with all their finances. (See T1:116:5-25; T4:596:4-7.) Though she still owed Mr. Vaka for

There was initially an appeal to the Second District Court of Appeal, which was assigned to a special panel of Fifth District judges.

After an opinion was rendered, a motion for rehearing en banc was filed, which was granted. And the panel opinion was withdrawn, and an en banc opinion was rendered.

Subsequent to that an appeal was taken to the Florida Supreme Court, which granted a review. The initial en banc opinion was quashed by the Supreme Court, and the case was remanded back to the Fifth District sitting en banc as the Second District, which rendered a second en banc opinion, which was substantially similar to the first one with some differences.

The case was then remanded back to the trial court here in Hillsborough County. Following the remand, an appeal was taken to enforce the mandate of the district court en banc in their second decision. And the Order of Remand was vacated, whereupon it was ... remanded again.

And I think I left one attempt at review by the Supreme Court out of that chronology.

(T2:266:12-T2:267:11.)

⁷ The money was paid from the Franks' joint account. (See T1:116:12.)

his fees, Stacy Frank had repaid the loan from Judge and Pat Frank in full by the time of the hearing. (See T4:597:16-21.)

Mr. Straley alleged improprieties in Stacy Frank's fee agreements during the Straley Divorce Litigation, suggesting that her lawyers accepted lower fees to curry favor with Judge Frank.

On May 24, 1993, after the trial court in the Straley Divorce Litigation denied his motion to withdraw as counsel, Stephen W. Sessums, Stacy Frank's trial attorney filed a notice of charging lien asserting a charging lien against Stacy Frank for legal fees and costs in the amount of \$145,063.73. (See Commission's Exhibit 3 at 1.) At this point, Mr. Straley and Stacy Frank were still litigating the issue of who was responsible for fees. (See T2:274:23-24.) The amount of fees claimed by Mr. Sessums exceeded Stacy Frank's share of the marital estate, and Mr. Straley feared that if the charging lien were approved by the court, Stacy Frank would have no incentive to try to settle the remaining issues because her lawyer would get every penny of any recovery. (See T2:275:4-9; Commission's Exhibit 3 at 2.) Based on these concerns, Mr. Straley filed a motion to deny the charging lien (the "Straley Motion"). (See T2:275:10-12; Commission's Exhibit 3.)

The Straley Motion asserted that Stacy Frank's fee agreement with Mr. Sessums was a "sham" and that he never expected to be paid by her. (See Commission's Exhibit 3 at 3-4.) The Straley Motion referred to an attached memorandum produced by Mr.

Sessums indicating that Stacy Frank had only paid him \$300 in fees for trial litigation since September 1990 and had paid him nothing for the substantial appellate litigation that had already taken place.⁸ (See Commission's Exhibit 3 at 3.) The Straley Motion cited the Second District's finding in 1992 that Stacy Frank had the "present ability to pay substantial attorney fees." (See Commission's Exhibit 3 at 3 (quoting Straley, 612 So.2d at 613).) It also pointed out that Stacy Frank's most recent financial affidavit filed with the court disclosed no present or future obligation for attorney's fees to Mr. Sessums. (See Commission's Exhibit 3 at 4.) The motion noted that Mr. Sessums had "acknowledged that the parties here are far less wealthy than in the typical case handled by him." (See Commission's Exhibit 3 at 4.) The motion also emphasized that Mr. Vaka had not invoiced Stacy Frank for any fees and, citing Mr. Vaka's deposition testimony in the Straley Divorce Litigation quoted supra, page 11, asserted that Mr. Vaka "candidly admitted that he undertook the representation of Frank because of the political prominence of the family." (See Commission's Exhibit 3 at 4.) The Straley Motion concluded by arguing that the proceedings had "been greatly prolonged because

⁸ The Hearing Panel took notice of three reported appellate decisions in which Mr. Sessums appeared on Stacy Frank's behalf before 1993. (See Findings at 17 (citing Straley v. Frank, 585 So. 2d 334 (Fla. 2d DCA 1991); Frank v. Straley, 602 So. 2d 1278 (Fla. 1992); Straley v. Frank, 612 So. 2d 619 (Fla. 2d DCA 1992).)

[Stacy] Frank has found two lawyers who (for whatever reason) have been willing to work for free." (See Commission's Exhibit 3 at 5-6.)

A newspaper reporter contacted Judge Frank about Mr. Straley's allegations.

According to Judge Frank in the Answer,⁹ Bruce Vielmetti, a reporter for the St. Petersburg Times telephoned Judge Frank sometime before September 6, 1993, and told Judge Frank that "an allegation had been made that lawyers were representing his daughter in her divorce for free in exchange for favorable consideration by the Judge."¹⁰ (Answer at 2.) Judge Frank admits in the Answer that he told Mr. Vielmetti that he "had studiously avoided involvement in the divorce" and that the allegation "accused him of criminal misconduct that was not true and would be defamatory if published."

⁹ Judge Frank confirmed that he had read the Answer and approved it before it was filed by his counsel. (T1:72:20-25.)

¹⁰ The Commission subpoenaed Mr. Vielmetti to testify, but at the beginning of the hearing Judge Frank N. Kaney, the presiding member of the Hearing Panel, granted a motion to quash the subpoena filed by the St. Petersburg Times based on the journalist's privilege. See Ch. 98-48, § 1, at 187, Laws of Fla. (enacting new § 90.5015, Fla. Stat.) Thus, Judge Frank's statement to this Court in the Response that the Commission made "no effort to call the reporter to testify" is false and misleading. (See Response at 3.)

Unfortunately, the transcript of the proceedings starts just after Judge Kaney ruled on the motion. At this point, counsel for the Commission asked Judge Kaney to withhold his ruling until Judge Frank testified. (See T1:5:11-15.) Judge Kaney indicated that his ruling stood but that he would consider a rehearing if necessary. (See T1:5:25-T1:6:1.) Judge Kaney also granted the request of counsel for the St. Petersburg Times that Mr. Vielmetti not be called without her present. (See T1:6:3-6.)

(Answer at 2.) Judge Frank did not recall in the Answer whether he and Mr. Vielmetti discussed the retention of Mr. Vaka. (Answer at 2.)

At the hearing, Judge Frank was evasive as to whether and to what extent he recalled his conversation with Mr. Vielmetti. (See T1:74:18-T1:77:13.) He ultimately confirmed, however, that he had told Mr. Vielmetti that he had been "far removed from" the Straley Divorce Litigation and "was unaware of his colleague Altenbernd asking Vaka to represent Stacy Frank." (See T1:76:25-T1:77:13.)

The St. Petersburg Times published an article about Mr. Straley's accusations in the Straley Divorce Litigation.

On September 6, 1993, the St. Petersburg Times published an article by Mr. Vielmetti (the "Vielmetti Article") regarding the Straley Divorce Litigation. (See Commission's Exhibit 2.) The title and caption of the Vielmetti Article stated, "Divorce escalates into a war of lawyers: He says her attorneys are forgoing legal fees to curry favor from her father, an influential judge. She, her attorneys and father say that's not true." (Commission's Exhibit 2 at 1.) The relevant portions of the article state:

In court documents, Straley, 44, questions why some of the best lawyers in Florida represented Frank, 38, for years without compensation.

He suggested that the true payoff might be influence with her father, Richard Frank, the chief judge of the 2nd District Court of Appeal.

...

The law on fees is intended to even the playing field between a poor spouse and one whose financial resources provide an unfair advantage in gaining legal assistance. Straley suggests that just the opposite is true because Frank was able to hire top-flight counsel, in essence, on credit, while he has had to make substantial regular payments to keep his attorneys on the case.

In court documents, Straley points to what some experts agree are unusual arrangements regarding Frank's legal representation.

Her attorney, Stephen Sessums, is among the most highly regarded divorce lawyers in the country. His typical clients are far wealthier than Frank, and his cases often involve marital assets of \$1-million or more.

As of May, Frank owed Sessums about \$145,000. He tried to withdraw from the case but Judge Foster wouldn't let him. Instead, Sessums has asked for a lien against whatever assets Stacy Frank finally is awarded. Sessums said in court documents that it is the first time he has filed such a lien.

Straley opposes the lien, calling Sessums' fee agreement with Frank a "sham." In support of that characterization, Straley cited Frank's financial statements that fail to mention any obligation, present or future, to Sessums.

Sessums' firm handled the trial and initial district court appeal. George Vaka, head of the appellate department at Tampa's Fowler, White, Gillen, Boggs, Villareal & Banker law firm, handled the two Supreme Court appeals.

Straley questions the motivations behind that move as well.

In court documents, Vaka said it was the first divorce appeal he has ever done, that he charged less than his usual fee, and that he took the case as a favor to Chris Altenbernd, his former mentor who shares the 2nd DCA bench with Richard Frank.

"Maybe I'm naive," Vaka said, "But to be asked by somebody who I consider to be a well-known and well-respected judge to represent a family member, I was more than happy to do so."

Vaka and his firm have advanced more than \$20,000 in fees and costs on Stacy Frank's case, beginning in 1991. Recently, he said, Fowler White sent her a bill, and she has made one installment payment.

Altenbernd recuses himself from any case involving Vaka or the Fowler White firm, Vaka said. Judge Frank has heard some of his cases since Vaka represented Stacy Frank.

"He obviously must not have felt there was any reason to recuse himself," Vaka said.

He called Straley's suggestion of impropriety "horse hockey."

Vaka said, "If he believes that's the truth, let him prove it. And if he really believes it, it's his obligation to present it to the Bar and the (Judicial Qualifications Commission)."

Richard Frank, a member of the JQC, which investigates all complaints of judicial misconduct, said he has been "far removed from that domestic relations matter."

He said he was unaware of his colleague Altenbernd asking Vaka to represent Stacy Frank and noted that, since his daughter's case began, he has recused himself from all divorce appeals involving similar issues.

Straley's suggestion that helping the daughter could influence the father is "absolutely untrue, patently absurd," Judge Frank said.

(Commission's Exhibit 2 at 1-2.)

Judge Frank filed a grievance with the bar against Mr. Straley in part for "inspiring" the newspaper article.

On October 28, 1993, less than two months after the Vielmetti Article was published, Judge Frank filed an affidavit with The Florida Bar initiating the Straley Grievance Proceedings. (See Respondent's Exhibit 1; T2:166:4-16; T3:307:7-18.) In the affidavit, Judge Frank characterized the Vielmetti article as "scandalous and untrue" and stated that he believed that Mr. Straley "inspired" the article.¹¹ (See Respondent's Exhibit 1 at 3.) He stated that he "was appalled that the St. Petersburg Times would publish such an article" and suggested that the article accused him of criminal conduct. (See Respondent's Exhibit 1 at 4.) He also alleged that Mr. Straley had attempted to inspire a similar article in the Tampa Tribune, but that Judge Frank was able to dissuade the editor of the Tampa Tribune from publishing the article. (See Respondent's Exhibit 1 at 3.)

