

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 13-308  
District Docket No. XIV-2013-0228E

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IN THE MATTER OF :  
:   
MATTHEW WILLIAM WOITKOWSKI:   
:   
AN ATTORNEY AT LAW :   
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Decision

Argued: January 16, 2014

Decided: March 11, 2014

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-13, following New York's imposition of a two-year suspension on respondent for his violation of the New

York State Disciplinary Rules equivalent to New Jersey RPC 1.15(a) (failure to safeguard funds), RPC 1.15(d) (recordkeeping violations), RPC 1.7(b) (concurrent conflict of interest), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).<sup>1</sup> The OAE seeks a reprimand for this misconduct. For the reasons expressed below, we determine to impose a censure on respondent.

Respondent was admitted to the New Jersey and New York bars in 1996. At the relevant times, he maintained an office for the practice of law in Staten Island, New York. He has no disciplinary history in New Jersey.

The facts are taken from the July 27, 2010 report of Special Referee Jerome M. Becker, the March 22, 2011 opinion and order of the Supreme Court of the State of New York Appellate Division: Second Judicial Department (the New York Court), and the transcript of the ethics hearing before the special referee.

On November 10, 2009, the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts of the New

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<sup>1</sup> Effective April 1, 2009, the State of New York supplanted the Disciplinary Rules of the Code of Professional Responsibility with the Rules of Professional Conduct. As seen below, however, not all of the New York RPCs correspond to the New Jersey RPCs.

York Court (Grievance Committee) served respondent with a petition containing nine counts of unethical conduct. At the ethics hearing, the Grievance Committee withdrew count seven. Also at the ethics hearing, respondent admitted all allegations contained in the remaining counts of the petition. This decision will organize the eight charges by theme.

Charges one, two, and eight stemmed from the negligent misappropriation of client funds that was caused by respondent's non-compliant recordkeeping practices. Charge one of the petition alleged that respondent engaged in a "pattern and practice of maintaining insufficient funds on deposit in his IOLA account," in violation of DR 9-102(A) (the equivalent to New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)).<sup>2</sup>

Specifically, between November 1, 2007 and December 31, 2008, respondent maintained an IOLA account at Commerce (now TD) Bank, into which he deposited funds "entrusted to him as a

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<sup>2</sup> There is no RPC 8.4(h) in New Jersey. This subsection of the New York rule prohibits an attorney from engaging in "any other conduct that adversely reflects on the lawyer's fitness as a lawyer," which is broader than the prohibition in New Jersey RPC 8.4(b), governing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

fiduciary, incident to his practice of law." On November 1, 2007, the account balance should have been at least \$109,000 "to cover outstanding fiduciary obligations" relating to eight client matters. However, the account balance on that date was only \$86,570.70.

From November 19, 2007 through July 31, 2008, respondent depleted the IOLA account by another \$28,550. During that same period, he "failed to maintain sufficient funds" in the IOLA account "to cover all outstanding fiduciary obligations" with respect to five additional client matters. Finally, between November 1 and 17, 2008, respondent failed to maintain sufficient funds in his IOLA account to cover all continuing fiduciary obligations in connection with three of his ongoing client matters.

Charge two alleged that respondent engaged in a pattern and practice of drawing IOLA checks against insufficient funds, in violation of DR 9-102(A) (the equivalent to New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)). Specifically, on March 12, 2008, a \$25,000 check, drawn on respondent's IOLA account, was returned for insufficient funds. On March 25, 2008, a \$3,528.25 check, drawn on the same account, was returned for insufficient funds. On

March 27, 2008, two more IOLA checks, in the amounts of \$5250 and \$2476, were returned for insufficient funds. On March 27, 2008, a \$445 IOLA account check was paid against insufficient funds. Between November 17 and 19, 2008, three checks drawn on respondent's IOLA account, in the sums of \$17,552.25, \$15,556.90, and \$24,900, were returned for insufficient funds.

Charge eight alleged that respondent failed to maintain the required bookkeeping records for his IOLA account, in violation of DR 9-102(D) (the equivalent to New Jersey RPC 1.15(d)) and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)). Specifically, between November 1, 2007 and December 31, 2008, respondent failed to maintain a complete and accurate ledger or "similar record" detailing the deposits into and the withdrawals from his IOLA account, as required by the New York Code of Professional Responsibility. In this regard, respondent testified that, although he maintained two IOLA accounts, he maintained only one combined ledger for both, thereby admittedly having failed to keep "'proper . . . general reconciliation[s] and individual client reconciliation[s].'"

