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Hackensack, NJ 07601  
201-342-6000

DISTRICT IIB ETHICS COMMITTEE,	:	
	:	DOCKET NO: IIB-04-011E
Complainant,	:	
	:	
vs.	:	DISCIPLINARY ACTION
	:	
ROBERT J. DeMERS, JR., ESQ.	:	
	:	COMPLAINT
Respondent,	:	

District IIB Ethics Committee by way of complaint against Respondent, says:

**GENERAL ALLEGATIONS**

1. Robert J. DeMers, Jr., (Respondent) was admitted to the Bar of this State in 1986.
2. Respondent maintains law offices at 444 Grand Street, in the City of Paterson, Passaic County, New Jersey.

**FIRST COUNT**

1. In 1989, Respondent was appointed attorney for the Paterson Zoning Board (BOA).
2. When first appointed, Respondent was advised by then Chairman, Edward J. Murphy, that the Minutes of the BOA suffice as memorialization of BOA action.
3. Except in rare instances such as when an appeal was virtually certain, Respondent followed the practice of preparing no memorialization Resolution as first suggested by Chairman Murphy in 1989.

4. This practice is contrary to the Municipal Land Use Law (MLUL) which requires written Resolution supporting Board action as set forth in N.J.S.A. 40:55D-10(g).

5. On at least two occasions, the failure of the BOA and Respondent to adopt memorialization Resolutions was subject to judicial review. In *Municipal Counsel of the City of Paterson v. Zoning Board of Adjustment*, Docket No. L-1833-95, Judge Mandak criticized the Respondent and the BOA's practice of failing to adopt memorialization Resolutions and ordered compliance with the MLUL. No appeal was taken from that ruling in which Respondent participated in the proceedings as counsel for the BOA.

6. The on-going failure of the BOA and Respondent to comply with the MLUL was again called into question in the matter entitled *Patricia Ackershoek v. The City of Paterson and the Board of Adjustment of the City of Paterson*, Docket No. L287-96. By Order dated December 11, 1997, the Honorable Christine Miniman declared the BOA to be in violation of the MLUL, N.J.S.A. 40:55D-10(g) and ordered the BOA to comply henceforth by preparing written Resolutions pursuant to Statute. Respondent represented the BOA in Ackershoek. No appeal was taken from the rulings of Judge Miniman.

7. Notwithstanding the Opinion of Judge Mandak in *Mayor and Counsel of Paterson v. Board of Adjustment* and the Order of Judge Miniman in *Ackershoek*, Respondent continued as attorney for the BOA yet failed to comply with the Court's Orders requiring compliance with the MLUL.

8. In July, 2002, then Chairman David L. Soo via Memorandum dated January 7, 2002, instructed Respondent to comply with the MLUL in respect to

memorializing Resolutions. A deadline of February 24, 2003 was given as the date for compliance. Respondent did not comply.

9. The Respondent has aided the BOA in remaining statutorily noncompliant during his term as counsel to the present.

10. Respondent's failure to comply with duly entered Court Orders and failure to comply with Municipal Land Use Law, 40:55D-10(g) constituted neglect and violation of RPC 1.1(b).

11. Respondent's failure to take further remedial action in light of the BOA's failure to comply with the MLUL and prior Court Orders constituted a violation of RPC 1.13(C).

12. Respondent's conduct in this matter when combined with the other acts of neglect and/or omission as alleged in this pleading demonstrates a pattern of conduct that is prejudicial to the administration of justice in violation of RPC 8.4(d).

WHEREFORE, Respondent should be disciplined.

DISTRICT IIB ETHICS COMMITTEE

Dated: June 5, 2006

/s/ Edward D'Alessio, Esq.  
Chair

ROBERT J. DE MERS, JR., ESQ. Counselor at Law  
Global Building  
444 Grand Street  
Paterson, N.J. 07505-2004  
(973) 357-0707  
Attorney Respondent

DISTRICT IIB ETHICS COMMITTEE,	:	
	:	DOCKET NO: IIB-04-011E
Complainant,	:	
	:	
vs.	:	DISCIPLINARY ACTION
	:	
ROBERT J. DeMERS, JR., ESQ.	:	
	:	ANSWER
Respondent,	:	

Attorney Robert J. DeMers, Jr., Esq., hereby states the following by way of Answer in this matter:

1. Respondent admits.
2. Respondent admits.

**FIRST COUNT**

1. Respondent admits.
2. Respondent admits.
3. The allegation is not correct. The allegation as presented does not fairly and fully present the facts of the situation, and by way of limited wording creates multiple incorrect implications which are negatively contrary to the subject, and therefore are also misleading to the reader.

