SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-264
District Docket No. XIV-2009-0602E

IN THE MATTER OF	:
MARK HENDERSON BRADY	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 19, 2015

Decided: May 9, 2016

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear for oral argument, despite proper service.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a)(4), based on respondent's suspension in Colorado for one year and one day for negligent misappropriation of escrow funds (RPC 1.15(a)) and conduct involving dishonesty, fraud, deceit, or misrepresentation (RPC 8.4(c)).

We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1984 and the Colorado bar in 1991. He has no prior discipline in New Jersey and has been retired from the practice of law in both jurisdictions for some time (since 2003 in New Jersey).

On October 15, 2010, the Supreme Court of Colorado suspended respondent for one year and one day for misconduct that occurred in 2008. The suspension was imposed two days after respondent entered into an October 13, 2010 "Stipulation, Agreement and Affidavit Containing Respondent's Conditional Admission of Misconduct" with ethics authorities in that state.

According to the stipulation, from 2000 through 2008, respondent was a resident of the State of Florida. During that time, he was the sole owner, president, and title insurance agent for two title companies in Brevard County, Florida: American Heritage Title Company (AH Title) and Adams Title, Inc.

In March 2008, respondent sought an application for a line of credit with Isle of Capri Casinos, Inc. (Capri), the owner of casinos in the United States and in the Bahamas. The stipulation is silent about respondent's geographical location when applying for credit in March 2008, as described below.

On March 12, 2008, respondent sent Capri a facsimile containing the account numbers for three personal checking

accounts. He also provided Capri with four former addresses, which a gaming industry clearinghouse, "Central Credit," could use to verify his gambling credit history with other casinos.

On March 14, 2008, respondent signed and submitted to Capri a handwritten application requesting a $50,000 line of credit with the casino. On it, he listed the three personal checking accounts and a fourth account belonging to AH Title. Respondent identified it as a business account, although it was actually that company's business escrow account.

On March 21, 2008, respondent signed a typewritten credit application prepared by Capri's personnel. The application listed the four bank accounts that respondent had provided in his handwritten application. All of the accounts carried the typed designation "pers," denoting them as personal accounts. Respondent stipulated that the representation concerning the fourth account was false, as it contained not personal funds, but third-party escrow funds.

On August 5, 2008, respondent traveled to Grand Bahama Island and gambled at the Capri casino. While playing blackjack, he signed five marker transfer requests totaling $45,000. Under the terms of the credit agreement that he had signed with Capri, if those marker transfer requests were not paid within thirty days, the bank or banks listed in the credit application would

be permitted to issue checks drawn on any of the four bank accounts to repay the markers. None of respondent's five marker transfer requests specified a particular account from which Capri should request payment.

Respondent failed to pay the $45,000 markers within the allotted thirty-day period following his gambling at the casino. Therefore, on September 15, 2008, the casino submitted five counter checks totaling $45,000, all written against AH Title's business escrow account. Each check was dated August 5, 2008, the date that respondent had signed the markers at the blackjack table. The checks included the bank escrow account number and a scanned image of respondent's signature, as though he had signed them on that date. The five checks cleared AH Title's bank on September 16, 2008. As a result, $45,000 of third party escrow funds were invaded and used to satisfy respondent's personal gambling debt to Capri.

According to the stipulation, respondent informed the Colorado ethics authorities that he had been unaware that the counter checks would be drawn from AH Title's business escrow account, "based upon the entirety of circumstances surrounding his marker transfer requests." Moreover, he had sufficient funds in his three personal bank accounts to cover the $45,000 in marker requests. In fact, respondent replaced the $45,000 within

days of the withdrawal. The stipulation does not state what other "circumstances" surrounded respondent's marker requests. Respondent, however, explained them in an August 24, 2015 affidavit (Ra) and brief to us.

Specifically, respondent's affidavit states that, on March 14, 2008, when he signed the Capri credit application, he was vacationing in the Bahamas. At the time, he maintained three personal checking accounts and four business operating accounts. Respondent owned all of the funds in all of those accounts.

The four business accounts related to Adams Title and AH Title. Respondent was the sole owner of both companies, which operated from four separate locations, each with its own operating business account. When completing Capri's credit application from the Bahamas, respondent furnished Capri with the account numbers for accounts that he thought were his personal and business operating accounts. Because he did not have the information with him for one of his business accounts, respondent called his office in the United States for his staff to retrieve that information from his desk.

