SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-351
District Docket No. XII-2010-0055E

IN THE MATTER OF	:
STUART M. NACHBAR	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 21, 2013

Decided: April 12, 2013

Karen E. Bezner appeared on behalf of the District XII 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 discipline (reprimand), filed by the District XII Ethics Committee (DEC). Respondent was charged with having engaged in a conflict of interest (RPC 1.7(a)).

Respondent was admitted to the New Jersey bar in 1994. He has no prior discipline.

Specifically, respondent was charged with having engaged in a conflict of interest when filing suit against the grievants, Moses and Mauricia Tabin, and later obtaining wage executions against each of them, to collect legal fees awarded to his law firm by a bankruptcy court. At the time, respondent and his law partner, Melinda Middlebrooks, were still bankruptcy counsel for the Tabins.[1] We determine to impose a reprimand.

Respondent admitted all of the facts set out in the complaint, with one minor exception: the date of a bankruptcy hearing. The undisputed facts are as follows:

On October 17, 2008, the Tabins retained respondent and Middlebrooks to file a Chapter 13 bankruptcy petition and to reorganize their debts through a Chapter 13 plan. The fee agreement provided for an initial fee of $3,000. The first $1,000 was to be paid upon signing of the agreement, another $1,000 one week later, and the remainder through monthly installments, paid through the Chapter 13 plan.

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[1] An ethics complaint was also filed against Middlebrooks for her alleged misconduct. That matter is scheduled for our consideration in the near future.

On October 31, 2008, respondent and Middlebrooks filed a Chapter 13 bankruptcy petition for the Tabins, in which both attorneys were named bankruptcy counsel.

Sometime thereafter, respondent filed a motion to "strip" a $52,000 second mortgage from the Tabins' property, due to the lack of equity in the real estate. The motion was unopposed. On February 26, 2009, the bankruptcy court granted it.

On July 15, 2009, respondent filed a fee application in the bankruptcy court for $6,413.74, representing additional legal fees, primarily for the extra legal work associated with the "stripping" motion, which was not included in the original $3,000 fee. By court order dated August 19, 2009, the fee application was granted in full. The bankruptcy order specified that the fees were to be paid "outside the plan," meaning directly from the Tabins, not by way of plan payments from the Tabins to the Chapter 13 trustee.

Thereafter, the law firm sent collection letters to the Tabins, dated August 20, September 10, and November 4, 2009. The letters were signed by Middlebrooks.

About a year later, under cover letter dated June 24, 2010, respondent's law firm filed a complaint against the Tabins, in Union County Superior Court, seeking the original $6,413.74, plus

interest, for a total of $7,118.26. On January 3, 2011, judgment by default was entered against them, in the amount of $6,479.74.

On February 12, 2011, respondent's law firm made an application for wage executions against the Tabins. The application was granted by court order dated February 23, 2011.

Meanwhile, on February 18, 2011, respondent filed, on his own and on Middlebrooks' behalf, a motion to withdraw as the Tabins' bankruptcy counsel. On March 18, 2011, Moses Tabin filed a pro se objection to that motion and, days later, on March 23, 2011, filed a motion for the bankruptcy court to reconsider the additional fees and expenses awarded to respondent's law firm.

Respondent filed a reply objection to the Tabin motion to reconsider the fee application, along with a letter-brief, to which the Tabins submitted an additional reply, on March 31, 2011.

On May 9, 2011, respondent appeared for oral argument on the motion, which was before the Donald H. Steckroth, U.S.B.J. The judge asked respondent what had prompted the motion to be relieved as counsel. Respondent replied, "We are having issues with our client with regard to being paid for our services as well as the client having filed other applications in State Court against us as well as with other organizations." The judge

then asked Tabin a few preliminary questions, before making the following remarks:

> And I have your handwritten objection in which you tell me that you would like to object to your counsel being withdrawn. You also tell me your counsel is garnishing your wages, that affects your bankruptcy plan, you've reported them to the ethics committee and the case is under investigation, right?
> . . .
> THE COURT: Mr. Tabin, -- Are they really garnishing [your] wages?
>
> MR. NACHBAR: We have a court order, State Court order based on a special civil part judgment that says that we can garnish his wages and his wife's wages, absolutely.
>
> THE COURT: What did you do, you took --
>
> MR. TABIN: They are garnishing 50 percent of our wages.
> . . .
> THE COURT: You took the order I signed awarding fees, took it to the State Court and had a garnishment issued?
>
> MR. NACHBAR: After filing –
>
> THE COURT: Against your own client, while you are representing them?
>
> MR. NACHBAR:
> That is what my office did, Your Honor, yes.
> . . .
> THE COURT: [] I just don't, I've never heard of lawyers suing clients in the middle of a case.
>
> [Ex.O]

The judge then asked respondent to voluntarily withdraw the wage executions, and directed the entry of an order determining that the wage executions violated the automatic stay provisions of the bankruptcy code. The docket sheet for the Tabin bankruptcy, however, reflects no entry for such an order. The judge granted respondent's motion to be relieved as counsel, by order dated April 14, 2011. By similar order, dated April 28, 2011, the judge denied the Tabins' motion for reconsideration of the fee award.

