SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-020
District Docket No. XI-2014-0001E

IN THE MATTER OF	
FRANK CRAIG FUSCO	
AN ATTORNEY AT LAW	

Decision

Argued: May 19, 2016

Decided: October 21, 2016

Kevin P. Harrington appeared on behalf of the District XI Ethics Committee.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a recommendation for a censure filed by the District XI Ethics Committee (DEC). The five-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence),[1] RPC 1.4(b)

[1] Although count two charged respondent with a lack of diligence, the second paragraph alleged that he failed to explain the matter to the extent reasonably necessary to permit his client

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(failure to keep a client reasonably informed about the status of the matter), RPC 1.5(a) (charging an unreasonable fee), RPC 1.5(b) (failing to communicate in writing the basis or rate of the fee), RPC 5.4(a) (sharing legal fees with a nonlawyer), and RPC 5.4(b) (entering into partnership to provide legal services with a nonlawyer). For the reasons expressed below, we determine that a reprimand is warranted.

Respondent was admitted to the New Jersey bar in 1995. He maintains a law office in Clifton, New Jersey.

In 2005, respondent received an admonition for engaging in a conflict of interest, by representing both parties to a real estate transaction without advising them of the inherent conflict in the dual representation and without obtaining their consent thereto. Four years after the closing, respondent threatened to file a civil suit against the seller after the seller threatened to report to disciplinary authorities that he had not received the $5,000 down payment from the transaction, a

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(Footnote cont'd)

to make informed decisions about the case pending against him. This conduct would constitute a violation of RPC 1.4(c), which was not specifically cited in the complaint. Moreover, although the complaint alleged that respondent reassured the client that the matter was being handled appropriately, which was not true, the complaint did not charge respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). The letter of admonition noted that there was no evidence that the seller had not received the funds.

We considered numerous mitigating factors, including that respondent had not technically engaged in a conflict of interest because he had not negotiated the terms of the contract, but merely memorialized the terms for two friends, who wanted a quick, simple closing. He had neglected to obtain their informed consent to the dual representation, however. He had not received a fee for his services. In addition, his threat to sue the seller was a knee-jerk reaction made in the heat of the moment. In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005).

In this matter, respondent stipulated that he was guilty of the charges in the complaint, with a few minor exceptions. Because the DEC accepted his stipulation, the record is sparse and grievant Frederic Richardson, a Maryland resident, did not appear at the DEC hearing.

According to the complaint, in December 2011, Richardson retained respondent on behalf of Frederic Richardson/East Coast Realty Ventures. The fully executed flat fee agreement provided, in relevant part:

Agreement for Legal Services

This agreement is between Professional Service Plus Inc.. [sic] 15 Princeton Street, Clifton, New Jersey, 07014, (973) 896-8003; hereinafter referred to as "attorney", and Fred Richardson/East Coast Realty Ventures, hereinafter referred to as "client".

Attorney Responsibilities

1. Represent client in the following matters:
   a. Full Case Analysis; Develop Course of Action

Client Responsibilities

. . . .

Fees

Client will pay attorney a $3,500 non-refundable retainer for the above referenced representation. A portion of this amount will be credited against subsequent fees. Failure to pay the legal fees and costs as listed will result in termination of representation.

[Ex.A;T20;T22.][2]

The complaint alleged that the fee agreement was for representation in connection with various legal issues that had arisen among numerous investors and partners and a hotel franchise involving Richardson. According to respondent, at the time he entered

[2] T refers to the August 18, 2015 DEC hearing transcript.

into the agreement with Richardson, he was not aware of any pending litigation involving Richardson.

Respondent maintained that he used this retainer agreement form because he intended to work with Professional Services Plus, Inc. (PSP). Rooney Sahai, the owner of PSP, permitted him to use the agreement. Although respondent admitted that, "ethically" using the fee agreement was a big mistake on his part, he denied having a "nefarious" reason for doing so. Rather, he claimed that he just failed to properly follow the RPCs.

