SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-291
District Docket No. XIV-2013-0418E

IN THE MATTER OF	:
LOUIS MACCHIAVERNA	:
AN ATTORNEY AT LAW	:

Decision

Decided: February 25, 2014

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

This matter was before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The one-count complaint charged respondent with practicing law while suspended (RPC 5.5(a)) and conduct prejudicial to the administration of justice (RPC 8.4(d)).

Respondent filed a motion to vacate the default, the details of which are set forth below. We determined to deny respondent's motion and to impose a one-year prospective suspension for his RPC violations.

Respondent was admitted to the New Jersey bar in 1998. On October 19, 2010, he was reprimanded for recordkeeping violations, and negligent misappropriation of client funds. In re Macchiaverna, 203 N.J. 584 (2010). Respondent was also required 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 September 20, 2011, respondent was temporarily suspended, effective October 20, 2011, for his failure to pay administrative expenses associated with the 2010 disciplinary matter for which he was reprimanded. In re Macchiaverna, 208 N.J. 358 (2011). Respondent was reinstated on November 23, 2011. In re Macchiaverna, 298 N.J. 378 (2011).

On July 12, 2013, respondent received a censure for knowingly practicing law while ineligible and for recordkeeping violations. In re Macchiaverna, 203 N.J. 584 (2013).

Service of process was proper in this matter. On October 15, 2012, the OAE sent a copy of the complaint to respondent's office address, by certified and regular mail, in accordance with the provisions of R. 1:20-4(d) and R. 1:20-7(h). A service letter accompanied the complaint. The certified mail receipt was

signed by a "P. Ippolito." The regular mail was not returned. Respondent did not file an answer to the complaint.

On January 29, 2013, the OAE sent respondent a "five-day letter" to his office address, advising him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record would be certified directly to us for the imposition of sanction. The letter was sent by regular mail, which was not returned.

On June 17, 2013, the DEC sent a copy of the complaint to respondent's home address, by certified and regular mail. The certified mail receipt was returned with an illegible signature, indicating delivery on June 19, 2013. The regular mail was not returned.

On July 18, 2013, the DEC sent respondent a "five-day" letter to his home address, by regular mail, again advising him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record would be certified directly to us

for the imposition of sanction. The regular mail was not returned.

As of August 15, 2013, the date of the certification of the record, respondent had not filed an answer.

As indicated earlier, on September 20, 2011, the Court issued an order suspending respondent, effective October 20, 2011, if he did not pay administrative costs accrued from his 2010 reprimand matter. The order provided that it "shall be vacated automatically if, prior to the effective date of the suspension, the Disciplinary Review Board reports that payment in full has been made or that a satisfactory installment payment plan is in place and current." The order also required respondent to comply with R. 1:20-20, addressing certain requirements by suspended attorneys.

Respondent did not pay the administrative costs until November 14, 2011. After filing a motion for reinstatement, he was reinstated on November 23, 2011.

During the October 20 to November 23, 2011 period of suspension, respondent continued to practice law, although he knew that he was suspended. Specifically, (1) on October 24 and November 4, 2011, respondent wrote letters requesting an adjournment of an appeal hearing in an unemployment matter

involving client Mary Davis; he did not advise his client or the unemployment appeal panel of his suspension; (2) between October 20 and November 3, 2011, respondent wrote a total of four letters to the two judges in a Middlesex County Law Division matter, in which respondent represented client Marc Haim; he did not advise the judges, his client, or his adversary, that he was suspended; (3) on November 8, 2011, respondent wrote to opposing counsel regarding discovery issues in a Middlesex County Law Division matter; when respondent learned that he would not be reinstated prior to the upcoming November 14, 2011 trial date, he advised the court and his adversary, in writing, that he was suspended; (4) on November 9, 2011, respondent forwarded payment to an expert in a DWI matter for his client Andrew Mika; on November 15, 2011, respondent advised the court that he needed an adjournment of the November 16, 2011 hearing, because he did not yet have an expert report; he failed to advise his client and the court that he was suspended at the time; and (5) on November 9, 2011, in a municipal court matter for client John DeRosa, respondent filed an "Application for Appointment as Private Prosecutor;" respondent did not advise the court or his client that he was suspended at the time.

On November 7, 2013, Office of Board Counsel (OBC) received a notice of motion to vacate default filed by respondent, along with an October 31, 2013 certification supporting the motion.