At the DEC hearing, Moses Tabin testified that he had been surprised by respondent's suit to collect legal fees. He claimed not to have understood the meaning of the collection letters, all of which expressly called for him to pay the balance due or to contact respondent's office for a payment plan.

Tabin recalled that, only upon receiving the November 4, 2009 pre-action letter, which informed him about his right to utilize the fee arbitration process, did he understood that the letters pertained to a debt that he owed to the law firm, rather than something related to a creditor.

The presenter in this case, Karen E. Bezner, Esq., asked Tabin if he had understood the original fee agreement, which set forth the hourly rates to be charged for additional legal work:

> Q. Mr. Tabin, when Mr. Turner [respondents' counsel] was asking you about the retainer letter and the additional fees for the motion, you said that they didn't discuss those fees with you. Why do you feel they should have discussed those fees with you?
>
> A. Well, because like right now they got the money from us, the $6,000 and all this [sic] additional fees, that's the only time I realized that they charged me per hour. You know, they should have discussed to us beforehand, you know, because what they did, okay, our fixed fee is $3,000 and here, sign this, sign that, we never got the chance to read it. They never even explained it to us about the motion. Okay, probably after three months we'll have a motion to strip your lien and this will be the charges. They never told us anything, they just let us sign, sign this, sign that and for us, you know, we just sign everything [sic] because that's our lawyer and we thought that they are taking good care of us and we didn't know that they are robbing us point blank.
>
> Q. So you feel you should have had the opportunity to know when they were charging you by the hour as opposed by the fixed fee?

A. Correct.

[T89-16 to T90-17.] [2]

Tabin was asked why he had not taken advantage of fee arbitration. He recalled having thought that it would be too expensive and that, by that time, he no longer trusted his attorneys.

Tabin also testified about his pro se participation in the Superior Court matter. He admitted having received the complaint, but stated that, by the time he was ready to act on it, "it was too late," because judgment had already been entered against them.

Tabin recalled that, when the law firm obtained the wage execution, he sent a pro se application to the bankruptcy court, addressed "to whom it may concern," seeking to re-open the $6,413.74, fee award. Tabin did so because he feared that he and his wife could not pay half of their salaries, with enough remaining income to make their required chapter 13 payments to the trustee. Tabin recalled that, at the oral argument on the motion, the bankruptcy judge seemed angry, "because this [was

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[2] "T" refers to the transcript of the April 25, 2012 DEC hearing.

his] first time to see this type of case, you know, a lawyer suing his client." The judge then denied Tabin's request to review the fees, but altered the Tabins' plan from a three to a four-year plan, so that the additional fees were included in the plan payments going forward.

Respondent testified that the decision was made to sue the Tabins stemmed from his and Middlebrooks' belief that the Tabins had sufficient assets to pay the fees. When questioned by the presenter about it, respondent stated:

> Miss Bezner, where do I think that they would get the money to pay it? They could have used their Schedule C exempted assets, they could have used future tax returns, set up a payment plan of $25 a month. All they had to do was call, was call us and set something up, offer something, they did not. They ignored us. They ignored everything.
>
> [T125-6 to 13.]

Respondent recalled that he and Middlebrooks, as law partners, would meet periodically to discuss late-paying clients, and that, if a "30-day" letter was not replied to, the matter could go to suit. He stated that, when they met about the Tabin situation, they did not believe that they had a conflict of interest "at that point," because they had a federal bankruptcy court order for fees. Respondent explained, "We

waited over a year and we would send him – regular reminders to pay that bill and he never contacted us, never said anything, nothing after the [R.] 1:20 letter."[3]

Respondent conceded that he did not file a motion to be relieved as counsel, prior to filing the state court complaint:

> MR. VIDA [Panel Chair]: But the question is why didn't you file to be relieved of counsel before you filed the Complaint in State Court?
>
> THE WITNESS: Quite honestly I don't know other than the fact that we didn't see any conflict of interest.
>
> MR. VIDA: There came a point when you were relieved of counsel, correct?
>
> THE WITNESS: Yes, sir.
>
> MR. VIDA: Until that point came did you believe that you had a duty to represent the Grievant with the utmost zeal?
>
> THE WITNESS: Yes.
>
> MR. VIDA: Were you aware that a judgment was obtained in State Court against the Grievant by your firm?

