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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF GALASSO,

Appellant.

No. 170

20 Eagle Street
Albany, New York 12207
September 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Galasso,
2 number 170. Counsel, do you want any rebuttal time?

3 MR. CATTERSON: Yes, Your Honor. If I
4 could have two minutes, please.

5 CHIEF JUDGE LIPPMAN: Yes, sure. You've
6 got it. Go ahead.

7 MR. CATTERSON: Good afternoon, Your
8 Honors. May it please the court, I am Jeffrey
9 Catterson. I am co-counsel for the appellant, Peter
10 Galasso.

11 The Rules of Professional Conduct were
12 drafted for two specific purposes: to protect the
13 public and to maintain the integrity of the - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what do you
15 believe that the - - - Mr. Galasso's obligation was
16 in this? What is his responsibility, particularly in
17 terms of escrow funds, and which would seem like a
18 sacred duty that a lawyer has, to make sure that
19 those funds are protected? What's his - - - put
20 aside the ethical rules as a lawyer, put aside the
21 technicalities of the rules. What is his
22 responsibility in relation to escrow funds?

23 MR. CATTERSON: As a fiduciary, he has the
24 obligation to safeguard those funds. And the
25 fiduciary - - - the nondelegable obligations are to

1 receive the monies; to make certain those monies are
2 not converted; to make certain that he doesn't
3 commingle those monies; and then to disburse those
4 monies to the appropriate individuals.

5 CHIEF JUDGE LIPPMAN: Do you believe that
6 he did not delegate that role to his brother?

7 MR. CATTERSON: Absolutely not.

8 CHIEF JUDGE LIPPMAN: Why not? It seems
9 that it was kind turned over almost lock, stock, and
10 barrel.

11 MR. CATTERSON: The obligations of the
12 fiduciary that I just went over, he never delegated.
13 The only signatory - - -

14 CHIEF JUDGE LIPPMAN: What did he delegate?

15 MR. CATTERSON: Assigned. He assigned
16 tasks; tasks for a bookkeeper and accountant to fill,
17 that he would oversee. He never delegated - - -

18 CHIEF JUDGE LIPPMAN: What's the level of
19 oversight that's required? How closely should he be
20 looking at the accounts, the checks, the monthly
21 reports? Is it - - -

22 JUDGE CIPARICK: How much - - -

23 CHIEF JUDGE LIPPMAN: - - - the most
24 general level, or is it a hands on?

25 MR. CATTERSON: I believe that this court

1 addressed that in the Matter of Holtzman. We take
2 the objective standard of a reasonable attorney in a
3 similar circumstance. Taken the circumstances that
4 the appellant was addressing in 2004, we're dealing
5 with a trusted employee that was employed for fifteen
6 years. Not just an employee, but his brother as
7 well.

8 JUDGE CIPARICK: Well, the fact that he's
9 changed his practices since this incident, doesn't
10 that demonstrate that there was a failure to
11 supervise, or something had broken down in that
12 office?

13 MR. CATTERSON: Absolutely not. What we do
14 as attorneys, we are always looking at what can we do
15 better. We're revising our practices. We're
16 revising how we approach cases.

17 JUDGE CIPARICK: Does this - - -

18 CHIEF JUDGE LIPPMAN: Could he have done
19 something better initially?

20 MR. CATTERSON: In hind - - -

21 CHIEF JUDGE LIPPMAN: Do you acknowledge
22 that - - -

23 MR. CATTERSON: In hindsight, we can always
24 do something better. But that doesn't mean what we
25 did in the first instance was inadequate.

1 JUDGE GRAFFEO: Well, this conduct
2 occurred, what, over two and a half years?

3 MR. CATTERSON: Correct.

4 JUDGE GRAFFEO: Right? Thirty months? And
5 how much total was taken from escrow funds? Over
6 five million dollars?

7 MR. CATTERSON: Correct, Your Honor.

8 JUDGE GRAFFEO: And over four million from
9 just one client, correct?

10 MR. CATTERSON: Correct. From an account
11 where the theft occurred by an individual who was not
12 a signatory on the account.

13 JUDGE GRAFFEO: So there's no obligation to
14 look at bank statements? There's no particular
15 obligation of the attorneys in the firm to check the
16 oversight - - -

17 MR. CATTERSON: Well, Your Honor - - -

18 JUDGE GRAFFEO: - - - when you're dealing
19 with escrow funds of this enormity?

20 MR. CATTERSON: Well, the appellant did.
21 In this case specifically, the Baron escrow account
22 that you're referring to - - -

23 JUDGE GRAFFEO: Well, I take it he didn't
24 look at the actual bank statements, or he would have
25 seen that there were withdrawals, substantial

1 withdrawals, from these accounts.

2 MR. CATTERSON: Well the actual bank
3 statements were forwarded to a P.O. box unbeknownst
4 to the firm.

5 JUDGE SMITH: He looked at what he thought
6 were the actual bank statements?

7 MR. CATTERSON: Correct. And not only did
8 he think that, Your Honor, anyone who looked at it
9 believed so. And there was (sic) findings by the
10 Nassau County District Attorney's Office and two
11 Nassau County Supreme Court justices - - -

12 JUDGE CIPARICK: Because the auditors and
13 accountants who looked at it believed that these were
14 the true - - -

15 MR. CATTERSON: Actual bank statements.

16 JUDGE CIPARICK: - - - actual statements.

17 CHIEF JUDGE LIPPMAN: Well, let me ask you
18 - - -

19 JUDGE GRAFFEO: You can delegate all the
20 responsibility to someone else, a non-attorney?

21 MR. CATTERSON: He wasn't delegating the
22 responsibility of a fiduciary. He was assigning the
23 task for an accountant or a bookkeeper. He was not
24 giving the authority to the bookkeeper to withdraw
25 monies, to transfer monies - - -

1 JUDGE GRAFFEO: So a lawyer could outsource
2 that to some third party - - -

3 MR. CATTERSON: So long as he has
4 appropriate - - -

5 JUDGE GRAFFEO: - - - and take - - -

6 MR. CATTERSON: - - - oversight.

7 JUDGE GRAFFEO: - - - and make the same
8 argument?

9 MR. CATTERSON: There has to be - - -

10 JUDGE GRAFFEO: I've still done my
11 fiduciary duty?

12 MR. CATTERSON: So long as he has
13 appropriate oversights and, when he establishes the
14 accounts, puts into place the provisions that comply
15 with those fiduciary obligations. There was no
16 foreseeability here.

