SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-171
District Docket No. XIV-2009-0076E

IN THE MATTER OF	
ANTHONY J. GIAMPAPA	
AN ATTORNEY AT LAW	

Decision

Argued: September 20, 2012

Decided: November 14, 2012

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

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. The four-count amended complaint charged respondent with having violated RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter or to promptly comply with reasonable requests for information), RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), RPC

1.15(a) (failure to safeguard client funds), RPC 1.15(b) (failure to promptly deliver funds to a client or third person), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), RPC 5.5(a) (practicing law while ineligible), RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons expressed below, we determine that a three-month suspension, with conditions, is warranted.

Respondent was admitted to the New Jersey bar in 1973. At the relevant time, he maintained a law office in Totowa, New Jersey.

Respondent was twice privately reprimanded in 1988. In one of the matters, he improperly disbursed to his client trust funds to which he believed his client was entitled, without receiving authorization from the seller of the property. In the Matter of Anthony J. Giampapa, DRB 84-382 (June 27, 1988). In the other matter, he engaged in a social and/or business relationship with his client's spouse and communicated directly with her on the subject of the representation of his client, knowing that she was represented by counsel and without obtaining that counsel's consent. He also concealed from his client the nature of his

relationship with the client's spouse. In the Matter of Anthony J. Giampapa, DRB 85-210 (June 30, 1988).

In November 2007, we admonished respondent for his failure to return his client's telephone calls, failure to return the balance of funds from his client's refinancing of a real estate loan, and failure to turn over his client's file, despite repeated requests from his client and the client's new attorney. In the Matter of Anthony J. Giampapa, DRB 07-178 (November 15, 2007).

Respondent received a censure, in 2008, for his representation of clients in a breach of contract action. He failed to keep them apprised of the status of their matter and did little to advance their interests. He filed a complaint on the clients' behalf only after they filed a grievance against him, two and one-half years after he was retained. In all, respondent was found guilty of gross neglect, lack of diligence, and failure to communicate with clients.

In 2009, respondent received another censure for failure to promptly disburse funds from his trust account that either his client or a third party was entitled to receive and failure to fully cooperate with the ethics investigation. We found, as an aggravating factor, that he had misrepresented to a court that

he was no longer holding the funds, even though they were still in his trust account. In re Giampapa, 200 N.J. 478 (2009).

Counts One and Three

Office of Attorney Ethics (OAE) Assistant Chief of Investigations Barbara Galati testified that the OAE had conducted random audits of respondent's books and records in 1990, 1993, and 2003.

By letter dated September 8, 2003, the OAE informed respondent of various deficiencies that were detected as a result of the 2003 random audit: client ledger cards were not fully descriptive, inactive trust account ledger balances remained in his trust account for an extended period, outstanding checks had not been resolved, trust and personal funds were commingled in the trust account, funds held in that account were in excess of amounts necessary for bank charges, the receipts journal for the business account was not fully descriptive, there was no professional liability insurance in place, and business account checks were not in compliance with R. 1:21-6(b). The letter also noted that the OAE had discovered and alerted respondent to some of the same deficiencies that had been detected during the 1990 audit.

By letter dated March 12, 2004, respondent represented to the OAE that he would correct the deficiencies listed in its September 8, 2003 letter.

As to the most recent audit, by letter dated March 11, 2008, the OAE instructed respondent to produce his books and records for a March 26, 2008 audit. Thereafter, by letter dated May 13, 2008, the OAE informed respondent that, as a result of its review, it had determined that his records were "grossly incomplete and not in accordance with *R. 1:21-6* and *RPC 1.15*." The OAE found that old or inactive balances remained in his attorney trust account, dating back as far as 1990, and that there were no monthly trust bank reconciliations with client ledger cards, journals and bank statements. In that letter, the OAE told respondent that "[t]he fact that you are unable to identify for our auditor the amount of funds you have on hand for each client at any given time is shocking" and that his actions presented "a clear and present danger to present and future clients."

The OAE gave respondent forty-five days to submit reconciliations of his trust account for the prior six months and to include copies of bank statements, the names and amounts held for all clients at the end of each month, and proof that he

had resolved the old balances that had remained in his trust account for more than two years.

According to Galati, respondent attempted to remedy the deficiencies. He prepared a list of his clients' trust ledger balances as of May 31, 2008, with handwritten notes about his efforts to resolve the old balances. Galati compared that list with the list that respondent had prepared in 2003. More than half of the names on the current list were the same names that had appeared on the 2003 list. Galati, therefore, concluded that respondent had not taken the measures indicated in his 2004 letter to the OAE. For example, he did not resolve all of the balances and did not remove his fees from the trust account. Galati testified that, when an attorney is unable to identify or locate a client to whom funds are to be disbursed, the Court Rules require that the attorney turn the funds over to the Superior Court Trust Fund.

