SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-296
District Docket No. XIV-2006-0632E

IN THE MATTER OF	:
DAVID L. WECHT	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 16, 2014

Decided: March 11, 2014

Christina Blunda Kennedy 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 reprimand filed by Special Master Michael L. Kingman. The three-count complaint charged respondent with having violated RPC 1.15(a) (failure to safeguard trust funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), RPC 8.4(d) (conduct prejudicial to the administration of justice), and In

re Hollendonner, 102 N.J. 21 (1985) (knowing misuse of escrow funds).

The Office of Attorney Ethics (OAE) recommended respondent's disbarment. For the reasons expressed below, we determine that a reprimand, with conditions is the appropriate measure of discipline for the only violations supported by clear and convincing evidence, recordkeeping irregularities and negligent misappropriation of trust funds.

Respondent was admitted to the New Jersey bar in 1989. He maintains a law office in Tenafly, New Jersey. He has no history of discipline.

Respondent did not dispute the allegations of the first two counts of the complaint. He admitted that he violated the recordkeeping rules (RPC 1.15(d) and R. 1:21-6) and that he negligently misappropriated trust funds (RPC 1.15(a)) because of his recordkeeping improprieties. He denied the remaining charges.

Respondent's recordkeeping problems, in part, resulted from his personal problems, as detailed below. He testified that, when his life became "overwhelming," he did not give his recordkeeping obligations the attention they required.

Count one of the complaint charged -- and respondent admitted -- that he did not maintain trust account receipts and

disbursements journals, checkbook stubs, and business account receipts and disbursements journals and that he did not perform monthly reconciliations of his trust account records. The OAE recordkeeping deficiency checklist revealed further that client ledger cards were not fully descriptive.

Count two of the complaint alleged that respondent negligently misappropriated client funds, when he mistakenly wire-transferred $386,704.58 twice to the same clients, on June 1 and June 3, 2005. The error went undetected for approximately four years, when respondent reconstructed his trust account records for an OAE audit. According to respondent, his clients, the Brioneses, were refinancing their mortgage loan. Respondent handled the closing and the disbursement of the funds. His paralegal filled out the wiring instructions to the Brioneses, which he signed, and the instructions were sent to the bank. Respondent was unaware that he had sent the wiring instructions to the bank twice.

Years later, when respondent discovered the error, he attempted to recover the funds by contacting the Brioneses, who had moved to Florida. Respondent testified that the Brioneses refused to take his call and had their daughter refer him to their attorney. According to respondent, the Brioneses' Florida attorney told him that he would "do the best I can to get your

money." With the assistance of his own Florida attorney, respondent entered into a consent judgment with the Brioneses for the full amount of the overpayment, together with $15,000 for respondent's attorneys' fees and interest at the rate of eleven percent per year, from the date of the consent final judgment.

Respondent collected only $127,500 from the Brioneses, who had filed for bankruptcy. Thereafter, respondent retained a bankruptcy attorney to challenge the discharge of the debt, on the basis that, although the Florida Homestead Act protects an individual's primary residence from bankruptcy, it does not protect a homestead purchased with stolen funds. Respondent had been trying to recover the funds for more than two years. He conceded that, as a result of the double transfer of funds, his trust account was severely impacted. He testified that, although he did not replenish the amount with his own funds, he had "a lot" of his own fees sitting in his trust account.

According to respondent, following the OAE audit and his realization that his trust account was "a mess," he opened up a new trust account. He also retained an accountant to reconcile his trust account and to conduct monthly reconciliations of his new trust account.

The remaining count of the complaint, count three, charged respondent with knowing misappropriation of escrow funds and attempting to improperly dispose of an ethics grievance.

The facts giving rise to these charges are as follows:

Respondent was the attorney for Willie Jennings, a contractor and, subsequently, a company that Jennings incorporated, WJ Capital, L.L.C. (WJ Capital). Jennings planned to assemble a group of investors to purchase and rehabilitate individual properties in the City of Trenton, as part of a redevelopment project. Jennings had been negotiating with the city to purchase six condemned properties. He expected the investors to hire him to renovate the properties. After purchasing the properties, the individual investors would be free to dispose of their units, as they saw fit. The purchase price for each unit was $10,000. Jennings was to receive $5,000 per unit for renovations. Each investor was expected to contribute $20,000 per unit to cover costs that were not specifically identified.

During the course of the negotiations with the city, one of the investors, Launette Woolforde, married Conrad Gardner, an experienced mortgage broker. At Conrad's direction, Launette lent her name and money to the transaction. The Gardners, who were not respondent's clients, are the grievants in this matter.

