PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	Case No. 16-O-16533-PEM
LISA LYNN GYGAX,	DECISION
A Member of the State Bar, No. 176029.	

INTRODUCTION[1]

In this contested disciplinary proceeding, respondent **Lisa Lynn Gygax** (Respondent) is charged with the following six counts of professional misconduct in a single matter: (1) committing an act of moral turpitude by misrepresentation; (2) failing to perform with competence; (3) failing to provide a client with written notice of a current relationship that the attorney has with a party or witness in the client's matter; (4) failing to provide a client with written notice of a past relationship that the attorney had with a party or witness in the client's matter that the attorney knows or should know will substantially affect the attorney's representation of the client; (5) entering into a business transaction with a client or acquiring interest adverse to a client without obtaining the clients informed, written consent; and (6) failing to support the laws of this state by breaching the common-law fiduciary duty of loyalty to a client.

[1] Unless otherwise indicated, all statutory references are to the Business and Professions Code, and all references to rules are to the State Bar Rules of Professional Conduct. All references to standards (or stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

This court finds, by clear and convincing evidence, that Respondent is culpable on only three of the six counts of charged misconduct. Based on the nature and extent of culpability and the single aggravating circumstance, the court recommends, among other things, that Respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that she be placed on probation for two years with conditions, including a 30-day actual suspension.

SIGNIFICANT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (OCTC) initiated this proceeding by filing a notice of disciplinary charges (NDC) against Respondent on December 13, 2017. On January 11, 2018, Respondent filed a response to the NDC.

On January 22, 2018, Deputy Trial Counsel (DTC) Laura Huggins filed a motion for leave to file an amended NDC to correct insubstantial typographical errors in the original NDC. On January 26, 2018, Respondent filed an opposition to the motion arguing, among other things, that the proposed amended NDC was not attached to the motion. On February 14, 2018, this court granted the motion for leave to file an amended NDC.

On February 16, 2018, OCTC filed a first amended NDC. Respondent filed a response to the amended NDC on February 27, 2018.

The trial in this matter lasted seven days. The first four days of trial were on April 3, 4 , 5, and 6, 2018, and the last three days were on June 27, 28, and 29, 2018. On the first four days, OCTC was represented by DTC Huggins, and on the last three days, OCTC was represented by Supervising Attorney Robert A. Henderson and DTC Peter Klivans. Respondent represented herself, appearing as co-counsel with Attorney Sally Steinhart.

On July 16, 2018, following the filing of closing briefs, the court took this matter under submission for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the evidence and testimony admitted at trial.

Respondent was admitted to the practice of law in California on March 19, 1995, and has been licensed to practice law in this state since that time.

Case No. 16-O-16533 — The Carrasco Matter

Facts

Respondent's law practice includes advising clients on cannabis (marijuana) law. As early as December 10, 2014, Gregory Carrasco, who is a real estate agent, broker, and investor, began discussions with Respondent about the problems he was having with a tenant in a single-story commercial building that Carrasco manages and is part-owner of in Hopland, California (Hopland property). At least in late 2014 and early 2015, the Hopland property was divided into three rental units, two retail-store-front units and one warehouse unit. However, the building is very run down and dilapidated, which makes it difficult to find tenants for the property.

The problem tenant was a Mr. J. Oliver, who was then leasing and operating a marijuana dispensary in one of the store-front units. Carrasco wanted to evict Oliver because of the problems Oliver was causing and because he wanted to increase the rent.

Respondent wanted to review the terms of Oliver's lease, but Carrasco could not find the actual lease that Oliver had signed. Thus, on December 11, 2014, Carrasco emailed to Respondent a copy of a blank lease form that was similar to the lease that Oliver signed. (Ex. 6, p. 25.) According to that lease form, the landlord/owner of the Hopland property was M.C. Hopland Properties, LLC (LLC). However, the actual title to the Hopland property was held by Carrasco and Carrasco's silent partner, an August Marino, as tenants in common. Even though Carrasco and Marino also owned the LLC, they had never transferred the title to the Hopland property to the LLC.

