kwiktag® 211 095 185

FILED
JAN 10 2017
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **THOMAS OSMONDE RUSSELL III** A Member of the State Bar, Member No. 107800.	**Case Nos.: 15-O-14576, 15-O-15637-DFM** **DECISION AND ORDER**

INTRODUCTION

Respondent Thomas Osmonde Russell III (Respondent) is charged here with nine counts of misconduct, involving two different client matters. The counts in case No. 15-O-14576 include allegations of willfully violating rule 4-100(A) of the Rules of Professional Conduct[1] (failure to maintain client funds in trust account); Business and Professions Code[2] section 6106 (moral turpitude – misappropriation) [two counts]; section 6068, subdivision (a) (failure to comply with laws – breach of fiduciary duty); and rule 4-100(A) (commingling – payment of personal expenses from client trust account). The counts in case No. 15-O-15637 involve allegations of violations of section 6103 (failure to obey court order); section 6106 (moral turpitude – misrepresentation) [two counts]; and section 6068, subdivision (d) (seeking to mislead court).

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

As will be discussed below, on November 21, 2016, the parties filed a stipulation to sever and abate two of the four counts of case No. 15-O-15637. By separate order, those counts are severed and abated, and they are not decided in this decision.

With regard to the remaining counts of the two cases, the court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) in case No. 15-O-14576 was filed by the State Bar of California on April 12, 2016.

On May 12, 2016, Respondent filed his response to that NDC. Thereafter, on May 20, 2016, Respondent filed a First Amended Response to the NDC, denying any culpability in the matter.

On May 23, 2016, the initial status conference was held in the case. At that time the case was abated at the suggestion of the parties due to the anticipated filing of new charges against Respondent by the State Bar.

The NDC in case No. 15-O-15637 was filed on July 25, 2016.

On August 1, 2016, a status conference was held in the two cases. At that time, the matters were consolidated and given a trial date of November 8, 2016, with a three-day trial estimate.

On August 11, 2016, Respondent filed his response to that NDC, denying all allegations of the NDC.

On October 31, 2016, the pretrial conference was held in the cases. At that time, due to a conflict of one of the attorneys and a shortened trial estimate of the parties, the start of the trial was delayed one day, to November 9, 2016.

Trial was commenced on November 9, 2016, and completed as scheduled. The State Bar was represented at trial by Senior Trial Counsel Charles Calix. Respondent was represented at trial by Kevin Gerry.

During the trial of this matter, testimony was given by the complaining witness in case No. 15-O-15637 that the issues forming the basis for two of the four counts in that case remain pending in the underlying family law court case. As a result, on November 21, 2016, the parties filed a stipulation to sever and abate counts 3 and 4 of case No. 15-O-15637. As previously noted, those counts are severed and abated, and they are not decided in this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Jurisdiction

Respondent was admitted to the practice of law in California on May 25, 1983, and has been a member of the State Bar at all relevant times.

Case No. 15-O-14576 (Blackbridge Matter)

On June 11, 2015, Alexander Dillon (Dillon), on behalf of Blackbridge Capital L.L.C. (Blackbridge), and Barbara Lynn (Lynn) entered into an agreement whereby Lynn would sell to Blackbridge her shares in a company called eWorld Companies, Inc. (eWorld). On the following day, the parties signed three documents memorializing the details of this transaction.

The first document was entitled "Share Purchase Agreement" and provided that Blackbridge was to pay $35,000 to Lynn and, in exchange, Lynn was to deliver her eWorld shares "via physical certificate and cleared (defined as free of any kind of restriction from resale,

including from DTC, the issuer, the transfer agent and the Buyer's brokerage and clearing firm) in the name of the Buyer." (Ex. 6.)

The second document was a "Rider Agreement" to the Share Purchase Agreement. This rider provided that "Blackbridge was to wire $3,500 to Troy Lowman, and the $3,500 sent to Troy Lowman shall be considered value received under the [Share Purchase Agreement]." (Ex. 7.)

