SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 01-247, 01-248
and 01-249

IN THE MATTER OF

ARTHUR G. D'ALLESANDRO :
:
AN ATTORNEY AT LAW :

IN THE MATTER OF :

DOUGLAS M. D'ALLESANDRO :
:
AN ATTORNEY AT LAW :

IN THE MATTER OF :

GREGORY D'ALLESANDRO :
:
AN ATTORNEY AT LAW :

Decision

Argued: October 18, 2001

Decided: March 1, 2002

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Donald R. Belsole appeared on behalf of respondents.

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

These matters were before us based on a recommendation for discipline filed by special master Donna duBeth Gardiner. The complaint filed by the Office of Attorney Ethics ("OAE") charged respondent Arthur D'Allesandro ("Arthur") with knowing misappropriation of trust funds, in violation of *RPC* 1.15(a) and *RPC* 8.4(c), and failure to maintain required records, in violation of *RPC* 1.15(d). The complaint also charged his sons, Douglas M. D'Alessandro ("Douglas") and A. Gregory D'Alessandro ("Gregory"), with negligent misappropriation of trust funds, in violation of *RPC* 1.15(a) and (b).

Arthur was admitted to the New Jersey bar in 1962, Gregory in 1987 and Douglas in 1989. Respondents have no disciplinary history. Although they maintain a law practice known as D'Alessandro & D'Alessandro, the firm is a sole proprietorship owned by Arthur. Douglas and Gregory are its employees. In addition to maintaining his law practice, Arthur is a municipal court judge in Washington Township, Morris County. It is undisputed that, as the owner of the firm, Arthur was responsible for the firm's practices, procedures and operation, including the maintenance of the trust and business accounts.

The central issue is whether Arthur's actions amounted to knowing misappropriation of client funds. Other issues are whether Arthur committed recordkeeping violations and whether Douglas and Gregory negligently misappropriated client funds.

The facts are not in dispute. Arthur admitted that, for many years, he deposited into his business account funds to pay title insurance premiums owed by his clients and used them for office operating expenses. He claimed, however, that, through a special agreement with a title insurance agency, Progressive Title Agency ("Progressive"), he had permission to use those funds. The OAE alleged that, although Arthur may have had Progressive's permission, he did not have the required consent of the clients and, therefore, he knowingly misappropriated those monies. Arthur, in turn, asserted that, because the funds were no longer clients' funds, he did not need the consent of his clients.

* * *

On January 26, 1998 OAE auditor Karen Hagerman performed a random compliance audit of the D'Allesandro firm's records for the prior two years (January 1996 through December 1997). Hagerman noticed that there were one or two checks issued from the firm's business account to Progressive. Because title insurance premiums are ordinarily paid out of trust account funds, Hagerman sent a letter to respondents asking them to identify other checks issued to Progressive after the date of the audit. On May 27, 1998, after Hagerman received the requested information, she conducted another audit.

Hagerman's subsequent audit revealed that, whenever the firm represented a buyer in a real estate transaction in which Progressive was the title insurer, the firm would issue

one trust account check to itself for both its legal fees and the title insurance premium and title searches, and would then deposit that check into its business account. The firm used those funds for operating expenses. Eventually, the firm would pay the title insurance premium from its business account. Although the firm used fourteen different title insurance agencies, this practice occurred only when the title insurance was issued through Progressive. In all transactions involving other title insurance agencies, the firm would issue a trust account check for the title insurance premium at the time of the real estate closing.

Because the firm handled approximately 150 closings per year, Hagerman limited her review to the year 1997. She compiled a summary of twenty-five real estate closings in which the firm paid title insurance premiums totaling $29,899 to Progressive, on dates ranging from eighty to 405 days after the real estate transactions.

Hagerman focused on one real estate matter, *Helriegel/Merz*, which was typical of the pattern of transactions involving Progressive. The *Helriegel/Merz* closing took place on September 20, 1996. On September 27, 1997, 374 days later, the firm paid Progressive its $1,150 premium. It is undisputed that, during the 375 days from the date of the closing to the date of the insurance premium payment, the firm's business account balance was less than $1,150 on sixty-nine days, including twenty-five days during which there was a negative balance. The firm, thus, did not hold the funds from the *Helriegel/Merz* transaction intact, either in the trust or the business account.

As of August 18, 1997, at a time when the firm owed Progressive $25,321 for title insurance premiums, the business account was overdrawn by $1,139.18.

