PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **KAMAU EDWARDS,** A Member of the State Bar.	)	Nos**. 07-O-13467; 07-O-14971** **OPINION ON REVIEW**

I. SUMMARY

The hearing judge found respondent Kamau Edwards culpable of misconduct, including moral turpitude, for improperly using his client trust account (CTA) as a personal checking account for over nine months and issuing four checks when this account was insufficiently funded (NSF). After finding that Edwards' misconduct was mitigated by good character, community involvement, lack of client harm and cooperation in the proceedings, the hearing judge recommended that he be placed on a two-year probation and be suspended from the practice of law for one year, stayed, with a 30-day actual suspension.

The Office of Chief Trial Counsel (State Bar) seeks review only as to mitigation, aggravation and the level of discipline.[1] It contends that the hearing judge should not have given mitigation credit for lack of harm and should have found that Edwards' misconduct was aggravated by his multiple acts of wrongdoing. The State Bar requests at least a 90-day actual suspension as provided under the standards.[2] The issue before us is whether standard 2.2(b),

[1] Contrary to Edwards' claim, the State Bar's opening brief was timely. (Rules Proc. of State Bar, rule 63; Code Civ. Proc., § 1013, subd. (a).)

[2] All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

which calls for at least a three-month actual suspension despite mitigating circumstances, should apply in this case. Edwards did not seek review but contends that the hearing judge improperly concluded he acted with moral turpitude, and requests a private reproval.

Upon independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's culpability findings that Edwards improperly used his CTA and issued NSF checks from it. However, we do not adopt the hearing judge's recommended 30-day actual suspension. Instead, we recommend a 90-day actual suspension consistent with standard 2.2(b)'s guideline. Although Edwards presented significant mitigation, we find he mishandled his CTA for a lengthy time, continued its improper use even after the State Bar contacted him, and committed multiple acts of misconduct including moral turpitude. Given Edwards' gross negligence in handling his CTA, we do not find that this case merits an exception to discipline under standard 2.2(b).

II. FINDINGS OF FACT

We adopt the hearing judge's findings of fact, which were primarily established by Edwards' stipulation and testimony. He was admitted to the practice of law in California in 2004 and began working as an attorney for Caltrans, a public agency. Edwards opened a CTA in 2006 to represent private clients, a practice long permitted by Caltrans. He described his private practice as "minimal and negligible." In fact, from December 27, 2006 through all relevant dates, his CTA held no client funds.

Edwards testified that he also maintained a personal bank account but began to use his CTA in its place when he misplaced his personal checkbook somewhere in his "unorganized home." He continued to use the CTA as his personal account for over nine months, even after he found his checkbook. Edwards explained that he "wasn't aware that [he] could not use the [CTA] account for any purpose other than client money."

Edwards' improper use of his CTA was substantial. From February until September 2007, he made at least six deposits and six fund transfers from his personal account into the CTA, totaling $57,480. From January to September 2007, he wrote at least 16 checks for personal and business expenses and made 10 cash withdrawals for his own use and benefit, totaling $16,657.99. Edwards also issued four NSF checks from his CTA during the month-and-a-half period from June to mid-July 2007. He stipulated that "he knew or should have known there were insufficient funds" to cover the checks when he wrote them. The bank honored three of those checks, charging overdraft fees, because Edwards immediately transferred money into the CTA to cover the checks. But the bank dishonored the fourth one. By the time the recipient of that check presented it for payment almost two weeks after it was issued, Edwards had made cash withdrawals and incurred overdraft fees, leaving insufficient funds in the CTA. Within a week, however, Edwards again transferred money to cover the fourth NSF check.

On July 2, 2007, Los Angeles State Bar investigator Lisa McGeo wrote to Edwards and requested a *written* explanation for the first NSF check by July 17, 2007. The letter was returned stamped "return to sender." Ms. McGeo sent another letter on July 23, 2007, enclosing her earlier letter, and informing Edwards that she had calendared the matter for his written response for August 6, 2007. Edwards received this correspondence by July 30, 2007, and although he clearly knew that the State Bar was inquiring about his CTA, he continued to use it as a personal checking account. From August 3, 2007 through September 20, 2007, he made two additional fund transfers and one ATM withdrawal and issued three checks.

Edwards failed to timely respond to Ms. McGeo's letters. Rather than provide the requested written explanation by the August 6, 2007 due date, he called the Los Angeles State Bar office about the status of the investigation and was told the matter had been transferred to

San Francisco.[3] In response to State Bar inquiries, Edwards sent letters to the San Francisco State Bar office on September 19, 2007, October 19, 2007 and February 4, 2008, explaining the four NSF checks. By the end of September 2007, Edwards had reconciled the CTA and limited its use "to client purposes and accounting administration."