In order to be successful in vacating a default, a respondent must satisfy a two-pronged test. First, the respondent must offer a reasonable explanation for the failure to answer the formal ethics complaint. Second, the respondent must assert meritorious defenses to the charges. Regarding his failure to answer the complaint, respondent stated as follows:

> With respect to my failure to answer this complaint until now, I respectfully submit the circumstances had made it impossible to do so any sooner.
>
> On October 29, 2012 my home town and the surrounding towns for ten miles north and south of us found ourselves essentially in the "bulls [sic] eye" of Superstorm Sandy.
>
> As a result I temporarily lost my home [in] Seaside Park, NJ, as well as my office in Lavallette, NJ.
>
> My wife and two children and I were forced to obtain temporary living accommodations in Brick, NJ. e did not go back to our permanent home until early June 2013.
>
> During the time from October 2012 to the present, and especially from April to July 12, 2013, I did not go to my law office on a daily basis, if at all.

My father was diagnosed with terminal cancer in or about April 2013. My father was 84 at the time, and my mother 81. He needed caregiver assistance at home and my mother could not be expected at her age to do what became necessary to care for my father.

I therefore stepped in and assisted my parents as long as I was needed.

My father needed 24 hour care at home for the last six weeks of his life. My father died July 12, 2013. His funeral was July 19th.

Having also lost my office as a result of Sandy, I had moved what was left of my practice to a new location in Lavallette in early 2013.

The Borough of Lavallette however was closed to all but essential personnel for approximately 6 weeks after the storm. The Lavallette post office never reopened and forwarded [mail] to Brick.

My Seaside Park mail went to Beachwood Post Office as the Seaside Park Post Office was flooded during Sandy and did not reopen for several months. (My wife and I were still receiving 2012 Christmas cards at our Brick location in March 2013.)

Consequently, during the period from November 1, 2012 to July or August 2013, my mail was difficult to keep track of.

On September 3-4 2013 [sic], I spent the late night early morning hours with extremely high fever and vomiting. I was forced at that time to admit myself to the emergency room at Community Medical Center in Toms River. I spent one week there, diagnosed as having sepsis secondary to a urinary tract and prostate infection.

> Upon discharge I underwent a prostate procedure on October 30, 2013, to address what we think gave rise to the sepsis.
>
> [R¶22-¶36.][1]

As to meritorious defenses to the charges, respondent asserted the following:

> I respectfully submit that because I understood the suspension to be temporary my alleged continued practice of law arose in great measure from my concern about ensuring preservation of the legal rights of my clients during that time, and that it was at least as important an obligation of mine as paying the aforesaid sanctions.
>
> It has often been the intermittent suspensions of my license that contributed or caused me to be unable to earn money to pay sanctions and represent my clients [sic] interests.
>
> I respectfully submit that the OAE's sanctioning of a sole practitioner in such a way is unconstitutional under the 14th amendment.
>
> From the correspondence I received in connection with notice of the imposed obligation to pay giving rise to the within complaint, it appeared I had an opportunity to pay the OAE and be automatically reinstated, or be suspended. However, it was clear to me now that the "correspondence" was in the form of an Order that by its contents suspended my license immediately.

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[1] "RC" refers to respondent's certification in support of his motion.

> I was suspended by operation of law, without additional notice or opportunity to make arrangements to pay, which at the time, I did not understand.
>
> I was notified of the suspension at the same time as the OAE by an adversary during a Middlesex county matter.
>
> Upon realizing the situation I immediately contacted OAE.
>
> In the interest of full disclosure, I submitted all of the information to OAE that I had about the files and clients I had been engaged with during the period of suspension.
>
> I did not practice law until I understood my status to be restored.
>
> [RC¶13-¶21.]

Regarding the first prong of the test – a reasonable explanation for the failure to answer the complaint – respondent explained that, in the aftermath of Hurricane Sandy (which hit New Jersey on October 29, 2012), his family's house was damaged, resulting in their displacement from the home for a substantial period of time. Respondent was displaced from his law office as well. In addition, respondent's time was spent caring for his terminally ill father and, later, respondent himself became ill, requiring a hospitalization and a "procedure." Under all of those circumstances, we could accept respondent's explanation for his failure to file an answer to

the complaint, although he must have received the complaint sent to his home address on June 17, 2013 and the "five-day letter" sent to the same address on July 18, 2013.

However, respondent did not satisfy the second prong of the test. With respect to meritorious defenses to the charge of practicing law while suspended, respondent claimed that he was denied his due process rights – in effect, that the Court rules utilized to suspend him were unconstitutional.[2] Respondent urged us to find that he was denied an opportunity to be heard, before the Court unilaterally suspended him "by operation of law."

Respondent is wrong that the Supreme Court Order of suspension took effect immediately. In reality, under the terms of the Court's September 20, 2011 Order, he was given one month, until October 30, 2011, to either pay the administrative costs in full or have an OBC-approved payment plan in place. He was not, as he claimed, "suspended by operation of law, without additional notice or opportunity to make arrangements to pay . . . ." Yet, he did not pay the outstanding amount or request and be given a payment plan. Had he done so, the order of suspension would have been automatically vacated. Because

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[2] Because constitutional issues are reserved for Supreme Court review (R. 1:20-15(h)), we did not address this issue.

respondent had that opportunity, but did nothing, he cannot be heard to complain that he was unfairly suspended. It should be noted that he did not contend that he was not timely served with the Court order.