At the audit, in reply to Hagerman's inquiry, Arthur asserted that, before he would pay Progressive, he would complete all steps necessary to close the file, such as canceling prior mortgages and removing all liens. Arthur told Hagerman that he had an oral agreement with Progressive, permitting him to proceed in this fashion. At the ethics hearing, Arthur testified that he had Progressive's consent to withhold the payment of the title insurance charges until he closed the file. As seen below, principals of Progressive confirmed this arrangement with Arthur, whereby it permitted the firm to use those funds for operating expenses. Although the firm never failed to pay the title insurance premiums, Progressive and Arthur's agreement required Progressive to issue title insurance regardless of premium payments. Representatives from Progressive confirmed this arrangement to Hagerman.

Upon completion of all post-closing requirements, the firm would submit the title insurance premium to Progressive, along with its post-closing letter, enclosing all necessary documentation for the issuance of the title insurance. It is undisputed that, in every instance, Progressive timely issued title insurance to the firm's clients.

Arthur explained that it is critical for an attorney with a high volume real estate practice to cultivate a relationship with one primary title insurance agency. In this fashion, the agency may agree to assume title risks that otherwise it would not take, thereby eliminating the need to file a costly action to quiet title. In the past, Arthur had had such a

relationship with General Abstract Title Insurance Agency ("General Abstract"). After two individuals, Terrence Flanagan and Marilyn Henshaw, left General Abstract to form Progressive, Arthur obtained most of his title insurance from Progressive. The firm had had a similar arrangement with General Abstract and, when Flanagan and Henshaw formed Progressive, the procedure continued to be utilized.

It is undisputed that the firm discontinued this practice sometime in 1997, before the notice of the random compliance audit had been received. Hagerman testified that either Douglas or Gregory had told her, during the audit, that he had suggested to Arthur that he discontinue the arrangement. Arthur, however, denied that his sons were involved in changing the procedure, stating that, as sole owner of the firm, it was his decision to do so. According to Arthur, in 1997 he was contemplating retirement and, with a view toward turning his law firm over to his sons, he wanted to analyze the profitability of various areas of his practice. He stated that, because the legal fees and title insurance premiums were combined in one check and deposited into the business account, the figures for the firm's real estate practice were skewed. In addition, he stated, although the title insurance premiums constituted a debt that he repaid, he paid income taxes on those funds. Since 1997, thus, the firm's procedure has been to pay all title insurance premiums directly from the closing proceeds.

Terrence Flanagan, one of Progressive's principals, testified that he had been doing business with Arthur for almost twenty years. He confirmed the above arrangement with the firm. At the hearing, the following exchange took place between the presenter and Flanagan:

Q. Would you describe [the agreement] for us, please.

A. The agreement was that Mr. D'Alessandro would perform the closing; and upon the completion of all of the recordings and discharges, he would pay us.

Q. Who originated the agreement? In other words, who approached whom about the agreement?

A. I believe Mr. D'Alessandro just told me that's how he did business.

Q. Did he give you a reason or rationale why he wanted to do things that way?

A. No.

Q. Let's take an example of Mr. D'Alessandro for some reason had failed to pay the premium. Who would be responsible for it?

A. I would.

Q. That never happened, I'm sure.

A. No, it didn't.

Q. He's a good customer.

A. Excellent.

Q. Was it Progressive's understanding or your understanding at any time that the title insurance premium was a personal obligation of Mr. D'Alessandro or his firm to your firm?

Q. Yes. . . .

Q. Was it ever your understanding that you were loaning those funds to Mr. D'Alessandro?

A. If he needed it, yes.

Q. Was that ever contemplated?

A. Yes.

[T78-79]

* * *

Q. In terms of delay between the closing date and the payment for a policy, what is the normal or average? Do you have any idea?

A. Well, there's really no average because it's dependent on the county. But from closing to issuance of a policy would range anywhere from certainly no -- it would not be issued before six months probably; and I had some in my office that have been a year and a half, two years. . . .

Q. And as far as you talked about this loan before to use the money as long as you got it down the line as far as --

A. Yeah. It was my money. Could use it any time they want. . . .

Q. And if he didn't pay you the money, you'd issue the policy anyhow.

A. Yes. Of course.

[T81-82, 84]

At the ethics hearing, Henshaw, another Progressive principal, also confirmed the agreement with Arthur.

Both Flanagan and Henshaw testified that Arthur was honest, trustworthy and an excellent attorney, as were his sons. Progressive continues to do business with the firm.

To dispel any notion that the firm utilized the funds from the title insurance premiums out of financial necessity, Arthur introduced evidence showing that, in addition to the firm's business account, he maintained about ten other bank accounts with total balances in excess of the funds due to Progressive. Among these were savings accounts, checking accounts and accounts funded by rental properties.[1] When the firm needed an infusion of cash, Arthur transferred funds from one of the other bank accounts. Arthur's income from his law practice during the audit period was $160,000 in 1996 and $220,000 in 1997.