Respondent explained to New York disciplinary authorities that, when he first opened his law practice, he had an IOLA account with Richmond County Savings Bank and that he used

QuickBooks to track deposits and checks. In 2005, he opened a second IOLA account at TD Bank. Yet, he continued to maintain only one ledger, which now encompassed both IOLA accounts. Respondent explained that, with respect to four separate real estate transactions, he deposited monies into the Richmond account but, when the closings actually took place, he mistakenly issued checks against the TD account. This resulted in the bounced checks mentioned in counts one, two, and six of the petition. Further, the Richmond checks and the TD checks were "identical," with the same color and same font, causing him to easily confuse the two and to issue checks against TD funds, when he intended to issue checks against Richmond funds, and vice-versa.

Charges three and four arose out of the sale of a newly-constructed residential property to Mikhael and Frida Abova by respondent's client, C & C PA Corp. (C & C). Charge three alleged, "in pertinent part," that respondent violated DR 9-102(A) (the equivalent to New Jersey RPC 1.15(a)), DR 1-102(A)(4) (the equivalent to New Jersey RPC 8.4(c)), and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)). Specifically, at the November 17, 2007 closing, respondent agreed to hold \$28,550 in escrow, pending completion of work on

the property. Nevertheless, he failed to hold that sum in escrow and failed to disclose this circumstance to either the purchasers or their attorney, all of whom relied on his agreement to hold the funds intact.

Charge four alleged that respondent converted funds entrusted to him as a fiduciary, incident to his practice of law, in violation of DRs 9-102(A) (the equivalent to New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent to RPC 8.4(h)).<sup>3</sup> Specifically, at the November 19, 2007 closing, respondent issued a \$28,550 IOLA check to his client, C & C. On November 20, 2007, "that check cleared against other clients' funds on deposit in his IOLA account."

The special referee found the following:

Testifying before the Special Referee, Respondent acknowledged that, incident to a closing in or about November 2007, the parties agreed that he would hold \$28,550 (from the proceeds of sale) in escrow, to ensure that "unfinished items would be finished" by Respondent's client.

Although Respondent understood that the parties expected him to honor his "fiduciary responsibility," he *released all of the proceeds to his client at closing*, thus failing to retain and/or deposit the agreed-

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<sup>3</sup> As seen below, the term "conversion," in New York, includes negligent misappropriations.

upon escrow. Despite his admitted fiduciary obligation to "all parties," Respondent never advised the purchasers (and/or their attorneys) of his failure to deposit/retain the funds as agreed. Rather, when the subject work was completed, Respondent paid his client a *second time*, thereby converting the funds of other clients on deposit in his IOLA account and further violating his fiduciary duty.

[Ex.4p.13 (citations to the record omitted).]

Respondent's explanation painted a picture of the events that is not nefarious, as the special referee's words suggest. Respondent testified that the parties had agreed to set aside \$28,550, which he was to hold in escrow. Respondent testified that, during the time in question, he handled approximately one hundred real estate closings a year. This particular closing was contentious and hectic with "tons of issues going on." Consequently, he had somehow forgotten to set aside the \$28,550, although his records reflected otherwise. He then released the full amount to the client. When the time came for the escrow to be released, he issued a \$28,550 IOLA account check to the seller, which then bounced. In this regard, respondent admitted that he had not been reconciling his accounts properly. Upon respondent's request, the client returned the \$28,550 to him, and he deposited the funds into the trust account.



Charges five and six involved two separate real estate closings. Charge five alleged that respondent converted funds entrusted to him as a fiduciary, incident to his practice of law, in violation of DR 9-102(A) (the equivalent to New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent to RPC 8.4(h)). Specifically, on March 3, 2008, respondent represented Christopher Bye in the sale of real property to Sandra and Steven Fernandez.

Respondent received \$17,193.23 to hold in escrow, but disbursed \$24,698.28 via two IOLA checks. Between March 3 and 10, 2008, the checks cleared against other clients' funds on deposit in respondent's IOLA account.

At the New York ethics hearing, respondent explained that, at the Bye-to-Fernandez closing, he received a \$7505 check, payable to Countrywide, which represented a partial pay-off of the sellers' mortgage. Although the check was given directly to Countrywide, respondent also wrote a check to Countrywide, in the same amount, and noted that the funds had been mistakenly deposited into his TD IOLA account. When Countrywide cashed respondent's check, other client funds were invaded. Eventually, respondent recovered the overpayment from Countrywide.

Charge six alleged that respondent converted client funds entrusted to him as a fiduciary, incident to his practice of law, in violation of DR 9-102(A) (the equivalent to New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)). Specifically, on November 10, 2008, when respondent represented John A. Greco in the sale of real property, he issued seven checks, totaling \$83,000, drawn on his IOLA account, on behalf of Greco, without having made a "commensurate deposit" into that account. Between November 13 and 19, 2008, four of those checks, totaling \$23,814.75, cleared against other clients' funds on deposit in the IOLA account.

