SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 10-394 and 10-414
District Docket Nos. XIV-2009-199E
and XIV-2009-447E

IN THE MATTERS OF

STEEVE J. AUGUSTIN

AN ATTORNEY AT LAW

Decision

Argued: February 17, 2010

Decided: May 5, 2011

John McGill appeared on behalf of the Office of Attorney Ethics in DRB 10-394.

Alan Dexter Bowman appeared on behalf of respondent in DRB 10-394.

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

These matters came before us in the form of a recommendation for discipline (disbarment) filed by the District XII Ethics Committee (DEC) and a default. Because both cases

arise out of the same overdraft in respondent's trust account, we have consolidated them into a single decision.

In the DEC matter, we determine that a three-year suspension is appropriate for respondent's reckless exposure of trust account funds to great risk of invasion, a violation of RPC 1.15(a) (failure to safeguard funds), and for his issuance of a trust account check that he knew would not be honored if the payee attempted to negotiate it, a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). In the default, we recommend that respondent be disbarred for the knowing misappropriation of trust account funds held by him in connection with a real estate transaction.[1]

Respondent was admitted to the New Jersey bar in 2002. He maintains an office for the practice of law in Newark. He has no disciplinary history.

[1] It is not clear from the allegations of the complaint whether the funds belonged to the client or to third parties or to both. It is clear, however, that the funds did not belong to respondent.

I - DRB 10-394 (The Borgata Matter)

On September 14, 2009, the Office of Attorney Ethics (OAE) filed a single-count formal ethics complaint, charging respondent with the "recklessly negligent" failure to safeguard client funds, a violation of RPC 1.15(a), based on his "substantial practice and egregious pattern of using his trust account funds as a source of collateral to cover his gambling habit." Respondent also was charged with the knowing misappropriation of client funds, a violation of RPC 1.15(a) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), based on his use of a trust account check to cover a $20,500 casino "gambling marker."[2]

[2] At New Jersey casinos, including the Borgata Hotel Casino & Spa (Borgata), a patron may establish a credit line that entitles the patron to borrow gambling funds for a certain period on presentation of a "marker," which functions as a promissory note or a check. In re Nitti, 110 N.J. 321, 322 (1988). If the marker is not repaid on time, the casino is authorized to present it for payment to the bank listed on the patron's credit application. Ibid. At the Borgata, markers take the form of counter checks, drawn on the patron's bank account. In re Ridge, 2010 Bankr. LEXIS 3015 (E.D. Va. August 24, 2010). When the patron requests chips, a machine generates a counter check, based on banking information provided to the casino on the patron's credit application. The patron must sign the check before receiving the chips. Ibid. The casino does not confirm with the bank that the patron has sufficient funds available to pay the marker, when it is due. Ibid.

The DEC held a formal hearing in this matter on August 6, 2010, at which time respondent and OAE investigator Gary K. Lambiase testified.

Respondent, whose law practice involved a "fair amount" of real estate transactions, testified that, on August 8, 2006, he applied for a line of credit at the Borgata, using his Bank of America (BoA) attorney trust account as collateral. At the time, the trust account balance was $129,995.15, which respondent believed would induce the Borgata to give him "a larger marker." Respondent admitted, on the one hand, that the trust account funds did not belong to him. On the other hand, however, he surmised that a portion of the monies may have belonged to him, although he never substantiated that contention.

Respondent also admitted that, at the time, he knew that he was not permitted to use the trust account for this purpose. He insisted, however, that he believed that he would always be able to pay the marker prior to its "hitting the account" and, that, therefore, the trust account funds would not be in "jeopardy."

After the Borgata approved respondent's application, it proceeded to use the trust account as collateral for his 146 markers between the date of the application and March 23, 2007.

The total credit extended to respondent during this time was $467,250, all of which was secured by the trust account.

OAE investigator Lambiase testified that, when respondent obtained a marker from the Borgata, the casino printed out a check in that amount, which respondent was required to sign. If respondent did not pay the marker when it became due, the Borgata would present the check to the bank for payment.

