SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-164
District Docket No. IIB-04-011E

IN THE MATTER OF

ROBERT J. DeMERS, JR.

AN ATTORNEY AT LAW

Decision

Argued: September 18, 2008

Decided: November 18, 2008

Bruce Atkins appeared on behalf of the District IIB 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) by the District IIB Ethics Committee ("DEC").[1]

[1] Before the DEC hearing, respondent filed a motion to transfer this matter to another district, on the basis of a perceived conflict of interest. At the inception of the hearing, the hearing panel denied the motion. Prior to oral argument before us, respondent renewed his request. For the same reasons expressed in detail in the transcript dated October 1, 2007, we denied his request.

The complaint charged respondent with having violated RPC 1.1(b) (pattern of neglect), RPC 1.13(c) (when representing an organization, a lawyer may take remedial action, including revealing information otherwise protected by RPC 1.6, that the lawyer believes to be in the best interest of the organization, in order to prevent a violation of law by the organization), and RPC 8.4(d) (conduct prejudicial to the administration of justice). The complaint alleged that, as counsel to the City of Paterson Zoning Board of Adjustment ("the Zoning Board" or "the Board"), respondent was responsible for ensuring that it complied with the resolution requirements of N.J.S.A. 40:55D-10 and that his failure to do so "aided the [Zoning Board] in remaining statutorily noncompliant".

We agree that a reprimand is the appropriate level of discipline in this case.

Respondent was admitted to the New Jersey bar in 1986. He has no prior discipline.

N.J.S.A. 40:55D-10g requires Zoning Boards to memorialize their decisions via resolutions. That statute provides, in relevant part:

> g. 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 municipal agency shall provide the findings and conclusions through:
>
> (1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development; or
>
> (2) A memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the municipal agency voted to grant or deny approval . . . . If the municipal agency fails to adopt a resolution or memorializing resolution as hereinabove specified, any interested party may apply to the Superior Court in a summary manner for an order compelling the municipal agency to reduce its findings and conclusions to writing within a stated time, and the cost of the application, including attorney's fees, shall be assessed against the municipality.

In 1989, respondent was appointed counsel for the Zoning Board. He remained in that position until 2006.

Edward Murphy, the Zoning Board's chair from 1975 to 2001, testified that the city had a longstanding tradition of using the Zoning Board's minutes to memorialize its actions. He recalled that, in 1989, he had advised respondent of that tradition.

According to Murphy, the memorialization of resolutions for all applications to the Zoning Board was too time-consuming and expensive for its counsel to prepare. Therefore, he and the former mayor had orally agreed to shift the burden of producing

those documents to the city attorney, who would then work from the transcribed Zoning Board's minutes.

Murphy recalled that, in 1989, he had specifically advised respondent not to prepare memorialization resolutions, as it was not counsel's function to do so. Respondent was to prepare resolutions only when it appeared that the applicant would be filing an appeal from the Zoning Board's determination.

Murphy further testified that, on more than one occasion as the Zoning Board's chair, he had tried to persuade city council to place additional funds in the Board's budget for an attorney to draft memorialization resolutions. He was unsuccessful in that regard.

As detailed below, respondent never prepared memorialization resolutions and, in fact, refused to do so, when ordered by two judges and by at least two Board chairs.

Murphy acknowledged that respondent had allowed the Zoning Board to conduct its business in contravention of the Municipal Land Use Law, although at Murphy's request. When Murphy was asked if he had ever requested respondent to go to court to compel the city to fund the Zoning Board's memorialization requirement, he replied that he had not.

