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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **MICHAEL DEE RUSSELL** **Member No. 80621** A Member of the State Bar.	**Case Nos.: 03-O-01199, 06-O-12828** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

This action arises out of two separate matters. In the first, respondent acted as a trustee of a trust and was responsible for dissipating over $150,000 of trust funds under unusual circumstances. After concealing the loss for nearly 15 years, respondent was eventually sued by the trust's beneficiaries in the Kern County Superior Court ("underlying civil action"). That action resulted in respondent resigning his position as trustee and then a subsequent finding by the Superior Court that he had violated his fiduciary duties as trustee.[1] He is charged here with (a) moral turpitude-misappropriation, (b) moral turpitude-misrepresentation, and (c) moral turpitude-breach of his fiduciary duty to provide an accounting, all alleged violations of Business and Professions Code section 6106.[2]

[1] Although the issue of damages in the underlying civil action had not yet been finally resolved at the time of the trial of this proceeding, the Superior Court's judgment regarding the breach of fiduciary duties is final and has been affirmed on appeal. However, because the judgment was not properly determined using a clear and convincing standard, this court denied the State Bar's request that it here be given collateral estoppel effect.

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

In the second matter, respondent drafted and had executed a faulty deed of trust for his clients. When the defect was brought to his attention by the clients, he promised to fix the problem but never did so. He is here charged with wilful failure to act with competence (Rules of Professional Conduct, rule 3-100(A)[3]), and failure to respond to client inquiries (section 6068(m)).

As explained more fully below, this court finds that respondent is culpable of four of the five counts alleged in this matter and concurs with the State Bar's recommendation that he be disbarred.

II. PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges was filed in this matter on April 17, 2008. A response was filed on May 29, 2008.

Trial was commenced on September 29, 2008, resumed on September 30, and completed on October 1, 2008, followed by a period of post-trial briefing. The State Bar was represented at trial by Deputy Trial Counsel Eli Morgenstern. Respondent acted as counsel for himself.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following facts are based on an extensive stipulation of undisputed facts and on the evidence presented during the course of the trial of this matter.

Jurisdiction

Respondent was admitted to the practice of law on June 23, 1978, and since that time has been a member of the State Bar of California.

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

Case No. 03-O-01199 (Blain)

Facts:

In March 1986, respondent drafted the Blain Trust ("Trust") on behalf of Joseph Alexander Blain ("Blain"), who was then terminally ill with cancer. On or about March 11, 1986, Blain executed the Trust. The primary purpose of the Trust was to provide financially for Blain's wife, Geraldine Blain Cady ("Cady"), and for the education of Blain's then four-year-old son, Jerold ("Jerold"). The remainder was to be distributed to Blain's three adult children from his prior marriage. The Trust assets included real property, cash, and Blain's life insurance coverage. Blain was the original trustee of the Trust.

Although the Trust Agreement had a procedure for the appointment of a successor trustee, it did not name or nominate any specific individual to act as that successor, despite the fact that Blain was aware that he was terminally ill. In late March 1986, shortly after the original Trust was executed, respondent drafted a document entitled "Amendments to Trust Instrument Successor Trustee and Powers of Same" (Amendment). This Amendment named respondent as successor trustee of the Trust, waived all statutory limitations and restrictions concerning the investment of the Trust's funds, and exempted respondent as successor trustee from liability for any investments except where he was grossly negligent or acted in bad faith. It also provided that respondent would be compensated for his services as trustee by a payment of one percent of the value of the Trust, plus possible additional fees for extraordinary services. In early April 1986, Blain signed the Amendment.[4] In presenting the Amendment to Blain for signature,

[4] The parties have stipulated that the Amendment was signed on April **1**, 1986. That stipulation, however, is not supported by the evidence presented by respondent to this court or previously to the Superior Court. Nor is it consistent with respondent's prior representations to the Supreme Court in the underlying action. The signature on the Amendment was notarized on April 15, 1986. The testimony of both the notary and respondent in the Superior Court action

respondent did not seek to comply with any of the requirements of then rule 5-101 (now rule 3-300). On April 21, 1986, Blain died, and respondent automatically became the trustee of the Trust.