On February 9, 2007, respondent took out a $20,500 marker, which he was unable to repay, when it became due the following month. Respondent admitted that he was unable to pay the marker and that, when he initially applied for it, he was aware that the trust account did not have sufficient funds to pay it. Thus, he claimed, he knew, at the time he applied for the marker, that client funds would not be at risk because no funds would be in the account, when the forty-five day period for repayment expired.

Lambiase explained that the OAE's investigation of respondent was prompted by its receipt of an attorney trust account overdraft notice from BoA. On March 26, 2007, the Borgata presented the $20,500 check for payment. However, respondent's trust account balance was only $2,198.11. Thus, Lambiase testified, there was an overdraft of $18,301.89. BoA

did not honor the check, however, and the Borgata never received any funds from the trust account.

The next day, March 27, 2007, respondent's trust account bank statement reflected a positive balance of $18,298.11. According to Lambiase, this represented the $2,198.11 that was already in the account, plus two deposits that were made on that date. The first deposit, in the amount of $15,000, was wired into the trust account by respondent's brother, Philip. Another $1100 was deposited into the account on the same day.

According to respondent, the $2,198.11 in the trust account represented his personal funds. Yet, despite the OAE's multiple requests, Lambiase testified that respondent never provided a full accounting of the $2100. According to Lambiase, "I wanted to see reconciliations and what normal records an attorney's supposed to keep in the practice of law, which I never really received." Respondent agreed that he was not forthcoming, when the OAE requested documents from him, during its investigation.

When asked for the basis underlying his assertion that the $2,198.11 belonged to him, respondent testified that he believed "at least at that point in time, that those were monies that would have been left over that [he] had not paid to [him]self,

from different transactions." When asked why he had not provided the OAE with proof of this claim, respondent answered:

> Well, in essence, it's been since this time, obviously, given the stress or the issue that is before me, I have not had an opportunity to collect all of the requisite data and all the information to ensure that this is what was remaining in my account.
>
> . . . .
>
> Well, if I recall correctly, I know that I had moved office space from where I had been, there were a number of files I needed to locate, and there were a number of documents that I needed to get and obtain, and really, I just – I wasn't on top of, in essence the request to get those documents.
>
> [T51-3 to 7;T51-25 to T52-5.][3]

When asked what "objective facts" he was relying on to support his claim that the $2100 belonged to him, respondent answered: "None at this time." He acknowledged that his claim was based upon "speculation and conjecture and not objective facts." Nevertheless, he denied that the funds belonged to a client named Mimms, as stated by the OAE.

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[3] "T" refers to the hearing transcript, dated August 6, 2010.

Respondent testified that he developed a gambling "habit" in late 2005/early 2006. He understood that this habit is not a defense to a charge of knowing misappropriation of client funds. According to respondent, it was not until he was unable to pay the March 2007 marker, when due, that he realized the extent of his gambling habit. He acknowledged that it jeopardized his career and that it caused difficulty in his communication with his lawyer, including his failure to appear for appointments with him. Respondent attributed these difficulties to "[j]ust stress."

Respondent conceded that he "recklessly" put trust account funds "at risk by utilizing them for a marker." He denied, however, that his conduct constituted knowing misappropriation of trust funds, because he "never believed that the marker would ever hit the trust account." Moreover, he argued, if the marker did hit the account, he knew that there would be no funds in there to satisfy it because the monies were related to real estate transactions and, therefore, would not remain in the trust account for extended periods of time. He did concede, however, that, if a marker hit, other client funds could be in the account.

According to respondent, in addition to gambling, he also drank while playing, as the casino served him with free alcohol. His attorney referred him to psychologist Paul M. Brala, Ph.D., who met with him five times, between March 17 and July 27, 2010. Brala issued a report on July 30, 2010.

After respondent met with Brala, he "realized" that he "probably" needed to seek professional help "to ensure that this doesn't happen again." He acknowledged that Brala had recommended that he see an addiction specialist and a therapist. When asked what he was doing about the former, respondent stated, "I'll do that, I intend on doing it." With respect to the latter, he stated, "I intend on seeing a psychologist" on a regular basis.