The third document was entitled "Escrow Agreement" and was entered into by Respondent in addition to Blackbridge and Lynn. Pursuant to this agreement, Respondent was to act as the "Escrow Agent" in the sale by Lynn of her shares to Blackbridge. This Escrow Agreement provided, in part, that Blackbridge was to place the remaining $31,500 of the purchase price in escrow with Respondent "to be used to make certain payments in respect of obligations under the Purchase Agreement by Blackbridge." The agreement further provided that Respondent, as the Escrow Agent, would "have IRREVOCABLE Instructions to release $31,500 of the Escrow Property, to SELLER [defined in the agreement to be Lynn] upon Blackbridge providing the Escrow Agent with confirmation that the shares are approved and deposited by Blackbridge's Brokerage Clearing Agent within." The agreement further provided in clause 1.03(a)(i): "In the event that Blackbridge's Brokerage Clearing Agent does not approve the shares within four trading days of the certificate being delivered, Blackbridge reserves the right to return the entire balance of the shares to the SELLER." Clause 1.03 went on to provide:

> The Escrow Agent shall return Escrow Property to Blackbridge upon confirmation by Blackbridge of events as per clause 1.03(a)(i) in the paragraph above.
>
> The Irrevocable Instructions to release the Escrow Property shall last the term of the Agreement and shall under no circumstances be amended.

(Ex. 6.)

Section 4.08 of the agreement further provided:

> This Escrow Agreement may be amended, modified, superseded, rescinded, or canceled only by a written instrument executed by the Parties and the Escrow Agent.

Lynn resided in Malaga, Spain, throughout the execution of the above documents. In order for her to transfer her shares to Blackbridge and then have them approved by its brokerage clearing agent, Alpine Securities (Alpine), it was necessary to have Continental Stock Transfer & Trust Company (Continental), the transfer agent and registrar for eWorld, first issue a certificate signifying Lynn's ownership of the shares. Continental issued this certificate on June 16, 2015. (Ex. 1002, p. 8.) After that certificate was issued, Lynn was then required to execute an "Irrevocable Stock or Bond Power," formally transferring the shares identified in the certificate to Blackbridge. Lynn executed this document on the same day that the certificate was issued, June 16, 2015. (Ex. 1002, p. 9.) This authority by Lynn to transfer her shares to Blackbridge was then communicated to Continental, who then issued a new certificate, indicating that ownership of the shares had been transferred to Blackbridge. This certificate was then sent to Alpine, which would then determine whether Blackbridge was receiving shares that it was legally able to market. Under the Escrow Agreement, when Blackbridge provided confirmation to Respondent that Alpine had "approved" the shares, Respondent was then authorized for the first time to release to Lynn the $31,500 that had previously been deposited by Blackbridge into the escrow account controlled by Respondent.

On June 17, 2015, after Lynn had provided the instruction to Continental to transfer her shares to Blackbridge, Blackbridge wired $31,500 into Respondent's client trust account (CTA). After this $31,500 had been deposited into the CTA, the balance of the account was $32,522.97. (Ex. 64, p. 27.)

The certificate issued by Continental, showing Blackbridge's new ownership of the eWorld shares transferred by Lynn, was issued on June 19, 2015, and was then sent to Alpine for

evaluation and possible "approval" of the transferred shares. (Ex. 17.) Alpine documented receiving this certificate on June 23, 2015. (Ex. 19.)

As part of the above approval process, the Chief Executive Officer of eWorld, Henning Morales, certified on June 27, 2015, that neither Blackbridge nor Lynn were ever officers, directors, or 10% or greater shareholders of eWorld. (Ex. 1002, p. 10.) This certification was necessary for Alpine to verify that the stock transfer was not prohibited or in violation of applicable securities laws.

Alpine never "approved" of the shares transferred by Lynn to Blackridge. Instead, on July 9, 2015, Blackbridge sent an email message to Respondent, notifying him that Alpine was unable to approve the eWorld shares and directing Respondent to return to Blackbridge the $31,500 that had previously been deposited into Respondent's CTA. (Exhibit 23.)