Respondent testified that what happened in the Greco matter was the same as in the others, namely, that he mistakenly wrote the checks from the TD Bank IOLA account, instead of the Richmond account, where the funds had been deposited.

Charge nine alleged that respondent engaged in an impermissible conflict of interest, in violation of DR 5-102(A) (the equivalent to New Jersey RPC 1.7(b)) and DR 1-102(A)(7) (the equivalent to New York RPC 8.4(h)). Specifically, between November 2007 and December 2008, respondent owned and operated Real Abstract, P.C. (Real Abstract), with offices on Staten Island. During that time, he also operated a law office at the

same location, representing buyers and sellers in residential real estate transactions. In addition, during that same period, respondent procured title abstract services and title insurance for buyers he represented in those transactions through Real Abstract, for which they paid sums of money to that entity. Respondent "failed to disclose [to the buyers] the implications of his personal interest in Real Abstract."

Respondent testified before the special referee that he had "repeatedly represented buyers in real estate transactions whom he asked to use his title company." He also acknowledged that his "financial relationship to the title company required a 'waiver of potential conflict,' and that the 'waiver' he used was 'insufficient.'"

In mitigation, respondent presented character evidence demonstrating that he is held in high regard in the legal community and has a reputation for honesty, integrity, and adherence to ethical standards. Moreover, he testified that he undertook remedial measures to ensure that his misconduct would not be repeated, including retaining ethics counsel and a certified public accountant to assist him in setting up and maintaining fully reconciled IOLA account general ledgers and individual client ledgers. Further, he ceased using two escrow

accounts and now maintains only one account at Richmond County Savings Bank; he implemented records to insure full traceability of all funds; he abandoned the use of a QuickBooks general ledger; and he now compares monthly bank statements with his computer records.

In aggravation, the special referee noted that respondent had "previously received a Letter of Caution . . . for having issued a check against a deposit of funds that had not yet cleared." However, the special referee also noted that "it appears Respondent now fully understands the importance of strict adherence to the Rules which govern escrow/IOLA accounts;" has "separately taken steps to remediate the concededly inadequate disclosure of the potential conflict in matters where his title company, Real Abstract, provides title insurance;" has expressed "sincere remorse and contrition;" and has submitted twelve character letters containing the following common themes:

Respondent's strong moral character and excellent reputation for honesty and integrity; his commitment to the ethical and zealous representation of his clients; his devotion to his family and his community; his acceptance of responsibility for his misconduct; and the unlikelihood that his misconduct will ever reoccur.

[Ex.4p.20.]

Upon the New York Court's review of the evidence and respondent's admissions, it concluded that the special referee had properly sustained charges one, two, four, five, six, eight, and nine, as well as those portions of charge three pertaining to the alleged violations of DR 9-102(A) (the equivalent of New Jersey RPC 1.15(a)) and DR 1-102(A)(7) (the equivalent of RPC 8.4(h)).

In imposing a two-year suspension on respondent, the New York Court balanced the mitigating factors against his disciplinary history and also took into consideration that three of the charges against him involved the "conversion" of client funds.<sup>4</sup>

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<sup>4</sup> The special referee summarized charges four, five, and six as pertaining to "multiple instances of *conversion of fiduciary funds* where Respondent drew IOLA checks . . ., which, in the absence of commensurate deposits, *cleared against other clients' funds* on deposit in the IOLA account." Although the term "conversion" means the intentional misuse of client funds in New Jersey, in New York, the term is used much more broadly, even to the point of including funds that are misappropriated by negligence, rather than intent. See, e.g., In re Altomerianos, 559 N.Y.S. 2d 712 (N.Y.App.Div. 1990) (noting that "misappropriated funds used by an attorney for personal purposes makes the 'conversion' much worse than if the funds are misappropriated for reasons the attorney honestly believes to be consistent with his obligations as a fiduciary," in which case it is referred to as "non-venal conversion").

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies to the facts of this case because respondent's unethical conduct in New York does not warrant a two-year suspension in New Jersey. Instead, a censure is the appropriate measure of discipline for his negligent

misappropriations, recordkeeping violations, and conflicts of interest.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

In this case, respondent maintained one recordkeeping system for two IOLA accounts and failed to reconcile the accounts individually, a violation of New Jersey RPC 1.15(d). This non-compliant recordkeeping system, in turn, resulted in the withdrawal of certain funds from an IOLA account into which they had not been deposited, thereby causing the invasion of other client monies, a violation of New Jersey RPC 1.15(a). Respondent further invaded client funds when, due to his hectic schedule and haphazard recordkeeping system, he confused checks for one IOLA account with checks for the other IOLA account, thereby drawing against other client funds.

Respondent also violated New Jersey RPC 1.7(b), when he arranged for his clients, the buyers in residential real estate transactions, to purchase title insurance from a title company owned by him, without complying with the disclosure and waiver requirements of the rule.