Respondent has never attended a Gamblers Anonymous or Alcoholics Anonymous meeting. However, he stated, "It's something that I am going to explore, after seeing the psychologist." He later claimed that he was "going to get involved" with both organizations.

Although Brala recommended that respondent inform his family of what had transpired, he stated he does not plan on doing so until the ethics matter is resolved.

Respondent volunteered that he is willing to have his law practice and his trust account supervised. As of the date of his testimony, respondent continued to handle real estate transactions on occasion. However, he used a title agency "that covers – the monies are handled over wire, and the money [sic] be the disbursement of funds." He had "an occasional client that might give [him] a small amount that goes into [his] trust account."

Upon examination by the hearing panel chair, respondent acknowledged having written five trust account checks to himself, totaling $31,000, between March 8 and 23, 2007. He claimed that these were his funds and that the checks "may have" represented the payment of legal fees in "one matter or different matters." However, he could not specifically identify the purpose of any of these checks. As discussed, in our analysis of the default, the $31,000 did not belong to respondent.

The DEC concluded that respondent had knowingly misappropriated client funds because he had used the trust account monies as collateral to secure credit from the Borgata. The DEC also found that the "overdraft" caused by the Borgata's attempted negotiation of the $20,500 check was an act of knowing

misappropriation. The DEC recommended that respondent be disbarred.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence. However, we are unable to agree with the DEC that the conduct rose to the level of knowing misappropriation.

Specifically, the DEC found that respondent had knowingly misappropriated trust account funds when he (1) used his trust account as collateral in order to obtain more than $400,000 in credit from the Borgata, between August 2006 and March 2007, and (2) issued a trust account check knowing that there were insufficient funds in the account to cover it. In both instances, however, respondent's conduct, in and of itself, did not constitute a misappropriation of either client or escrow funds because there was no actual invasion of trust account monies. However, we find that his actions did amount to other acts of misconduct, as detailed below.

In re LaRosee, 122 N.J. 298 (1991), is instructive in this matter. There, in one of the several client matters that caused the filing of a formal ethics complaint against him, LaRosee, the attorney for undisclosed buyers in a business transaction,

was given $18,000 in deposit monies. Although he never deposited the funds into his trust account, he issued a $15,000 trust account check, representing a "deposit" for the transaction. Id. at 307.

According to LaRosee, he and the lawyer for the sellers had orally agreed that the sellers' attorney would not deposit the $15,000 check until LaRosee was satisfied with the agreement, the buyers authorized the release of the funds, and LaRosee gave sellers' attorney the "go-ahead." Id. at 306. His cover letter to the sellers' attorney instructed him not to "disburse" the funds without authorization. Ibid. The sellers' attorney held onto the check until LaRosee agreed to the terms of the contract, at which point the check was deposited. Id. at 307.

We found that LaRosee had issued the check "knowing that there were no equivalent funds on deposit" in the account. In the Matter of David LaRosee, DRB 88-227 and DRB 89-142 (April 11, 1990) (slip op. at 19). In our view, this act did not constitute knowing misappropriation because the mere drawing of the check did not amount to one of the "essential elements" of knowing misappropriation, that is, "the actual invasion" of trust account funds. Id. at 20-21; In re LaRosee, supra, 122 N.J. at 308. Instead, we found that, once the sellers' attorney

deposited the $15,000 check, which was paid, a knowing invasion of LaRosee's client funds occurred because LaRosee had never deposited in his trust account the $18,000 given to him as a deposit. We found the misappropriation to be knowing because LaRosee was aware that there were no equivalent funds to back up the $15,000 check that he gave to the sellers' attorney.