Nancy Martinez, Murphy's immediate successor as the Zoning Board's chair, testified that respondent's contract with the city did not include a provision for memorializing resolutions:

> It was a matter of [respondent's] contract with the Board and the way the contract continues to be worded. There is no mention of memorializing resolutions . . . . Any additional services were to be additionally paid and [respondent was] to tell the Board if [he was] going to do work that was going to cost more money, before [he] did the work.
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> [4T99-20 to 4T100-2.][2]

The contract between respondent and the city provided, in pertinent part:

> 2. The PROFESSIONAL ATTORNEY will provide legal services pursuant to established precedent of service during the aforementioned period at the stated remuneration and benefits in accordance with applicable City ordinance, New Jersey Statutes and instruction of the Board.
>
> 3. It is further understood and agreed by and between the BOARD and PROFESSIONAL ATTORNEY, that in addition to the annual retainer and benefits, that [sic] [for] any other services rendered by the PROFESSIONAL ATTORNEY over and above the services covered under the retainer, the PROFESSIONAL ATTORNEY will charge the sum of $95.00 per hour plus cost associated therewith.

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[2] "4T" refers to the transcript of the November 21, 2007 DEC hearing.

> 4. It is further understood and agreed by and between the BOARD and the PROFESSIONAL ATTORNEY that the PROFESSIONAL ATTORNEY shall notify the BOARD prior to performing any services not covered by this retainer and the BOARD shall either approve or disapprove said services.
>
> 5. For the said retainer and benefits herein the PROFESSIONAL ATTORNEY agrees to attend all regular meetings of the BOARD. The PROFESSIONAL ATTORNEY agrees to render opinions, review data and otherwise render incidental services, pursuant to established precedent of services all of which shall be included in the aforementioned consideration herein.
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> [Ex.P-2.]

On two occasions during respondent's tenure as the Zoning Board's counsel, the Board's practice of using its minutes, instead of memorialization resolutions, was the subject of litigation and resulted in rulings against the Zoning Board.

In 1995, in <u>Municipal Counsel of the City of Paterson v. Zoning Board of Adjustment</u>, the court apparently criticized respondent and the Zoning Board's practice of substituting its minutes for the required resolutions. The court ordered the Zoning Board to produce memorialization resolutions.[3] Respondent

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[3] Only the first few pages of the court's decision are part of Exhibit P-5. The decision transcript was entered into evidence as a partial document. The pertinent pages were inadvertently omitted.

appeared as Zoning Board's counsel. The Zoning Board did not appeal from the decision.

In 1997, in Patricia Ackershoek v. The City of Paterson and the Board of Adjustment of the City of Paterson, another court found the Zoning Board in violation of N.J.S.A. 40:55D-10g. The court order provided as follows:

> IT IS on this 4th day of December, 1997
> ORDERED AND ADJUDGED that judgment be and the same is hereby entered in favor of the City of Paterson and against the Board of Adjustment as to the Third Count of the City of Paterson's Crossclaim; and it is further
>
> ORDERED AND ADJUDGED that the Board of Adjustment is hereby declared to be in violation of the Municipal Land Use Law, N.J.S.A. 40:55D-10g in that it does not include findings of fact and conclusions nor does it reduce those decisions to writing as required by subsection g; and it is further
>
> ORDERED AND ADJUDGED that the Board of Adjustment is mandated to prepare either written "resolutions" containing findings of fact and conclusions or written "memorializing resolutions" setting forth findings of fact and conclusions of law adopted at a meeting in accordance with N.J.S.A. 40:55D-10(g)(2), which mandate applies to all applications decided by the Board of Adjustment and in doing so the Board is to comply fully and completely with the requirements of N.J.S.A. 40:55D-10; and it is further
>
> ORDERED that the Board of Adjustment is hereby mandatorily required to comply with

> N.J.S.A. 40:55D-10g by preparing "resolutions" or "memorialization resolutions" of its decisions and voting on the adoption of such "resolutions" and the publication and issuance of the decision on the same . . . .
>
> [Ex.P-1.]

Respondent appeared as Zoning Board's counsel in that matter as well. Once again, the Zoning Board did not appeal from the court's decision.

Martinez remembered the 1997 lawsuit and the Zoning Board's meeting that ensued. According to Martinez, the Board decided to proceed with its practice of not memorializing resolutions. The Board's decision was prompted by the lack of available funds for such purpose. When Martinez was asked if respondent had ever recommended a suit to compel the city to fund the resolutions, she replied that he had not.

