

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-141
District Docket Nos. XIV-2010-0618E
and XIV-2010-0701E

IN THE MATTER OF
LOUIS MACCHIAVERNA
AN ATTORNEY AT LAW

Decision

Argued: July 19, 2012

Decided: October 9, 2012

Melissa Ann Czartoryski appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for discipline (censure) by the District IIIA Ethics Committee (DEC). A two-count complaint charged respondent with recordkeeping violations (RPC 1.15(d) and R. 1:21-6) and the unauthorized practice of law (RPC 5.5(a)(1)). In his answer,

respondent admitted all of the factual allegations of the complaint. At the inception of the DEC hearing, he stipulated all of the facts in the complaint, as well as the charged violations. The DEC recommended a censure. We agree with that level of discipline.

Respondent was admitted to the New Jersey bar in 1998. On October 19, 2010, he was reprimanded for having violated RPC 1.15(a) (negligent misappropriation) and RPC 1.15(d) and R. 1:21-6 (recordkeeping violations). In re Macchiaverna, 203 N.J. 584 (2010). The order required respondent to submit to the OAE, on a quarterly basis, monthly reconciliations of his attorney accounts for two years and until further order of the Court.

On July 29, 2008, the Office of Attorney Ethics (OAE) conducted a demand audit of respondent's trust account, after receiving two overdraft notices. The audit revealed several recordkeeping violations and failure to safeguard funds in the trust account.

On December 7, 2009, the OAE conducted another demand audit, which revealed several recordkeeping violations:

- a. Failure to perform monthly three-way reconciliations. R. 1:21-6(c)(1)(H).
- b. No running checkbook balance. R. 1:21-6(c)(1)(G).

- c. Trust receipts journal did not fully describe each item deposited. R. 1:21-6(c)(1)(A).
- d. Trust disbursements journals do not fully describe the purpose of each disbursement. R. 1:21-6(c)(1)(A).
- e. Deposit slips do not identify client matter(s) by file number or client name. R. 1:21-6(c)(1)(A).
- f. A disbursement for a personal expense from the trust account.

[C15;A15.]¹

According to count one of the ethics complaint, on November 8, 2010, the OAE received a notice from Sovereign Bank of a November 4, 2010 trust account check for \$700 that was presented against insufficient funds.

On February 22, 2011, the OAE conducted a demand audit of respondent's trust and business accounts for the period of June 1, 2010 through January 31, 2011. It determined that the \$700 check, dated November 1, 2010, and made payable to Pressler & Pressler, on behalf of client Tozzi, was mailed to that law firm by respondent's secretary, before Tozzi's funds were deposited.

¹ "C" refers to the December 7, 2011 ethics complaint.

Respondent had issued the \$700 check on November 1, 2010, relying on Tozzi to deliver equivalent funds to his office, on the same day, for deposit into his trust account. Tozzi failed to do so until November 4, 2010. The funds were immediately deposited, but were not posted to the account until November 5, 2010. Because respondent's trust account held no funds on account of other clients at the time, no client funds were invaded by the returned check.

The OAE demand audit also revealed the following recordkeeping deficiencies:

- a) Failure to perform monthly three-way trust account reconciliations. R. 1:21-6(c)(1)(H).
- b) No running checkbook balance. R. 1:21-6(c)(1)(G).
- c) Trust receipts journal did not fully describe each item deposited. R. 1:21-6(c)(1)(A).
- d) Trust disbursements journals do not fully describe the purpose of each disbursement. R. 1:21-6(c)(1)(A).
- e) Client ledger did not fully provide a description of the charges or withdrawals. R. 1:21-6(c)(1)(B).

[1C16;1A16.]

Respondent admitted that he failed to comply with the October 19, 2010 order, requiring him to send to the OAE completed reconciliations of his accounts, on a quarterly basis. He had ceased preparing them, in April 2011. He conceded that those actions constituted willful failure to comply with recordkeeping requirements, in violation of RPC 1.15(d) and R. 1:21-6.

Count two charged respondent with practicing law while on the New Jersey Lawyers' Fund for Client Protection (CPF) list of ineligible attorneys, for failure to pay the annual attorney assessment for 2010.

On September 22, 2010, the Supreme Court issued an order declaring respondent ineligible for failure to pay the 2010 annual assessment. On February 7, 2011, respondent paid the assessment of \$294. He was reinstated on February 28, 2011.

Respondent conceded that, during his period of ineligibility, he continued to practice law, conducting real estate closings and remitting Tozzis' payment to the Pressler firm, during that time.

Respondent knew of his ineligibility, but continued to practice law anyway:

And when I get that bill for \$290, you know, I have to pay rent and I have to pay my phone and I have to feed my kids and, you know, it kind of gets -- it's another matter of priority.

It's not that I'm -- it doesn't go to my -- you know, my ability as a lawyer, it goes to my ability to pay funds.

And my mistake, and it's no excuse and I am wrong, but sometimes I pay something else before I pay those fees, and then when I get around to paying those fees I pay those fees.

And it's not a matter of me thinking, oh, let me practice without a license here, it's a matter of -- you know, it's borrowing from Peter to pay Paul and keeping the doors open and keeping the money coming in so that the clients that I have don't get short shift [sic] and their cases don't wind up falling through the cracks

[T15-16 to T16-8.]²

The DEC found respondent guilty of all of the charges in the complaint, that is, (1) willful failure to comply with the recordkeeping rules (RPC 1.15(d) and R. 1:21-6), for respondent's failure to submit, on a quarterly basis, monthly reconciliations of his attorney trust account, since April 2011,

² "T" refers to the transcript of the March 23, 2012 DEC hearing.

and for the listed recordkeeping deficiencies revealed by the OAE's demand audit and (2) practicing law while ineligible for failure to pay the 2010 CPF annual attorney assessment, a violation of RPC 5.5(a)(1).

