TOWNSHIP OF MANALAPAN, Plaintiff, v. STUART J. MOSKOVITZ, ESQ., JANE DOE and/or JOHN DOE, ESQ., I-V (these names being fictitious as their true identities are presently unknown) and XYZ CORPORATION, I-V (these names being fictitious as their true corporate identities are currently unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-MONMOUTH COUNTY DOCKET NO. MON-L-2893-07 **CIVIL ACTION** (LEGAL MALPRACTICE)

BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION TO VACATE THE ORDER TO SHOW CAUSE AND CROSS-APPLICATION TO BAR DEFENDANT FROM COMMUNICATING WITH REPRESENTATIVES OF PLAINTIFF

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Dated: August 3, 2007

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PRELIMINARY STATEMENT

The Township of Manalapan ("Township") brought this action against Defendant, Stuart J. Moskovitz, to recover damages the Township suffered as a result of Defendant's negligence in connection with his legal representation of the Township in its purchase of certain real property. Rather than file an Answer to the Township's Complaint, Defendant inappropriately contacted the Township directly to demand that it indemnify him against this action, stating that the Township would incur significant costs should it fail to do so. Even after counsel for Township advised Defendant of its representation and requested that Defendant refrain from further direct communications with Township officials, Defendant continued his campaign of coercion and threats.

In that regard, Defendant filed the instant Order to Show Cause seeking to dismiss the Township's Complaint and to compel the Township to provide immediate indemnification despite the fact that the very nature of such relief renders it inappropriate for a summary action. Defendant's application is further deficient in that it fails to demonstrate any irreparable harm. Rather, Defendant claims that he has suffered minimal monetary loss and damage to his reputation as a result of the existence of this action. Such alleged harm does not constitute irreparable harm and cannct serve as the basis for

the extraordinary relief which Defendant seeks. As Defendant has failed to carry his burden for entry of injunctive relief, the Court should vacate the Order to Show Cause.

Additionally, because Defendant continues to defy the prohibition on direct communication with a represented party, and because Defendant's communications contain increasingly volatile threats and intimidation, the Court should bar Defendant from direct communications with Township officials, other than counsel.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Background

The Township of Manalapan ("Township") appointed Defendant, Stuart J. Moskovitz, Esq., ("Defendant"), as the Township Attorney for the calendar year 2005. See Resolution No. 2005-431, attached to Certification of Daniel J. McCarthy as Exhibit 1.[1] In his capacity as Township Attorney, Defendant executed a contract on behalf of the Township obligating the Township to purchase real property located adjacent to the athletic fields owned by the Township ("Dreyer Property"). See Contract for Sale of Real Estate between Gus and Linda Dreyer and the Township of Manalapan, Ex. 2. The contract obligated the Township to purchase the Dreyer Property "as is" and did not condition the Township's obligation to purchase on receipt of

[1] All exhibits are attached to the Certification of Daniel J. McCarthy. All exhibits will be referenced solely by their Exhibit letter.

Preliminary Site Assessment ("PASI") report. Ibid.

The Township intended to fund the purchase of the property through, inter alia, grants to be received by the Township from the New Jersey Department of Environmental Protection Green Acres Program and the County of Monmouth Recreation Program. Green Acres and the Monmouth County Board of Recreation Commissioners both required that the Township demonstrate that the property was free from contamination prior to the release of grant funding. See letter dated June 15, 2005, from Green Acres to the Township, Ex. 3; and letter dated February 9, 2005, from the Monmouth County Board of Recreation Commissioners, Ex. 4.

The Township learned that an underground storage tank located on the Dreyer Property had leaked fuel oil and contaminated the soil.

Township Action

Accordingly, at a public meeting held on or about December 27, 2006, the Governing Body of the Township passed Resolution No. 2006-542, appointing Ruprecht, Hart & Weeks, LLP, as Counsel for Special Litigation. See Resolution No. 2006-542, Ex. 15. At a subsequent public meeting, the Governing Body of the Township passed Resolution No. 2007-130, authorizing execution of an agreement with Ruprecht, Hart & Weeks, which agreement was attached and made a part of the resolution. See Resolution No. 2007-130, Ex. 16. The contract states that Ruprecht, Hart &

Weeks will "represent the [Township] with respect to the [Township's] claim for damages suffered as a result of professional negligence in connection with real estate purchases by the Township in 2005." Ibid. It further states that Ruprecht, Hart & Weeks will "pursue" the Township's claim "with respect to those who may be responsible for the injuries or damages." Ibid. At a public meeting held on or about January 7, 2007, the Governing Body of the Township passed Resolution No. 2007-06, appointing Rogut McCarthy Troy, LLC, as Township Conflict/Alternate Counsel for the calendar year 2007. See Resolution No. 2007-06, Ex. 17.

On or about June 14, 2007, the Township, by its Special Litigation Counsel, Ruprecht, Hart & Weeks, caused to be filed the instant Complaint against Defendant and certain fictitious persons and corporations. See Plaintiff's Complaint ("Pl. Compl."), Ex. 18. The Complaint alleges that Defendant committed legal malpractice. Ibid. In connection with the filing of its Complaint, the Township filed an Affidavit of Merit executed by Robert F. Renaud, Esq. Mr. Renaud is a licensed and practicing attorney in the State of New Jersey. See Affidavit of Merit of Robert F. Renaud, Esq., ("Renaud Aff."), Ex. 19. In his Affidavit, Mr. Renaud states that he reviewed correspondence related to the Township's purchase of the Dreyer property between the Township and Green Acres, the

Township and the Monmouth County Board of Recreation Commissioners, and Defendant and various Township personnel, as well as Defendant's file on the matter. Id. at 1-2. Mr. Renaud asserts that based upon that review and his "experience in representing municipalities and both buyers and sellers in real estate transactions in the State of New Jersey for over thirty years," it is his "opinion that Mr. Moskovitz failed to conform to the standard of care for attorneys in his representation of the Township of Manalapan in its purchase of the [Dreyer] property." Id. at 2.

Defendant's Demands

By letter dated June 28, 2007, Defendant demanded that the Township indemnify him in this action brought by the Township. See letter dated June 28, 2007, from Defendant to Tara Lovrich, Township Administrator ("June 28 letter"), Ex. 20.

By letter dated July 13, 2007, this firm advised Defendant that it was Special Counsel to the Township in this matter and that it would reply to his demand for indemnification. See letter dated July 13, 2007, from Daniel J. McCarthy to Defendant ("July 13 letter"), Ex. 21. The letter further requested that Defendant communicate directly with this firm regarding matters pertaining to this action and refrain from contacting the Township officials directly. Ibid.

By letter dated July 13, 2007, Defendant asserted that the

Township had not taken action in public session to authorize this lawsuit. See letter dated July 13, 2007, from Defendant to Mr. McCarthy ("Def. July 13 letter"), Ex. 22. Defendant further asserted that a Comment to Rule 4.2 of the Rules of Professional Conduct excused him from compliance with that Rule's mandate that attorneys refrain from directly communicating with parties known to be represented by counsel about the subject of that representation. Ibid.