It must be made clear that this was the practice of the public Board, long in place, with its prior public attorneys, determined by the public Board, and not its public attorneys, to enable the public Board to operate within its very limited public budget.

Denied.

4. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording creates multiple incorrect implications, and suppositions based upon the prior allegation, which are negatively contrary to the subject, and therefore are also misleading to the reader.

N.J.S.A. 40:55D-10(g) states that: "The municipal agency shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing." The Board, and its limited finances, which are the actual subjects of the allegation, and not the respondent, did this in its Official Minutes. The Board had case law indicating that it was entitled to rely on its Minutes. The Board preferred to call its written memorializations "Official Minutes", rather than "resolutions." The Board saw its practice as complying with the Municipal Land Use Law (MLUL) by its providing its findings of fact and conclusions in a formal decision, on every application for development, reduced to writing in a formal presentation similar to a transcript, specifying the relief granted or denied, and fully recounting the dates involved, Attorneys and all witnesses present, essential matters testified to, procedural aspects, any amendments or changes to the original application, the vote thereon, the vote on the application, and the result of the vote, which is the decision.

Denied.

5. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording creates multiple incorrect implications and presumptions from prior allegations, negatively contrary to the subject, and therefore misleading to the reader.

The allegation evidences a lack of understanding of how a public Board of Adjustment operates. Only a public Board can adopt its written memorializations, as the subject Board did constantly. An attorney has no vote in the public adoption process, which is an operative action of a public Board, as a collective of its publicly appointed members. Once again, an attorney does not vote. An attorney is present to advise a Board, not participate in its actions and decisions. To allege participation by an attorney as part of a Board's decision making process is contrary to N.J.S.A. 40:55D-69, which states clearly that only members of a Board may vote; an attorney is not a member. In this case, where the attorney was a public employee of the Board, this is more clear. The Board employed the respondent attorney as a regular public employee, with all of the public servant immunities normally attendant therewith.

In fact, many was the time, in the course of a meeting, before he was removed from the Board, that the alleged "grievant" would emphatically state that the attorney to the Board was not a member of the Board, was not entitled to vote, and was present "merely" to advise the Board. A public attorney does not control the public actions of a public Client, in keeping with RPC 1.2 and RPC 1.13. The Client was the public Board at public meetings. As clearly pointed out in the multiple submissions already made to the Committee, the Client was not the individual who was removed from the Board, and has held himself out to the Committee as being a prior chairman.

Everything concerning the alleged "grievance" was carried out in the light of public examination and scrutiny. The only thing that has not been carried out in public has been the presentation of this complaint to the committee, and any ex-parte discussions which may have preceded said.

Denied.

6. Denied for reasons presented supra. A public employee attorney does not make the decisions of a public Board by whom the public attorney is publicly employed. This is why the Court ordered the public Board to take the action, not its public employee attorney. The Court was well aware that only the public Board could take action as a completely public entity. The allegation presented does not contain that same awareness.

7. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording and reference to prior incorrect allegations, creates multiple incorrect implications which are negatively contrary to the subject, and therefore are also misleading to the reader.

The allegation as presented is compound and misleading ab initio. The first term used, "Notwithstanding," is an attempt to create a misleading presumption of negativity on the rest of the allegation presented, thereby prejudicing the ability of a reader, or listener in a committee presentation, to determine the accurate, underlying facts of the matter. The first term "Notwithstanding" infers and presumes underlying negative suppositions which are not supported by the facts.

The presentation of the allegation ignores, either deliberately or ignorantly, the clear direction of N.J.S.A. 40:55D-69, that only public members of a public Board participate in public decisions of a Board, and attorneys do not participate; they provide advice. The Board determines whether or not it will act in accordance with the advice of an attorney. There are zoning boards and planning boards around the State of New Jersey which do not always act in accordance with the advice of their respective attorneys. An attorney who has interacted with such boards for a long period of time should, in honesty, recognize this phenomena. The State Legislature specifically

determined that it will be the public Board members who make decisions, and not attorneys who are advising a Board. If the State Legislature wanted attorneys to make these decisions, they would not have created these Boards, with different members in each unique community. Since the State Legislature has already made a clear decision in this area, it is therefore not the job of a presenter to an ethics committee to try and recreate and modify that clear intention.

The allegation has been created and phrased in such a compound and misleading manner so as to give a reader or listener lacking knowledge of N.J.S.A. 40:55D-69, the incorrect impression that the public employee attorney was a party to the lawsuit. The allegation is incorrect; the attorney was only a public employee, not a party to the lawsuit. The party was the public Board, as a cross-claim defendant, in a completely public lawsuit, with its source of funding, the City, for publicized political reasons. To try and cast the matter in any other way is, at best, inappropriate.

