

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 97-195

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IN THE MATTER OF  
RICHARD CARUSO,  
AN ATTORNEY AT LAW

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Decision

Argued: July 17, 1997

Decided: November 18, 1997

Robert A. Ballou appeared on behalf of the District IIIA 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 the Board based on a recommendation for discipline filed by the District IIIA Ethics Committee ("DEC"), arising out of respondent's handling of a municipal court matter. Specifically, respondent was charged with a violation of RPC 1.1 (no subsection was specified); RPC 1.3 (lack of diligence), RPC 3.3 (misrepresentation to a tribunal) and RPC 4.1 (misrepresentation to a third party). Respondent was also charged with failure to cooperate with the DEC, although the appropriate rule, RPC 8.1(b), was not cited.

At the DEC hearing, respondent contended that there was "bad blood" between himself and the presenter's partner because of an unrelated proceeding in which they were adversaries. Prior to the hearing, respondent sent the presenter a letter asking that he recuse himself. The DEC referred

the question to the Office of Attorney Ethics, who determined that the presenter could remain on the case. Respondent also claimed that he had been denied discovery, particularly the investigative report. The DEC investigator/presenter explained that he had no discovery to supply to respondent and that he had informed respondent that he had not prepared an investigative report. Respondent denied receipt of that information.

Respondent also contended that he had been unable to prepare a defense because the language of the complaint referred to eleven occasions where he failed to appear in his client's behalf and did not identify the particular dates with specificity. The DEC, however, determined that the allegations in the complaint were sufficiently clear.

Respondent was admitted to the practice of law in New Jersey in 1986. He maintains an office in Brick, Ocean County.

By Order dated September 16, 1997, the Court reprimanded respondent for lack of diligence (RPC 1.3) in two matters and failure to expedite litigation (RPC 3.2) in a third matter. In re Caruso, \_\_\_ N.J. \_\_\_ (1997).

\* \* \*

Respondent represented Frank P. Kessler in connection with a municipal court proceeding. Beginning in May 1993, the matter was scheduled to be heard on eleven occasions in Red Bank Municipal Court before Judge William Himelman. Respondent's appearance was required. Notices of the scheduled dates were sent to Kessler and respondent. Respondent admitted receiving the notices.

Court records and testimony of witnesses revealed the following history of the municipal court proceeding, as summarized in part by the DEC:

- 5/18/93 Respondent advised the Court, via telephone, he was ill and would not be appearing. (Defendant Kessler appeared).
- 6/29/93 Matter was re-scheduled by the Court. (No reason provided by documents and/or testimony).
- 7/28/93 Respondent advised the Court, via telephone, (after the Court session was concluded) he was ill and would not be appearing. (Defendant Kessler appeared).
- 8/26/93 Respondent advised the Court, after the Court session was concluded, via telephone, that his mother was hospitalized and he would not be appearing. (Defendant Kessler appeared).
- 10/93[sic] Re-scheduled by the Court. (No reason provided through testimony or documentation).
- 12/2/93 Respondent advised the Court, via telephone, (following the conclusion of the Court's session that day), that he was unable to appear as a result of attending an arbitration in another Court. (Defendant Kessler appeared).<sup>1</sup>
- 1/18/94 Respondent appeared after the Court session was concluded. Judge Himelman had left the Court at the conclusion of his scheduled calendar. (Defendant Kessler was present at the Court session).
- 2/8/94 Respondent appeared and advised the Court he was ill and Respondent left. (Defendant Kessler present).
- 3/22/94 Respondent contacted the Court and requested an adjournment. No notation as to why an adjournment was requested was indicated in the Court's file. (Defendant Kessler present).
- 4/14/94 Respondent failed to appear and the Court's records do not indicate a reason having been provided. (Defendant Kessler present).

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<sup>1</sup> Respondent contended that he appeared in court, albeit late, on December 2, 1993. Indeed, exhibit C-7, the summons issued to Kessler, states "12/2/93 attorney came in late."

5/24/94 Respondent and his client, Kessler, appeared and a conditional plea was entered on behalf of Kessler to violating N.J.S.A. 39:4-50.

[Hearing panel report at 6-7]

Kessler's conditional plea allowed him to file an appeal of the sentence imposed by the court. The court stayed all penalties pending the appeal. Respondent contended that the appeal had been timely filed. According to the judge, however, it was not. The appeal was then rejected by the criminal assignment clerk. Accordingly, the court scheduled the matter for sentencing. The original July 12, 1994 date was re-scheduled to July 26, 1994. The court records do not note any reason for that change. On July 26, 1994 respondent failed to appear when the matter was called. Kessler, however, was present. After the court recessed for the day, respondent "faxed" a letter to the court requesting an adjournment and citing several reasons for his request. Exhibit C-4.