Judge Frank's affidavit also detailed a series of telephone calls he and Stacy Frank had received in which the caller hung up without saying anything. He contended

¹¹ Judge Frank testified before the Hearing Panel that the article made him "look bad," "gave the appearance of impropriety," and questioned his honesty. (See T1:112:1-T1:113:5.)

that the calls were "harrassive and violate Chapter 365, Florida Statutes." (See Respondent's Exhibit 1 at 2.) He averred that he purchased a Caller I.D. device that identified subsequent hang up calls as coming from Mr. Straley's home. (See Respondent's Exhibit 1 at 2.) Judge Frank returned one of the calls to Mr. Straley and hung up when Mr. Straley answered. (See Respondent's Exhibit 1 at 2.) He also accused Mr. Straley of calling Stacy Frank and threatening to "drag me through the newspapers unless Stacy withdrew her claims upon the marital estate." (See Respondent's Exhibit 1 at 5.) Judge Frank concluded by averring that he had received another hang up phone call from a bar that he had been told Mr. Straley frequented and by stating, "Straley, to my knowledge, is an alcoholic." (See Respondent's Exhibit 1 at 5.)

Judge Frank testified in the Straley Grievance Proceeding that he had stayed away from the Straley Divorce Litigation.

As a result of Judge Frank's complaint, the Straley Grievance Committee initiated an investigation of Mr. Straley. (See Answer at 2.) Judge Frank testified before the committee in support of his grievance. (See T1:79:12-T1:80:6; Answer at 3-5.) He gave the following testimony regarding the Vielmetti Article during his examination by Mr. Straley's counsel:

Q Well, you would agree that the article is accurate insofar as it indicates Straley won an appeal with respect to the meat of the issues. Right?

A I will tell you, I have studiously stayed away from Stacy's divorce litigation.

(T2:184:1-10; Answer at 3-4.) This testimony was quoted in the Notice of Formal Proceedings against Judge Frank. (See Notice of Formal Proceedings at 3.) In his Answer and testimony before the Hearing Panel, Judge Frank presented the rest of his answer to the question posed:

I will tell you also that I don't believe I've even read more than once any of the opinions that came out of the Fifth District.

And I've had a Fifth District -- I've been with the Fifth District Judges on several occasions and I have never discussed Stacy's case with any of them. I just don't know that much about it. I have stayed out of it.

I do know that Judges have come to me and have said that a bizarre result was reached over in the Fifth District, but I've never commented about that to anyone.

(T2:184:10-24; Answer at 4.) The Answer also stated that Judge Frank "did not participate in the legal proceedings surrounding the divorce other than lending her money to pay a portion of the fees owed to her counsel." (Answer at 6-7.)

Judge Frank also testified that he had never discussed the representation of Stacy Frank with Judge Altenbernd.

After testifying as to his involvement in the Straley Divorce Litigation, Judge Frank's testimony in the Straley Grievance Proceeding moved to the Vielmetti Article's statement about Judge Frank's knowledge of Judge Altenbernd contacting Mr. Vaka:

Q [T]he reporter quotes you as saying that you were unaware that Chris Altenbernd asked George Vaka to represent your daughter.

A Right.

Q Is that true?

A It's absolutely true. I never discussed with Chris Altenbernd the representation of my daughter, to the best of my knowledge.

(Answer at 4-5; T1:80:7-T1:81:14; T2:186:18-T2:187:14.)

Before the Hearing Panel, Judge Frank again asserted that he "did not discuss the representation of Stacy with Altenbernd." (See T2:226:9-10; see also Answer at 5 ("Denied that this testimony dealt with the hiring of Mr. Vaka.")) In the Answer,

Judge Frank tried to reconcile these statements with the admitted fact that he did speak to Judge Altenbernd about Mr. Vaka handling Stacy Frank's appeal as follows:

The communication between Judge Frank and Judge Altenbernd involved the question posed by Judge Frank as to whether George Vaka would be competent and willing to consider the handling of a matrimonial matter on appeal. The answer by Judge Frank to the question posed occurred in direct response to the precise phrasing of the question Although Judge Altenbernd may have assumed the reason for the inquiry, Judge Frank never mentioned Stacy Frank's name or that the inquiry related to his daughter's need for counsel.

(Answer at 5-6.)

Judge Frank's testimony at the hearing further sought to reconcile his denial of any discussions with Judge Altenbernd regarding the representation of his daughter with the conversations he had with Judge Altenbernd as follows:

Q Here's -- here's your testimony, and I've got it underlined. Why don't you read it. You read the question and answer.

A Yes, I never asked Chris Altenbernd to ask Vaka to represent my daughter.

Q But that was the question. Your answer was, "I never discussed with Chris Altenbernd." Now, are you making some kind of distinction?

A Yes, a very rational one. There's a big --

Q What is the rational distinction?

A There's a big difference between asking someone to do something for you and asking someone if another person is competent to do something.

Now, my question to Altenbernd was, "Do you believe that George Vaka could handle a matrimonial matter?"

Now, you have -- you have to understand why I say that. George Vaka had appeared in front of me on many, many occasions in one very limited field, and that was insurance defense work.

But I knew him to be an extremely competent lawyer, and I had no difficulty forming the judgment that if he -- if he could -- if he could represent Stacy, that would be fine for Stacy because of his competence. But I did not ask George -- Chris Altenbernd to ask Vaka to represent Stacy.

Q You answer, Judge -- and I -- I mean we're going to start talking about technicalities -- your answer was, "It's absolutely true. I never discussed with Chris Altenbernd the representation of my daughter."

Now, you did discuss the representation of your daughter. Even if you didn't ask him, you discussed it, didn't you?

A Well, I'm not sure how far you want to stretch the word "discussed." And obviously you want to stretch it, but --

Q I do? You think that's stretching it?

A Of course. If you ask a question, there's a big difference between that and a discussion.

I asked one question: "Do you think George Vaka would be competent to handle a domestic relations matter?" And that was it.

Q And he came back and said, "Yes, I have discussed it with George Vaka, and he said, 'Have Stacy call me.' "

A All -- all I recall Chris Altenbernd saying was, "Have Stacy call George Vaka." That's all I recall.

Q All right. Well, then you knew that you discussed --

A Well, that was much later. That was much later in time. See, the question doesn't speak to the context of -- what the context was when I first spoke with Altenbernd.

Q We're talking about -- there's two conversations. You spoke with Judge Altenbernd.

A Yeah. Right.

Q And he spoke with Vaka, and then he spoke with you. Is that correct?

A Yes. Yeah.

Q And you don't think that those three things are in discussion -- constitute a discussion about whether ... Vaka could represent Stacy?

A Well, let me tell you. If this whole things [sic] hinges on the word "discussion," I probably had a -- an inaccurate concept of what it - or the value given to the words that were spoken between us.

Was there a discussion, give and take between two people? No, there was not. There was one question asked. Then Chris Altenbernd took it upon himself to do what he did.

(T1:81:10-T1:84:10.)

Judge Frank's counsel was prevented from eliciting testimony from members of the Straley Grievance Proceeding that they did not consider Judge Frank's testimony to be misleading or material.

Judge Frank's counsel also sought to illicit testimony from members of the Straley Grievance Committee "whether or not they felt or were of the opinion or impression that they were somehow misled by the testimony of Judge Frank in connection with the grievance proceedings." (T5:682:2-10.) Specifically, he proffered that they would have testified that "there was nothing that Judge Frank said in that proceeding that in any way misled them into doing something that they would not otherwise have done." (T5:683:17-20.) Judge Kaney sustained objections to this testimony by the Commission's counsel on the ground that this line of questioning was irrelevant, speculative, and called for a legal conclusion and by counsel for The Florida Bar on the ground that the questions asked for the confidential mental processes of the grievance committee members. (See T4:508:21-T4:510:13; T4:522:12-24.)

Judge Frank sought to control the prosecution of the Straley Grievance Proceeding.

The Straley Grievance Committee found probable cause and filed a formal complaint against Mr. Straley with three counts: (1) inspiring the Vielmetti Article, (2) placing hang-up telephone calls to Judge and Stacy Frank, and (3) calling Stacy Frank and threatening to tell the newspapers that Judge Frank was accepting bribes if she did

not settle the Straley Divorce Litigation. (See T3:308:4-14: Respondent's Exhibit 3.)¹²

The committee did not find probable cause on Judge Frank's allegation that Mr. Straley's telephone calls constituted a crime. (See T3:317:15-T3:318:5.)

Joseph Corsmeier, the assistant staff counsel prosecuting the grievance, testified that Judge Frank assumed a very active role throughout the Straley Grievance Proceeding. During the investigation stage, before the finding of probable cause, Mr. Corsmeier testified that Judge Frank "would quiz me as to how the investigation was going, give me little tips or pointers as to how to conduct my investigation, from what I recall." (See T3:311:1-4.) He testified that throughout the proceedings Judge Frank acted like the charges were "far more serious" than Mr. Corsmeier believed. (See T3:312:21-24.) Even Judge Frank's counsel emphasized that Judge Frank made Mr. Corsmeier aware that the judge "was very concerned about this situation and the complaint he filed and he wanted the matter prosecuted diligently." (See T3:326:25-T3:327:6.)

Though he was only a complaining witness, Judge Frank called Mr. Corsmeier frequently, always identifying himself as a judge. (See T3:313:18-T3:314:21.) Mr.

¹² Respondent's Exhibit 3 is the original complaint filed after the finding of probable cause. (See T3:323:23-T3:324:4.) Although it did not formally divide the case into three counts, the prosecutor who filed it believed that he filed an amended complaint dividing the allegations into the three separate counts. (See T3:324:5-10.)

Corsmeier's notes showed that Judge Frank left at least eleven messages from November 1994 until November 1995, and that Mr. Corsmeier returned each message. (See T3:313:14-T3:314:5.)¹³ Judge Frank always identified himself as a judge and conveyed the impression that Mr. Corsmeier "was a mere Bar bureaucrat and ... needed some guidance from him ... to help ... out with the prosecution of the case." (See T3:314:16-T3:315:5.)

Once the committee found probable cause, Mr. Corsmeier discussed with Mr. Straley the possibility of Mr. Straley admitting the charge in exchange for the committee finding "minor misconduct," which would have obviated the need for proceedings before the referee. (See T3:311:17-24.) When Mr. Corsmeier discussed this possibility with Judge Frank, Judge Frank became "extremely upset" and threatened, "If it's a minor misconduct, I'm going to the Board of Governors."¹⁴ (See T3:312:13-T3:313:3; T3:327:12-14.) While Judge Frank did not explicitly state that "because he was a judge, he could cause the Bar Association to do something which it would otherwise do," his threat implied to Mr. Corsmeier that the judge "felt he had the ability to do that." (See T3:327:15-21.)

¹³ Judge Frank testified that he could not remember calling Mr. Corsmeier "more than once, twice at the most." (See T1:132:6-8.)

¹⁴ Mr. Corsmeier testified that a complainant in a grievance proceeding is not a party and has no right of appeal. (See T3:313:7-13.)

The majority of the grievance against Mr. Straley was decided in Mr. Straley's favor on summary judgment, and the bar dismissed the remainder of the grievance.

The referee assigned to try the charges granted summary judgment in Mr. Straley's favor on the first two counts, leaving the count involving Mr. Straley's conversation with Stacy Frank as the only charge in the Straley Grievance Proceeding. (See T3:308:20-T3:309:15.) Mr. Corsmeier testified that when the committee had found probable cause, he believed the grievance involved "a lot of novel issues" and should be tested before the referee. (See T3:316:14-20.) He further testified that when they were "tested" before the referee, the referee not only dismissed the first two counts, but also indicated that he "was not real happy and was not real thrilled with the third count. And he made it very clear ... at that hearing." (See T3:316:20-T3:317:1.)

