SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-261
District Docket Nos. XIV-2013-0466E;
XIV-2014-0642E; and XIV-2016-0056E

IN THE MATTER OF	:
RICHARD M. ROBERTS	:
AN ATTORNEY AT LAW	:

Decision

Decided: March 6, 2017

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

This matter was before us on a certification of default, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-4(f). The five-count complaint charged respondent with violations of RPC 1.15(a) (failure to safeguard funds and negligent misappropriation of funds) (mistakenly cited as RPC 1.15(b)),[1] RPC 1.15(b) (failure to promptly disburse funds), RPC 1.15(d) (recordkeeping violations), RPC 5.3(a), (b), and (c) (failure to supervise a non-attorney employee), R. 1:21-

[1] There appear to be several typographical errors in the ethics complaint that relate to the citation of different sub-sections of RPC 1.15 and RPC 8.4.

1C(a)(3)(b) (improperly holding oneself out to be a limited liability corporation (LLC) and failing to maintain malpractice insurance, a violation of RPC 5.5(a) (unauthorized practice of law), which was not cited in the complaint); R. 1:20-20 (failure to comply with the obligations of a suspended attorney (the complaint did not cite a violation of RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) or RPC 8.4(d) (conduct prejudicial to the administration of justice)); RPC 5.5(a) (unauthorized practice of law – practicing while suspended); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, or inducing another to do so); and RPC 8.1(b) and R. 1:20-3(g)(3) (failure to cooperate with an ethics investigation). For the reasons expressed below, we determine that a three-year suspension is warranted.

Respondent was admitted to the New Jersey bar in 1971. At the relevant time, he maintained a law office in Newark, New Jersey.

In 1993, respondent received a private reprimand for failure to provide his client with a writing setting forth the basis or rate of the fee; failure to reinstate a complaint or to file a new complaint until after the client filed a grievance; failure to keep the client apprised of the status of the matter

or to reply to numerous requests for information; and failure to comply with the investigator's numerous requests for information or to timely file a written reply to the grievance. In the Matter of Richard M. Roberts, DRB 93-342 (November 23, 1993).

In 2002, respondent was admonished for failure to provide a client with a writing setting forth the basis or rate of the fee. In the Matter of Richard M. Roberts, DRB 02-148 (July 8, 2002).

In 2009, respondent received a censure. In re Roberts, 199 N.J. 307 (2009). We consolidated two disciplinary cases that addressed four client matters. Respondent failed to provide his clients with writings setting forth the basis or rate of the fee in three matters, grossly neglected two matters, lacked diligence in three matters, failed to communicate with clients in two matters, engaged in a conflict of interest in one matter, and made a misrepresentation in one matter. We also found that respondent made misrepresentations to a tribunal, failed to take responsibility for his misconduct by trying to blame others, and was less than forthcoming in his testimony at the ethics hearing. The Court ordered respondent to complete a course in law office management and to provide the OAE with proof of fitness to practice law.

In 2009, respondent received yet another censure and was ordered to practice under the supervision of an OAE-approved attorney for a two-year period. In re Roberts, 200 N.J. 226 (2009). In that matter, he failed to set forth in writing the basis or rate of his fee, failed to act with diligence in securing a bail reduction for a client, and failed to communicate with the client. He had twice filed a motion for bail reduction, but failed to appear on the return dates of both of the motions.

Respondent was suspended for three months, effective December 4, 2015, for failing to refund an unearned fee to a client on termination of the representation and failure to reply to a grievance. In re Roberts, 223 N.J. 347 (2015).

Respondent also was temporarily suspended in 2015 and two times in 2016, for failure to comply with fee arbitration determinations.

Respondent remains suspended to date.

* * *

Service of process was proper in this matter. On May 26, 2016, the OAE sent a copy of the complaint by regular and certified mail to respondent's last known home address. The regular mail was not returned. The certified mail was returned marked "Return to Sender, Unable to Forward."

Respondent did not file an answer within the required time. The certification of the record states that, on July 5, 2016, the OAE sent the complaint, again, by regular and certified mail to respondent's last known home address, referencing Exhibit D. Exhibit D, however, is a letter notifying respondent that, if he did not file an answer within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b). The regular mail was not returned. The United States Postal Service tracking information provides that, in respect of the certified mail, "notice left, no authorized recipient available."

As of the date that the OAE transmitted the default, respondent had not filed an answer to the ethics complaint.

