PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **HARRIS DAY HIMES,** A Member of the State Bar, No. 86074.	**Case No.: 12-C-10954-DFM** **DECISION**

INTRODUCTION

This proceeding arises from the criminal convictions of respondent **Harris Day Himes** (Respondent) for violations of Montana Code Annotated sections 30-10-201, subdivision (1) (failure to register as a salesperson), and 30-10-202, subdivision (1) (failure to register a security).

This court finds that the circumstances surrounding Respondent's convictions did not involve moral turpitude, but do warrant discipline. It also recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

On April 18, 2014, the State Bar transmitted evidence that Respondent had been convicted of violating Montana Code Annotated sections 30-10-301, subdivision (l)(b) (fraudulent securities practices), 30-10-201, subdivision (1) (failure to register as a salesperson), and 30-10-202, subdivision (1) (failure to register a security), all felonies under the laws of the State of Montana. (Mont. Code Ann., § 30-10-306, subd. (1).) On April 30, 2014, the State Bar

transmitted supplemental evidence showing that Respondent had filed an appeal of his conviction.

On June 12, 2014, the Review Department of this court filed an order, finding that Respondent's conviction of fraudulent securities practices under Montana law is a felony involving moral turpitude. It also found that his convictions for violating the two Montana statutes regulating the sale of securities are crimes that may or may not involve moral turpitude. Based on the Review Department's finding that Respondent had been convicted of a felony involving moral turpitude, the Review Department ordered that Respondent be suspended from the practice of law, effective July 2, 2014, pending final disposition of this proceeding. (Bus. & Prof. Code, § 6102; Cal. Rules of Court, rule 9.10(a).)

On March 24, 2015, the Montana Supreme Court issued a decision in the criminal matter, affirming Respondent's convictions for failing to register a security and failing to register as a securities salesman but reversing Respondent's criminal conviction of fraudulent securities practices under Montana law and remanding the matter for possible further proceedings.

On May 18, 2017, the Review Department referred evidence of Respondent's convictions in Montana to the Hearing Department of this court for a determination of whether the circumstances surrounding Respondent's convictions involved moral turpitude or other misconduct warranting discipline and, if so, a recommendation of what discipline should be imposed.

On May 19, 2017, a notice of assignment (notice of hearing) [NOH] was filed and served, scheduling a status conference on June 19, 2017.

On June 19, 2017, Respondent filed his response to the notice of hearing. In his response, he alleged that neither the convictions nor the underlying circumstances of those convictions involved moral turpitude.

The initial status conference was held on June 19, 2017. At that time a trial date of September 6, 2017, was scheduled with a two-day trial estimate.

Trial was commenced on September 6, 2017; recessed on September 8, 2017; resumed and completed on November 2, 2017; and followed by a period of post-trial briefing. The State Bar was represented at trial by Senior Trial Counsel Eli Morgenstern and Deputy Trial Counsel Esther Fallas. Respondent acted as counsel for himself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NOH, the stipulation of undisputed facts previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in the State of California on May 31, 1979, and has been a member of the State Bar of California since that time.

Procedural History of Criminal Proceeding

On September 27, 2011, the State of Montana charged Respondent with alleged violations of the following Montana Code Annotated sections:

(1) 45-6-301(2)(c) [theft by deception];
(2) 30-10-201(1) [failure to register as a securities salesperson];
(3) 30-10-202(1) [failure to register a security];
(4) 30-10-301(1)(b) [fraudulent practices];
(5) 45-6-301(2)(c) and 45-4-102(1) [conspiracy to commit theft by deception]; and
(6) 30-10-301(1)(b) and 45-4-102(1) [conspiracy to commit fraudulent practices].

On September 20, 2013, after a one-week trial, the jury found Respondent not guilty of (1) theft by deception; (2) conspiracy to commit theft by deception; and (3) conspiracy to commit fraudulent practices. However, it found him guilty of (1) failure to register as a securities salesperson, a felony; (2) failure to register a security, a felony; and (3) fraudulent practices, a felony.