After discussing how to proceed following the summary judgment ruling, Mr. Corsmeier and three of his superiors with the bar, including Mr. Boggs, the Director of Lawyer Regulation, agreed not to request a rehearing and eventually to dismiss the remaining count. (See T3:309:20-T3:310:10.) The remaining count involved Stacy Frank only and did not involve Judge Frank. (See T3:343:18-T3:344:2.)

Judge Frank became furious and pursued a complaint of incompetence against the bar counsel who prosecuted the Straley Grievance Proceeding.

After the summary judgment rulings, Judge Frank called Mr. Corsmeier's supervisor, David Ristoff, on several occasions. (See T3:350:5-10.) In the first call, Judge Frank complained about the bar's decision not to move for rehearing and severely criticized Mr. Corsmeier's competence. (See T3:351:21-T3:353:21.) Mr. Ristoff testified that Judge Frank "was adamant that we did not understand the law; that under the argument of a summary judgment that the facts are presumed to be correct; and the facts, as alleged, alleged -- or set forth a crime that was committed." (T3:352:5-9.) Judge Frank also criticized the referee's understanding of the law. (See T2:352:17-24.)

When Mr. Ristoff told the judge that the bar could not allege that a crime was committed because the grievance committee did not find probable cause on this charge, Judge Frank began to criticize Mr. Corsmeier's handling of the case. (See T3:352:10-16; T3:353:7-21.) Judge Frank told him that Mr. Corsmeier had "done a terrible job" and that "a number of lawyers" and "several people on the grievance committee" had told Judge Frank that Mr. Corsmeier was incompetent. (See T3:353:15-21.)¹⁵ Specifically, Judge Frank said that Mr. Blank, the investigating member of the committee, had told him that Mr. Corsmeier had done a poor job. (See T3:353:14-18.)

¹⁵ Mr. Ristoff testified that at that point he had worked with Mr. Corsmeier for five or six years and found Mr. Corsmeier to be a "very competent and hardworking lawyer." (See T3:353:24-T3:354:8.)

Mr. Ristoff characterized the conversation as follows: "It was very tense. He was obviously very upset concerning the Bar's handling of the case. He was very derogatory toward ... Joe Corsmeier, and it was not a pleasant conversation." (T3:354:22-25.)

Judge Frank called back to tell Mr. Ristoff that he had received more hang-up telephone calls since the motion for summary judgment was filed. (See T3:355:2-12.) When Mr. Ristoff asked whether Judge Frank had reported the calls to the police, the judge responded, "Yeah, like I would tell you and Corsmeier that." (T3:355:13-16.) After Mr. Ristoff told the judge that his response was "very insulting," the judge added, "Well, maybe not you, but Corsmeier." (T3:355:17-20.) At the hearing, Judge Frank characterized this conversation as "bilaterally hostile," but said he could not remember making those remarks. (See T1:134:16-T1:135:11.) Mr. Ristoff testified that Judge Frank called back later and said he hoped he had not caused Mr. Ristoff "any discomfort." (T3:356:10-14.) Judge Frank denied this, though when reminded that his counsel had referred to this call in the opening statement, he stated he was sure he had made the call, but just could not remember it. (See T1:135:8-24.)

When Judge Frank learned that the remaining count was dismissed, he called Mr. Corsmeier and again was very upset, even though the remaining count did not involve him. (See T3:341:12-20; T3:343:18-21.) He also called Mr. Ristoff to ask why the

case had been dismissed. (See T3:356:20-23.) When Mr. Ristoff replied that the bar was "unable to sustain the charges," the judge again attacked Mr. Corsmeier's competence. (See T3:356:23-T3:357:2.) He told Mr. Ristoff that he had spoken with the president of The Florida Bar about the situation and that Mr. Ristoff "was also a target." (See T3:357:2-6.) Mr. Ristoff understood this to mean that Judge Frank wanted to initiate an investigation into the competence of Mr. Corsmeier and Mr. Ristoff. (See T3:357:10-14.)

Judge Frank in fact had called the president of the bar, then the bar's executive director, then Mr. Boggs. (See T1:135:25-T1:136:16; T2:206:17-T2:207:2.) Judge Frank complained about Mr. Corsmeier's competence to Mr. Boggs during at least five separate telephone calls. (See T3:367:5-9, 21-25.) Each time, the judge made sure to introduce himself as "Judge Frank, Chief Judge of the Second District Court of Appeal." (See T3:367:10-16.) After the dismissal of the remaining count of the grievance, Judge Frank repeated his complaints of incompetence. (See T3:368:2-9.) Mr. Boggs emphasized that the judge was complaining not just that Mr. Corsmeier did not do a "good job," which would have been a simple personnel matter, but that he was challenging Mr. Corsmeier's professional competence as a lawyer. (See T3:368:18-T3:369:7.) Mr. Boggs told the judge that he would conduct an investigation into the judge's allegations. (See T3:369:12-19.)

Mr. Boggs conducted a thorough investigation of the matter which included travelling twice to Tampa from Tallahassee, reviewing the entire litigation file, and interviewing Mr. Blank, Mr. Straley's counsel, and even the judge who granted summary judgment for Mr. Straley. (See T3:369:20-23.) At Judge Frank's request, he also interviewed Mr. Vaka. (See 370:24-T3:371:2.) Although he had received hundreds of complaints about bar counsel in the past, Mr. Boggs testified that he had never before gone to a branch office to review a file, interview individuals not involved in the case or interviewed a referee about a specific lawyer in a specific case. (See T3:371:3-21.) He explained his actions as follows:

Q Real briefly, why did you conduct such an in-depth investigation in this case if you hadn't in all the other cases?

A It was not only my decision but the decision of those that were discussing this, that it was necessary because of who Judge Frank was and quite frankly the feeling that we all had that if we did not do more here to show the judge that we were at least responsive to his criticisms, that we ourselves would be criticized in some other capacity or some other way.

Q What was the judge's tone of voice when he spoke to you on the phone?

A Generally speaking he was agitated. He was not happy with what was going on with the Bar proceedings, and he was very unhappy with Joe Corsmeier personally.

(T3:380:24-T3:381:12.)

Nobody Mr. Boggs interviewed suggested that Mr. Corsmeier was incompetent, and Mr. Boggs concluded that there was no evidence to conclude that Mr. Corsmeier had handled the grievance incompetently. (See T3:373:2-7.)

Judge Frank falsely denied knowledge that he had caused Mr. Corsmeier's competence to be investigated.

Judge Frank asserted in the Answer that he was "unaware of any investigation of Mr. Corsmeier, or the results of such an investigation" until he learned of the investigation in these proceedings. (See Answer at 9-10.) In his testimony, he again denied knowing that he had endangered Mr. Corsmeier's job until these proceedings. (See T1:136:25-T1:137:14.) The testimony and evidence at the hearing, however, demonstrated these assertions to be false. In addition to Mr. Boggs testimony that he had told Judge Frank he would investigate the judge's complaint, Mr. Boggs sent the judge two letters regarding the investigation. (See T3:369:12-19; Commission's Exhibits 6 & 7.) Judge Frank admitted to receiving and reading the letters. (See T1:138:8-23; T1:140:1-22.)

The first letter, dated January 17, 1996, provided a "status report" on the investigation, and the second letter, dated February 14, 1996, informed Judge Frank of the results of Mr. Boggs' investigation. (See Commission's Exhibits 6 & 7.) Judge Frank argued that the first letter did not suggest that the investigation was based on his

complaints of incompetence. (See T1:138:24-T1:139:15.) The second letter, however, was captioned "Complaint of Incompetence" and stated that the investigation was "predicated on [Judge Frank's] complaint that the matter was not competently handled." (Commission's Exhibit 7 at 1.) The letter informed Judge Frank that Mr. Blank, whom the judge had reported to Mr. Ristoff as complaining of Mr. Corsmeier's performance, (see T3:353:14-18), told Mr. Boggs "that he saw no shortcomings in Mr. Corsmeier's performance." (Commission's Exhibit 7 at 2.) The letter also informed the judge that Mr. Boggs and other bar personnel "with the authority to effect dismissal of the [Straley] matter advised Mr. Corsmeier (at an early stage) that the matter was fraught with practical (factual), legal and policy issues that suggested abandonment." (Commission's Exhibit 7 at 2.)

Despite the best efforts of his counsel, Judge Frank demonstrated little genuine remorse for the trouble he caused Mr. Corsmeier.

After learning of the Commission's charges against Judge Frank regarding his interference with the Straley Grievance Proceeding, Judge Frank's counsel contacted Mr. Corsmeier and asked him "if it would be prudent for the judge to send a letter of apology" to help Judge Frank's defense. (See T3:344:12-21; T3:347:13-17.) Mr. Corsmeier clarified that Judge Frank's conduct had not so much "hurt his feelings" as it had questioned his "professional integrity," that this was especially damaging because Judge Frank was the Chief Judge of the Second District, and that it impacted him "every single day" at the bar because he "had to work under this cloud." (See T3:345:3-15.) Mr. Corsmeier acknowledged that Judge Frank did send him a letter stating that the judge "was sorry to cause [Mr. Corsmeier] any discomfort," but under the circumstances, he believed that the letter was not genuine, but was simply an attempt to assist his defense before the Commission. (See T3:345:17-T3:345:1.)

Judge Frank's counsel attempted to elicit some acknowledgement from Judge Frank that he acted improperly regarding Mr. Corsmeier, but Judge Frank resisted:

Q Well, in any event as you look back on it, Judge, do you wish that perhaps you had maybe been more amiable or more -- less abrasive or less --

A More gentle?

Q More gentle?

A I suppose I could have said what I said in a more gentle way, of course. But I didn't feel that I had to refrain from reacting, and I -- I'm quick -- I'm quick to concede that perhaps I overreacted.

But these weren't children I was talking to; these were men who had been in the legal world for a while, and I presumed that they would have some thick skin.

(T5:661:17-T5:662:6.)

Mr. Vaka appeared before Judge Frank several times while representing Stacy Frank, and on at least twelve occasions Judge Frank neither recused nor disclosed his relationship with Mr. Vaka to opposing counsel.

In the Answer, Judge Frank admitted that he "sat on two cases in which Mr. Vaka represented the appellee in 1993, both of which were affirmed by a unanimous panel of three judges," but alleged that there "were no other cases since 1993." (Answer at 7.) In fact, however, Mr. Vaka appeared at least twelve times before Second District panels on which Judge Frank sat between the end of 1991 (after Mr. Vaka was retained by Stacy Frank) and November 28, 1994, the date of the last published opinion in the Straley Divorce Litigation in which Mr. Vaka represented Stacy Frank. (See Commission's Exhibit 4.)¹⁶ Mr. Vaka represented the appellant or

¹⁶ This exhibit was a compilation of the records of the Second District, certified by the clerk of that court. (See T1:122:5-T1:123:20; see also Florida Judicial Qualifications Commission's Request for Judicial Notice.) It only includes appeals decided during this time period.

petitioner in three of those cases.¹⁷ (See Commission's Exhibit 5.¹⁸) Judge Frank neither offered to recuse in any of these cases nor disclosed his relationship to Mr. Vaka to opposing counsel.

