SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-127
District Docket No. XIV-2013-0624E

IN THE MATTER OF	:
JOHN ANDREW KLAMO	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 20, 2017

Decided: October 24, 2017

Andrea R. Fonseca-Romen appeared on behalf of the Office of Attorney Ethics.

Respondent's counsel waived appearance for oral argument.

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

This matter was before us based on a recommendation for a two-year suspension filed by the District IV Ethics Committee (DEC). A one-count complaint charged respondent with violations of RPC 1.15(a) (failure to safeguard client funds), RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter), and RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation). We voted to impose a two-year suspension.

Respondent was admitted to the New Jersey bar in 1982. In 1996, he was reprimanded for delegating his recordkeeping responsibilities to an employee whom he never supervised or instructed on recordkeeping practices. As a result, the employee misappropriated client funds. Respondent was found guilty of gross neglect, negligent misappropriation of client trust funds, commingling fees and trust account funds, recordkeeping violations, and failure to cooperate with ethics authorities. In re Klamo, 143 N.J. 386 (1996).

In 2013, respondent was suspended for three months for charging improper expenses in contingent fee matters; failing to promptly deliver funds belonging to clients and third parties by amassing approximately $100,000 in his trust account and failing to disburse deductibles and co-pays, in some instances for as long as thirteen years, until the Office of Attorney Ethics (OAE) began its investigation and instructed him to disburse the funds; recordkeeping violations; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; making material misstatements of fact to ethics authorities; and failure to maintain malpractice insurance. In re Klamo, 213 N.J. 494 (2013). On September 25,

2013, he was reinstated to the practice of law and ordered to practice under the supervision of an OAE-approved proctor for a two-year period and to submit to the OAE, also for a two-year period, on a quarterly basis, monthly reconciliations of his attorney accounts, prepared by an accountant. In re Klamo, 215 N.J. 520 (2013).

On June 15, 2016, respondent received a censure for misconduct in two consolidated matters, including failure to abide by the client's decisions concerning the scope of the representation, lack of diligence, failure to communicate with the client, failure to expedite litigation, and misrepresentation by silence. Although the Court also concluded that respondent had failed to maintain malpractice insurance, it declined to impose additional discipline because he had been found guilty of that infraction in his 2013 disciplinary matter. In re Klamo, 225 N.J. 331 (2016).

Finally, in a matter currently pending with the Court, we recommended that respondent receive a three-month suspension, in a default, for misconduct including gross neglect, lack of diligence, and failure to communicate with his clients. In that case, respondent permitted a complaint to be dismissed for failure to answer interrogatories. Respondent also failed to obtain his client's authorization before retaining an entity to

prepare an appellate brief, a violation of RPC 1.2(a). He violated RPC 5.5(a) by failing to submit certificates of insurance to the Clerk of the Court for the years 1998 to 2010, a requirement of R. 1:21-1A(b), and misrepresented the status of the case to his clients by telling them that their case was proceeding apace, a violation of RPC 8.4(c). In the Matter of John Andrew Klamo, DRB 16-443 (June 29, 2017).

This matter arises from a simple set of facts, made complicated by the widely divergent versions of events presented by the various witnesses below. Some essential facts, however, are not in dispute, as follows.

On March 3, 2011, a house owned by the grievant, Nancy Walker-Powell, located in Camden, New Jersey, was damaged by fire. Powell retained Garden State Public Adjusters, Inc. (GS) to assist in settling her claim with New Jersey Insurance Underwriters Association (NJIUA), with whom Powell had a $40,000 homeowner's policy. GS agreed to represent Powell in exchange for ten percent of the net settlement.

On May 24, 2011, GS settled the fire claim with NJIUA for the $40,000 policy amount. Because, however, the Administrator of Veterans Affairs (VA) was listed as the property owner, NJIUA did not disburse the settlement monies to Powell.

In December 2011, Powell retained respondent to expedite NJIUA's payment, and, on April 5, 2012, she signed a written fee agreement for the representation.

On January 25, 2012, respondent sent NJIUA a letter proving Powell's ownership of the property. Two days later, on January 27, 2012, NJIUA issued a settlement check for $40,000 payable to Powell, respondent, GS, and Midland Mortgage Company (Midland).

When respondent sought GS' endorsement on the check, the company refused, citing a contractual dispute with Powell. Therefore, on March 14, 2012, respondent filed an order to show cause (OTSC) to obtain GS' endorsement. The parties promptly settled the matter after GS agreed to reduce its fee from $4,000 to $2,500. Consequently, on April 19, 2012, respondent withdrew the OTSC.