The complaint alleged that the fee check tendered by Richardson was deposited into the PSP account, and respondent shared a portion of the fee with Sahai, a nonlawyer. Respondent explained that, even though he maintains trust and business accounts, the check was deposited into the PSP account because, at the time, he was attempting to cultivate a relationship with Sahai and did not view his own services to Richardson as "total legal representation." Rather, there were other business aspects in the "original representation," that involved funding for Richardson's hotel.

Respondent conceded that he had made a mistake in his handling of the fee and that he should have deposited it into his own attorney account and paid PSP for its services to Richardson. Instead, Sahai retained a portion of the $3,500 fee check and paid respondent approximately $2,500. Respondent admitted violating the RPCs, but

maintained that "there was no evil purpose behind it, it was more of an expediency issue."

Although the complaint alleged that PSP was a New Jersey corporation and that respondent and Sahai, a nonlawyer, were partners, respondent denied that he was a partner of the company and, therefore, did not stipulate to this allegation. He testified that Sahai was PSP's sole owner. Respondent maintained that, in his discussions with the presenter, he never intended to convey that he was a part owner of the company, but was nervous and misspoke when he stated, "I had a company."

Richardson had retained respondent for advice on hotel franchises. Sahai was in the "hotel franchise business." Respondent contended that he had been trying to develop a long-term relationship with PSP to use the company as a consultant to arrange financing for business endeavors. Sahai was to act as a consultant in the Richardson matter even though they had no written agreement setting forth the services Sahai was to provide.

The services respondent provided to Richardson included reviewing approximately thirty-five e-mail chains that included documentation and contracts, and working "through an analysis with [Richardson] on the state of his situation."

Respondent maintained that, because Richardson was "transient," that is, on the road much of the time, their communications were via

telephone. Therefore, respondent's advice was given verbally, not in writing. Respondent conceded that, if he had updated Richardson in writing, it would have prevented most of the problems he was facing. According to respondent, the few notes he had in Richardson's matter were destroyed by a flood in his basement. Nevertheless, he admitted he would have had nothing more than "scratch paper notes," and perhaps some e-mails from other lawyers.

In December 2011, Richardson was served with a complaint captioned Holiday Hospitality Franchising, Inc. v. ECRV Hanover Hospitality Leaseco, LLC and Frederic Richardson, that had been filed on November 14, 2011, in DeKalb County, Georgia. Respondent did not know whether Richardson had been aware that he was going to be sued at the time he retained respondent and, in any event, reiterated that he personally had no knowledge of the litigation when Richardson retained him.

In early January 2012, Richardson forwarded a copy of the complaint to respondent, who assured Richardson that, even though respondent did not practice law in Georgia, he would retain local counsel for Richardson and would prepare responsive pleadings, and viable cross-claims and counterclaims. Respondent contended, however, that Richardson had issues with the costs associated with local counsel. Nevertheless, respondent admitted that Richardson properly

relied on his representations that he would locate an attorney to handle the matter.

Respondent claimed that he provided Richardson with the names of two or three attorneys and, on at least two occasions, explained that time was of the essence because Richardson could not afford to have a judgment entered against him. Respondent remarked that a judgment could impact Richardson's "ability to be a qualified investor." By the time Richardson retained local counsel, however, a default judgment and a final judgment in the amount of $198,265.32 already had been entered against him.

Richardson had conveyed to the presenter that, as of the date of the DEC hearing, the default had neither been vacated nor "enforced." The presenter added that, ultimately Richardson retained Georgia counsel, who was unsuccessful in his efforts to vacate the default.

Addressing mitigation, the presenter commented that respondent was always candid, honest, straightforward, and cooperative during the course of the investigation and readily admitted that he had made some mistakes in the handling of Richardson's matter. Respondent also had expressed remorse for these mistakes. The presenter added that, during his multiple conversations with Richardson, he never expressed any animosity towards respondent, but was simply disappointed that a default judgment had been entered against him.