III. EDWARDS IS CULPABLE OF TWO COUNTS OF MISCONDUCT

The State Bar has charged Edwards with two counts of professional misconduct: (1) commingling personal funds in his CTA, and (2) moral turpitude by issuing NSF checks from his CTA, repeatedly commingling personal funds in that account, making no effort to ascertain his professional responsibilities for the CTA, and continuing to misuse it even after he knew about the State Bar's investigation. We agree with and adopt the hearing judge's findings that Edwards is culpable on both counts.

A. Count One: Improper Use of CTA (Rule 4-100(A))

Rule 4-100 provides that, except in narrow circumstances not applicable here, an attorney shall not deposit or otherwise commingle personal funds in his CTA.[4] The hearing judge correctly found that Edwards violated this rule by using his CTA as a personal checking account, even though it held no client funds. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23 ["The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit."]; *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 ["Trust accounts, open or closed, are never to be used for personal purposes . . . ."].)

[3] The record does not reveal the date Edwards made this call.

[4] 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 . . . ."

B. Count Two: Gross Negligence Constituting Moral Turpitude (§ 6106)

The hearing judge also correctly found that Edwards committed an act of moral turpitude because he was grossly negligent in issuing four NSF checks when he knew or should have known the CTA had insufficient funds. "Knowledge that a check was issued without sufficient funds is an integral element of a charge of moral turpitude premised on writing a bad check. [Citation.]" (*Read v. State Bar* (1991) 53 Cal.3d 394, 409.) An attorney who issues checks which he knows will not be honored acts dishonestly and with moral turpitude (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426), even though no client funds were involved. (*In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 54.)

The totality of circumstances demonstrates that Edwards grossly neglected his CTA. First, he opened and used the account without researching the rules governing attorney trust accounts. Second, he was inattentive and careless in monitoring its balance. Third, even when he found his misplaced checkbook, he continued to use the CTA for personal finances. Finally, after the State Bar contacted him about the first NSF check, he neither timely responded to the inquiry nor ceased using the CTA as his personal account. This cumulative misconduct aptly supports the hearing judge's moral turpitude finding based on gross negligence. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876 [gross negligence where attorney used CTA for personal expenses, issued NSF checks, made no effort to track CTA balances or determine proper use, and continued CTA use after contact from State Bar].)

On review, Edwards argues that he did not act with moral turpitude because he thought the NSF checks would be honored when he electronically transferred funds into his CTA. While "a justifiable and reasonable belief that the check will be honored is a defense" to a moral turpitude charge for issuing NSF checks (*In the Matter of McKiernan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 426), Edwards has neither sought review on this issue nor proved this defense. In fact,

he stipulated to the contrary – that he knew or should have known the CTA had insufficient funds to cover the NSF checks. We therefore reject Edwards' argument that he had a justified and reasonable belief that his NSF checks would be honored.

IV. DISCIPLINE

We determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Edwards must establish mitigation by clear and convincing evidence, while the State Bar has the same burden of proof for aggravating circumstances. (Stds. 1.2(e)) & 1.2(b).)

A. One Factor in Aggravation

The State Bar presented no evidence in aggravation and the hearing judge found none. However, the State Bar contends that Edwards committed separate acts of misconduct by using his CTA extensively as a personal account on numerous occasions and then issuing four NSF checks from that account. We agree. In addition to the NSF checks, Edwards made 12 deposits of personal funds into, and 26 withdrawals from, his CTA within a nine-month period. Five of these transactions occurred after he received notice that the State Bar was investigating his use of the CTA. Therefore, we assign aggravating weight to Edwards' multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

B. Four Factors in Mitigation

The hearing judge found four factors in mitigation and we agree. First, Edwards displayed candor and cooperation during the disciplinary proceeding by stipulating to key facts and the admission of exhibits. (Std. 1.2(e)(v).) This entitles him to substantial mitigation credit.

Second, Edwards presented significant evidence of community service, which is "a mitigating factor that is entitled to 'considerable weight.' [Citation.]." (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) He has devoted personal time to two civic organizations – the

Berkeley Police Review Commission and the City of Berkeley Public Works Commission. Since 2004, he has also volunteered for R&R Residential Educational Homes (R&R), mentoring and tutoring underprivileged youth and providing pro bono legal assistance.

Third, Edwards presented evidence of good character. (Std. 1.2(e)(vi).) Four witnesses testified on his behalf, including the executive director of R&R, a real estate broker who has known Edwards for several years, an attorney and a former co-worker. Each praised Edwards' competence, integrity, dedication and trustworthiness. All four witnesses were aware of the misconduct and testified that it did not affect the high regard they held for Edwards. In addition, Edwards had expressed remorse to at least three of these witnesses. Despite the convincing force of the character testimony, however, we give it limited weight because four witnesses do not represent a wide range of references in the legal and general communities, as called for in the standard. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [testimony of four character witnesses afforded diminished weight in mitigation].)