At the time of Blain's death, the corpus of the Trust was comprised of both cash and real and personal property. How much cash was owed by the Trust at the time that respondent first assumed his responsibilities as Trustee is unknown because respondent failed to keep the first two bank statements of the Trust's bank account ("Blain Trust Bank Account") for the period immediately after Blain's death. These statements would have shown both the amount of cash held by the Blain Trust at the time of Blain's death and when respondent first disbursed funds from the account. Instead, the earliest bank account produced by respondent was for the period ended May 22, 1986. It reports that the balance of the Trust's bank account on that date was $115,025. The amount of cash held by the Trust was thereafter increased in July 1986, when additional funds of $60,339, representing life insurance proceeds, were deposited in the Blain Trust Bank Account.

At some point during the summer of 1986, respondent was approached by his father, Grant Russell ("respondent's Father"), about the possibility of acquiring a particular oil lease in Oklahoma. As recalled by respondent during his testimony in the underlying civil action, "He asked me if I knew somebody that might be interested in investing in purchasing an oil lease **with him**." (Exh. 3, pp. 1326-1327 [emphasis added].) Respondent decided to use money from the Trust for that purpose.

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was that the Amendment was signed on the same date that it was notarized. The testimony in that action was also to the effect that the "April 1" date typed on the document was a mistake, caused by the figure "5" being inadvertently omitted from the document. Respondent's stipulation to a different fact in this matter is contrary to his sworn testimony in that other proceeding.

With no discussion or disclosure to any member of the Blain family, respondent formed a California corporation named RCON, Inc. in September 1986, for the purpose of purchasing the Oklahoma oil lease with his father. Respondent was designated by himself as the chief executive officer of RCON; respondent's brother-in-law, Wayne L. Vaughn ("Vaughn"), was designated as secretary and chief financial officer; and respondent's Father was designated as a director. The money used to create and thereafter operate RCON came solely from the Trust.

On September 29, 1986, just a few days after its formation, RCON entered into a written purchase agreement for the Oklahoma oil lease. The leased property had 13 existing wells, ten of which were already capped. The remaining three wells were not producing any oil. The oil that had been produced by the wells in the past was of low quality (more like tar than motor oil), meaning that it would be more costly to produce and less valuable on the market. The purchase agreement provided for a purchase price of $200,000, consisting of an initial payment of $20,000 and monthly payments thereafter of $ 2,760.88, starting on January 2, 1987.

Although respondent's Father contributed no money to the purchase, the purchase agreement made him a co-buyer and co-owner of the lease. The percentage of respondent's Father's ownership interest in the oil lease is unclear from the paperwork. The purchase agreement merely designates him as a co-buyer. Respondent testified that his father's ownership interest in the lease was to be 11% to 13% of the lease. RCON's share of the lease was to be approximately 65% to 67% of the oil lease. The remaining 22% of the leased rights were retained by a prior owner as a royalty right.

The initial down payment of $20,000 was made solely with funds taken from the Blain Trust Bank Account. Steps were taken by respondent, however, to conceal the source of the funds. The money was not paid directly by the Trust to the Seller; nor was the money paid by

the Trust to RCON. Instead, the funds were drawn by respondent from the Blain Trust Bank Account and paid into the client trust account of respondent's law firm ("CTA"). In making this transfer of funds, respondent used a counter check obtained from the bank, rather than a regular printed, numbered check. Respondent then issued a check on his CTA in the amount of $20,000, payable to respondent's Father, rather than to the Seller. According to respondent's testimony, respondent's Father then endorsed this CTA check over to the Seller after the lease purchase agreement was executed. When asked in the underlying civil action why the check was made payable to his father, rather than directly to the Seller, respondent testified that he could not remember.

In the twelve months after September 1986, respondent disbursed virtually all of the Trust's remaining cash. Including the down payment on the oil lease, these disbursements totaled approximately $130,000. There is very little documentary evidence of where this money went. Where there is any record of a specific disbursement, it generally reveals only that the disbursement check was made payable to respondent personally or to his CTA. Most of the money simply disappeared so far as any paper trail is concerned. Respondent did not keep the complete bank statements or cancelled checks of either the Blain Trust Bank Account or his own CTA; did not keep any organized ledger of his disbursements of Trust money; did not keep invoices or other records of claimed lease expenses; did not file any tax returns for either RCON or the Trust; and did not provide to the beneficiaries at any time any sort of accounting or reporting of the Trust's or activities. Further, when respondent issued checks on the Blain Trust Bank Account, he routinely used unnumbered, counter checks, making it impossible to now account for all distributions. With regard to the CTA, respondent did not maintain the records required by the State Bar's rules. (See then rule 8-101 [now rule 4-100].) Finally, for many

months after RCON was formed, respondent did not even open a banking account for it. Hence there was never a bank statement to record the corporation's receipt and disbursement of funds. While one would expect that some sort of financial and/or accounting records would have been created and maintained for the corporation, there is no evidence that such was ever the case.[5] Finally, respondent states he has now lost his files for the corporation.