17 CHIEF JUDGE LIPPMAN: Counselor, do you
18 believe that there could be a different standard in
19 what the DA might view the situation in terms of the
20 cooperation of your client versus the ethical rules
21 that govern the practice of law?

22 MR. CATTERSON: I will concede that the
23 District Attorney's Office were not viewing the
24 appellant's ethical obligations, but they were
25 viewing the same facts and circumstances that the

1 Appellate Division was viewing, as well - - -

2 JUDGE PIGOTT: Your argument - - - I'm
3 sorry. Please finish.

4 MR. CATTERSON: - - - as well as the two
5 Nassau County Supreme Court justices all viewed the
6 same fact pattern; all received the same
7 documentation, same information, came to the
8 conclusion that the appellant and the firm, not only
9 did they not know, they could not have known, given
10 the legitimate-looking bank statements they were
11 reviewing and the totality of the circumstances of
12 what they were seeing.

13 JUDGE SMITH: Counselor, what - - -

14 JUDGE CIPARICK: What about the accounting
15 to the Barons? After all this was over, isn't there
16 also a charge that he failed to adequately account to
17 the Barons for monies? Yeah.

18 MR. CATTERSON: There is. And that's
19 twofold. If you address it in the first instance,
20 the accounting that he would have to initially
21 produce to the Barons, would be of the activities on
22 the account. Known to the appellant at that time,
23 there was no activity on the account. There was a
24 single authorized transaction of a 100,000-dollar
25 payment to Mrs. Baron's attorney. Other than that

1 singular transaction and the interest that should
2 have been accruing on a monthly basis, there was
3 nothing else to account for.

4 JUDGE CIPARICK: What about his lack of
5 cooperation with the grievance committee? Isn't
6 there an allegation that - - -

7 MR. CATTERSON: There is an allegation,
8 Your Honor. But if you review the record, it cannot
9 be substantiated by the record. We have voluminous
10 documentation produced to the committee. And if I'm
11 going to curtail it - - -

12 CHIEF JUDGE LIPPMAN: Why do you think they
13 took the view that they did about his cooperation;
14 putting aside whether he violated the ethical rules
15 or not?

16 MR. CATTERSON: I believe that they didn't
17 understand the fact pattern that they were dealing
18 with. I believe that there was a supposition that
19 was brought into the case originally, and their
20 investigation was trying to fit that square peg into
21 - - -

22 JUDGE SMITH: On the - - -

23 MR. CATTERSON: - - - that round hole.

24 JUDGE SMITH: - - - on the actual
25 cooperation, is it possible that they confused a

1 disagreement with misconduct? I mean, they said we
2 want these documents; you said, I don't think you
3 should have these documents?

4 MR. CATTERSON: And I'll take it one step
5 further. Yes. Whereas there may have been a
6 dialogue about what the responsibilities were, every
7 single response at the end was we will produce - - -
8 the appellant would produce. What was lost here is
9 he no longer had the documentation to produce.

10 JUDGE SMITH: Is there any allegation - - -
11 I mean, I understand you would say it didn't happen -
12 - - but is there any allegation that his alleged
13 noncooperation was designed to mislead or conceal or
14 slow up anything?

15 MR. CATTERSON: That was the conclusion or
16 the supposition reached by the referee, which is
17 belied - - -

18 JUDGE SMITH: What did the referee find the
19 motive to be? Do you know?

20 MR. CATTERSON: There was some reference
21 that he believed the culpability in the civil action
22 by the firm may in some way have affected his
23 cooperation or the firm's cooperation - - -

24 JUDGE SMITH: So the theory - - -

25 MR. CATTERSON: - - -in the grievance.

1 JUDGE SMITH: - - - the theory was that he
2 wanted - - - he was trying to keep the grievance
3 committee from getting documents that might lead to
4 some civil liability. Okay. And if I asked - - - I
5 shouldn't ask you to explain that; I should ask him.
6 Okay.

7 MR. CATTERSON: Correct. But that's belied
8 by the record, which shows that four months after the
9 theft was discovered, the appellant and his firm
10 commenced a civil action to recoup the monies,
11 knowing full well that any and all documentation is
12 going to be disclosed in that proceeding.

13 JUDGE PIGOTT: Mr. Catterson, what is the -
14 - -

15 JUDGE GRAFFEO: Have the clients received
16 any recompense?

17 JUDGE PIGOTT: I'll get there.

18 JUDGE GRAFFEO: I'm sorry.

19 MR. CATTERSON: Those actions are still
20 pending, Your Honor. It's five years later and - - -

21 JUDGE GRAFFEO: Is that a no?

22 MR. CATTERSON: No, not at this point, Your
23 Honor.

24 CHIEF JUDGE LIPPMAN: Judge Pigott.

25 MR. CATTERSON: But the civil actions are

1 still pending to do so.

2 JUDGE GRAFFEO: Judge Pigott.

3 CHIEF JUDGE LIPPMAN: Judge Pigott.

4 JUDGE PIGOTT: What's our standard of
5 review here? I understand the facts that you're
6 relating and of course there's a judicial hearing
7 officer who made findings of fact and conclusions.
8 The Second Department said what it said. Isn't our
9 jurisprudence that we have a fairly narrow review
10 ability here?