By letter to respondent dated July 26, 1994, the judge requested a meeting with him on August 4, 1994 at 8:00 A.M. Also by way of that letter, the court re-scheduled the Kessler matter for August 16, 1994. On August 4, 1994 respondent did not meet with the judge. Instead, he "faxed" a letter to the court stating that he had been unable to reach the judge by telephone that morning. Respondent went on to explain that he would be unable to meet with the judge because of an 8:59 A.M. appearance in Ocean County Superior Court on that date. Respondent also stated that he had to be in court earlier than planned to deliver documents to his adversary in the Ocean County proceeding. Respondent offered to meet with or talk to the judge at another time.

At the judge's request, Arlene Holiday, Court Administrator for the Borough of Red Bank, contacted the Ocean County Superior Court on August 4, 1994 to confirm the information in respondent's "fax." Holiday was told that respondent had called the court informing that he would

be late in arriving in court that day and that he was present in court at 9:30 A.M. (Respondent asserted, however, that he was there for a 9:00 A.M. call).

On August 16, 1994 Kessler appeared for the scheduled proceeding. Respondent, however, failed to appear. According to the judge, no reason was supplied for respondent's absence. On August 18, 1994 the judge contacted the Honorable Patrick J. McGann, Jr., the acting assignment judge for Monmouth County. Judge McGann instructed the judge to contact the DEC. (Judge Himelman recalled a conversation with respondent, during which the judge advised respondent that he would be filing a grievance. The date of that conversation is unclear).

The appeal filed in behalf of Kessler was never perfected. As of the DEC hearing, a warrant had been issued for Kessler's arrest for failure to pay the assessed fines.

\* \* \*

Respondent testified that, on each occasion that he had received a notice to appear before the court, he either appeared or contacted the court by phone or by mail before the scheduled date. Respondent added that, on one occasion, when his car broke down, he called after the court was in session. (Both Holiday's testimony and the court records confirmed that at some point respondent's car broke down, although the date of that incident is unclear). Respondent added that each time he appeared the court was still in session when he arrived and that the Kessler case had already been adjourned either by the court sua sponte or at the prosecutor's request. Respondent produced no documents to support this contention. According to respondent, at no time had there been any indication to him that his failure to appear had been a problem. Respondent also noted that Kessler

had not complained about his conduct and that, in fact, it was to Kessler's advantage to have the municipal court proceeding adjourned.

The judge testified that Kessler was in court on all scheduled dates, complaining that he did not know of respondent's whereabouts. Respondent was unable to state with certainty if Kessler knew in advance that respondent would not be present for the scheduled appearances.

Respondent accused the judge of bias against him as a result of a disagreement between them as to whether Kessler had reserved the right to withdraw his guilty plea and proceed to trial. According to respondent, prior to this dispute the court had not objected to his failure to be in court for scheduled appearances.

By way of explanation for his conduct, respondent testified that he was involved in a motor vehicle accident in September 1991, resulting in back injuries that "slowed [him] down a little bit." Although the DEC stated that respondent supplied "no medical evidence of injuries to himself which would prevent him from performing his duties and obligations as an attorney," attached to respondent's above mentioned July 26, 1994 request for adjournment is a letter from his then treating physician, explaining respondent's back injury. Respondent pointed out that his mother's illness in 1993 and 1994 also took a toll on his practice.

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By letters dated September 20 and November 11, 1994, the DEC investigator asked that respondent supply a copy of his file in the Kessler matter. Respondent failed to comply with the investigator's request. During the hearing, respondent continued to deny the investigator/presenter

access to his file. Respondent contended that his file contained confidential information about Kessler, who was objecting to its review by the DEC.

\* \* \*

The DEC concluded that respondent had “not established bias or motive to support [his] theory that the Municipal Court Judge and/or the Presenter have manufactured evidence to support claims of unethical conduct by the Respondent.” The DEC found that respondent displayed a pattern of neglect in his handling of the Kessler matter, in violation of RPC 1.1(b), and that he violated RPC 1.3 based on his lack of diligence and promptness in representing Kessler. The DEC also found that respondent had failed to cooperate with the investigator. The DEC was unable, however, to conclude by clear and convincing evidence that respondent was guilty of a misrepresentation to the tribunal or to a third party. Accordingly the DEC dismissed the charge of a violation of RPC 3.3 or RPC 4.1.

The DEC referred to “prior findings of unethical conduct” by respondent, noting that those findings, along with the within determination, “establish a continuing pattern of behavior by this Respondent which cannot be ignored.” The DEC recommended that respondent be suspended and that, upon reinstatement, he practice under the supervision of a proctor.

\* \* \*

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

This matter comes down to a question of credibility. Had respondent been unable to appear in Kessler's behalf because of legitimate events, such as illness or scheduling conflicts, and had he notified the court in advance, then he would not be facing disciplinary proceedings. However, the presiding judge recalled that respondent failed to notify the court of his scheduling problems until after the proceedings had begun. There is a difference between notifying a tribunal, in advance, of a scheduling conflict and waiting until after the scheduled appearance time has passed to inform of a conflict. The first is acceptable to a point; the second is clearly improper. The fact that respondent failed to supply any documentation of his conflicts and/or attempts to contact the court does not lend any credence to his contention.