Unbeknownst to Blackbridge at the time of this instruction, the $31,500 deposited by Blackbridge into Respondent's CTA was no longer being held by Respondent in escrow. Instead, on June 17, 2015, the very same day that Respondent had received the funds, he began disbursing the funds to various individuals, including himself. None of the recipients of these funds was either Lynn or Blackbridge. The June 17, 2015, disbursements by Respondent included (1) a withdrawal of $2,000; (2) a transfer of $500 to Respondent's business checking account; (3) two wire transfers to Click Trade Media LC of $5,767.52 and $7,800; (4) a $6,000 wire transfer to Ron Touchard (Touchard); and (5) a $7,800 wire transfer to eWorld Companies. After the bank charged $17 for each wire transfer, the balance of Respondent's CTA on June 17, 2015, had dipped to $2,587.45. (Exhibit 64, p. 27.)

On July 9, 2015, Blackbridge sent an email to Respondent stating it had been unable to clear the shares and requesting an immediate return of the $31,500. At the time Respondent received this instruction from Blackbridge on July 9, 2015, the balance of his CTA was down to

$265.44, reflecting a number of additional transfers by Respondent of funds from his client trust account to his personal account. (Ex. 65, pp. 83-84.) Later that day, Blackbridge sent a second email, attaching the first email demanding an immediate return of the $31,500. Respondent then replied on July 9, 2015, "I will make the arrangements." (Ex. 24.)

Despite Blackbridge's instruction that the escrow funds be immediately returned to it, Respondent made no effort to do so. Instead, Respondent forwarded Blackbridge's email demand to Touchard with the comment, "This doesn't look good." Touchard replied, "[N]ot possible unless they got the cert to us, which would take 2 weeks, but I am getting them something t [sic] help clear." (Ex. 23.)

On Friday, July 10, and again on Monday and Tuesday, July 13 and 14, 2015, Blackbridge sent additional emails to Respondent requesting the status of the funds. (Exhibits 24 to 28.) Respondent forwarded these email messages to Touchard with the request, "How should I respond?" (Ex. 27, p. 1.)

On July 16, 2015, at 9:18 a.m., Respondent received an email from eWorld stating:

> Attached is confirmation of the requirement for Blackbridge.
>
> Their error in attempting to clear the shares was that, instead of following the escrow details and transferring the full payment of $35,000, they instead transferred $31,500 to Barbara Lynn, with the difference of $3,500 as a payment to Troy Lowman. As a result the documentation didn't match up.

Although eWorld was not a party to the transaction between Blackbridge and Lynn, attached to its email was the following "requirement" purportedly being imposed before Respondent could or would return funds to it:

> In the matter regarding Blackbridge, in order to process the return of funds to them they need to execute a name transfer back to Barbara Lynn for the eWorld Companies, Inc share certificate they hold, number ECI 0610.

(Ex. 34, pp. 1-2.)

On July 16, 2015, Respondent, using the rationale contained in the eWorld email, sent an email to Blackbridge, purporting to justify his ongoing failure to return funds to Blackbridge by stating, "The terms of the transaction weren't followed when the full $35,000 wasn't transferred to the shareholder Barbara Lynn. Therefore the stock did not clear." (Ex. 29, p. 1.)

Efforts by Blackbridge to have Respondent return the funds it had previously deposited into his client trust account continued unsuccessfully into August, 2015, at which time it retained California counsel to represent it in obtaining the funds. Throughout the time that Respondent and Blackbridge were communicating with one another regarding the disputed $31,500, Respondent did not disclose the fact that he was no longer holding the funds in escrow.

On August 11, 2015, attorney Stanley Morris emailed and messengered a letter to Respondent on behalf of Blackbridge. Making clear that Blackbridge was unaware that Respondent had previously disbursed the $31,500 and was no longer holding the funds in escrow, the letter stated, in pertinent part:'

> My firm represents Blackbridge Capital LLC ("Blackbridge").
>
> Pursuant to Section 1.03(l)(i) of the escrow agreement between and among Blackbridge, Barbara Lynn, and you, Blackbridge hereby gives notice that you immediately refund the $31,500 you currently hold in escrow. Upon receipt of the $31,500, Blackbridge will return the Shares it could not deposit.
>
> As you know, Section 1.03(l)(i) of the escrow agreement expressly provides that you may not release the $31,500 in escrow until Blackbridge provides you with confirmation that the shares are approved and deposited in Blackbridge's Brokerage Clearing Agent. Blackbridge has been unable to do so. Accordingly, Blackbridge must return the entire balance of the shares and instructs you immediately to refund the $31,500 it escrowed.