11 MR. CATTERSON: I believe this court has
12 the ability to give the review it so deems warranted
13 in this specific fact pattern. The committee has
14 already said that it was a de novo review by the
15 Appellate Division. I believe that you would step
16 into those shoes, as well, and have the ability to do
17 a de novo review, as well.

18 JUDGE SMITH: Even as to the sanction?

19 MR. CATTERSON: Absolutely.

20 JUDGE SMITH: They don't - - - doesn't the
21 Appellate Division have some discretion in making
22 this call?

23 MR. CATTERSON: But if there's an abuse of
24 that discretion based upon the record, this court can
25 step in.

1 JUDGE CIPARICK: So this is an - - -

2 JUDGE SMITH: But that's different from de
3 novo review, isn't it?

4 JUDGE CIPARICK: This is an abuse of
5 discretion as a matter of law?

6 MR. CATTERSON: I believe, based upon the
7 record, it would be.

8 JUDGE CIPARICK: It rises to that level?

9 MR. CATTERSON: Yes.

10 JUDGE PIGOTT: Because you want to say that
11 you've been treated to a standard of strict
12 liability: that the money's missing, therefore you
13 violated the canons of professional responsibility?

14 MR. CATTERSON: Correct.

15 JUDGE PIGOTT: And you want us to say
16 that's not true. Would we then send it back?

17 MR. CATTERSON: I don't believe you would
18 have to, because the record is complete. I don't
19 believe there's a question of fact. There's a
20 question of the interpretation of those facts, but
21 there's a complete record before this court that, as
22 the committee has conceded in their brief, there were
23 stipulated facts, and the most of the exhibits that
24 went into evidence were stipulated into evidence.

25 CHIEF JUDGE LIPPMAN: Why couldn't you look

1 at this, instead of saying that it's a per se rule or
2 strict liability, why wasn't what the grievance
3 committee did - - - why isn't it just a failure of
4 oversight; that monies could be missing and in some
5 cases no responsibility, because it was - - - the
6 lawyer did the best that he or she could to oversight
7 (sic) and to follow it; in other cases, it's a
8 failure of oversight. Why is it a strict - - - why
9 do you view it as a strict liability situation?

10 MR. CATTERSON: For the very reason - - -

11 CHIEF JUDGE LIPPMAN: If you do. Yeah.

12 MR. CATTERSON: - - - for the very reason
13 you just brought up, that there was oversight here.
14 Every other case that's been cited by the Appellate
15 Division and the committee, there is no oversight.
16 There's a complete abdication of the account. Here
17 there - - -

18 JUDGE SMITH: But complete abdication isn't
19 the standard, is it? You can't say that anything
20 short of complete abdication is okay?

21 MR. CATTERSON: Absolutely not. What we're
22 saying here is that the appellant's conduct, when
23 viewed in an objective standard of a reasonable
24 attorney and the given circumstances, not today, but
25 2004 and 2005, when it was occurring, that his

1 conduct and his oversight was reasonable at that
2 time.

3 JUDGE SMITH: And isn't - - - I mean, but
4 isn't an attorney held to a duty of extreme
5 vigilance, really, of - - - unusual vigilance, when
6 he's looking over escrow funds. This isn't the - - -
7 or shouldn't he be even more careful than he would
8 have been with his own money?

9 MR. CATTERSON: He's held to the standard
10 of a fiduciary. The fiduciary standard is the same
11 whether it's for an attorney, a third party, or an
12 accountant. There's a fiduciary obligation. A
13 trustee. And I labeled for this court before, the
14 four areas of that fiduciary obligation that's
15 nondelegable.

16 CHIEF JUDGE LIPPMAN: Are you saying that
17 what the brother did was undetectable by a reasonably
18 vigilant, capable attorney?

19 MR. CATTERSON: Not only am I saying that,
20 Your Honor, the District Attorney's Office said that,
21 Justice Palmieri said that, Justice Warshawsky said
22 that. And we can look at it and say - - -

23 JUDGE CIPARICK: Well, that's not exactly
24 what they said. They said that there was - - - it
25 was insufficient evidence to proceed with a criminal

1 prosecution. They didn't say that the oversight was
2 reasonable or not reasonable.

3 MR. CATTERSON: They didn't go to his
4 oversight, Your Honor, because they weren't ruling on
5 that issue. What they did say is that - - -

6 JUDGE CIPARICK: That's our issue here.

7 MR. CATTERSON: Absolutely. But the
8 findings of fact that the District Attorney's Office
9 made, and Justice Palmieri and Justice Warshawsky,
10 was that the appellant could not have known, given
11 the layers of fraud that took place by the
12 bookkeeper.

13 JUDGE GRAFFEO: Can you address the
14 purchase of the condominium, the office?

15 MR. CATTERSON: Absolutely.

16 JUDGE GRAFFEO: Because where did the
17 members of the firm think that that money had come
18 from?

19 MR. CATTERSON: It was the appellant's
20 custom and practice to have a separate money market
21 account where any of his excess earnings that he
22 generated on a monthly basis, a bi-monthly basis,
23 would then be deposited into that money market
24 account.

25 The bookkeeper produced to the appellant

1 QuickBooks statements, which is a generally accepted
2 program for attorneys and accountants, delineating
3 the savings he was accumulating. And when the time
4 came to purchase the condominium, the appellant
5 directed the bookkeeper: from my money market
6 account, distribute the down payment.

7 A year later, when the closing took place
8 in September of 2005: from my money market account,
9 make the final payment. The bookkeeper produced
10 authentic-looking QuickBooks - - -

11 CHIEF JUDGE LIPPMAN: Well, wouldn't he
12 have some idea of what should be in the money market
13 account?

14 MR. CATTERSON: Absolutely. And these
15 QuickBooks statements verified what it should be.
16 You had referenced before the firm's monthly
17 financial statements - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. CATTERSON: - - - which really
20 delineates all the transactions in the firm's
21 accounts on a monthly basis. That also verified the
22 money market account balances or savings that were
23 being put into the money market account.