By letter dated April 19, 2012, GS' counsel confirmed the agreement, and indicated that a representative would travel to respondent's office to endorse the check. According to the letter, respondent would thereafter deposit the check into his trust account and then issue a trust account check to GS.

In an April 24, 2012 meeting at respondent's office, Powell endorsed the settlement check and signed a settlement statement that respondent had prepared. That document listed

disbursements of $2,500 to GS; $2,000 to Service Star, whose workers helped secure the property; $3,000 for respondent's fee; and $379.90 for respondent's costs.

Respondent also drafted an April 24, 2012 letter to the contractor selected to make the repairs to the property, Gary Lupo, who owned an entity known as Foxcroft Properties. The Lupo letter stated, in part, as follows:

> It is my understanding that your company will have Midland Mortgage properly endorse said draft and you will deposit same in your company bank account and issue a check payable to [respondent and Powell] for . . . $7,879.70 which is for costs payable to Garden State Public Adjusters, Service Star Restoration and myself. The balance will be for the purposes of repairing [the] property. Please forward me a detail [sic] contract for the repair of said property for my client's signature.

One of the most highly contested issues in the ethics matter was what happened to the Lupo letter and the original check. Respondent claimed that he gave the letter and check to Powell, to hand-deliver to Lupo. For her part, Powell denied that respondent ever gave her the check or the letter to give to Lupo.

On April 26, 2012, respondent received a check, not from Lupo/Foxcroft, but from Filacon, LLC, for $7,879.70, the amount requested in the Lupo letter. Respondent deposited that check in

his attorney trust account and, the following day, sent disbursement checks to GS ($2,500) and Service Star ($2,000).

In August 2012, Powell and her daughter, Indya Walker,[1] arranged to meet with respondent, at his office, because repairs to the property were still incomplete. The events that took place that day are in dispute, and will be discussed below. The following day, Guy Bruno, Filacon's owner, called Powell to arrange a September 7, 2012 meeting at the property about the completion of repairs.

On September 3, 2012, prior to meeting Bruno, Powell sent respondent an e-mail demanding a detailed accounting of all disbursements he had made from the settlement proceeds.

In a September 14, 2012 letter to Powell, respondent replied as follows:

> First, I have constantly answered all your telephone messages and answered all of your questions. You have appeared in my office over 20 occasions where we have discussed your claim. . . . You should be well aware that the check was given to you and endorsed by me. It is my understanding that you personally . . . gave the check to the builder Gary Bruno and/or Gary Lupa [sic] at Foremost [sic] Builders. . . . Again, you gave the check of $40,000 to the builder. This check never went through any of my accounts.

[1] Walker's name is alternately spelled "India" in parts of the record.

[Ex.P-17.]

In his written reply to the grievance, respondent stated that, in April 2012, "[t]he parties came in and endorsed the check. [Powell] also endorsed the check." On April 24, 2012, he gave Powell a copy of the check, along with the original check, to give to the builder, along with respondent's April 24, 2012 letter to Lupo. Contrary to Powell's assertion that respondent had referred Lupo/Foxcroft to her to perform the repairs, respondent told investigators that, although he knew who Lupo was, he had not recommended that Powell retain him. Rather, Lupo had approached Powell at the property, of his own volition, and persuaded her to retain him.

I. Respondent's Version of Events

At the DEC hearing, respondent again claimed that Powell appeared at his office on April 24, 2012, signed in at the front desk (as evidenced by an office sign-in sheet containing her signature, next to the time: 10:57 a.m.) and signed a settlement statement. She had previously signed the January 27, 2012 settlement check during a prior visit immediately after the check was received.

Respondent further testified that, on an unknown date, he received Lupo/Foxcroft's $36,000 estimate for the repair work,

dated February 8, 2012. Respondent did not know how he came into possession of the estimate, whether Powell or Lupo had delivered it, or if it had come through the mail. However, it contained respondent's office "received" stamp dated February 8, 2012. The balance of the $40,000 settlement, after disbursements to respondent, GS, and Service Star, was $32,120.30, an amount insufficient to complete the repairs to the property, based on Lupo's $36,000 estimate.

Respondent further testified that he and Powell had discussed the possibility that she would be required to spend her own funds to complete the repairs. Powell later told respondent that Lupo had agreed to accept the $32,120.30 as payment in full for all of the repairs. Respondent had no part in negotiating this agreement. At Powell's urging, respondent listed Foxcroft Properties in the settlement statement as entitled to the $32,120.30 balance after disbursements.