After Respondent received Carrasco's December 11, 2014 email, Respondent sent an email to Carrasco asking for his permission to discuss Oliver's lease and the problems that Carrasco was having with Oliver with a potential tenant/buyer that Respondent had for the Hopland property. Carrasco readily gave Respondent the permission she requested.

On December 12, 2014, Respondent sent an email to Carrasco stating that she wanted to speak with him about the potential tenant/buyer she had. (Ex. 6, p. 27.) Then, on December 18, 2014, Respondent sent an email to Carrasco notifying him that she had met with her potential tenant/buyer[2] and stating that she had:

> negotiated $2.00.00 a square ft. with triple net for the existing 3,000 rented space or 1.75 with triple net for all 5,000 sq. feet. They would prefer buy out your LLC for 1.4 million with $380,000 Down at 5.5% on a 30 year due in 10 if you prefer to sell. I would then become a duel agent at 1%.

Respondent's potential tenant/buyer was willing to pay significantly more rent than Oliver paid. In her December 18, 2014 email to Carrasco, Respondent also stated that she needed to meet with Carrasco because the law did not permit her to do any more work without a representation agreement. (Ex. 6, p. 33.) Carrasco and Respondent met later that same day. At that meeting, Carrasco retained Respondent to evict Oliver from the Hopland property and paid Respondent a $3,000 retainer.

The written fee agreement that Carrasco and Respondent signed on December 18, 2014, provides in paragraph number 1 that "[t]he Attorney will be representing the clients specifically and only for lease negotiations." Paragraph number 2 of the fee agreement provides::

> The Clients hire the Attorney to provide legal services in only the matter of the Hopland [property] lease.... The Attorney will represent

[2] Before Respondent discussed Oliver's lease or Carrasco's problems with Oliver with her potential tenant/buyer, Respondent had the potential tenant/buyer sign a confidentiality agreement to protect Carrasco. (Ex. 6, pp. 29-32.)

> the Clients through the negotiations but not filing without further agreement. This Agreement does not cover representation on appeal or any other actions. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written Agreement. *If it turns into a sale, a new written agreement will be necessary.*

(Ex. 6, p. 35, italics added.)

The fee agreement does not contain a provision under which Respondent will be paid a finder's fee if one of her potential tenants/buyers purchases the Hopland property. Nonetheless, as a result of Carrasco and Respondent's December 18, 2014 meeting, Carrasco clearly understood that, if one of Respondent's potential tenants/buyers purchased the Hopland property, he was to pay Respondent one percent of the purchase price as a finder's fee.

Because the Hopland property was in such poor condition, Respondent knew that the only way Carrasco could get the rent that he wanted on the Hopland property was to rent the property to another marijuana dispensary. The record is clear that Respondent conveyed this view to Carrasco and that Carrasco endorsed it. See, for example, Respondent's January 8, 2015 email to Carrasco. (Ex. 6, pp. 107-110.) Carrasco admits receiving and reading Respondent's January 8, 2015 email.

While Respondent was working on evicting Oliver, Respondent put Carrasco in touch with Ms. D. Frank. Frank was the potential tenant/buyer to whom Respondent previously referred to in her emails to Carrasco. Respondent has known Frank since 2005. Respondent served as legal counsel for Frank and some of Frank's businesses from about 2006 to 2012 and then from about 2014 to 2016. Respondent told Carrasco that Frank would be a good replacement tenant for Oliver because she was also a marijuana dispensary owner. In addition, on December 26, 2014, Respondent sent Carrasco an email in which Respondent effectively vouched for Frank (i.e., that Frank is financially solid and owns organized businesses).