By letter dated July 17, 2007, this firm advised Defendant that it was in receipt of his July 13, letter and again requested that he refrain from contacting the Township officials directly regarding the litigation or his demand for indemnification. See letter dated July 17, 2007, from Mr. McCarthy to Defendant ("July 17 letter"), Ex. 23. The letter explained that this firm did not interpret the Comment to RPC 4.2 as exempting Defendant from the prohibitions on direct communications with parties known to be represented by counsel. Ibid. In response to Defendant's allegation that the Township did not authorize this action in public session, this firm attached Resolutions Nos. 2006-542, 2007-06, and 2007-130, for his review. Ibid.

In addition to the numerous letters Defendant has sent this firm and the Township, Defendant has also discussed the various aspects of this matter on his internet blog, "daTruthSquad" and

in newspaper articles published in "The News Transcript." For example, articles published on May 18, and May 23, 2007, quote numerous comments made by Defendant. See Kathy Baratta, "Protection for town at issue in land deal", The News Transcript, May 18, 2007 ("May 18 article"), Ex. 12; Kathy Baratta, "Millburn law firm hired to eye possible negligence", The News Transcript, May 23, 2007 ("May 23 article"), Ex. 13. And an in article published on July 18, 2007 Defendant utilized the public medium to plead his case:

> Reached for comment, Moskovitz said he was immune to any retaliatory measures by the township due to the New Jersey Tort Claims Act, which he said indemnifies him and any public official. He said the statute covered him in his duties as township attorney when the deal on the property closed.

See Kathy Baratta, "Township seeks damages from atty. on land deal: Manalapan lawsuit claims contamination went undetected", The News Transcript, July 18, 2007 ("July 18 article"), Ex. 14. In that same article, Defendant continued his verbal assault on Township counsel. Ibid. Defendant also wrote an editorial guest column wherein he claimed that the Township's claim is part of a personal vendetta against him by the Township's former Mayor, Andrew Shapiro. See Stuart J. Moskovitz, "Taxpayers should not pay for petty politics", The News Transcript, July 11, 2007 ("Def. editorial"), Ex. 11.

Regarding Defendant's internet blog, "daTruthSquad,"

Defendant uses the anonymous forum to dissect the specific allegations asserted against him, offering his opinion and analysis of the validity of each claim. See "Da BACONHEAD of Da Week!", daTruthSquad, May 18, 2007 ("May 18 blog"), Ex. 5; "DaTruth or Da Consequences", daTruthSquad, May 26, 2007 ("May 26 blog"), Ex. 6; "Citizen King's 'Costly' Campaign", daTruthSquad, July 3, 2007 ("July 3 blog"), Ex. 7; "Da BACONHEAD of Da Week!" daTruthSquad, July 12, 2007 ("July 12 blog"), Ex. 8; "Earth to Mayor Andy Boy-Clues 4 Sale", daTruthSquad, July 17, 2007 ("July 17 blog"), Ex. 9; "Da BACONHEAD of Da Week!" daTruthSquad, July 20, 2007 ("July 20 blog"), Ex. 10. Defendant further uses the blog to accuse various Township officials of improper motives and repeatedly threaten the Township with a retaliatory lawsuit. The contents of those blogs are lengthy and thus will not be recounted in full here; instead, certain particularly relevant excerpts are quoted in the argument below.

Order to Show Cause

On July 16, 2007, Defendant filed an Application for an Order to Show Cause with Temporary Restraints. See Defendant's Certification ("Def. Cert."), Ex. 25, and Defendant's Brief ("Def. Br."), Ex. 26.

On July 17, 2007, the Court entered an Order to Show Cause requiring the Township to show cause why its Complaint should

not be dismissed, or in the alternative, mandating that the Township indemnify Defendant in the instant litigation, and restraining the Township, its attorneys, officers, elected officials and employees "from communicating with the press, directly or indirectly, or anyone else outside the litigation circle other than the Court and Defendant, in connection with this matter." See Order to Show Cause dated July 17, 2007 ("July 17 OTSC"), Ex. 27.

In violation of this Order, Defendant posted an entry in his internet blog proposing his future success in defending this claim and in recovering significant damages from the Township:

> Da Mosked Man had his day in court, and on a sunny morning he was vindicated of all charges against him in da case of da Dreyer patch after a judge threw da case out claiming it lacked any merit. Da Mosked Man decided to spend his afternoon personally serving Manalapan's Township administrator filing a $100 million dollar defamation lawsuit against da town. He made even bigger news by personally serving da King during a township committee meeting!

See July 20 blog, Ex. 10.

On July 23, 2007, the Court entered a second Order to Show Cause requiring the Township to show cause why an Order should not be entered dismissing the Complaint and mandating the Township to indemnify Defendant. See Order to Show Cause dated July 23, 2007 ("July 23 OTSC") at 1-2, Ex. 28. The Order to Show Cause also "enjoined and restrained" the Township, "including the Township elected officials, employees, and

Township attorneys and staff, and Defendant" from "Communicating with the press and the public concerning the subject matter of this litigation[.]" Id. at 2. The Order to Show Cause vacated that portion of the July 17, 2007, Order directing counsel for the Township to assure Defendant that Township officials were in receipt of all materials related to this action. Ibid. Lastly, the Order to Show Cause scheduled a hearing for August 20, 2007, and established a briefing schedule for the parties. Id. at 2-3.

Accordingly, the Township respectfully submits this Application to Vacate the Order to Show Cause and Cross-Application to bar Defendant from directly communicating with Township officials regarding this litigation.

LEGAL ARGUMENT

THE COURT SHOULD VACATE THE ORDER TO SHOW CAUSE BECAUSE DEFENDANT IS NOT ENTITLED TO INJUNCTIVE RELIEF

Injunctive relief is an extraordinary remedy that should not be granted unless "necessary to prevent substantial, immediate and irreparable harm." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997) (citing Crowe v. De Gioia, 90 N.J. 126, 132 (1982)). One who seeks this extraordinary relief must establish: (1) a threat of substantial, immediate and irreparable harm; (2) a settle legal claim; (3) a reasonable probability of ultimate success on the

merits; and (4) relative hardships that favor a grant of an injunction prior to a full hearing. Id. at 638 (citing Crowe, supra, 90 N.J. at 132-34). The movant must establish each element by "clear and convincing proof in order to grant an injunction." Id. at 639. A party who, like Defendant, seeks mandatory preliminary injunctive relief must satisfy a "particularly heavy" burden. Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980).

Defendant failed to carry his burden here. Indeed, Defendant did not even attempt to meet his burden as his application is devoid of any mention of the standard or required conditions for issuing injunctive relief. Significantly, neither Defendant's application nor the Order to Show Cause establishes any harm to Defendant other than potential monetary concerns. Such alleged monetary harm is insufficient to justify the imposition of a mandatory injunction.