According to respondent, by late April 2012, Powell sought to avoid waiting for him to obtain the Midland endorsement, the only party left to sign the settlement check. Respondent explained to her that processing the settlement check through his attorney trust account would require at least ten days. Powell then directed respondent to turn over the original check to her. She would then obtain the Midland endorsement, and give

the check to Lupo to deposit in his own bank account. In that way, Foxcroft could start work immediately.

Respondent acknowledged that his letter to Lupo lacked any indication that Powell would hand-deliver it, or that Powell was to receive a copy of it. Nevertheless, respondent claimed, Powell left his office that day with the original check and letter for Lupo, as well as copies of the check, letter, and settlement statement for her own file.

Respondent testified to his belief that he was acting ethically by providing the check to Powell, because it was at her own request, and that he had adequately safeguarded the settlement funds by doing so.

A few days later, respondent received a check in the mail for $7,879.70, the exact amount contemplated in the Lupo letter. It was drawn on the checking account of "Filacon, LLC," not Foxcroft. Respondent found nothing unusual about having received a check from an entity other than Foxcroft. He just assumed that Filacon was one of Lupo's companies.

Another point of contention below centered on whether respondent or Powell had retained Lupo/Foxcroft to perform the repairs. Respondent testified that, although he had known Lupo for twenty or thirty years (the two men gambled at the same casinos), he had not told Powell about Lupo or Foxcroft, and had

not recommended that she use them. In fact, respondent denied having recommended Lupo to any of his clients.

In turn, Lupo testified that he had known respondent for only five or six years, and did not know how Powell had obtained his contact information. Lupo, however, obtained work by word of mouth, did not advertise, and rarely did residential work.

Respondent's file for the Powell matter contained a facsimile cover sheet, indicating that a one-page document was sent from his law office to Foxcroft, at 12:45 p.m. on April 24, 2012. Although it was suggested that the Lupo letter had accompanied that cover sheet transmittal, respondent was unable to recall if that was so.

After receiving Filacon's April 26, 2012 check for $7,879.70, respondent directed Powell to visit his office to endorse it. Although he did not remember the date, respondent specifically recalled watching her sign it in his presence. Others in respondent's office that day, including his secretary, Denise Stone, also saw her sign the check.[2] After the Filacon check cleared his trust account, on May 3, 2012, respondent sent the disbursement checks to GS and Service Star.

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[2] Stone testified that Powell had called and visited the office twenty or more times, and that she saw Powell sign the Filacon check a few days after it was received in the office.

During the summer of 2012, Powell continued to visit respondent's office and to call him, complaining about the lack of progress of repairs at the property. Therefore, on a date unknown, respondent spoke with Lupo, who informed him for the first time that Guy Bruno and Filacon were assisting him with the repairs. Lupo did not tell him the entire truth – that Lupo and Foxcroft had decided against doing the job, and had turned it over to Bruno/Filacon.

II. Powell's Version of Events

At the DEC hearing, Powell testified that she bought the Camden property in 1987, as an investment. A March 3, 2011 fire inside the home displaced her tenant and caused significant damage, rendering the building uninhabitable. As of October 1, 2015, the date she testified at the DEC hearing, the house remained vacant and boarded up, the repairs never having been completed.

Powell was unable to recall signing the fee agreement, but did not contest that she had done so. Likewise, she did not specifically recall endorsing the $40,000 settlement check, but testified that she had gone to respondent's office to do so on or about January 27, 2012, the same date that the check was

written. She was the first person to endorse the reverse of the check.

According to Powell, she knew no contractor capable of handling the extensive repairs needed for her property. Respondent told her that he knew "someone good," and recommended Lupo/Foxcroft. Powell also testified that respondent had given her Foxcroft's itemized repair estimate, dated February 8, 2012, which Lupo had prepared. She further recalled a discussion with respondent that, because only $32,000 was available for Foxcroft's repairs, she might have to use some of her own funds to complete the repairs.

Powell testified that she had always expected respondent to deposit the settlement check in his trust account and disburse the settlement proceeds to all of the parties. She denied having seen the April 24, 2012 Lupo letter that respondent prepared. Likewise, she was unaware of the plan described in the letter whereby Lupo would obtain Midland's endorsement, deposit the settlement check in his bank account, and make the necessary disbursements.

Powell denied having asked respondent for the settlement check in order to expedite the repair process, or having taken possession of it. She specifically denied respondent's assertion that, when she signed the settlement statement at his office,

he gave her the original $40,000 check, along with instructions to give the check and a letter to Lupo when she next met with him. To the contrary, she had relied on respondent to obtain all of the endorsements and to disburse the settlement proceeds accordingly. She also believed that he would disburse funds to the contractors that he had hired to do the repairs.