By letter dated June 30, 2008, respondent hand-delivered various documents to the OAE and also stated that he would provide additional documentation, including copies of requests he had made to Lakeland Bank and the Bank of New York to obtain duplicate trust account information for records that had been destroyed by a flood.

On January 30, 2009, the OAE received a notice from the Lakeland Bank that one of respondent's trust account checks had been returned for insufficient funds. As of that date, he had a trust account balance of $5,709.29. According to Galati, a trust account check issued to one of respondent's clients had "bounced." Respondent claimed that he was unaware of the problem until the client called to complain about it.

Galati learned from one of respondent's friends, Jay Surgent, Esq., that there had been a theft from respondent's trust account, while he was on vacation. Respondent discovered that, in either December 2008 or January 2009, Pamela Neal and former Senator John Ewing had removed checks from his office. Respondent had known Neal for more than fifteen years. She had helped him with computer problems. Ewing was respondent's former client. Over the course of approximately six weeks, they had cashed five or six checks, totaling $45,000. Neal had also taken deposit slips, check stubs, and other trust account records to conceal the theft. After respondent reported the thefts to the police, warrants were issued against Ewing and Neal.

By letters dated February 6, 2009 and June 8, 2009, the OAE instructed respondent to submit various documents relating to the forged checks, including proof that he had opened a new trust account for all new client matters and a narrative

documenting the sequence regarding the theft. The OAE further instructed him to immediately replace the stolen funds. Galati also asked him to prepare a client ledger card to memorialize the theft.

Respondent prepared a revised trust account reconciliation as of January 31, 2009. It showed, among other things, that he should have had $48,334.95 of client funds in his trust account and it noted $45,000 as "Ewing forged checks." At the time of the reconciliation, respondent had earned fees in his trust account that should have been removed years earlier.

Respondent admitted that he had a $10,000 fee "sitting" in his trust account from a personal injury case, which, he claimed, he would have removed, had he known it was there. He also prepared a client ledger card titled "EWING, JOHN H. – FORGERIES." It listed five forged checks, totaling $45,000. It also showed funds from attorney's fees that he had left in his trust account and that were applied against the forged checks. The funds were transferred from one client ledger card to the Ewing Forgery ledger card. Respondent's fees, which should have been deposited into his business account, were credited towards replacing the stolen funds. Respondent repaid the client whose check had bounced with funds from his business account. He then

credited the ledger card, thereby reducing the amount that had to be refunded to his trust account.

According to Galati, respondent did not deposit any other money into his trust account to replace the stolen funds, even though the OAE had requested him to do so on numerous occasions. Respondent told Galati that he did not have the money. Galati noted that respondent had not taken any action to replenish the funds, such as file suit against the bank for paying the forged checks, make a claim against any insurance policies, or file any other type of civil action to recoup the stolen funds.

Galati testified that, even though Neal and Ewing were indicted, the charges against them were dismissed. Respondent had not known about the dismissal until the day of the DEC hearing, February 15, 2012, even though he had contacted the prosecutor's office about the status of the matter on numerous occasions. Respondent claimed that he had replaced the funds to the extent that he could, informed the OAE that he planned to obtain a loan from his mother, and was awaiting funds from a client matter, while continuing to explore other sources to replace the funds.

As of the date of the DEC hearing, February 15, 2012, respondent had not submitted proof to the OAE that he had

deposited any additional funds to offset the $17,905 that left him out of trust as a result of the theft.

The record is not clear about the amount of client funds that were stolen and the amount of respondent's fees that had been left in the trust account at the time of the theft.

Count Two

Respondent represented John Freeswick in connection with Freeswick's mother's estate. Respondent held the money from the sale of Margaret Freeswick's home and was to disburse the proceeds to Freeswick and his children.

In 2006, respondent deposited funds on behalf of the Freeswick estate into his trust account. As of July 14, 2006, he was holding $161,153.41 in his trust account for Freeswick. In 2006 and 2007, he disbursed funds to the beneficiaries, with the exception of Olivia, a minor. In August 2007, he intended to deposit $11,172.35 into a twelve-month certificate of deposit in John Freeswick's name, as the trustee for the benefit of Olivia Freeswick, but never did so. According to respondent, the funds earmarked for Olivia's bequest were affected by the Ewing/Neal theft.