The grievants in this disciplinary matter, Brian Duncan and David Soo, were members of the Zoning Board during respondent's tenure as counsel. Both testified at the DEC hearing.

Duncan testified that he was appointed to the Zoning Board in 2001 and became its chairman in 2002. To learn about zoning issues, he and Soo had read a treatise on zoning law, identified in the record as the "Cox treatise." The treatise made it clear

that municipalities were required by statute to prepare memorialization resolutions.

Duncan recalled that, based on his and Soo's reading of the Cox treatise, they had held "extensive" discussions with respondent about the requirement for memorialization resolutions. Respondent, however, had refused to prepare them.

In 2002, Duncan and Soo held a meeting with respondent at a local diner. At the time, Soo was the Zoning Board's chairman. Duncan was its vice-chairman. Duncan testified as follows:

> A. We instructed [respondent] to – during our time, whatever was done in the past was done but we said we wanted to get – to have all the resolutions done from that moment forward. We took him to a restaurant, we had breakfast and literally – and we said from now on we will, in fact, be compliant with the law.
>
> [Presenter] And what did [respondent] respond in that discussion, if any?
>
> A. He felt that it wasn't necessary to do it, he objected to it. We said notwithstanding the fact that we were not attorneys, the fact of it is it was rather black and white as far as the Cox treatise was concerned, that we needed to do this because failure to memorialize resolutions could actually put the Board in a very vulnerable position in terms of applicants that did not get what they desired in terms of their application, that in fact, it needed to be as a matter of law put down this way. He agreed that he would do it.

Subsequently, however, he did not and it became a source of constant arguments.

[1T38-6 to 1T39-4.][4]

According to Duncan, respondent's unwillingness to prepare resolutions spilled over into open meetings, at which time respondent would insist that it did not have to be done. Duncan recalled that respondent would become argumentative, claiming that "as civilians . . . [we] should not put forward the argument that it needed to be done [just because] it was in the Cox treatise".

Duncan also recalled learning from the city attorney, later on, that "Judge Miniman [had given] a direct order, I believe this was back in 1997, to [respondent] to forthwith comply and create memorialized resolutions." Duncan recalled that this information had come as "a complete shock" to him, as respondent had never before disclosed the existence of a court order to him.

Duncan also learned that, back in 1995, another judge had "directed [respondent], he was the Board of Adjustment attorney, specifically to comply and to produce memorializing resolutions."

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[4] "IT" refers to the transcript of the October 1, 2007 DEC hearing.

Duncan interpreted "New Jersey Statutes" in paragraph two of the contract to require respondent to abide by New Jersey law, and, therefore, to prepare memorialization resolutions as part of his contract. He explained that it was for this reason that he and Soo had directed respondent to prepare resolutions.

David Soo, the Zoning Board's chair for the year 2002-2003, introduced Duncan and the other Zoning Board members to the Cox treatise. Soo asserted that, from the beginning of his tenure as chairman, he had insisted that the Zoning Board comply with the Land Use Law.

Soo recalled that, at the breakfast meeting with respondent and Duncan, in November 2002, he and Duncan had tried to convince respondent to prepare the resolutions. Soo was unaware at the time that two judges had ordered respondent to prepare the resolutions.

Soo also recalled discussing the issue of the resolutions with respondent a dozen times, between July 2002 and January 2003. Respondent had repeatedly refused to prepare the resolutions, claiming that it was not in his contract and that it was unnecessary for the city to do so because the minutes were sufficient to document the Zoning Board's action.

Still unaware that the city had twice been found in violation of the law, Soo sent respondent a January 7, 2003

memorandum, directing him to bring the Zoning Board into compliance with the statute. His memorandum stated:

> The Paterson Board of Adjustment (Board) has never been statutorily compliant with regard to both Memorializing Resolutions[5] and Annual Reports. When I was elected Chairman in July of 2002 I *immediately* instructed you to begin preparing memorializing resolutions for every completed matter from that date. In October the Vice Chairman and I met with you again to discuss the need to complete the memorializing resolutions by calendar year end 12/31/02. To this date there has been no statutory compliance in this matter. The Board must meet its statutory obligations to the public. All matters from the date of the last reorganization meeting must have supporting memorializing resolutions. These resolutions are to be completed by 45 days from the date of this memorandum.