Where the funds did not go to after September 1986 was to make any additional payments to the Seller of the lease. The only money paid to the Seller was the initial $20,000 down payment. None of the required monthly payments was ever made.

In September 1987, respondent filed a petition with the bankruptcy court, seeking on behalf of RCON a Chapter 11 reorganization. The principal creditor listed in the petition was the Seller, whose claim was listed as being for $180,000. The remaining creditors listed in the bankruptcy petition were stated to be owed funds totaling less than $8,000. The Trust was not listed as a creditor. Nor was it disclosed as an owner.

In fact, the Trust was never actually made an owner of any portion of either the lease or RCON. No shares in RCON were ever issued to it and respondent never filed a statement with the State of California identifying it as an owner. Steps were also taken to conceal that Trust money was being used to create and fund the corporation. Nor was there any apparent understanding as to whether payments of RCON expenses or investments using Trust money were a loan, a purchase of new stock, or something else.

Even if the Trust did own a portion of RCON, it is not clear what share it owned. Although respondent testified in this proceeding that the Trust was intended to be the sole owner

[5] As previously noted, respondent's brother-in-law was designated RCON's secretary and chief financial officer. When asked in the underlying civil action what the brother-in-law's involvement in the corporation was, respondent stated that he "never did anything. I never asked him to do anything."

of RCON, in his bankruptcy petition he represented that there were two shareholders of the corporation, both unidentified in that document. In his testimony in the underlying civil action, when asked to identify those shareholders of RCON, he stated that his father "might have owned a small interest, but I never issued any stock but he was going to own some interest." (Exh. 3, p. 1338.) There is no indication that the father ever contributed to the costs associated with the lease or that respondent ever sought any sort of contribution or indemnity from him, on behalf of either RCON or the Trust, for the costs, liabilities, and losses associated with the oil lease operation.

Although the bankruptcy petition filed by respondent for RCON was seeking a Chapter 11 reorganization, no reorganization plan was submitted to the bankruptcy court until well after a motion to dismiss was filed by the Seller and the U.S. Trustee in February 1989, more than a year later. In April 1989, respondent then filed a brief reorganization plan and an opposition to the motion to dismiss. In that opposition, he stated under penalty of perjury that "Until this permit [to install an injection well] was issued [on August 17, 1988] it was impossible to produce any oil on the oil leases owned by RCON, Inc." In addition he blamed the economic failure of the lease venture on the Seller, indicating that the Seller had mislead RCON into believing that there were 13 producing wells on the property; had concealed that 10 of the 13 wells were "cemented and plugged"; had misrepresented that he owned the equipment on the lease when in fact he owned none of it; and "represented that the special equipment he had on the lease had produced 145 barrels of oil, when in fact the equipment had utterly failed and was incapable of

producing any oil." (Exh. 3, pp. 874-875.) This sworn statement conflicts substantially with respondent's testimony and representations in the instant proceeding.[6]

In June 1989, the bankruptcy court dismissed the Chapter 11 proceeding. Although the bankruptcy court did not convert the proceeding to a Chapter 7 proceeding, as had been requested by the Seller, respondent testified in this proceeding that he has no idea what became of the lease.

In late 1987, Joseph Blain, Jr. (Joseph Jr.), one of the beneficiaries of the Trust, began seeking to contact respondent to get information regarding the Trust. At the time his inquiries were being made, the bulk of the Trust's cash reserves had already been disbursed by respondent, the oil lease was still not capable of being operated profitably[7], the bankruptcy petition was on file, and the motion to dismiss that bankruptcy was filed. Notwithstanding these very significant and adverse developments, respondent had not disclosed to the Trust beneficiaries the prior investment in the oil lease, the creation or existence of RCON, the filing and status of the RCON bankruptcy, or the status of the Trust's depleted accounts. Despite numerous efforts by Joseph Jr. for more than a year to get information from respondent, he could not get a response. Finally, after being repeatedly rebuffed in his efforts to get any information or response from respondent, Joseph Jr. eventually hired an attorney to make the inquiries. The inquiries by this attorney continued into early 1989. Finally, on January 31, 1989, respondent wrote the attorney a one-paragraph letter, indicating that "All the distribution of the Blain Estate that was to be distributed to your clients has been made and was made quite some time ago. The

[6] The court finds that respondent has lacked credibility candor in the instant proceeding. The discrepancies in his testimony, here and in the underlying civil action, are too numerous to list. His demeanor and comments were also consistently evasive.