The presenter represented to the DEC that Richardson was satisfied with respondent's stipulation; that Richardson was "grateful" that he was not required to drive from Maryland to testify; that there had not been an execution on the default judgment against Richardson; and that, as of the date of the hearing, Richardson had not sued respondent for malpractice.

Although the presenter was satisfied that respondent had learned from his mistakes and would not commit any further ethics infractions, he believed that respondent's ethics history supported the imposition of a censure, rather than a reprimand.

Respondent expressed remorse for not meeting Richardson's expectations. He acknowledged that he should have been able to do more for Richardson. Although respondent believed that his fee for the case analysis was reasonable, he conceded that, because he was unable to obtain the results that Richardson sought and because he permitted the entry of a default judgment, his fee in that regard was unreasonable.

As to his prior discipline, respondent pointed out that, in the admonition case, he had not accepted a fee in the matter, which he had taken on for a friend. He had only "codified" the parties' agreement and filed the deeds in the real estate transaction. When the parties' relationship soured, they pursued him.

Respondent asserted that his conduct warranted either a reprimand or a censure, but contended that a suspension would have a catastrophic effect because he supports his family through his solo law practice. He also noted his involvement in the community, specifically, his past service as a councilman from 2006 to 2010.

Respondent stated that the ethics process had taken a toll on him, he has not taken the process lightly, he is remorseful for his conduct, and he has apologized to Richardson. Based on this incident, respondent has made changes to his practice: maintaining better documentation, keeping better notes, communicating more with clients, meeting with them on a more regular basis, using retainer agreements bearing his name, and removing the "nonrefundable" provision from his retainer agreements. He added that he no longer has a professional relationship with PSP.

The complaint alleged that respondent engaged in gross neglect and lacked diligence by failing to promptly retain counsel for Richardson's pending litigation, resulting in a final judgment against Richardson; failed to explain the matter to the extent reasonably necessary to permit Richardson to make informed decisions about the litigation; failed to keep Richardson reasonably informed about the status of the Georgia litigation and reassured him on numerous occasions that the matter was being handled appropriately while allowing a default

to be entered; entered into a partnership with PSP; conducted the practice of law through the partnership; shared fees with a nonlawyer; charged an unreasonable non-refundable $3,500 fee; and failed to communicate the basis or rate of the fee in writing.

The DEC found respondent guilty of all of the ethics violations charged in the complaint and recommended the imposition of a censure, relying on In re Stewart, 118 N.J. 423 (1990) (reprimand for attorney who grossly neglected and lacked diligence in an estate matter, and failed to keep the client reasonably informed about the status of the matter). The DEC pointed out that, even though respondent's conduct was similar to Stewart's, discipline greater than a reprimand was warranted because respondent's failure to act resulted in the entry of a substantial default judgment against Richardson; he split fees with a nonlawyer; he has a disciplinary history; he engaged in "sloppy file handling;" and he used an ambiguous retainer agreement.

Finally, because respondent acknowledged that Richardson did not receive the entire value of the retainer ($3,500 worth of representation), the DEC recommended that respondent issue a full refund to Richardson.

Following a de novo review of the record, we are satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The fee agreement in this matter failed to establish the services that respondent was retained to provide on Richardson's behalf. It stated only that the attorney's responsibilities include "Full Case Analysis; Develop Course of Action." Respondent testified that he only reviewed e-mails, documents, and contracts that Richardson had submitted.

The agreement also provided that the "Client will pay attorney a $3,500 non-refundable retainer for the above referenced representation." Had this been a simple flat-fee arrangement, the writing might have been sufficient. However, the document provided further that a portion of the retainer would be credited against subsequent fees. It failed to establish what would trigger additional fees or the basis or rate of those additional fees. In this regard, as respondent stipulated, the writing violated RPC 1.5(b), which requires a lawyer to provide a client, whom the lawyer has not regularly represented, with a writing setting forth the basis or rate of the fee.