Respondent did not violate New Jersey RPC 8.4(c), however. Although he did not place the \$28,550 in escrow at the C & C closing, as he and the parties had agreed, it is clear from his testimony that this was an oversight on his part. In New Jersey, a violation of RPC 8.4(c) requires intent. See, e.g., In the Matter of Ty Hyderally, DRB 11-016 (July 12, 2011) (complaint charged attorney with RPC 8.4(c), based on the appearance of the emblem of the New Jersey Board of Attorney Certification sixteen times on his website; emblem was placed there by his non-attorney cousin, who designed the website and used the emblem in order to make the site "attractive and appealing;" complaint dismissed because the attorney did not intend to include the certified civil trial attorney emblem on his website, was unaware of its appearance on the site, and, upon learning of the emblem, arranged for its immediate removal); In re Uffelman, 200 N.J. 260 (2009) (we noted that, if an attorney makes a statement believing it to be true at the



time that he makes it, it is not a misrepresentation; a misrepresentation is always intentional and, therefore, does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances; In the Matter of David Uffelman, DRB 08-355 (June 19, 2009)); and In the Matter of Karen E. Ruchalski, DRB 06-062 (June 26, 2006) (case remanded because the attorney stipulated that her statements in reply to a grievance were misrepresentations, when, in fact, they were inaccuracies; the attorney did not intend to make the misrepresentations and did not stipulate intent).

There remains for determination the appropriate quantum of discipline to be imposed for respondent's violations of New Jersey RPC 1.15(a), RPC 1.15(d), and RPC 1.7(b).

Attorneys who represented a buyer in a real estate transaction and steered the buyer toward the purchase of title insurance from a title company owned by the attorney, without complying with the disclosure and waiver requirements of RPC 1.7(b), received a reprimand. See, e.g., In re Mott, 186 N.J. 367 (2006) (attorney prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to buyers, the

attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a written waiver of the conflict of interest from them) and In re Poling, 184 N.J. 297 (2005) (attorney engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to buyers, in addition to not disclosing that title insurance could be purchased elsewhere).

In addition, a reprimand is typically imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation of client funds in a default matter; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; although the baseline discipline for negligent misappropriation is a reprimand and, in a default matter, the otherwise appropriate level of discipline is enhanced, a reprimand was viewed as adequate in this case because of the attorney's unblemished professional record of thirty-six years

and his cardiac and serious cognitive problems (mild dementia)); In re Gleason, 206 N.J. 139 (2011) (in five real estate transactions involving a single client, attorney disbursed more funds than he had collected for the client; excess disbursements were the result of the attorney's poor recordkeeping practices; he did not take more monies than what he was owed in fees for his work; and all overdisbursements were for the client's benefit; the attorney also failed to communicate to the client in writing the basis or rate of the 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; we found that the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping

practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest); and In re Fox, 202 N.J. 136 (2010) (motion for discipline by consent; 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).

A reprimand for the violations may still be imposed if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. See, e.g., In the Matter of Clifford B. Singer, 210 N.J. 554 (2012) (as a result of attorney's failure to reconcile his trust account "for several years," he overdisbursed funds in a client matter, causing a \$7517 shortage in the trust account, in violation of RPC 1.15(a) and RPC 1.15(d)); prior reprimand); In re Dias, 201 N.J. 8 (2010) (due to attorney's recordkeeping deficiencies, an overdisbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney also failed to promptly comply with the OAE's requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, it was considered that the attorney, a single mother working on a per diem basis

with little access to funds, was committed to and had been replenishing the trust account shortfall in installments); and In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated \$13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered).

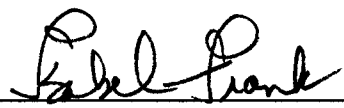
This matter involves multiple ethics infractions, each of which would result in a reprimand. However, rather than single violations of RPC 1.15(a), RPC 1.15(d), and RPC 1.7(b), respondent engaged in a "pattern and practice" of maintaining insufficient funds in the IOLA account; he had been cautioned previously about his recordkeeping practices; and the conflict of interest involved an untold number of clients. Given the multiple infractions, at least a censure would be in order. In our view, the mitigation – that is, respondent's admission of wrongdoing, contrition and remorse, and remedial measures – should preclude the enhancement of that censure to a suspension.

We, thus, determine that a censure is the right form of sanction in this matter.

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:   
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Isabel Frank  
Acting Chief Counsel

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Matthew W. Woitkowski  
Docket No. DRB 13-308

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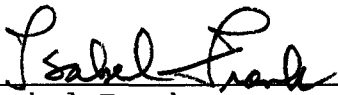
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Argued: January 16, 2014

Decided: March 11, 2014

Disposition: Censure

| <i>Members</i> | Disbar | Suspension | Censure | 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