Respondent credibly testified that she told Carrasco, in various telephone conversations with him, that she had been Frank's attorney for a number of years. Carrasco, however, claims that the only thing Respondent told him about her relationship with Frank was that Respondent represented Northbay Wellness Group, an entity which Frank owns, in 2010. Carrasco claims that Respondent did not inform him that she represented Frank in the *303 Harbor v. The American Grower Exchange, LLC* lawsuit or the *City of San Diego v. Hillcrest Organics* lawsuit or that she represented the Organic Cannabis Foundation, LLC, which Frank also owns.[3]

On January 6, 2015, Frank sent an email to Respondent noting, with displeasure, that she had just learned from her Certified Public Accountant (CPA), who had reviewed the tax and title records, etc. of the Hopland property, and from her building maintenance employee, who had inspected and measured the exterior of the Hopland property, that a number of the Respondent's representations regarding the Hopland property (e.g., who owned the property, the square footage of the property) were not true. (Ex. 6, pp. 98-99.) In that email, Frank expressed her disappointment in Respondent noting that for the nearly 10 years that Frank has known of Respondent and that in all of their prior dealings over the years, all of Respondent's statements had always been true.

Respondent did not intentionally or knowingly make any false representations/statements concerning the Hopland property to Frank. Respondent's representation/statements to Frank were based on false information she received from Carrasco and which Respondent had no reason to question and which Respondent believed to be true. Accordingly, Respondent forwarded a copy of Frank's January 6, 2015 email to Carrasco that same day (i.e., January 6, 2015). After he received Frank's email, Carrasco sent Respondent a reply email stating: "Please don't do anything else until we talk thank you." According to Carrasco, he later told

[3] Much of Carrasco's testimony lacks credibility.

Respondent, in reference to Frank's January 6, 2015 email, that he did not need another problem and to just deal with evicting Oliver.

From January through February 2015, Respondent worked out the details of the eviction of Oliver. On January 31, 2015, Oliver vacated the Hopland property without Respondent having to file a wrongful detainer action against him. Needless to say, Carrasco was completely satisfied with Respondent's legal services in evicting Oliver.

Even though Carrasco did not expressly hire Respondent to find a replacement tenant/buyer for the Hopland property once Oliver was evicted, it is clear that, from January through February 2015, Respondent undertook finding and, in fact, found a replacement tenant/buyer for her client Carrasco. It is also clear that Respondent helped Carrasco negotiate and draft the lease agreement as well as the option to purchase agreement with Frank. Moreover, it is clear that Carrasco knew that, in the event that Frank exercised the option to purchase, Respondent expected him to pay her 1 percent of the sale price as a finder's fee.

Yet, Respondent never fully disclosed the terms of the finder's fee to Carrasco in writing in a manner which should reasonably have been understood by Carrasco. Nor did Respondent provide Carrasco with written notice of Carrasco's right to seek the advice of an independent lawyer of Carrasco's choice or give Carrasco a reasonable opportunity to seek that advice.

Moreover, Respondent never obtained Carrasco's informed written consent to the 1-percent finder's fee. As noted above, Respondent's fee agreement expressly provides that if the lease "turns into a sale, a new written [fee] agreement will be necessary," Yet, Respondent and Carrasco still never entered into a new written fee agreement in which Carrasco agreed to pay Respondent a 1-percent finder's fee. Nonetheless, as also noted above, on December 18, 2014, Carrasco understood that, if Respondent found a buyer for the Hopland property, Respondent would receive one percent of the sale price as a finder's fee.

Respondent testified credibly that the only way she could enforce her right to receive or collect the 1-percent finder's fee if Carrasco failed to voluntarily pay it was to file an independent lawsuit against Carrasco and to obtain a judgment against him. OCTC did not present any evidence or cite any legal authority to the contrary. In short, with respect to the one percent finder's fee, Respondent did not acquire an adverse interest in Carrasco's property. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 759 [attorney acquires an adverse interest in a client's property when the attorney has the ability to extinguish the client's rights in the property without any judicial scrutiny].)

From the evidence developed at the trial in this proceeding, the court finds that Respondent acted as a go-between Carrasco and Frank in negotiating the lease and the option to purchase that Carrasco and Frank executed and the lease and option agreement that Carrasco and Marino executed. As early as January 6, 2015, Respondent is corresponding with Frank regarding a lease/purchase agreement on the Hopland property. (Ex. 6, p. 98.) And, on January 8, 2015, Respondent sent Carrasco an email regarding some of Frank's concerns and noting some additional ramifications of Carrasco's leasing to another dispensary. (Ex. 6, pp. 107-110.)