The Supreme Court disagreed with our determination that LaRosee's conduct constituted knowing misappropriation. In re LaRosee, supra, 122 N.J. at 311. Citing In re Wilson, 81 N.J. 451 (1979), the Court first observed that, "when an attorney has knowingly misappropriated clients' trust funds, no matter for what purpose, the result will be disbarment." Id. at 309. The Court did not find that LaRosee had knowingly misappropriated client funds because, when he gave the check to the sellers' lawyer, he was of the belief that they had forged an oral agreement that the check would not be deposited until the deposit was authorized by all parties, as opposed to an agreement to the terms of the contract, as understood by the sellers' attorney. Id. at 306. Moreover, the Court found that LaRosee's frantic actions after the $15,000 check was deposited "did not reflect the state of mind associated with a knowing misappropriation." Ibid.

Nevertheless, the Court ruled:

> By issuing a check from his trust account without corresponding funds on deposit, respondent exposed his clients' funds to an unauthorized risk of withdrawal, in violation of the mandate of RPC 1.15. Moreover, the mere issuance and delivery of the check drawn on his trust account was deceitful in that it constituted a representation by respondent that his trust account contained funds that were available . . ., thereby violating RPC 8.4(c). . . .
>
> [Ibid.]

These violations, according to the Court, warranted "severe discipline." Id. at 311.[4]

Here, respondent did not knowingly misappropriate client funds, when he used his trust account as collateral for credit markers at the Borgata. He testified that, when he signed the counter checks, he knew that no funds would be in the trust account, if and when the Borgata ever presented the checks for payment. See In re Cotz, 183 N.J. 23 (2005) (in order to "placate" a personal creditor, attorney issued a trust account check to him, knowing that the check would not be honored and

[4] Ultimately, the Court disbarred LaRosee for his misconduct in all five of the matters before it. Id. at 313.

that it would be returned for insufficient funds; the attorney was not disciplined for this conduct; rather, he was suspended for six months for negligent misappropriation when he issued other trust account checks upon the mistaken belief that there were sufficient funds in the trust account to cover those checks).

Furthermore, respondent did not misappropriate client funds, when the $20,500 trust account check presented by the Borgata to BoA bounced. The bank did not honor the check. The Borgata received no money. Therefore, no trust account funds were ever invaded.

Unquestionably, however, respondent's use of his trust account as collateral for casino markers exposed the trust account funds to a great risk of an unauthorized withdrawal, which, as held in LaRosee, constitutes a violation of RPC 1.15(a). *Moreover, by issuing what he knew to be a "bad check,"* respondent violated RPC 8.4(c), inasmuch as his signature constituted a misrepresentation that there were sufficient funds in the account to cover it.

In light of LaRosee's holding that conduct like respondent's "warrants severe discipline," we determine to impose a three-year suspension for respondent's extensive use of

the trust account as collateral at the Borgata and his issuance of a "bad" trust account check, knowing that there were insufficient funds in the account to cover the instrument.

II - DRB 10-414 (The Mimms Matter)

Service of process was proper in this matter. On September 22, 2010, relying on the representation of Alan Dexter Bowman, respondent's counsel in the DEC matter, that he was authorized to accept service of the ethics complaint on respondent's behalf, the OAE sent a copy of the document to Bowman, at his law office address, via regular and certified mail, return receipt requested. On September 27, 2010, "Tom Prezioso" signed for the letter. The letter sent via regular mail was not returned.

On November 10, 2010, the OAE sent a letter to Bowman at the same address, via regular and certified mail, return receipt requested. The letter directed the filing of an answer within five days and informed him that, if an answer were not filed, the record would be certified directly to us for the imposition of sanction. On November 16, 2010, "D. Claiborne" signed for the letter. The letter sent via regular mail was not returned.

As of November 30, 2010, respondent had not filed an answer to the complaint. Accordingly, on that date, the OAE certified this matter to us as a default.

By letter dated December 2, 2010, Bowman informed OAE Assistant Counsel John McGill, III that he no longer represented respondent, as respondent had been non-responsive to his requests. On January 6, 2011, Chief Counsel Julianne K. DeCore spoke to Bowman on the telephone. Bowman assured her that respondent was very much aware of the complaint.

According to Bowman, after he received the complaint from the OAE, respondent came into his office to discuss the matter. Bowman told respondent that he had to produce the records relating to the allegations of the complaint so that they could address them. Respondent was to return to Bowman's office with the records. However, Bowman never heard from respondent again.