The public, political leverage held by one public entity was exercised to bring a mandamus order against another entity that it was responsible for funding. The first, more powerful entity, the City, then did not provide the funding, because the Mayor wanted the Board to hire a specific, additional attorney to fulfill the Order that the City obtained. When this did not work out, due to the Mayor's disagreements with the City Council, the Order was abandoned by the City, to become dormant. The mandamus order was acquired by one public entity against another public sub-entity, which was the party, not the attorney.

It is therefore obvious that the situation arose out of urban political strife carried over into the courts. The real "issue" involved in the entire situation was the lack of sufficient public funding for a public purpose. The purpose was obviously carried out

to the extent of the public resources provided. A public employee respondent did not control the resources and public funding of his employer.

Denied.

8. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording creates multiple incorrect implications which make unjustified presumptions, and are negatively contrary to the subject, and therefore are also misleading to the reader.

The allegation presumes an authority and autonomy of an individual which is contrary to the clear Legislative Intent of N.J.S.A. 40:55D-69. The respondent attorney was not going to violate this clear intent of N.J.S.A. 40:55D-69, which says that the public Board, at a Public Meeting, is the Client, and is the decision maker. A person in the role of chairman is a member of a Board who is subject to the public process of that Board. This understanding is missing from the thinking which created this allegation and the complaint. The allegation created has not properly informed the reader and the Committee of this fundamental understanding of the law.

How could David Soo have created a Memorandum as Chairman, in January of 2002, when he did not even become Chairman until July of 2002?

How does a chairman act unilaterally to order a public attorney to break the Local Budget Law? How can a chairman act in such a manner without the public Board authorizing the action? What public action of the public Board is alleged here?

David Soo was not empowered to unilaterally instruct the public Board's public attorney to encumber the public Board for such expenditures.

Where is that public action of the public Board?

Where has such a public action been presented to the Ethics Committee before it voted? The answer is that such was not presented to the Ethics Committee before it voted.

This lack of necessary information left the Committee less than fully informed, and therefore reveals the action attributed to the Committee as being invalid.

A Committee is supposed to be fully and correctly informed before it is asked to vote on something of this importance and potential harm to a public employee attorney.

At least half of the Board members tried to remove David Soo in his fourth month as Chair. When that did not work, many of them resigned. The public Board was not going to allow that individual to carry out that type of unilateral direction without examination and approval by the Board. The public attorney was not going to seek personal enrichment by violating the Local Budget Law. Therefore, didn't this Ethics Committee deserve to be better informed on these issues before voting on a matter which could be so harmful to a public attorney engaged in public service for an urban center that is recognized around the State as being financially distraught?

Public discussion was engaged in on this subject, in transcripts, which Mr. Soo apparently did not supply to the presenter. However, multiple submissions relevant to this subject, and contravening this allegation, were made by the respondent, which submissions do not seem to have been read by the Committee. Were these submissions ever presented to the Committee for its consideration prior to the Committee voting on the matter?

The public Board did not engage in action, i.e. vote, to instruct the public attorney to do something which would violate the public Local Budget Law. The

allegation contains no indication of the public Board acting. The allegation presented in this manner is again misleading.

The public Board did not want to deliberately incur expenses which would knowingly exceed its budget, and place itself in violation of the Local Budget Law. Quite the contrary, the public Board always cautioned its attorney to not incur expenses beyond its budget.

A submission was specifically made to the Committee by the respondent public employee attorney of a Memorandum of April, 2003, in which the respondent then informed the Chairman and the Board that the Board could hire a separate attorney to create resolutions in addition to the Official Minutes, as long as the Board had the finances to do so, so that the Board would not be deliberately exceeding its budget, in violation of the Local Budget Law. The public attorney, the respondent, was not going to deliberately enrich himself in violation of the Local Budget Law, compounded by a lack of authorization from the public Board, which was the only actual authority; not some person emotionally overwhelmed by an attempt to be a board chairman. Did David Soo ever present this Memorandum to the Committee? Apparently not. Was the Committee ever informed of this Memorandum? Apparently not.

Respectfully, the complaint is short-sighted, and should be withdrawn in the interests of justice.

The allegation made here actually accuses David Soo of instructing the respondent to break the law, to violate the Local Budget Law, both without first obtaining the public direction and action of the public Board. The allegation is essentially unsound, indicating that an action should have been taken which would contradict the instructions of the public Client, the Board, without authorization of the

Client, for personal enrichment, while leading the Board to break the Local Budget Law. That would be contrary to RPC 1.1, RPC 1.2, RPC 1.5, and RPC 1.13, and would therefore make no sense.