Freeswick testified that his other children had received their distributions but, because Olivia was a minor at the time,

he wanted her portion invested into something that would earn interest. Respondent informed him that Margaret's will limited the types of investments that could be made for Olivia. However, Freeswick consulted with another attorney, who told him that there were no restrictions under the will. Respondent claimed that the will specifically limited investing the funds into an FDIC insured account. The funds could not be invested into a bond or stock fund.

Freeswick called respondent many times, before he learned about the theft from respondent's trust account. Respondent told him that he could not release Olivia's funds until he had sufficient funds to pay everyone at the same time. As of the date of the DEC hearing, Freeswick was still waiting to get Olivia's distribution.

Freeswick had also retained two other attorneys, who were unable to communicate with respondent. Either respondent's voice mailbox was full or he did not return the attorneys' telephone calls.

Respondent admitted that he did not communicate with Freeswick after the money was stolen, but explained that Freeswick knew about the theft, having heard about it from the OAE. Respondent acknowledged that Freeswick's calls to him in 2009, which respondent estimated to have been two or three, were

unanswered. He stated that he was either not in his office or Freeswick "got a voicemail that was full or something like that."

Count Four

Respondent admitted that he practiced law while ineligible for failure to pay his annual assessment to the New Jersey Lawyers' Fund for Client Protection (the Fund) from September 19, 2006 to January 5, 2007 (approximately three-and one-half months), September 22, 2008 to October 8, 2008 (approximately two weeks), and September 22, 2009 to October 13, 2009 (approximately three weeks). He also practiced law while on the IOLTA Fund's list of ineligible attorneys, from October 21, 2009 to March 31, 2010 (approximately five months). He claimed that "the minute" he found out about the periods of ineligibility he "filled out the necessary paperwork and over nighted the necessary fee," whereupon he was reinstated.

As a form of mitigation, respondent stated that he had replaced whatever funds he could. He had expected to sell some property to repay the funds but, as a result of his divorce, his financial situation took a turn for the worse. He had to declare bankruptcy and could not satisfy the terms of his property settlement agreement. He claimed further that he did not even

have $275 to pay the filing fee in a lawsuit that he had prepared against the Lakeland Bank. In 2011, the bank offered to settle the matter for only $10,000 of the $45,000 that was stolen. According to respondent, the bank claimed, as a defense, that respondent was negligent in permitting the theft to occur. He did not accept the offer and his insurance policy did not cover the loss.

To further explain his dire financial circumstances, respondent asserted that he had to borrow money from his eighty-seven-year old mother to pay the administrative costs that were assessed against him, in his prior ethics matter. He noted that, as the economy worsened, so did his finances. He became unable to continue renting office space. His landlord obtained a $12,000 judgment against him and locked him out of his office for non-payment of rent. In addition, he could no longer afford to pay his bankruptcy attorney, who withdrew from his case. He testified that he has less than $300 to his name. He borrowed $2,000 from his son to pay for his health insurance premium for a couple of months but, it was eventually cancelled for non-payment and he was unable to reimburse his son. He claimed that he did not earn more than $10,000 to $15,000 in the past two years.

According to respondent, without health insurance he cannot afford much needed eye surgery. He told the hearing panel about his plight:

> Nobody chooses to live like that if they can avoid it and it's debilitating as well as embarrassing to find yourself at 64-years old in a position where financially because of a variety of factors I need [sic] more money when I was a young lawyer a year out of law school than I do now. I've started looking for a job but even that has caused a degree of difficulty because of the pendency of these proceedings to go to somebody. I'm tired of practicing law on my own, I'm incapable of practicing law on my own, financially being successful and hire me [sic] but, by the way, there is an ethics proceeding that's pending that may result in my suspension so or whatever might happen so take that into consideration.
>
> [T97-23 to T98-13.][1]

Respondent asserted that, although he might have been able to scrape money together to file suit against Lakeland, the trauma caused from thefts by people he trusted had become "debilitating."

According to respondent, from 2003 to 2007, his attorney records, which had been stored in his basement, were intact, until a flood from a hurricane destroyed them. He claimed that he was able to identify the clients that comprise the $17,905

[1] T refers to the transcript of the DEC hearing of February 15, 2012.

balance in his trust account and that he would have disbursed the funds, if the theft had not occurred. Of that amount approximately $12,000 was money earmarked for Olivia. No other clients came forward to complain that they had not been paid.

The DEC found that respondent violated RPC 1.15(a) by failing to "adequately secure, safeguard and manage his Trust Account" and by virtue of his "poor, sloppy or nonexistent record keeping." He had no safeguards in place to secure his physical office or trust account records and checks, while he was absent from the office, and failed to notice the forgeries that occurred over a six-week period. Moreover, once he discovered the theft, he failed to take timely action to replenish the stolen funds by pursuing the bank or the individuals who had stolen the funds from him.