[7] According to respondent, the lease generated slightly more than $5,000 in oil production during its entire operation. When, and under what circumstances, this claimed production occurred is the subject of conflicting versions by respondent.

only matter remaining is the lot split."[8] The letter went on to say that respondent expected the "lot split" issue to be resolved in 1989.

Joseph Jr.'s attorney continued to press for information regarding the Trust. Respondent then wrote a follow-up letter on March 23, 1989:

> "I have been informed by my assistant that you've called my office a few times recently. I am sorry that I haven't been able to return your call. I am involved in a very difficult litigation in Victorville and it has taken much of my time for the past few months and will continue to do so. ***I intend to have a full report and complete financial report and tax returns for the past two years but because of my schedule I don't believe I'll be able to get the information to you before the end of April.*** In any event the subdivision of the lot is proceeding and will be accomplished this year." [Emphasis added.]

This letter by respondent was just before he filed his opposition to the motion to dismiss the bankruptcy. Nonetheless, he failed to disclose the bankruptcy proceeding in his response.

Joseph, Jr. then terminated the services of the attorney. Respondent then failed to provide an accounting or to file tax returns for the Trust.

Beginning in 1988, and until his resignation as trustee, whenever there was an obligation to make a payment to one of the Trust's beneficiaries, respondent used his own money to do so. He did not disclose the fact that he was doing so until after the underlying civil action was filed.

In or about January 2000, Blain's widow (Cady) and her son (Jerold) hired attorney Timothy Kleier (Kleier) to contact respondent to obtain an accounting of the Trust's assets.

Between January 2000 and September 2000, Kleier mailed at least two letters to respondent demanding an accounting. Respondent received the letters. In September 2000, respondent informed Kleier that he intended to provide an accounting within a couple of weeks. He then failed to provide it.

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[8] This "lot split" related to Blain's desire to divide certain of his real property between his children. Despite the letter's optimistic prediction about when the split would be accomplished, respondent never effectuated any partition of the property and the lot had still not been split at the time of respondent's resignation as trustee.

In June 2001, Kleier, on behalf of Jerold, filed the underlying civil action. The action sought removal of respondent as trustee, an accounting, and an award of attorney's fees and costs. Among other things, the petition in that action alleged that respondent had breached his fiduciary duties by refusing to account to the beneficiaries, refusing to distribute Trust income, and conducting the affairs of the Trust for his own benefit.

On or about August 14, 2001, Kleier met with respondent and his attorney to discuss the Trust assets. At the meeting, respondent informed Kleier that respondent had used the Trust's funds to purchase and operate an oil and gas lease in the State of Oklahoma, that the investment was made in the name of the Trust, and that all of the Trust money that was invested in RCON was lost. During the meeting, respondent agreed to resign as trustee and to provide an accounting. Cady then became the trustee of the Trust.

Between on or about July 27, 2001 and the Spring of 2002, Kleier continued to request that respondent provide an accounting of the Trust assets. Respondent nonetheless failed to provide one. In or about the Spring of 2002, Martin Nielsen (Nielsen), an accountant hired by Cady as the new trustee, prepared a preliminary accounting that was then provided to Kleier, Jerold, and Cady. This accounting was based on the limited information provided to Nielsen by respondent. Kleier, on behalf of Jerold and Cady, disagreed with the content of that accounting.

On or about September 4, 2002, respondent filed an accounting of the Trust's assets with the probate court. This accounting was different than the Spring 2002 accounting. Kleier, on behalf of Jerold and Cady, continued to dispute portions of the accounting.

In or about March and May 2003, trial was held in the underlying civil action. In or about September 2003, the Superior Court filed its ruling on the petition. The court determined that the Amendment was invalid because Blain was not able to comprehend the Amendment's

substantive change. The court also determined that respondent wielded undue influence over Blain. The court awarded Jerold $164,404.36 in principal, plus interest, attorney's fees, and costs.

Respondent moved for a new trial on the grounds that, *inter alia*, the probate court erred by permitting the petition to be amended to add a claim for punitive damages; and on February 27, 2004, the probate court granted his motion. To avoid a new trial, Jerold waived his right to recover punitive damages.[9]

On or about January 27, 2006, the probate court entered judgment on the petition. The probate court awarded Jerold compensatory damages in the amount of $164,404.36, $318,703.04 in prejudgment interest, and post judgment interest at the rate of 10%. The judgment also included credit for contributions respondent made to the Trust from his personal assets: $10,000 from a Janus Fund, and a $25,000 interest in property in Los Angeles.