On January 20, 2015, Respondent sent Carrasco another email regarding the option to purchase. (Ex. 6, p. 163.) On January 26, 2015, Respondent sent Carrasco an email asking him whether he was drafting an option to purchase that was separate from the lease agreement and, if he was not, did he need Respondent to draft one. On January 29, 2015, Respondent sent an email to Frank regarding further negotiations on the lease and option to purchase, which she signed "Lisa L. Gygax, Esq. [¶] for Gregory Carrasco [¶] M C Hopland Properties, LLC." (Ex. 6, p. 192.)

By about the end of January 2015, the parties agreed that Frank would lease the Hopland property for 18 months (from February 2015 through July 2016); that the rent would be $8,500 a

month for each of the 18 months of the lease; and that Frank would be given 12 months from the start of the lease (from February 2015 to February 2016) to exercise her option to buy the Hopland property.

On January 31, 2105, Carrasco sent Respondent, from zipFormPlus, a draft commercial lease agreement for Frank, which Carrasco prepared by filling in the blanks on the standard commercial lease agreement form of the California Association of Realtors on zipFormPlus. (Ex. 6, pp. 202-208.) The next day, on February 1, 2015, Carrasco sent Respondent, from zipFormPlus, a draft option to purchase agreement for Frank, which Carrasco also prepared by filling in the blanks in the standard option agreement form of the California Association of Realtors on zipFormPlus. Both of those drafts contained a number of reckless and suspicious errors/mistakes for a licensed real estate agent and experienced real estate investor to have made.

Late at night on February 1, 2015, Respondent sent Carrasco an email calling his attention to the many errors in the draft lease agreement and the draft option to purchase agreement that Carrasco prepared and sent to Respondent for review. (Ex. 6, p. 232.) Carrasco confirmed receiving Respondent's February 1, 2015 email.

Among the errors that Respondent pointed out to Carrasco in her February 1, 2015 email included the following: (1) paragraph 2A of the draft commercial lease agreement erroneously provided for a lease term of 29 and one-half months from February 1, 2015, though July 14, 2017, when it should have provided for an 18-month lease from February 1, 2015, to July 31, 2016; (2) paragraph 7A of the lease agreement correctly provided that the monthly rentals were $8,500, but erroneously required the $8,500 monthly rent only from February 1, 2015, to January 31, 2015, which makes no sense whatsoever since January 2015 came before, not after, February 2015; and (3) paragraph number 3 of the draft option agreement provided that the one-year option period began on February 2, 2016, but erroneously failed to specify when the option

period ended.[4] Eventually, Respondent asked for Carrasco's password on zipFormPlus in order to make corrections to the draft lease that Carrasco had prepared and sent to her for review. (Ex. 6, pp. 176-177.)

On February 2, 2015, Frank sent Respondent an email complaining that Carrasco had asked for an additional $10,000, presumably as consideration for his giving her the option to purchase the Hopland property. In that email, Frank also told Respondent that she was getting cold feet because the Hopland property was a "total fucking WRECK" and because there was no way Frank could pay the $160,000 seller's partial financing loan in two years. In response to that email, Respondent sent an email to Carrasco stating that Frank was grumpy and that lease and option agreements need to state who Frank should have the two cashier's checks made out to. (Ex. 6, p. 238.)

In early February 2015, Respondent scheduled a meeting amongst Frank, Carrasco, and Marino, wherein the three parties would all sign the same lease and the option to purchase agreements. While the meeting took place on February 3, 2015, only Carrasco and Frank attended and signed the same lease and option agreements. Marino did not attend the meeting and did not sign the same physical agreements that Carrasco and Frank signed. Carrasco asserts that, on the morning of February 3, 2015, he met with Marino and that Marino and he signed a separate copy of the commercial lease agreement. Respondent kept copies of the lease and option agreements that Carrasco and Frank signed. Once Carrasco and Frank signed the lease