Conrad instructed Launette to deposit $10,000 with respondent, in increments of $5,000. The deposits were intended for the purchase of the properties located at 334 and 342 Brunswick Avenue, in Trenton.

On or about March 31, 2006, Launette signed a contract to purchase the first unit from the City of Trenton. Launette testified that she had given Conrad authority to act on her behalf and that she did not recall reading any of the letters or documents sent to her in connection with the transactions. She did not know when the closings on the properties were to take place, but was aware that they were "time sensitive transaction[s]."

Earlier, on March 25, 2006, Launette have given respondent the initial $5,000 deposit to hold in escrow for 334 Brunswick Avenue, Trenton. Approximately a month-and-a-half later, the second property, 342 Brunswick Avenue, became available. On May 15, 2006, Launette gave the second $5,000 deposit to respondent. Conrad explained that, thereafter, the city would not recognize individual investors, but wanted to sell the properties in bulk.

According to respondent, after he drafted the individual contracts for each unit, the city determined to sell the units only to a corporate entity that would handle the rehabilitation of the properties. As a result, respondent and Jennings created

WJ Capital, L.L.C., of which Jennings and each of the investors would be members. The L.L.C. would purchase the units and sell them to the investors for one dollar. That change necessitated that respondent renegotiate the contracts with the city.

Respondent testified that both he and Jennings informed the investors about the change in the manner that the units would be purchased. Indeed, by letter dated June 13, 2006, respondent told Launette that, "[a]s you are aware, the transfer of the Trenton properties to the investors will be accomplished through two separate purchases. First, WJ Capital, LLC will purchase [the six properties from] Trenton City Home Corporation, Inc." Respondent's letter also informed Launette that, after the properties were refurbished, WJ Capital would transfer each property to the individual investor. Respondent enclosed copies of the contract between WJ Capital and Trenton and an operating agreement for WJ Capital to "formally" notify the investors about the structure of the new deal with Trenton. Respondent's letter advised Launette to review the documents and to consult with an attorney of her choice and to contact respondent with any questions or comments.

The letter also informed Launette that, because she was purchasing two properties, her contribution was to be $40,000. As Launette had already deposited $10,000 for the transaction,

respondent instructed her to forward him a $30,000 check made out to his trust account. Respondent also enclosed contracts of sale for the properties from WJ Capital to her, for her signature, if they met with her approval. Launette could not recall reading any letters or documents received from respondent.

Respondent claimed that he and Conrad discussed Conrad's concerns about the operating agreement, which gave Jennings control over the L.L.C. and none to Conrad. According to respondent, he and Jennings individually had several conversations with Conrad about the agreement. Conrad testified that he had orally suggested alternate terms for the operating agreement, but that they had not been incorporated into the agreement.

Respondent also notified Conrad that the closing on the properties would take place on June 26, 2006 and that he needed the balance of the funds beforehand. According to respondent, Conrad told him, several times before the closing date, that he still wanted to buy both properties and that he would forward the necessary funds to respondent. Conrad eventually forwarded the funds, on June 22, 2006. On that date, the Gardners wire-transferred $20,000 to respondent's trust account, rather than the requested $30,000. Conrad helped Launette fill out the wire

transfer instruction. A few days later, the Gardners left for their honeymoon.

Conrad testified that he had wire-transferred the funds to respondent to secure his and Launette's position with the properties. Although he did not agree with the terms of the operating agreement, he "wanted to show good faith in terms of being interested in continuing with the purchase." According to Conrad, he had asked Launette "to send the monies as additional deposits to secure our purchase and with the understanding that I actually spoke to Will Jennings that when I get back [sic], we can go back through and work out an Operating Agreement that's going to work for everyone." Conrad asserted that the wired funds "had nothing to do with W.J. Capital's purchase from Trenton" and that he had not authorized respondent to use the funds to purchase the properties.[1] He testified further, however, that, when he and Launette returned from their honeymoon, he was "excited to learn he closed figuring now we can move forward with our purchase from him and move forward."

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[1] At the ethics hearing, Conrad initially claimed that, when he wired the funds, he did not know that the closing was imminent. During cross-examination, however, when he was shown his deposition testimony from the civil suit against respondent, he conceded that he knew that the closing date would be on June 26, 2006.

According to respondent Jennings became angry, when he discovered that the Gardners had not wire-transferred the full $30,000. Nevertheless, respondent had sufficient funds for the closing, but not for Jennings' services. Respondent testified that he had received oral authorization to use funds for the closings, although he did not specify from whom. Likewise, he did not receive written authorization to form the L.L.C. (the operating agreement), but contended that it was unnecessary to have a writing to form "an L.L.C." According to respondent, Conrad disagreed with only one term of the operating agreement and told respondent that he and Jennings would "square [it] away later."