According to Powell, GS removed debris from the property at the time of the fire in 2011. In 2012, someone that respondent hired replaced some of the windows in the house, but she did not know who did that or how they were paid. That was the extent of the repairs. She was anxious to know, but respondent never told her, what happened to the $32,000 that was supposed to finance all of the repairs.

In the summer of 2012, with no progress on the repairs, Powell contacted respondent, who told her to call Lupo. When she did so, Lupo told her that Filacon, Guy Bruno's company, was doing the repairs. She thought nothing of it at the time, having surmised, "[respondent] knew about it and that's what they had decided." On one occasion that summer, Powell "dropped in" to respondent's office on a day when Lupo happened to be there, but respondent was not in. Respondent's assistant, a man named Chris, asked her about the settlement check:

> And that's when Chris, the guy in the office there, took over, 'cause I -- the reason why

> I remembered that, remembered Chris, was because he kept saying, well, you got the check, didn't you? And I was really getting agitated because everybody was telling me that they -- they gave me a check, and nobody gave me a check.
>
> So I was kind of really irritated and I said, why do you keep saying that? Nobody gave me a check. I do not have the -- the check. So I don't know, he – I guess he just kind of like brushed me off.
>
> [2T39-9 to 19.][3]

Powell was asked about the $7,879.70 check from Filacon that respondent deposited in his trust account, which required her endorsement. Powell initially denied previously having seen that check. When she was shown an endorsement bearing her name, Powell insisted that she had not signed the check, stating, "[t]he signature was not how I write." She always hyphenated Walker-Powell. The signature on the Filacon check contained no such hyphen. Nevertheless, on cross-examination, she was less certain, saying that she did not recall seeing or signing that check.

[3] 2T refers to the transcript of the September 30, 2015 DEC hearing.

Indya Walker's Testimony

Powell's daughter, Indya Walker, testified that her mother had returned from a meeting at respondent's office, just after signing the January 27, 2012 settlement check, and told her that respondent knew a contractor named Lupo who could handle the renovation of the Camden house.

Thereafter, in June or July 2012, Walker contacted Lupo about the lack of progress at the property. Lupo met with her and Powell at the property a few days later for a walk-through of the house. After removing a door to gain access, Lupo saw that no recent work had been done to repair the premises. He "proceeded to not speak too kindly of [Bruno] in somewhat colorful language." He also told them that he had received no money from the job, that Bruno had previously "ripped him off," and that they needed to contact Bruno. He gave them Bruno's telephone number.

Walker was also present with Powell, an aunt and uncle, Lupo, and respondent's assistant, Chris, at an August 27, 2012 meeting in respondent's office. Although respondent had arranged the meeting, he was not present. At that meeting, Walker asked Chris several times what had happened to the settlement check, because the repairs were never done. Each time she asked, he

replied, "your only concern at this point should be getting your property fixed up."

Walker was also surprised to see Lupo at the meeting, because he had already told her that he received no settlement funds and was not involved in the repair work. Lupo said that he had been told to be there, and that he felt bad about her mother's situation. Claiming that his reputation was at stake, and in order that it not be "smeared," Lupo agreed to complete the repairs himself. Walker asked why he would do that if he received no money from the settlement, and he told her, "I just feel bad for you guys, and I don't want this to come back on me in any way." Walker and her mother did not take that offer seriously, and, in fact, never heard from Lupo again.

The next day, August 28, 2012, Bruno called Walker to perform another walk-through of the property, which took place a few days later. At that walk-through, Bruno told her that he had received the settlement check from Lupo, and had deposited it in his Filacon account.

Between September 7 and October 10, 2012, Walker and Bruno exchanged a series of e-mails about his intention to complete the repairs to the property. For example, Walker's September 10, 2012 e-mail to Bruno requested the following information: his liability insurance carrier; the names of any subcontractors he

intended to use; his New Jersey contractor's license number; a formal contract, to include the start date, completion date, and detailed descriptions of the names and brands of items to be used in the house; and Bruno's plans to obtain city permits prior to commencing work.

On October 9, 2012, Bruno sent Walker the following e-mail message:

> [Respondent] is the one that would have the disbursements of the fees. We acted on his request and I have followed his request as he is the one person who hired us. Please let me know if we can help further, we would like to get started before the weather gets bad.
>
> [Ex.P-26.]