* * *

In December 2012, respondent negotiated with Gerald Saluti, Esq., to form a partnership. Before their merger, Saluti employed Gabriel Iannacone as an office manager/administrator. Iannacone, however, had been convicted of aggravated assault, eluding arrest, deceptive business practices, passing bad checks, and several counts of theft by deception. Despite his

criminal record, Saluti delegated control of his attorney accounts to Iannacone.

When respondent and Saluti formed the partnership of Roberts and Saluti, LLC (the firm), respondent agreed to use Iannacone as his office manager/administrator and to "abdicate all of his supervision and control over his business and trust accounting of all money generated by him and [the firm] to Saluti and Iannacone." Respondent did not supervise or investigate Iannacone's handling of the firm's financial affairs.

Count One (The Aarons Matter)

In 2012, Ann and Cordell Aarons, Sr., retained Roberts for a wrongful death action involving their son, Cordell Aarons, Jr. Ann was appointed administratrix ad prosequendum and general administratrix of Cordell, Jr.'s estate. The case was set for trial on January 15, 2013. On that date, the parties reached a $100,000 settlement, the amount that had been deposited with the court.

Ann's January 24, 2013 letter to respondent requested that the settlement remain with the court, but if the monies were to be released, that no distribution be made without her specific authorization.

On February 4, the court released the settlement to the firm, which was deposited into the firm's trust account the next day. At that time, that particular trust account held no other funds.[2]

According to Saluti, on February 7, 2013, Iannacone made a cash withdrawal of $37,500 from the firm's trust account and deposited those funds into the firm's operating business account. On February 18, 2013, a $15,000 firm trust account check was deposited into the firm's business account. Although the check purported to be signed by Saluti, he denied signing it or any of the firm's trust account checks. On March 4, 2013, a $5,000 cash withdrawal was made from the firm's trust account. The signature on the withdrawal slip, although illegible, resembled Iannacone's signature. None of these disbursements were made with Ann's knowledge or consent.

On February 23, 2013, Ann filed an order to show cause to stay the distribution of the settlement and to keep the funds intact, pending her review. Ann was not aware that the aforementioned disbursements had been made against the settlement funds.

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[2] The firm and the individual partners had several trust and business accounts that were operational at various times.

On March 18, 2013, when Saluti appeared before a judge on the order to show cause, he misrepresented that only the firm's one-third share of the settlement had been disbursed. If that representation were true, the firm should have been holding $66,666.67 in the trust account on Ann's behalf. On March 18, 2013, however, the balance in the trust account was only $42,492.

Despite the Court's instructions not to disburse any additional funds from the settlement, additional disbursements totaling $52,000 were made by way of cash withdrawals and checks payable to Iannacone, the firm, and to Peter Nwanonyiri. These disbursements caused an overdisbursement of the Aaronses' settlement funds in the amount of $9,534, which invaded other client funds. Ann had not authorized any of the disbursements.

In mid-August 2013, respondent and Saluti discovered that Iannacone had stolen funds from the firm's account. By that time there was a negative $9,524 balance in the firm's trust account, against the Aarons settlement. As a result, the firm retained an accountant to prepare a forensic accounting report. Based on the results of that accounting, the firm notified the OAE that it had been a victim of a "defalcation of funds" by Iannacone in the amount of approximately $121,300 and that, of that amount, $47,500 was stolen from the Aarons settlement.

As of the date of the complaint, the Aaronses had received neither an accounting nor any disbursements of the settlement funds, a violation of RPC 1.15(b).

During an OAE interview, respondent admitted that he abdicated his responsibility of monitoring his attorney accounts to Saluti, and that he had not reviewed the firm's accounts before Saluti told him about Iannacone's thefts from the firm, a violation of RPC 1.15(d).

Respondent's failure to supervise Iannacone resulted in the unauthorized disbursement of funds from the Aarons settlement and a failure to safeguard funds – violations of RPC 5.3(a), (b), and (c), and RPC 1.15(a), rather than RPC 1.15(b), as cited in the complaint.

Count Two (R. 1:20-20)

The Court issued three Orders temporarily suspending respondent effective November 24, 2015, and twice, effective March 3, 2016, for failure to satisfy fee arbitration awards. He was also suspended for three months, effective December 4, 2015.

On December 2, 2015, respondent submitted to the OAE a deficient affidavit of compliance with R. 1:20-20. On February 5, 2015, the OAE informed respondent about the deficiency and set a deadline of February 18, 2016 for him to supplement his submission.

As of the date of the complaint, May 24, 2016, respondent had not corrected the deficiencies. Although not cited in the complaint, this infraction, pursuant to R. 1:20-20(c), is deemed a violation of RPC 8.1(b) and RPC 8.4(d).