Moreover, the Order to Show Cause fails to make specific findings setting forth the reasons for its issuance in violation of R. 4:52-3. Instead, the Order confusingly states that it is "based upon the facts set forth in the Verified Complaint filed herewith" though neither Defendant nor the Township filed a Verified Complaint.[2] See July 23 OTSC, Ex. 28 at 1. Such

[2] Defendant filed a Certification and Brief in support of this Order to Show Cause. Defendant's Certification, however, violates R. 1:6-6 by setting forth more than "facts which are admissible into evidence and to which the affiant

reference to the parties' documents further violates R. 4:52-4. That rule states in pertinent part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]

R. 4:52-4.

Accordingly, because Defendant failed to carry his burden of proof and because the Order impermissibly relies on Defendant's submissions and fails to set forth the reasons for its issuance, the Court should vacate the Order to Show Cause.

I. DEFENDANT DID NOT DEMONSTRATE A THREAT OF SUBSTANTIAL, IMMEDIATE AND IRREPARABLE HARM

Defendant did not establish any threat of substantial, immediate and irreparable harm. To demonstrate irreparable injury, Defendant must show that the alleged harm "cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In other words, Defendant "must have no adequate remedy at law." Subcarrier Communications, supra, 299 N.J. Super. at 638 (citing Green v. Piper, 80 N.J. Eq. 288, 293 (Ch. Div. 1912)). Thus, Defendant's alleged loss of filing fees and billable hours, by their very nature, cannot constitute irreparable harm.

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is competent to testify." Thus, the Township requests that the Court not rely on Defendant's Certification since it improperly includes legal theory and argument and should be stricken.

Defendant further asserts that he suffered irreparable harm because he "has not been properly served" since he received service by mail and rather than personal delivery. This claim also has no merit. Rule 4:4-4 expressly permits service upon a party to "be made by registered, certified or ordinary mail," and states that such form of service shall become effective "if the defendant answers the complaint or otherwise appears in response thereto . . . within 60 days following mailed service." R. 4:4-4(c). The Township filed the Complaint on June 14, 2007. Defendant responded on July 16, 2007 by filing the instant application for an order to show cause. Thus, Defendant cannot claim that service by mail will cause him immediate, substantial and irreparable harm because such service is proper under R. 4:4-4(c) and effective upon Defendant's filing of the instant Order to Show Cause. Further, Defendant conceded that he received the Complaint; thus, Defendant cannot claim any harm, let alone irreparable harm, since he had notice of the Township's claims.

Defendant also claims that he will suffer "considerable' harm to his reputation caused by the mere "existence of the lawsuit." See Def. Br., Ex. 26 at 8. But Defendant has not proven or even alleged that the statements contained in the Complaint are false. Rather, the gravaman of Defendant's application seeks to relieve Defendant of liability for his

actions. Defendant's mere allegation that he will suffer harm from permitting the Township to proceed with its Complaint does not establish the existence of any such harm. Simply saying it is so does not make the alleged harm a verifiable reality. Indeed, even if Defendant does suffer some damage to his reputation, such damage is not irreparable. "[T]he prospect of vindication in the case itself may offer the most effective means of recovering from any reputational harm." Smith v. Smith, 379 N.J. Super. 447, 456 (Law Div. 2004).

Damage to one's reputation as a result of defending a properly filed Complaint is insufficient to warrant injunctive relief. Ibid. Indeed, lawsuits are privileged, and any reasonable allegation made in a lawsuit is also privileged. Thus, Defendant cannot maintain a defamation claim against the Township for its assertions. Consequently, because any purported damage to his reputation would not be actionable, Defendant cannot seek relief upon such a claim.

Ironically, while Defendant argues here that his business will suffer irreparable harm from newspaper articles "detailing" this litigation, Defendant himself offers numerous comments on the subject matter and merit of this action in those articles. See May 18 article, Ex. 12; May 23 article, Ex. 13. Indeed, in an article published on July 18, 2007, after the Court entered the Order enjoining all parties, including Defendant, from

communicating with the press regarding the substance of the litigation, Defendant used the public medium to plead his case. See July 18 article, Ex. 14. The article asserts:

> Reached for comment, Moskovitz said he was immune to any retaliatory measures by the township due to the New Jersey Tort Claims Act, which he said indemnifies him and any public official. He said the statute covered him in his duties as township attorney when the deal on the property closed.

Ibid. Specifically, Defendant states that he "cannot be sued for any damages resulting from an exercise of discretion." Ibid. He further continues his verbal attack on counsel for the Township, stating that "[t]he Township Committee should have been told about the Tort Claims Act prior to spending one nickel on this case." Ibid. Defendant also wrote an editorial guest column wherein he claimed that the Township's claim is part of a personal vendetta against him by the Township's former Mayor, Andrew Shapiro. See Def. editorial, Ex. 11.

Moreover, upon information and belief, Defendant discusses the various aspects of this litigation on his internet blog, "daTruthSquad." On May 18, and May 23, 2007, Defendant dissects the specific allegations asserted against him, offering his opinion and analysis of the validity of each claim. In "Da BACONHEAD of Da Week!", Defendant tells his side of "da story." See May 18 blog, Ex. 5. In "DaTruth or Da Consequences", Defendant states that by commenting in the newspaper articles,

"Da Mosked man used the da Snoozer to his advantage - drawing a line in da tabloid sand." See May 26 blog, Ex. 6. He asserts that "Da Mosked man's claims, now in print, can all be used against him in a court of law", after which, he lists those claims, providing his legal analysis. Ibid.

Significantly, in direct contradiction to Defendant's claims of irreparable harm ensuing from the publicity attached to this Complaint, Defendant writes on July 12, 2007, that neither the Township nor the News Transcript had mentioned the matter in approximately two months:

> Two months have gone by since Manalapan "detective" and current TC wannabe Drew "Citizen King" Shapiro went before da committee and proclaimed something wasn't peachy in da township, blaming a former township attorney for all da town's ills.
>
> Since then, there has not been one word on how da investigations launched by Citizen King have been going, and not one word by da Snoozer [the News Transcript].

See July 12 blog, Ex. 8.

Thus, Defendant's own rantings have contributed to, if not wholly created, the purported harm upon which he seeks to rely to dismiss the Township's Complaint. It is axiomatic that Defendant may not obtain such relief.

Accordingly, because Defendant has failed to offer even a shred of proof indicating a threat of substantial, immediate and irreparable harm, the Court must vacate the Order to Show Cause.

II. DEFENDANT DID NOT ESTABLISH A SETTLED LEGAL RIGHT UNDERLYING HIS CLAIM

Defendant alleges that the Court must dismiss the Township's Complaint because the Tort Claims Act ("TCA"), N.J.S.A. 59:10-1 et seq., bars the Township from maintaining any action against him. He further argues that the Court should issue a mandatory injunction compelling the Township to indemnify him against this claim for his own legal malpractice and other misconduct. Defendant also claims that he is entitled to a mandatory injunction against the Township, its attorneys, officers, elected officials and employees, restraining them from communicating with the press or anyone else, directly or indirectly, in connection with this matter. As is more fully discussed in the sections specifically addressing each of these claims, Defendant has asserted no legal right to any of the relief he seeks.