[4] Even though Respondent did not point the error out to Carrasco in her February 1, 2015 email, the court notes that the February 1, 2016 beginning date of the option period is itself erroneous because it contains the wrong year(i.e., it contains 2016 when it should contain 2015. Under the agreed upon terms, the 12-month-option period was to begin on the February 1, 2015 effective date of the commercial lease agreement and to end 12 months later on February 1, 2016. Had Frank waited until after the erroneous start date of February 1, 2016, to exercise the option to purchase, she would have failed to exercise the option during the 12-month option period. In short, this error as to the start date of the option period could have clearly benefited the person who made it (i.e., Carrasco).

and the option to purchase agreements, Frank gave Carrasco a check for $27,000, over which Carrasco was ecstatic. Carrasco then gave Frank the key and a key fob for the Hopland property.

The lease and option agreements that are signed only by Carrasco and Marino and the lease and option agreements that are signed only by Carrasco and Frank all had the wrong year in the termination dates of the 18-month lease term and in the end dates of the 12-month option period. The lease agreements erroneously provided that the 18-month lease term terminated on July 31, 2015, when it should have provided that the lease term terminated on July 31, 2016.

As the option agreement itself clearly provides in paragraph number 13 (ex. 11, p. 7), the parties agree that Frank was to be given 12 months in which to exercise the option to purchase the Hopland property. The option agreement, however, erroneously provided that the 12-month option period ended in 2015 when it should have provided that the option period ended in 2016. Further, the lease agreement that both Carrasco and Frank signed, but unsigned by Marino, was missing page number 4. (Exs. 9 & 10.) The missing page number 4 contained a mediation clause. On the other hand, the lease agreement signed only by Carrasco and Marino had a page 4, which had a mediation clause. Frank testified that she did not like mediation.

After Frank moved into the Hopland property, disputes and problems arose between Carrasco and Frank. Carrasco felt that Frank was a problem tenant and that, whatever he gave her, was never enough. Both Carrasco and Frank would email Respondent to inform her of these disputes. Often times, the parties used her as a mediator. (See ex. 6, pp. 295-297, 304-308.)

On November 3, 2015, Carrasco sent Respondent an email asking her to send him copies the signed Frank lease and option agreements because he realized he did not have signed copies of them. (Ex. 6, p. 305.) On November 3, 2015, Respondent wrote a note-to-file about how she felt about the numerous Carrasco and Frank disputes. (Ex. 6, p. 306.) Respondent thought that Carrasco was in breach of the lease for not removing his personal property/junk from the

Hopland property. Respondent was not going to help him get out of or breach the option to purchase.

On November 8, 2015, Carrasco sent Respondent a follow-up email requesting again that she send him a signed copy of Frank's lease and option to purchase. On November 10, 2015, Respondent assured Carrasco that she had not forgotten his request and stated that she had not done so because her wife had been hospitalized. (Ex. 6, p. 310.)

On November 19, 2015, Respondent emailed to two scans of Frank's signed lease and option to purchase agreements to both Carrasco and Frank. The first scan, which Respondent emailed to each of them at 2:00 p.m., was illegible. (Ex. 6, pp. 310, 313-325.) The second scan, which Respondent emailed to each of them at 3:41 p.m., was legible. (Ex. 6, p. 311; see also exs. 9 & 10.) As noted above, the lease agreement signed by only Carrasco and Frank (and not by Marino) stated that the lease terminated on July 31, 2015. Without question, the lease did not terminate in June 2015 as Frank was still leasing/renting the Hopland property in November 2015. Similarly, paragraph number 3 of the option to purchase agreement that is signed by only Carrasco and Frank, stated that the option period ended on July 31, 2015. Without question, the 12-month option period, which is provided for in paragraph number 13 of the option agreement and which began in February 2015, could not have also ended in 2015. Respondent noticed these two erroneous references to the year 2015 shortly before she emailed the second scan of the signed lease and option agreements to Carrasco and Frank. Accordingly, she corrected the erroneous references to the year 2015 before she emailed the second scan of the signed lease and option agreements.