(Ex. 36, p. 2.)

On August 17, 2015, after Respondent had not responded to his prior email/letter, attorney Morris both phoned and sent a follow-up email to Respondent's office.

On the following day, August 18, 2015, after receiving an email instruction from Henning Morales of eWorld, Respondent sent an email to Morris, stating:

> I am currently out of the office on vacation. In order to process the return of the funds you need to execute a name transfer back to Barbra [sic] Lynn for the eWorld certificate you hold, number ECI0610. The escrow agreement provided a payment of $35,000, instead $31,500 was transferred to Barbara Lynn with the difference of $3,500 as a payment to Troy Lowman. As a result the documentation did not match up.

(Exhibits 37 and 38.)

Once again, Respondent did not disclose that the funds were no longer being held by him in escrow.

Because it was clear that Respondent was not going to return the funds that had been paid into his client trust account, Blackbridge then complained to the State Bar.

During his testimony at the trial of this matter, Respondent claimed for the first time that he had disbursed the Blackbridge funds from his CTA only after being informed on June 17, 2015, by Joe Carter, then an employee of Blackbridge, that the transferred shares had been "approved." Hence, he argues, his release of the funds was consistent with the language of the escrow agreement. This testimony was not credible, lacked candor, and is belied by all of Respondent's actions after Blackbridge demanded a refund of its funds. Had Respondent been told by Joe Carter that the stock shares had been approved, thereby authorizing him to release funds to Lynn, one would expect that Respondent would have documented that fact at the time and subsequently repeatedly pointed to that prior approval in justifying his failure and inability to return to Blackbridge the money. He did neither. Instead, he concealed the fact that he had disbursed the funds, despite the demonstrated ongoing belief by Blackbridge that he was continuing to hold the funds, and he sought to justify his ongoing failure to return the funds with arguments that Blackbridge was responsible for the non-approval of the stock and needed to return the transferred shares before any of the money could be returned.

Moreover, there is no reason to believe that Carter would have stated on June 17, 2015, that the transferred shares had already been approved by Blackbridge's clearing house. The

shares had not yet even been transferred by Continental to Blackbridge by then! That transfer did not happen until two days later. That Joe Carter was aware on June 17, 2015, that the shares had not yet been transferred is made clear by his email to Respondent, at 12:20 p.m. on June 17, 2015, in which he stated, "The escrow has been funded. Are able to get the shares transferred at this point?" (Ex. 14, p. 1.) More than one-half hour later, at 12:58 p.m., Respondent forwarded this inquiry regarding whether the shares had yet been transferred to Ron Touchard, with the inquiry, "Let me know what the response is." (Ex. 14, p. 1.) There is no evidence that Respondent even replied to Carter's inquiry on June 17, which is likely not to have occurred since the shares had, in fact, not yet been transferred. Nonetheless, in less than four hours after Carter wanted to know whether the stock had even been transferred into the name of Blackbridge, Respondent had disbursed the funds to the various payees– possibly even before Respondent responded to Carter's inquiry. (See Ex. 64, p. 77.)

Finally, Respondent's claim, that Joe Carter had somehow authorized a release of the escrow funds by telling Respondent on June 17, 2015, that the stocks had not only been transferred to Blackbridge but also had already been approved by its clearing house, does not justify the actual disbursements made by Respondent that day and later, including his payments of funds to himself. The escrow instructions were clear that the funds were to be paid only to Lynn, as the seller, and that no change or amendment to this "irrevocable" escrow instruction could be made. None of Respondent's disbursements were to Lynn. Several of them were either to himself or merely in the form of a withdrawal.

Even more egregious and telling is the fact that Respondent continued to disburse what remained of the funds even after being made aware that the shares had not been approved and that Blackbridge was demanding a refund. As previously noted, Respondent was notified of the refund demand on July 9, 2015. At that time, the balance of his CTA was $265.44. Rather than

return to the escrow account the funds that Respondent had previously disbursed to himself, by December 9, 2015, after several additional transfers of funds in the CTA to himself, the balance of the account had been reduced to $85.24. In Respondent's response on January 5, 2016, to the State Bar investigator's inquiry about the Blackbridge funds, Respondent, through his then attorney, stated that none of the Blackbridge funds still remained in his trust account.