With respect to the TCA, Defendant summarily states that as a public employee, he is immune from suit for his negligent conduct. But Defendant fails to provide any authority for his brazen assertion that even the Township, a sovereign public entity, cannot recover from him for damages it sustained as a result of his legal malpractice and other misconduct committed during his tenure as Township Attorney. Indeed, Defendant does not even attempt to explain the clear violation of public policy

such a determination would perpetrate. The Township submits that Defendant makes no attempt at explanation because there is no explanation. The law does not permit an attorney to escape liability to his public entity employer for his own malpractice and misconduct while engaged in representation of that public entity.

Defendant makes a similar argument regarding the Township's indemnification provision, claiming that the Court must issue a mandatory injunction compelling the Township to indemnify him in this action. Defendant, however, fails to provide the requisite proof to obtain such injunctive relief. Like his TCA claim, Defendant makes no attempt to justify the harsh penalty Defendant would have the Township suffer for Defendant's incompetence. Rather, he simply concludes that as an employee, he must be indemnified. This assertion also has no merit. Defendant cannot shirk his legal and ethical responsibilities to represent the Township in a reasonable and diligent manner. Compelling the Township to provide for his indemnification would permit him to do so act and thus cannot be sanctioned.

Further, Defendant makes the bold assertion that the fact that local newspapers may publish articles discussing the instant litigation entitles him to the issuance of prior restraints on the Township's and its personnel's right to "communicat[e] with the press, directly or indirectly, or anyone

outside the litigation circle other than the Court and Defendant in connection with this matter." See July 17 OTSC, Ex. 27 at 1. It goes without saying that Defendant has no legal right to such relief. A prior restraint, like the injunction here preventing speech, is the "most serious and least tolerable restraint" on speech. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976). Any such prior restraint on expression bears "a heavy presumption against its constitutional validity." New York Times v. United States, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141 (1971). Defendant's purported embarrassment and damage to his reputation is woefully insufficient to rebut that heavy presumption, especially when the subject of the Township's Complaint is a matter of public record having been properly filed with the Court.

Thus, the Court should vacate the Order to Show Cause because the Defendant has failed to demonstrate an asserted legal right underlying his various claims for injunctive relief.

III. DEFENDANT DID NOT DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

A. Defendant will not likely prevail on a Motion to Dismiss the Township's Complaint

The Court should vacate the Order to Show Cause requiring the Township to show why the Complaint should not be dismissed because a party may not use a summary proceeding for such relief. "An OTSC may properly be utilized where a party seeks

some form of emergent, temporary, interlocutory or other form of interim relief such as the preservation of the status quo pending final hearing of the cause." Solondz v. Kornmehl, 317 N.J. Super. 16, 20 (App. Div. 1998) (citation omitted). A party may also use an order to show cause "in those actions in which the court is permitted by statute or rule to proceed in a summary manner." Ibid. (citation omitted). A party may not, however, use this procedural device where the relief provided for is "instant, complete and final relief without giving the opposing party an adequate opportunity to present argument." Ibid. (citation omitted) (internal quotation marks omitted).

Thus, Defendant may not use an Order to Show Cause in lieu of filing a proper motion to dismiss pursuant to R. 4:6-2. "The examination of a complaint's allegations of fact required" to decide a motion to dismiss "should be one that is at once painstaking and undertaken with a generous and hospitable approach." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Such an analysis and determination is not appropriate for disposition in a summary action.

1. The Township's Complaint States a Claim Upon Which Relief May be Granted

The Court should also vacate the Order to Show Cause because the Township's Complaint states a claim upon which relief may be granted. A "motion to dismiss should be granted

only in rare instances." Smith v. SBC Communications Inc., 178 N.J. 265, 282 (2004). In determining a motion to dismiss for failure to state a claim, the Court must search the Complaint "in depth and with liberality to ascertain whether the fundament of a cause of action can be gleaned even from an obscure statement of claim . . . ." Ibid. (citations omitted). "At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart, supra, 116 N.J. at 746 (citations omitted). Indeed, "plaintiffs are entitled to every reasonable inference of fact." Ibid. Thus, the Township's Complaint will withstand a motion to dismiss "[i]f a generous reading of the allegations merely suggests a cause of action." Smith, supra, 178 N.J. at 282 (quoting F.G. v. MacDonell, 150 N.J. 550, 556 (1997)).

Here, the Township's Complaint asserts sufficient facts to plead a claim of legal malpractice. To establish legal malpractice, the Township must show the existence of an attorney-client relationship imposing a duty of care on the attorney, breach of that duty by the attorney, and damages proximately caused to the Township from that breach. Jerista v. Murray, 185 N.J. 175, 190-91 (2005). The Township's Complaint alleges facts, which if proven, will establish each of those elements.

First and foremost, Robert F. Renaud, Esq., filed an Affidavit of Merit in support of the Township's Complaint pursuant to N.J.S.A. 2A:53A-27. See Renaud Aff., Ex. 20. The purpose of requiring an Affidavit of Merit in actions alleging professional negligence is "to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court." Hubbard v. Reed, 168 N.J. 387, 395 (2001). Thus, Mr. Renaud's Affidavit of Merit satisfies the statutory requirement and is prima facie evidence of the Township's claim against Defendant for legal malpractice.

Specifically, Mr. Renaud's Affidavit states that Mr. Renaud has been licensed to practice as an attorney in the State of New Jersey since 1974. Renaud Aff., Ex. 20 at 1. The Affidavit further states that Mr. Renaud "is actively engaged in the practice of law" and that his "practice includes the management and closing of real estate transactions such as the one that is the subject of this action and the representation of municipalities and other government entities." Ibid. Mr. Renaud states that he reviewed correspondence related to the Township's purchase of the Dreyer property between the Township and Green Acres, the Township and the Monmouth County Board of Recreation Commissioners, and Defendant and various Township personnel, as well as Defendant's file on the matter. Id. at 1-

2. He asserts that based upon that review and his "experience in representing municipalities and both buyers and sellers in real estate transactions in the State of New Jersey for over thirty years," it is his "opinion that Mr. Moskovitz failed to conform to the standard of care for attorneys in his representation of the Township of Manalapan in its purchase of the [Dreyer] property." Id. at 2. Thus, Mr. Renaud's Affidavit provides the Township sufficient support to state a prima facie claim of legal malpractice.