On or about May 3, 2006, respondent filed a Notice of Appeal of the judgment. On or about April 23, 2007, the Court of Appeal affirmed the ruling of the probate court with regard to the invalidity of the amendment and respondent's liability, but ordered a new trial on damages. That retrial on the issue of damages had not yet taken place at the time of the trial of the instant proceeding.

On or about June 1, 2007, respondent filed a Petition for Review with the Supreme Court. On or about July 11, 2007, the Supreme Court denied respondent's Petition.

[9] During the trial of the instant proceeding, this court took under submission whether pages 529-546 of Exhibit 3 should be received in evidence. Those pages are hereby received in evidence, but are limited to showing what took place during the reported session of the underlying civil action. They are not received in evidence as proof of any matter asserted.

Count 1 – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Fahey* (1973) 8 Cal. 3d 842, 849, citing *In re Craig* (1938) 12 Cal.2d 93, 97; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 73; *In re Boyd* (1957) 48 Cal.2d 69, 70.)

While moral turpitude generally requires a certain level of intent, guilty knowledge, or wilfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) The paramount purpose of the moral turpitude standard is not to punish practitioners but to protect the public, the courts and the profession against unsuitable practitioners. "To hold that an act of a practitioner constitutes moral turpitude is to characterize him as unsuitable to practice law." (*In re Higbie* (1972) 6 Cal.3d 562, 570.)

The court finds that respondent intentionally misappropriated substantial funds of the Trust, acts of moral turpitude by respondent in violation of section 6106. The Superior Court in the underlying civil action described respondent as using the trust funds as his own "personal bank account." This court reaches the same conclusion. Respondent disbursed approximately $150,000 of cash from the Trust's bank account, much of which was paid directly to himself or to his client trust account. The money then largely disappeared. In one of the few instances where it can be tracked, it is found that respondent used the money to purchase an oil lease for the benefit of his father. In another instance, he used Trust money to purportedly pay substantial

legal fees to himself. This payment was unreasonable and unjustified.[10] He failed to provide an accounting of those disbursements at the time, despite his assurance in 1987 that one was forthcoming; and he failed to maintain records that would show now where the funds went and why.

Respondent, here and in the underlying civil action, contended that the trust funds were exhausted by virtue of legitimate expenses associated with his decision to purchase the oil lease in Oklahoma. Given the highly unusual manner in which the claimed business was allegedly being conducted, the absence of records to verify the claims expenses and activities, and respondent's extensive efforts to conceal his activities, that contention by respondent is neither credible nor convincing. (See instead *Jackson v. State* Bar (1979) 23 Cal.3d 509, 513; *Walter v State Bar* (1970) 2 Cal.3d 880, 889 [attorney's failure to maintain records supports inference of misappropriation].)

Count 2 – Section 6106 [Moral Turpitude – Breach of Fiduciary Duty]

Section 6106 provides that an attorney's "commission of any act involving moral turpitude…whether committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Moreover, conduct which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude. (*In re Strick* (1983) 34 Cal.3d 891, 901.) Thus, an attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. (*In*

[10] The bill produced by respondent to justify this payment is highly suspect. Respondent's testimony that it was a legitimate bill lacks candor. Although respondent testified that he had a computerized billing system, this bill was handwritten, did not contain dates for when the claimed work was performed, included substantial charges for work done before Blain died and for which Blain had already paid money to respondent, and was generated long after the claimed work was performed. It lacked all indicia of reliability.

the Matter of Kittrell (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208.) Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*Id.*, citing *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) Finally, an attorney's deliberate breach of a fiduciary duty or a breach resulting from the attorney's gross carelessness involves moral turpitude even in the absence of an attorney-client relationship. That is because "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, supra*, 4 Cal. State Bar Ct. Rptr. at 208, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341.)

Respondent had a fiduciary duty, both as an attorney and as a trustee, to provide an accounting to the beneficiaries after one was requested in 2000. He wilfully failed to comply with that duty. His ongoing failure constituted an act of moral turpitude, in violation of section 6106.