At the time of the trial of this matter, Respondent had still not refunded any portion of the funds previously entrusted to him by Blackbridge as an escrow agent. Nor is there any evidence that Respondent now holds any of those funds in escrow.

Count 1 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) requires that "funds received or held for the benefit of clients" shall be deposited in a client trust account (CTA). Under this non-delegable duty, an attorney must maintain these client funds in trust until outstanding balances are settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277-278; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.) An attorney holding funds for a person who is not a client is held to the same fiduciary duties in dealing with those funds as if there were an attorney-client relationship. (*In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185.)

Respondent took funds belonging to Blackbridge from his CTA and disbursed them in a manner inconsistent with the escrow instructions he had been provided as escrow agent. Some of those funds he misappropriated for his own personal use. Such conduct constituted a willful violation by him of rule 4-100(A).

However, the conduct underlying this violation is essentially the same as that underlying the finding, below, that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106. Accordingly, the

court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

Counts 2 and 3 – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption. In Counts 2 and 3 of the NDC, the State Bar charges that Respondent's mishandling of the funds deposited into his client trust account by Blackbridge constituted misappropriation by him of those funds and acts of moral turpitude, in willful violation of section 6106. This court agrees.

"An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney." (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341.) Respondent completely disregarded the obligations imposed on him as an attorney with regard to how he is required to handle money entrusted to him for safe-keeping. Respondent did not maintain the funds entrusted to him by Blackbridge in his client trust account. Nor did he disburse the funds pursuant to the escrow instructions he had received. Instead, he immediately disbursed the funds to numerous individuals, including himself, resulting in the loss of access by Blackbridge to those funds. By his actions, Respondent misappropriated these funds in violation of section 6106. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034; *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793; [moral turpitude established without regard to motive or personal gain]; *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830.)

Count 4 – Business and Professions Code Section 6068, subd. (a) [Failure to Comply with Law – Breach of Fiduciary Duty]

In this count, the State Bar alleges that Respondent's mishandling of the funds entrusted to him represented a breach of his fiduciary duties and a failure to comply with the laws.

This court agrees that Respondent's conduct represented a breach by him of his fiduciary duties. However, because the conduct underlying this violation is essentially the same as that underlying the finding, above, that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry, supra,* 3 Cal. State Bar Ct. Rptr. at p. 403.)

Count 5 – Rule 4-100(A) [Commingling – Payment of Personal Expenses from Client Trust Account]

Rule 4-100(A) "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; see also *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 . . . ."].) Evidence that an attorney has paid personal expenses with checks drawn on a client trust account establishes a violation of rule 4-100(A), showing either a commingling of trust and personal funds or a misappropriation of client funds. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404.)

In this count, the State Bar alleges that Respondent violated rule 4-100(A) by issuing seven checks on his client trust account to pay personal expenses during the period July 8, 2015, to November 6, 2015, in violation of the prohibition against commingling. Five of those checks were lease payments and two were "support" payments to his former wife, Julie Patton.

At trial, Respondent stipulated, and this court finds, that, by virtue of the foregoing conduct, Respondent is culpable of a violation of rule 4-100(A), as alleged in this count.

Case No. 15-O-15637 (Russell/Patton Matter)

On May 22, 2001, Julie Jones Patton aka Julie Jones Russell (Patton) filed a Petition for Dissolution of Marriage from Respondent in the Superior Court of California, County of Los

Angeles, entitled *Julie Jones Russell vs. Thomas O. Russell III*, LASC case no. ED028266 (*Russell v. Russell*).

On September 27, 2007, the Superior Court ordered Respondent to pay child support to Patton in the amount of $1,250 per month by making two payments of the approximate sum of $625 each month.

On August 5, 2013, Patton's attorney Robert K. Holmes (Holmes) filed an Order to Show Cause and Affidavit for Contempt in *Russell v. Russell*, requesting that the Superior Court find Respondent guilty of contempt for failing to make the required monthly support payments for 35 specific months. Each of these 35 months was set out as a specific count of contempt. In support of these charges, Patton alleged that between on May 1, 2007, and on July 29, 2013, Respondent was to pay the approximate sum of $95,726 to Patton, but paid only $9,100, leaving an arrears of the approximate sum $86,626 in violation of the court's order.