On the day of the closing, June 26, 2006, Jennings gave respondent three checks, totaling $45,000. Respondent did not deposit the funds that day, but did so three days later. The city's attorney assured respondent that his $60,000 check would not be deposited until she had received his authorization to do so, after he deposited the corresponding checks. In fact, the city's attorney added, the checks would not be deposited for several weeks.

After the closing, respondent notified Conrad that the units had been purchased, that the Gardners needed to obtain rehabilitation financing, and that they owed an additional

$10,000 for the purchase. According to respondent, Conrad told him that he would "square it away" with Jennings and would also "square away" the terms of the operating agreement.

Respondent's confirming June 27, 2006 letter to the Gardners stated 1) that the closing had taken place; 2) that, pursuant to their agreement with Jennings, they were required to deposit $40,000, as their capital contribution, but had only deposited $30,000; 3) that WJ Capital was, therefore, forced to obtain funds from other sources; and 4) that, if they did not submit the remaining balance by July 5, 2006, the funds that they had deposited with respondent would be deemed forfeited. In a subsequent letter, dated June 29, 2006, respondent further informed Launette that the "next step in the process" was to obtain financing for the rehabilitation of her units and to keep Jennings informed about the status of her mortgage application. Respondent enclosed copies of the sale contracts from WJ Capital, for her review and signature, and asked her to contact him with any questions.

Conrad testified that he had telephone conversations with Jennings about the operating agreement, but that "Jennings never followed through." He finally told Jennings that he wanted to "call the deal off" and wanted his money back. Jennings refused, prompting Conrad to contact respondent. Jennings then began

looking for new investors and instructed respondent to send information about the investment opportunity to other potential investors.

In early August 2006, in a telephone conference among Jennings, respondent, and Conrad, Jennings offered to refund only $15,000 of the Gardners' contribution. The Gardners then filed a civil lawsuit against respondent, Jennings, and WJ Capital. Respondent referred the matter to his malpractice insurer. Against respondent's wishes, the insurer's attorney recommended that he settle the case and told him that, if he refused, he would be on his own; he could "take the case and run with it." Given that alternative, respondent authorized the $17,500 settlement.

The insured's attorney drafted the release for the Gardners' signature. It included a paragraph that stated, "in addition I hereby agree to withdraw and/or no longer cooperate with nor bring in the future any ethics complaints against [respondent] arising out of the subject of the lawsuit set forth above and will specifically withdraw ethics complaint Docket Number XIV-206 [-0632E]." According to respondent, when the insurer's attorney told him about the language, he questioned its inclusion in the document and told the attorney that it was not enforceable. The attorney replied that it could not hurt to

keep the language in the release. Respondent, thus, relied on the attorney's expertise. Respondent was not a signatory to the release.

During the ethics hearing, an issue arose about the HUD-1s that respondent had prepared for the closings. One of the payments listed on the HUD-1s was to Harris Surveying. According to respondent, because that company wanted to be paid in advance, he paid the $850 bill well in advance of the closing, using his own funds from his operating account.[2]

Respondent testified about the personal problems that affected his recordkeeping practices. In short, respondent suffered from life-long "severe clinical depression" that was exacerbated by marital discord. Respondent eventually retained an attorney for divorce proceedings that began in 2007 and concluded sometime in 2008. During this difficult period, respondent continued to work as a sole practitioner. He testified that he worked as hard as he could and relied heavily

[2] The OAE tried to undermine respondent's credibility on two grounds: 1) that he misrepresented on the HUD-1s the amount paid for the surveys and 2) that he executed a jurat for Launette, outside of her presence. The special master did not allow testimony in this regard. The special master ruled that, because the issues had not been raised at the pre-hearing conference, respondent was not prepared to defend against them.

on his paralegal to help him "through the nitty-gritties of the transactions."

In his written summation to the special master, respondent's counsel argued that, as to the Gardner transaction, the Gardners had given respondent a deposit to close on two properties and that, shortly before they had left for their honeymoon, they had wired $20,000 to respondent, with no restrictions on the use of the funds, for the simple reason "[t]hat it was to be used to buy the property." Therefore, counsel maintained that respondent's belief that he could use the funds for that purpose was reasonable. Moreover, counsel stated that, upon Conrad's return from his honeymoon, he had attempted to "work out" the terms of the operating agreement with both Jennings and respondent, but they could not reach an agreement. The dispute was, thus, "plainly a matter for resolution in the courts . . . a garden variety piece of commercial litigation . . . certainly not, in any sense, a matter of 'willful misappropriation'."