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[3] The November 4, 2009 "pre-action" letter to the Tabins explained the fee arbitration process and the law firm's intent to sue, in the absence of a fee arbitration proceeding, full payment by the Tabins or their cooperation in setting up a payment plan.

THE WITNESS: Yes.

MR. VIDA: Were you aware that a wage execution was commenced at the request of your firm against the employer of the Grievant?

THE WITNESS: Yes.

MR. VIDA: Were you aware of this when it happened?

THE WITNESS: When it happened? I don't know if I was aware of it that very day. I don't know.

MR. VIDA: Were you aware of it before the actual attachment of wages?

THE WITNESS: Again, I do not have a specific recollection of when that took place.

[T135-4 to T136-8.]

When questioned by the presenter, respondent admitted that a wage execution outside the bankruptcy plan would eliminate funds that could have been used to fund plan payments and that, without the plan payments, the bankruptcy would fail, with the possible reinstatement of the stripped mortgage.

When asked about the bankruptcy judge's remark that, by executing on his clients' wages, he had violated the automatic stay, respondent replied that he had declined to engage the judge on that point, although he believed the judge to be mistaken on the law. Instead, he asked the following question:

"Your Honor, while I do not wish to risk penalties or anything in this matter, if the client is unwilling to pay and is ignoring us, what other option do we have?" The panel chair then quoted the judge's reply:

> MR. VIDA: And then did the court respond and beginning on line —
>
> THE WITNESS: Yes, the court did.
>
> MR. VIDA: If I may, on page seven line 11 the court responded, "Well, I'm not going to get into a lecture or a course on ethics but moving to withdraw as counsel is the typical standard and that's what I see constantly and that's what you do. I wish I had a dollar for every lawyer that didn't get paid for every dollar that they earned. The standard for relief typically is just to be discharged from the case, that's all." Is that correct?
>
> THE WITNESS: That is what the record states, yes.
>
> MR. VIDA: But did you respond to the court after that to perhaps enlighten them to something else?
>
> THE WITNESS: No.
>
> [T144-10 to 25.]

When respondent's counsel questioned him as to why he had remained silent before the judge, respondent replied, "Unless I had absolutely irrefutable case law a mile long, if a judge made

a ruling, I would bite my tongue no matter how much I thought the judge was wrong."

Middlebrooks was the final witness to testify at the ethics hearing. Like respondent, she stated that, at a meeting together, they had decided to sue for the fee only after they had waited for over a year for payment. She recalled that they had sent the Tabins "reminder" letters to either pay the fee or to contact the office to set up a payment plan, but that the Tabins had done neither.

With regard to Tabin's testimony that he was unaware that he was being charged for the "stripping" motion, Middlebrooks stated that "the normal course when we do an electronic filing, we take the electronic filing sheet, put it on top of the pleading and we mail them out," along with the notice of hearing, which comes directly from the bankruptcy court.

Middlebrooks explained the reasoning behind allowing the Tabins' fees to be paid:

> Yes, and, you know, I guess because we're here on what would be considered a conflict of interest, I wonder whether that would be any different to come back and expose a client to a greater plan with more money when I've offered them something that would be less, you know, outside the plan. So, you know, no good deed goes unpunished. We decided we'll accept our fees outside the

plan to allow the debtor to be able to -- if their goal was to finish their plan in three years so they are out of the bankruptcy and they have those two years without a second lien on their home so they are either able to refinance or sell it or whatever their intentions were, they're two years ahead of the curve. If I put my fees through the plan and extended it, that may -- that may not have met what they asked for so that's —

MS. SUPLEE [Panel Member]: Did you discuss this with the client?

THE WITNESS: I did not because I do --

MS. SUPLEE: Do you know whether anyone in your office discussed this with the client and explained the actual dollars and cents of this?

THE WITNESS: I do not know but Mr. Nachbar handles the 13s and was very active on this case.

BY MR. TURNER:

Q. Again, follow up. Implicit I guess and the question is if you've reached out to the client via letter, is it your impression that the client would then have to respond to at least have these discussions?

A. Yes.

Q. And in terms of the adverseness, if the fees were put into the plan, you know that you expose the client to an automatic extra $600 under the trustee's scheme; is that correct?

A. Correct.

> Q. Whereas your fee arrangements would not include an extra $600 carrying charge, I think you used the term you would be the bank; is that correct?
>
> A. Correct.
>
> [T176-1 to T177-22.]