Respondent also stipulated that he violated RPC 1.5(a), which requires a lawyer's fee to be reasonable. We cannot determine from the limited facts before us whether respondent's fee was unreasonable. He asserted that the fee for his case analysis and development was reasonable but, because a default judgment had been entered against Richardson, it was not reasonable.

The retainer agreement was not drafted with the expectation that respondent would represent Richardson in any litigation. The complaint stated that respondent was retained in December 2011, the complaint was served on Richardson on December 28, 2011, and Richardson forwarded it to respondent in January 2012. Respondent testified that he had no knowledge of the litigation at the time he was retained. Thus, there is no clear and convincing evidence that respondent's fee was unreasonable. Richardson had agreed to the $3,500 fee for the services relating to franchise issues, not for litigation-related issues.

Notwithstanding the terms of the retainer agreement, respondent assured Richardson that he would locate local counsel for the lawsuit and prepare responsive pleadings and viable cross-claims and counterclaims. Respondent failed to obtain local counsel in a timely manner, resulting in a default and final judgment against Richardson. Respondent's conduct in this

regard violated RPC 1.1(a) and RPC 1.3, violations to which he stipulated.

Respondent also failed to communicate to Richardson the status of the Georgia lawsuit, a violation of RPC 1.4(b). He also stipulated that he failed to explain the matter to the extent reasonably necessary to permit Richardson to make informed decisions about the Georgia litigation. This conduct, if supported, would constitute a violation of RPC 1.4(c), not RPC 1.3, as charged in the complaint. Although the facts alleged in the complaint may have put respondent on sufficient notice of a potential violation of RPC 1.4(c), respondent did not admit that he violated that rule and the limited record before us does not support such a violation. Thus we make no finding in that regard.

As to the RPC 5.4 violations, respondent testified, uncontestedly, that he was not Sahai's partner in PSP, but that Sahai was its sole owner. Nevertheless, he held himself out as part of that company when he executed a retainer agreement between PSP and Richardson, with PSP referred to as "attorney." In addition, Richardson's fee check was deposited into PSP's account and respondent shared his legal fee with PSP/Sahai. Respondent's conduct in this regard violated RPC 5.4(a), which prohibits a lawyer from sharing fees with a nonlawyer. However,

in our view, the record does not clearly and convincingly establish that respondent violated RPC 5.4(b), which prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. We, therefore, dismiss that charge.

Thus, on the limited record before us, we find that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.5(b), and RPC 5.4(a). We dismiss the charged violations of RPC 1.5(a) and RPC 5.4(b).

The remaining issue is the appropriate quantum of discipline for respondent's unethical conduct. Sharing fees with a nonlawyer has resulted in discipline ranging from an admonition to a term of suspension, depending on mitigating or aggravating factors present, such as the attorney's commission of other ethics violations or an ethics history. See, e.g., In the Matter of Paul R. Melletz, DRB 12-224 (November 16, 2012) (admonition for attorney who hired a paralegal for immigration matters as an independent contractor and, for a few years, evenly divided the flat fee charged to immigration clients); In the Matter of Ejike Ngozi Uzor, DRB 12-075 (May 29, 2012) (admonition for lawyer, who as legal counsel for a loan-modification entity, opened his own practice in the entity's office space; when the entity lost its trade name, the lawyer permitted it to operate under his law

firm's name and permitted the entity's nonlawyers to administer finances through his attorney business account; he also shared legal fees charged to the loan-modification clients, violations of RPC 5.4(d)(3) (prohibiting nonlawyers from exercising control over the professional judgment of the lawyer) and RPC 5.4(a), respectively; we gave great weight to the mitigating circumstances: the attorney was newly admitted; the improper involvement was short-lived (four months); and the attorney immediately terminated the relationship when he realized it was inappropriate and took steps to protect the entities' clients from harm, by working without compensation and by contributing his own funds to pay former staff to complete open files; and he readily admitted his misconduct); In the Matter of Geno Saleh Gani, DRB 04-372 (January 31, 2005) (admonition for attorney who contracted with a Texas organization to develop a New Jersey practice to prepare living trusts, made misleading communications about his services, engaged in other advertising violations, shared legal fees with non-attorneys, and assisted others in the unauthorized practice of law); In re Burger, 201 N.J. 120 (2010) (reprimand for attorney who paid a paralegal employee fifty percent of the legal fees generated by immigration cases the paralegal had referred to the attorney; we determined that the employee's earnings, both from the fee shares and her weekly salary, were not excessive for