On December 20, 2013, the Montana trial court held the sentencing hearing and imposed the sentence for the three convictions. The court sentenced Respondent to three concurrent ten-year terms of commitment, suspended, with 90-days actual time, to be served five days of every seven day week, to the Montana Department of Corrections. Respondent was also ordered to sign up with the Adult Probation and Parole Bureau; pay $150,000 restitution to the victim (Geoffrey Serata), in monthly installments of $1,500 with $5,000 due immediately; and pay court costs. Respondent appealed.

On March 24, 2015, the Montana Supreme Court affirmed Respondent's convictions of failing to register as a salesperson and failing to register a security, both felonies. However, the court reversed and remanded Respondent's conviction of fraudulent practices, concluding that the trial court erred by giving the jury a jury instruction for fraudulent practices that incorporated an Administrative Rule of Montana, thereby creating an evidentiary standard for the crime of fraudulent practices different than that required by statute.

On December 7, 2015, on remand, the trial court dismissed the fraudulent practices felony charge and ordered Respondent to begin serving the sentence it had previously imposed for the other two convictions.

Circumstances Surrounding Convictions

At the outset of this decision, this court feels compelled to address the State Bar's belief that "the factual findings made by the Montana Supreme Court in its March 24, 2015 Decision are clearly and convincingly supported by the record." (Closing Brief, p. 5.) This issue is important because, if the Montana Supreme Court appropriately made "factual findings," they would be entitled to considerable deference by this court.

The State Bar's belief that the factual summary contained in the Supreme Court's decision represents "factual findings" by that court ignores the Montana Supreme Court's explicit statement in its decision disclaiming any such intent:

> The standard of review of the sufficiency of evidence to sustain a conviction is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [citation omitted] We review a jury's verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. [citations omitted]

(Ex. 6, p. 3.)

This statement makes clear that the Supreme Court was not attempting to resolve credibility issues surrounding the testimony of Geoffrey Serata (Serata), the prosecution's chief witness; nor was it seeking to weigh or decide the considerable evidence contradicting that testimony.[1] The court was merely setting forth the evidence in "the light most favorable to the prosecution." As such, the Montana Supreme Court's summary of that evidence is owed no deference by this court as a finding of fact, except to the extent of those facts and legal conclusions were required to establish the two criminal convictions – which are deemed to have been conclusively established.

Turning to this court's determination of the facts conclusively established by the criminal convictions and/or otherwise proven in this proceeding by clear and convincing evidence, this court finds the following.

Respondent is a retired California attorney who owns and now serves as the senior minister at the Big Sky Christian Center in Hamilton, Montana. Before becoming an attorney in California in 1979, he was a decorated Marine Corps officer, rising to the rank of Colonel, with

[1] That the jury acquitted Respondent on the fraud, theft, and conspiracy charges raises the distinct possibility that it disbelieved, or at least doubted, much of the testimony of the prosecution's principal witness.

extensive combat experience in Vietnam.[2] After practicing law successfully in California for nearly two decades, he gave up the practice of law in 1997 after receiving a degree in Divinity and being ordained a minister of the Calvary Church. In approximately 2000, he moved to Montana, where he used his own funds to found the Big Sky Christian Center. This Center serves as a shelter for battered women and the homeless and has "supported the needs of hundreds of people."

Geoffrey Serata was one of the many individuals who has sought and enjoyed the assistance and counseling of Respondent in Montana. He first went to Respondent's facility in 2003. Although the Montana Supreme Court described Serata as a "disabled veteran", the evidence is uncontradicted that Serata's disability is only partial (10 percent) and resulted from a civilian motorcycle accident, rather than his activities in the military. Nonetheless, because Serata's income and wealth were relatively limited prior to 2008, Serata credits Respondent with personally assisting him, as a former veteran, to obtain medical treatment from the Veterans Administration. However, because Serata's disability and significant medical needs were unrelated to his military service, Serata's entitlement to VA medical services was dependent on his income and financial status not going above certain designated disqualification levels. Serata was required to disclose his financial status to the VA on a regular basis in order to continue to receive VA benefits.

Serata was a frequent visitor at Respondent's home and center in Hamilton, both because he would perform miscellaneous tasks at the center and because Respondent was teaching him to read the Biblical Greek language in which the New Testament was originally written. Serata regarded Respondent as a friend, and the feeling was then mutual.