24 JUDGE PIGOTT: In fact, Anthony had moved
25 money to make sure that that balanced, right?

1 MR. CATTERSON: Yes, he did.

2 JUDGE JONES: Do you think - - -

3 MR. CATTERSON: This was the ultimate Ponzi
4 scheme. He would take from one victim; finish with
5 one victim; move on to the next. And he covered his
6 tracks very well. And - - -

7 CHIEF JUDGE LIPPMAN: Judge Jones?

8 JUDGE JONES: Do you think the fact that
9 this was his brother made your client less likely to
10 scrutinize the accounts?

11 MR. CATTERSON: Not that it was his
12 brother, per se. You had the whole context of the
13 employee, the fifteen-year relationship with the
14 employee, the relationship with every other member of
15 the firm and employee of the firm, with that
16 bookkeeper, and what everyone saw or believed was
17 taking place with that individual, that added to the
18 cumulative effect of how you should treat this
19 individual.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 JUDGE SMITH: I'm sorry, can I ask?

22 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
23 Smith.

24 JUDGE SMITH: Has your client made - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 JUDGE SMITH: - - - any restitution from
2 his personal funds?

3 MR. CATTERSON: From his personal funds, he
4 has funded the civil litigation, Your Honor.

5 JUDGE SMITH: Okay. But he hasn't actually
6 paid claimants from his funds?

7 MR. CATTERSON: No. If he had done that,
8 then you're saying that - - - or to do so would say
9 that he's an insurer of the monies that were taken by
10 a third party.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.
12 Thanks.

13 MR. CATTERSON: Thank you, Your Honor.

14 CHIEF JUDGE LIPPMAN: You have your
15 rebuttal time.

16 MR. CATTERSON: Thank you.

17 CHIEF JUDGE LIPPMAN: Counselor?

18 JUDGE CIPARICK: So you agree with the fact
19 that attorneys should not be deemed insurers of their
20 escrow accounts? Do you agree with that?

21 MR. LEE-RENERT: We don't believe that
22 attorneys are insurers on their escrow account, Your
23 Honor.

24 JUDGE SMITH: Is the fact - - - are you - -
25 - I don't see any point at which you complain about

1 inadequate restitution or efforts to make
2 restitution.

3 MR. LEE-RENERT: Well, he was charged with
4 unjust enrichment. But the Second Department
5 specifically has a rule that restitution is not a bar
6 to a disciplinary proceeding.

7 JUDGE SMITH: Well, it's one thing to say
8 it's not a bar. But obviously, if he had - - - if he
9 was sitting there on a huge pile of money and said
10 no, I'm keeping it, I'm not helping, you could have
11 held that against it - - - against him. But I don't
12 see that you did.

13 MR. LEE-RENERT: Well, typically, in
14 disciplinary cases, restitution or whether there was
15 client harm often is considered as whether it's a
16 fact in mitigation or a fact in aggravation.

17 JUDGE SMITH: And you don't say it's either
18 here?

19 MR. LEE-RENERT: Well, while it's not
20 stated in here, the fact that he received money from
21 the funds that were stolen, both for his condominium
22 and for his firm when it happened - - -

23 JUDGE SMITH: Well, let me try a yes or no
24 question. Are you saying that his failure to make
25 restitution is a fact in aggravation?

1 MR. LEE-RENERT: I'm saying it could be
2 deemed as a fact in - - -

3 JUDGE SMITH: You want to answer the - - -

4 MR. LEE-RENERT: Then, no, it's not listed
5 as a fact in aggravation here.

6 CHIEF JUDGE LIPPMAN: Counselor, why would
7 the district attorney and the judges seem to make the
8 basically positive comment about Mr. Galasso and his
9 actions, and something along the lines that it really
10 wouldn't be something that he would be able to know?

11 MR. LEE-RENERT: Well, they were - - -

12 CHIEF JUDGE LIPPMAN: Why would they make -
13 - - is it a different standard, or what is it that's
14 not credible about those findings or statements?

15 MR. LEE-RENERT: Well, it was a standard,
16 both in the criminal matter - - - you were talking
17 about the standard to bring criminal charges. With
18 regards to those cases, they were looking at the
19 issue of actual knowledge. I disagree with my - - -

20 JUDGE PIGOTT: We had a case - - - we had a
21 case a few months ago, I forget the cite, but
22 Greenberg Trager v. I think HSBC. And what had
23 happened there is that they had gotten into a
24 situation where they thought someone, I think from
25 Hong Kong, was retaining them for purposes of

1 collections.

2 The sum and substance of it was that they
3 were stuck with about a 900,000-dollar check that
4 they called the bank and asked if it had cleared; the
5 bank said yes, that there's a little discrepancy
6 here. But it turns out that - - - then CitiBank, who
7 it was drawn on said, it's a phony check; that's not
8 our check.

9 They were out of trust 900,000 dollars, I
10 think, the minute that check got dishonored. In your
11 view, is that then a violation of the canons of
12 professional responsibility?

13 MR. LEE-RENERT: That would not necessarily
14 be a violation. The standard is if whether or not,
15 in the exercise of reasonable oversight and
16 diligence, they would have been able to prevent the
17 fraud.

18 JUDGE PIGOTT: I'm having trouble finding
19 out what should have been done here that wasn't. And
20 I take a little bit of issue - - - I know at one part
21 you say, "none of these safeguards", one of them
22 being the partners handled daily bookkeeping and
23 accounts of the firm -- that would mean a lot of our
24 firms better turn themselves in -- that the
25 respondent opens bank account - - - bank mail

1 himself, that he personally reviews every check and
2 every bill, and that he speak to the accountant
3 monthly. And you say that because they were doing
4 this, none of these basic safeguards, which I suggest
5 to you, I doubt that there's many firms that do them,
6 because they didn't exist before, shows that they
7 didn't do what they were supposed to do.