In 1981 Arthur had been the subject of another random compliance audit. He asserted that, at the time, his records would have indicated to the OAE auditor that he was engaging in the same practice with Progressive. According to Arthur, in 1981 the auditor never questioned this practice.

There was extensive testimony on whether the monies earmarked for the payment of the title insurance premiums were technically clients' funds. Arthur testified that he "never considered the funds that were in these accounts to be client funds. They were not client funds. They were -- they belonged to the title company and the title company allowed me to use those funds." On cross-examination, the following exchange took place between Arthur and the presenter:

> Q. Now, the money that was to be paid over to Progressive for the title insurance premium originally came from one of your clients, correct?

---

[1] In addition to practicing law, Arthur owned and managed about fifty to sixty rental properties.

A. Correct.

* * *

Q. What then about your agreement with Progressive changed the character of those funds?

A. Because I collected the funds -- pursuant to my agreement with Terry, I collected the funds for Terry at the time of closing; and the funds were in essence paid -- **the title premium was in essence paid on behalf of the client at time of closing pursuant to my arrangement; and Terry agreed that whether I paid or not was irrelevant, that he would issue the policy based upon the fact that he was paid as a result of our arrangement**. And then it became an obligation from me individually to pay those premiums to Terry, which meant that I used the funds in the interim; but that was part of the agreement with Terry, that I could -- I could do so. But insofar as the client was concerned, the title premium and the title search was paid at time of closing. And that was our agreement. (Emphasis added.)

[T125-126]

In Arthur's view, thus, his clients' debt to Progressive became his debt, with Progressive's consent.

* * *

Several "character witnesses" testified in Arthur's behalf. Victor Rizzolo, formerly a Superior Court and Municipal Court judge, and Eugene Purcell, an attorney for thirty-eight years, testified that Arthur's reputation for honesty, professionalism and ethics was impeccable.

* * *

As to Douglas and Gregory, the complaint charged that, as employees of the firm, they followed Arthur's direction to deposit funds for title insurance into the firm's business account and, therefore, failed to ensure that closing funds were promptly remitted to Progressive.

Douglas was the settlement agent in twelve of the twenty-five closings summarized by Hagerman; Gregory acted as the settlement agent in two of the transactions, both times covering the closings for Douglas, who had scheduling conflicts. According to the complaint, Douglas and Gregory failed to safeguard funds and to pay them promptly to a third person.

Douglas testified that he joined his father's firm in 1991, after practicing law elsewhere for two years. He began handling real estate matters almost immediately. He agreed with his father's understanding that, because of the agreement with Progressive, the funds designated for payment of title insurance premiums were not strictly clients' funds and, therefore, could be used for the firm's operating expenses without the clients' consent. He confirmed that it ordinarily takes six to eighteen months to close a real estate file.

Gregory's testimony, too, substantiated Arthur's and Douglas' statements.

* * *

Count three of the complaint alleged that Arthur committed ten recordkeeping violations. Although, in his answer, Arthur denied most of the allegations, at the ethics hearing, when the presenter began introducing evidence on this issue, Arthur stipulated to his recordkeeping deficiencies.

* * *

The special master determined that Arthur knowingly misappropriated clients' trust funds, finding that the fees given to an attorney for title insurance premiums remain as clients' funds until paid to the intended third parties. The special master recommended Arthur's disbarment. The special master noted that Arthur was a municipal court judge, practiced law for almost forty years and was an astute businessman owning fifty to sixty rental properties. The special master found it "impossible" to believe that Arthur did not realize that monies paid to him by clients and placed in his trust account belonged to the clients until disbursed.

The special master found that Arthur did not have an agreement with Progressive, but instead dictated to Progressive when he would submit the title insurance premiums and Flanagan, the "owner of a fledgling business," simply went along with the terms imposed by Arthur because he was a lucrative new client.

As to Douglas and Gregory, the special master found that neither actively participated in the misappropriation of client funds. The special master concluded, however, that, pursuant to *RPC* 5.2(a) (a lawyer is bound by the *RPCs,* notwithstanding that the lawyer acted at the direction of another person), "neither can escape the fact that such misappropriation was occurring." The special master recommended that Douglas and Gregory receive reprimands.

* * *

Following a *de novo* review of the record, we found no clear and convincing evidence that Arthur misappropriated clients' funds. The record establishes that Arthur and Progressive had an agreement whereby Progressive considered the premiums paid upon receipt of corresponding funds from Arthur's clients and then allowed Arthur to utilize them for office expenses.