Judge Frank did recuse, however, from all domestic relations appeals after his daughter lost the appeal before the Fifth District sitting as the Second District. (See T1:68:25-T1:69:8; T1:119:22-T1:120:4; see also Respondent's Exhibit 2.) Judge Frank testified that he recused from all such cases because he "found the Fifth District opinion rather difficult to deal with, and I was not going to have -- and we could have been

¹⁷ During the deposition of Judge Frank, his counsel explained that he did not thoroughly investigate the number of cases in which Mr. Vaka appeared before Judge Frank in preparing the Answer, but Judge Frank did not amend the Answer.

¹⁸ To support its claim of an appearance of impropriety, the Commission presented a summary of the cases in which Mr. Vaka appeared before the Second District while representing Judge Frank's daughter. Commission's Exhibit 5 summarizes the cases by showing that Mr. Vaka's clients prevailed (i.e., he represented the appellant in a reversal or the appellee in an affirmance or dismissal) before the Second District in all twelve cases in which Judge Frank sat on the panel, but lost eleven out of eighteen cases in which Judge Frank was not on the panel.

The Commission repeatedly clarified that it was not attempting to show any actual impropriety (i.e., that Judge Frank influenced the favorable rulings based on Mr. Vaka's representation of his daughter), but rather to show an appearance of impropriety that might lead a reasonable litigant to seek to disqualify Judge Frank. (See T1:124:8-16; T1:127:10-22.)

The Hearing Panel did not rely on this evidence, finding that there were "too many factors which the statistical analysis does not consider" and that "Mr. Vaka's statistical won/loss record is irrelevant." (Findings at 29.)

affected by it in the Second District because the Fifth was sitting as the Second." (T1:69:9-16.) He was not so much concerned with having to sit on one of Stacy's cases, as "having to apply [the opinion], having to follow it, having to be in a situation where I am her father and I am following or using or relying upon a case that affected her," even where the case involved other litigants. (T1:70:2-11.)

Judge Frank also recused himself from some cases on which Mr. Vaka sat after the Vielmetti Article appeared, though he also sat on some of Mr. Vaka's cases during that time. (See T2:180:5-22.) Specifically, he had Mr. Vaka's firm placed on his recusal list on October 27, 1993, over a month after the article was published and the day before he filed his affidavit initiating the Straley Grievance Proceeding. (See Respondent's Exhibit 2.) He removed the firm from his list on December 26, 1995, and returned the firm to the list sometime after January 8, 1998. (See Respondent's Exhibit 2.)

The Hearing Panel heard views from five judges on the duty of a judge to disclose a potential conflict of interest.

Judge Frank called four current or former district judges, and each testified as to the duty of an appellate judge to disclose facts that might lead a litigant to question the judge's partiality. Additionally, the Commission presented a March 1, 1989, opinion authored by Judge Frank while he was Chairman of the Committee on

Standards of Conduct Governing Judges (the "Frank Opinion"). (See Commission's Exhibit 7.)

Judge Alan R. Schwartz of the Third District testified that an appellate judge is never required to recuse and that the test for recusal is an entirely personal decision, (see T3:436:7-17), though he did admit that "perhaps" the test for disclosure is "a lot lower" than the test for recusal, (see T3:439:13-16.)

Judge Peter D. Webster of the First District testified that he was "not sure anybody really understands what the rules [for recusal] are because the rules are kind of created by the Supreme Court of Florida as they go along." (See T4:454:24-T4:455:2.) When asked if a judge should disclose "if there is even a smidgen of a question in someone's mind," Judge Webster answered that that "certainly" was true for trial judges, but he was unsure for appellate judges. (See T4:459:20-T4:460:17.) When given a series of hypothetical facts similar to the facts in this case, Judge Webster ultimately admitted that if he were a lawyer, he would want to know the relationship between the judge and the opposing counsel. (See T4:464:6-T4:470:14.)

At this point, the Commission presented Judge Webster with an opinion that Judge Frank had issued on behalf of the Committee on the Standards of Conduct Governing Judges. (See T4:472:2-6.) The opinion responded to an inquiry from a judge with a social relationship with an attorney who had contributed to the judge's

son's interest in quail hunting and had permitted the judge to use his cabin in North Carolina. (See Commission's Exhibit 8.) Judge Frank reported that the majority felt that the inquiring judge "must disclose the relationship with and the benefit received from the attorney whenever that attorney appears" before the judge, though the judge was not required to recuse automatically. (See id.)

Judge Richard Lazzara, formerly a colleague of Judge Frank on the Second District and now a federal judge, testified that the duty to recuse is determined on "case-by-case basis, and you do a lot of soul searching." (See T4:531:4-11.) He agreed with the statement posed by a member of the Hearing Panel that the standards for recusal and disclosure are the same -- "it's a case-by-case basis, and the judge -- and the judge does the soul searching, and it's not subject to any other standards." (See T4:540:7-15.) As to the facts involving Judge Frank, he testified that he knew "nothing about the facts of the case" other than what he read in the newspaper and hesitated to respond due to an admitted bias in favor of Judge Frank. (See T4:536:14-18; T4:537:14-21.)

Finally, Judge Monterey Campbell, also a colleague of Judge Frank on the Second District, testified that, as the chief of the Second District at the time, he recused the entire court from the first appeal in the Straley Divorce Litigation. (See T4:562:15-T4:564:19.) He testified that he did so in part to avoid the appearance of impropriety

and in part to avoid potential adverse effects on the court's collegiality if members of the court decided an appeal adverse to Judge Frank's daughter. (See T4:566:3-17.) He had discussed this with Judge Frank, but did not know of Mr. Vaka's relationship to Judge Frank and the Straley Divorce Litigation until the Commission's proceedings had begun. (See T4:564:5-9.) He testified that he had "sat on numerous of the cases ... that Judge Frank sat on involving George Vaka," and he rejected any suggestion of impropriety regarding these cases "other than the fact that perhaps [Judge Frank] should have recused himself -- perhaps." (T4:564:21-T4:565:4.)

Judge Frank lied to the Hearing Panel about how he first learned of Judge Altenbernd's conversation with Mr. Vaka and how he first learned of the Commission's investigation into his conduct.

Judge Frank's defense ended with accusations that the Investigative Panel did not inform him directly of the charges against him, but instead directed him to speak to Judge Altenbernd. (See T5:664:3-T5:665:1.) The topic arose when Judge Frank insisted that the first time he learned of Judge Altenbernd's conversation with Mr. Vaka was when he spoke with Judge Altenbernd following a meeting of the Commission in November 1997. (See T5:656:9-13; T5:657:11-12; see also T2:224:24-T2:225:3.) He testified that after the meeting, Judge Gilbert Goshorn, the Chairman of the Investigative Panel, and Thomas C. MacDonald, Jr., the Commission's general counsel and legal advisor to the Investigative Panel, asked him to stay for a moment and told

him that he should meet with Judge Altenbernd, who would tell him "what this is all about." (See T5:663:16-25.)

Judge Frank flatly denied the suggestion that Judge Goshorn and Mr. MacDonald discussed with Judge Frank the charges they were investigating. (See T5:664:3; T5:667:21-T5:669:9.) He testified that any suggestion that they had gone over the charges with him was "absolutely untrue." (T5:664:3-9; T5:664:19-23.) Indeed, he stated that if Judge Goshorn or Mr. MacDonald testified to the contrary, he would be "amazed." (See T5:664:25-T5:665:1.)

When the Commission offered to call Mr. MacDonald, the Hearing Panel went into executive session and determined that they wanted to hear from him. (See T5:665:10-T5:666:5.) The Commission gave Judge Frank a chance to recant his testimony after indicating that it was going to call Mr. MacDonald to testify, and Judge Frank again insisted that Judge Goshorn and Mr. MacDonald "did not talk to me about the charges" and "did not mention any one of [the charges]." (T5:667:21-T5:668:1; T5:669:1-9.)

Mr. MacDonald, who was not in the courtroom when Judge Frank gave this testimony, was summoned and testified that he and Judge Goshorn had in fact discussed the charges with Judge Frank in detail after the JQC meeting. (See T5:686:2-

T5:687:10.)¹⁹ Mr. MacDonald related that Judge Frank told them that he thought that the issues in Count I "had been resolved." (T5:686:17-19.) While he conceded that they told Judge Frank that he might want to talk to Judge Altenbernd, Mr. MacDonald testified that this advice was in response to Judge Frank's statement that he did not remember the details of his conversation with Judge Altenbernd. (See T5:688:8-T5:689:7.) Finally, in response to a question from the Hearing Panel, Mr. MacDonald testified that the conversation between him, Judge Goshorn and Judge Frank lasted thirty to forty-five minutes. (See T5:697:4-7.)²⁰ The Hearing Panel expressly found Judge Frank's testimony to be false. (See Findings at 33.)

After Mr. MacDonald's testimony, Judge Frank rested his case, and the parties presented closing arguments. (See T5:698:9-T5:699:3.) Judge Frank, who had moved

¹⁹ They did not discuss the charges relating to Craig Weber because the complaint on that matter had not yet been filed with the Investigative Panel. (See T5:687:11-14.)

²⁰ Judge Frank raises the issue again in the Response, accusing Judge Goshorn and/or Mr. MacDonald of departing from "previous Commission procedures" by directing Judge Altenbernd to give Judge Frank correspondence between Judge Altenbernd and Mr. Corsmeier that demonstrated that Judge Frank's testimony to the Straley Grievance Committee was false. (See Response t 13 n.4.)

Mr. MacDonald's testimony made clear that not only did he and Judge Goshorn not ask Judge Altenbernd to give any documents to Judge Frank, Mr. MacDonald did not even know that Judge Altenbernd had done so. (See T5:693:5-T5:694:21.)

to dismiss the charges at the end of the Commission's case, (see T3:420:6-T3:432:9),²¹ did not renew his motion or otherwise challenge the sufficiency of the evidence against him.

Judge Frank's Motions Regarding Breaches of Confidentiality

Judge Frank refers in the Response to two pretrial motions he filed regarding alleged breaches of the Commission's rules on confidentiality for Commission investigations. On July 14, 1998, Judge Frank filed a Motion for Entry of Order to Show Cause Why Craig Weber Should Not Be Held in Contempt (the "Weber Motion"), in which he alleged that Mr. Weber violated the oath of confidentiality contained in Rule 23(c) of the Florida Judicial Qualifications Commission Rules. Similarly, on August 3, 1998, Judge Frank filed a Motion for Inquiry into Breach of Rule 23 (the "Investigative Panel Motion") in which he intimated a possible breach of confidentiality by one or more members of the Investigative Panel of the Commission.

On October 23, 1998, both the Investigative and Hearing Panels of the Commission held a joint session at which they took up the Weber Motion and the Investigative Panel Motion. On November 4, 1998, the Commission issued its Order on Motion for Entry of Order to Show Cause, ruling that the Weber Motion would be

²¹ In that motion, he did not question the fact that the Commission did not enter into evidence the entire transcript from the Straley Grievance Proceeding.

treated as a notice of an alleged breach of confidentiality and reserved jurisdiction to take further action on the notice as may be required. That same day, the Commission issued its Order Denying Motion for Inquiry, in which it assumed that the allegations in the Investigative Panel Motion were true, but denied the motion because it failed sufficiently to allege that Judge Frank was prejudiced by any breach of confidentiality in defending against the charges against him. The Hearing Panel also addressed the two confidentiality motions in the Findings. The panel clarified that the issues raised in those motions were "not germane to its determination of the formal charges." (Findings at 14.)