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[2] He is described by several former Marine Corps veterans as "a war hero" and as having "led his men in heroic deeds of action." Respondent is reported by them to have received a Purple Heart and a Bronze Star with a V for Valor as a result of his service in Vietnam.

In January 2008, Serata learned that he was going to receive a substantial amount of money as the beneficiary of his grandfather's estate. Ultimately this inheritance proved to be approximately $425,000. When Serata learned of his eminent and significant inheritance, he sought advice from Respondent about how he should invest the funds. In response, Respondent merely referred him to an accountant and a Montana attorney for advice.

When Serata then indicated a desire to use the money for ministerial purposes, Respondent educated him regarding the benefits of creating a "corporate sole" under Montana law[3] and transferring the funds to that entity. Respondent then assisted Serata in creating such a corporate sole, which Serata named "Image of Truth."

One of Respondent's long-time friends was another ordained Calvary minister named James Bryant (Bryant). Well before 2008, Bryant had come up with a plan to create a business to generate funds for ministerial purposes by manufacturing and selling structurally insulated solar panels (SIPs) at a factory to be located in Mexico. Respondent had been assisting Bryant in the creation of this company and was himself a minor investor in it, along with a number of others.

In March 2008, prior to Serata's actual receipt of his inheritance, Serata and Bryant were at Respondent's home at the same time. Serata had previously met Bryant at Respondent's home in 2006. Hearing that Bryant was in the process of creating this new SIP business in Mexico (to be named "Duratherm"), Serata expressed an interest in learning about it as a possible investment. Bryant then met privately with Serata, showing him a slide show of photos that

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[3] As explained by the Montana Supreme Court: "A corporation sole is "a corporation having or acting through only a single member." *Black's law Dictionary* 418 (Bryan A. Garner e&, 10th ed. 2014), In Montana, corporations sole are limited to creation under the "Montana Religious Corporation Sole Act," §§ 35-3-101, et seq., MCA, and the sole member may be "a bishop, chief priest, or presiding elder" designated to hold property for "any religious denomination, society, or church," § 35-3-201, MCA."

Bryant had put together regarding the manufacture of SIPS and the future factory.[4]

During the criminal trial Respondent exercised his right not to testify. Bryant, however, voluntarily returned to Montana to do so, even though it resulted in his being arrested for criminal charges comparable to those then faced by Respondent. Bryant testified in the criminal trial that Respondent had actually cautioned him against allowing Serata to become an investor in the project, warning Bryant that Serata could be "difficult to deal with." (Ex. 18, p. 35.) Respondent provided comparable, and persuasive, testimony during the trial of this proceeding. Nonetheless, Bryant agreed to allow Serata to do so, reaching an agreement whereby Serata would invest $150,000 of his inheritance in the project in exchange for a 6% interest. Both Bryant and Serata testified at various times during the criminal proceeding that it was anticipated that Serata's interest in the business would be that of a "partner." In June 2008, after Serata had received his inheritance and transferred it to his non-profit corporate sole, he arranged for $150,000 to be transferred to the account of a bank account of what was the largest investor in Duratherm.[5]

At some time after this agreement had been reached orally, Serata requested that Bryant, not Respondent, prepare some sort of document to memorialize the agreement. During the criminal trial, Serata indicated uncertainty about whether he had made this request before or after he had actually funded the Duratherm investment, providing testimony to support either conclusion. During his testimony in the instant proceeding, he stated that he had made his request after the investment had been funded. In any event, to satisfy Serata's request, Bryant used a form "Subscription Agreement" that apparently had been used in an earlier transaction involving a mining operation; modified it slightly to refer to the Duratherm transaction; and

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[4] While Serata testified that Respondent participated in this session, both Bryant and Respondent have testified persuasively to the contrary.

[5] Illustrative of the fact that Duratherm was at that time merely a start-up company, it then did not even have its own bank account.

emailed it to Respondent to provide to Serata.[6] Bryant also indicated to Respondent that "it needed to be filled out for Geoff, and I [Bryant] didn't know any of the variables on him." (Ex. 18, p. 68.)

