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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 05-345  
District Docket No. IIIA-04-037E

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IN THE MATTER OF  
RUSSELL CHEEK  
AN ATTORNEY AT LAW

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Decision

Argued: January 12, 2006

Decided: February 22, 2006

Kenneth Fitzsimmons appeared on behalf of the District IIIA Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a remand from a default that resulted in a recommendation for discipline (three-month suspension) filed by the District III Ethics Committee ("DEC"). The two-count complaint charged respondent with violating RPC 3.3 (lack of candor toward a tribunal), RPC 1.1(a) (gross neglect), RPC 1.4, presumably (b) (failure to keep a client reasonably

informed about the status of the matter or to comply with reasonable requests for information), RPC 1.15, presumably (b) (failure to promptly deliver funds to the client),<sup>1</sup> and RPC 8.4(d) (conduct prejudicial to the administration of justice).<sup>2</sup>

Respondent was admitted to the New Jersey bar in 1980. At the relevant times, he maintained a law office in Toms River, New Jersey.

In 1996, respondent was admonished for failure to correct certain recordkeeping deficiencies discovered during a 1995 demand audit by the Office of Attorney Ethics. In the Matter of Russell G. Cheek, Docket No. DRB 96-100 (May 22, 1996). In 1999, he was reprimanded for grossly neglecting an uncomplicated estate matter, failing to communicate with the executrixes and beneficiaries about the status of the matter, and violating the recordkeeping rules. In re Cheek, 162 N.J. 98 (1999). In 2003, respondent was suspended for three months for misconduct in three matters, which included gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to turn over client files, failure to reply to a lawful demand for information from a

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<sup>1</sup> Although the complaint referred to the language of RPC 1.15(b), it cited RPC 1.15(c). This decision presumes that RPC 1.15(b) was intended.

<sup>2</sup> Although the complaint did not specify a subsection of RPC 8.4, it referred to conduct prejudicial to the administration of justice, which is subsection (d).

disciplinary authority, and misrepresentations. In re Cheek, 178 N.J. 70 (2003).

This disciplinary case flowed from the ethics matter that led to respondent's 1999 reprimand. As stated above, respondent neglected an estate matter. In the ensuing disciplinary case, respondent agreed to pay the penalties resulting from his failure to timely file the New Jersey inheritance tax. When he breached that agreement, the within disciplinary charges were filed against him. For the most part, respondent admitted the allegations of the complaint.

In July or August 1993, Doris McAteer and Joan Horbert, co-executrixes, retained respondent to represent the estate of Grace B. Armeit, who died on July 8, 1993. Respondent served as the estate's attorney until March 1999, when the executrixes retained a new attorney, Scott Keanneally.

During 1993, the estate sold the decedent's residence for \$130,000. At the time of the closing, respondent retained \$7,000 in his trust account as an escrow for the payment of New Jersey transfer inheritance taxes. The remaining funds were deposited into an estate account maintained by the co-executrixes.

Under New Jersey law, an inheritance tax return must be filed within eight months of the decedent's date of death or

interest will accrue on the unpaid taxes at a rate of ten percent per annum.

The estate paid the Division of Taxation \$49,875.17 in taxes and \$12,232.90 in penalties and interest, for a total of \$62,108.07. It is not clear when these payments were made. According to the complaint, however, on January 12, 1999, the Division of Taxation issued a notice of assessment showing "a zero balance due," thereby acknowledging that the estate had satisfied the inheritance tax liability and penalties.

In March 1999, Keanneally obtained the estate's file from respondent. Although respondent thereafter performed no further services for the estate, he kept the \$7,000 that had been escrowed to pay the New Jersey transfer inheritance taxes. He did so despite the Division of Taxation's January 12, 1999 notice indicating that the taxes had been paid in full.

