

**State of Rhode Island
Before the Rhode Island Ethics Commission**

**In Re: Francis X. Flaherty
Respondent**

Complaint No. 2016-14

DECISION AND ORDER OF THE ETHICS COMMISSION

This matter was adjudicated before the State of Rhode Island Ethics Commission (“Commission”) on February 26, 2019, pursuant to R.I. Gen. Laws § 36-14-13, § 42-35-9, and Commission Regulation 520-RICR-00-00-3.22 - Hearing to Determine Violation of the Code of Ethics (1015). The following Commissioners were present for the entire adjudicative hearing and participated in the deliberations and rendering of this unanimous Decision and Order: Ross E. Cheit, Chair; Marisa A. Quinn, Vice-Chair; Arianne Corrente, Secretary; M. Therese Antone; J. Douglas Bennett, and Robert A. Salk.

Attorney Katherine D’Arezzo prosecuted the case on behalf of the People of the State of Rhode Island pursuant to 520-RICR-00-00-3.22(B) and 520-RICR-00-00-3.6(D). The Respondent appeared and was represented by attorney Marc DeSisto. Herbert DeSimone, Jr. attended all proceedings as independent legal counsel for the Commission.

TRAVEL OF THE CASE

On September 22, 2016, Ms. Helen L. Hyde filed a complaint with the Commission against the Respondent, Francis X. Flaherty, in his capacity as an Associate Justice of the Rhode Island Supreme Court, a state appointed position. The complaint alleges that the Respondent failed to disclose his position as President of the St. Thomas More Society of Rhode Island (“Society”) on his Financial Disclosure Statements (“Statements”) filed with the Commission for calendar years 2010-2015. On October 18, 2016, the Commission conducted an initial determination, consisting of an examination of the facts alleged in the complaint, and authorized an investigation into the allegations.

Pursuant to R.I. Gen. Laws § 36-14-12(c)(4) and Commission Regulation 1006 (now numbered 520-RICR-00-00-3.11), the Commission conducted a probable cause hearing in this matter on April 25, 2017, at which time the Commission considered the complaint, the Investigative Report, Respondent's Motion to Dismiss for Lack of Probable Cause, and the arguments of counsel. After hearing thereon, the Commission issued the following Order and Finding of Probable Cause:

THAT, there exists probable cause to believe that, on his 2010-2015 Financial Statements required to be filed pursuant to R.I. Gen. Laws § 36-14-16, the Respondent, Francis X. Flaherty, an Associate Justice of the Rhode Island Supreme Court, failed to list his position as President of the St. Thomas More Society of Rhode Island, as required by Commission Regulation 36-14-17008.¹

On September 28, 2018, the Respondent filed three motions to dismiss the complaint with supporting memoranda, each setting forth separate grounds for dismissal. Respondent alleged that the Commission had impermissibly expanded the definition of business entity, had denied him due process, and that any omission on the financial statement was not knowing and willful. On November 15, 2018, the Prosecution filed objections to each motion with memoranda in support thereof. The Commission held a hearing on the motions on November 20, 2018. After hearing the arguments of counsel, the Commission deliberated and voted in open session to deny all three motions.

An adjudicative hearing was held on February 26, 2019. At the beginning of the adjudicative hearing the Chair, as presiding officer, read aloud the finding of probable cause which the Respondent denied. The parties, through counsel, then presented a signed stipulation which, by agreement, was admitted into evidence as Joint Exhibit 1. Therein, the

¹ In May 2018, the Ethics Commission amended its regulations to conform to the style of the Rhode Island Code of Regulations ("RICR"). To comply with the requirements of the RICR, the Ethics Commission renumbered the Code of Ethics without making any substantive changes to the regulations. As a result, Regulation 36-14-17008 now corresponds to Regulation 520-RICR-00-00-4.11 Leadership Positions with Not-For-Profit Organizations (36-14-17008). For ease of reference we will refer to this provision as "Regulation 17008."