It must be noted, too, that respondent was well aware of his duty to pay administrative expenses, long before the Supreme Court suspension. Specifically, respondent had communicated with OBC as follows: on December 10, 2010, the OBC sent a late notice to him, indicating that, without prompt payment, a judgment would be obtained and a motion for his temporary suspension would be filed; on February 10, 2011, the OBC granted respondent a payment plan; the correspondence from the OBC regarding the plan also warned respondent that a default on the payment plan would result in a judgment against him and the filing of a motion for his temporary suspension; after respondent defaulted on the payment plan, on July 21, 2011, OBC personnel called respondent's office and spoke to his secretary about the OBC's intention to file a motion for respondent's temporary suspension; the secretary requested an invoice, which was faxed to respondent's office. Yet, as mentioned above, from October 20, 2011 until his November 23, 2011 reinstatement, respondent knowingly engaged in the practice of law when he

(1) wrote letters seeking the adjournment of Mary Davis' appeal of an unemployment matter; (2) wrote letters to two judges in a Superior Court matter for client Marc Haim; (3) wrote to opposing counsel regarding discovery issues in another Superior Court matter; (4) paid an expert in a DWI matter for client Andrew Mika and, later, requested an adjournment of that municipal court matter; and (5) filed an "Application for Appointment as Private Prosecutor," in municipal court, for client John DeRosa.

Respondent's practice of law while suspended was with full knowledge that he had been suspended for failure to pay administrative costs. Yet, he made the decision to forge ahead, representing clients in court matters, during the period of suspension. He did so, he claimed, because he thought it just as important to continue representing clients, during his suspension, as paying the outstanding administrative expenses that would have permitted his reinstatement to the practice of law. We remind respondent that, while taking care of clients' well-being is obviously important, the maintenance of his license to practice law is essential to the performance of that task. Because respondent knew that he could not practice law and

did so anyway, he has failed to satisfy the second prong of the test to vacate a default.

We, thus, determined to deny his motion and to proceed with our review of this disciplinary matter as a default, pursuant to R. 1:20-4(f).

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f).

All that remains is the imposition of discipline for respondent's violation of RPC 5.5(a) and RPC 8.4(d).

The level of discipline for practicing law while suspended ranges from a lengthy suspension to disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and the presence of aggravating or mitigating factors. See, e.g., In re Bowman, 187 N.J. 84 (2006) (one-year suspension for attorney who, during his three-month suspension, maintained a law office where he met with clients, represented clients in court, and acted as Planning Board solicitor for two municipalities; prior three-month suspension; extremely compelling mitigating circumstances); In re Marra, 170 N.J. 411

(2002) ("Marra I") (one-year suspension for attorney who practiced law in two cases while suspended and committed substantial recordkeeping violations, despite having previously been the subject of a random audit; on the same day that the attorney received the one-year suspension, he received a six-month suspension and a three-month suspension for separate violations, having previously received a private reprimand, a public reprimand, and a three-month suspension); In re Lisa, 158 N.J. 5 (1999) (one-year suspension for attorney who appeared before a New York court during his New Jersey suspension; in imposing only a one-year suspension, the Court considered a serious childhood incident that made the attorney anxious about offending other people or refusing their requests; out of fear of offending a close friend, the attorney agreed to assist as "second chair" in the New York criminal proceeding; there was no venality or personal gain involved; the attorney did not charge his friend for the representation; prior admonition and three-month suspension); In re Hollis, 154 N.J. 12 (1998) (one-year suspension for attorney who, in a default matter, continued to represent a client during his period of suspension; the attorney had been suspended for three years on two occasions; no reasons given for only a one-year suspension); In re Wheeler, 140 N.J.

321 (1995) ("Wheeler I") (two-year suspension for attorney who practiced law while serving a temporary suspension for failure to refund a fee to a client; the attorney also made multiple misrepresentations to clients, displayed gross neglect and a pattern of neglect, engaged in a conflict of interest, negligently misappropriated client funds, and failed to cooperate with disciplinary authorities);[3] In re Marra, 183 N.J. 260 (2005) ("Marra II") (three-year suspension for attorney found guilty of practicing law in three matters while suspended; he also filed a false affidavit with the Court stating that he had refrained from practicing law during a prior suspension; the attorney had received a private reprimand, two three-month suspensions, a six-month suspension, and a one-year suspension also for practicing law while suspended); In re Cubberley, 178 N.J. 101 (2003) (three-year suspension for attorney who solicited and continued to accept fees from a client after he had been suspended, misrepresented to the client that his disciplinary problems would be resolved within one month, failed