When Respondent met with Serata and provided him with the document that had been prepared by Bryant, it was observed by the two that there were modifications that needed to be made to it. The exact nature of those modifications is unknown to this court. In any event, Respondent opened the Subscription Agreement on his computer and made modifications to it. The agreement ended up describing Serata's resulting ownership interest as "shares" in a company. During the criminal trial, the prosecution's other witness testified that the stored information on Respondent's computer indicated that the total time that the Subscription Agreement, forwarded by Bryant, had remained "open" on Respondent's computer was only 27 minutes. During the trial of this proceeding, Serata testified that he understood this Subscription Agreement was merely an "interim" contract, and that the formal contract for this business arrangement in Mexico was to be drawn up by an attorney in Mexico so that it would comply with Mexican laws. Bryant provided comparable testimony during the criminal trial.

At the time that Serata became interested in the Duratherm investment, he was already scheduled to have significant corrective surgery at a VA facility in September 2008. Because Serata was interested both in working on the Duratherm project and in exploring other business opportunities in Mexico, he volunteered in the summer of 2008 to go to Mexico. One of the activities that Serata knew he would be participating in during that outing was the purchase and transport into Mexico of the glue machine required for Duratherm to begin manufacturing SIPs. In July or early August, 2008, Serata traveled to Texas, where he stayed for several weeks, working with Bryant to make arrangements and purchase various equipment for the Duratherm

[6] Bryant did not live in or near Hamilton and was frequently in Mexico, working on putting together the Duratherm project.

project (including purchasing the needed glue machine). He then traveled to the Duratherm factory location in Puerto Escondido, Mexico, where he stayed for several weeks. The email correspondence between Serata and either Bryant or Respondent during this period was friendly and devoid of any complaints by Serata about the status of his investment.

Suddenly, in mid- to late August, 2008, after Serata had been at the factory for approximately three weeks, he left Mexico without warning. In his apparent hurry to get out of the country, he took a borrowed car improperly across the border, creating considerable problems for the vehicle's owner. Once back in this country, Serata began to complain about the Duratherm investment and demanded that he be bought out of the investment (with a premium attached to the return of his investment). As leverage for this demand, Serata refused to relinquish possession of cameras and "film" that Serata had been provided by Respondent solely for the purpose of Serata editing the existing film into a video of a recent reunion of Marines veterans who, along with Respondent, had been involved in the celebrated fighting at Khe Sanh.[7] Those cameras, and the film in them, belonged to those veterans and not to Serata. Nonetheless, Serata continued to refuse to release those items unless and until he had been "bought out" of the Duratherm investment. He retained these items, over Respondent's protests, until 2012, despite being warned by a police officer (to whom he was complaining about Respondent) that Serata's failure to return the cameras amounted to theft. It was only after Respondent filed a civil action against Serata that the cameras and film were returned. In the meantime, Serata, in what eventually proved to be a successful effort by him to require someone to make restitution to him, aggressively pursued the filing of criminal charges against Respondent and Bryant.

As a result of Respondent's criminal convictions, he has been timely complying with his obligation to make restitution of $150,000 to Serata. At the same time, while the Duratherm

[7] Videography was one of Serata's occupations.

project's successful launch was severely hampered by the economic downturn in late 2008, it is now an "up-and-running" company, manufacturing and selling SIPs to the public and also providing them for use on various church-related facilities.

Did the circumstances surrounding Respondent's convictions involve moral turpitude or warrant discipline?

As set forth above, the missive from the Review Department to this court is to determine whether the circumstances surrounding Respondent's convictions involved moral turpitude or other conduct warranting discipline. With regard to the first component of this inquiry, this court concludes that the misconduct did not involve acts of moral turpitude.

At the outset of this assessment, this court notes that the decision of the Supreme Court, affirming two of the convictions and reversing the third, make clear that the convictions themselves do not evidence any act of moral turpitude.