As to count three, the DEC found that respondent violated RPC 1.15(b), RPC 1.15(d), and RPC 8.1(a), but not RPC 8.4(c). The DEC noted that respondent had a long history of recordkeeping problems that began long before the most recent audit. Moreover, even though respondent represented to the OAE that he had corrected the problems, he had not. His recordkeeping problems were compounded by water damage to his records, "but long predated that calamity."

The DEC found that, by respondent's own admission, he violated RPC 5.5(a) by continuing to practice law, even though he had not timely paid his annual attorney assessment in 2006, 2008, and 2009 and that he failed to satisfy his IOLTA requirement in 2009.

The DEC considered respondent's violations, ethics history, and compelling financial circumstances and concluded that a censure, rather than a suspension, was warranted.

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

As a result of the theft from respondent's trust account, he was out of trust by almost $18,000. His failure to properly monitor his trust account prevented him from detecting the theft for approximately six weeks. It was not until his client alerted him that a trust account check had been returned for insufficient funds that he realized that something was amiss with his trust account.

Respondent was able to repay that client with funds from his business account and earned legal fees that he had improperly left in his trust account, but he did not replace all of the stolen funds. Therefore, he was unable to distribute funds to Olivia Freeswick.

Respondent also failed to correct deficiencies in his trust account, some of which existed as far back as 1990, even though he had informed the OAE that he would correct them.

In sum, the evidence clearly and convincingly establishes that respondent failed to safeguard funds, failed to disburse funds to a third person, and failed to comply with the recordkeeping provisions of R. 1:20-6, thereby violating RPC 1.15(a), RPC 1.15(b), and RPC 1.15(d), respectively.

Respondent also failed to adequately communicate with Freeswick. He did not return Freeswick's or Freeswick's attorneys' telephone calls. The evidence also demonstrates that respondent failed to explain the purported restrictions under Margaret's will as they related to Olivia's distribution, such that Freeswick could make an informed decision about what should be done with Olivia's bequest. Respondent, therefore, also violated RPC 1.4(b) and RPC 1.4(c).

The evidence does not clearly and convincingly demonstrate that respondent was guilty of violating RPC 8.1(a) and RPC 8.4(c), however. The complaint alleged that respondent misrepresented to the OAE, in his March 12, 2004 letter, that he had corrected the recordkeeping deficiencies and that, on a quarterly basis, he would review his open client balances and close them as appropriate. Respondent's March 12, 2004 letter,

however, did not state that he had made the changes; it only indicated what he intended to do to correct the deficiencies. In addition, Galati testified that respondent had attempted to cure the problems by preparing a list of his clients' trust ledger balances and had made handwritten notations on the list about his efforts to resolve the old balances.

A violation of RPC 8.4(c) requires intent. See, e.g., In re Hyderally, 208 N.J. 453 (2011), and In re Uffelman, 200 N.J. 260 (2009). Respondent may have intended to make the changes mentioned in his March 12, 2004 letter. In view of a lack of clear and convincing evidence that respondent's statements in his letter were knowingly false, we, thus, dismiss the charged violations of RPC 8.1(a) and RPC 8.4(c).

Altogether, respondent is guilty of having violated RPC 1.4(b) and (c), RPC 1.15(a) and (b), RPC 1.15(d) and R. 1:21-6, and RPC 5.5(a). As seen below, each violation, considered independently, would deserve no more than an admonition. However, the combination of violations, given respondent's extensive ethics history and failure to learn from prior mistakes warrants more serious discipline.

In its letter-brief to us, the OAE pointed out that a reprimand is the appropriate discipline for knowingly practicing law while ineligible. However, the OAE took the position that,

here, the discipline should be increased accordingly, because of respondent's other ethics violations and his ethics history.

The OAE stressed that a third censure is not likely to "impress" respondent and provide the impetus for change. It, therefore, urged the imposition of a three-month suspension, during which time respondent can correct his recordkeeping deficiencies and attempt to recover the funds that belong to his clients.

Practicing law while ineligible, without more, is generally met with an admonition if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of Robert B. Blackman, DRB 10-137 (June 18, 2010) (attorney practiced law while ineligible for failure to file the annual IOLTA registration statement for three years; mitigation was the attorney's lack of knowledge about his ineligibility and the nineteen-year lapse since his prior discipline, a reprimand) and In the Matter of Matthew George Connolly, DRB 08-419 (March 31, 2009) (attorney ineligible to practice law rendered legal services; the attorney's conduct was unintentional).