[Ex.P-4.]

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[5] Except for matters that appear to be subject to appeal, which at best is a subjective standard.

Respondent did not challenge, at the DEC hearing or in his answer, Duncan and Soo's assertion that he had not disclosed to them the 1995 court directive and the 1997 court order.[5]

At a May 8, 2003 Board meeting chaired by Soo, a heated exchange took place, during which the Board members sought respondent's legal advice about the resolution requirement. One commissioner specifically asked respondent whether or not there had been prior litigation about the issue:

> COMMISSIONER MARTINEZ: Mr. DeMers, did the City of Paterson go to court over such a situation? Didn't Bill Wax (phonetic) take this?
>
> MR. DEMERS: I have been told that counsel prior to myself was involved in something, I'm not familiar with that case.
>
> [Ex.P-3 at 30-9 to 14.]

In fact, the initial page of the transcript of the 1995 decision, which page is in the Zoning Board's record, indicates that respondent, not a predecessor, appeared on the Board's behalf.[6] In the 1997 suit, too, respondent appeared for the Board.

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[5] Although the record contains repeated references to court "orders," the record does not reveal whether the 1995 decision was reduced to a formal court order.

[6] As previously noted, the copy of the transcript in evidence includes only the first few pages of the decision.

Anthony DeFranco, a long-time city employee, testified that he had been employed as a professional planner in Paterson for thirty-six years and had been Paterson's acting director of the Division of Planning and Zoning. He attended Zoning Board meetings. He recalled that it was never Board counsel's job to prepare memorialization resolutions for every matter and that the Board had instructed respondent not to prepare them.

On cross-examination, DeFranco acknowledged that respondent had never told him that the Zoning Board was in violation of the Land Use Law for its failure to provide resolutions.

Edward Perretti, PhD., Soo's successor as chair, recalled the May 8, 2003 Board meeting at which respondent had discussed memorialization resolutions. Perretti testified that respondent had not mentioned the existence of the 1995 and 1997 court orders at that meeting.

At the DEC hearing, Perretti was asked about an August 14, 2003 memorandum that respondent had prepared for him, containing a detailed history of Paterson's practice of not preparing resolutions. Seven pages in length, and meant to serve as a guide for the new Board chair, the memorandum contained no reference to the 1995 and 1997 court orders. Perretti gave the

following testimony on the issue of respondent's disclosure and advice to the Board:

> Q. [Respondent] obviously didn't inform you that the court order was obtained by the City of Paterson compelling the Board of Adjustment to perform memorializing resolutions; isn't that correct?
>
> A. Correct.
>
> Q. Did he ever advise the Board that they can bring an action against the city to compel the funding necessary to comply with the court order?
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> A. Not that I remember, no.
>
> Q. Would you agree that an attorney is to advise a Board as to what its options are?
>
> A. Yes.
>
> Q. And would you agree if there was a court order in place, that the obligation of counsel would be to advise the Board as a body that we have an order that compels us to do something and if they are not giving us the funding, we have the option of bringing an action against the body to provide the funding?
>
> A. Yes.
>
> Q. And did he do that?
>
> A. No.
>
> Q. Did he ever do that during the course of your time working with him as the Board attorney?
>
> A. No.
>
> [4T42-23 to 4T43-25.]

Perretti testified that, until the DEC hearing, he was unaware of the two court orders.

Respondent did not testify at the DEC hearing, electing to put forth his version of the events in his answer. Respondent asserted that, upon his 1989 appointment as Zoning Board counsel, the chair had directed him not to prepare memorialization resolutions, because of budgetary reasons. He was to prepare them only when he was virtually certain that the matter would be appealed to the Superior Court.