The DEC set out several factors that, although not titled mitigation, fall in that category: the poor economy had changed the nature of respondent's practice and, as a result, he rarely used his trust account; as the sole keeper of the books and records for his solo practice, and knowing that he had not misappropriated funds, respondent allowed himself to fall behind in his recordkeeping; he now understands the importance of keeping up with the recordkeeping duties and has corrected "the majority" of the deficiencies "and has a plan in place" to correct the remaining deficiencies"; and he was remorseful for his misconduct in this matter.

The DEC recommended a censure, without citing case law in support of that sanction.

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.

Respondent admitted that, since April 2011, he has failed to provide the OAE, on a quarterly basis, with required monthly

three-way reconciliations, as required by the Court order in a prior disciplinary matter.

In addition, after receiving an overdraft notice from respondent's bank that a \$700 trust account check for the Tozzi matter had been presented against insufficient funds, the OAE conducted a February 22, 2011 demand audit of respondent's trust account. Although the audit revealed no invasion of other client funds, it showed almost identical deficiencies to those found in earlier audits, conducted in July 2008 and December 2009, for which respondent received a reprimand in 2010. As a result of these new recordkeeping deficiencies, respondent violated RPC 1.15(d) and R. 1:21-6.

Recordkeeping irregularities ordinarily are met with an admonition, where, as here, they have not caused a negligent misappropriation of client funds. See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002); and In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001).

In addition, respondent practiced law while ineligible from September 22, 2010 to February 28, 2011. Specifically, he conducted real estate closings and disbursed the Tozzi funds to

the Pressler law firm during that time. He knew, during the ineligibility period, that he was precluded from practicing law, but chose to meet other financial needs. Respondent's misconduct constituted the unauthorized practice of law, a violation of RPC 5.5(a)(1).

Practicing law while ineligible, if the attorney is aware of the ineligibility and practices law nevertheless, typically leads to a reprimand, even when the misconduct is found alongside certain ethics improprieties or prior discipline for conduct of the same sort. See, e.g., In re Payton, 207 N.J. 31 (2011) (attorney practiced law during a 2009-2010 period of ineligibility; the attorney explained that, due to the hospitalization of her husband, also an attorney and her law partner, she was in dire financial straits and unable to pay the CPF annual assessment; she stipulated that she was aware of her ineligibility; prior admonition for similar misconduct); In re Steiert, 201 N.J. 119 (2010) (attorney practiced law while ineligible to do so due to retirement, the attorney also made a \$100,000 settlement offer that his client had not authorized, then attempted to automatically trigger his client's authorization to settle by requiring his reply within two days; later, the attorney misrepresented that he had the client's

authorization to present the offer and that the client intended to settle the matter for \$100,000); In re Austin, 198 N.J. 599 (2009) (during one-year period of ineligibility, attorney made three court appearances on behalf of an attorney-friend who was not admitted in New Jersey, receiving a \$500 fee for each of the three matters; the attorney knew that he was ineligible; also, the attorney did not keep a trust and a business account in New Jersey and misrepresented, on his annual registration form, that he did so; several mitigating factors considered, including the attorney's unblemished disciplinary record); In re Marzano, 195 N.J. 9 (2008) (motion for reciprocal discipline, following attorney's nine-month suspension in Pennsylvania; the attorney represented three clients after she was placed on inactive status in Pennsylvania; she was aware of her ineligibility); and In re Kaniper, 192 N.J. 40 (2007) (attorney practiced law during two periods of ineligibility; although the attorney's employer gave her a check for the annual attorney assessment, she negotiated the check instead of mailing it to the CPF; later, her personal check to the CPF was returned for insufficient funds; the attorney's excuses that she had not received the CPF's letters about her ineligibility were deemed improbable and viewed as an aggravating factor.

For respondent's practicing law knowing that he was ineligible, precedent calls for a reprimand. That level of discipline may be imposed even if accompanied by other other forms of misconduct, such as in Steiert and Austin, above. Each of those matters included misrepresentations. Here, other, non-serious misconduct includes recordkeeping deficiencies, which, on their own, would ordinarily warrant an admonition.

In mitigation, respondent was remorseful and claimed to finally understand the importance of keeping proper attorney books and records. According to the OAE, he has taken steps toward bringing his records into compliance with the rules.


On the other hand, this is not respondent's first encounter with the ethics system over his shoddy recordkeeping. He was reprimanded, in 2010, for recordkeeping improprieties of client funds that led to negligent misappropriation of client funds.

We find that respondent's prior reprimand for almost identical misconduct to be a significant factor warranting the imposition of enhanced discipline, a censure. We also require respondent to provide the OAE, on a quarterly basis, monthly reconciliations of his attorney trust account, for a period of two years.

Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

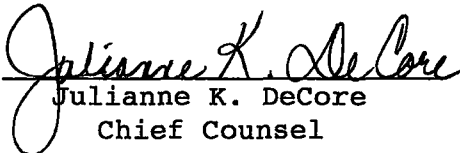
In the Matter of Louis Macchiaverna
Docket No. DRB 12-141

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Decided: October 9, 2012

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark						X
Doremus			X			
Gallipoli			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1


Julianne K. DeCore
Chief Counsel