Finally, Edwards is entitled to some mitigation credit because his misconduct caused no actual harm to the client or person who is the object of the misconduct. (Std. 1.2(e)(iii).) Edwards did not hold any clients funds in his CTA during the time he improperly used it for personal finances. And he promptly covered the NSF checks, including the one that was dishonored and returned to the bank.[5]

[5] We agree with the hearing judge that Edwards is not entitled to mitigation credit under standard 1.2(e)(ii) for the good faith belief he could use the CTA for personal purposes because it contained no client funds. Even if that belief were honestly held, it was not reasonable since it plainly violated rule 4-100(A). (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 976 [to establish good faith as mitigating circumstance, respondent must prove his beliefs were both honestly held and reasonable].)

C. Level of Discipline

We first consider the standards in recommending the appropriate discipline to protect the public and preserve the integrity of the legal system. While we recognize that they are not binding on us in every case, the Supreme Court has instructed that we should follow the standards "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and they should be given great weight in order to promote " 'the consistent and uniform application of disciplinary measures.' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Several standards apply here. Standard 2.3 provides for actual suspension or disbarment for an act of moral turpitude, and standard 2.2(b) calls for a three-month actual suspension irrespective of mitigation for a rule 4-100 violation that is not a willful misappropriation of client funds. Guided by standard 1.6(a), we must consider the most severe discipline that applies to Edwards' misconduct. We find standard 2.2(b) to be the most pertinent because it recommends a three-month actual suspension.

We recommend a 90-day actual suspension in accordance with standard 2.2(b). Edwards severely neglected professional responsibilities related to his CTA. And although his mitigation is significant overall, standard 2.2(b) calls for a three-month suspension "irrespective of mitigating circumstances." This language guides us beyond our usual evaluation of "mitigating circumstances" which establish that the public will be protected by imposing a more lenient sanction than called for in the applicable disciplinary standard. (Std. 1.2(e).) Rather, it suggests to us that more than ordinary mitigation or circumstances are required to justify deviating from the applicable standard. Here, Edwards has not demonstrated any circumstances to justify such a departure, particularly since his misconduct constitutes moral turpitude and is aggravated by multiple acts of wrongdoing. (See *In re Silverton*, *supra,* 36 Cal.4th at p. 92 [burden on attorney

to demonstrate "extraordinary circumstances" for a sanction lesser than provided in the standard in disbarment case].)

Edwards argues that applying standard 2.2(b) would not be fair because he did not know that he violated his CTA responsibilities, he did not engage in dishonesty and the bank only dishonored a single $100 check (the fourth NSF check). These arguments, however, do not acknowledge the broader responsibilities of maintaining a CTA, such as the prohibition against using it for any personal transactions. We also find it significant that Edwards did not research fundamental trust account duties before he opened his CTA, and then misused the account for over nine months, continuing to do so after the State Bar raised questions about the first NSF check on the account.

We remain mindful that even post-*Silverton*, the Supreme Court has instructed us to consider application of the standards and "'any ground that may form a basis for an exception to their application'" in making discipline recommendations. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr 980, 983.) We find no grounds for exception here. In following standard 2.2(b) and recommending a 90-day actual suspension, we emphasize that Edwards' issuance of four NSF checks amounted to misconduct that constituted moral turpitude. Indeed, the seriousness of CTA misuse itself is suggested by the three-month actual suspension directed by standard 2.2(b). (See *In the Matter of McKiernan, supra,* 3 Cal. State Bar Ct. Rptr at p. 425, citing *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 976 [purpose of rule 4-100 is to avoid danger that client's money will be lost whenever attorney fails to manage money as designated by rule, even where no client funds in account].) Neither Edwards' claim that he did not know the rules for managing a CTA nor his subsequent payments to cover the NSF checks persuade us that a lesser sanction than the standard provides should apply, particularly given the moral turpitude finding. Therefore, we conclude that a 90-day actual suspension is the appropriate

discipline under these circumstances and would not be "unduly harsh" considering Edwards' overall misconduct. (*Brockway v. State Bar* (1991) 53 Cal.3d 51, 66.)

The purpose of attorney discipline 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.) We make our recommendation with this goal in mind and find support in comparable case precedent. (See *In the Matter of Doran, supra,* 3 Cal. State Bar Ct. Rptr. at p. 880 [personal use of two trust accounts and writing NSF checks merit six-month actual suspension]; *In the Matter of McKiernan, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 428-429 [misuse/neglect of CTA and issuing two NSF checks merit 90-day actual suspension]).

V. RECOMMENDATION

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

1. He must be suspended from the practice of law for the first 90 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.

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 of the 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 which 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 after 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 of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

8. 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.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Kamau Edwards 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).)

VII. RULE 9.20

We further recommend that Kamau Edwards be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this proceeding.

VIII. 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.

PURCELL, J.

We concur:

REMKE, P. J.

EPSTEIN, J.