It is undisputed that, for many years, whenever Arthur represented a buyer in a real estate transaction, he would not immediately pay the title insurance premiums owed to Progressive. Instead, pursuant to an arrangement that he had with Flanagan, he would issue a trust account check for both his legal fees and the title insurance charges, deposit the check into his business account and use the funds for operating expenses, with Progressive's consent. Although the funds were not remitted to Progressive at the time of the real estate

closing, Progressive agreed to issue the title insurance. In fact, Progressive would issue the title insurance even if Arthur never paid the premium. Arthur's uncontroverted testimony was that submitting the title insurance charges with his post-closing letter would not delay the issuance of the title insurance policy. At oral argument before us, the presenter conceded that there were no unusual delays in the issuance of the title insurance policies as a result of this agreement.

Flanagan confirmed that Progressive had authorized Arthur to use the funds as he wished until he closed his file, at which time the funds were remitted to Progressive. Flanagan characterized the transaction as a loan. We cannot agree with the special master's finding that Arthur dictated the terms of the agreement to Progressive and that, therefore, there was not a meeting of the minds. The record clearly establishes that Progressive was willing to accommodate Arthur's request to delay the payment of the title insurance premiums. Flanagan appeared satisfied with the arrangement and, twenty years later, continued to do business with Arthur.

Although it is clear that Progressive consented to Arthur's use of the funds, the question now is whether that authorization was sufficient to save respondent from a finding of knowing misappropriation of clients' funds. The presenter argued that, because the funds were given by the clients for the specific, limited purpose of obtaining title insurance, the monies remained clients' funds until disbursed to the intended recipient, in this case, Progressive. According to the presenter, Arthur needed the consent of his clients to use the funds. Arthur, in turn, acknowledging that he had not obtained his clients' consent,

contended that his agreement with Progressive changed the character of the funds from clients' funds to a loan to him. Simply stated, Arthur claimed that, initially, the clients were responsible for the payment of the premiums and that, therefore, the monies entrusted to him for that purpose constituted clients' funds. He argued, however, that, Progressive considered the clients' responsibility extinguished upon tender of the funds to Arthur and allowed him to use those funds for office expenses until all post-closing steps were complete. In short, Arthur maintained that this agreement meant that Progressive acknowledged the clients' payment, considered the clients' obligation to it satisfied, lent the funds to Arthur and now considered the payment of the premium to be Arthur's, not the clients', obligation. To buttress this contention, Arthur pointed to (1) Progressive's consent to issuing a policy even without receiving the premium payments; (2) the distinction between the handling of the payments to Progressive and those to other title insurance companies; and (3) the fact that the OAE auditor who reviewed his attorney records in 1981 was aware of this practice and did not question it as improper.

The presenter, in turn, argued that, in accordance with *In re Barlow*, 140 *N.J.* 191 (1995), funds given to an attorney for payment of title insurance premiums are client funds. We find that the facts of this case are distinct from the facts in *Barlow*. There, the attorney represented clients in two unrelated real estate transactions. Six months later, he made the necessary disbursements, except for a total of $2,894.94 for payment of title insurance and surveyors' fees from both transactions. Accordingly, that amount should have remained intact in Barlow's trust account. Barlow, however, issued to himself a trust account check

in the exact amount of $2,894.94, referencing the client matters in the memo column of the check. He deposited the funds in his business account, which had a negative balance before the deposit, and used the money to pay business and personal expenses, including a gambling debt. Barlow paid one title insurance bill more than seven months after the closing. Although he had charged his clients $794 for that item, the bill was actually only $594. Barlow retained the $200 difference. He paid the surveyor's bill almost one and one-half years after the closing, and then only after a judgment had been entered against him. In the second real estate transaction, Barlow paid the surveyor four years after the closing.

In determining that Barlow knew that he was taking his client's funds, the Court pointed to his testimony, as follows: "Were those balances belonging to these two clients? Of course, they were.... Of course I was aware they were my clients' funds." *Id.* at 196- 97. Barlow also testified that he knew, when he deposited those funds into his business account, that he was not entitled to his client's money.

Barlow is distinguishable from this matter in several respects. Barlow acknowledged that he had used client funds for personal expenses, without the clients' consent. Here, Arthur claimed that, by virtue of his agreement with Progressive, the funds were no longer client funds and, hence, he was entitled to use them, without the clients' consent. Unlike this case, Barlow charged a client $794 for a $594 surveyor's bill, retaining the $200 difference. He also failed to pay a surveyor's bill until four years after the closing and then only after a judgment had been entered against him. Most importantly, unlike Arthur, Barlow did not contend that he had the payees' authorization to utilize the monies as loans.