According to counsel, respondent reasonably believed that the Gardners wanted the properties, that the monies delivered on the eve of the closing were for that purpose, and that "real estate attorneys simply do not receive separate 'authorizations to use' after they receive the purchase money." Therefore,

counsel added, respondent had every reason to understand that he was authorized to make the purchase with the funds, even though there was a subsequent inability to agree on the terms of the operating agreement.

Counsel pointed out that, although there was no charge in this regard, the OAE seemed to suggest that respondent had invaded trust account funds because the three checks he received from Jennings on the day of the closing had cleared three days after the closing. Counsel underscored the fact that respondent had specifically addressed that issue with the City of Trenton's attorney, who had assured respondent that his $60,000 check would not be deposited for approximately two weeks after the closing.

As to the release with the language about the ethics grievance, counsel noted that respondent had objected to the inclusion of that language in the release, but that the insurer's attorney had insisted on keeping it. Furthermore, there was no proof that respondent had attempted to enforce that provision.

Counsel urged the special master to impose only a reprimand, given that the only charges supported by the evidence were that respondent had not properly maintained his books and records and, that, as a result, he had negligently

misappropriated trust funds, for which he had offered compelling mitigating factors.

In its written summation to the special master, the OAE argued, in turn, that there was no meeting of the minds about the formation of the L.L.C. to purchase the properties and that the Gardners had wired the funds to respondent solely as a deposit to purchase the properties, only after the operating agreement was finalized. Thus, the OAE contended, respondent did not have authorization from the owners of the escrowed funds, the Gardners, to use them for the June 26, 2006 closing and respondent so knew.

The OAE argued, in its brief and before us, that respondent had an incentive to close on the properties because he had used his own funds to pay for the surveys and, without the Gardners' funds, the entire deal would have failed, causing him to lose money.

The OAE claimed further that, according to the insurer's attorney, respondent's counsel in the civil suit, respondent was involved in the preparation of the release.[3]

[3] The attorney did not testify at the hearing before the special master.

For respondent's knowing misappropriation of escrow funds and other violations, the OAE recommended to the special master that respondent be disbarred.

The special master concluded that, as to the Gardner matter, the record suffered from factual inconsistencies on the part of the principal witness against respondent, Conrad Gardner, and that Launette demonstrated "her lack of awareness of any salient facts . . . except that she permitted money to be withdrawn" for a real estate investment by her soon-to-be husband.

The special master emphasized that he had carefully observed Conrad's testimony and "found him to be evasive, inconsistent, unconvincing, and not credible as to key points. His testimony conflicted with both documentary evidence and also earlier testimony he had given under oath in a deposition." The special master also found it difficult to accept much of Conrad's testimony, because it consisted of opinion, rather than facts.

The special master found that the execution of the operating agreement was not a pre-condition to the consummation of the transactions and that respondent had advised the Gardners of their right to seek independent counsel to review the agreement. The special master highlighted the fact that the

wire-transfer documents specified that the funds were for a "deposit on 342 and 334 Brunswick Ave., Trenton, N.J."

Based on the totality of the evidence, the credibility of the witnesses, consistency with documentary evidence, and deposition testimony, the special master found that Conrad knew about the date of the closings and had conveyed his intent that respondent proceed with the transaction, while Conrad was on his honeymoon.

The special master noted that, even though there was not an executed operating agreement at the time of the closing, based on the documentary evidence, Conrad had an interest in the L.L.C. Moreover, the special master remarked, it was not until after the closing that Conrad expressed to respondent his concerns about the agreement.

The special master further found that Conrad never informed respondent, either orally or in writing, that he was withdrawing his authorization for the use of the funds at the closings, and that his efforts to secure the return of his funds began only after the closing.

The special master concluded that the Gardners' funds were used for what respondent believed to be their intended purpose. The special master did not find that respondent had knowingly misappropriated the Gardners' funds.

Likewise, the special master did not find knowing misappropriation for respondent's disbursement of the closing funds, given that the closing was a "dry"/escrow closing; the attorney for the City of Trenton had assured respondent that his trust account check would not be presented for payment until respondent confirmed that the funds were available; no evidence was presented to contradict this version of events; and respondent's bank records confirmed that funds for the closing were not drawn against undeposited amounts.

As to the charges relating to the release, the special master found that respondent's malpractice insurer had prepared the release and that, although the language was unethical, because respondent had neither prepared the release nor signed it, he could not be found guilty of any improprieties in this context.