8 And it seems to me that you're put - - -
9 you say these are basic. And I don't know where you
10 get that. I mean, having been in private practice, I
11 will tell you, that is not basic. That is super
12 oversight, because of what happened in the past.

13 MR. LEE-RENERT: We weren't saying that
14 each one of those is a requisite. But when you look
15 at it collectively - - -

16 JUDGE PIGOTT: "None of these basic
17 safeguards existed before." That's the quote. And I
18 don't see them as basic safeguards. They're good
19 things to do. I mean, if somebody cleaned out your
20 safe, you better go change the combo. But I
21 challenge your premise that these are basic
22 safeguards, because I don't think that's what's done
23 in firms.

24 MR. LEE-RENERT: Well, certainly there had
25 to be something for Mr. Galasso to verify what was

1 happening in the accounts.

2 JUDGE SMITH: Are you really saying he was
3 in fault for not opening the envelopes himself?

4 MR. LEE-RENERT: No, no. We're not saying
5 that it's simply that. We're saying when you looked
6 in the totality of everything that was happening - -
7 -

8 JUDGE SMITH: In the - - -

9 MR. LEE-RENERT: - - - at this firm.

10 JUDGE SMITH: - - - the bank state - - - he
11 did - - - the record does seem to show that he looked
12 at the actual bank state - - - what he thought were
13 actual bank statements.

14 MR. LEE-RENERT: Actually, Your Honor, the
15 record does not show that. If you look at the
16 referee's report, and you look at the record, all Mr.
17 Galasso ever claimed was that either he or an
18 associate looked at the record. He testified that he
19 could not remember specifically what records he may
20 have looked at.

21 JUDGE PIGOTT: Is there any venality being
22 charged here? I mean, I read the record thoroughly;
23 I looked at all the exhibits. I looked at what their
24 argument is. And I was looking for some evidence,
25 scintilla of venality in what went on here. It just

1 looked to me like there was that holy smokes moment
2 when Anthony came in and said, I just got to tell
3 you, I just took five million dollars out of your
4 firm. And then they, it seems to me, did everything
5 they were supposed to do.

6 MR. LEE-RENERT: That moment came after two
7 and a half years of Mr. Galasso not looking at a
8 single IOLA statement.

9 JUDGE PIGOTT: Right. But I'm saying,
10 where's the venality? I'll concede all that you want
11 to say happened here, but they did have a bookkeeper
12 who did this stuff, who reported to them on a regular
13 basis, who did absolutely it's - - - I shouldn't say
14 absolutely - - - but seemed to have done everything
15 that any law firm would want from their bookkeeper,
16 until they find out that the bookkeeper had done
17 this.

18 And you're not charging them with any
19 venality, right?

20 MR. LEE-RENERT: Venality is not a
21 necessary element to show misappropriation.

22 JUDGE PIGOTT: No. But I'm saying you're
23 not.

24 MR. LEE-RENERT: No, we're not charging
25 venality.

1 JUDGE PIGOTT: Because there's so many, as
2 you know, because you do this work, where it's - - -
3 the lawyer is taking money, where one of the famous
4 ones, I'm sure you've seen, is where there's money in
5 escrow and the lawyer says, I've got to pay my
6 daughter's tuition; I've got a client coming in at 2.
7 I'll write the check, and then when the guy comes in
8 at 2, I'll put the money back, and then he doesn't
9 show. That's - - - that's just spending out of
10 trust. That - - - even that didn't happen here.

11 MR. LEE-RENERT: I'm sorry, Your Honor?

12 JUDGE PIGOTT: There was no spending out of
13 trust here?

14 MR. LEE-RENERT: Well, the spending out of
15 trust was happening on a regular basis.

16 JUDGE CIPARICK: The monies were being
17 transferred to other accounts, right?

18 MR. LEE-RENERT: The monies were being
19 transferred, and more than ninety transfers came out
20 of the Baron account alone.

21 JUDGE SMITH: But you say he should have
22 known that. What exactly should he have done?

23 MR. LEE-RENERT: He should have - - - the
24 best example, I think, is when he learned - - - when
25 the firm was notified, that there was a short balance

1 in the Baron account - - - and there's no greater red
2 flag than the balance in the account being short - -
3 - he should have taken some meaningful role in
4 actually finding out what happened.

5 JUDGE SMITH: There was some - - - when he
6 was notified that there was a 5,000-dollar
7 discrepancy between - - -

8 MR. LEE-RENERT: Yes.

9 JUDGE SMITH: - - - an ending balance and a
10 - - -

11 MR. LEE-RENERT: Yes.

12 JUDGE SMITH: - - - and obviously what
13 happened is his brother said, oh, I checked with the
14 bank and they took care of that.

15 MR. LEE-RENERT: Yes.

16 JUDGE SMITH: You say he should have - - -
17 what should he have done instead?

18 MR. LEE-RENERT: He could have called the
19 bank.

20 JUDGE SMITH: He could have called the
21 bank. But I guess - - -

22 MR. LEE-RENERT: He could - - -

23 JUDGE SMITH: - - - what I'm saying is, if
24 you're sitting there with someone you trust in a,
25 what you think is a four million dollar account, and

1 someone says hey, there's a 5,000 - - - these numbers
2 miss by 5,000 dollars. And the guy you trust says
3 yeah, I called the bank; they took care of it. Is it
4 so bad to say okay? I mean, it's not as though it's
5 50,000?

6 MR. LEE-RENERT: When you're dealing with a
7 fiduciary account, Your Honor, respectfully, no, it's
8 not okay. You should be - - - you should be seeing
9 things as potential red flags and irregularities, not
10 thinking of ways to rationalize - - -

11 CHIEF JUDGE LIPPMAN: What about the - - -

12 MR. LEE-RENERT: - - - how it makes sense.

13 CHIEF JUDGE LIPPMAN: - - - what effect do
14 you think all of this will have, if we affirm the
15 penalty, what does it have on the average lawyer with
16 escrow accounts? Is it a favorable result that tells
17 lawyers that you have to be extremely vigilant when
18 it comes to escrow accounts, or does it make lawyers
19 nervous about taking money in an escrow, which is a
20 fairly typical event?