Walker replied the following day in an e-mail to Bruno, denying that respondent had authority to hire anyone to make the repairs, and asserting that she and her mother had spent six months seeking answers to their questions, only to find respondent unwilling to provide an accounting of all of the funds. The e-mail also stated that Midland Mortgage's legal department had initiated a check-fraud investigation because that company never endorsed the reverse of the settlement check. Walker ended the e-mail by stating that she intended to file a claim with the New Jersey Department of Consumer Affairs, and would have no further contact with Bruno.

Bruno's Testimony

Bruno testified at the DEC hearing, by telephone, from Maryland. He first met respondent on April 24, 2012, when he agreed to drive Lupo, who did not drive, to respondent's office. Both Lupo and Bruno were associated with Tilmar Designs, a Philadelphia construction company. At the time, Lupo/Tilmar were renovating seven homes in South Camden for a nonprofit organization. As a Tilmar subcontractor, Bruno reported daily to the same Camden job site as Lupo.

On April 24, 2012, Lupo and respondent met for several minutes, but Bruno did not hear their conversation. Once they returned to Tilmar's Philadelphia office, Lupo offered Bruno the Powell job.

The next day, April 25, 2012, Lupo gave Bruno the original settlement check, and asked him to deposit it in Bruno's Filacon account, because Lupo did not have a local bank account. That same day, Bruno deposited the check in his Filacon checking account at a Wells Fargo Bank ATM in Philadelphia.

An issue arose with the missing Midland endorsement, and soon after Bruno's deposit, the bank placed a hold on the check. Bruno admitted that he then affixed a phony Midland endorsement

on the check, apparently before re-depositing it. He claimed to have done so at Lupo's direction.

Bruno never saw the Lupo letter or the Foxcroft estimate for repairs. Rather, Lupo gave him explicit instructions, which he followed, when sending the $7,879.70 check to respondent. Bruno took all of his direction from Lupo, not respondent. In fact, Bruno summed up the parties' relationship this way: "Powell hired [respondent] to oversee Lupo who oversees me."

Bruno also testified about the depletion of the $32,120.30 settlement proceeds in his checking account. Lupo doled out jobs to Tilmar subcontractors. In order to obtain Tilmar business, Lupo required Bruno to make periodic cash payments to him of $2,000 to $4,000. Lupo received about $20,000 that way.[4] Bruno kept no records of his own regarding the Powell funds. He recalled, however, that he disbursed $3,240 of the settlement funds for his own work, and $7,300 to pay his subcontractors. He claimed to have been "devastated" when, in September 2012, Walker told him that Lupo had misused the Powell funds.

[4] To support his claim, respondent offered Bruno's April and May 2012 Filacon bank statements for the Wells Fargo account, which show entries for cash withdrawals and outgoing checks in large amounts. No other evidence, such as the canceled checks, was presented to tie Lupo to the settlement funds.

Gary Lupo's Testimony

Lupo had known respondent for five or six years prior to his involvement in the Powell matter, and probably met respondent at a gambling establishment.

According to Lupo, on an unknown date, Powell called and asked him to complete a fire restoration at the Camden property. He looked at the property with Powell and provided a written estimate of $36,000 to restore the premises. On or about April 24, 2012, Powell gave him a letter from respondent and the original $40,000 settlement check. Lupo was certain that he received the letter from Powell.

Lupo was too busy with the seven Camden renovations to take on Powell's job, so he subcontracted it to Bruno and Filacon. He had known Bruno for only about eight months at the time, and gave him the project without a written contract setting forth their respective obligations. Lupo conceded never having told Powell that he subcontracted the job to Bruno. He saw no reason to do so, because he always used subcontractors on his jobs.

In respect of respondent's April 24, 2012 letter to him, Lupo had "no clue" why respondent thought that his company would obtain the Midland endorsement or deposit the settlement check. He had no recollection of any discussions with respondent about the issues in that letter.

When asked whether he ever met Powell at respondent's office, he recalled a meeting in August 2012 attended by Powell, Walker, and himself. A "gentleman" from respondent's office was also present at the meeting, which lasted about fifteen minutes, during which time no one spoke a word. When asked why that meeting had been scheduled, he replied, "I don't have a clue." He could not recall whether, at that meeting, he had offered to perform the repairs because he felt bad for Powell.

Lupo was adamant that he had received no money from the Powell settlement, pointing the finger at Bruno. He claimed that, about three months after he gave Bruno the settlement check, Bruno "disappeared off the face of the earth."