By letters dated June 6, 2001, October 30, 2001, December 14, 2001, and August 30, 2002, Keanneally asked respondent for the release of the \$7,000 escrow. His third letter also enclosed a summary of the interest and penalties (\$18,930.02) incurred by the estate for its failure to file certain returns, and asked respondent for reimbursement. Keanneally's fourth letter, too, requested reimbursement to the estate for interest and penalties for the New Jersey inheritance taxes and state and federal taxes.

By letter dated January 3, 2002, respondent notified Keanneally that he had not received the attachment to Keanneally's December 14, 2001 letter, detailing the interest and penalties due. Respondent requested that information. His letter also stated, "I do otherwise acknowledge my prior stipulation to reimburse the estate for applicable penalties." The letter confirmed respondent's intention to bill for the actual legal services he had performed, clarified that he had never agreed to waive his claim for fees, and acknowledged his expectation that the estate representatives would raise an objection to the fees.

According to the formal ethics complaint, notwithstanding respondent's claim for fees from the estate, he was required to release the escrow proceeds to the estate upon receiving notification from the Division of Taxation that all taxes had been paid in full and the tax waiver had been issued.

During the 1999 disciplinary proceeding stemming from respondent's handling of the Armeit estate, he represented to us that he would reimburse the estate for penalties resulting from his failure to timely file the New Jersey inheritance tax return. We relied on this representation in determining that a reprimand was adequate discipline, as did the Court. Our decision stated, in relevant part: "By way of mitigation, the stipulation states that respondent has taken 'substantial steps' to settle the

estate and has agreed to pay any penalties resulting from his failure to timely file the New Jersey inheritance tax return." In the Matter of Russell G. Cheek, Docket No. 98-445 (DRB May 26, 1999) (slip op. at 3). Notwithstanding this representation, respondent neither made any payments, nor offered any payment plan to the estate. He did not release the escrow funds to the estate until the April 13, 2005 DEC hearing.<sup>3</sup>

According to respondent, he had never taken a fee or been reimbursed for costs in the estate matter. He claimed that, after he turned the files over to Keanneally, it was another two years before Keanneally asked him to release the escrow. He further claimed that he had informed Keanneally of his belief that the value of his services exceeded the amount of the loss to the estate.

As to mitigation, respondent maintained that, during the relevant time, his father was suffering from a long-term "neurological disorder of unknown etiology." As a result, in late 1997, respondent's parents moved back to New Jersey, near respondent. Respondent's father died on December 3, 2000. Respondent testified that his father's problems had a profound effect on him. As a result, he claimed, he was not thinking clearly, "must have been in a fog," and did not intend to use the

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<sup>3</sup> The complaint does not allege that respondent failed to keep the funds separately until the resolution of the fee dispute.

escrow money.<sup>4</sup> Respondent admitted that he should have returned the \$7,000 escrow and "either work out or fight out [his] claim for fees and costs." According to respondent, he did not "receive anything of value for the work that [he] did." He also claimed that he was retained to represent the estate on a "percentage basis" (presumably a contingency basis), and that, in figuring out the amount of his fee, he would have to "somehow go back and recreate a month of merit statements for [his] services." Respondent did not mention whether he provided his clients with a written agreement setting forth the basis or rate of his fee.

The first count of the ethics complaint charged that respondent's failure to reimburse the estate, despite his representations to us that he would do so, constituted a lack of candor to a tribunal, a violation of RPC 3.3, and conduct prejudicial to the administration of justice, a violation of RPC 8.4(d).

The second count of the complaint alleged that, on January 12, 1999, the Division of Taxation issued a notice of assessment indicating that all taxes had been paid in full; that, as of October 1, 1993, respondent had escrowed \$7,000 in his trust account to pay the New Jersey transfer inheritance taxes for the sale of the decedent's real property; and that respondent had

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<sup>4</sup> The money was escrowed in 1993.

failed to release the escrowed proceeds, as requested in Keanneally's July 6, 2001, October 30, 2001, and August 30, 2002 letters. According to the complaint, respondent was required to release the escrowed proceeds upon receiving notification from the Division of Taxation that all taxes had been paid in full and upon the Division's issuance of a tax waiver. Although respondent had the inheritance tax waiver recorded in the Ocean County Clerk's Office, he failed to release the escrow funds. The complaint charged that respondent's failure to release the proceeds to the estate violated RPC 1.1(a), RPC 1.4, and RPC 1.15(b).