In this situation, the respondent attorney was careful not to break these RPC's. This was the most responsible public action to take under the circumstances.

Mr. Soo continually refused to address this situation to the Governing Body, the City Council, despite the requests of the public Board that he do so. He was simply emotionally unable to face the prospect of publicly asking the City Council for more finances. When Mr. Soo was Chairman, his constant neediness for emotional reassurance caused him to constantly call the attorney, and speak to the attorney, for untold hours which went unbilled. Mr. Soo was emotionally way over his head, and he was removed from the Board by the Governing Body. This individual has now been allowed to use the grievance process to privately continue the public litigation he lost in the very public Superior Court when he tried to replace the subject attorney with a Hackensack attorney. This has allowed the respondent attorney to be defamed in the press.

The respondent attorney submitted a fifty-seven (57) page request for a change of committee, based upon the conflict of interest involving this Hackensack attorney, prior to the committee proceeding in its investigation. The committee has still not addressed this conflict of interest and change request.

So much of this was explained already in earlier submissions, of which the Committee does not seem to have enjoyed the benefit before it acted on the complaint presented.

The public attorney worked for a large city with significant financial problems, with a public Board of Adjustment which has been constantly and grossly under-funded. The answer to the problem of urban under-funding is not to blame an attorney who receives very limited remuneration.

The answer is the mechanism for new funding that the former public employee attorney ensured would be in place before he left, in the new Zoning Ordinance. The public employee attorney made efforts since 2003 to have a provision for escrows included in the new Zoning Ordinance being prepared by an outside consulting firm. Paterson had avoided this as it was apparently felt that it was not necessary, and that it would be a burden on people filing applications for development requiring approval of a board.

The allegation presented is, at best, short-sighted. Denied.

9. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording creates multiple incorrect implications and suppositions which are negatively contrary to the subject, and therefore are also misleading to the reader.

This allegation ought to state that the respondent public employee attorney has remained a victim, along with the public Board, of a history of under-funding, for the Zoning Board of the 3rd largest city in the State of New Jersey.

Obviously, limited funding and under-funding in a city which was just "bailed out" by the State of New Jersey with 30.8 Million Dollars (\$ 30,800,000.000) for long accumulated debt, left the public Board with a lack of sufficient public funding to provide more public services. The allegation deliberately ignores the numerous remedial efforts made by the respondent attorney, as documented and provided in

multiple submissions already made to the Committee. Query, was the Committee informed of these remedial efforts before it voted?

Denied.

10. Once again, the allegation as presented does not fairly and sufficiently present the facts of the situation, and by way of limited wording creates multiple incorrect implications and suppositions which are negatively contrary to the subject, and therefore are also misleading to the reader.

The allegation is criticizing a grossly under-funded urban public Board, and attempting to attribute any alleged shortcomings of the public Board to its former public employee attorney. This is like saying that the respondent public employee attorney had a personal duty to fully finance the public Board, his employer. The allegation therefore makes no sense.

The complaint, as drafted, encourages violation of RPC 1.1, RPC 1.2, RPC 1.5, and RPC 1.13.

Denied.

11. The multiple submissions of the respondent appear to have been ignored in the drafting of the complaint. The many documented efforts toward remedial action have gone unrecognized and unacknowledged in the presentation of the complaint.

Why?

A prosecutor has a duty to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. If a case is being presented before a body, for a consensus vote based upon the presentation, the person presenting an alleged case for prosecution has a duty to ensure impartiality. This obligation includes not presenting misrepresentative allegations when the prosecuting party knows that there

are multiple submissions and affidavits which would contradict the allegations presented. An allegation should not misstate or mislead as to the inferences it may draw. Respectfully, this Committee should be given an opportunity to reconsider its actions, based upon the greater understanding presented in this Answer.

This obligation of a prosecutor also includes not alleging violation of an RPC when the prosecutor knows that an attorney would have to have been in violation of multiple RPC's to avoid the twisted direction of the allegation presented.

The duty of a prosecutor also includes not trying to blame a public attorney for the under-funding of a public agency, in a city long-strapped by financial crisis, by which the public attorney is employed to serve the public with the limited funds available. There is a duty to recognize, when it is clearly pointed out to the prosecutor, that in a city in financial crisis the most necessary functions are carried out first with the limited funding available. This means that the ability to carry out public functions may be affected and limited by the limited public funding available..

