SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-043
District Docket No. XIV-2013-0445E

IN THE MATTER OF	
LOUIS MACCHIAVERNA	
AN ATTORNEY AT LAW	

Decision

Decided: May 28, 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 complaint charged respondent with practicing law while suspended, in violation of RPC 5.5(a)(1) and RPC 8.4(d), or, in the alternative, attempting to practice law while suspended, in violation of RPC 8.4(a), RPC 8.4 (d), and RPC 5.5(a)(1). We determine to impose a two-year consecutive suspension.

Respondent was admitted to the New Jersey bar in 1998. On October 21, 2010, he was reprimanded for recordkeeping violations and negligent misappropriation of trust funds. In re

Macchiaverna, 203 N.J. 584 (2010). The Supreme Court order also required him 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 failure to pay the administrative costs 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, 214 N.J. 517 (2013). By order of even date, respondent was temporarily suspended, effective immediately, for failing to appear on the Court's order to show cause why he should not be temporarily suspended for his non-compliance with the 2010 Court order, requiring him to submit quarterly reconciliations of his attorney accounts to the OAE. In re Macchiaverna, 215 N.J. 1 (2013). He remains suspended to date.

In a recent default matter, now pending with the Court, we recommended a one-year suspension for respondent's practicing

law during his October 2011 temporary suspension for failure to pay the administrative costs associated with his 2010 reprimand. In the Matter of Louis Macchiaverna, DRB 13-291 (February 25, 2014).

Service of process was proper in this matter. On November 18, 2013, the OAE sent a copy of the complaint, by certified and regular mail, to respondent's office address listed in the attorney registration records, 1605 B. Grand Central Avenue, Lavalette, NJ 08735. The certified mail receipt was returned with an illegible signature. The regular mail was not returned.[1]

Also on November 18, 2013, the OAE sent a copy of the complaint to respondent's last known home address listed in the attorney registration records. The certified mail was returned to the OAE, marked "Return to Sender Unclaimed Unable to Forward Return to Sender." The regular mail was not returned.

On December 11, 2013, the OAE sent respondent a letter to the same office address, by regular mail, 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

[1] Respondent was temporarily suspended at that time.

be deemed admitted and the record would be certified directly to us for the imposition of sanction. The regular mail was returned to the OAE, marked "Return to Sender - Not deliverable as addressed Unable to Forward."

Also on December 11, 2013, the OAE sent an identical letter to respondent's last known home address, by regular mail. The regular mail sent to respondent's home address was not returned.

As of February 12, 2014, the date of the certification of the record, respondent had not filed an answer.

We now turn to the circumstances that gave rise to the current disciplinary matter against respondent.

On April 26, 2013, the Court issued two orders to show cause (OTSC), compelling respondent's appearance before the Court on July 9, 2013. One OTSC required respondent to show cause why he should not be temporarily suspended for his failure to comply with the Court's October 21, 2010 Order, requiring him to submit quarterly reconciliations of his attorney records to the OAE. The OTSCs were sent to respondent's law office address by Denise McCollum, Administrative Specialist with the Supreme Court Clerk's Office. The certified mail receipt was signed by respondent.

On April 27, 2013, respondent sent McCollum an email about his receipt of the OTSCs. Nevertheless, he failed to appear before the Court on the July 9, 2013 return date of the OTSC, resulting in a July 12, 2013 order for his temporary suspension, effective immediately.[2]

On July 12, 2013, McCollum sent respondent a copy of the suspension order to his office address, by certified mail. The certified mail receipt was returned, indicating delivery, on July 23, 2013, having been signed by respondent.

On August 8, 2013, Guy P. Ryan, the Seaside Heights Planning Board attorney, sent the District IIIA Ethics Committee a letter reporting that respondent, while suspended, had attempted to enter an appearance before the Seaside Heights Planning Board, on behalf of a Patricia Hershey.

Ryan's letter stated that, on August 5, 2013, the date of a planning board meeting, he had received a telephone call from the borough administrator to advise him that respondent had stopped at borough hall to discuss a pending application for a

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[2] The July 12, 2013 order did not address the second OTSC, which was also returnable on July 9, 2013.

variance and to inform him that he would be appearing on Hershey's behalf that evening, as her attorney. Respondent wanted to know if a formal letter of representation was required in advance of the hearing. The administrator told respondent that a letter was not necessary, but, later, concerned about the correctness of his statement to respondent, the administrator called Ryan about it.

During their telephone conversation, Ryan assured the administrator that he had correctly advised respondent. Because Ryan recalled having read that respondent had recently been the subject of attorney discipline, he consulted the New Jersey Courts attorney index and learned that respondent had been suspended. When respondent arrived at the planning board meeting with Hershey, Ryan stated to him, in Hershey's presence, that he was listed as suspended.

