PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **DON CAMERON BURNS,** A Member of the State Bar.	No. **06-O-10519** **OPINION ON REVIEW**

Respondent, Don Cameron Burns, stipulated as charged to a single count of violating the California Rules of Professional Conduct, rule 4-100(A)[1] due to his gross negligence in the supervision of his client trust account. During a 12-month period, Burns deposited personal funds totaling $86,828.17 into his trust account and commingled them with other funds in that account, although there was no evidence of misappropriation or client harm.

The State Bar is challenging the hearing judge's discipline recommendation of 30 days' actual suspension and two years' probation, arguing that it is too lenient in view of serious uncharged misconduct in aggravation and the lack of compelling mitigation. The State Bar urges that 90 days' suspension is appropriate. Burns also is appealing and contends that the hearing judge committed error by finding uncharged misconduct in aggravation and that no suspension is warranted.

Upon our independent review (*In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the hearing judge's discipline recommendation, although we do not make the same findings in aggravation and mitigation.

[1] All further references to rule(s) are to these Rules of Professional Conduct unless otherwise noted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Burns was admitted to the Texas Bar in 1985 and the California Bar in 1988. He has no prior disciplinary history. From early 2002 through 2003, Burns was affiliated with the Law Offices of Dale S. Gribow. As of March 2002, Burns handled most of Gribow's approximately 120 personal injury cases. As a consequence, he was extremely busy representing Gribow's clients at their court hearings and trials. At that time, Burns' daughter worked as his assistant. Other than a part-time bookkeeper, he had no support staff. In the fall of 2002, when his daughter left to attend school, Burns asked Gribow for additional assistance.

Gribow paid Burns 20 percent of the gross fees that Gribow received from his personal injury cases. Burns maintained his own client trust account at California Bank and Trust (CTA), which he referred to as the "Law Office of Don C. Burns Trust Account." Between November 2002 and November 2003, Burns received ten checks totaling $86,828.17 from Gribow as his share of the gross fees. Each of these checks constituted Burns' personal funds. He believed he personally endorsed one or two of the checks for deposit into his CTA and asked Gribow's staff to deposit the remaining checks. Burns did not recall instructing anyone specifically to deposit the checks into his CTA, but on one occasion he directed Robin Kornblatt, Gribow's bookkeeper, to endorse check number 5385, dated August 5, 2003, in the amount of $35,000 as follows: "Don Burns [¶] Law Office of Don C. Burns Trust [¶] 20-300402-81 [the CTA account number]."

Burns wrote several checks from his CTA to his daughter as payment of her wages, noting on each check the specific case for which she was being paid. The monthly statements of account for the CTA disclose that Burns also withdrew funds by check and made various telephonic and wire transfers to other accounts, although the recipients or purposes of those withdrawals and transfers were not established. The balance in the CTA occasionally exceeded

the amount of the deposits of his personal funds, but there was no evidence of the source of other funds in the account. Burns stipulated that he received the monthly statements from his CTA showing the deposits and withdrawals from December 2002 to December 2003.

Gribow reported these activities to the State Bar. On December 14, 2007, the Office of Chief Trial Counsel of the State Bar filed a Notice of Disciplinary Charges (NDC), alleging one count of misconduct against Burns arising from the deposit of personal funds into his CTA, resulting in commingling and a violation of rule 4-100(A). At trial, Burns stipulated to culpability.

II. DISCUSSION

A. Client Trust Account Violation (Rule 4-100(A))

The parties stipulated that "[b]y failing to monitor the deposits made into his client trust account between November, 2002 and November, 2003, Burns was grossly negligent in the supervision of his client trust account in willful violation of rule 4-100(A)."[2] Although the parties stipulated to culpability, we have an affirmative duty to independently determine if the stipulation is supported by the record. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 409.) We find that the record amply supports the parties' stipulation as to facts and conclusions of law. Burns failed to monitor the deposits of his personal funds into his CTA during a one-year period, even though he received monthly banking records confirming the deposits. The personal funds were commingled with other funds, although there is no clear and convincing evidence that the other funds in his CTA belonged to clients. Nevertheless, "[t]he

[2] Rule 4-100(A) provides, in relevant part: "All funds received or held for the benefit of clients by a member or law firm, . . . shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, ... No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith . . . ."

rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.)

The State Bar called Kornblatt to testify about the endorsement and deposit of check number 5385. The hearing judge found that Kornblatt's testimony established an additional basis for culpability under Count One because Burns "specifically instructed Kornblatt to deposit the August 5, 2003, $35,000 check. . . into his CTA." The judge characterized this as deliberate misconduct. However, we do not adopt this finding since the parties stipulated that Burns' culpability was based on his *grossly negligent* supervision of his client trust account, resulting in the ten deposits of his personal funds, which included the deposit of the $35,000 check that Kornblatt deposited.