Count Three (R. 1:21-1C(a)(3)(b))

Respondent admitted that he had not maintained malpractice insurance for five years and that, for those same five years, the firm had not filed a certificate of formation for an LLC with the Clerk of the Supreme Court, even though the firm's letterhead listed the firm as an LLC. Although not cited in the complaint, these omissions constitute a violation of RPC 5.5(a).

Count Four (Practicing While Suspended)

In early November 2015, respondent formed an agreement with Thomas Verrastro, Esq., whereby Verrastro would undertake the representation of respondent's clients, between November 2015 and March 2016, the date on which respondent anticipated that he would be reinstated from his three-month suspension. Respondent, thus, referred his former clients to Verrastro, with the understanding that the clients would be returned to him on his reinstatement. This agreement violated R. 1:20-20(b)(6), which prohibits the solicitation of legal business for any other attorney.

As a result of their agreement, Verrastro took over approximately twenty-five to thirty of respondent's "former" clients' cases. While suspended, respondent offered legal advice to Verrastro on those cases, thereby violating R. 1:20-20(c)(1) and (3), RPC 5.5(a), and, presumably, RPC 8.4(d) – not RPC 8.4(a), as cited in the complaint.

Respondent also (1) continued to represent a client, Gail Pele-Pedone, after the effective date of his suspension; (2) as of February 3, 2016, used an automated e-mail reply, which stated that he was currently on trial; and (3) while interviewed on a television program, stated "I am still practicing criminal defense . . . yes," violations of R. 1:20-20(b)(1) and (3), RPC 5.5(a) and, presumably, RPC 8.4(d) – not RPC 8.4(a), cited in the complaint.

On March 1, 2016, respondent wrote to the OAE, requesting that he be permitted to practice "for the sole purpose of visiting his 'client' to discuss a possible resolution of a matter involving one of his former clients." The letter added that he "represent[s]" the client and requested permission to visit "my client." The letter further stated that he had spoken to the State and that the parties all agreed that a "plea" should be reached. The complaint alleged that respondent's conduct in this regard constituted the practice of law while suspended, in violation of RPC 5.5(a).

Count Five (Failure to Cooperate with an Ethics Investigation)

Respondent failed to reply to the OAE's February 5, 2016 letter seeking supplementation to his deficient R. 1:20-20 submission and failed to reply to the OAE's letters sent on February 24, March 8, and April 14, 2016, seeking information as a follow-up to an OAE interview and information concerning his continued practice of law while suspended, violations of RPC 8.1(b) and R. 1:20-3(g)(3).

* * *

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Respondent abdicated his recordkeeping responsibilities to Saluti and Iannacone, a convicted felon, who systematically misappropriated client funds.

RPC 5.3 states in relevant part that:

> (a) Every lawyer . . . authorized . . . to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
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> (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if
>
> . . . .
>
> (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Respondent admitted that he did not supervise or investigate Iannacone's handling of the firm's finances and abdicated all of those responsibilities. In so doing, he violated RPC 5.3(a), (b), and (c), as well as his recordkeeping responsibilities under R. 1:21-6 and RPC 1.15(d). He also failed to safeguard client funds, which Iannacone purportedly stole, a violation of RPC 1.15(a). Respondent is also guilty of failing to promptly disburse funds to his client, the Aaronses, in violation of RPC 1.15(b).

Respondent also violated RPC 8.1(b) and RPC 8.4(d) by failing to comply with the Court's Order requiring compliance with R. 1:20-20.

Respondent's failure to maintain malpractice insurance or to file a certificate of formation of an LLC with the Clerk of the Supreme Court, pursuant to R. 1:21-C(a)(3)(b) is a violation of RPC 5.5(a). Respondent also violated RPC 5.5(a) by practicing law while suspended.

Finally, respondent failed to cooperate with the OAE's investigation, by failing to provide the information it requested on several occasions, a violation of RPC 8.1(b).

The only issue left for determination is the proper quantum of discipline to impose.