SUMMARY OF ARGUMENT

Judge Frank seeks to avoid discipline on all three counts with a barrage of technical arguments. As to Count I, he admits that he made the statements that are the basis of the Count, but argues that he should not be disciplined for making the statements because they were literally true, they were not material to the Straley Grievance Proceeding, and the Commission did not introduce the entire transcript from the grievance proceeding. Even if the statements were technically accurate, which they were not, they were sufficiently misleading to warrant discipline. The Commission was not required to prove that the statements were material to the grievance proceeding, but

in any event, the statements were material. Finally, if Judge Frank truly believed that the rest of the transcript would have remedied the untrue and misleading nature of his statements, he bore the burden of providing the rest of the transcript.

As to Count II, Judge Frank argues that there was insufficient evidence to establish a duty to disclose, arguing that the decision to recuse or disclose was within his sound discretion. This argument confuses a litigant's right to disqualify a judge from a judge's ethical duty to disqualify himself or herself or to disclose in accordance with the Code of Judicial Conduct. Judge Frank's personal involvement in the Straley Divorce Litigation, his active role in Stacey Frank's retention of Mr. Vaka, and his efforts to conceal that role all served to create the duty to disclose. Judge Frank also offers technical arguments that the Hearing Panel's findings differed from the charge, that attorneys appearing before Judge Frank were already aware of his relationship to Mr. Vaka, and that the Commission was required to but failed to call an expert witness on the issue. These arguments fail because the findings did not differ materially from the charge, Judge Frank's argument that the attorneys appearing before him were aware of his relationship to Mr. Vaka relies on insupportable assumptions, and while the Commission was not required to call experts, the expert testimony presented supports the Hearing Panel's finding.

As to Count III, Judge Frank contends that the evidence did not show that he used his position as a judge in interfering with the Straley Grievance Proceeding, that he was obligated to report Mr. Straley's alleged misconduct, and that he should not be disciplined because the public was not aware of any of his actions until these proceedings. The evidence shows, however, that Judge Frank's involvement and interference in the Grievance Proceeding related directly to his position as a judge, a position to which he frequently referred. While Judge Frank did have a duty to report Mr. Straley's alleged misconduct, Judge Frank improperly exceeded this duty by not only reporting the alleged misconduct but attempting to control the prosecution of the grievance. Regardless of whether the public actually was aware of his conduct, Judge Frank's conduct was unethical and warrants discipline.

Finally, Judge Frank argues that he should not be disciplined because Mr. Weber and possibly a member of the Investigative Panel breached the Commission's confidentiality rules. The Hearing Panel properly found that his allegations did not prejudice his defense. Thus, they are irrelevant to the issue of whether Judge Frank should be disciplined.

ARGUMENT

I. JUDGE FRANK'S TESTIMONY BEFORE THE STRALEY GRIEVANCE COMMITTEE WAS UNTRUE AND MISLEADING.

Judge Frank does not deny that he made the statements that are the basis of Count I,²² but instead offers three technical arguments as to why these statements should not subject him to discipline. First, he argues that his statements were technically accurate. (See Response at 6-8, 12-13.) Second, he contends that the Commission was required to prove that his statements were "material," but failed to do so. (See Response at 8-12.) Finally, he claims that the Commission's failure to introduce the entire transcripts from the Straley Grievance Proceeding is fatal to the Commission's case. (See Response at 13-15.)

A. The evidence conclusively demonstrates that Judge Frank's testimony was misleading, even under Judge Frank's semantic arguments that it was technically accurate.

²² As noted in the Statement of the Facts, Judge Frank admitted telling Mr. Vielmetti that he stayed away from the Straley Divorce Litigation and never discussed Mr. Vaka's representation of his daughter with Judge Altenbernd. (See T1:76:25-T1:77:13.) These are the same statements, in substance, that he made under oath before the Straley Grievance Committee. The Hearing Panel's finding that the latter statements were untrue and misleading therefore compels the conclusion that "Judge Frank was not completely candid in his statements to the newspaper." (See Findings at 30.)

Thus, Judge Frank's representation to this Court that there was no evidence presented as to his statements to Mr. Vielmetti is disingenuous and adds nothing to his arguments. (See Response at 3 & n.1.) The Hearing Panel made "no specific findings" regarding these statements simply because the sworn testimony was more "important and essential." (See Findings at 26.) Judge Frank's untrue and misleading statements to Mr. Vielmetti are clear from the record, though the Commission's recommendation for discipline is not directly based on them.

Judge Frank's statements that he stayed away from the Straley Divorce Litigation and never discussed Mr. Vaka's representation of his daughter with Judge Altenbernd were patently false. He involved himself in the litigation by suggesting that his daughter retain Mr. Vaka, asking Judge Altenbernd if Mr. Vaka was competent to handle and would consider handling the representation, allowing (if not indirectly asking) Judge Altenbernd to approach Mr. Vaka about the representation, telling his daughter to call Mr. Vaka after Judge Altenbernd told him Mr. Vaka would consider the representation, and loaning his daughter \$30,000 to fund the litigation. His intense involvement in the litigation is demonstrated by the fact he became so upset at the Fifth District's adverse decision that he had to recuse himself from all future domestic relations cases.

Instead of denying any of these facts, Judge Frank seeks to avoid discipline by arguing over the technical meaning of the words "litigation" and "discuss." Even if this Court were to accept Judge Frank's assertions that his statements were literally accurate, discipline is still warranted because the statements were misleading at the very least. While Judge Frank's semantic arguments might suggest a defense to a criminal charge of perjury, *see, e.g., Bronston v. United States*, 409 U.S. 352, 360 (1973) (holding that "literal truth" is a defense to federal perjury charges), they have no application to this charging Judge Frank with unethical conduct.

Canons 1 and 2A of the Code of Judicial Conduct go beyond prohibiting a judge from violating the law (e.g., committing perjury). Canon 1 requires judges to "participate in establishing, maintaining, and enforcing high standards of conduct, and ... personally observe those standards so that the integrity and independence of the judiciary may be preserved." Canon 2A requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge that makes misleading statements under oath violates both of these canons, even if the statements are literally true. Indeed, this Court recently removed a judge based on "inaccurate, incomplete, and misleading testimony" in a judicial proceeding. See In re Hapner, 718 So. 2d 785 (Fla. 1998).

Judge Frank argues that his statement that he stayed away from the Straley Divorce Litigation is accurate because "[p]articipating in the litigation would entail drafting pleadings, drafting discovery, doing legal research, communicating with opposing counsel, appearing at hearings or trials, preparing witnesses for testimony, or something in that vein," and Judge Frank took none of these actions. (See Response at 5.) Instead of testifying that he did not "participate in the litigation," however, Judge Frank testified before the grievance committee that he "studiously stayed away" from the litigation. The absolute nature of this statement required Judge Frank to point out that he did have some involvement in his daughter's litigation.

Judge Frank himself demonstrated this principle in the Answer when he stated that he "did not participate in the legal proceedings surrounding the divorce other than lending her money to pay a portion of the fees owed to her counsel," (Answer at 6-7 (emphasis added)), and in the Response when he argued, "A lot can happen in litigation over a five or six year span of time, and it cannot merely be assumed that because Judge and Mrs. Frank loaned their daughter money early in the case that the Judge did not 'studiously stay away' from the litigation thereafter," (Response at 13 (emphasis added)). Judge Frank's failure to qualify his broad, absolute statement while under oath was misleading.

Judge Frank's defense regarding his statement that he "never discussed with Chris Altenbernd the representation of my daughter, to the best of my knowledge" is even more disingenuous. He admitted at trial (1) that he asked Judge Altenbernd if he thought Mr. Vaka was competent and willing to handle a domestic appeal, (2) that he knew Judge Altenbernd understood him to be referring to his daughter's appeal from the Fifth District decision, (3) that Judge Altenbernd told him that Judge Altenbernd would speak to Mr. Vaka, and (4) that Judge Altenbernd reported back to him that Mr. Vaka would consider representing Stacy Frank. Judge Frank nonetheless contends that none of this constitutes a "discussion." Even if this Court were to accept Judge Frank's strained interpretation of the word "discuss" and his contention that his testimony

"occurred in direct response to the precise phrasing of the question," (see Answer at 5), the absolute nature of his statement that he never discussed the representation required him to disclose that he had at least asked Judge Altenbernd about Mr. Vaka's competency and interest in handling his daughter's appeal and that Judge Altenbernd reported back that Mr. Vaka would consider taking the case. Again, Judge Frank's failure to qualify his broad statement rendered his testimony misleading, if not outright false. Judge Frank's suggestion that he is free to give misleading testimony under oath as long as it is literally true must fail.

B. Although it is irrelevant whether Judge Frank's untrue and misleading testimony was material, the testimony nonetheless was material to the Straley Grievance Proceedings.

In addition to his literal truth defense, Judge Frank seeks to infuse another technical element of perjury law into the Code of Judicial Conduct. He contends that the Commission was required to prove that his untrue and misleading statements "were material to the issues under consideration by the Grievance Committee." (Response at 9.) This argument must fail for two reasons. First, it is not clear that the Commission was required to prove materiality at all, and second and more importantly, Judge Frank's statements were material.

In support of his assertion that materiality is required, Judge Frank only cites dicta from a case that involved the very different issue of a judge's lack of candor in

defending himself during a hearing before the Commission. See In re Davey, 645 So. 2d 398, 407 (Fla. 1994). This Court stated that such a false statement must "concern a material issue in the case" after emphasizing its concern that "every judge who unsuccessfully defends against a charge of misconduct would be open to a charge of lack of candor." Id. No such concern exists in Judge Frank's case.²³ Judge Frank made the untrue and misleading statements not when defending himself against charges of misconduct, but instead when levelling charges of misconduct against Mr. Straley.

While a judge should certainly not be subject to discipline for innocuous inaccuracies, materiality is simply not the test. The test should be the judge's motive in lying. If a judge makes a false or misleading statement to conceal an appearance of impropriety, he has violated the Code of Judicial Conduct even if his statements are not material to the proceeding in which he testifies.

In Judge Frank's case, the only motivation he could have had for attempting to conceal his conversations with Judge Altenbernd was to avoid an appearance of

²³ Despite the fact that the Hearing Panel determined that Judge Frank's testimony on several issues was false, the Commission has not amended the charges against Judge Frank to include this lack of candor, nor did the Hearing Panel base its recommendation on Judge Frank's testimony at the trial. (See Findings at 33 (citing Davey, 645 So. 2d 398).)

His lack of candor did detract from his credibility as a witness in the eyes of the Hearing Panel, and properly so.

impropriety on his part. After all, he initiated the grievance in part because Mr. Straley allegedly "inspired" an article the judge considered "scandalous and untrue" because it suggested that Mr. Vaka was representing his daughter to curry his favor. Right or not, the public likely would have viewed the allegations more likely to be true if they learned that Judge Frank knew that Mr. Vaka took the case because, based on Judge Frank's conversation with Judge Altenbernd, Judge Altenbernd told Mr. Vaka that Judge Frank was interested in Mr. Vaka representing his daughter. Judge Frank concealed from the public any connection to the litigation or Mr. Vaka to avoid this potential appearance of impropriety.²⁴ As this Court recognized in rejecting a recantation defense,

[the judge's] reliance on the law of perjury is misplaced. The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge.

²⁴ Again, the Commission does not accuse Judge Frank of actually giving Mr. Vaka favorable treatment based on his representation of the judge's daughter.