On August 30, 2013, Holmes filed and served an additional "Notice of Delinquency" in *Russell v. Russell*, again stating that between on May 1, 2007, and on July 29, 2013, Respondent was to pay the approximate sum of $95,726 to Patton, but paid only $9,100, leaving an arrears of the approximate sum $86,626

On January 17, 2014, Holmes filed and served a Motion to Apply Penalty to Delinquent Child Support in *Russell v. Russell*, seeking statutory interest of $48,245.78 and a statutory penalty of $62,245.78.

On February 6, 2014, Respondent: (A) pled no contest to "Counts 6 to 19" of the contempt accusation; (B) agreed to pay $2,000 to Patton on February 6, 2014; and (C) agreed to pay $200 per month for March, April and May 2014, increasing to $750 per month on and after June 15, 2014. At the scheduled contempt hearing on February 6, 2014, sentencing on the

contempt was continued six months at a time as long as Respondent was in full compliance of the order, with a follow-up hearing being scheduled for June 23, 2014..

On June 23, 2014, Respondent and Holmes appeared for a renewed contempt hearing in *Russell v. Russell*. The court ordered Respondent back for a hearing on February 2, 2015 and indicated that "Notice is waived."

On December 15, 2014, Holmes filed and served a "Court Order Transferring Case for Contempt Hearing Only" in *Russell v. Russell*, transferring the February 2, 2015 hearing of the contempt matter to a different judge.

On February 2, 2015, Respondent and Holmes appeared for a contempt hearing in *Russell v. Russell*. During the hearing, the court set the sentencing hearing in the matter on August 3, 2015 at 8:30 a.m., and denied Respondent's request to hold the matter at 10:30 a.m. After Respondent volunteered to waive notice, the court then ordered him to return for the August 3 contempt hearing as follows: "Sir. Mr. Russell, you are ordered to return without any further notice or subpoena," to which Respondent acknowledged by stating, "Yes, Your Honor." (Ex. 49, p. 5.) This order was then memorialized in the court's subsequent written order.

On August 3, 2015, Respondent, despite his awareness of the court's order, failed to appear for the scheduled contempt hearing. As a result, the court scheduled a follow-up hearing on September 2, 2015, and issued a bench warrant for $30,000, which warrant was to be held until the September 2, 2015 hearing.

On September 2, 2015, Respondent again failed to appear for the contempt hearing in *Russell v. Russell*. At that hearing, Holmes noted for the court that Respondent's two recent support payments had been on checks issued on his client trust account. The court then issued and released a bench warrant for $35,000 and stated that it would notify the State Bar.

On September 4, 2015, Holmes filed and served a "Notice of Ruling and Issuance of Bench Warrant" in *Russell v. Russell*, stating that Respondent had failed to appear on September 2, 2015, and that the court had released a bench warrant for delivery to the Sheriff.

On January 12, 2016, a State Bar Investigator sent a letter and email to Respondent, requesting that he explain, in part, why he failed to appear for the August hearing after having been personally ordered to appear on that date on February 2, 2015. Respondent received the January 12, 2016, email and, on the same day, sent an email response to the State Bar, stating:

> This involves an appearance on my 15 year old divorce. I had hired an attorney to represent me in that matter and did not get notice of the hearing. I had an attorney make an appearance in Court yesterday and will get this resolved ASAP."

(Exhibit 54.)

In response to this email, the State Bar investigator immediately sent Respondent a copy of the transcript of the February 2, 2015, with an email indicating that he might want to review the transcript before providing his written response to her prior inquiry.

On February 10, 2016, Respondent sent a letter to the State Bar, responding to the State Bar's inquiry and stating that "I had been advised by my counsel that said further appearances were not necessary. ... I then did not receive notice from opposing counsel that he was required to give of another hearing. There was never any intent to purposely not attend any court date."

In his initial testimony at the trial of this disciplinary proceeding, Respondent reiterated that he had not appeared at the August 3, 2015, hearing because he had been told by his prior attorney that the matter had been resolved. However, in testimony given shortly thereafter, Respondent contradicted his prior testimony and testified that he had actually attempted to attend the August 3, 2015, hearing but had gone to the wrong courthouse. As a result, when he arrived at the court, he was told that the matter was not on calendar. This explanation, of course, conflicts with his email to the State Bar on January 12, 2016; his letter and email to the State Bar

on February 10, 2016; and the court's records, showing that the hearing was both calendared and conducted by the court on that date.