The special master found that the evidence supported findings of recordkeeping improprieties and negligent misappropriation of client funds only, the latter, resulting from respondent's mistaken duplicate payment to the Brioneses. The special master also noted that respondent has suffered from life-long depression, which, exacerbated by marital discord and divorce, led to the neglect of his recordkeeping responsibilities. In addition, the special master considered the

efforts that respondent had taken to secure the return of the funds from the Brioneses.

Based on the totality of the circumstances, the special master recommended a reprimand for respondent's violations of RPC 1.15(a) and RPC 1.15(d).

By letter-brief dated November 19, 2013, respondent, among other things, expressed his concurrence with the special master's findings of facts and conclusions of law and urged us to impose an admonition or, at most, a reprimand.

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

There is no dispute that respondent's records were not maintained in accordance with the recordkeeping rules and that his inadequate records caused him to negligently misappropriate trust funds, when he improperly disbursed funds twice to the Brioneses, violations of RPC 1.15(a) and RPC 1.15(d).

The question is whether respondent knowingly misappropriated escrow funds and whether he sought to improperly dispose of an ethics grievance.

The special master emphasized that Conrad Gardner's testimony was not believable and that Launette Gardner knew

virtually nothing about the transactions. The record establishes that the Gardners provided respondent with $30,000 for the purchase of two units. Before the Gardners left for their honeymoon, Launette, with Conrad's help, wire-transferred $20,000 to respondent's trust account on June 22, 2006, four days before the scheduled closing on the two properties. Conrad knew the date of the closings. He testified that he wanted to secure his position in the purchase and that, upon his return from his honeymoon trip, he was excited to learn that the closing had taken place and that they could move forward with their investment. Conrad had assured respondent, before the closing and after, that he and Jennings would "square away" the troublesome terms in the operating agreement. Respondent, thus, reasonably believed that he had the Gardners' blessings to proceed with the closing.

There is no evidence in the record, oral or written, that Conrad withdrew that authorization, notwithstanding the problems with the terms of the operating agreement. Respondent's belief that he was authorized to go forward was based on his receipt of two deposits for the two properties, a month-and-a-half apart; on the June 22, 2006 wire-transfer; and on his conversations with Conrad and Jennings, his client. There is no proof that the authorization to buy the properties was rescinded or that

respondent knowingly misappropriated escrow funds, by using them without the Gardners' consent.[4] It was not until August 2006, after the properties had been purchased, that the Gardners had second thoughts about the transactions and sought a refund. As respondent's attorney noted, it was purely a civil matter, not an ethics matter.

Moreover, because the closing was a dry closing, the check to the city was not deposited until after respondent notified the city's attorney that she could deposit it. There was no proof that respondent made disbursements against uncollected funds.

After the civil case against respondent was settled, respondent's attorney drafted a release, which included improper language that prevented the Gardners from pursuing an ethics grievance against respondent or assisting in its investigation. Despite the OAE's claim that, according to the insurer's attorney, respondent was involved in the preparation of the release, there is no evidence in the record to support this assertion. The attorney did not testify at the ethics hearing.

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[4] This cannot even be viewed as a possible violation of RPC 1.2 (a lawyer shall abide by a client's decision concerning the scope and objections of the representation) because (1) respondent's conduct was consistent with what he believed was the objective of the representation and (2) the Gardners were not his client.

Respondent's unrefuted testimony was that the improper language was included against his judgment. Respondent neither drafted nor signed the release. For these reasons, we dismiss count three of the complaint charging respondent with having violated RPC 8.4(c) and RPC 8.4(d).

In sum, the evidence supports only that respondent was guilty of recordkeeping improprieties and negligent misappropriation of trust funds. As indicated earlier, since the OAE audit, respondent has retained an accountant to reconstruct his records and to perform his monthly reconciliations.

The only remaining issue is the proper quantum of discipline for respondent's violations of RPC 1.15(a) (negligent misappropriation) and RPC 1.15(d) (recordkeeping violations).

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent

misappropriation of $43.55 occurred in attorney trust account, as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); and In re Fox, 202 N.J. 136 (2010) (attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds).

We, therefore, determine that respondent should be reprimanded for his recordkeeping violations and negligent misappropriation of client funds.

We also determine to require respondent to provide to the OAE, on a quarterly basis, monthly reconciliations of his attorney records, certified by an accountant approved by the OAE, and, further, within ninety days of the date of the Court's

order, to submit to the OAE proof of fitness to practice law, as attested to by a mental health professional approved by the OAE.

Member Doremus 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: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David L. Wecht
Docket No. DRB 13-296

Argued: January 16, 2014

Decided: March 11, 2014

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus						X
Gallipoli			X			
Hoberman			X			
Singer			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Isabel Frank
Acting Chief Counsel