B. Aggravation

The hearing judge found one factor in aggravation: Burns "deliberately used his CTA for personal purposes from November 2002 through November 2003. . . ," in violation of rule 4-100(A). This finding is duplicative of the charged misconduct of commingling in Count One. "[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses. . . ." (*Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777.)

As an additional factor in aggravation, we find that Burns committed multiple acts of misconduct. (Std. 1.2(b)(ii).) There are ten instances of wrongful deposits, and Burns ignored 12 monthly statements that should have alerted him to the commingling of his personal funds. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.)

C. Mitigation

The record establishes several factors in mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[3]

Burns' 20 years of discipline-free practice is a substantial factor in mitigation. (Std. 1.2(e)(i).)

At trial, Burns offered mitigation testimony that he has been involved in substantial pro bono work and community service. In September 2005, about a week after Hurricane Katrina, Burns moved to Louisiana to volunteer in the recovery effort, which he continued until March 2007. He drove supplies to New Orleans, picked up trash, and volunteered at the Louisiana Family Recovery Corps (LFRC) camps for children affected by the hurricane. Burns also volunteered to work with an attorney through the California Appellate Project ("CAP") on a post-conviction death penalty case. After working numerous hours on that case, he volunteered for another capital case. Presently, about half of Burns' caseload are pro bono matters.

Five character witnesses provided declarations that were admitted into evidence. Kim Landry, a resident of Louisiana who was employed by LFRC, has known Burns since May 2006. She attested that Burns ultimately was responsible as a volunteer for the entire LFRC camp system, which involved a budget of several million dollars and programs for more than 10,000 children. After the camp program ended in October 2006, Burns continued to volunteer as a member of the Essential Services Committee established by FEMA.

Attorney Karen Kelly met Burns in May 2006 when he volunteered to assist her with a post-conviction death penalty hearing. The case was extremely complex and time-consuming, and Kelly estimated that Burns worked on it for 150 to 200 hours. Although he was entitled to

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[3]All further references to "standard(s)" are to the Standards for Attorney Sanctions for Professional Misconduct, unless otherwise noted.

do so, Burns did not submit a bill for his services and expenses. He has also expressed an interest in working on other cases with Kelly.

Attorney David Sergi, a member of both the California and the Texas Bars, met Burns in 2005 at a death penalty seminar held in San Francisco. In the summer of 2006, while he was still volunteering in Louisiana, Burns traveled to Texas where he worked with Sergi for several weeks as a volunteer on a capital case. Burns drafted briefs and interviewed other potential death-row inmates, and, according to Sergi, did an exceptional job. In addition, Burns paid his own travel expenses from Louisiana and Texas. Sergi believes that Burns "is an ethical, conscientious lawyer who is the epitome of what the solo practitioner should be."

Katie Underwood is a social worker who was a program manager for the Louisiana Recovery Corps (LRC), which provided services to the hundreds of thousands of people affected by Hurricane Katrina. Underwood met Burns in late 2005 while he was volunteering for the LFRC. She observed that he was working extremely hard "on an altruistic basis, and that he was genuinely concerned and compassionate about the victims. . . ." Underwood attested that "he is a person of the most genuine and highest character."

Susan Childe has been employed as Burns' legal assistant since October 2004. Before then, she was a paralegal for Gribow. Childe handles all administrative matters, coordinates Burns' calendar, produces documents, and performs bookkeeping for his general and trust accounts. Burns instructed her as to which checks to deposit into which account and, as a consequence, Childe has not deposited checks into Burns' CTA unless specifically directed to do so, and she attested that Burns has never directed her to deposit earned fees into his CTA. Childe has observed Burns for four years and she believed, based on her observation, that "Mr. Burns is concerned with the integrity of all aspects of his practice, including his banking of client trust funds." Childe also stated that Burns focuses on the welfare of his clients.

The hearing judge found that this evidence was entitled to "considerable" weight in mitigation under standard 1.2(e)(vi), and we agree. "[S]ervice to the community is a mitigating factor that is entitled to 'considerable weight.'" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge also found Burns' exceptional legal abilities and dedication to his clients as additional evidence in mitigation. However, since we considered this in assigning substantial weight under standard 1.2(e)(vi), it is not a basis for a separate finding in mitigation.

Burns' witnesses also provided impressive and compelling examples of his good character. But the probative value of that evidence is diminished because these witnesses did not affirm that they were aware of the extent and nature of his misconduct. (Std. 1.2(e)(vi).) We thus give limited weight in mitigation to this evidence.

We also acknowledge and give mitigating credit to Burns for his cooperation in entering into a stipulation of facts, conclusions of law and admissibility of documents, which entirely obviated a trial on the merits as to culpability. (*In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906.)