Respondent's effort to justify his claimed inability to provide an accounting is disingenuous and unavailing. There is no justification for respondent's failure to maintain the records necessary to prepare an appropriate accounting. He was asked prior to March 1989 to provide an accounting and represented in writing at that time that he was going to provide one. Having pledged to provide an accounting, he will not now be excused by this court for failing to maintain the documents necessary to providing one.

Respondent's failure is also inexcusable under the particular circumstances of this case. If it were actually true that Trust funds were being used to pay legitimate expenses resulting from the Trust's investment in RCON and the lease, respondent was aware that the manner in which

he was making those payments made tracking the funds virtually impossible, absent the maintenance of contemporaneous records. Nonetheless, he failed to keep records prepared by others (such as bank statements and invoices) and files he had prepared himself (such as the corporate formation files for RCON, his files regarding the bankruptcy, and his records regarding his CTA). He also conspicuously failed to have prepared contemporaneous and routine accounting records, corporate filings, and periodic reports for either the Trust or RCON (records such as periodic financial statements, tax returns, 1099 statements, and client property files), often despite legal and professional obligations that such records be maintained. That he persisted in not documenting his use of the Trust's money, both before and after the time that it was evident that these funds were being quickly exhausted, gives rise to a very strong inference that his actual intent was to prevent others from ever be able to have a true accounting. It does not create an excuse for his failure to provide one.

Respondent's failure to provide an accounting after being requested to do so in 2000 constituted a wilful failure by him to satisfy his fiduciary duties, acts here constituting moral turpitude in violation of section 6106.

Count 3 – Section 6106 [Moral Turpitude – Misrepresentation]

Respondent used Trust money to purchase the oil lease in 1986. He did not disclose the transaction to the Trust's beneficiaries at the time. He created a corporation for the purpose of purchasing the lease. He did not disclose that transaction at the time. Nor did he disclose the corporation's subsequent bankruptcy, despite the fact that a Trust beneficiary was seeking information about the Trust's activities while the bankruptcy was ongoing.

In 2002, after being sued in the underlying civil action, respondent disclosed to Kleier the prior purchase of the oil lease. In providing that disclosure, however, he represented that the

lease had been made in the name of the Trust and was owned by the Trust. That was a substantial misrepresentation by him. The purchase had been made by RCON and respondent's Father, not by the Trust. The father owned a portion of the oil lease and possibly a portion of RCON. No shares in RCON were ever issued for the benefit of the Trust. This misrepresentation by respondent constituted an act of moral turpitude, in violation of section 6106.

Case No. 06-O-12828 (Waltz)

Facts:

In or about late October 2001, Harry (Harry) and Maudie (Mrs. Waltz)Waltz (collectively "Waltzes") hired respondent to update their will and create an updated living family trust (for which they were co-trustees), transfer interest to their personal property to the trust, and transfer title to their real property to the new trust. The Waltzes paid respondent $970 in advanced legal fees.

At all relevant times, the Waltz's real property consisted of a residential property on Putter Lane and a residential property on Lincoln Avenue. Both properties were in the City of Bakersfield.

Between October 2001 and December 24, 2001, respondent drafted a new living family trust for the Waltzes and prepared grant deeds for each of the real properties to transfer title from the prior trust to the new trust. On December 24, 2001, the Waltzes signed the new trust agreement and the deeds.

Unfortunately, each of the deeds erroneously listed *Raymond L.* (rather than Harry) Waltz as one of the two co-trustees of the new trust. In addition, the deed for the Putter Lane property and the Lincoln Avenue property listed an incorrect Assessor's Parcel Number. Finally,

although the deeds were signed by Harry and Maudie, the documents failed to recite that the Waltzes were signing in their capacity as co-trustees of the old trust. None of these mistakes was noted by the Waltzes at the time they executed the deeds, although they read and approved the documents before executing them.

The grant deeds for each of the two properties were then subsequently recorded.

When the Waltzes received their property tax bills for the properties later in 2002, Mrs. Waltz noticed that the incorrect name "Raymond L." Waltz listed for each of the properties. She initially went to the property tax office and was told that it could not change the recorded title without proof that Raymond L. Waltz was not the correct grantee. Mrs. Waltz then went back to respondent's office and informed him of the problem. This took place in October of 2002, at the latest. Respondent told Mrs. Waltz that he would take care of getting the problem fixed.

From that point on, Mrs. Waltz would periodically seek to find out whether the problems with the deeds had been corrected. When she talked with respondent, he would always tell her that he would take care of the problem. From 2002 to 2006, he never did.

On or about January 11, 2004, Harry died.