Justin Floyd's Testimony

Finally, Justin Floyd, the NJIUA claims adjuster who handled the Powell fire claim, testified at the DEC hearing. On May 2, 2012, Floyd received a call from Bruno, asking NJIUA to call Wells Fargo, his bank, with instructions to clear NJIUA's settlement check. Not knowing Bruno, NJIUA refused. Bruno then faxed to Floyd a copy of the April 24, 2012 Lupo letter, in order to prove that he was associated with the transaction. Without any further action taken by NJIUA, Wells Fargo determined to release the funds to Filacon.

Floyd first learned that an issue had arisen in respect of the settlement funds on August 30, 2012, when Walker called with questions about the check. By then, however, Wells Fargo had released the funds. Wells Fargo never informed NJIUA why it released the funds to Filacon, who was not a named party on the check.

Respondent's Brief

In an October 7, 2016 post-hearing submission, respondent's counsel argued that respondent's version of events – that he gave the settlement check to Powell – must be true, because it was in respondent's possession on April 24, 2012, when Powell signed the settlement statement and respondent prepared the Lupo letter. Yet, the next day, it was deposited in Philadelphia. Counsel maintained that otherwise, it was "facially implausible" that Bruno could have deposited the check at a Philadelphia bank the next day. Counsel urged the panel to find credible respondent's testimony that he had done exactly what Powell directed him to do with the check, thereby safeguarding the funds.

* * *

The DEC found a violation of RPC 1.15(a), based on respondent's failure to deposit the NJIUA settlement check in

his attorney trust account and thereafter disburse funds to the appropriate parties via trust account checks against the funds. The panel cited In re Silber, 167 N.J. 3 (2001), where the attorney was found guilty of failing to safeguard client funds by placing them in his attorney expense account instead of the attorney trust account.

The panel found that respondent failed to safeguard the funds in other respects as well. Specifically, he relied on Lupo, a third party, to obtain the endorsement of Midland, deposit the check in his own bank account, and make disbursements from his personal bank account. Moreover, respondent failed to question why Filacon, not Lupo/Foxcroft, had issued a check for disbursements to GS and Service Star. The panel concluded that, had respondent safeguarded the funds by using his trust account, as required, the delay would have been minimal, while the check cleared his bank.

In addition, the panel found that respondent lied to ethics authorities by misrepresenting that: (1) he had given the settlement check to Powell, at her request; and (2) he had nothing to do with hiring Lupo/Foxcroft and Bruno/Filacon. Both Powell and Bruno testified that respondent, not Powell, had been responsible for involving them in Powell's matter. Therefore,

respondent's statements to the contrary were knowingly false, a violation of RPC 8.1(a).

The panel also found that respondent made misrepresentations to Powell. First, he led Powell to believe that he would deposit the settlement check in his trust account and make the proper disbursements from there, as evidenced by the settlement statement she signed. Instead, he delegated the depositing of the settlement check and disbursement of funds to Lupo and/or Bruno. Respondent never told Powell about the actual arrangement that he had made with them. He also misrepresented in his September 14, 2012 letter to Powell that he had given her the original settlement check, when he had actually given it to Lupo.

Finally, the panel faulted respondent for possibly forging Powell's signature on the Filacon check, in order to hide from her that Filacon, not respondent, had control of the settlement funds. Yet, the panel also stated that, "it is important to reiterate that [Powell] cannot definitely say whether or not she endorsed the Filacon check." It is unclear, thus, whether the panel found that respondent actually forged Powell's signature.

After considering respondent's prior ethics history, the panel concluded that a two-year suspension was warranted.

* * *

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

RPC 1.15(a) states:

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey (emphasis added).

The uncontested facts are that respondent failed to use his attorney trust account for the Powell matter. The language of the Rule required respondent to place the settlement funds in his attorney trust account.

Respondent claimed that Powell wanted to take possession of the check in order to expedite the repair process, a claim that Powell denied. Even if she had made that demand, respondent was required to follow the Rule.

Counsel for respondent argued that, by acquiescing to Powell's wish that she be given the check, respondent was somehow absolved of the duty to safeguard the funds any longer. Yet, respondent had a fiduciary duty to all of the endorsees and parties to the check, including NJIUA, whose funds were at risk. The only way to safeguard the funds was to place them in his trust account, pending the proper disbursements by him.

Respondent's reckless disregard for this fundamental concept led to the disastrous loss that Powell suffered, and violated RPC 1.15(a).