According to Ryan, respondent claimed to be unaware that he was suspended. He asked to see the print-out that Ryan had from the attorney index and asked if it was alright for him to observe the hearing. Ryan replied in the affirmative, pointing out that it was a public hearing. Respondent then observed Hershey's handling of the application pro se. He did not participate in the hearing in any way.

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).

On July 12, 2013, respondent was temporarily suspended from the practice of law, having failed to appear at the Court's OTSC regarding his non-compliance with an order requiring the submission of quarterly reconciliations of his attorney accounts to the OAE. On July 23, 2013, respondent signed for a certified mail card, thereby acknowledging his receipt of the July 12, 2013 Court order of temporary suspension. When he arranged to represent Hershey, thus, he knew that he was suspended.

Furthermore, in August 2013, when he approached the Seaside Heights borough administrator about Hershey's application for a variance, he knew that there was another disciplinary matter pending with the OAE (DRB 13-291), charging him with practicing while suspended for failure to pay the administrative costs in connection with his 2010 reprimand matter. He knew because, in June 2013, he was properly served with the complaint in that matter.

We note that the complaint in this case was carefully crafted to include the possibility that respondent only attempted to practice law while suspended. But that distinction is not necessary, for respondent's actions went beyond a mere attempt to practice law. It is obvious that respondent had a prior arrangement with Hershey to represent her at the planning board hearing. When he made that arrangement, he engaged in the practice of law. So, too, when he held himself out to the borough administrator as Hershey's attorney, he engaged in the practice of law. When he appeared at borough hall on August 5, 2013, ready for the hearing, he had Hershey with him. It was purely fortuitous that he did not act as Hershey's counsel that evening, having been barred by Ryan. We find it unquestionable, thus, that respondent violated RPC 5.5(a)(1) and RPC 8.4(d), by practicing law while suspended. We dismissed the RPC 8.4(a) as inapplicable to the facts of this case.

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,

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[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.

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 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 and one-year suspension, on a motion for reciprocal discipline, for unrelated misconduct); In re Kasdan, 132 N.J. 99 (1993) (three-year suspension for attorney who continued to practice law after 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, after he was suspended, agreed to represent four clients in bankruptcy cases, 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 a court, was convicted of stalking a woman with whom he had had a romantic relationship, and engaged 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).

Here, respondent engaged in the same wrongdoing as he did in DRB 13-291, the matter for which we voted to impose a one-year suspension. As mentioned before, respondent knew about the DRB 13-291 complaint, which he received in June 2013, alleging that his 2011 representation of clients, while temporarily suspended, was an ethics violation. And he forged ahead, nevertheless. Telling is a quote from respondent's October 31, 2013 certification in support of his motion to vacate the default in DRB 13-291. He stated as follows:

> 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.

[DRB 13-291, Motion to Vacate Default: Certification of Louis Macchiaverna at ¶13-¶15.]

We gave respondent "a break" in DRB 13-291, determining not to enhance the sanction (beyond a one-year suspension) for the default, having been somewhat moved by mitigating factors presented by respondent in his certification.

There are no mitigating factors here. It is obvious that nothing has changed in respondent's view toward taking on the representation of clients during a period of suspension.

As to the appropriate sanction for the new violations, we find that respondent's misconduct was serious, but not as serious as those found in the three-year suspension cases, Wheeler II and Marra II, both of which involved prior suspensions for practicing law while suspended. Wheeler had a prior two-year suspension and Marra a one-year prior suspension, both for practicing while suspended. Marra also had a prior private reprimand, two three-month suspensions, and a six-month suspension. Additionally, he filed a false affidavit with the Court.

To suspend respondent for three years would be draconian, where he has no such prior one or two-year suspension for practicing law while suspended, as did Marra and Wheeler. It is

true that, when respondent practiced law here, he had already received the complaint in DRB 13-291, charging him with practicing law while temporarily suspended in 2011. But allegations in a complaint are far different from having already received a long-term suspension for practicing law while suspended and then committing that same violation again.

We find, therefore, that a two-year suspension, to be served at the expiration of any suspension imposed by the Court in DRB 13-291, is enough sanction in this matter, even when considering the default nature of this proceeding. To enhance the discipline one more notch would add an entire year to the suspension, an action that seems to be disproportionate to the failure to file an answer to the complaint.

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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Louis Macchiaverna
Docket No. DRB 14-043

Decided: May 28, 2014

Disposition: Two-year suspension

Members	Disbar	Two-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Gallipoli						X
Hoberman		X				
Singer		X				
Yamner		X				
Zmirich		X				
Total:		7				1

Ellen A. Brodsky
Chief Counsel