In addition, regarding the attorney-client relationship and the attendant duty of care Defendant owed to the Township, the Complaint asserts that at all relevant times, Defendant was the Township Attorney, thereby creating an attorney-client relationship between Defendant and the Township. See Pl. Compl., Ex. 18 ¶¶ 2, 14 and 15. Specifically, the Complaint alleges that as the Township Attorney and pursuant to a Resolution Authorizing the purchase of the underlying property, Defendant "was vested with the responsibility to act on the Township's behalf in negotiating with the Dreyers [sellers] the purchase of the Dreyer property." Id. at ¶ 16. It states the Defendant "represented the Township of Manalapan in the negotiation and purchase of the Dreyer property" and that "it was the duty of Defendant, Stuart J. Moskovitz, to exercise the appropriate care in negotiating the Contract for Sale of Real

Estate with the Dreyers so that no economic harm would come to the Township of Manalapan." Id. at ¶ 17 and First Count ¶ 2. In particular, the Complaint alleges that Defendant "had a duty to negotiate a contract that contained a clause that the Township's obligation to purchase the Dreyer property was contingent on obtaining a favorable [Preliminary Site Assessment ("PASI")] report or an equivalent environmental inspection which stated that the property was free of contamination and therefore fit for public use." Id. at First Count ¶ 3.

Further, the Complaint alleges that Defendant breached his duty of care by "among other things, negligently authorizing the Township to enter a Contract, which did not contain a clause stating that the Township's obligation to purchase the Dreyer property was contingent on an environmental inspection. Id. at First Count ¶ 4. It also states that as a result of Defendant's breach, the Township must expend taxpayers' monies to cover the cost of cleaning of the contaminated soil fond on the property. Id. at ¶ 31-32 and First Count ¶¶ 7-8.

Accordingly, the Court should not dismiss the Township's Complaint because it pleads sufficient facts to state a claim of legal malpractice against Defendant.

2. The Tort Claims Act Does Not Bar the Township from Bringing this Claim Against Defendant

The Tort Claims Act ("TCA"), N.J.S.A. 59:10-1 et seq., does not prevent the Township from maintaining this claim against Defendant. The Legislature intended the TCA to protect public entities such as the Township by reestablishing "'the general rule of the immunity of public entities from liability for injuries to others.'" Chasin v. Montclair State Univ., 159 N.J. 418, 425 (1999) (quoting Brooks v. Odom, 150 N.J. 395, 402 (1997)). It did not intend to grant employees immunity for injuries they caused to their public entity employers. And it certainly did not intend to preclude such public entities from bringing suit against its employees. See Municipal Council of Newark v. James, 183 N.J. 361, 375 (2005) (noting that "[b]ecause City Council had to sue Corporation Counsel, among others, it was self-evident that City Council needed to retain its own counsel to prosecute this cause").

Morevoer, the TCA does not purport to preclude public entities from holding their employees accountable for their own misconduct. To hold otherwise would be contrary to public policy and indeed, common sense. To permit a Township Attorney to commit legal malpractice in his representation of the Township and then claim that due to his immunity as a public employee, the Township may not sue him for his malpractice and

other negligent conduct would be tantamount to relieving Mr. Moskovitz of any legal obligation he had to exercise reasonableness in performing his duties as the Township Attorney. It is manifest that such a conclusion cannot be sustained. See Jersey City v. Hague, 18 N.J. 584, 599 (1955) ("That an officer of the city [e]ntrusted with city funds may so employ them without sustaining a liability to the city for resulting profits is a doctrine that we repudiate without hesitation; that any person acting in concert with him, 'may, with impunity from civil liability, keep his share of the profits from such an unlawful enterprise we likewise deny.").

Thus, Defendant would not likely prevail on a motion to dismiss the Township's Complaint because the TCA does not entitle Defendant to immunity from suit by the Township.

3. The Township Properly Authorized this Action in Public Session

The Township properly authorized this action against Defendant. Defendant's wholly unsubstantiated claims to the contrary are simply untrue.

The Open Public Meetings Act ("OPMA"), N.J.S.A. 10:4-6 et seq., requires public bodies to make all meetings open to the public unless an express exception permits the public body to exclude the public. One such exception "empowers a public body to exclude the public from all or a portion of a meeting where

the public body discusses '[a]ny pending or anticipated litigation or contract negotiation other than [a collective bargaining agreement] in which the public body is, or may become a party.'" Fallone Props., LLC v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 566-67 (App. Div. 2004) (quoting N.J.S.A. 10:4-12(b)(7)). Thus, the OPMA expressly authorized the Governing Body of the Township ("Township Committee") to conduct in closed session any discussion relating to the anticipated litigation against Defendant and the proposed contract with counsel to represent the Township in that litigation. Upon completion of such discussions, the Township Committee may take action in public session.

This is precisely what the Township Committee did here. Indeed, the Township Committee passed at least three (3) resolutions in public session that pertain to the instant litigation, properly authorizing the action. Specifically, on December 26, 2007, the Township Committee passed Resolution No. 2006-542, naming the law firm, Ruprecht, Hart & Weeks, LLP ("RHW"), as Counsel for Special Litigation "to handle a matter of potential litigation." See Resolution No. 2006-542, Ex. 15. On February 14, 2007, the Township Committee passed Resolution No. 2007-130, authorizing the execution of an agreement between the Township and RHW in accordance with the contract attached to the resolution. See Resolution No. 2007-130, Ex. 16. That

contract stated that RHW would "represent the [Township] with respect to the [Township's] claim for damages suffered as a result of professional negligence in connection with real estate purchases by the Township in 2005." Id. at 2. The agreement further stated that RHW would "pursue" the Township's claim "with respect to those who may be responsible for the injuries or damages." Ibid. The Township Committee attached the agreement and made it a part of the resolution. Id. at 1.

Additionally, the Township Committee passed Resolution No. 2007-06 at a public meeting held on January 7, 2007, appointing Rogut McCarthy Troy, LLC, as Township Conflict/Alternate Council. See Resolution No. 2007-06, Ex. 17. Thus, the Township Committee properly authorized this action and the Township's representation in this action by resolutions passed at no less than three (3) separate public meetings and further, attached to one of those resolutions the agreement with RHW describing the proposed litigation against Defendant. The public documents exist evidencing this public authorization. Indeed, these public documents are available for inspection upon request. The simple fact is that Defendant did not request such documents. His failure to do so, however, does not change the fact that the Township Committee properly passed the necessary resolutions in public session.

In addition, as explained above, even if this action was not publicly authorized, such procedural defect would not serve as a basis for summarily dismissing the Township's claim. "[I]nvalidation of public action is an extreme remedy which should be reserved for violations of the basic purposes underlying the [OPMA]." Fallone Props., supra, 369 N.J. Super. at 566 (citations omitted). Accordingly, the Court should vacate the Order to Show Cause.