In the first instance, the Montana Supreme Court was explicit in its decision that Respondent's convictions did not require a "malicious motive" or any other *mens rea* other than a showing that the defendant acted "willfully" (as defined in the statute quoted below):

> Himes asserts that that the definition of "willfully" used by the District Court was inappropriate for the offenses charged. The jury instruction at issue defined "willfully" as follows: "A person acts 'willfully' if the person is aware of what the person is doing. It does not mean that the person intended to violate the law, injure another, or acquire any advantage" This definition is based on § 1-1-204(5), MCA, which states that "when applied to the intent with which an act is done or omitted, [willfully] means a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire any advantage." Himes argues that we should follow federal law in our definition of "willful," which requires the act to be done "with knowledge that his conduct was unlawful." *Bryan* v. *U.S.*, 524 U.S. 184, 191-92, 118 S. Ct. 1939,1945 (1998). The State counters that the District Court offered the correct definition of "willfully" based on § 1-1-204(5), MCA, and the State was not required to prove that Himes had a malicious motive; the State only had to prove that Himes was aware of what he was doing. *See, e.g., Erickson* v. *Fisher*, 170 Mont. 491, 494, 554 P.2d 1336, 1338 (1976) (holding that an act did not need a "malicious motive" to be "willful"). (Ex. 6, p. 16 [underlining added].)

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> Himes was charged with violating several provisions of the Securities Act. The Securities Act falls outside Titles 45 and 46. However, it provides for criminal sanctions when any person "willfully violates" any provision of the Act Section 30-10-306(1), MCA. Therefore, the Securities Act "includes a particular mental state." The District Court correctly instructed the jury on the appropriate mental state to prove violations of the Securities Act. Section 30-10-306(1), MCA, expressly provides criminal sanctions when any person "willfully violates" any provision of the Securities Act "Willfully" is defined at § 1-1-204(5), MCA, and "such definition is applicable to the same word or phrase wherever it occurs," § 1-2-107, MCA. The District Court correctly instructed the jury in accordance with the statutory definition of "willfully." (Ex. 6, p. 17 [underlining added].)

Because the Montana Supreme Court specifically rejected any requirement that a malicious, dishonest, or fraudulent intent or state of mind was necessary for there to be a violation of the Montana securities statutes under which Respondent was convicted, this court cannot conclude that the convictions themselves per se establish that the misconduct involved acts of moral turpitude. (See also *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 116 [knowingly driving without a license is not moral turpitude].)

Moreover, the discussion by the Montana high court of its basis for upholding the securities convictions makes clear that the convictions are based solely on Respondent's actions in modifying and presenting to Serata the written evidence of his investment in Duratherm:

> In the present case, a reasonable juror could have found that Himes sold a security to Serata based on the evidence adduced at trial. The jury was not required to rely on one single definition of a "security," as Himes contends. Without objection,[8] the jury was properly instructed on the statutory definition of "security." While the State may have focused on

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[8] During its closing argument in the criminal trial, the prosecutors focused on the language of the statute defining "securities" as encompassing "profit-sharing agreements." On appeal, Respondent cited to case law indicating that this language was sufficiently vague and overbroad that a modifying, explanatory instruction was needed. Unfortunately for Respondent, who had acted as his own attorney during the criminal trial, he had not objected during the trial to this explanatory instruction not being provided. As a result, the Supreme Court ruled that he had waived that issue on appeal.

> the evidence of a profit-sharing agreement during closing argument, adequate evidence was introduced from which the jury could find that Himes sold Serata stock in Duratherm. The Subscription Agreement that Himes provided Serata identified a "guarantee of issuance" of a "(6%) ownership in DBS, LLC." The Subscription Agreement also referred to Serata's interest as "shares" and reflected that Serata may receive profits in the form of cash dividends. These are all common factors associated with stock, as articulated in *Landreth*, 471 U.S. at 686, 105 S. Ct at 2302. Based on this evidence, a reasonable juror could have concluded that Himes sold Serata a security.

(Ex. 6, p. 15.)

At the conclusion of the criminal trial, the jury seemed to reach inconsistent results in acquitting Respondent of the charges of theft by deception, conspiracy to commit theft by deception, and conspiracy to commit fraudulent practices, while convicting him of fraudulent practices.

On appeal, Respondent argued that his conviction of fraudulent practices was the result of an erroneous instruction which seemed to require a conviction if he had not provided a formal prospectus to Serata (something that he acknowledged not doing). The Montana Supreme Court agreed.