the position of a paralegal/secretary); In re Aqrapidis, 188 N.J. 248 (2006) (reprimand imposed where, over a four-year period, the attorney shared fees with nonlawyer employees on twelve occasions by paying them a percentage of legal fees received from clients whom the employees had referred; the attorney was not aware of the prohibition against fee-sharing and viewed the payments as "bonuses"); In re Gottesman, 126 N.J. 376 (1991) (attorney reprimanded for compensating his paralegal/investigator by paying him fifty percent of his legal fees; the attorney also assisted the employee in the unauthorized practice of law; although the attorney believed the fee share arrangement was permissible because his former firm had engaged in the same practice, the Court found that his ignorance of the disciplinary rules was not a defense to the ethics charges); In re Marcus, 213 N.J. 493 (2013) (censure for attorney who, for approximately eleven years, gave employees who referred clients to his firm fifteen percent of the firm's fee if the referred case was successfully resolved; the nonlawyer employee who referred the case served as the client's contact with the office and assumed oversight and responsibility for the file; the attorney voluntarily stopped the practice when an attorney staff member advised him that the practice might pose ethics issues; the attorney admitted that the conduct violated RPC 5.4(a) and RPC 7.3(d); the attorney's ethics history consisted of

three reprimands); In re Lardiere, 200 N.J. 267 (2009) (attorney censured for improperly sharing fees with a company that retrieved surplus funds from sheriffs' sales of foreclosed properties; the attorney also engaged in recordkeeping improprieties and failed to cooperate with disciplinary authorities); In re Macaluso, 197 N.J. 427 (2009) (censure imposed on an attorney, who, as a nominal partner, participated in a prohibited compensation arrangement with an employee and failed to report the controlling partner's misconduct); In re Fusco, 197 N.J. 428 (2009) (companion case to Macaluso – attorney suspended for three months for paying a nonlawyer claims manager both a salary and a percentage of the firm's net fee recovered in personal injury matters that were resolved with the manager's "substantial involvement;" the claims manager received a larger percentage of the firm's fees in cases that he had referred to the firm; other infractions included failure to supervise nonlawyer employees and failure to report another lawyer's violation of the RPCs); In re Malat, 177 N.J. 506 (2003) (three-month suspension imposed on attorney who entered into an arrangement with a Texas corporation to review various estate-planning documents on behalf of clients, for which the corporation paid him; the attorney had a previous reprimand and a three-month suspension); In re Carracino, 156 N.J. 477 (1998) (six-month suspension for attorney who agreed to share fees with a

nonlawyer, entered into a law partnership agreement with a nonlawyer, engaged in a conflict of interest, displayed gross neglect, failed to communicate with a client, engaged in conduct involving misrepresentation, and failed to cooperate with disciplinary authorities); In re Moeller, 177 N.J. 511 (2003) (one-year suspension for attorney who entered into an arrangement with a Texas corporation (AES) that marketed and sold living trusts to senior citizens, whereby he filed a certificate of incorporation in New Jersey for AES, served as its registered agent, allowed his name to be used in its mailings and was an integral part of its marketing campaign, which contained many misrepresentations; although the attorney was compensated by AES for reviewing the documents, he never consulted with the clients about his fee or obtained their consent to the arrangement and assisted AES in the unauthorized practice of law; he also misrepresented the amount of his fee, and charged an excessive fee); and In re Rubin, 150 N.J. 207 (1997) (one-year suspension in a default matter where the attorney assisted a nonlawyer in the unauthorized practice of law, improperly divided fees with the nonlawyer, engaged in fee overreaching, violated the terms of an escrow agreement, and made misrepresentations to the client about a real estate transaction and about his fee).