Eventually Mrs. Waltz "gave up" on respondent and, in early 2006, she went to another attorney to get title to the properties corrected. On October 2, 2006, a Petition to Confirm Validity of Trust, to Confirm Successor Sole Trustee; and to Confirm Real Property Owned by Trust was filed by Mrs. Waltz in the Kern County Superior Court, leading to a resolution of the problems caused by the defective deeds.

Count 4 – Rule 3-110(A) [Failure to Perform with Competence]

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

Respondent was hired by the Waltzes in 2001 to create a living trust and to help them transfer their real property into it. The deeds that he prepared to make that transfer of ownership were defective. When the problem was brought to his attention in 2002, he repeatedly indicated to his clients that he would take care of the problem, but he never did. This inaction continued until after one of the two clients had died. It was not until 2006 that the problem was remedied, and then only after the client had hired another attorney.

Respondent acknowledges that the deeds were defective but complains that the new attorney could have remedied the situation by an easier approach than filing the lengthy petition. However, this complaint by respondent serves not to decrease his culpability in the situation but, rather, to increase it. If the problem could have been easily remedied with a quick fix, his failure to implement that fix promptly on behalf of his elderly clients is even less justifiable.

Respondent offered into evidence a letter from his office to the Waltzes, dated June 18, 2003, together with a grant deed naming Harry (rather than Raymond) as the intended grantee. This evidence fails to show any exercise of competence by respondent in addressing the problem. Mrs. Waltz denied ever receiving the letter. Her testimony was credible in that regard. The letter was purportedly not sent until June of 2003, many months after the problem with the deed had first been addressed with him. Although respondent indicated during trial that the letter included the draft grant deed, the letter makes no reference to it. Rather, the letter was instead explicit in stating that, "The deeds are ok, even though they name Raymond as a trusted [sic]." The letter then goes on to state that the Waltzes might "wish to appoint Raymond as a co-trustee in any event." Since the Waltzes did not know a Raymond Waltz, this was not appropriate advice.

In addition, the draft deed itself was useless. It provided no property description or parcel number and listed a signature date in 2001. Respondent offered no explanation as to why this deed would bear a 2001 date, if he had actually prepared it in mid-2002. The deed also contained no indication that it was a "correcting" deed. Nor did it address the problem that the Waltzes needed to be conveying the property in their capacities as trustees of the prior trust, rather than in their individual capacities. Finally, the letter provided the Waltzes with absolutely no guidance on what steps would need to be taken to convert the incomplete draft deed into a document that would rectify the problems created by the prior deeds.

Respondent's ongoing failure to take any significant steps to correct the problem created by him in December 2001, despite repeated assurance to Mrs. Waltz that he would take care of the situation, constitutes a wilful failure by him to comply with his duties under rule 3-110(A). (See, e.g., *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 950; *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 279; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641-642.)

Count 5 –Section 6068(m) [Failure to Respond to Client Inquiries]

Section 6068(m) of the Business and Professions Code obligates an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

The State Bar failed to present clear and convincing evidence that respondent failed to respond to reasonable status inquiries by the Waltzes. Although Mrs. Waltz testified during trial that she attempted to call respondent on 6-8 occasions during the period from 2002 through

2006, she offered no testimony on what happened when she made those calls, other than to say that she left messages. There was no testimony that respondent failed to return her calls.

Similarly, although Mrs. Waltz indicated that she made unscheduled visits to respondent's office to discuss the situation with him on four different occasions, she recalled meeting with him on two of those occasions. On the other two occasions, she merely recalled not being able to get into the office, with no other information or explanation being provided.

Because the State Bar failed to produce clear and convincing proof of a violation by respondent of section 6068(m), this count is dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).) [11]

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)[12]

Respondent has been found culpable of multiple counts of misconduct in the present proceeding involving two separate matters. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Dishonesty

Respondent's misconduct in the Blain matter has been surrounded by and followed by bad faith, dishonesty, concealment, overreaching and other violations of the State Bar Act or

[11] All further references to standard(s) are to this source.

[12] Although the court concludes that respondent violated rule 4-100(B)(1), that violation arises from the same misconduct that provided the basis for finding culpability for violating section 6106. Accordingly, no additional weight is given this violation in determining the appropriate discipline. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

Rules of Professional Conduct (Std. 1.2(b)(iii).) The circumstances regarding the creation and execution of the Addendum include significant overreaching and, at a minimum, a violation by respondent of his duties under then rule 5-101 (now rule 3-300). Thereafter, respondent's efforts to conceal his activities with the Trust's money included past false assurances that accountings and tax returns were being prepared, destruction of records and files, and a repeated lack of candor with both this court and the underlying Superior Court.