Count 1 – Section 6103 [Failure to Obey Court Order]

Section 6103 provides, in pertinent part: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, ... constitute causes for disbarment or suspension."

Respondent was ordered by the court to appear at the August 3, 2015, contempt hearing, but failed to do so. The first explanation he offered for that failure, that he had not received notice of the hearing, is demonstrably incorrect and the latter two explanations are contradictory. None of them is either persuasive or justifies his disobedience of the court's order. Instead, this court finds that his failure to appear at the hearing constituted willful failure to comply with the court's order and a violation by him of section 6103. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 72-73 [failure to attend court-ordered hearings is violation of section 6103].)

Count 2 – Section 6106 [Moral Turpitude – Misrepresentation to State Bar]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. In Count 2, the State Bar alleges that Respondent made a false statement to the State Bar on January 12, 2016, when he indicated he did not get notice of the August 3, 2015, hearing, in violation of the prohibition of section 6106. This court agrees. Respondent was present when he was personally ordered to return to the court on August 3, 2015, without any further notice or subpoena. None of Respondent's contradictory explanations for why he did not appear for the August hearing justifies or explains his false claim that he had

never received notice of it. This court finds instead that it was a knowingly misleading statement by him and an act of moral turpitude, in willful violation of the prohibition of section 6106.

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,[3] std. 1.5.) The court finds the following with respect to aggravating circumstances.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.5(b).)

Multiple acts of misconduct as aggravation are not limited to the counts pleaded. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555.) Multiple improper CTA withdrawals constitute multiple acts of misconduct, despite the fact that culpability was alleged and found in a single count. (*In the Matter of Song, supra,* 5 Cal. State Bar Ct. Rptr. at p. 279; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over two years].)

Significant Harm

Respondent's misconduct significantly harmed Blackbridge, which has not recovered any portion of the funds improperly disbursed by Respondent. (Std. 1.5(f).)

Lack of Candor

Respondent displayed a lack of candor with this court during his testimony in this matter. His explanations regarding his non-appearance at the August 3, 2015, contempt sentencing hearing were contradictory, contrary to the formal record, and unsupported by either corroborating evidence or good sense. His testimony at trial, that he had been told by a

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

Blackbridge employee on June 17, 2015, that the subject shares had been approved by Blackbridge's clearing house, is unsupported by any other evidence and instead is belied by the communications between Respondent and Blackbridge at and after that date, and all of Respondent's actions up to the commencement of the instant trial. Such a lack of honesty with this court is a substantial aggravating factor. (Std. 1.5(h); *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791-2); *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282-3.)

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. He remains defiant and has no insight regarding his unethical behavior. This is an aggravating factor. (Std. 1.5(g); *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 235; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) His insistence that his conduct was justified is "particularly troubling" because it suggests that such misconduct may recur. (*In the Matter of Davis*, supra, 4 Cal. State Bar Ct. Rptr. at p. 595.)

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 more than 30 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline.

Respondent's lengthy tenure of discipline-free practice is a mitigating factor. (Std. Std. 1.6(a); *Heavey v. State Bar* (1976) 17 Cal.3d 553, 560; *In the Matter of Maloney and Virsik, supra,* 4 Cal. State Bar Ct. Rptr. at p. 789; *In the Matter of Bleecker, supra,* 1 Cal. State Bar Ct. Rptr. at p. 127; *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.) However, the weight to be given to that fact is reduced greatly by the fact that the misconduct here, including intentional misappropriation and misrepresentation to the State Bar, is serious. (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 116; see also *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 520; *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688; *In the Matter of Kueker, supra,* 1 Cal. State Bar Ct. Rptr. at p. 594 [mitigating weight of such a long period of discipline-free service does not rule out possible disbarment in appropriate case].) Where the misconduct is serious, the lack of a prior discipline record is most relevant if the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218.) Here, unfortunately, Respondent has shown an ongoing lack of insight regarding his ethical violations, by offering ill-founded explanations for his transgressions. Consequently, this court is not persuaded by his lengthy record of discipline-free practice that he will avoid future misconduct and, therefore, assigns only reduced mitigating

credit for his long discipline-free record. (*In the Matter of Song, supra,* 5 Cal. State Bar Ct. Rptr. at p. 279.)