21 MR. LEE-RENERT: Well, since the standard
22 here has not changed, you could say nothing would
23 happen. Understandably, any time somebody - - -

24 CHIEF JUDGE LIPPMAN: You don't think this
25 case has sort of gotten a lot of attention, because I

1 think escrow accounts are such a common thing in a
2 practicing lawyer. And I guess the standard of
3 oversight or care or vigilance, is very much a matter
4 of interest for the bar. So does it send a message?
5 I would think that you want to send a message.

6 MR. LEE-RENERT: I think it reminds
7 attorneys of the vigilance that they are supposed to
8 have and that they've been consistently - - -

9 CHIEF JUDGE LIPPMAN: How would you define
10 that vigilance? What's your standard in terms of the
11 oversight - - - if you had to summarize it, what's
12 the nature of that oversight?

13 MR. LEE-RENERT: That you have to provide
14 reasonable oversight based upon the circumstances.
15 And that may vary if you're in a 500-person firm
16 versus a - - -

17 JUDGE GRAFFEO: Is that a strict liability
18 standard?

19 MR. LEE-RENERT: No, it is not a strict
20 liability standard.

21 JUDGE GRAFFEO: Because if we're
22 uncomfortable with a strict liability standard, as
23 obviously the bar associations that have submitted
24 briefs here are very concerned with, I think what the
25 Chief is trying to get at is, what's the test?

1 What's the rule? How do people know what they - - -
2 how do attorneys know what they have to do?

3 MR. LEE-RENERT: On a reasonable standard,
4 there has to be some degree of leeway based on the
5 circumstances. But as the Appellate Division found
6 in their report, Mr. Galasso did not either review,
7 audit, or reconcile the accounts in any meaningful
8 way.

9 So while it doesn't define that you have to
10 do specific tasks, the attorney should find a way
11 that some fiduciary - - - and there was no fiduciary
12 here who was overseeing the accounts, because Mr.
13 Galasso wasn't - - - but some fiduciary should be
14 able to verify and have some more direct knowledge of
15 what's happening in the account instead of simply
16 taking the word of the non-attorney, non-fiduciary to
17 whom he delegated.

18 CHIEF JUDGE LIPPMAN: So is that a new
19 rule? Is that a new standard?

20 MR. LEE-RENERT: No, it is not, Your Honor.
21 This is the same standard that's been set forth in
22 the cases that we provided in our brief.

23 JUDGE GRAFFEO: So every lawyer has to call
24 the bank periodically? Is that reasonable?

25 MR. LEE-RENERT: It's not necessarily

1 whether it's calling the bank or whether it's
2 reviewing the statements, whether it's meeting with
3 the accountant personally, but there has to be more
4 than simply looking at a piece of paper that somebody
5 wrote a number on and handed it to you. And that's
6 what - - - all he did here.

7 JUDGE PIGOTT: Well, that's not what
8 happened here. You're making it - - - that's not
9 what happened here. You're making this - - - you're
10 being very flip, it seems to me, about the facts.

11 MR. LEE-RENERT: That - - - in fact, Your
12 Honor, that's exactly what happened here. Those
13 monthly statements - - -

14 JUDGE PIGOTT: You're saying that Anthony
15 wrote a number on a piece of paper and handed it to
16 his brother and said this is what you got in the
17 bank?

18 MR. LEE-RENERT: That's what the monthly
19 statements were. If you look at the - - -

20 JUDGE PIGOTT: I thought - - -

21 MR. LEE-RENERT: - - - monthly statements -
22 - -

23 JUDGE PIGOTT: Excuse me. I thought that
24 he had doctored them, he made them look like the real
25 bank statements, and that the ones that Peter Galasso

1 got from Anthony looked like the real bank
2 statements.

3 MR. LEE-RENERT: That's for the Baron
4 account, Your Honor. For the IOLA account, the only
5 oversight that was given was these monthly statements
6 which were sometimes forty pages which contained in
7 one - - -

8 JUDGE SMITH: Was it not - - -

9 MR. LEE-RENERT: - - - page - - -

10 JUDGE SMITH: - - - the IOLA account, as I
11 remember, was one that Mr. Galasso had rather little
12 to do with, that it was primarily his partner. I
13 mean, does every partner in the firm have to look at
14 the IOLA statements?

15 MR. LEE-RENERT: He actually had more
16 involvement than he would suggest. And in
17 Respondent's Exhibit S and T - - -

18 JUDGE SMITH: Weren't they mostly personal
19 injury awards in that IOLA account?

20 MR. LEE-RENERT: Well, there were more
21 personal injuries. He had thirty-three matters over
22 the course of the period in the Signature Bank
23 account. He had twenty matters in the M&T IOLA
24 account. He was regularly and periodically using the
25 account. In fact, the monthly statements - - -

1 JUDGE SMITH: So you're saying that even if
2 the account is predominantly - - - even if it's
3 predominantly used by the personal injury attorney,
4 the matrimonial attorney, who uses it occasionally -
5 - - and I gather those were for less large amounts?

6 MR. LEE-RENERT: It - - -

7 JUDGE SMITH: You don't want to answer,
8 okay.

9 MR. LEE-RENERT: Yes. I'm sorry. It
10 varies from matter to matter in each of the cases.

11 JUDGE CIPARICK: Right. Because the Baron
12 account was 4.8 million.

13 JUDGE SMITH: No, no. But the Baron
14 account was not IOLA, was it? The Baron account - -
15 -

16 MR. LEE-RENERT: Not the IOLA account.

17 JUDGE SMITH: - - - was - - - yes.

18 JUDGE CIPARICK: That was escrow.

19 JUDGE SMITH: - - - the Baron account was a
20 Signature Bank account and - - -

21 JUDGE PIGOTT: But if you have a - - -

22 JUDGE SMITH: - - - and we know - - - we've
23 seen forged statements on that account.

24 JUDGE PIGOTT: When you have an escrow
25 account - - - and maybe - - - I guess the statute's

1 run on anything I did - - - but you send over your
2 paralegal to do a house closing with about three
3 escrow checks: one to pay for the mortgage recording
4 tax, one to pay for the recording of the mortgage, et
5 cetera. And they come back and then they give you
6 the closing statement and they spent this, this and
7 this.