Neither does the Commission intend to suggest that there was anything wrong with Judge Frank asking Judge Altenbernd to see if Mr. Vaka would consider representing Judge Frank's daughter. Indeed, it would not have been improper for Judge Frank to have done so directly. Judge Frank's conduct was unethical because he sought to conceal his involvement and did so under oath.

In re Leon, 440 So. 2d 1267, 1269 (Fla. 1983). Judge Frank should not be allowed to hide behind a materiality defense, especially where his false statements were made in a grievance proceeding he initiated.

Even if the Commission was required to prove materiality, however, the statements were material to one of the counts in the proceeding. As Judge Frank well knows, the test for materiality is whether the false statement "has the mere potential to affect the resolution of a main or secondary issue before the court." State v. Barbuto, 571 So. 2d 484, 485 (Fla. 2d DCA 1990) (emphasis added).²⁵ One of the issues in the Straley Grievance Proceeding was whether the Vielmetti Article was "untrue and scandalous."²⁶ Judge Frank contends that the article imputed that he was amenable to influence by his daughter's lawyers. Whether he was involved in the litigation in general and whether he played a role in the retention of Mr. Vaka to represent his daughter both have at least the potential to affect the resolution of whether the article was defamatory.

²⁵ Judge Frank was on the panel issuing this opinion.

²⁶ Judge Frank's suggestion that this was not a main issue and that the grievance "dealt principally with" Mr. Straley's alleged hang-up telephone calls is belied by both Judge Frank's affidavit initiating the grievance and the formal complaint in the grievance. (See Respondent's Exhibits 1 & 3.)

Moreover, Judge Frank was the complaining witness in the Straley Grievance Proceeding. Even if his false statements did not directly relate to the subject matter of the grievance, Judge Frank well knows that "[m]isrepresentations which tend to bolster the credibility of a witness, whether successful or not, ... are regarded as material for purposes of a perjury conviction." Barbuto, 571 So. 2d at 485. Judge Frank's statements suggesting that he had no connection to the divorce litigation or Mr. Vaka's participation therein tended to bolster his credibility as the complaining witness by suggesting that he was an objective bystander. They also sought to impeach the credibility of Mr. Vaka, who was quoted in the article as saying that he was asked by "a well-known and well-respected judge to represent a family member." (See Commission's Exhibit 2 at 2.) Thus, the statements were material as a matter of law.²⁷

C. Judge Frank bore and failed to carry the burden of demonstrating that his testimony, when taken in context and read with the entire transcript, was not untrue and misleading.

²⁷ Judge Frank's assertion that materiality could only be proven, or could be disproven, by testimony from the members of the grievance committee lacks merit. The issue of materiality is a question of law, not fact. See Barbuto, 571 So. 2d at 485 (citing Rader v. State, 52 So. 2d 105 (Fla. 1951)). Whether the members of the grievance committee considered the statements to be misleading or material simply has no bearing. The only people whose opinion on these legal questions counts are the members of the Hearing Panel in the first instance and ultimately the Justices of this Court. The majority of the former group found the statements to violate the Code of Judicial Conduct, and this Court should have little trouble reaching the same conclusion.

Judge Frank's final attempt to escape discipline on Count I through a technicality involves the Commission's failure to admit the entire transcript of the Straley Grievance Proceeding. He asserts that "a review of the entire transcript would demonstrate that the testimony was neither misleading nor material to the issues under consideration." (See Response at 15.) This argument fails for two reasons. As an initial matter, Judge Frank is barred from raising this purported technical "failure" of the Commission in light of his own technical failure in failing to renew his motion to dismiss the charges at the end of his case. While he did move to dismiss after the Commission's case, even then he did not raise this argument. See W.R. Grace & Co.-Conn. v. Dougherty, 636 So. 2d 746, 749 (Fla. 2d DCA 1994) (holding that objecting party is limited to bases argued before trial court). Arguments going to the sufficiency of the evidence are waived by the defense if not raised at the conclusion of the opponent's case in chief and again at the conclusion of the entire case either by renewing a motion for direct verdict or moving for a new trial. See, e.g., Honda Motor Co. v. Marcus, 440 So. 2d 373, 375 (Fla. 3d DCA 1983).

Second and more fundamentally, the Commission had no obligation to produce the entire transcript. The Commission at least made a prima facie case by presenting the excerpts from the transcript that contain his false and misleading testimony. If Judge Frank believed that something in the remainder of the transcript would have

dispelled this prima facie showing, he had the burden of establishing this affirmative defense by producing those portions of the transcript.²⁸

Not only did Judge Frank fail to present to the Hearing Panel any other part of the transcript that he believed remedied his false statements, he fails to cite any to this Court. His conclusory assertions that the rest of the transcript would cure his false statements is therefore an appellate after-thought and insufficient to establish any error on the Hearing Panel's part. The only permissible inference is that Judge Frank did not rely on the rest of the transcript before the Hearing Panel and does not do so before this Court because the full transcript does nothing to remedy his false statements. This technical argument must be rejected.

II. JUDGE FRANK HAD A DUTY AT LEAST TO DISCLOSE HIS RELATIONSHIP TO MR. VAKA.

As to Count II, Judge Frank contends that there was insufficient evidence to establish a duty to disclose his relationship to Mr. Vaka. He disputes that the evidence relied upon by the panel established such a duty, (see Response at 16-18), suggests that the findings differed from the charge, (see Response at 15), argues that attorneys

²⁸ Judge Frank did present the portion of the transcript containing the rest of his answer following his assertion that he stayed away from his daughter's case. (See T2:184:10-24: Answer at 4.) The Hearing Panel correctly determined that this testimony did not remedy the false and misleading statement that preceded it.

appearing before him were already aware of his relationship with Mr. Vaka, (see Response at 15), and contends that the Commission's failure to call an expert witness on the issue is fatal to its case.

A. The Hearing Panel correctly concluded that Judge Frank at least had a duty to disclose his relationship to Mr. Vaka, if not to recuse himself automatically from cases in which Mr. Vaka appeared.

Judge Frank appears to contend that this Court's decision in In re Estate of Carlton, 378 So. 2d 1212 (Fla. 1979) relieved him of any duty to recuse or disclose as long as he subjectively determined that neither recusal nor disclosure was necessary. (See Response at 16.) Carlton stands for no such proposition. While that opinion might suggest that the decision to recuse is "a matter which is 'personal and discretionary with individual members of the judiciary,'" Carlton, 378 So. 2d at 1216-17, this Court recently clarified that it has the power to review a district judge's personal decision not to recuse. See 5-H Corp. v. Padovano, 708 So. 2d 244 (Fla. 1997) (reviewing decision of four district judges not to recuse and, after examining the facts of the case and policies implicated, concluding that judges' decision was proper).

The more fundamental problem with Judge Frank's reliance on Carlton and Padovano is that those cases involve a litigant's legal right to disqualify an appellate

judge.²⁹ For example, the holding in Carlton was that the disqualification provisions of §§ 38.02 and 38.10, Fla. Stat., apply only to trial court judges and not appellate judges and justices. See Carlton, 378 So. 2d at 1216. The appropriate inquiry in this case is not whether one of Mr. Vaka's opponents would have had the right to disqualify Judge Frank. Rather, the question is whether Judge Frank's failure at least to disclose his relationship to Mr. Vaka violated the Code of Judicial Conduct.

Canon 3, and not Carlton or Padovano, provides the applicable legal principles. Canon 3E(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." (Emphasis added.) The commentary addresses the duty to disclose: "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." (Emphasis added.) Thus, the inquiry is whether a party or attorney opposing Mr. Vaka in the Second District might reasonably question Judge Frank's partiality toward Mr. Vaka.

In answering this question in the affirmative, the Hearing Panel initially noted that it did not intend to suggest that disclosure "is required in every situation where a

²⁹ Neither case raised the issue of disclosure because the attorneys in those cases had full knowledge of the facts relevant to recusal.

lawyer represents the adult son or daughter of a sitting judge in an isolated litigation matter." (Findings at 29.) The Hearing Panel instead relied on the several factors that made Mr. Vaka's representation of Judge Frank's daughter "out of the ordinary and by no means an isolated event." (Findings at 30.) The Straley Divorce Litigation was a "cause celebre" in the community. Not only was the divorce contentious, but Judge Frank became personally involved, filing a bar grievance against his former son-in-law based on his conduct during the divorce and his statements in his motion to deny the charging lien, which were published in the Vielmetti Article. The judge's personal feelings were so involved that the litigation had a direct impact on the performance of his duties -- he recused himself from all domestic relations appeals regardless of the issue or the parties.

The Committee on Standards of Conduct Governing Judges has recognized in two opinions that a judge who was represented by an attorney in "a 'high-profile' case or one of great personal or monetary significance," see Opinion 93-17 (attached as Appendix "A"), or in "a contested divorce," see Opinion 93-19 (attached as Appendix "B"), has a duty to disclose that representation even if the representation ended several years ago. While there is certainly a difference between a lawyer representing a judge in such a matter and a lawyer representing the judge's daughter, there are additional facts in this case to justify applying this principle to Judge Frank.

Importantly, the Fifth District's decision, which caused Judge Frank to recuse himself from all divorce appeals, was the same decision that Judge Frank suggested his daughter hire Mr. Vaka to appeal to this Court. Beyond simply recommending Mr. Vaka, Judge Frank actively pursued the matter, asking Judge Altenbernd about Mr. Vaka's competence and willingness to handle the appeal. He allowed a fellow judge to approach Mr. Vaka to ask if he would consider representing Stacy Frank. As Mr. Vaka testified, it was clear that Judge Frank wanted Mr. Vaka to handle the appeal. Judge Frank read the Vielmetti Article which quoted Mr. Vaka as saying that he took the case because "a well-known and well-respected judge" asked him to represent a family member. He also knew that Mr. Vaka agreed not only to represent his daughter for a reduced fee, but also that Mr. Vaka was not billing her for fees and costs at least until the end of the litigation.

Indeed, Stacy Frank's legal fees compounded the appearance of impropriety. The appeal that Judge Frank wanted Mr. Vaka to handle (and that caused Judge Frank to recuse from all divorce appeals) involved the entitlement of attorney's fees. Judge Frank's daughter was seeking to recover attorney's fees against Mr. Straley. She had been unable to pay her trial counsel his fees and had borrowed \$30,000 from Judge and Mrs. Frank -- with Judge Frank's knowledge -- to pay part of those fees. Thus, Judge Frank had a personal, financial interest in Mr. Vaka's success. If his daughter prevailed

on appeal and recovered fees from Mr. Straley, she would more likely have been able to repay her debt to her father.

Moreover, if Mr. Vaka did not really anticipate being paid all his fees by the judge's daughter, as Mr. Straley suggested in opposing the charging lien and as Mr. Vaka himself conceded was possible, Judge Frank could at least expect to be repaid before Mr. Vaka's fees were paid. Stacy Frank's testimony was that she in fact had repaid her father by the time of the hearing, but had not yet paid the balance of her fees to Mr. Vaka.

If known, all of these facts could lead a litigant reasonably to fear that Mr. Vaka was representing the judge's daughter to please the judge and to further the judge's economic interests. Such a litigant might reasonably fear that Judge Frank would be inclined, consciously or subconsciously, to favor Mr. Vaka.³⁰ The Commission makes

³⁰ Throughout his testimony, Judge Frank took the position that an appellate judge generally need not recuse himself or herself when a trial judge might because the district court sits in panels of three judges. This fact simply does not remove the appearance of impropriety of a judge sitting on a case in which his or her partiality reasonably might be questioned.