Cooperation

Respondent entered into an extensive stipulation of facts for which conduct Respondent is entitled to some mitigation. The weight of that mitigation credit, however, is reduced significantly by Respondent's ongoing denials of culpability for the bulk of his misconduct. (Std. 1.6(e); *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 185; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but "very limited" where culpability is denied].)

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.)

The State Bar contends that disbarment of Respondent is called for by both the case law and the standards and that such is necessary to protect both the public and the profession. This court agrees.

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

The most severe sanction is found at standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension.

Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar*, *supra*, 53 Cal. 3d at p. 1035; *Kelly v. State Bar* (1988) 45 Cal. 3d 649, 656.)

Respondent's misconduct represents an egregious violation by him of his fiduciary duties to Blackbridge. He voluntarily assumed an important position of responsibility and trust and formally agreed to assume responsibility for safeguarding funds belonging to Blackbridge. Having directed that company to pay its funds into his client trust account, where it should have remained safe from any disbursement not expressly authorized by Blackbridge in the Escrow Agreement, Respondent instead almost immediately withdrew the funds from that account and disbursed the money to various payees, including himself, without the knowledge or authority of

Blackbridge. None of those payees had been named in the escrow instructions as authorized to receive any portion of the funds paid into the escrow account. Once the funds were disbursed by Respondent to those payees, they were gone.

The public's trust that funds entrusted to an attorney for safekeeping will remain safe is frequently crucial to the public's ability to conduct its affairs and transact its business. Misconduct damaging or even endangering that trust is intolerable, and standard 2.2(a) makes clear that it will not be condoned.

The amount of money misappropriated by Respondent was far from being insignificant, and the harm caused by Respondent is ongoing. The guideline of Standard 2.2(a) clearly indicates that Respondent be disbarred.

Turning to the case law, misappropriation of client funds has long been viewed by the courts as a particularly serious ethical violation. The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 656; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) The Supreme Court has also imposed disbarment on attorneys with no prior record of discipline in cases involving a single misappropriation. (See, e.g., *In re Abbott* (1977) 19 Cal.3d 249 [taking of $29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately $29,000 in law firm funds over an 8-month period. In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost $7,900 from his law firm, coincident with his termination by that firm, and was disbarred. (See also *In the Matter of Blum, supra,* 3 Cal. State Bar Ct. Rptr. 170 [no prior record of discipline, misappropriation of approximately $55,000 from a single client]; *In the Matter of Spaith*, *supra*, 3 Cal. State Bar Ct.

Rptr 511 [misappropriation of nearly $40,000, misled client for a year, no prior discipline]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of $10,000 from multiple clients and failure to return files with no prior misconduct in eight years]; and *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 [disbarment for misappropriation of $20,000 and failure to account with no prior discipline in seven years].)

Here, Respondent continues to dispute his culpability for his misconduct and instead seeks to find justifications for it. He also continues to retain the funds that he improperly disbursed to himself. Under such circumstances, disbarment is both appropriate and necessary to protect the profession and the public.

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **Thomas Osmonde Russell III,** State Bar No. 107800, be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

Restitution

It is further recommended that Respondent make restitution to Blackbridge in the amount of $31,500, plus 10% interest per annum from June 17, 2015 (or to the Client Security Fund to the extent of any payment from the fund to Blackbridge, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

California Rules of Court, Rule 9.20

The court further recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20 and 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 matter.

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. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Thomas Osmonde Russell III,** State Bar No. 107800, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 220(c).)[4]

Dated: January 10, 2017

DONALD F. MILES
Judge of the State Bar Court

[4] Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or even to hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

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 10, 2017, I deposited a true copy of the following document(s):

DECISION AND ORDER

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:

KEVIN P. GERRY
711 N SOLEDAD ST
SANTA BARBARA CA 93103

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

CHARLES CALIX, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 10, 2017.

Rose M. Luthi
Case Administrator
State Bar Court