8 Are you suggesting that I was in violation
9 of the canons of professional responsibility by
10 giving blank or signed, but not filled in, escrow
11 checks to my paralegal to close a house?

12 MR. LEE-RENERT: No, not necessarily, Your
13 Honor.

14 JUDGE PIGOTT: I'm okay, there?

15 MR. LEE-RENERT: The New York State Bar
16 Association has actually opined directly on that
17 issue, and it has said that when you delegate these
18 tasks you have - - - the attorney has to be mindful
19 of maintaining vigilant oversight, because they could
20 be responsible for the errors or the misuse of the
21 trust that's been delegated.

22 JUDGE CIPARICK: Let me ask you. If we
23 agree with you in terms of the misconduct, is there
24 anything we could do with respect to the penalty?
25 Can we bifurcate that and - - - do we have any

1 discretion?

2 MR. LEE-RENERT: I wouldn't - - -

3 JUDGE CIPARICK: What would one have to do?

4 MR. LEE-RENERT: I wouldn't want to tell
5 Your Honors what to do. However, that would be a
6 departure from the prior cases of this court which
7 have found that the issue of sanction is in the
8 discretion of the Appellate Division.

9 JUDGE SMITH: So you - - -

10 JUDGE CIPARICK: From us, if we found a
11 abuse of discretion of a matter of law, we couldn't
12 do anything with the penalty.

13 MR. LEE-RENERT: Well, for example, in the
14 Matter of Kelley, where it found that some of the
15 charges were dismissed, but one may be upheld, it
16 then remanded it back to - - - this court remanded it
17 back to the Appellate Division - - -

18 JUDGE SMITH: Are you saying - - -

19 MR. LEE-RENERT: - - - where it sustained
20 some but not other - - -

21 JUDGE SMITH: - - - are you saying we have
22 no power to review, even for abuse of discretion?

23 MR. LEE-RENERT: The cases whether it's
24 Ackstole (ph.) or Matter of Mix or who else, has
25 shown that where charges have been sustained, where

1 misconduct has been found - - -

2 JUDGE SMITH: I hate to be - - - I seem to
3 be having a hard time getting yeses and nos.

4 MR. LEE-RENERT: Okay.

5 JUDGE SMITH: Are you saying we have no
6 standard - - - we have no power to review even for
7 abuse of discretion? You can say yes. It's not a
8 problem.

9 MR. LEE-RENERT: There's no precedent of
10 this court ever doing it. It has always deferred to
11 the Appellate Division. Except for cases in which
12 there was no - - -

13 JUDGE SMITH: Isn't that - - - I mean, I
14 guess - - -

15 MR. LEE-RENERT: - - - charges sustaining,
16 you dismissed.

17 JUDGE SMITH: - - - I see your point about
18 the cases. But isn't it troublesome that you're
19 essentially - - - if we have no power to review
20 there's no review, because the Appellate Division
21 makes the initial determination, right?

22 MR. LEE-RENERT: Well, with regards to
23 sanction - - -

24 JUDGE SMITH: With regard to sanction. I'm
25 talking about sanction.

1 MR. LEE-RENERT: - - - the judiciary law
2 has specifically and exclusively vested that - - -
3 the power to suspend or - - -

4 JUDGE SMITH: Where does it say
5 "exclusively"?

6 MR. LEE-RENERT: In Section 90 - - - it
7 doesn't say "exclusively". This court, however, in
8 the arbitration of Erlanger in 1967 referred to it as
9 being the exclusive power of the Appellate Division.

10 JUDGE SMITH: So you do interpret that as
11 meaning there's no review at all, even for abuse of
12 discretion?

13 MR. LEE-RENERT: If the court has found
14 that misconduct charges have been sustained, then
15 there's no discretion.

16 JUDGE SMITH: Yes, is a permissible answer.
17 You can say - - -

18 MR. LEE-RENERT: Yes, Your Honor.

19 JUDGE SMITH: Yes.

20 JUDGE PIGOTT: Would you, in your final
21 time here, talk about the failure to cooperate?

22 MR. LEE-RENERT: Yes, Your Honor.

23 JUDGE PIGOTT: Do you disagree with Mr.
24 Catterson on it?

25 MR. LEE-RENERT: The failure to cooperate,

1 which is really laid out finely in detail by the
2 special referee, shows that first, Mr. Galasso did
3 not timely respond to our request for information.
4 That was why the subpoenas were necessary in this
5 case, because he was unresponsive. Then for an
6 extended period, Mr. Galasso was given the
7 opportunity - - -

8 JUDGE CIPARICK: Was the criminal
9 investigation still pending at that time?

10 MR. LEE-RENERT: I'm sorry?

11 JUDGE CIPARICK: Was the criminal
12 investigation pending at that time?

13 MR. LEE-RENERT: The criminal - - - the
14 criminal investigation, I don't believe was still
15 pending at that time, Your Honor. I'm not sure if
16 sentencing had occurred.

17 JUDGE CIPARICK: So there's no issue that
18 maybe he didn't want to cooperate because he didn't
19 want to incriminate himself or - - - there's no - - -

20 MR. LEE-RENERT: There was no Fifth
21 Amendment issue raised, Your Honor.

22 JUDGE SMITH: What do you say his motive
23 was?

24 MR. LEE-RENERT: No matter how many times
25 we asked, he never provided - - - he never showed

1 where the money went.