Indeed, respondent apparently does not consider court appearances as an obligation. Even if he were being truthful about his illness or about other court appearances, at some point the Kessler matter had to be put above other matters and resolved. Otherwise, respondent should have withdrawn from the representation. In particular, respondent's failure to advise Kessler, in advance, that he would not be appearing in his behalf was inexcusable.

Respondent noted that Kessler had not complained about his representation and that it was in Kessler's interest to have the municipal court proceeding continue for as long as possible, because of the nature of the charges. Even assuming, however, that respondent had intentionally "dragged out" this matter, which does not appear to be the case, he should not be allowed to waste judicial



resources by failing to appear on scheduled dates merely to benefit his client. Indeed, respondent raised a similar argument in an earlier ethics proceeding. The Board determined then that he was guilty of failure to expedite litigation in a matter where respondent thought it was to his client's advantage not to obtain a final judgment of divorce. As the Board noted there, "the matter could not be left unresolved indefinitely."

Similarly, in this matter respondent again failed to expedite litigation, in violation of RPC 3.2.<sup>2</sup> Respondent contended that the responsibility to move the case forward was not his. Although this contention is not entirely wrong, respondent's defeat of the court's efforts to move the case along cannot be tolerated.

Respondent's accusation that the judge brought this proceeding against him after their disagreement about Kessler's right to withdraw his guilty plea is groundless. The primary evidence against respondent was not the judge's testimony, but the court's computer records reflecting respondent's numerous non-appearances.

With regard to specific findings, the DEC's determination that respondent did not violate RPC 3.3 was correct. The complaint does not reveal the basis for that charge. If the charge arose out of the August 4, 1994 incident, then it is not supported by the record. The statement of a third party that respondent was in court at 9:30 A.M. does not prove that he was not in the courthouse before that time. There is, therefore, no proof that respondent made a misrepresentation to a tribunal. Indeed, with regard to each of the occasions where respondent failed to appear, there is no proof that he made misrepresentations to the court, only that he failed to appear.

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<sup>2</sup> Although this rule was not charged in the complaint, a majority of the Board determined that the language in the complaint gave respondent sufficient notice of this potential finding. Two Board members disagreed with the Board majority and would not find a violation of RPC 3.2.

Similarly, the DEC was correct in its determination that there was insufficient proof of a violation of RPC 4.1. Indeed, it is unclear who the third party would be, since, in her role as court administrator, Holiday would be considered to be in the same position as the tribunal.

The DEC found that respondent was guilty of a pattern of neglect, in violation of RPC 1.1(b). That rule does not apply to multiple instances of neglect in one matter. A violation of RPC 1.1(a) (gross neglect) is a more appropriate finding, particularly in light of the fact that Kessler's appeal was never perfected and that, as of the date of the DEC hearing, there was an outstanding warrant for Kessler's arrest for failure to pay fines. The DEC also appropriately found that respondent exhibited a lack of diligence, in violation of RPC 1.3.

With regard to respondent's failure to cooperate with the DEC, the Board recalled that respondent raised the "bad blood" argument with the presenter in his earlier matter, heard in 1994. The following year, respondent raised the same argument in this case. Similarly, in the prior matter, as in this case, respondent failed to produce his files for the presenter. The Board noted, however, that neither the Board's decision nor the hearing panel report in the prior case had been issued at the time of respondent's misconduct in this matter. Thus, it cannot be said that respondent repeated behavior for which he had been previously disciplined or that he was otherwise on notice that his behavior was unacceptable. Respondent, however, should have known of his duty to cooperate with the DEC. Unquestionably, respondent's conduct violated RPC 8.1(b).

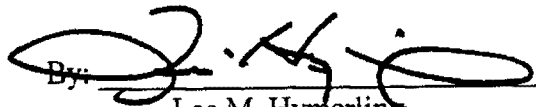
A five-member majority of the Board determined that a reprimand is appropriate discipline for respondent's transgressions. See In re Onorevole 144 N.J. 477 (1996) (reprimand imposed where the attorney grossly neglected a landlord-tenant matter, lied to his client to hide his neglect and failed to cooperate with the DEC. The attorney had been previously admonished). In addition,

the Board determined to require respondent to practice under the supervision of a proctor for a period of one year.

Two members would have imposed a three-month suspension. Two members recused themselves.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for appropriate costs.

Dated: 11/18/57

By:   
Lee M. Hymerling  
Chair  
Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY**

**DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

**In the Matter of Richard D. Caruso  
Docket No. DRB 97-195**

**Argued: July 17, 1997**

**Decided: November 18, 1997**

**Disposition: Reprimand**

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali						x	
Brody			x				
Cole		x					
Lolla						x	
Maudsley			x				
Peterson			x				
Schwartz		x					
Thompson			x				
<b>Total:</b>		2	5			2	

*Robyn M. Hill* 12/8/97  
Robyn M. Hill  
Chief Counsel