Respondent's most serious violation is practicing law while suspended. The level of discipline for such a violation ranges from a lengthy suspension to disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and aggravating or mitigating factors. See, e.g., In re Brady, 220 N.J. 212 (2015) (one-year retroactive suspension imposed on attorney who, after a Superior Court judge had restrained him from practicing law, represented two clients in municipal court and then appeared in a municipal court on behalf of a third client, after the Court had temporarily suspended

him; the attorney also failed to file a R. 1:20-20 affidavit following the temporary suspension; significant mitigating factors, including the attorney's diagnosis of a catastrophic illness and other circumstances that led to the dissolution of his marriage, the loss of his business, and the ultimate collapse of his personal life, including becoming homeless, and, in at least one of the instances of his practicing while suspended, his desperate need to provide some financial support for himself; prior three-month suspension); In re Bowman, 187 N.J. 84 (2006) (one-year suspension for attorney who, during a period of suspension, maintained a law office where he met with clients, represented clients in court, and acted as Planning Board solicitor for two municipalities; prior three-month suspension; extremely compelling circumstances considered in mitigation); In re Lisa, 158 N.J. 5 (1999) (one-year suspension for attorney who appeared before a New York court during his New Jersey suspension; mitigation considered was a serious childhood incident that made the attorney anxious about offending other people or refusing their requests; out of fear of offending a close friend, he agreed to assist as "second chair" in the New York criminal proceeding; there was no venality or personal gain involved; the attorney did not charge his friend for the representation; prior admonition and three-month suspension); In

re Wheeler, 140 N.J. 321 (1995) (two-year suspension imposed on attorney who practiced law while serving a temporary suspension for failure to refund a fee to a client; the attorney also made multiple misrepresentations to clients, displayed gross neglect and pattern of neglect, engaged in negligent misappropriation and in a conflict of interest situation, and failed to cooperate with disciplinary authorities); In re Marra, 183 N.J. 260 (2005) (three-year suspension for attorney who practiced law in three matters while suspended; the attorney also filed a false affidavit with the Court stating that he had refrained from practicing law during a prior suspension; the attorney had received a private reprimand, a reprimand, two three-month suspensions, a six-month suspension, and a one-year suspension also for practicing law while suspended); In re Cubberley, 178 N.J. 101 (2003) (three-year suspension for attorney who solicited and continued to accept fees from a client after he had been suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed to notify the client or the courts of his suspension, failed to file the affidavit of compliance required by Rule 1:20-20, and failed to reply to the OAE's requests for information; the attorney had an egregious disciplinary history: an admonition, two reprimands, a three-month suspension, and two six-month

suspensions); In re Wheeler, 163 N.J. 64 (2000) (attorney received a three-year suspension for handling three matters without compensation, with the knowledge that he was suspended, holding himself out as an attorney, and failing to comply with Administrative Guideline No. 23 (now R. 1:20-20) relating to suspended attorneys; prior one-year suspension on a motion for reciprocal discipline and, on that same date, two-year consecutive suspension for practicing while suspended); In re Walsh, Jr., 202 N.J. 134 (2010) (attorney disbarred on a certified record for practicing law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court appearance on behalf of seven clients; the attorney also was guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievances; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008); In re Olitsky, 174 N.J. 352 (2002) (disbarment for attorney who agreed to represent four clients in bankruptcy cases after he was suspended, did not advise them that he was suspended from practice, charged clients for the prohibited representation, signed another attorney's name on the

petitions without that attorney's consent and then filed the petitions with the bankruptcy court; in another matter, the attorney agreed to represent a client in a mortgage foreclosure after he was suspended, accepted a fee, and took no action on the client's behalf; in yet another matter, the attorney continued to represent a client in a criminal matter after the attorney's suspension; the attorney also made misrepresentations to a court and was convicted of stalking a woman with whom he had had a romantic relationship; prior private reprimand, admonition, two three-month suspensions, and two six-month suspensions); and In re Costanzo, 128 N.J. 108 (1992) (attorney disbarred for practicing law while serving a temporary suspension for failure to pay administrative costs incurred in a prior disciplinary matter and for misconduct involving numerous matters, including gross neglect, lack of diligence, failure to keep clients reasonably informed and to explain matters in order to permit them to make informed decisions about cases, pattern of neglect, and failure to designate hourly rate or basis for fee in writing; prior private reprimand and reprimand).

Here, respondent practiced while suspended, even admitting during a television interview, that he was still practicing "criminal defense." He represented several clients, referred clients to another lawyer, intending to resume their

representation once reinstated, permitted his automated e-mail response to state that he was "currently on trial," and, after negotiating on behalf of a client, sought the OAE's permission to practice law for the purpose of visiting his client to discuss a plea agreement.