In his defense, respondent contended that the first count of the complaint involved a fee dispute, rather than an ethics violation. As to the second count, he claimed that it was not his intention to withhold the escrow monies.

Respondent argued before us that he had never intended to avoid his obligation to the estate. He explained that, when he notified Keanneally about his fee claim, Keanneally failed to consider it. Respondent admitted that, nevertheless, he should have turned over the escrow to the estate, and then pursued it for his fees.

In 1999, when respondent represented to us that he would reimburse the estate, he did not mention that he was owed fees.



This time, he argued that, when he previously appeared before us, he did not know the amounts of accrued interest and penalties to the estate. Therefore, he contended, he did not believe that this omission was a misrepresentation to us.

On respondent's behalf, the presenter noted that, during the course of his investigation, respondent was extremely cooperative and "did not conceal anything." At oral argument before us, the presenter emphasized that he was impressed with respondent's efforts to rectify his problems with the estate, and that he was very cooperative in making payment to the estate. Asked by one of our members why the problem had not been resolved sooner, respondent acknowledged that it should have, but pointed out that he was going through a difficult time.

The DEC's perfunctory report merely recited the RPCs charged in the complaint and the rules that, in its view, respondent violated. The DEC found that respondent violated RPC 1.15(b), because he failed to promptly deliver funds to his client, namely the \$7,000 escrow funds. The DEC reasoned that, because of this violation, respondent also violated RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct), a charge not cited in the complaint. The DEC dismissed the remaining allegations for lack of clear and convincing evidence.

The DEC concluded that, based on respondent's ethics history and his continued unethical conduct in the present case, a three-month suspension was warranted.

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

In imposing discipline in 1999, we — and the Court — considered, as mitigation, respondent's representation that he would pay any penalties resulting from his failure to timely file the New Jersey inheritance tax return in the Armeit matter. Keanneally's December 14, 2001 letter to respondent indicated that the estate had incurred interest and penalties totaling \$18,930.02, and that, as of January 31, 2002, respondent had not reimbursed the estate. We note, however, that respondent believed that he was entitled to an offset for unpaid attorney's fees against amounts owed to the estate; that he never waived his fees and so informed the estate's new attorney; that, when he appeared before us in 1999, he did not know the amount of accrued penalties and interest; and that there is no clear indication that he intended to disavow his obligation to the estate. Persuaded by respondent's argument, we find that he did not make a misrepresentation to us in 1999, but simply failed to follow through with his offer to repay the estate. Unquestionably,

respondent should have reimbursed the estate, as promised, and then pursued a fee resolution. To respondent's credit, with the assistance of the presenter, he has now resolved all outstanding payments to the estate.

Based on the foregoing, we dismiss the charged violations of RPC 3.3 and RPC 8.4. We find, however, that respondent's failure to promptly reimburse the estate and to release the \$7,000 that he held in escrow for twelve years violated RPC 1.15(b) (failure to promptly deliver funds to a client or third person). The complaint also charged respondent with gross neglect for this conduct. Because RPC 1.15(b) more properly address respondent's misconduct in this context, we dismiss the charged violation of RPC 1.1(a).

Respondent was also charged with violating RPC 1.4. The DEC viewed his failure to release the escrow proceeds as a breach of his duty to keep his clients reasonably informed about the status of the matter, and a failure to promptly comply with their reasonable requests for information. The complaint did not allege, however, that respondent failed to communicate with his clients. Again, his failure to release the escrow funds was more properly a violation of RPC 1.15(b). Therefore, we dismiss the charged violation of RPC 1.4.