B. Defendant Will Not Likely Prevail on a Motion to Compel the Township to Indemnify Defendant for His Own Legal Malpractice and Other Misconduct

Defendant is not entitled to indemnification from the Township for the Township's action against Defendant. Defendant improperly asserts that the Township may not sue him for his own legal malpractice and other misconduct because the Township's indemnification provision requires the Township to provide for his defense and pay any resulting judgment. In this regard, Defendant would have the Court relieve him of all liability for any malpractice or misconduct he committed in his capacity as the Township Attorney. This claim quite simply, makes no sense. Chapter 9 of the Township Code states:

> § 9-2. Defense and indemnity against civil actions.
>
> Whenever any civil action has been or shall be brought against any person holding office, position, employment or board membership under the jurisdiction of the Township of Manalapan for any act or omission arising out of and in the course of the performance of

> the duties of such office, position, employment or board membership, the Township shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Said defense shall be provided by the Township Attorney. When the Township Attorney is unable to participate in that defense, the official, officer, employee or board member shall have the name of the person of his or her choice submitted to the Township for approval and agreement as to the cost of services. In the event that any official, officer, employee or board member engages an attorney without the approval of the Township and an agreement as to the cost of services, any and all costs shall be the responsibility of that official, officer, employee or board member.

Township Code § 9-2, Ex. 21.

That provision does not entitle Defendant to defense of and indemnification against claims of his own malpractice and misconduct -- especially when the Township itself asserts such claims against him. In making his demand, Defendant relied upon Borough of Dunellen v. F. Montecalvo Contracting, 273 N.J. Super. 23 (1994); but his reliance is misplaced. In that case, "the issue was whether a municipality had to provide a defense and indemnification for its borough engineer, Stetler, for claims asserted against Stetler by a third party." County Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 175-76 (3d Cir. 2006) (emphasis added). Here, the claims against Defendant are not asserted by a third party, but are alleged directly by the Township. To permit Defendant to seek refuge under the Township's general indemnification provision would eviscerate

any legal and ethical responsibility he had as the Township Attorney to act reasonably and diligently in his representation of the public entity.

Further, the Rules of Professional Conduct ("Rules") establish that Defendant may not rely on the Township's indemnification provision to escape liability for his own malpractice. Those rules expressly prohibit an attorney from entering into "an agreement prospectively limiting the lawyer's liability to a client for malpractice." RPC 1.8(h). Thus, the very standards which govern Defendant's profession preclude him from utilizing the Township's general indemnification provision to limit his liability to the Township for his malpractice.

Indeed, New Jersey courts strictly construe indemnification clauses against the indemnitee. Englert v. The Home Depot, 389 N.J. Super. 44, 51 (App. Div. 2006). "Thus, a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Ibid. (quoting Ramos v. Browning Ferris Indus. of So. Jersey, Inc., 103 N.J. 177, 191 (1986)). "'[A]bsent explicit contractual language to the contrary, an indemnitee who has defended against allegations of its own independent fault may not recover the costs of its defense from an indemnitor.'" Id. at 52 (quoting Mantilla v. NC Mall Assocs., 167 N.J. 262, 275 (2001)). Here, the Township's

general indemnification provision does not expressly provide for the defense and indemnification against claims arising from an officer's own independent fault. Thus, Defendant cannot invoke the provision to cover this claim for malpractice and other misconduct.

In addition, N.J.S.A. 2A:13-4 expressly states that "[i]f an attorney shall neglect or mismanage any case in which he is employed, he shall be liable for all damages sustained by his client." Defendant cannot seek to escape such liability by attempting to force the Township to defend him against claims of his own malpractice and misconduct. As the Township Attorney, the people of Manalapan relied upon his legal expertise and trusted him to manage the Township's legal concerns. If Defendant failed to meet his obligation, the law permits the Township to hold him accountable.

Moreover, even if the general indemnification provision contemplated a direct action by the Township against the Township Attorney, the instant litigation would be exempt from coverage pursuant to the exceptions set forth in Section 9.4. That section states that the Township will not indemnify any judgment or settlement of a civil cause of action relating to a claim based upon "misconduct." Township Code, Ex. 21 § 9.4(A). Thus, by virtue of Defendant's own malpractice and misconduct, the indemnification provision would not apply to him in this

matter. Further, Section 9.4 provides that the Township shall not be responsible under the indemnification provision when there is "[a]ny insurance available for payment." Id. at § 9.4(C). Thus, if Defendant has any type of insurance coverage which could potentially apply to this matter, he may not seek coverage from the Township's general provision. Significantly, the Township has requested that Defendant provide information pertaining to such potential insurance coverage, but has not received any response to date.

The TCA further supports the Township's ability to deny coverage to Defendant. That statute requires the State to defend and indemnify State employees but permits the State to refuse to provide such defense and indemnification under certain circumstances. Specifically, the TCA expressly permits the State to refuse to defend an action brought against an otherwise covered public employee if the defense of the action "would create a conflict of interest between the State and the . . . former employee." N.J.S.A. 59:10A-2(c). No greater conflict can arise than requiring the Township to defend and indemnify against its own claim against its former attorney for legal malpractice.

The principle at issue here is simple: an attorney representing a public entity must be accountable for his actions to that public entity and the citizens it governs. It is

contrary to public policy and indeed, common sense for Defendant to imply that the Township shall have no recourse against Defendant when he fails to act reasonably in executing his legal obligations on behalf of the Township. Defendant cannot fail to do the job for which he was hired and then ask the Township to pay for his defense when the Township seeks to recover the cost of Defendant's incompetence. Accordingly, Defendant may not invoke the Township's general indemnification clause to protect himself from liability for his own malpractice and other misconduct.

C. Defendant Will Not Likely Prevail on a Motion to Restrict the Township's Freedom of Speech

The Order to Show Cause imposes impermissible prior restraints of expression on the Township, its attorneys, officers, elected officials and employees. Indeed, the prior restraint ordered here is particularly inappropriate in that restricts communication "with the press and the public." July 23 OTSC, Ex. 28 at 2. Such prior restraints on speech are unconstitutional and must be vacated.

The Supreme Court has declared that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n, supra, 427 U.S. at 559, 96 S. Ct. at 2803. It has further held that "[t]he damage can be particularly great when

the prior restraint falls upon the communication of news and commentary on current events." Ibid. Thus, any prior restraint of expression bears "a heavy presumption against its constitutional validity." New York Times, supra, 403 U.S. at 714, 91 S. Ct. at 2141.

Generally, "[t]he term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Murray v. Lawson, 138 N.J. 206, 221-22 (1994) (quoting Alexander v. United States, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771 (1993)). "Injunctions are often classic examples of prior restraints." Ibid. (citation omitted). One factor in determining whether a restraint is an impermissible prior restraint is "whether the restraint prevents the expression of a message." Id. at 222. "Another factor in determining whether a restriction imposes a prior restraint on speech is whether the injunction was issued because of the content of the expression." Id. at 224.

Here, the Order Show Cause imposes a prior restraint that both prevents the expression of a message and concerns the content of the expression. Indeed the injunction strictly prohibits the Township and its personnel from engaging in any form of communication with the press or any other person not

party to this litigation. Such a broad-sweeping prior restraint on speech without sufficient justification may not be enforced.