Respondent also failed to supervise Iannacone's handling of the firm's accounts. Attorneys who fail to supervise their non-lawyer staff are typically admonished or reprimanded, even when a failure to safeguard funds or misappropriation of client funds has occurred. See, e.g., In re Bardis, 210 N.J. 253 (2012) (admonition; attorney's failure to reconcile and review his attorney records permitted an individual who helped him with office matters to steal $142,000 from his trust account, causing a shortage of $94,000; mitigating factors were the attorney's deposit of personal funds to replenish the account, numerous other corrective actions, his acceptance of responsibility for his conduct, his deep remorse and humiliation for not having personally handled his own financial affairs, and lack of a disciplinary record); In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a paralegal, who then forged the attorney's signature on trust account checks and stole $272,000 in client funds); In the Matter of Brian C. Freeman,

DRB 04-257 (September 24, 2004) (attorney admonished for failing to supervise his paralegal, who also was his client's former wife; the paralegal forged a client's name on a retainer agreement, a release, and two settlement checks; the funds were never returned to the client; mitigating factors included the attorney's clean disciplinary record and the steps he took to prevent a reoccurrence); In re Deitch, 209 N.J. 423 (2012) (reprimand; as a result of attorney's failure to supervise his paralegal-wife and poor recordkeeping practices, $14,000 in client or third-party funds was invaded; the paralegal-wife stole the funds by negotiating thirty-eight checks made out to herself by either forging the attorney's signature or using a signature stamp; no prior discipline); and In re Murray, 185 N.J. 340 (2005) (attorney reprimanded for failure to supervise non-attorney employees, which led to the unexplained misuse of client trust funds and to negligent misappropriation; the attorney also committed recordkeeping violations). But, see, In re Key, 220 N.J. 31 (2014) (censure imposed on attorney who failed to ensure that his non-lawyer employees recorded the time he spent on client matters, a violation of RPC 5.3; the attorney also violated RPC 3.1 when, while his appeal from an adverse fee arbitration award was pending, he filed an answer to his clients' civil complaint seeking to enforce the award and

asserted a counterclaim for the purpose of relitigating the reasonableness of his fee; the attorney knew that the court was without jurisdiction while the fee appeal was pending and, further, that he was barred from relitigating the fee arbitration panel's determination; further, after the Board dismissed his appeal from the fee award, he did not withdraw his counterclaim; the attorney also failed to record expenses and costs incurred on behalf of his clients, a violation of RPC 1.15(d); two prior admonitions and a reprimand for recordkeeping violations); and In re Weichsel 227 N.J. 141 (2016) (three-month suspension for attorney who failed to supervise his secretary, giving her access to his trust account, even after he became aware that she had forged his signature on at least one trust account check; failed to safeguard funds resulting in the secretary's misappropriation of funds; failed to perform three-way reconciliations that would have alerted him to the thefts earlier; and made misrepresentations to the OAE; prior admonition and reprimand).

As to the failure to maintain malpractice insurance, such a violation standing alone ordinarily warrants discipline no greater than an admonition. In the Matter of Gerald F. Fitzpatrick, DRB 99-046 (April 21, 1999).

The threshold measure of discipline for an attorney who fails to file an affidavit of compliance pursuant to R. 1:20-20(b)(15) is a reprimand. In re Girdler, 179 N.J. 227 (2004). By the very terms of R. 1:20-20(c), the failure to file the affidavit constitutes a violation of RPC 8.1(b) and RPC 8.4(d). Here, respondent filed the affidavit, but it was deficient. He, thereafter, failed to correct the deficiencies, despite the OAE's letter requesting him to do so.

In determining the appropriate discipline for this respondent, we start with respondent's practicing law while suspended. The attorneys who received one-year suspensions presented compelling mitigating circumstances. Here, there are no mitigating circumstances to consider. There is, however, a significant aggravating factor – respondent's extensive ethics history: (1) a 1993 private reprimand; (2) a 2002 admonition; (3) a 2009 censure; (4) another 2009 censure; (5) a 2015 three-month suspension; and (6) three temporary suspensions for failure to comply with fee arbitration awards. This is respondent's sixth ethics matter before us. Even though he took no steps to be reinstated, he continued to hold himself out as a lawyer. Moreover, we consider the default status of this matter as an aggravating factor. "A respondent's default or failure to cooperate with the investigative authorities acts as an

aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332,342 (2008).

Thus, under the totality of the circumstances - respondent's misconduct, together with his extensive ethics history, and the fact that he permitted his matter to proceed as a default – we determine that a three-year suspension is warranted.

Members Gallipoli, Hoberman, and Zmirich voted to recommend respondent's disbarment.

Vice-Chair Baugh 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 Richard M. Roberts
Docket No. DRB 16-261

Decided: March 6, 2017

Disposition: Three-year suspension

Members	Three-year suspension	Disbar	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman		X	
Rivera	X		
Singer	X		
Zmirich		X	
Total:	5	3	1

Ellen A. Brodsky
Chief Counsel