In short, Respondent changed the year in the lease agreement and option agreement to reflect the intent of the parties. It was clear that, when the lease and option to purchase agreements were drafted and when they were signed by Carrasco and Frank, that the years were

wrong and did not reflect the intent of the parties. Recognizing the mistake, Respondent changed the dates.[5] However, in her November 19, 2015 emails to Carrasco and Frank, Respondent failed to inform Carrasco or Frank that she corrected the erroneous references to the year 2015 so that the agreements correctly reflected the parties' intent at the time the lease and option agreements were signed.

On November 19, 2015, Respondent sent a second email to Carrasco notifying him of Frank's intent to exercise the option to purchase the Hopland property and providing him an overview of the things that he will need to do when she does.

In November 2015, Frank exercised her option to purchase the Hopland property, which was well within the 12-month option period. (Ex. 6, p. 311.) As of December 22, 2015, Frank still had not heard from Carrasco in response to her exercising the option to purchase, for which she paid Carrasco $10,000 on February 3, 2015. (Ex. 6, p. 339.) Accordingly, Frank sent Respondent an email informing her of Carrasco's failure to respond. (Ex. 6, p. 339.)

On December 29, 2015, Carrasco sent Respondent an email acknowledging receipt of her November 19, 2015 email about Frank exercising the option to purchase and reciting that paragraph number 6 of the option to purchase agreement provides:

> that the tenant cannot exercise [the option to purchase] if they [sic] are in default. The tenant has not only made significant alterations to the interior of the premises without my consent but they [sic] also are [sic] operating an illegal business on-site, both defaults under the lease. Due to those defaults and the fact that they [sic] exercised after the expiration date of the time to exercise (July 31, 2015), I would like you to let the tenant know that they [sic] cannot exercise the option.

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[5] Respondent is dyslexic and also suffers from an additional medical condition, which can cause double vision during periods of high visual stress. This medical condition and Respondent's dyslexia are likely the reason why Respondent mistakenly wrote 2015 instead of 2016 when she was working on the draft agreements that Carrasco sent her from zipFormPlus to correct the multiple errors that Carrasco made in them, and why she did not catch her mistakes, which are akin to "typos," when she proofread the changes she made to Carrasco's draft agreements. (Ex. C.)

> Also, I noticed that the dates for the end of the lease term and the end of the option term were changed from 2015 to 2016 on the most recent lease you sent over. Did you notice that? I am not sure how that happened since they originally said 2015 and the lease/option was initialed that way.

(Ex. 6, p. 340.)

Under the foregoing findings of fact, it is hard to imagine a situation in which either Carrasco's assertions that Frank was in default under the terms of the lease because she made significant alterations (in light of the run down and dilapidated condition of the Hopland property any significant alterations would have also have been a material improvement to the property) to the leased premises without Carrasco's consent and because she was operating an illegal business (i.e., operating a marijuana dispensary) on-site or Carrasco's assertion that Frank failed to exercise the option to purchase within the 12-month option period could plausibly be viewed as anything other than pretextual, hypocritical, and meritless.

On December 29, 2015, Respondent replied to Carrasco's email by sending Carrasco an email castigating Carrasco for choosing "a despicable route to try and either extort more money or by fraud have gotten so much money and deferred care for the [Hopland property]"; notifying him that she could no longer work for him because of his dishonesty; and stating:

> I can't be [Frank's] lawyer because I represented you for the Oliver eviction and parts of the contract talks but I am not an agent on the contract form; our agreement is 1% for finding the buyer and an hourly amount for Oliver. I have done both well and will get my entire fee even if you find a way to steal the building back dishonorably.

(Ex. 6, p. 341,)

Conclusion of Law

Count 1 – Section 6106 (Moral Turpitude)

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. In count 1 of

the first amended NDC, OCTC alleges that, on November 19, 2015, Respondent altered material dates in Frank's fully executed lease and option to purchase agreements on the Hopland property without her client Carrasco's permission and that Respondent attached electronic copies of the altered agreements to emails that she sent to both Carrasco and Frank. OCTC further alleges that Respondent falsely stated in those emails that she was attaching copies of Frank's fully executed lease and option to purchase agreements and that Respondent failed to inform either Carrasco or Frank that she had altered material dates in the agreements.