Defendant has not, and cannot overcome the heavy presumption of invalidity attached to this restraint. Defendant's one and only justification for seeking to infringe upon the Township's right to freedom of speech is that his reputation allegedly continues to suffer damage from "the existence of this lawsuit." Def. Br., Ex. 26 at 8. Defendant claims that Township officials "continue to leak to the press the fact that they believed [Defendant] had committed 'Legal Malpractice'". Def. Cert., Ex. 25 at 2. But what Defendant fails to grasp is that the Township filed a formal Complaint against him in the Superior Court, which claims that he committed legal malpractice and other misconduct. This is not a "leak"; this is public information.

Accordingly, Defendant has clearly failed to proffer any sufficient justification for the imposition of such serious prior restraints on a public entity and its personnel.

IV. THE RELATIVE HARDSHIPS DO NOT FAVOR ENTRY OF AN INJUNCTION PRIOR TO A FULL HEARING

The relative hardships do not favor injunctive relief in this case prior to affording the parties a full hearing on the merits. Indeed, the Township would suffer greater harm if the

Court affirms the Order to Show Cause than Defendant would suffer if it vacates that Order.

In determining whether to grant an injunction, the Court must balance the equities of the respective parties and consider the injury the complainant will suffer from an injunction in relation to any potential injury the other party will suffer if the injunction is denied. Crowe, supra, 90 N.J. at 134. "An injunction is the strong arm of equity" and should not be issued when it would "operate oppressively or contrary to the real justice in the case or where it is not the fit and appropriate method of redress under all circumstances of the case, or where the benefit it will do the complainant is slight in comparison with the injury it will do the defendant." Sautto v. Edenboro, 84 N.J. Super. 461, 478 (App. Div.), certif. denied, 43 N.J. 353 (1964) (citations omitted).

Here, the Order to Show Cause requires the Township to show cause why the complaint should not be dismissed or, in the alternative, mandating the indemnification of Defendant. As stated above the restraints sought are mandatory in nature and thus should issue only in extraordinary circumstances. In addition, prior restraints were entered against the Township restraining it from "communicating with the press and public."

The Township would obviously suffer greater harm by the dismissal of its Complaint than Defendant would suffer from

permitting the Township to proceed properly with this action. As discussed above, Defendant has circumvented the New Jersey Court Rules by filing this Order to Show Cause instead of proceeding by way of the proper motion practice. Likewise, the relief sought is improper as it demands, in part, the summary disposition of litigation without any legal basis to proceed in such a fashion. See R. 4:67-1 et seq. If the Court does not vacate this Order to Show Cause, requiring the plaintiffs to show cause why the complaint should not be dismissed, then the Township will be prevented from pursuing a cognizable cause of action. Indeed, the Township will be prevented from pursuing discovery and from full and fair resolution of its claims, the resolution of which would inure to the benefit of the public.

Defendant would not suffer any harm since he is free to pursue a motion to dismiss the complaint for failure to state an action pursuant to R. 4:6-2. He chose not to because Defendant knew that the Township properly stated a cognizable cause of action as evidenced in Mr. Renaud's Affidavit of Merit. Likewise Defendant could, following discovery on the merits, move for summary judgment pursuant to R. 4:46-1 et seq. Thus, the only harm Defendant would suffer by allowing the complaint to proceed in its normal cause is an issue of timing.

Similarly, the harm to Defendant if the Township is not required to indemnify him at this juncture is minimal compared

to the harm the Township would endure. If the Court orders the Township to indemnify Defendant, now before any discovery has taken place or before Defendant has brought a proper motion, the Township will have to expend public funds to comply with the order. If it is ultimately determined that Defendant is not entitled to indemnification then the Township will have to seek reimbursement of public funds from Defendant, which as a public entity would require discussion and deliberation at a Township Committee meeting. Conversely, Defendant would not be harmed simply because he would have to wait to be paid for his legal services. Furthermore, as stated above, the relief sought by Defendant in seeking indemnification now, is monetary in nature, and as such, is not appropriate for injunctive relief.

With respect to the prior restraints the Township seeks to vacate, the harm to the Township by restricting its speech through the issuance of the injunction far outweighs any harm to Defendant. As noted above, a prior restraint of speech, like the injunction here, is the "most serious and least tolerable restraint." Nebraska Press Assn., supra, 427 U.S. at 559, 96 S. Ct. at 2803. It is axiomatic that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times, supra, 403 U.S. at 714, 91 S. Ct. at 2141. Simply put,

to prevent the Township's right to speech is per se inappropriate.

Accordingly, the Court should vacate the Order to Show Cause because the harm to the Township if upheld far outweighs any potential harm to Defendant if vacated.

THE COURT SHOULD PROHIBIT DEFENDANT FROM FURTHER COMMUNICATIONS WITH TOWNSHIP OFFICIALS

The Court should prohibit Defendant from communicating with Township officials because Defendant knows that the Township is represented by council and as such, should direct all communications regarding this litigation through counsel for the Township. Further, Defendant has demonstrated a pattern of hostile and threatening communications and should not be permitted to continue his attempts to coerce the Township. Indeed, Defendant's recent communications coupled with his attacks on Township officials posted on his blog, "daTruth Squad", betray a mental instability and dangerous fixation on elected and appointed Township officials. We respectfully request that the Court require Defendant to adhere to the Rules of Professional Conduct and direct all litigation-related communications to the Township's attorneys.

RPC 4.2 states in pertinent part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter[.]

A lawyer must adhere to this express prohibition on direct communication with represented parties "unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the

communication is to ascertain whether the person is in fact represented." RPC 4.2. The Official Comment of the Supreme Court states the following with respect to communications with government officials:

> Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

Official Comment of the Supreme Court to RPC 4.2 (agreeing with the American Bar Association's Comment). Thus, an attorney may not communicate directly with a represented government official regarding the subject of that representation unless that attorney's client is "exercising a constitutional or other legal right to communicate with a government official." Ibid.

"The purpose of RPC 4.2 is to 'preserve[ ] the integrity of the attorney client relationship and the posture of the parties within the adversarial system.'" In re Complaint of PMD Enters. Inc., 215 F. Supp. 2d 519, 527 (D.N.J. 2002) (quoting Michaels v. Woodland, 988 F. Supp. 468, 470 (D.N.J. 1997)). It "is not solely or even primarily to benefit lawyers." Horowitz v. Weishoff, 318 N.J. Super. 196, 201 (App. Div. 1999). Rather, the rule is "intended to protect the right of a client to

receive the advice of an attorney who does not represent any interest except that of his client." Ibid. It further assures, "to the extent possible, that when a lay client decides to deal directly with an attorney representing an adverse interest, the client does so deliberately, after an opportunity for reflection and professional advice." Ibid. Thus, the rule principally seeks to protect a client from "manipulation by opposing counsel." Michaels, supra, 988 F. Supp. at 470 (citations omitted).