Where an attorney has failed to promptly release escrow funds, the discipline has ranged from a reprimand to a three-month suspension, depending on the presence of other violations and the attorney's ethics history. See, e.g., In re Jodha, 174 N.J. 407 (2002) (reprimand where the attorney did not refund escrow proceeds to his client until twenty months after a closing; the attorney was also found guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to correct recordkeeping deficiencies noted in a 1988 random audit); In re Dare, 174 N.J. 369 (2002) (reprimand where the attorney did not return escrow funds for approximately five months, despite repeated telephone calls and letters from the clients' new attorney; the attorney did so only when the OAE scheduled a demand audit of his records; the attorney also failed to diligently protect his clients' interests, displayed gross neglect, and failed to communicate with his clients; the attorney was contrite for his actions and had a prior unblemished record of twenty-six years); In re Hintze, 171 N.J. 84 (2001) (three-month suspension in a default matter where the attorney failed to return \$900 held in escrow in connection with the sale of the client's business; the attorney also engaged in gross neglect, pattern of neglect, lack of diligence, and failure to communicate with clients; the attorney had a prior reprimand); and In re

Medford, 148 N.J. 81 (1997) (three-month suspension where the attorney failed to turn over escrow funds to the client for more than two years, grossly neglected an appeal, resulting in its dismissal with prejudice, made misrepresentations, failed to communicate with the client about the status of the matter, failed to cooperate with disciplinary authorities, and practiced law while ineligible).

We find that respondent's failure to resolve the outstanding payments to the estate for almost six years was serious. Because, however, he was not guilty of any other ethics violations, we find that his conduct was not as serious as that in Medford, which involved multiple ethics violations, including the attorney's failure to cooperate with disciplinary authorities and practicing law while ineligible. Moreover, this case did not result from a default, such as in Hintze. Both of those cases resulted in three-month suspensions. Because, however, respondent's conduct was exacerbated by his ethics history (an admonition, a reprimand and a three-month suspension), we find that a censure, rather than a reprimand, more properly addresses his behavior.

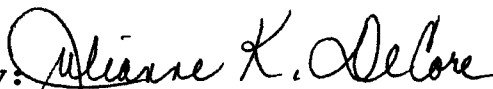
Members O'Shaughnessy, Wissinger, and Neuwirth disagree with the majority. They find that respondent misrepresented to us, in 1999, that he would repay the estate. These members, therefore, find violations of RPC 3.3, RPC 8.4(c), RPC 8.4(d),

and RPC 1.15(b), and determine that a three-month suspension is warranted.

Members Lolla and Stanton did not participate.

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

Disciplinary Review Board  
Mary J. Maudsley, Chair

By:   
Julianne K. DeCore  
Chief Counsel

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**SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

In the Matter of Russell G. Cheek  
Docket No. DRB 05-345

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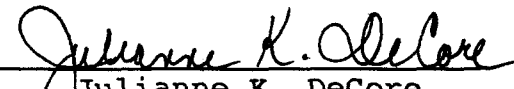
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Argued: January 12, 2006

Decided: February 22, 2006

Disposition: Censure

| Members       | Censure  | Three-month Suspension | Admonition | Disqualified | Did not participate |
|---------------|----------|------------------------|------------|--------------|---------------------|
| Maudsley      | X        |                        |            |              |                     |
| O'Shaughnessy |          | X                      |            |              |                     |
| Boylan        | X        |                        |            |              |                     |
| Holmes        | X        |                        |            |              |                     |
| Lolla         |          |                        |            |              | X                   |
| Neuwirth      |          | X                      |            |              |                     |
| Pashman       | X        |                        |            |              |                     |
| Stanton       |          |                        |            |              | X                   |
| Wissinger     |          | X                      |            |              |                     |
| <b>Total:</b> | <b>4</b> | <b>3</b>               |            |              | <b>2</b>            |

  
Julianne K. DeCore  
Chief Counsel