OCTC then charges that Respondent willfully violated section 6106's proscription of acts of moral turpitude, dishonesty, and corruption because she knew that her statement that she was attaching copies of Frank's fully executed lease and option agreements to her email was false and misleading when she made it. In the alternative, OCTC charges that, if Respondent did not deliberately make the false and misleading statement in her emails to Carrasco and Frank, that she made them through gross negligence in willful violation of section 6106's proscription of acts involving moral turpitude. The record, however, fails to establish, by clear and convincing evidence, that Respondent deliberately or through gross negligence engaged in an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106.

First, on November 19, 2015, Respondent sent two emails with copies of Frank's lease and option to purchase agreements attached to them to Carrasco and two emails with copies of Frank's lease and option to purchase agreements attached to them to Frank. As noted above, the copies of Frank's agreements that Respondent attached to the first emails she sent to Carrasco and Frank were illegible. Accordingly, she sent Carrasco and Frank a second email, which had legible copies of Frank's agreements attached to them. Respondent did not state, indicate, or

imply in either the first or the second emails that she sent to Carrasco and Frank on November 19, 2015, "that she was attaching a copy of the *fully executed* lease agreement and option to purchase agreement" to her emails. (Italics added.) Moreover, the copies of the lease and option agreements that Respondent attached to her emails to Carrasco and Frank on November 19, 2015, disclose on their face that they are not fully executed agreements because they were signed by only two of the four named parties to the agreements. The agreements were signed by Carrasco and Frank, but not by Marino or by M. C. Hopland Properties, LLC. Assuming that Marino did in fact sign a separate copy of the agreements on the morning of February 3, 2015, as Carrasco asserts, Respondent did not change the references to the year 2015 to the year 2016 in that agreement.

Second, the record clearly establishes that Respondent corrected the erroneous references to the year 2015 by changing them to the year 2016, which is the year that the parties actually intended to refer to in the agreements.

Third, when Respondent corrected the erroneous references to the year 2015 in Frank's lease and option agreements, Respondent honestly believed that she was permitted to correct her clerical mistakes in referring to 2015 when she and the parties to the agreements intended the agreements to reference the year 2016. Respondent's honest mistaken belief, even if unreasonable, precludes the court from finding a willful violation of section 6106. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 589.) Accordingly, count 1 is DIMSISSED with prejudice for want of proof.

Count 2 – Rule 3-110(A) (Failure to Competently Perform Legal Services)

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. In December 2014, Carrasco

employed Respondent to perform legal services, to handle an eviction matter. Shortly thereafter, Respondent started to handle more than just the eviction matter for Carrasco. She started negotiating a lease agreement and an option to purchase agreement with the new tenant, Frank. At one point, Respondent admitted that she represented Carrasco for parts of the contract talks.

Evidence Code section 952 defines a client as someone who *consults* a lawyer for the purpose of retaining the lawyer or securing legal advice from him in his professional capacity. It is clear that Carrasco hired Respondent to handle the eviction matter and sought Respondent's advice in negotiating the lease agreement and option to purchase agreement with Frank. She was intimately involved in the negotiations between Frank and Carrasco and at the same time she was actively representing Carrasco in evicting Oliver.

The lease agreement and the option to purchase agreement, which Carrasco drafted and Respondent revised, incorrectly referenced the year 2015 instead of correctly referencing the year 2016. Respondent corrected these clerical errors in the lease agreement and option to purchase agreement after Carrasco and Frank signed them without getting approval from Carrasco or Frank.[6]

Moreover, the lease agreement, which Carrasco drafted, Respondent revised, and only Carrasco and Frank signed, did not include page number 4 of the standard commercial lease agreement form of the California Association of Realtors, but included a duplicate of page number 5. The omitted page number 4 contains a mediation provision. The lease agreement fails to recite whether the omission of page number 4 was deliberate to prevent the inclusion of a mediation provision in the lease agreement. Moreover, Respondent failed to perform due

[6] The Doctrine of Scrivener's error is a legal principle which permits a typographical error in a written contract to be corrected by parole evidence if the evidence is clear, convincing, and precise. However, if such correction affects property rights then it must be approved by those affected by it. In this case, the error affected property rights.

diligence with respect to determining whether Carrasco and Marino's mortgage loan on the Hopland property could be assumed by third parties (e.g., by Frank).