A prosecutor is supposed to be aware enough of the differences in finances available in society that the prosecutor does not deliberately ignore the very basic issue of public funding, and the way that public funding has a direct and correlative relationship to the amount of services which can be provided to the public. A prosecutor acting in good faith is supposed to recognize that a limit on public funding limits the amount of services which can be provided to the public. Limited public funding is not to be blamed upon a public attorney who was making a small salary in 1989, and continued at almost the same level for over seventeen years. To do that is to demean the sense of service to a struggling community that some attorneys value more than simply seeing how much money they can make. To ignore the obvious issue

of limited public funding, is to change public service to a struggling community into a public liability for any attorney who is trying to serve the public, particularly an urban public. This is what has been done in the creating of this complaint against the respondent as a public employee attorney.

Denied.

12. This allegation, when combined with the rest of the allegations in the complaint, indicates a desire to try and make an obvious issue of limited public funding into some type of issue of misconduct. The complaint and allegations show a pattern of conduct that is prejudicial to the spirit of public service, and contrary to the idea of a public attorney helping a struggling urban community to the extent that the resources of that community are available. In short, it shows the worst form of societal condescension, combined with some type of agenda which has caused the obvious issue of lack of public funding to be deliberately overlooked.

A complaint is not supposed to allege that a course of action should have been taken when the such action would have resulted in the obvious violation of four (4) RPC's, as articulated above, and as pointed out in submissions made.

If the legal profession is to espouse a belief that public service is a value of importance, then the legal profession must recognize that public resources are necessary to carry out public service. A public employee attorney is not to be blamed for a lack of sufficient and desired public funding. A public employee attorney is to be commended for not seeking to enrich himself through compromise the Local Budget Law.

Mostly, of course, a prosecutor has a duty of good faith, and is supposed to act in good faith. In presenting a case in good faith, a prosecutor should be straight-

forward. If justice is a moral issue, then to carry out an injustice would be immoral. The complaint created missed the understanding that the respondent attorney was a regular public employee whose duties were directed by a completely public entity with limited public funding to accomplish its purposes.

The "highest authority", when representing a public board, as a public employee, in completely public actions, is the public record, whereby the actions of the public body are subject to the public light of day.

The "highest authority" is not an individual, acting as a chairman, seeking to compel unilateral action, in violation of the Local Budget Law, without needed authorization of the public body, without necessary public funds available, without necessary public discussion, and without a public decision, i.e. a vote. One of the reasons that the "grievant" was removed from the Board of Adjustment was for successive violation of the Local Budget Law.

The complaint is effectively and erroneously stating that a respondent public employee attorney should have been complicit in such improper behavior for the public attorney's own financial benefit. This is wrong, and, respectfully, the complaint should be withdrawn by the Committee.

Denied.

WHEREFORE, the Respondent requests denial of any and all requests of the Complainant in its Complaint, and dismissal of the Complaint in this matter. In the absence of reconsideration and dismissal of the Complaint, it is requested that the matter be sent to another jurisdiction for investigation, due to a Conflict of Interest on the part of the IIB Committee. If there is then to be a hearing on the matter, it should be conducted in that new Jurisdiction..

## **AFFIRMATIVE DEFENSES**

1. The charges in the Complaint fail to support a case against the former public employee attorney, who was named as a respondent. If there was a case to be made, it would have been against the limited public funding, lack of public funding, and underfunding of the public operation of the public Board.

Respectfully, it seems that a greater consciousness must now be allowed to supersede whatever thinking led to the creation of the complaint. It is therefore the respectful request of the public employee respondent that the complaint be reconsidered and withdrawn.

## **VERIFICATION**

I hereby certify that the foregoing statements made by me in this Answer are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are wilfully false, I may be subject to punishment.

Dated: August 9, 2006

/s/ ROBERT J. DE MERS JR., ESQ.  
Respondent

**NOTICE OF MOTIONS TO DISMISS**

**MOTION TO DISMISS**

**FOR CONFLICT OF INTEREST & LACK OF PROPER JURISDICTION**

Respondent hereby provides Notice of a forthcoming Motion To Dismiss for Conflict of Interest on the part of the Committee.

1. Some of the grounds for said Motion have already been addressed to the Committee in multiple submissions.
2. The Committee never responded to the issues raised that it would be improper for it to have jurisdiction of the matter.
3. A more formal Motion will follow pursuant to Rule 1:20-05.

**MOTION TO DISMISS**

**THE COMPLAINT IS LACKING IN LEGAL SUFFICIENCY**

Respondent hereby provides Notice of a forthcoming Motion To Dismiss for Lack of Legal Sufficiency In the Complaint.

1. A more formal Motion will follow pursuant to Rule 1:20-05.

Dated: August 9, 2006

/s/ ROBERT J. DE MERS JR., ESQ.  
Respondent