Respondent's staff person gave respondent the account number information over the telephone, information that respondent at all times believed related to a business operating account. Respondent was unaware "then and at all times

subsequent," that his staff had inadvertently given him checking account information "for one of the escrow accounts, rather than the business checking account requested:"

> I put the business account checking information on the credit application, unaware that it was actually one of four escrow accounts we used in the same businesses.
>
> I was aware that the casino would withdraw funds from one of my accounts, which I requested that they do from either of the personal checking accounts.
>
> The money owed was in fact withdrawn from the business account, which I at all times believed to be one of my business operating accounts.
>
> Not until the withdrawal actually occurred did I realize monies were withdrawn from an escrow account.
>
> Upon this becoming known to me, I immediately deposited the funds withdrawn from the escrow account with my own funds.
>
> Whereas my deposit was immediate, no checks were presented on the account.
>
> Had I had any intentions to subject escrow accounts to this possibility, I would not have immediately deposited my own funds nor presumably even had the funds to deposit.
>
> At no time in question, prior to the withdrawal above referenced, was I aware that credit application contained escrow account information.
>
> At no time did I intend to use escrow account information or escrow funds for my personal use or collateral.
>
> As evidenced by my actions, it was always my intention to utilize my personal funds for any obligation arising out of the credit application.
>
> [Ra¶9-¶17.][1]

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[1] Ra refers to respondent's affidavit, attached as Exhibit A to his brief in response to the Office of Attorney Ethics motion for reciprocal discipline.

Respondent urged us to consider that: other than this matter, he has never had any disciplinary actions against him; he has been retired from the practice of law for more than five years, and significantly longer in New Jersey; he has never had an issue with trust or escrow accounts before or after this incident; and no claims have ever been made against him or one of his companies regarding bank accounts "or otherwise."

Respondent stipulated that his actions resulted in the negligent misappropriation of third party escrow funds, a violation of the Colorado equivalent of RPC 1.15(a). Respondent further stipulated that he had "engaged in dishonest conduct by signing an application for credit in which he stated that a business escrow account was a personal account from which [he] could access personal funds for gambling debts," a violation of the Colorado equivalent of RPC 8.4(c).

Initially, in its motion and brief in support, the OAE urged us to conclude that respondent "knew that he had inappropriately designated his [AH Title] escrow account as a personal account as collateral for his gambling debt," thereby orchestrating a knowing misappropriation of $45,000 in third party escrow funds to pay his personal gambling debt. Citing In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985), the OAE called for respondent's disbarment.

Subsequently, however, at oral argument before us, OAE counsel acknowledged that she, too, had received respondent's brief and affidavit to us, and, on her review of those submissions, concluded that respondent had negligently, not knowingly, misappropriated escrow funds. Thus, the OAE recommended the imposition of a suspension of one year and one day – the same discipline imposed by Colorado's disciplinary authorities.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides that

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). However, paragraph (E) applies, for the reasons discussed below.

It is clear to us, from respondent's brief and supporting affidavit, that he did not intentionally invade his title company's escrow account. Indeed, the OAE has been persuaded that respondent did not knowingly misappropriate escrow funds.

In March 2008, respondent called his office from the Bahamas for personal bank account information, but was given information that mistakenly included an escrow bank account number. Although respondent was vacationing in the Bahamas, apparently at the Capri casino, there is no evidence that he used any markers on that trip or invaded escrow funds. Rather, it was not until his second trip to the Bahamas, in August 2008, that he used the markers that led to an invasion of funds. It stands to reason that, had respondent intended to use AH Title's escrow account to fund his gambling debts, he would have done so in March 2008, when he first obtained the credit line.

We, therefore, conclude, as the OAE has conceded, that there is a lack of clear and convincing evidence that respondent ever intended to use the escrow account as collateral for his credit line with Capri and find, instead, as the Colorado

authorities did, that respondent negligently misappropriated escrow funds of $45,000, a stipulated violation of RPC 1.15(a).

We further find that the record lacks clear and convincing evidence to support the conclusion that respondent acted dishonestly by intentionally furnishing Capri with information for an escrow account. Again, respondent never intended that the escrow account information be included as a part of his credit application with Capri. Rather, it was inadvertently included as a result of a mistake made by respondent's office staff when providing information over the telephone while respondent vacationed in the Bahamas. Because respondent had no intention of using the account to fund his gambling debts, his honesty is not in issue. Therefore, we decline to find a violation of RPC 8.4(c).

In summary, respondent is guilty of a sole violation of RPC 1.15(a) for the negligent misappropriation of $45,000 of escrow funds.

Generally, a reprimand is imposed for negligent misappropriation of client or escrow funds, often found alongside recordkeeping deficiencies. See, e.g., In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the

excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in attorney trust account, as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney over-disbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest); and In re Weinberg, 198 N.J. 380 (2009) (motion for discipline by consent granted; attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because he did not regularly

reconcile his trust account records, his mistake went undetected until an overdraft occurred; the attorney had no prior final discipline).

Although respondent has no prior discipline in over thirty years at the bar[2] and no one was harmed by his actions, respondent's misconduct was serious and negligently exposed escrow funds to the invasion that ultimately occurred. For these reasons, we determine that respondent should receive a reprimand for his misconduct.

Vice-Chair Baugh and Member Singer voted for an admonition.

Member Zmirich 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: 
Ellen A. Brodsky
Chief Counsel

[2] As noted previously, respondent has been in retired status in New Jersey since 2003.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark H. Brady
Docket No. DRB 15-264

Argued: November 19, 2015

Decided: May 9, 2016

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Frost			X			
Baugh				X		
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer				X		
Zmirich						X
Total:			5	2		1

Ellen A. Brodsky
Chief Counsel