Here, Defendant has known from the inception of this case that the Township is represented by counsel. The Complaint the Township filed against Defendant clearly states that Ruprecht, Hart & Weeks ("RHW") is the attorney for the Township in this action. Pl. Compl., Ex. 18 at 1. Further, by letters dated July 13, and July 17, 2007, this firm advised Defendant that it also represented the Township in this matter and specifically requested that he refrain from further communications with Township officials regarding this action. See July 13 letter, Ex. 22; July 17 letter, Ex. 24.

Moreover, a newspaper article wherein Defendant commented on the litigation unequivocally states that "the firm of Ruprecht, Hart, Weeks, of Millburn, has been retained for the purposes of litigation"; indeed, that article is entitled, "Millburn law firm hired to eye possible negligence." See May

23 article, Ex. 13. The article further asserts that the "Township Committee resolution hiring Ruprecht, Hart, Weeks states that the firm was retained to represent Manalapan '. . . with respect to the client's claim for damages suffered as a result of professional negligence in connection with real estate purchases by the township in 2005" and that "[t]he law firm will pursue the claim of the client with respect to those who may be responsible for the injuries or damages." Ibid. Thus, there can be no dispute that Defendant knows the Township to be represented by counsel in this matter.

However, despite such knowledge, Defendant defied the prohibition of RPC 4.2, claiming that the rule did not apply to him. Defendant, however, offers no basis for this claim. Contrary to Defendant's contentions, the Comment to RPC 4.2 creates only the possibility of a limited exception, available in certain circumstances such as when a person is exercising a constitutional right to communicate with a government official, in which case that person's attorney may be permitted to communicate directly with the government officials who have the authority to take or recommend action in that matter. See Official Comment of the Supreme Court to RPC 4.2. Defendant, however, is not seeking to exercise such a constitutional right

Moreover, Defendant's subsequent communications with the Township are hostile and extremely offensive. Defendant not

only makes a multitude of accusations of inappropriate conduct without any basis in fact or law, but also articulates numerous threats in an attempt to coerce the Township into withdrawing its claim. Indeed, Defendant's communications represent the very types of contact RPC 4.2 seeks to prevent. "RPC 4.2 was intended to prevent an unrepresented party from being overwhelmed by opposing counsel" and "to prevent trickery or other conduct intended to induce the represented party to somehow impair, compromise or settle his or her own case." 'Neil S. Sullivan Assocs., Ltd. v. Medco Containment Servs., Inc., 257 N.J. Super. 155, 161 (Law Div. 1992) (citation omitted).

Defendant acknowledged that RHW filed this action against Defendant but nevertheless made demand directly on the Township that it indemnify him. See June 28 letter, Ex. 20. Defendant relies upon his legal expertise to overwhelm the Township into compliance with his demand, stating, among other things, that "the law of the land in New Jersey" was created by "a case well-known by virtually every experienced municipal attorney" and requires the Township to indemnify Defendant against any and all claims. Id. at 2. Significantly, Defendant asserts his legal opinions and demands on the Township Administrator, who Defendant knows is not an attorney. Such a lay person cannot be expected to decipher truth from exaggeration or outright fabrication. To someone without legal training, Defendant's

bold assertions may seem convincing. The Rules expressly seek to prevent such manipulation.

Indeed, Defendant further attempts to coerce the Township into submission by threatening legal action:

> Please assure me within the next week that the Township will be indemnifying me. A failure to do so will require me to file a motion in court compelling the indemnification, which naturally, would lead to expense on both of our parts that will ultimately be borne, once again, by the taxpayers.

Id. at 3.

After this firm advised Defendant of our representation of the Township and requested that he direct all communications through counsel, Defendant responded with baseless accusations and more threats. See July 13 letter, Ex. 23. Defendant erroneously asserted that this firm did not copy the Township on our correspondence and "caution[ed]" us that "withholding such information from [the Township officials] is problematic, if not an additional breach of ethics on [our] part." Id. at 1-2. Defendant then "advise[d]" us "to tread carefully." Id. at 2.

Defendant's specious claims and harassing threats permeate throughout his letters and blog entries, clearly demonstrating that the Court should not permit Defendant to continue his blatant disregard of the Rule's prohibition on direct communication with a represented party. Indeed, Defendant's writings are the agitated ramblings of a seemingly unstable

person. We will not repeat in full here each entry in its entirety; however, the following excerpts are illustrative of Defendant's strange obsessions and delusional view of the facts and purpose of this litigation.

Defendant refers to various Township officials by derogatory nicknames and to himself as "da Mosked man." On July 3, 2007, Defendant called "Drew 'Citizen King' Shapiro" his "arch enemy" and threatened to file a costly lawsuit against the Township in retaliation for the Township's institution of this action:

> Question 1: Who has da most to lose?
>
> Answer: Da residents of Manalapan. Citizen King has forced another partisan witchhunt that will cost residents first when township attorney and political candidate Machogrande [Township Attorney, Caroline Casagrande] starts billing for her time at your expense. Eventually, do not be surprised if nothing is proven, Citizen King uses da publicity in his campaign, and eventually da Mosked Man sues da township (because of da committee) for "damages." Any legal eagle will tell you if he does, just da settlement will be costly and you, and not Citizen King, will pick up da tab for that and other future potential cronyism.

July 3 blog, Ex. 7.

On July 12, 2007, Defendant articulated his admiration for himself for writing an editorial guest column in the News Transcript and once again threatened a lawsuit against the Township:

> DaTruth is, by writing this editorial da Mosked Man is drawing a line through town hall, saying he is innocent, this is a reckless political attack, and we believe if found innocent, a potential lawsuit against da town could be a distinct possibility.

July 12 blog, Ex. 8.

On July 20, 2007, after this Court enjoined Defendant from further public communications regarding this lawsuit, Defendant created a fictitious future scenario, again threatening to bring a claim for substantial damages against the Township:

> Da Mosked Man had his day in court, and on a sunny morning he was vindicated of all charges against him in da case of da Dreyer patch after a judge threw da case out claiming it lacked any merit. Da Mosked Man decided to spend his afternoon personally serving Manalapan's Township administrator filing a $100 million dollar defamation lawsuit against da town. He made even bigger news by personally serving da King during a township committee meeting!

July 20 blog, Ex. 10.

Defendant's repeated attempts to coerce the Township into settling or withdrawing its claim are well documented. Defendant is a practicing attorney in this State and as such, must abide of the Rules of the legal profession. RPC 4.2 precludes him from directly communicating with Township officials, and the limited exception created by the comment to that Rule does not relieve him of his legal and ethical obligations to adhere to that prohibition. Indeed, the Rule was designed specifically to prevent the type of "trickery" and

"manipulation by opposing counsel" in which Defendant has engaged here.

Accordingly, the Court should compel Defendant to comply with the strictures of RPC 4.2 and prohibit him from communicating directly with Township officials regarding this litigation.

CONCLUSION

Based on the forgoing, it is respectfully requested that this Court vacate the Order to Show Cause and prohibit Defendant from further communicating with Township officials.

Respectfully Submitted,

Daniel J. McCarthy

Dated: August 3, 2007