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. See, e.g., In the Matter of Walter N. Wilson, DRB 15-338 (November 24, 2015) (admonition for an attorney who was hired to handle a tax appeal from the loss of a special assessment and who neither filed an appeal nor advised his client of the deadline, thus depriving the client of the opportunity to perfect an appeal; in mitigation, we considered that the attorney had no prior discipline; his misconduct involved only one client matter and did not result in significant injury, and the misconduct was not for personal gain; in addition, at the time of the misconduct, the attorney was caring for his girlfriend, who was seriously ill); In the Matter of Josue Jean Baptiste, DRB 15-211 (September 21, 2015) (admonition for an attorney whose filing error resulted in a $1.5 million default judgment entered on the defendant's counterclaim against his client and his client's employer; throughout the representation, the attorney did not inform his client of adverse procedural developments and court rulings against him, such as a subpoena seeking information in

connection with the default judgment, and a warrant for the client's arrest issued as a result of the attorney's failure to honor the subpoena; seven months later, the attorney had the judgment vacated, but the client elected to proceed pro se; we considered, as mitigation, that the attorney's misconduct involved only one client matter, he had no prior discipline, he readily admitted a portion of his misconduct (and contested the gross neglect charge in good faith), and exhibited genuine contrition and remorse for his conduct); In re Sachs, 223 N.J. 241 (2015) (reprimand imposed on attorney who represented two sisters in the sale of a house, against which two liens had attached; the attorney did not negotiate the pay-off of the judgments, despite his promise to do so; he also failed to communicate with the clients for several years after the escrow funds had been disbursed; we considered the economic loss suffered by the clients from the attorney's failure to negotiate the judgments and an unjustified fee taken by the title company); In re Calpin, 217 N.J. 617 (2014) (reprimand for attorney who failed to oppose the plaintiff's motion to strike his client's answer, resulting in the entry of a final judgment against his client; the attorney never informed his client of the judgment; notwithstanding the presence of some mitigation in the attorney's favor, the attorney received a reprimand because

of the "obvious, significant harm to the client," that is, the judgment); In re Burstein, 214 N.J. 46 (2013) (reprimand for attorney guilty of lack of diligence, gross neglect, and failure to communicate with the client; although the attorney had no disciplinary record, the significant economic harm to the client justified a reprimand); and In re Kurts, 206 N.J. 558 (2011) (attorney reprimanded for mishandling two client matters; in one matter, he failed to complete the administration of an estate, causing penalties to be assessed against it; in the other, he was retained to obtain a reduction in child support payments but, at some point, ceased working on the case and closed his office; the client, who was unemployed, was forced to attend the hearing pro se, at which time he obtained a favorable result; in both matters, the attorney was found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to memorialize the basis or rate of his fee; medical condition considered in mitigation).

We have analyzed respondent's conduct against the above cases, and have considered the potential harm to Richardson because of the $198,265.32 default judgment that remains on his credit history, as well as respondent's 2005 admonition for unrelated ethics violations. We have balanced these factors against the mitigating factors – respondent's ready cooperation

with the DEC investigation, his admission of wrongdoing, and sincere contrition, and the changes he has made to his practice. On balance, we find that the mitigating facts weigh against the imposition of discipline greater than a reprimand. We, therefore, determine to impose a reprimand here.

Finally, because respondent did some work on Richardson's behalf, we cannot agree with the DEC's recommendation requiring him to refund Richardson's retainer. The question of whether Richardson is entitled to a refund of his retainer more properly belongs before a fee arbitration committee.

Member Gallipoli voted to impose a censure.

Vice-Chair Baugh and Member Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frank C. Fusco
Docket No. DRB 16-020

Argued: May 19, 2016

Decided: October 21, 2016

Disposition: Reprimand

Members	Reprimand	Censure	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich			X
Total:	6	1	2

Ellen A. Brodsky
Chief Counsel