In respect of respondent's alleged misrepresentation to the OAE throughout the ethics proceedings, respondent maintained that he had no role in hiring Lupo/Foxcroft. The record, however, is replete with evidence to the contrary, supporting the conclusion that respondent, indeed, made misrepresentations to the OAE. Powell testified that she knew no one who could handle a fire restoration, and was adamant that respondent had recommended Lupo, because he was "someone good." Walker, too, testified that her mother returned from a January 2012 meeting with respondent and told her that he knew someone who could handle the renovation, namely Lupo.

Moreover, respondent had known Lupo for many years before the Powell representation, as both men gambled at the same establishments. Lupo did not advertise his services and did not ordinarily handle private, residential renovations. Powell had never met Lupo prior to this matter. Furthermore, Lupo, Bruno, Powell, and Walker all testified, to varying degrees, about respondent's involvement in hiring Lupo – that respondent was in charge of the repair process. Thus, in our view, the evidence

that respondent lied about having no role in bringing Lupo on the scene is overwhelming.

Respondent also lied about the disposition of the settlement check. Throughout the ethics proceedings, he claimed to have given the check to Powell, perhaps to shift the blame for his reckless handling of the settlement funds. Powell adamantly denied ever having seen that check, after endorsing it. The DEC found Powell's testimony on the issue credible.

In addition, Powell's actions support her version of events, that respondent did not give her the check. As the summer of 2012 wore on with no progress on her repairs, she redoubled her efforts to find out what happened to the settlement funds. Interestingly, she received no real help from respondent. By late summer 2012, Powell and her daughter were in contact with NJIUA to piece together the trail of the settlement check – an extraordinary effort if, as respondent claims, Powell knew, all along, that respondent had given her the check months earlier.

Similarly, respondent's claim to have given Powell the check flies in the face of his only documentation on the issue – the Lupo letter, which enclosed the settlement check for Lupo, and the settlement statement, which listed a disbursement to Lupo from the trust account.

We also reject respondent's argument that Powell, not he, must have given Lupo the check. This contention was based on the fact that the check was in respondent's possession on April 24, 2012, yet deposited into Bruno's Philadelphia checking account the next day. First, Bruno testified that he drove Lupo to respondent's office on April 24, and that respondent met with Lupo for several minutes. Furthermore, Lupo gave Bruno the check on April 25, 2012, and Bruno immediately deposited it that day.

In this context, we find that respondent lied to ethics authorities about his involvement in both Lupo's retention and his release of the settlement check. In doing so, respondent violated RPC 8.1(a).

Respondent also made misrepresentations to Powell. He prepared and obtained her signature on a settlement statement that did not accurately convey his actual handling of the settlement funds. That document falsely led her to believe that he would deposit the settlement check in his trust account and appropriately disburse funds to the parties from that account. Yet, the Lupo letter contained respondent's actual plan, to give the check to Lupo. By misrepresenting the truth in the settlement statement, respondent violated RPC 8.4(c).

Respondent's September 14, 2012 letter to Powell also contained a misrepresentation – that he had given her the

settlement check destined for Lupo. Respondent knew that information was false, once again evidenced by his own documentation, the Lupo letter. For that additional misrepresentation, respondent is guilty of having violated RPC 8.4(c).

To the extent that the DEC may have found that respondent violated RPC 8.4(c) by forging Powell's signature on the Filacon check, when Powell was pressed about her claim to have always used a hyphen when signing her last name, she left open the possibility that she might have signed the Filacon check. Thus, we dismiss that RPC 8.4(c) finding for lack of clear and convincing evidence.

As to sanction, respondent's most serious misconduct involved his lies to Powell and the OAE about the settlement check and hiring Lupo.

A misrepresentation to a client requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Dwyer, 223 N.J. 240 (2015) (attorney made a misrepresentation by silence to his client, by failing to inform her that her complaint had been dismissed, a violation of RPC 8.4(c); violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c),

and RPC 3.2 also found); and In re Ruffolo, 220 N.J. 353 (2015) (attorney misrepresented to the client that the matter was proceeding apace, and that the client should expect a monetary award in the near future, knowing that the complaint had been dismissed, thereby violating RPC 8.4(c); violations of RPC 1.1(a), RPC 1.3, and RPC 1.4(b) also found).