A reprimand is usually imposed when the attorney has an extensive ethics history, has also committed other ethics improprieties, or is aware of the ineligibility and practices

law nevertheless. See, e.g., In re Feinerman, 202 N.J. 48 (2010) (attorney practiced law while ineligible, negligently misappropriated funds, committed recordkeeping violations, and made misrepresentations on real estate closing documents; mitigation included that the misrepresentations were more a series of omissions, rather than intentional acts, that the attorney was unaware of his ineligibility, and that he had no history of discipline); and In re Austin, 198 N.J. 599 (2009) (during a one-year period of ineligibility, attorney made three court appearances on behalf of an attorney-friend who was not admitted in New Jersey, receiving a $500 fee for each of the three matters; the attorney knew that he was ineligible; also, the attorney did not keep a trust and a business account in New Jersey and misrepresented, on his annual registration form, that he did so; several mitigating factors considered, including the attorney's unblemished disciplinary record).

More serious circumstances, such as the default nature of the proceeding or an extensive ethics history, warrant even greater discipline. See, e.g., In re Payton, 205 N.J. 103 (2011) (censure for attorney who knowingly practiced law while ineligible from September 28, 2009 to August 18, 2010; significant ethics history included an admonition, a reprimand, and two three-month suspensions; the attorney's prior discipline

was for unrelated violations; mitigation included the attorney's poor health that resulted in financial problems) and In re Manzi, 202 N.J. 339 (2010) (censure in a default matter for attorney who practiced law while on the IOLTA list of ineligible attorneys and was guilty of lack of diligence, failure to communicate with the client, and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation).

As to the discipline for respondent's other charges, attorneys who fail to properly deliver funds to clients or third persons also receive admonitions or reprimands. In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (admonition for attorney who for three years did not remit to the client the balance of settlement funds to which the client was entitled; the attorney also lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash;" significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (attorney did not promptly disburse to a client the balance of a loan that was refinanced; in addition, he did not adequately communicate with the client and did not promptly return the client's file;

admonition imposed); In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney was admonished for failure to promptly deliver the balance of settlement proceeds to a client after her medical bills were paid); In the Matter of E. Steven Lustig, DRB 02-053 (April 19, 2002) (admonition imposed where for three-and-a-half years, the attorney held in his trust account $4800 earmarked for the payment of a client's outstanding hospital bill); and In re Dorian, 176 N.J. 124 (2003) (reprimand for an attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities).

Where five matters were involved and the attorney was guilty of committing multiple ethics violations, a censure was imposed. See In re Squitieri, 204 N.J. 219 (2010) (in one matter, the attorney failed to remit a portion of a fee to an attorney for a period of six years; in four personal injury matters, he was found guilty of gross neglect, lack of diligence, and failure to communicate with clients).

An attorney, like respondent, whose recordkeeping problems permitted a person he trusted to steal funds from his trust account received an admonition. See In re Bardis, 210 N.J. 253 (2012) (admonition imposed; as a result of the attorney's failure to reconcile and review his attorney records, an

individual who helped him with office matters was able 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 the lack of a disciplinary record).

Finally, we recently imposed an admonition on an attorney guilty of failure to safeguard funds. He failed to monitor his trust account and did not discover that he had insufficient funds in it to cover bank maintenance fees. A check to a client was also returned for insufficient funds. See In the Matter of Robert C. Armstrong, DRB 11-309 (November 30, 2011).

In fashioning the proper measure of discipline in this case, we considered that respondent has received two private reprimands, an admonition, and two censures and that he continues to make the same mistakes. His books and records have been reviewed by the OAE on four occasions. Each time, the OAE found recordkeeping infractions. He did not correct all of the prior infractions, even though he informed the OAE that he intended to do so. He was also previously found guilty of failing to communicate with clients, failing to properly disburse funds, and improperly disbursing trust funds. In

addition, although respondent painted a bleak picture of his finances, evoking a great degree of sympathy, he did not establish a nexus between his financial problems and his failure to pay his annual assessment to the Fund. Moreover, his economic hardship, too, does not explain or excuse his other ethics improprieties.

Under the totality of circumstances, we are not persuaded that an additional censure would serve any purpose. We, therefore, determine that a short-term suspension (three months) is warranted here.

We also determine that, prior to reinstatement, respondent should submit proof to the OAE that he has corrected all of his recordkeeping problems and that, upon reinstatement, he should submit to the OAE monthly reconciliations of his trust account, on a quarterly basis, for a two-year period.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony J. Giampapa
Docket No. DRB 12-171

Argued: September 20, 2012

Decided: November 14, 2012

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Gallipoli		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

Julianne K. DeCore
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Chief Counsel