On this record we do not find clear and convincing evidence of the absence of client harm as an additional mitigating circumstance under standard 1.2(e)(iii).

Finally, the embarrassment and humiliation that Burns asserts he suffered as the result of the actions of Gribow in bringing these proceedings to the attention of various judges is not a cognizable mitigating factor. (Cf. *Segretti v. State Bar* (1976) 15 Cal.3d 878 [mitigation for embarrassment of prior *criminal* misconduct unrelated to the practice of law]. We decline to afford mitigation credit for possible embarrassment due to disclosure of charges of professional misconduct, which most attorneys may suffer as a consequence of their involvement in these proceedings.

Overall, we find the evidence in mitigation in this matter to be compelling, and we find that it clearly outweighs the evidence in aggravation. It convincingly "demonstrates that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth in [the] standards. . . ." (Std. 1.2(e).)

III. DISCIPLINE ANALYSIS

The purpose of a State Bar disciplinary proceeding is not to punish the attorney, but to protect the public, to preserve confidence in the profession, and to maintain the highest possible professional standards for attorneys. (Std. 1.3.) In determining the appropriate level of discipline, we look first to the standards for guidance. But the standards are not applied in a talismanic fashion; rather, we temper our analysis of the proper level of discipline by "'considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994).

Standard 2.2(b) is most relevant since it addresses a violation of rule 4-100 that does not result in the willful misappropriation of entrusted funds. Such a rule violation "shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances." (Std. 2.2(b).) The State Bar acknowledges that this standard has not been applied in every case involving a rule 4-100(A) violation. Indeed, the broad range of misconduct and the varying degrees of harm arising from trust account violations often result in discipline significantly less than the three-months' actual suspension provided in standard 2.2(b). (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17 [private reproval for "inadequate supervision" of trust account for several months with no misappropriation and strong mitigation]; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716 [private reproval for failure to place disputed funds in trust account by attorney with no prior record, strong character evidence and extensive pro bono activities as mitigation]; *In the Matter*

of Lazarus (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387 [two months' stayed suspension and one year probation for unilateral withdrawal of fees from trust account not involving moral turpitude, plus failure to notify client of receipt of settlement and to render accounting]; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354 [45 days' actual suspension for comingling, plus failure to act competently, supervise associates, and respond to client's subsequent attorney and State Bar with "extensive" mitigation].)

We conclude that a departure from the 90-day suspension prescribed by standard 2.2(b) is justified in the instant case because Burns' misconduct did not involve misappropriation, and no client harm was established. In addition, several factors indicate that his misconduct was aberrational. Burns has taken responsibility for his actions and stipulated to culpability for a violation of rule 4-100(A). His paralegal/ bookkeeper, who has worked for him for four years, attested that Burns regularly instructed her to deposit each check into the proper account and that since she has been employed by him, he has never deposited a personal check into his trust account. Finally, Burns has committed no other misconduct in the previous 20 years of practice, and during that time, he has demonstrated an admirable commitment to the use of his legal skills for the benefit of the less fortunate and the community. Accordingly, we adopt the hearing judge's recommendation of 30 days' actual suspension as warranted by this record and the decisional law. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317 [30-day suspension for attorney who made numerous withdrawals from trust account for attorney fees during a six-and-one-half-month period without client authorization and for failing to render an account]; *In the Matter of Blum, supra,* 4 Cal. State Bar Ct. Rptr. 403 [30-day suspension for grossly negligent oversight of trust account constituting moral turpitude which resulted, inter alia, in delaying payment of $5,618.25 to client for 13 months and six-month delay in distribution of settlement funds to another client, as well as collection of illegal fee].)

IV. DISCIPLINE RECOMMENDATION

For the foregoing reasons, we recommend that DON CAMERON BURNS be suspended from the practice of law in the State of California for one year, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions.

1. Don Cameron Burns must be suspended from the practice of law for the first 30 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all of the conditions of this probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. He must comply with the following reporting requirements:

   a. If he possesses client funds at any time during the period covered by a required quarterly report, he shall file with each required report a certificate from him, certifying that:
      i. he has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and
      ii. he has complied with the "Trust Account Record Keeping Standards" as adopted by the Board of Governors pursuant to rule 4-100(c) of the Rules of Professional Conduct.

   b. If he does not possess any client funds, property or securities during the entire period covered by a report, he must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, he need not file the certificate described above.

c. The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year of the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

8. Within one year of the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School – Client Trust Accounting School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

9. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Don C. Burns be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 9, 2009, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED OCTOBER 9, 2009

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

ELLEN ANNE PANSKY
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1010 SYCAMORE AVE UNIT 308
SOUTH PASADENA, CA 91030

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Joseph R. Carlucci, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 9, 2009.

Milagro del R. Salmeron
Case Administrator
State Bar Court