If one judge could not affect the outcome of an appeal then there would be no reason for that judge to be on the panel. On a three judge panel, all a judge need do to achieve a particular outcome -- regardless of his motivation -- is convince one other judge to follow him. An influential judge, such as Judge Frank, or one with a particularly strong view on a particular case surely could win over the vote of another judge who may be "on the fence." There is certainly nothing improper with this

no insinuation that any of this actually occurred, but it contends, and the Hearing Panel found, that these kinds of fears would be reasonable under the facts of this case. Accordingly, Judge Frank had a duty to disclose at least some of these facts.³¹

Canon 3E(1) lists several examples of situations where a judge's partiality reasonably might be questioned, though it expressly states that the list is not exhaustive. One of the examples is where one of the judge's children³² has a "more than de minimis interest that could be substantially affected by the proceeding." Canon 3E(1)(c).³³ A reasonable litigant might fear that Mr. Vaka was giving Stacy Frank special consideration by representing her without billing her and by charging a reduced rate to

phenomenon, indeed it is to be expected. The point is that even appellate judges are bound by the provisions of the Code of Judicial Conduct governing disqualification and disclosure.

³¹ Recognizing the line-drawing problem of what specific facts Judge Frank should have disclosed, the Hearing Panel suggested that "a simple solution would have been for Judge Frank to simply add Mr. Vaka to his recusal list." (Findings at 32.)

Judge Frank's suggestion that such a recusal would have placed an undue burden on his colleagues on the bench is unavailing in light of the fact that he had already recused himself from an entire category of cases -- domestic relations -- regardless of the issue or the parties. Certainly the Second District had far more divorce appeals than the twelve appeals in which Mr. Vaka appeared before panels on which Judge Frank sat.

³² No distinction is made between adult and minor children.

³³ The Code defines "de minimis" as "an insignificant interest that could not raise reasonable question as to a judge's partiality."

curry favor with Judge Frank, as suggested by Mr. Straley in the divorce litigation and by the Vielmetti Article. If that was the case, Stacy Frank would have an interest in any case in which Mr. Vaka appeared before a panel that included Judge Frank, an interest that Judge Frank must disclose.

Not only did Judge Frank fail to disclose his relationship to Mr. Vaka, he actively sought to conceal that relationship through his false statements to Mr. Vielmetti and to the Straley Grievance Committee. As discussed supra, he did this to avoid the appearance of impropriety. Ironically, by doing so he made the appearance of impropriety created by sitting on Mr. Vaka's cases all the more serious. The cumulative effect of all the factors identified above is that Judge Frank had an ethical duty at least to disclose his relationship to Mr. Vaka.

B. The Hearing Panel's findings did not vary from the Notice of Formal Proceedings in any material way.

Judge Frank contends that the Hearing Panel's finding regarding his duty to disclose varied from Count II of the Notice of Formal Proceedings. Count II charged Judge Frank with failing to recuse or "to advise opposing counsel of the representation of your daughter by Mr. Vaka." (Notice of Formal Proceedings at 4.) The Hearing Panel found that Judge Frank "should have advised counsel of the fact that he had been involved in Mr. Vaka taking over the appellate representation." (Findings at 27.)

Judge Frank is simply playing another word game with this Court. While the Hearing Panel's finding may be more specific than the charge, Judge Frank has failed to demonstrate and cannot demonstrate that he was in any way prejudiced by this technical difference.

C. Whether most attorneys appearing before Judge Frank were aware of Mr. Vaka's relationship to Judge Frank is irrelevant.

Judge Frank next argues that due to the publicity surrounding the Straley Divorce Litigation, "opposing counsel could therefore have been well aware of Mr. Vaka's role in representing Stacy Frank." (See Response at 15.) This argument is so speculative as to barely warrant a reply. Among other things, it assumes that all attorneys appearing before the Second District live and practice in the Tampa-St. Petersburg area -- a dubious assumption. The significance of Judge Frank's argument is that it highlights the important connection between Count I and Count II. Members of the local community likely would not be aware of Judge Frank's role in the hiring of Mr. Vaka because he falsely denied any role in his statements to Mr. Vielmetti and his testimony at the grievance proceeding.

D. Expert testimony was not required to establish Judge Frank's duty to disclose, but the expert views presented to the Hearing Panel did support a duty of disclosure.

Finally, Judge Frank asserts in the Response that expert witnesses were required to establish the duty to disclose, that the Commission failed to present any such experts, and that the only experts who did testify were his character witnesses who, he claims, testified there was no duty to disclose. Each argument must fail.

First, the duty of a judge to disclose facts that might lead a reasonable person to question the judge's partiality is an issue to be decided by the Hearing Panel in the first instance, and ultimately by this Court. It is a legal conclusion, not a factual issue. This Court must reject Judge Frank's implicit claim that expert witnesses are better suited than the Hearing Panel or this Court to determine if he was required to disclose based on the facts of this case. The constitution gives this Court alone the obligation to oversee the judiciary and ensure that the state's judges are fit to hold their offices. See art. V, § 12, Fla. Const.

Second, the Commission did present an expert's view that a judge has a duty to disclose that a lawyer has given the judge and one of the judge's children gifts; that expert was none other than Judge Frank himself. (See Commission's Exhibit 8.) Moreover, none of the experts called by Judge Frank testified that under all the facts of this case, Judge Frank had no duty to disclose. None of the judges were aware of all the facts before the Hearing Panel. Indeed, when Judge Webster was given most of the facts as hypotheticals, he testified that he would want to know these facts if he

were a lawyer on the other side. (See T4:464:6-T4:470:14.) Similarly, Judge Campbell, who of the four judges had the most personal knowledge of the facts, testified that "perhaps" Judge Frank should have recused himself. (See T4:564:21-T4:565:4.) Thus, to the extent expert testimony is probative to Judge Frank's ethical duties under the Code of Judicial Conduct, the testimony supported the Hearing Panel's findings.

III. JUDGE FRANK IMPROPERLY INTERFERED WITH THE STRALEY GRIEVANCE PROCEEDING.

Judge Frank contends that he should not be reprimanded on Count III because the evidence failed to show that he used his position as a judge, (see Response at 19-21), he was obligated to report Mr. Straley's alleged misconduct to the bar, (see Response at 19, 22), and the public was unaware of his actions until these proceedings, (see Response at 22-23).

A. Judge Frank used his position as a judge to attempt to influence the Straley Grievance Proceeding.

The testimony of Messrs. Corsmeier, Ristoff and Boggs demonstrated that Judge Frank assumed a much more prominent role in the prosecution of the Straley Grievance Proceeding than a typical complaining witness. Mr. Corsmeier, who prosecuted the grievance, testified that Judge Frank treated him as "a mere Bar bureaucrat" who needed the judge's guidance and help to prosecute the case, often quizzing him about

the case and giving "pointers" on how to proceed. (T3:311:1-4; T3:314:16-T3:315:5.) Judge Frank acted like Mr. Corsmeier did not take the charges seriously enough and made sure Mr. Corsmeier knew he wanted the case "prosecuted diligently," in the words of Judge Frank's counsel. (See T3:326:25-T3:327:6.) Judge Frank's position as the chief judge of the district allowed him to treat Mr. Corsmeier in a way that no normal complainant could.

Indeed, Judge Frank called Mr. Corsmeier at least eleven times about the grievance, always reminding Mr. Corsmeier that he was a judge. When Mr. Corsmeier told the judge there was a chance that the committee would accept an admission from Mr. Straley in return for a finding of "minor misconduct," Judge Frank became furious and threatened to go to the bar's board of governors. (See T3:312:13-T3:313:3; T3:327:12-14.) After summary judgment was entered in Mr. Straley's favor for the counts involving Judge Frank, he became even more furious and demanded that the bar seek rehearing. He called Mr. Corsmeier's boss, Mr. Ristoff, complaining that the bar staff and the presiding judge did not understand the law and that he, a district judge, did. When Mr. Ristoff made clear that the bar would not seek rehearing, Judge Frank began attacking Mr. Corsmeier.

Once Judge Frank learned that the remaining charge against Mr. Straley, which did not even involve the judge, was dismissed by the bar, his anger and involvement

increased. He called the president of The Florida Bar to complain. He told Mr. Ristoff that he had gone to the president and that Messrs. Ristoff and Corsmeier were his "targets." He called both the president and executive director of The Florida Bar to air his complaints. He called Mr. Ristoff's boss, Mr. Boggs, at least five times. True to form, he was sure to remind Mr. Boggs that he was a chief district judge every time he called. His complaints caused Mr. Boggs to conduct the most thorough investigation of a bar counsel he had ever conducted. Mr. Boggs understandably handled the case with extreme care: He was dealing with an irate, but influential judge who had demonstrated that a member of the Bar's staff who did not accede to his demands could expect trouble.

Judge Frank's denials notwithstanding, the judge was well aware of the havoc he was wreaking, as evidenced by Mr. Boggs' testimony and letters. The investigation demonstrated that Judge Frank's complaints against Mr. Corsmeier were groundless, just as the referee had concluded that Judge Frank's complaints against Mr. Straley were groundless.

Judges carry substantial prestige and influence in the community. Their office clothes them with additional credibility, and when a judge expresses his or her feelings on a matter, especially a matter related to the law, people tend to listen more closely than they otherwise would. For this reason, Canon 2B prohibits a judge from

"lend[ing] the prestige of judicial office to advance the private interests of the judge or others." The commentary provides the following example: "it would be improper for a judge to allude to his or her judgeship to obtain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense." Judge Frank's role as a judge, who is charged with helping regulate the lawyers appearing before him, gave him particular influence in the grievance setting. Indeed, Mr. Boggs testified that he conducted the most thorough investigation of his career "because of who Judge Frank was." (T3:381:2-9.) Judge Frank knew or should have known that his position as a judge, to which he constantly alluded, would carry special influence with the Bar. His conduct abused this influence.

Throughout these proceedings, Judge Frank has tried to justify all of his misconduct, but particularly the conduct that is the subject of Count III, by noting that he is a protective father and was only acting as a father should. The Commission and the Hearing Panel have been very sensitive to this concern throughout the process. The fact remains, however, that as a judge, Judge Frank was constrained by much stricter ethical constraints than a normal citizen. This Court frequently has recognized that "judges hold a unique position in our society that warrants distinguishing them and what they can do from the general citizenry." E.g., In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)), 603 So. 2d 494, 498 (Fla. 1992); see also In re LaMotte,

341 So. 2d 513, 517 (Fla. 1977) ("Judges should be held to even stricter ethical standards [than lawyers] because in the nature of things even more rectitude and uprightness is expected of them.").

Canon 2A codifies this precept: "A judge ... shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The commentary clarifies this rule as follows:

A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

This Court has quoted the Massachusetts Supreme Judicial Court with approval as noting, "More is expected of him and, since he is a judge, rightfully so. A judge should weigh this before he accepts his office." In re Code of Judicial Conduct, 603 So. 2d at 498 (quoting In re Troy, 306 N.E.2d 203, 235 (Mass. 1973)). This principle has led this Court to hold that a judge's speech may be restricted in ways that unquestionably would violate the First Amendment if applied to the public. See In re Code of Judicial Conduct, 603 So. 2d at 499 (holding that canons prohibiting a judge from publicly endorsing a political candidate do not violate the judge's right to freedom

of speech).³⁴ Thus, while Judge Frank's personal role as a father may mitigate his violations of the Code of Judicial Conduct (e.g., supporting a reprimand as opposed to removal), it is no defense.