> Regarding the definition of "fraudulent practices " the jury was instructed: "It is unlawful for any person, in connection with the offer or sale of any security, directly or indirectly, in, into, or from this state, *to willfully omit to provide a prospectus.*" (Emphasis added [in original; footnote deleted].) Himes contends that the requirement for a prospectus is based on an Administrative Rule, Admin. R. M. 6.10,401(2), and not the statute defining fraudulent practices under the Securities Act, § 30-10-301(1)(b), MCA, which makes it unlawful for a person to "make any untrue statement of a material fact or omit to state a material fact," but the statute does not include the requirement of a written prospectus. Himes argues that the jury was allowed to erroneously rely upon the standards set by Admin. R. M. 6.10.401(1)(j), rather than statute, § 30-10-301(1)(b), MCA, and his conviction for fraudulent practices should therefore be reversed.[9]

The State concedes that neither the Administrative Rule nor the statute

[9] A review of the trial transcript makes clear that the prosecution, during closing argument, relied on the lack of a prospectus as the basis for asking for a conviction of "fraudulent practices."

> required a prospectus at the time that Himes allegedly committed the fraudulent practices with which he was charged. The State contends, however, that the inclusion of a prospectus requirement within the definition of fraudulent practices was harmless error because other sufficient evidence was presented to convict Himes for fraudulent practices pursuant to § 30-10-301(1)(b), MCA. We disagree.
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> The District Court erred by instructing the jury that the willful omission of a prospectus constituted fraudulent practices when neither the Administrative Rule nor the statute included such a requirement at the time that Himes is alleged to have committed the crime of fraudulent practices. Although the State characterizes this error as harmless, there is no dispute that Himes did not provide Serata with a prospectus and we cannot simply assume that the lack of a prospectus did not form the basis for the jury's conviction on this charge. We therefore reverse Himes' conviction for fraudulent practices pursuant to § 30-10-301(l)(b), MCA, and remand to the District Court for a new trial on this charge.

(Ex. 6, pp. 20-21.)

When the case was remanded to the trial court for further proceedings, the court and prosecutors, consistent with the jury's prior "not guilty" decisions on the other fraud and deception charges, dismissed the case.

Serata testified during both the criminal trial and the trial in the instant proceeding. During his testimony in this proceeding, he largely repeated the charges of fraud and deception that he made against Respondent during the criminal matter. If that testimony had been believed by the jury "in the light most favorable to the prosecution," it presumably would have resulted in convictions of fraud and theft by deception. It did not.

This court is also unpersuaded by Serata's complaints that he was defrauded and misled by Respondent. Virtually all of his complaints against Respondent were persuasively refuted by the testimony of Bryant in the criminal trial and by that of Respondent during the instant proceeding. Further, many of Serata's claims are not credible on their face or are completely contradicted by evidence from other sources, including, inter alia, his claims that he had no idea that Duratherm was a start-up company (despite the fact that he was well aware that it did not yet

even have the glue machine necessary to manufacture a single SIP); his complaint in the criminal case that Bryant had sought to have him killed by leaving him at an unsafe beach, Playa Manzanillo – a beach later described as safe, beautiful, a great place to snorkel to see fish,[10] and renowned for its fabulous surfing; his attempt to blame Respondent for his problems with other residents of Hamilton, Montana (thereby purportedly forcing Serata to move to Tennessee), while ignoring the fact that his shooting his shotgun at the farm animals of those individuals and in the vicinity of their homes had led to his own criminal conviction; his complaint that Bryant had abandoned him in Mexico without warning, when there was an email to Serata from Bryant at the time, explaining the reasons for Bryant's unexpected delay in being able to cross the border back into Mexico; and his weak suggestion that Respondent was somehow responsible for Serata's failure to inform the VA of his inheritance [which would have disqualified Serata from receiving all of the free VA services he was seeking], notwithstanding disclosure forms that Serata was required to complete to establish his ongoing entitlement to VA benefits.[11]

Although this court does not find that Respondent's conduct involved moral turpitude, it does conclude that his misconduct warrants discipline. Respondent knowingly was involved in the creation and presentation to Serata of a document that was intended to have legal significance and which described his investment as "shares" in a company – thereby falling within the regulating the sales of securities. Those laws are designed to avoid the very types of unhappy investment surprises by uninformed members of the public about which Serata sought to complain. They also serve to provide a defense against such bogus complaints from an investor merely seeking a basis to renege on a prior commitment. The importance to the public of total

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[10] Serata went to the beach with snorkel gear to see the fish.