parties stipulated to the following facts and to the admission of the following documents as full exhibits:

STIPULATED FACTS

1. The Respondent was appointed as an Associate Justice of the Rhode Island Supreme Court in 2003 and has served continuously in said capacity.
2. The Respondent was listed as President of the St. Thomas More Society in its annual reports filed with the Office of the Secretary of State for calendar years 2010-2015.
3. The Respondent resigned from his position as President of the St. Thomas More Society during calendar year 2016.
4. The St. Thomas More Society was incorporated as a Rhode Island non-profit corporation on April 15, 1998 pursuant to R.I. Gen. Laws §§ 7-6-1 to -108, the Rhode Island Nonprofit Corporation Act.
5. The St. Thomas More Society has approximately 20-25 members and their contributions to the Society are voluntary.
6. The St. Thomas More Society is a non-denominational entity which is open to all faiths.
7. During the period 2010-2015, the St. Thomas More Society sponsored an annual Red Mass held at the Cathedral of Saints Peter and Paul in Providence to mark the opening of the judicial term.
8. The St. Thomas More Society does not solicit funds but does accept contributions to offset the costs of the dinner after the Red Mass.
9. In addition to the Red Mass, during the period 2010-2015, the St. Thomas More Society also annually celebrated the feast of St. Thomas More with a mass followed by a light informal meal. The Society at times charged a fee to attend the light informal meal, which was advertised through the Rhode Island Bar Association and open to all.

10. The Society, on at least one occasion, has also sponsored a continuing legal education (CLE) seminar followed by a luncheon, where a fee was paid by attendees to cover the costs associated with the seminar.
11. During the period 2010-2015, the St. Thomas More Society filed 990-N forms with the Internal Revenue Service as a non-profit corporation.
12. In response to Question No. 9 on his 2010-2015 Financial Statements filed with the Ethics Commission, the Respondent did not list his position as President of the St. Thomas More Society.

PROSECUTION'S EXHIBITS

1. St. Thomas More Society's Articles of Incorporation.
2. St. Thomas More Society's 2010-2015 Annual Reports.
3. St. Thomas More Society's Bylaws.
4. Respondent's 2010-2015 Financial Statements, and Instruction Sheets thereto.
5. St. Thomas More Society Board Members' Financial Statements:
 - a. Victoria M. Almeida's 2005-2017 Statements.
 - b. Laureen A. D'Ambra's 2005-2011 Statements.
 - c. Richard A. Gonnella's 2005 Statement.
 - d. James V. Murray's 2006-2012 Statements.
 - e. Madeline Quirk's 2002-2006 Statements.

RESPONDENT'S EXHIBITS

1. St. Thomas More Society Board Members' Financial Statements:
 - a. Francis J. Darigan, Jr.'s 2005 Statement.
 - b. Armando O. Monaco, II's 2013-2016 Statements.
 - c. Peter A. DiBiase's 2015 Statement, as amended.
 - d. Joseph R. Weisberger's 1999 Statement.

Following the Prosecution's case, the Respondent moved to dismiss the complaint on the basis that the Prosecution had not established that Respondent had committed a knowing and willful violation of Regulation 17008. After the conclusion of oral arguments on this issue, the Commission voted unanimously to go into executive session to deliberate on the motion. The only persons present for deliberations were the Commissioners and their independent legal counsel.

During deliberations on the Respondent's motion to dismiss, the following questions were posed to legal counsel and the following answers were provided:

Question: Please describe the knowing and willful standard. Answer: When a violation of the statute is reasonable and made in good faith, in order to show a knowing and willful violation it must be shown that Respondent either knew or showed reckless disregard for the question of whether the conduct was prohibited by the statute. Consequently, an individual avoids liability under the knowing and willful standard when he or she acts in accordance with reason and in good faith. In this context, the knowing and willful standard does not permit the imposition of sanctions when an official has violated the letter of the statute but has acted reasonably and in good faith. Where the mandate of the law is clear, however, it is difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the alleged violation is not reasonable, it must be shown that the official was cognizant of an appreciable possibility that he might be subject to the statutory requirements and he failed to take steps reasonably calculated to resolve the doubt.