In his answer, respondent denied any wrongdoing. He claimed that it was the city's responsibility, not his, to prepare the resolutions. He stated that, in April 2003, he had informed the Board's chair that the Board could hire another attorney to prepare the resolutions and the minutes, "so 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 DEC found that respondent had failed to comply with the statute, with the Zoning Board's instructions to prepare the resolutions, and with the court orders. The DEC also found that respondent failed to take remedial action to prevent the Board from conducting its business in violation of the law. The DEC found respondent guilty of violating RPC 1.1(b), RPC 1.13(c), and RPC 8.4(d).

As indicated above, the DEC recommended 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.

Unquestionably, for years respondent caused the Zoning Board to violate a statutory requirement that the Board prepare, separately from its minutes, resolutions memorializing its actions. We are unable to agree, however, that he violated RPC 1.1(b). His conduct was not the product of neglect but, instead, of deliberation. He intentionally did not prepare the resolutions, claiming that they were not required and that, in any event, it was not his job to do so; his contract with the city did not provide for that assignment. He also pointed to Murphy's testimony that, back in 1989, he had instructed respondent not to prepare the resolutions because of lack of funding.

Respondent might be right that his job responsibilities did not include the preparation of the resolutions. Nevertheless, he knew that the law required his client, the Zoning Board, to memorialize its decisions by way of a resolution or a memorializing resolution, lest the Board's conduct be brought to the attention of the courts and costs, including attorney's

fees, be assessed against the Board. The language of the statute, N.J.S.A. 40:55D-10g, could not be clearer:

> The municipal agency shall provide the findings and conclusions through:
>
> (1) A resolution adopted at a meeting held within the time period provided in the act for action by the municipal agency on the application for development; or
>
> (2) A memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the municipal agency voted to grant or deny approval . . . . If the municipal agency fails to adopt a resolution or memorializing resolution as hereinabove specified, any interested party may apply to the Superior Court in a summary manner for an order compelling the municipal agency to reduce its findings and conclusions to writing within a stated time, and the cost of the application, including attorney's fees, shall be assessed against the municipality.

As the Board's attorney, respondent had an obligation to advise his client that its practice of not preparing resolutions was a violation of the Land Use Law. Had he done so, and had the Zoning Board persisted in perpetuating its longstanding practice, his duty was to withdraw as Board counsel.

RPC 1.13 addresses an attorney's duty when the client is an organization. Subsection (a) makes it clear that a lawyer employed or retained to represent an organization represents the

organization, rather than its officers, members, or other constituents. For purposes of the rule, "organization" includes local government as well. RPC 1.13(f).

Subsection (b) requires that a lawyer "proceed as reasonably necessary in the best interest of the organization," when the lawyer is aware that an officer, employee or other person associated with the organization is engaged in action that is a violation of the law. That subsection provides, in relevant part:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intend to act or refuses to act in a matter related to the representation that is a violation of a legal obligation of the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer *shall* proceed as is reasonably necessary in the best interest of the organization. . . . Any measures taken shall be designed to minimize disruption of the organization . . . . Such measures may include among others:
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> (1) asking reconsideration of the matter;
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter,

> referral to the highest authority that can act in behalf of the organization as determined by applicable law. [Emphasis added.]

When it is the organization's highest authority that insists upon action or refuses to take action that is a violation of the law, subsection (c) of the rule allows the lawyer to take further remedial action that the lawyer believes is necessary to be in the best interest of the organization. "If the highest authority within [the] organization refuses to take action against misconduct, Rule 1.13(c) permits the lawyer to withdraw in accordance with Rule 1.16 . . . ." American Bar Association, <u>Annotated Model Rules of Professional Conduct</u> (5th ed. 2003) at 226.

Applying these principles to this case, even though it might not have been respondent's responsibility to memorialize the resolutions, as the Zoning Board's attorney he was required by <u>RPC</u> 1.13(b) to "proceed as [was] reasonably necessary in the best interest" of the Zoning Board. That means that he was obligated to advise the Board that it was in violation of <u>N.J.S.A.</u> 40:55D-10g; to explain the consequences that could flow from the Board's actions; and, when appropriate, to refer the matter to its "highest authority" (the Board's chair). If the

"highest authority" insisted on continuing with the improper conduct, respondent was permitted to take whatever "further remedial action" was appropriate under the circumstances. If all of those steps proved unavailing, then respondent should have resigned from his position as Board counsel.