The address to which Bowman sends mail to respondent and at which respondent has received that mail is the same address that is on file with the OAE.

At oral argument in the DEC matter, Bowman confirmed to us that he represented respondent in that matter, but not in the default matter. He stood by the representations that he made to Chief Counsel, in January of this year, about his meetings and

conversations with respondent regarding the matter that proceeded to default.

According to the complaint, on July 6, 2006, respondent represented Jason Mimms in the purchase of an East Orange property from Crystal Matthews. As settlement agent, respondent received $294,917.60 on behalf of Mimms.

Between July 10 and October 23, 2006, respondent made nine disbursements in connection with the Mimms transaction, totaling $271,797.96. Thus, as of November 15, 2006, the date that the last check was posted by the bank, respondent should have held a $23,129.64 balance in his trust account for the Mimms matter.[5] The complaint also identified certain disbursements that were never made, such as the payment of the third-quarter property taxes and a water bill.

Between March 8 and 23, 2007, respondent issued to himself five trust account checks, in even dollar amounts, for a total of $26,000. None of the checks contained any client reference.

[5] Respondent also issued additional checks in the Mimms matter, totaling $5056, which were never negotiated. Because these funds never left the trust account, they were a part of the $23,129.64 balance.

On March 19, 2007, respondent's trust account balance was only $16,698.11, representing a shortfall in the Mimms matter of $6,431.53. By the next day, the balance was down to $7,698.11, increasing the Mimms shortfall to $15,431.53. On March 23, 2007, the balance had fallen to $2,198.11, causing a total shortfall in the Mimms matter of $20,931.53.

On March 26, 2007, when the Borgata presented the $20,500 check to BoA, respondent's trust account balance was only $2,198.11. As indicated previously, BoA did not honor the check, returning it for "NSF." According to the complaint, this "overdraft" "completely misappropriate[ed] the Mimms' funds."

The complaint goes on to detail respondent's gambling problem, the Borgata's attempted negotiation of the $20,500 trust account check on March 26, 2007, and the replenishment of the trust account thereafter.

According to the complaint, respondent invaded the Mimms settlement funds knowing that he had no authority to do so. Respondent's own ledger card for the Mimms transaction stated that, as of October 23, 2006, respondent was holding in his trust account $19,073.64 in connection with the matter. His trust account reconciliation reflected a $21,699 balance as of March 26, 2007. Yet, respondent's disbursements to himself

caused the trust account balance to dip to $2000 on March 23, 2007.

Based on these facts, the complaint charged respondent with knowing misappropriation of the Mimms settlement funds, a violation of RPC 1.15(a) (failure to safeguard client funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and the principles set forth in In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979), and in In re Hollendonner, 102 N.J. 21, 26-27 (1985).[6]

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)(1).

Without question, respondent knowingly misappropriated the Mimms settlement funds, when he disbursed to himself the $23,129.64 that remained in his account, after the July 6, 2006 closing. Specifically, between March 8 and March 23, 2007,

[6] The complaint likely charged violations of Wilson and Hollendonner only because it was not clear whether the settlement funds belonged to Mimms or to third parties.

respondent issued five trust account checks to himself, in even-dollar amounts, totaling $26,000. These checks were not linked in any way to the Mimms matter. The disbursements were not authorized by Mimms or any other party.

As a result of the disbursements, the trust account balance was down to $2,198.11 on March 23, 2007. In the meantime, even respondent's own trust account reconciliation for the Mimms matter reflected a $21,699 balance as of March 26, 2007.

For respondent's knowing misappropriation of the Mimms settlement funds, we, therefore, recommend his disbarment.

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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Steeve J. Augustin
Docket No. DRB 10-394

Argued: February 17, 2011

Decided: May 5, 2011

Disposition: Three-year suspension

Members	Disbar	Three-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Steeve J. Augustin
Docket No. DRB 10-414

Argued: February 17, 2011

Decided: May 5, 2011

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark	X					
Doremus	X					
Stanton	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	9					

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Chief Counsel