Although, thus, the presenter was correct that clients' monies given to an attorney for the payment of title insurance premiums constitute client trust funds, here, Progressive acknowledged payment by the clients, considered the clients' financial obligation satisfied and allowed Arthur – either personally or through his firm – to become responsible for the payment of the premiums. This crucial distinction converted the character of the funds from client trust funds to Progressive's personal funds and then to loans to Arthur's firm. In other words, once Progressive agreed that it was obligated to issue the title insurance policy upon the client's payment of premiums to Arthur, the client's interest in those funds was extinguished. We find, thus, that Arthur's use of the funds did not amount to knowing misappropriation.

Even if we were to find that the character of the funds did not change, Arthur's reasonable belief that the funds at issue were Progressive's alone – in light of his agreement with Progressive – would save him from a finding of knowing misappropriation. At times, as in this matter, an attorney will rely on an asserted belief to defend against a knowing misappropriation charge. We must then determine whether that belief is reasonable. A reasonable, albeit erroneous or mistaken, belief may succeed in proving that a misappropriation was negligent, not knowing. In *In re Rogers*, 126 *N.J.* 345 (1991), the attorney's mistaken belief that he could use escrow funds saved him from disbarment. There, after Rogers disbursed funds following a real estate closing, American Express improperly levied on his trust account to satisfy a personal debt to American Express. As a result, the attorney's check issued to pay off a prior mortgage against the property was

returned for insufficient funds. The attorney thereafter paid most of the mortgage and obtained the consent of the mortgagee to repay the balance after the resolution of his financial difficulties. When American Express returned the monies to the attorney, however, he deposited them into his business account, instead of his trust account, and did not pay off the mortgage. Although the attorney paid some of the mortgage balance, he used the remainder to pay business and personal debts. The attorney testified that, because he believed that the mortgagee had allowed him to assume the obligation, it was his understanding that the "loan" from the mortgagee converted the monies returned by American Express from escrow funds to the mortgagee's funds, available for the attorney's personal use. The Court found that knowing misappropriation had not been established:

> We are unable to conclude that under the totality of circumstances the record clearly and convincingly demonstrates that respondent knowingly misappropriated the escrow funds. The evidence indicates that respondent may have had a good faith belief that the character of the returned American Express check had been converted from 'escrow funds' to his own funds, subject of course to his debt to [the mortgagee]. Although respondent's belief was incorrect, we cannot conclude from this record that his misappropriation was 'knowing.'
>
> *[In re Rogers, supra,* 126 *N.J.* at 347]

Here, Arthur testified that he believed that the monies given to him for title insurance payments were no longer client funds. Thus, although we conclude that the nature of the funds changed from clients' trust funds to Progressive's trust funds and there was an agreement permitting Arthur to use those funds, even if we found that the funds continued to be clients' funds, Arthur's reasonable belief that they were Progressive's would preclude a finding of knowing misappropriation.

The only remaining charges against Arthur are the recordkeeping violations, to which Arthur stipulated.

In light of the foregoing, a four-member majority found no knowing misappropriation and determined that an admonition is the appropriate discipline for Arthur's recordkeeping infractions. *See, e.g., In the Matter of Bette R. Grayson*, DRB No. 97-338 (1998) (admonition); *In the Matter of Katina Sytlianou*, DRB No. 97-024 (1997) (admonition); *In the Matter of Joseph S. Caruso*, DRB No. 96-076 (1996) (admonition); *In the Matter of William E. Agrait*, DRB No. 94-374 (1995) (admonition). Because the negligent misappropriation charges against Douglas and Gregory are derivative of the knowing misappropriation charge against Arthur, we also dismissed those charges.

One member found knowing misappropriation and voted for disbarment. That member filed a separate dissenting decision. One member recused himself. Three members did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Arthur G. D'Allesandro
Docket No. DRB 01-247

Argued: October 18, 2001

Decided: March 1, 2002

Disposition: Admonition

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson				X			
Maudsley				X			
Boylan							X
Brody	X						
Lolla				X			
O'Shaughnessy						X	
Pashman							X
Schwartz							X
Wissinger				X			
Total:	1			4		1	3

Robyn M. Hill 3/15/02
Robyn M. Hill
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Douglas M. D'Allesandro
Docket Nos. DRB 01-248

Argued: October 18, 2001

Decided: March 1, 2002

Disposition: Dismiss

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson					X		
Maudsley					X		
Boylan							X
Brody					X		
Lolla					X		
O'Shaughnessy						X	
Pashman							X
Schwartz							X
Wissinger					X		
Total:					5	1	3

Robyn M. Hill 3/15/02
Robyn M. Hill
Chief Counsel