Attorneys found guilty of lying to ethics authorities have received discipline ranging from a reprimand to a term of suspension. See, e.g., In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Otlowski, 220 N.J. 217 (2015) (censure imposed on attorney who had misrepresented to an individual lender of his client and to the OAE that funds belonging to the lender and his co-lenders, which had been deposited into respondent's attorney trust account, were frozen by a court order when, to the contrary, they had been disbursed to various parties, and who also made misrepresentations on an application for professional liability insurance; violations of RPC 8.1(a) and RPC 8.4(c); mitigating factors included the

passage of time, the absence of a disciplinary history in respondent's lengthy career, and his public service and charitable activities); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; he also filed a motion on behalf of another client after his representation had ended, and failed to communicate with both clients); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who improperly released escrow funds to his cousin, a party to the escrow agreement, and then falsified bank records and trust account reconciliations to mislead the ethics investigator that the funds had remained in escrow); In re Silberberg, 144 N.J. 215 (1996) (two-year suspension imposed on attorney who, in a real estate closing, allowed the buyer to sign the name of the co-borrower; the attorney then witnessed and notarized the "signature" of the co-borrower; the attorney stipulated that he knew at the time that

the co-borrower was deceased; after the filing of the ethics grievance against him, the attorney falsely stated that the co-borrower had attended the closing; on another occasion, the attorney sent a false seven-page certification to the district ethics committee in order to cover up his improprieties); and In re Penn, 172 N.J. 38 (2002) (three-year suspension imposed on attorney who failed to file an answer in a foreclosure action, thereby causing the entry of default against the client; thereafter, in order to placate the client, the attorney lied that the case had been successfully concluded, fabricated a court order, and signed the name of a judge; the attorney then lied to his adversary and to ethics officials; the attorney also practiced law while ineligible).

Failure to safeguard funds for clients or third persons typically results in an admonition, even when accompanied by other non-serious infractions. See, e.g., In the Matter of Michael P. Otto, DRB 08-294 (February 26, 2009) (attorney's failure to oversee law firm trust account enabled law partner to repeatedly misappropriate trust account funds, a violation of RPC 1.15(a); recordkeeping violations also present) and In the Matter of Patrick W. DiMartini, DRB 04-440 (February 22, 2005) (attorney received an $8,500 down payment check from a client, but failed to ensure that it was deposited in his trust account,

enabling an office visitor to steal the check and cash it, in violation of RPC 1.15(a)).

Here, respondent's misconduct falls between that of Rinaldi (three-month suspension) and Katsios (two-year suspension). In Rinaldi, the attorney lied to the client about the status of the case, which he had failed to prosecute, and then submitted fictitious letters to the ethics committee in order to cover up his inaction. Here, respondent lied to the client about her own actions in the case, and then similarly lied to the OAE throughout the ethics proceedings to further his false narrative. He did so in order to hide his own reckless handling of the client's funds. In Katsios, the attorney went to somewhat greater lengths than respondent to cover up an improper release of escrow funds, falsifying bank records and trust account reconciliations to mislead the ethics investigator that the funds had remained in escrow.

Without more, respondent's actions, compared to those of Rinaldi and Katsios, would warrant a suspension of six months. However, there are highly aggravating factors that must also be considered, such as respondent's significant ethics history. In 1996, respondent received a reprimand for misconduct in a matter that included recklessness: the theft of funds from his trust account by an employee who was not sufficiently monitored.

In 2013, respondent was suspended for three months for charging improper expenses in client matters. In fact, he had amassed $100,000 in the trust account by failing to disburse deductibles and copays for periods as long as thirteen years. Then, during the ethics investigation, respondent made false statements to the OAE in an attempt to absolve himself.

In 2016, respondent received a censure for misconduct in two consolidated matters. Respondent had made misrepresentations to the client by silence.

On June 29, 2017, we transmitted to the Court a default matter in which we recommended a three-month suspension for respondent, in yet another case that involved misrepresentations to the client, this time about the status of the client's case.

Finally, in further aggravation, we find that it was highly reckless for respondent to release the $40,000 settlement check to Lupo and/or Bruno, one or both of whom appear to have absconded with the $32,000 that was supposed to fund repairs to Powell's property. Virtually none of the repairs were completed. To this day, Powell's house remains vacant and boarded up. Thus, she has suffered a substantial loss.

Given respondent's proclivity to act dishonestly, and to lie to his clients and ethics authorities; the seriousness of

his prior discipline; and the extreme harm to Powell, we determine to impose a two-year prospective suspension.

Member Hoberman 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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John A. Klamo
Docket No. DRB 17-127

Argued: July 20, 2017

Decided: October 24, 2017

Disposition: Two-year prospective suspension

Members	Two-year Prospective Suspension	Did not participate
Frost	X	
Baugh	X	
Boyer	X	
Clark	X	
Gallipoli	X	
Hoberman		X
Rivera	X	
Singer	X	
Zmirich	X	
Total:	8	1

Ellen A. Brodsky
Chief Counsel