[11] By transferring his inheritance into the non-profit corporate sole, Serata justified his action in not disclosing the wealth in the VA disclosure statements. When he bought a home with the bulk of the remaining inheritance after the Duratherm investment, title to the home was held in the name of the non-profit corporation. After his surgery in 2008, title to the home was transferred to Serata.

compliance with those laws in Montana is reflected in the fact that violations are treated as felonies and that criminal penalties will be assessed when a violation is merely "willful."

Respondent is an attorney. He was finalizing and presenting to Serata as an investor in Duratherm (a company in which he had an ownership interest) a legal document. It was not a defense to the criminal charges that he may not have known that this document fell within the definition of a security, and it is not a defense to the issues of culpability here.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct, [12] std. 1.5.) The court finds the following with respect to aggravating circumstances.

Multiple Acts of Misconduct

Respondent has been convicted of two violations of the securities laws of Montana. Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.5(b).)

Significant Harm

Respondent's misconduct significantly harmed Serata. This is also an aggravating factor. (Std. 1.5(j).)

The court declines to find that Serata was a vulnerable individual. At the time of this transaction he had already been referred by Respondent to an attorney and an accountant for advice and he had plenty of money available to pay for such advice. Further, while Serata tried to describe himself as unknowledgeable about investment matters, his prior investment history and conduct and testimony in the underlying matter made such self-serving protestations by him not credible.

[12] All further references to standard(s) or std. are to this source.

Nor does this court conclude that Respondent's continuing unhappiness and disagreement with the convictions is an aggravating factor. In fact, his convictions may well have resulted from the jury not receiving adequate instructions regarding the definition of a security. But that deficiency resulted from Respondent's own failure to request the required instruction or to object to it not being provided. The Montana Supreme Court correctly concluded that the issue was waived by Respondent's inaction at trial and that the description of Serata's interest in Duratherm as "shares" (rather than as a partnership), when viewed in the light most favorable to the prosecution, supported the convictions. While Respondent may be understandably in disagreement with the criminal case's outcome, there is absolutely no indication that that attitude poses any risk of any future misconduct.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

No Prior Discipline

Respondent had practiced law in California for approximately 18 years prior to his retirement in 1997. During that time span, Respondent had no prior record of discipline. Since his retirement in 1997, there have been no indications of any other professional or criminal activity by Respondent. Moreover, Respondent's misconduct here appears to represent completely aberrational activities on his part, making clear that there is little or no risk of future misconduct by him. Respondent's lengthy tenure of discipline-free practice and professional life prior to the instant misconduct is entitled to moderate weight in mitigation. (Std. 1.6(a); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [17 years of discipline-free practice is a significant mitigating factor]; *In the Matter of Fonte* (Review Dept. 1994) 2

Cal. State Bar Ct. Rptr. 752, 764-765 ["his long service at the bar and for his community counterbalances misconduct that would otherwise warrant substantial discipline"].)

Candor

Respondent demonstrated candor to the State Bar and this court regarding the circumstances showing his misconduct. Such is a mitigating factor. (Std. 1.6(e).)

Character Evidence/Community Service

Respondent presented testimony from numerous witnesses regarding his good character and community service, including his parole officer, a California attorney, numerous military veterans, and a large number of individuals who have benefitted from his work at the Big Sky Christian Center. Respondent is entitled to substantial mitigation for this character evidence. (Std. 1.6(f); *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785; *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 305 [10-15 hours per month of volunteer community and church work counseling people in crisis.]; see also *In the Matter of Crane and DePew* (Review Dept 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than

two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.16, which provides, "Actual suspension is the presumed sanction for final conviction of a felony not involving moral turpitude, but involving other misconduct warranting discipline."

In assessing the appropriate discipline to recommend for Respondent's misconduct, this court concludes that a relatively short minimum period of discipline is required or appropriate to address Respondent's misconduct and the dictates of standard 2.16 because Respondent's misconduct, by any standard, was aberrational and doubtless not recur. Moreover, Respondent has been on interim suspension since July 2, 2014, as a result of the Review Department's order premised on his conviction of fraudulent practices, a crime involving moral turpitude but a conviction that was subsequently overturned on appeal. The case law is clear that such a lengthy period of interim suspension should be taken into consideration by this court in assessing what discipline is appropriate to impose – especially where the duration of the interim suspension has been increased by the respondent's appeal of the conviction. (See, e.g., *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 515-516; citing *In re Young* (1989) 49 Cal.3d 257, 268; and *In re Fudge* (1989) 49 Cal.3d 643, 645.) Here, Respondent has already

been suspended from the practice of law for well more than three years and the specific conviction on which the Review Department expressly based its interim suspension order has reversed and dismissed more than two years ago.