Middlebrooks conceded that "it would have been better to withdraw before the Complaint was filed, but we felt as though we would be able to resolve it and then move on from there."

Respondent also offered a defense to his actions, namely that the hearing panel's reliance on In re Simon, 206 N.J. 306 (2011), was misplaced because that conflict of interest case was decided after the conduct here took place. Therefore, he claimed, he was not on notice that the conduct was improper.

The DEC found respondent guilty of a conflict of interest, in violation of RPC 1.7(a)(2). The DEC reasoned that Simon not only established a "bright line prohibition of such suits in the future, but that it was applied retroactively" in that case. Therefore, the DEC concluded, respondent's argument that he should not be held to a standard that was not in place at the time of his actions was unpersuasive.

With regard to the imposition of discipline, the DEC found that respondent was aware of the wage execution aspect of

collection suit, which was handled by another attorney in the office, and that, with that knowledge, he should have been aware that it could adversely affect the bankruptcy plan. In particular, if the plan failed for lack of funds, the "stripped" second mortgage could have been reinstated. Therefore, the DEC concluded, respondent deserved a reprimand.

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

Respondent was named bankruptcy counsel for the Tabins' Chapter 13 case. The Tabins were successful in having a three-year plan approved by the bankruptcy court, after which an issue arose that required additional legal work by the firm. The written fee agreement, signed by the Tabins at the inception of the representation, clearly established the hourly charges that the Tabins would incur for additional legal services.

We note here that, although Tabin testified about being seemingly unaware of the supplemental fees associated with the "stripping" motion, respondent was not charged with any misconduct related to those fees, which were reviewed and approved in their entirety by the bankruptcy court. Therefore, the only ethics question for us involves the alleged conflict of interest.

Respondent conceded that, when the Tabins failed to pay the supplemental fees, he and Middlebrooks met and decided to file suit in Superior Court to collect the fees, which were already established by bankruptcy court order to be $6,413.74. The order specified that the fees were to be paid outside the plan, by the Tabins directly. The purpose was to leave the three-year plan intact.

Although it is true that respondent and Middlebrooks waited a year after they sent the Tabins a pre-action letter, before actually filing suit, when they did so, they were still the Tabins' attorneys in the Chapter 13. Both attorneys testified that they did not seek to be relieved as counsel in the bankruptcy matter, before filing the state court collection action, because they did not believe that bringing that action presented a concurrent conflict of interest with the clients.

When, in January 2011, the law firm obtained a default judgment against the Tabins, an application was made for wage executions against the Tabins' on salaries. On February 18, 2011, respondent and Middlebrooks filed a motion to be relieved as the Tabins' bankruptcy counsel.

However, on February 23, 2011, before the motion to be relieved was heard, the Superior Court ordered wage executions on the Tabins' salaries.

Apparently, the wage executions spurred Tabin to action. He immediately filed an objection to the bankruptcy motion to be relieved as counsel and for reconsideration of the $6,413.74 in supplemental fees.

At the hearing, Judge Steckroth was stunned that respondent and Middlebrooks had sued their bankruptcy clients for fees, while still representing them, and that they had reduced his court order to a wage execution along the way. When respondent suggested that the suit was a last resort, the judge presciently stated, "Well, I'm not going to get into a lecture or course on ethics, but moving to withdraw as counsel is the typical standard and that's what I see constantly."

RPC 1.7(a)(2) states, in relevant part: "(a) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."

Obviously, the collection of legal fees is "a personal interest of the lawyer." As discussed below, it is settled law that attorneys create an impermissible concurrent conflict of interest when suing a present client for fees. In this matter,

it was made all the worse because of the wage execution. Had the wages actually been executed, it could have proven ruinous to the Tabins' Chapter 13 plan.

In In re Simon, supra, 206 N.J. 306, a reprimand case, the Court held that an attorney who sues a present client for fees creates an impermissible conflict of interest that requires termination of the representation. The attorney in Simon represented a client facing murder charges. Simon had generated pre-trial legal fees of over $70,000, plus expenses of $13,000, but had been paid only about $20,000 by relatives of the defendant. When Simon sent an invoice for the outstanding fees to the relatives, he was told that there was no more money available, even though they had promised Simon an additional $50,000 from the refinancing of a property that they owned. Instead, they sold the property and gave respondent only $10,000 of the proceeds. With $66,000 in fees still outstanding, and prior to the court's having set a trial date, Simon sent the family four letters over the course of four months, seeking payment. Each letter contained a warning that, if the family did not arrange for payment, Simon would seek to be relieved as counsel. Other correspondence to them indicated that, if payment was not forthcoming, he intended to sue for it.