[3] In that same order, the Court imposed a retroactive one-year suspension on the attorney, on a motion for reciprocal discipline, for his retention of unearned retainers, lack of diligence, failure to communicate with clients, and misrepresentations.

to notify the client or the courts of his suspension, failed to file the affidavit of compliance required by R. 1:20-20(a), and failed to reply to the OAE's requests for information; the attorney's disciplinary history included an admonition, two reprimands, a three-month suspension, and two six-month suspensions); In re Wheeler, 163 N.J. 64 ("Wheeler II") (2000) (three-year suspension for attorney who handled three matters without compensation, with the knowledge that he was suspended, holding himself out as an attorney, and failing to comply with Administrative Guideline No. 23 (now R. 1:20-20) relating to suspended attorneys; prior two-year suspension for practicing while suspended); In re Kasdan, 132 N.J. 99 (1993) (three-year suspension for attorney who continued to practice law after being suspended and after the Court denied her request for a stay of her suspension; she also failed to inform her clients, her adversary and the courts of her suspension, deliberately continued to practice law, misrepresented her status as an attorney to adversaries and to courts where she appeared, failed to keep complete trust account records, and failed to advise her adversary of the whereabouts and amount of escrow funds; prior three-month suspension); In re Beltre, 130 N.J. 437 (1992) (three-year suspension for attorney who appeared in court after

having been suspended, misrepresented his status to the judge, failed to carry out his responsibilities as an escrow agent, lied to us about maintaining a bona fide office, and failed to cooperate with an ethics investigation; prior three-month suspension); In re Walsh, Jr., 202 N.J. 134 (2010) (disbarment for attorney who, in a default, practiced law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court appearance on behalf of seven clients; the attorney was also guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievances; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008); In re Olitsky, 174 N.J. 352 (2002) (disbarment for attorney who agreed to represent four clients in bankruptcy cases after he was suspended, did not advise them that he was suspended from practice in federal court, charged clients for the prohibited representation, signed another attorney's name on the petitions without that attorney's consent and then filed the petitions with the bankruptcy court; in another matter, the attorney agreed to represent a client in

a mortgage foreclosure after he was suspended, accepted a fee, and took no action on the client's behalf; the attorney also made misrepresentations to the court and, was convicted of stalking a woman with whom he had had a romantic relationship and engaging in the unauthorized practice of law; prior private reprimand, admonition, two three-month suspensions, and two six-month suspensions); In re Costanzo, 128 N.J. 108 (1992) (disbarment for attorney who practiced law while serving a temporary suspension for failure to pay administrative costs incurred in a prior disciplinary matter and for misconduct involving numerous matters, including gross neglect, lack of diligence, failure to keep clients reasonably informed and to explain matters in order to permit them to make informed decisions about cases, pattern of neglect, and failure to designate hourly rate or basis for fee in writing; prior private reprimand and public reprimand); and In re Goldstein, 97 N.J. 545 (1984) (disbarment for attorney who practiced law in eleven matters while temporarily suspended by the Court and in violation of an agreement with the Disciplinary Review Board that he would limit his practice to criminal matters).

Respondent's case is similar to Bowman (one-year suspension), where the attorney, after having been suspended for

three months in 2004, failed to seek reinstatement and, instead, maintained a law office where he met with clients, represented a client in Superior Court and continued as solicitor for two local planning boards for the year 2004. Bowman's prior three-month suspension was an aggravating factor. Extremely compelling mitigation was considered, however, including Bowman's bouts with alcoholism; a lack of understanding of the gravity of his actions; inability to pay for medical treatment, administrative costs imposed by the Court, and child support obligations; financial pressures so great that he moved in with his parents, whose house was in foreclosure; no income, savings or car; and the fact that his children moved in with him because of their mother's hospitalization for a mental illness.

Here, respondent practiced law for a short period of suspension, from October 20 to November 23, 2011. No special mitigating circumstances are present, unlike in Bowman, but Bowman's disciplinary history included a three-month suspension, contrasted to respondent's censure.

We, therefore, determine that a one-year suspension is the right degree of discipline for respondent's practicing during his suspension. The two-year suspension case, Wheeler, and the three-year and disbarment cases involved much more egregious violations

and aggravating factors. We are mindful that, in a default matter, the appropriate discipline for the found ethics violations is ordinarily enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In re Kivler, 193 N.J. 332, 342 (2008). In this instance, we thought it appropriate not to enhance the level of discipline for the default, recognizing the troubles for respondent that accompanied the hurricane, his medical issue, and the death of his father.

Member Doremus 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
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Louis Macchiaverna
Docket No. DRB 13-291

Decided: February 25, 2014

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus						X
Gallipoli		X				
Hoberman		X				
Singer		X				
Yamner		X				
Zmirich		X				
Total:		8				1

Isabel Frank
Acting Chief Counsel