Question: Please describe the standard to be applied when ruling on the motion to dismiss. Answer: The Prosecution having presented its case, if there is no legally sufficient evidentiary basis for a reasonable factfinder to find for the Prosecution, the motion to dismiss should be granted. At this stage of the proceedings, the prosecution has the burden of presenting legally sufficient evidence as to all of the elements of the alleged violation.

After further deliberations, the Commission voted unanimously to return to open session. After returning to open session the Commission voted unanimously to deny the motion to dismiss, ruling that the Prosecution had submitted legally sufficient evidence as to all elements of the complaint.

The Respondent presented his case by referring to the exhibits in Joint Exhibit 1 and calling three witnesses: Family Court Magistrate Armando O. Monaco II, retired Superior Court Associate Justice Francis J. Darigan Jr., and himself.

DELIBERATIONS

At the conclusion of the closing statements, the Commission voted 6-0 to go into executive session to deliberate. The only persons present for deliberations were the Commissioners and their independent legal counsel. Legal counsel did not participate in the deliberations beyond answering the following legal questions which were posed by members of the Commission:

Question: May the fact that other Society board members listed, or did not list, the Society in their statements be considered when deciding whether the Respondent acted reasonably? Answer: Yes, in determining whether Respondent acted reasonably, you may consider the actions of the other board members in either listing or not listing the Society in their statements.

Question: What is the procedure after the Commission makes a decision? Answer: The prosecution or the Respondent can request a new hearing or a modification of the decision. If those requests are denied, an appeal may be taken pursuant to the Administrative Procedures Act to the Superior Court.

After deliberating on the evidence presented, the Commission returned to open session and voted unanimously to find that the Respondent committed a knowing and willful violation of Commission Regulation 36-14-17008 (now numbered 520-RICR-00-00-4.11) by failing to list his position as President of the St. Thomas More Society on his 2010-2015 Financial Statements required to be filed by R.I. Gen. Laws § 36-14-16. The Commission then voted unanimously to impose a civil penalty of Two Hundred (\$200) Dollars.

FINDINGS OF FACT

The aforementioned violation and civil penalty are supported by the following findings of facts, adopted by the Commission in consideration of the stipulated facts, exhibits, testimony, and arguments of counsel:

1. The Respondent was appointed as an Associate Justice of the Rhode Island Supreme Court in 2003, has served continuously in said capacity and is subject to the Code of Ethics.
2. The St. Thomas More Society of Rhode Island (“Society”) was incorporated as a Rhode Island non-profit corporation on April 15, 1998, pursuant to R.I. Gen. Laws § 7-6-1 *et*

seq., the Rhode Island Nonprofit Corporation Act, and was at all relevant times a Rhode Island nonprofit corporation.

3. The Society's Annual Reports for 2010-2015 were filed with the Rhode Island Office of Secretary of State.
4. During the period 2010-2015, the Society filed 990-N forms with the United States Internal Revenue Service as a non-profit corporation. The Society is a 501(c)(3) entity.
5. The Respondent served as President of the St. Thomas More Society in calendar years 2010-2015, and he was duly listed as such in the Society's annual reports filed with the Office of Secretary of State each year for calendar years 2010-2015.
6. According to the Society's Bylaws, as President the Respondent is also a member of the Society's Board of Directors, and "is the chief executive officer of the corporation" who "supervises and controls all the corporation's business and affairs." See Prosecution's Exhibit 3.
7. The Society's records and its checkbook were at all relevant times maintained by its Treasurer, Rhode Island Family Court Magistrate Armando O. Monaco II, in his office. The amount of money in the Society's checking account was sometimes discussed at Directors' meetings attended by the Respondent.
8. During the period 2010-2015, the Society sponsored an annual "Red Mass" held at the Cathedral of Saints Peter and Paul in Providence to mark the opening of the judicial term. After the Red Mass, the Society offered a light informal meal or refreshments.
9. In addition to the Red Mass, during the period 2010-2015, the Society also annually celebrated the feast of St. Thomas More with a mass, followed by a light informal meal or refreshments. The Society at times charged a fee to attend the light informal meal/refreshments, which was advertised through the Rhode Island Bar Association and was open to all.