Hearing nothing, Simon filed a motion to be relieved as counsel. The prosecutor filed no opposition, but the court denied that motion, without asking the defendant if he wished to terminate the representation. A trial date was set for four months hence.

Thereafter, Simon appealed the trial court's decision. When he learned that the family had transferred a house to another family member for a nominal sum, he filed suit against them. He also named his client as a defendant in the suit, even though he never expected to collect from the client. When the client learned about the suit, he contacted the court and asked that respondent be relieved as counsel. The judge then entered an amended order relieving Simon as counsel. That order stated that, because Simon filed a lawsuit against his own client, any further representation by Simon would be "impossible."

At fee arbitration, Simon was awarded $55,000 against the defendant's brother and mother. When defending against the conflict-of-interest charge, Simon contended, at the DEC hearing, that he had done everything possible to protect his client, but ultimately had to sue him in order to prevent any further "fraudulent conveyances" of property by family members.

We and the DEC noted that there was a "dearth" of law on the issue of conflicts involving lawyers suing present clients. So, too, Simon argued that any curative measure should be made prospectively, because of the lack of guidance about such conflicts. However, the DEC, this Board, and the Court all found that he had violated RPC 1.7(a)(2) by suing a present client.

The Court did not hesitate to apply RPC 1.7(a)(2) retroactively to Simon's violation and quoted our decision that, "despite the paucity of rule or law on the subject – or precisely because of it – the basic truth is that lawyers cannot sue present clients without immersing themselves in an untenable conflict of interest." The Court further stated that, "as the DRB points out, by filing suit against his client for unpaid fees while defending that client against murder charges, respondent violated RPC 1.7(a)(2) by placing himself in an adversarial relationship vis-à-vis his client and thus 'jeopardize[ing] his duty to represent [his client] with the utmost zeal.'" Id. at 318.

Immediately thereafter, the Court stated, "respondent's arguments to the contrary are unpersuasive. Given the clarity of our *RPCs*, there can be no legitimate confusion about a lawyer's ability to sue an existing or current client." Ibid.

As previously stated, the Court imposed a reprimand for Simon's misconduct.

Since 1994, it has been a well-established principle that a reprimand is the standard measure of discipline imposed on an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," then discipline greater than a reprimand is warranted. Id. at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; the attorney, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land, and then failed to fully explain to the Club the various risks involved with the representation and to obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed") and In re Fitchett, 184 N.J. 289 (2005) (three-month suspension; the Court order noted that the

"circumstances of [the attorney's] conflict of interest [were] egregious" and that his misconduct was "blatant and gross").

In special situations, admonitions have been imposed on attorneys who have violated the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (attorney admonished for an imputed conflict of interest, among other violations, based upon his preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; compelling mitigating factors present); In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (attorney admonished for, among other things, engaging in a conflict of interest when she collected a real estate commission upon her sale of a client's house; mitigating factors were the attorney's unblemished fifteen-year career, her unawareness that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction); In the Matter of Andrys S. Gomez, DRB 03-203 (September 23, 2003) (admonition for attorney who, among other things, engaged in a conflict of interest when he represented both driver and passengers in a motor vehicle

accident; mitigating circumstances were the significant measures" taken by the attorney "to improve the quality of [her] practice"); and In the Matter of Victor J. Horowitz, DRB 01-091 (June 29, 2001) (on motion for discipline by consent, attorney was admonished for representing both driver and passengers in an automobile accident, a violation of RPC 1.7; the attorney's unblemished nineteen-year career was considered in mitigation).

Although compelling circumstances may reduce the measure of discipline to an admonition, we see no compelling circumstances here that warrant such a departure. Respondent and Middlebrooks admitted that they met together to determine how to proceed to collect their outstanding fees from the Tabins. Together, they decided to sue their clients in Superior Court to collect their fees, knowing that they were engaged in an ongoing bankruptcy representation.

In mitigation, respondent has no prior discipline since his 1994 admission to the New Jersey bar.

In aggravation, respondent's actions placed the clients at great risk. Had the fifty-percent (according to Tabin) wage executions been completed, the entire Chapter 13 might have failed and the second mortgage might have been reinstated.

Unfortunately, respondent's actions are of a kind that weakens the confidence that members of the public place in their attorneys. We determine that a reprimand is the appropriate sanction in this case, as in Simon.

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 Stuart M. Nachbar
Docket No. DRB 12-351

Argued: February 21, 2013

Decided: April 12, 2013

Disposition:

Members	Disbar	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
Julianne K. DeCore
Chief Counsel