B. Judge Frank's obligation to report Mr. Straley's alleged misconduct to the bar neither required him to become deeply and personally involved in the prosecution of the grievance nor excused his improper interference.

Judge Frank also seeks refuge in the duty of a judge to report perceived lawyer misconduct to the bar. (See Response at 19.) While the Commission recognizes this important duty, see, e.g., Padovano, 708 So. 2d at 247, this obligation is no more than a duty to report. The bar and this Court are charged with investigating and prosecuting claims of misconduct. District judges are not. In this case, the bar accepted Judge Frank's complaint, investigated it, filed a formal complaint and lost on summary judgment. Judge Frank had no duty or right to second-guess or try to control this prosecution. Indeed, the Committee on Standards of Conduct Governing Judges has even recognized that Canon 2B's prohibition on testifying "voluntarily as a character

³⁴ Thus, Judge Frank's suggestion that his conduct in pursuing the grievance is protected by the First Amendment, (see Response at 21), has no merit. Any right Judge Frank may have to express his opinions about the need to discipline an attorney pales in comparison to the right to endorse a political candidate, which is the most protected form of speech and the "essence of self-government." See id. at 496 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

witness" prohibits a judge from testifying voluntarily in a grievance proceeding against an attorney accused of misconduct in that judge's court. See Opinion 97-1 (attached as Appendix "C"). In seeking to control the grievance proceeding, Judge Frank crossed the line from fulfilling his duty to report perceived misconduct to improperly using his office to further his personal dispute with Mr. Straley.

C. Whether the public was aware of Judge Frank's interference with the Straley Grievance Proceeding is irrelevant.

Finally, Judge Frank argues that the "public had no knowledge of [his interference] whatsoever prior to the filing of these charges, and the filing of these charges cannot be the basis for a 'lessening of the confidence of the public in the judiciary' which supports the charge itself." (Response at 23.) This Court has previously rejected the contention that a judge may act inappropriately so long as the public does not find out about it: "[I]f a judge commits a grievous wrong which should erode confidence in the judiciary, but it does not appear that the public has lost confidence in the judiciary, the judge should nevertheless be removed." In re LaMotte, 341 So. 2d at 518. Moreover, regardless of the effect of Judge Frank's conduct on the general public, it clearly eroded the confidence of the bar staff members who had to contend with Judge Frank's interference. For this Court to fail to reprimand Judge

Frank would send the message to the bar that it must accept unwarranted and improper intrusion by this state's judges.

IV. ANY BREACH OF CONFIDENTIALITY REGARDING THE INVESTIGATIVE PANEL'S PROCEEDINGS HAS NO BEARING ON THE HEARING PANEL'S FINDINGS AND IS NOT PROPERLY BEFORE THIS COURT.

Judge Frank's final technical defense involves his allegations that Mr. Weber and one or more members of the Investigative Panel breached the Commission's rules on confidentiality. (See Response at 23-25.) The Hearing Panel found that Judge Frank failed sufficiently to allege any prejudice to his defense even if his allegations were true. (See Findings at 14.) Judge Frank contends first that "absence of prejudice [is] not the test" and second that he has been denied the opportunity to demonstrate prejudice.

Judge Frank's first argument misconstrues the posture of this case. These proceedings are before this Court on the Hearing Panel's findings and recommendation that Judge Frank be disciplined. The constitution allows this Court to "accept, reject or modify in whole or in part the findings, conclusions, and recommendations of the commission." Art. V, § 12(c)(1), Fla. Const. It does not authorize this Court to review the full Commission's rulings that do not effect the Hearing Panel's recommendation. This is simply not the avenue for Judge Frank to seek to compel the Commission to

investigate or punish anyone other Judge Frank.³⁵ Thus, his argument is properly before this Court only to the extent it alleges actual prejudice in this case.

Judge Frank fails to allege either in his motions or in the Response any way in which the alleged breaches of confidentiality prejudiced his defense. Neither does he explain how he has been denied the opportunity to establish prejudice. In fact, it is difficult to conceive of any way in which he has been prejudiced. As this Court has recognized, "the reason for confidentiality no longer exists after formal charges are filed and the charges become public." In re Leon, 440 So. 2d at 1269. This Court recently rejected similar arguments, reasoning:

[T]he confidentiality requirements promote the effectiveness of the judicial disciplinary process and protect judicial officers from unsubstantiated charges. The due-process concerns involved with respect to the confidentiality requirement is whether the reported information prejudiced respondent's rights to a fair hearing. We do not find that the fairness of the hearing or the JQC's recommendations were affected by the reported information.

³⁵ The Commission is mindful from past experience that any attempt to punish Mr. Weber for violating its confidentiality rules would face a serious constitutional attack. See Doe v. State of Fla. Judicial Qualifications Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990) (holding Florida constitution's confidentiality provisions regarding witnesses violate the United States Constitution).

In re Graziano, 696 So. 2d at 752. Judge Frank's failure to demonstrate that the alleged breaches rendered his hearing or the Hearing Panel's recommendations³⁶ unfair is fatal to his argument. Thus, Judge Frank's final assertion of a technicality should not prevent this Court from disciplining him.

V. JUDGE FRANK'S CONDUCT WARRANTS NO LESS THAN A REPRIMAND.

Each of the three counts for which Judge Frank should be disciplined are serious violations of the Code of Judicial Conduct and under almost all circumstances would warrant removal when viewed cumulatively. Indeed, the false and misleading testimony would warrant removal standing alone. In recent years, the Commission has recommended removal and this Court has removed judges for conduct similar to that charged in Counts I and III. See In re Hapner, 718 So. 2d 785 (removing a judge in large part for giving "inaccurate, incomplete and misleading testimony" in a judicial proceeding); In re Graham, 620 So. 2d 1273 (Fla. 1993) (removing a judge in part for

³⁶ Judge Frank suggests that any member of the Investigative Panel who violated the confidentiality requirements should be removed from the Commission. (See Response at 24.) Because he has not alleged that any member of the Hearing Panel violated any confidentiality requirements, the only implication from his argument is that he believes he should escape discipline because the panel that found probable cause against him was improperly constituted. The fact that the Hearing Panel, whose composition Judge Frank has never challenged, found that three charges were supported not only by probable cause but by clear and convincing evidence renders his argument an insult to the Code of Judicial Conduct.

using his office to make unwarranted allegations of misconduct), cert. denied, 510 U.S. 1163 (1994). The Hearing Panel must have taken into account that Judge Frank was in the process of retiring.

The recommended sanction of a reprimand is the minimal level of discipline that the Commission may recommend. Because it appears that this Court is no longer prohibited from exceeding the recommended discipline of the Hearing Panel, see art. V, § 12(c)(1), Fla. Const. (authorizing Court to "accept, reject, or modify" recommendations),³⁷ the Commission deems it appropriate to address the mitigating and aggravating circumstances.

A. MITIGATING FACTORS

As the Hearing Panel noted, Judge Frank has served as a judge of the Second District for fourteen years and has also been the chief judge of that district. He has distinguished himself in the field of judicial ethics, serving the Commission for approximately eight years and also serving (and chairing) the Committee on Standards

³⁷ This Court previously has held that it could only accept or reject the Commission's recommendations. See In re Fowler, 602 So. 2d 510, 511 n.* (Fla. 1992). Since that decision, the constitution was amended to allow the Court to modify the Commission's recommendations in addition to accepting or rejecting them. See In re Alley, 699 So. 2d 1369, 1370 n.1 (Fla. 1997). The Commission takes no position on the issue of increased sanctions.

of Conduct Governing Judges. He has never faced formal charges of judicial misconduct from the Commission prior to these proceedings.

Importantly, Judge Frank has reached the end of his judicial career. He left office this month, having reached the age of retirement. This factor led the Commission to ask the Hearing Panel only for a reprimand during closing argument. Absent this circumstance, the Commission would have sought Judge Frank's removal.

Additional mitigating factors include significant health problems Judge Frank has suffered in recent years, including a purported loss of memory. Although Judge Frank presented no evidence to support his claimed memory loss, it may partially explain why his testimony often was at odds with the evidence. Finally, Judge Frank's misconduct in Counts I and III centered around a personal dispute involving his daughter. While this does not excuse his misconduct, it does present grounds for some leniency.

B. AGGRAVATING FACTORS

Despite the mitigating circumstances, there are several substantial aggravating factors present. In addition to the severity of the charges themselves, Judge Frank has demonstrated no genuine remorse for his conduct, nor has he acknowledged that he acted improperly. Instead of accepting the lowest sanction the Hearing Panel could recommend, Judge Frank has continued to seek to evade any discipline by this Court with a series of highly technical defenses that are without merit. Again, he has not

disputed most of the pure factual allegations against him, but instead vehemently has argued that he did nothing wrong.

The only evidence remotely suggesting remorse was Judge Frank's letter of apology to Mr. Corsmeier. While Judge Frank elected not to present this letter as evidence, Mr. Corsmeier's testimony indicated that the letter did not appear to be genuine and was instead a strategic decision driven by Judge Frank's counsel. When his counsel tried to get him to admit that he wished he had been more "amiable" or "gentle," Judge Frank refused to take the bait, testifying that Messrs. Corsmeier, Ristoff and Boggs "weren't children" and should have had "some thick skin." (See T5:661:17-T5:662:6.)

Moreover, Judge Frank's conduct throughout the trial showed no signs of remorse or regret. While the Hearing Panel properly declined to base its recommendation on Judge Frank's lack of candor, that lack of candor belies any sense of remorse. Judge Frank also took every opportunity he could to make gratuitous attacks in a public forum against his former sons-in-law during the trial.³⁸

³⁸ During the trial he referred to Mr. Straley as an alcoholic (twice), "totally bizarre," "pathological," "a really mixed-up human being [who] had had extensive psychiatric treatment and a prior divorce," and "intrusive." (See T2:161:9-10; T5:676:1-4; T2:229:19; T5:677:17-24; T5:678:17-20.) In the Answer, he described Mr. Straley as "physically abusive, obsessive and emotionally unstable." (Answer at 6.) He characterize Mr. Weber as "parasitic" and "the kind of person who feels no

Finally, Judge Frank's service on the Commission and the Committee on Standards Governing Judges cuts both ways. While it demonstrates laudable service to the State of Florida, it also demonstrates that Judge Frank should have known his conduct violated the Code of Judicial Conduct. Indeed, Judge Frank helped promulgate the Code of Judicial Conduct. See In re Code of Judicial Conduct, 643 So. 2d 1037, 1038 (Fla. 1994). Just as judges generally should be expected to meet a higher standard of conduct than lawyers and the general public, judges who serve the Commission or assume similar roles in regulating the judiciary should be held to an even higher standard. For the Commission's judgments and recommendations of discipline against this state's judges to carry any credibility, the members of the Commission themselves must remain far above the slightest reproach. Judge Frank singularly failed in that responsibility.

CONCLUSION

This Court should discipline Judge Frank. Although more serious sanctions might well be imposed, it is respectfully recommended that this Court accept the recommendation of the Commission to reprimand Judge Frank and further award costs to the Commission.

obligation to another." (See T1:142:19-T1:143:11.)