10. The Society also, from time to time but not for the last four or five years, sponsored a continuing legal education (CLE) seminar followed by a luncheon, where a fee was paid by attendees to cover the costs associated with the seminar.
11. Respondent testified that he read each question fully when filling out his 2010-2015 Financial Statements filed with the Ethics Commission.
12. For the 2010-2013 Financial Statements, Question 9 read as follows: "List the name and address of any business organization or other entity, whether for profit or non-profit, in which you, your spouse, or dependent child held a position as a director, officer, partner, trustee, or a management position." (Emphasis added).
13. An instruction sheet was included with the Financial Statements mailed to the Respondent in 2010-2013. Each year, the instruction sheet read as follows: "If you, your spouse or dependent child held a position as director, officer, partner, trustee, or management position, identify the position and state the business address. This applies to a non-profit organization of any type as well as profit-making organization." (Emphasis added).
14. Respondent testified he would generally look at the filing instructions if he didn't understand the question and may have read this instruction.
15. For the 2014-2015 Financial Statements, Question 9 read as follows: "If you, your spouse or dependent child held a management position, or were a director, officer, partner, or trustee of any business, organization or other entity (for profit or non-profit), list the following: Name of Family Member; Name and Address of Entity and Position." (Emphasis added).
16. An instruction sheet was included with the Financial Statements mailed to the Respondent in 2014 and 2015. Each year, the instruction sheet provided: "List all positions of management, as well as positions of director, officer, partner, trustee or positions of a similar nature in any entity (including non-profits), held by you, your

spouse or dependent child at any time in calendar year 2014/2015. This includes businesses as well as non-profit organizations or groups. Examples include: Vice-President of Acme, Inc., Manager of Windows, LLC; Director of Greenfield Bank; Board of Directors of Big Brothers; Trustee of Apple Valley Land Trust; Secretary of Citizens for Healthy Shellfish; Treasurer of Aquidneck Island Little League.” (Emphasis added).

17. Respondent testified that he did not know if he read the instructions for 2014 and 2015, but that he “probably” did.
18. In his answers to Question No. 9 on his 2010-2015 Financial Statements filed with the Ethics Commission, the Respondent did not disclose that he served as the President of the St. Thomas More Society.
19. The wording of Question 9 on the Financial Statements for calendar years 2010-2015 clearly and unambiguously provided notice to the Respondent, and would have provided notice to any reasonable person, that the Respondent was required to list his position as President of the St. Thomas More Society on his Financial Statement. Under the circumstances, the Respondent should have known that such disclosure was required and the omission of his position on the St. Thomas More Society was not reasonable.
20. The Respondent did not call the Ethics Commission or ask for an advisory opinion to seek clarification of the meaning of Question 9, nor did he take any other steps that were reasonably calculated to resolve any doubt as to whether he was required to list his position as President of the Society on his 2010-2015 Financial Statements.

CONCLUSIONS OF LAW

1. As an Associate Justice of the Rhode Island Supreme Court since 2003, the Respondent was at all relevant times a state appointed official subject to the Code of Ethics pursuant to R.I. Gen Laws § 36-14-4 and R.I. Const. art. III, sec. 8, and was required to file Financial Statements with the Ethics Commission for calendar years 2010-2015 pursuant to R.I. Gen Laws § 36-14-16.