Here, Murphy, the Board's chair when respondent was hired, was instrumental in causing the violation of the law. Therefore, respondent could not have reported the impropriety to the "organization's highest authority." But respondent could have refused to assist the Board's chair in violating the law -- he could have resigned.

After Murphy's tenure as chair, however, respondent did not refer the violation to the Board's "highest authority," that is, Murphy's successors. Instead, two of the chairs, Duncan and Soo, were the ones who brought the Board's violation of the statute to respondent's attention. Duncan and Soo insisted that respondent prepare the resolutions. Respondent first promised that he would and then did not make good on his promise.

Respondent would have been ethics-bound to take the steps contemplated in RPC 1.13 if he had been faced with the Board's violation of the statute alone, that is, if there had been no court orders. More egregiously, however, respondent withheld

from the Board the existence of the 1995 and 1997 court orders, which found the Board in violation of the Land Use Law and directed the Board to prepare the mandated resolutions. Even when asked by some of the Board members whether there had been litigation over this issue, respondent denied knowledge of litigation. His answer was, "I have been told that counsel prior to myself was involved in something, but I'm not familiar with that case."

We find, thus, that respondent violated RPC 1.13(b) and RPC 8.4(d). Although the complaint did not specifically cite subsection (b) of the rule, it did cite subsection (c), which must be read in conjunction with subsection (b). Subsection (c) allows the lawyer to take *further* remedial action to prevent the organization from running afoul of the law. That provision contemplates that the lawyer has already taken *initial* remedial action, which is the subject of subsection (b). Both subsections, thus, must be read together. Furthermore, the issue of respondent's ethics obligations to the Board was fully explored at the DEC hearing. Therefore, no due process violation will occur in finding respondent guilty of violating subsection (b) of the rule.

Research uncovered no New Jersey cases addressing RPC 1.13 violations. Therefore, in assessing the proper discipline in this instance we are guided by cases dealing with the other violation committed by respondent -- conduct prejudicial to the administration of justice.

Ordinarily, attorneys who have prejudiced the administration of justice have been reprimanded. See, e.g., In re Holland, 164 N.J. 246 (2000) (attorney who was required to hold in trust a fee in which she and another attorney had an interest violated a court order by taking the fee prior to the resolution of the dispute); In re Milstead, 162 N.J. 96 (1999) (attorney violated a court order by disbursing escrow funds to his client); and In re Hartmann, 142 N.J. 587 (1995) (attorney intentionally and repeatedly ignored court orders to pay opposing counsel a fee, resulting in a warrant for the attorney's arrest; the attorney also exhibited discourteous and abusive conduct toward a judge, with intent to intimidate her).

In aggravation, we took into account respondent's misrepresentations to the Board, both by silence and by affirmation, about the court orders. In mitigation, we noted that he has no prior discipline in over twenty years at the bar.

After considering the nature of respondent's conduct and weighing the aggravating factor against the mitigation factor, we determine that a reprimand is the proper sanction in this case.

Members Boylan, Doremus, and Clark found that respondent's only infraction was his misrepresentation by silence about the existence of the court orders. They would have imposed an admonition.

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: ____________________
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

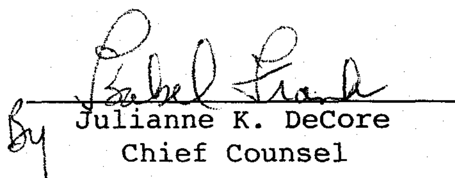
In the Matter of Robert J. DeMers, Jr.
Docket No. DRB 08-164

Argued: September 18, 2008

Decided: November 18, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan				X		
Clark				X		
Doremus				X		
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			6	3		



By Julianne K. DeCore
Chief Counsel