Significant Harm

In the Blain matter, respondent's misconduct caused significant harm. (Std. 1.2(b)(iv.)

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He remains defiant, has repeatedly sought to shift blame for his misconduct to others, and has demonstrated no insight regarding his unethical behavior.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

No Priors

Respondent was admitted to practice in 1978 and has never been previously disciplined. That record is considered by this court to be a mitigating factor. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13.) However, the weight to be given that fact is reduced greatly by the fact that the misconduct here is serious, that the misconduct regarding the Trust began in 1986 (eight years after respondent began to practice as an attorney) and continued until 2002, and that the misconduct in the Waltz matter began in 2002 and

continued until 2006. (Std. 1.2(e)(i); *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.)

Cooperation

Respondent did not admit culpability in the matter but entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 ; cf., *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].)

Character Evidence

Three members of respondent's community testified credibly regarding their high regard for him for the years and their view of him as being an ethical individual.

The three witnesses, however, do not constitute "a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." (Std. 1.2(e)(vi).) None of these three witnesses was a lawyer or a judge; none had any knowledge of the current charges against him; and none reported any awareness of the longstanding, underlying civil proceeding or of the very adverse decision against him in it. While this court accords respondent some modest mitigation credit for this favorable character evidence, it is not significant. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477; *In the Matter of Johnson, supra,* 4 Cal. State Bar Ct. Rptr. at p. 190; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.)

IV. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the 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.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *In the Matter of Van Sickle, supra*; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) 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; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(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. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.2(a) which recommends

disbarment for wilful 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.

A review of the pertinent cases also indicates that the discipline assessed for misappropriation such as here is disbarment. 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. As repeatedly stated by the California Supreme Court, "misappropriation generally warrants disbarment unless clearly extenuating circumstances are present." (*McKnight v. State Bar* (1991) 53 Cal. 3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal. 3d 649, 656.)

Applying the guidelines of standard 2.2(a) to the instant case indicates that disbarment here is the appropriate discipline. The amount of money misappropriated is far from insignificant.

The major source of mitigation established by respondent at trial is his many years of prior practice without being disciplined. This court gives him credit for that prior record. That credit, however, does not convince this court that disbarment is not required here to protect the profession and the public. "Lack of a prior disciplinary record over many years of practice may be considered in mitigation when coupled with present misconduct which is not deemed serious. It does not, however, preclude substantial discipline for serious misconduct." (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.) Nor is a prior record of discipline required for disbarment to be ordered in appropriate cases. (See, e.g., *Chang v. State Bar*, *supra*, 49 Cal.3d at pp. 128-129; *Bowles v. State Bar* (1989) 48 Cal.3d 100, 106; *Weber v. State Bar* (1988) 47 Cal.3d 492, 508; *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1228-1229; *Cooper v. State Bar* (1987) 43 Cal.3d

1016, 1028-1030 [thirty years]; *Rosenthal (Jerome) v. State Bar* (1987) 43 Cal.3d 612, 632; *Rosenthal (Michael) v. State Bar* (1987) 43 Cal.3d 658, 664; *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9; 20-21; and *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 686-687.)

There is also no evidence of any extenuating circumstance that would militate against disbarment. Indeed, quite the contrary is true. Respondent's conduct has involved numerous acts of moral turpitude. His testimony in this and other forums has repeatedly lacked candor. He lacks remorse and insight into the inappropriateness of his conduct. Just as was stated in *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 595, "[t]he gravity of the misappropriation and accompanying deceit, surrounded by no extraordinary mitigation which could explain the offense, followed by lack of sufficient evidence of rehabilitation to reasonably assure the public that the offense would not recur calls for disbarment both to properly protect the public and to assure the integrity of the profession." (See also *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1073; *Weber v. State Bar*, *supra*, 47 Cal.3d at pp. 508-509; *Kelly v. State Bar*, *supra*, 45 Cal.3d at pp. 656-659.)

V. RECOMMENDED DISCIPLINE

This court recommends that respondent **Michael Dee Russell** 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.

Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within

30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[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.

VI. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Michael Dee Russell** be involuntarily enrolled as an inactive member of the State Bar of California effective three court days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 220(c))[14]

Dated: April _____, 2009

DONALD F. MILES

[13] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

[14] 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 of law, or to even 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.)