That said, and was also concluded in the *Katz* decision, because Respondent has been ineligible to practice for such a long period of time, he should be required to provide proof to this court of his rehabilitation, fitness to practice, and present learning and ability in the general law before he is restored to active status. (Std. 1.2(c)(1).) The minimum period of six months of actual suspension imposed in *Katz*, running from the effective date of the Supreme Court order imposing discipline in this matter, is both appropriate for the nature of the Respondent's misconduct here and fairly approximates the length of time that would be required for Respondent to prepare, file, and have decided a petition to be restored to active status (should he chose to ever file such a petition).

The State Bar's recommendation that Respondent be disbarred is based on its mistaken belief that the Supreme Court had made "findings" establishing moral turpitude and its reliance on the Supreme Court's 1937 decision in *In re Hatch* (1937) 10 Cal.2d 147. Neither basis is applicable here. Neither the Montana Supreme Court nor this court have concluded that Respondent's misconduct reflects acts of moral turpitude. In turn, the *Hatch* decision emphasized the knowingly dishonest and fraudulent conduct of the respondent there. Even with that showing, the court there declined to order disbarment.

RECOMMENDED DISCIPLINE

Actual Suspension/Probation

It is recommended that respondent **Harris Day Himes**, State Bar Number 86074, be suspended from the practice of law for one year, that execution of that suspension be stayed, and

that Respondent be placed on probation for two years with the following conditions.

1. Respondent must be suspended from the practice of law for a minimum of the first six (6) months of Respondent's probation and until Respondent provides proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

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

3. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Membership Records and Compliance Office (Membership Records) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, he or she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to Membership Records, within ten (10) days after such change, in the manner required by that office.

4. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation deputy to discuss the terms and conditions of Respondent's discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation deputy in person or by telephone. During the probation period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

5. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).[13] However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional

[13] To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

6. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.

7. Because Respondent resides outside of California, within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must either submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session or, in the alternative, complete six (6) hours of California Minimum Continuing Legal Education-approved participatory activity in California legal ethics and provide proof of such completion to the Office of Probation. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for this activity. If Respondent provides satisfactory evidence of completion of the Ethics School or the hours of legal education described above, completed after the date of this decision but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

8. Respondent must comply with all probation conditions imposed in the underlying criminal matter and must report such compliance under penalty of perjury in all quarterly and final reports submitted to the Office of Probation covering any portion of the period of the criminal probation. In each quarterly and final report, if Respondent has an assigned criminal probation officer, Respondent must provide the name and current contact information for that criminal probation officer. If the criminal probation was successfully completed during the period covered by a quarterly or final report, that fact must be reported by Respondent in such report and satisfactory evidence of such fact must be provided with it. If, at any time before or during the period of probation, Respondent's criminal probation is revoked, Respondent is sanctioned by the criminal court, or Respondent's status is otherwise changed due to any alleged violation of

the criminal probation conditions by Respondent, Respondent must submit the criminal court records regarding any such action with Respondent's next quarterly or final report.

Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the termination of the probation period, if Respondent has complied with all of the terms of his probation, the three-year period of stayed suspension will be satisfied and the suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

It is not recommended that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, because Respondent was ordered to comply with rule 9.20 at the time he was ordered ineligible in 2014 and has remained ineligible to practice since that time. (*In the Matter of Katz*, supra, 1 Cal. State Bar Ct. Rptr. 516, fn. 13.)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and

that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: January 31, 2018

DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); 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 January 31, 2018, I deposited a true copy of the following document(s):

DECISION

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:

HARRIS DAY HIMES
PO BOX 540
HAMILTON, MT 59840

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

ESTHER FALLAS, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 31, 2018.

Mazie Yip
Case Administrator
State Bar Court