2 JUDGE SMITH: What do you say his motive
3 was?

4 MR. LEE-RENERT: Motive isn't an element
5 here, but - - -

6 JUDGE SMITH: Okay.

7 MR. LEE-RENERT: - - - it seems - - - I
8 concur with the special referee that he delayed
9 advising us exactly how much he benefitted - - -

10 JUDGE PIGOTT: Did you move for sanctions?
11 I mean, old PJ here, I mean, if our grievance
12 committee issues a subpoena that's not honored,
13 usually they come and talk to us and we get angry.

14 MR. LEE-RENERT: The charge of failure to
15 cooper - - -

16 JUDGE PIGOTT: Did you do that?

17 MR. LEE-RENERT: I'm sorry, Your Honor.

18 JUDGE PIGOTT: Did you do that with respect
19 to your subpoenas?

20 MR. LEE-RENERT: That's what the charge of
21 failing to cooperate is.

22 JUDGE PIGOTT: I know that. But did you do
23 that with respect to your subpoenas? In other words,
24 in order to prove your case, you need this
25 information.

1 MR. LEE-RENERT: No, we - - -

2 JUDGE PIGOTT: So when the subpoena's not
3 honored, you then move to say would you please
4 sanction these people because they're not giving us
5 what we want?

6 MR. LEE-RENERT: I apologize, Your Honor,
7 if I misunderstood. We did not allege that they
8 failed to comply with the subpoena. We alleged that
9 the subpoena was necessary because they did not
10 respond to our lawful request prior to subpoena.

11 JUDGE PIGOTT: That makes it noncooperation
12 because you had to iss - - -

13 MR. LEE-RENERT: That is sufficient - - -
14 that is sufficient - - -

15 JUDGE PIGOTT: - - - let me finish. Let me
16 finish. Because you had to issue a subpoena, means
17 they didn't cooperate?

18 MR. LEE-RENERT: Because they didn't answer
19 our request, which there's no dispute they received.
20 Because they were unresponsive, that's the failure to
21 cooperate.

22 JUDGE SMITH: So you say that even if - - -
23 even apart from motive, if a lawyer gets a request
24 from you and does not give you what you want, that's
25 misconduct?

1 MR. LEE-RENERT: If the information - - -
2 if it was a lawful request, and the information was
3 relevant to the investigation, yes.

4 JUDGE SMITH: What if the lawyer is surly
5 enough to disagree with you that it's relevant.

6 MR. LEE-RENERT: The lawyer has options at
7 that point. Whether they can make a motion to the
8 Appellate Division with regards to the request,
9 whether - - -

10 JUDGE SMITH: Well, they can certainly make
11 a motion. But this is just - - - this is before you
12 serve a subpoena. You ask them for something, they
13 say I don't think you're entitled to that.

14 MR. LEE-RENERT: There was - - - that's not
15 the - - -

16 JUDGE SMITH: Misconduct right there?

17 MR. LEE-RENERT: That's not the facts of
18 this case, Your Honor. There was no response. And
19 again, they had options if they felt the
20 investigation had gone beyond a proper scope. They
21 were represented by experienced counsel. Nothing was
22 done.

23 JUDGE SMITH: There was no response? I
24 mean, you say the response was unsatisfactory.
25 You're not saying they ignored your letters, or are

1 you?

2 MR. LEE-RENERT: They did ignore the letter
3 until after the subpoena.

4 JUDGE SMITH: There are unanswered letters?
5 I didn't see that.

6 MR. LEE-RENERT: They did not answer the
7 letter until after the subpoena. They then responded
8 after service of the subpoena, and then their
9 examination under oath was scheduled.

10 CHIEF JUDGE LIPPMAN: Okay, Counselor.
11 Thanks.

12 MR. LEE-RENERT: Thank you, Your Honors.

13 CHIEF JUDGE LIPPMAN: Counselor?

14 MR. CATTERSON: Your Honors, if I may
15 address first the failure to cooperate charge. I
16 disagree, and the record will show that the appellant
17 did respond to every single request made by the
18 committee.

19 CHIEF JUDGE LIPPMAN: Before the subpoena?

20 MR. CATTERSON: Before the subpoena. The
21 subpoena was issued based upon the erroneous belief
22 by the committee that the appellant had the requested
23 documents in his possession. As the justice pointed
24 out, there was a district attorney's investigation,
25 that every document the firm had was turned over to

1 contention between the respondent and the lead
2 investigator, unfortunately.

3 CHIEF JUDGE LIPPMAN: What do you think - -
4 - what do you think was at the crux of that? What
5 was going on? Why did this happen? We assume, if we
6 take you at face value, that your client wanted to be
7 cooperative, was as shocked as everyone else by what
8 happened. Why was this? What was underlying this?
9 I mean, is it your contention that they're looking to
10 get your client? I mean what was going on here?

11 MR. CATTERSON: I think it's a myriad of
12 circumstances that came together, one being what I
13 hinted on before that there was a presupposition
14 coming in. They believed that the appellant had to
15 know of the theft before. And his brother took the
16 money. How could the appellant not know? That's
17 what they came in here with.

18 And the appellant, obviously, we're looking
19 at a period of time where there's complete turmoil in
20 his life. Complete turmoil. His brother is just
21 guilty of stealing five million dollars from his
22 firm. His wife has just finished going through
23 breast cancer surgery. He's dealing with trying to
24 save the livelihood of his employees and is being
25 accused of certain different things.

1 So there's those combinations. So was
2 everybody perfect in that scenario? Probably not.
3 But was he uncooperative? Absolutely not. The
4 record will show every letter. A demand is made by
5 the committee. There's a response provided.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.
7 Thanks.

8 MR. CATTERSON: Thank you, Judges.

9 CHIEF JUDGE LIPPMAN: Thank you both.
10 Appreciate it.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Galasso, No. 170 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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