The foregoing facts clearly establish that Respondent recklessly failed to perform legal services competently when she represented Carrasco with respect to Frank's lease and option to purchase agreements on the Hopland property.

Count 3 – Rule 3-310(B)(l) (Failing to Provide Notice of Relationship)
Count 4 – Rule 3-310(B)(2) (Failing to Provide Notice of Relationship)

Rule 3-310(B)(1) provides that an attorney must not accept or continue representation of a client without providing written disclosure to the client where the attorney has a *current or ongoing* business, legal, professional, financial, or personal relationship with a party or witness in the same matter. Rule 3-310(B)(2) provides that an attorney must not accept or continue representation of a client without providing written disclosure to the client where the attorney knows or reasonably should know that the attorney had *a prior/past* business, legal, professional, financial, or personal relationship with a party or witness in the same matter, and the *prior/past* relationship would substantially affect the attorney's representation.

In count 3 of the first amended NDC, OCTC charges Respondent with willfully violating rule 3-310(B)(1) because she failed to provide Carrasco, a written disclose of her *current* attorney-client relationship with Frank. In count 4 of the first amended NDC, OCTC effectively charges in the alternative, that if Respondent did not have a current attorney-client relationship with Frank at the same time that she represented Carrasco, Respondent had a past attorney-client relationship with Frank, which required that she provide Carrasco with a written disclosure under rule 3-310(B)(2).

As noted above, Respondent has known Frank since 2005 and served as Frank's legal counsel at least from about 2006 to 2012 and from about 2014 to 2016. Thus, the court finds that Respondent had a current, if not ongoing, attorney-client relationship with Frank at the same

time that she represented Carrasco with respect to Oliver's eviction and the negotiations of Frank's lease and options agreements on the Hopland property. Because Respondent had a current (or ongoing) relationship with Frank at the same time that Respondent represented Carrasco, Respondent had a duty, under rule 3-310(B)(1), to disclose the relationship to Carrasco.

Even though Respondent made significant oral disclosures, to Carrasco, of her current attorney-client relationship with Frank, which provided Carrasco with sufficient information as to put him in a position to weigh the adverse consequences of retaining Respondent and to make an informed decision whether to seek other counsel, rule 3-310(B)(1) required that Respondent do more.

The word "disclosure" as used in rule 3-310 "means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." (Rule 3-310(A)(1).) Under the foregoing definition of disclosure, Respondent was required to give Carrasco a written statement that contained both (1) a fair description of her relationship with Frank and (2) a fair statement of the actual or foreseeable adverse implications that her relationship with Frank has for Carrasco. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2017) ¶ 4:246, pp. 4-171 to 4-172.) At a minimum, Respondent was required to disclose to Carrasco in writing that her relationship with Frank might cause her not to insist that Carrasco's agreements with Frank include clauses that would be beneficial to him, but would be opposed by Frank (e.g., a mediation clause) and that her desire to continue to represent Frank in the future and Respondent's interest in getting a 1-percent finder's fee might cloud her judgment as to her representation of Carrasco and prevent her from assisting Carrasco in strictly enforcing the terms of the option to purchase against Frank.

In sum, the record clearly establishes that Respondent failed to provide Carrasco with written notice of her relationship with Frank in willful violation of rule 3-310(B)(1) as charged in count 3.

Count 4, which charges Respondent with violating her duty, under rule 3-310(B)(2), to provide Carrasco with written notice of her relationship with Frank, is DISMISSED with prejudice as duplicative of count 3.

Count 5 - (Rule 3-300 [Avoiding Interests Adverse to a Client])

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an ownership, security, possessory, or other pecuniary interest adverse to a client unless the transaction/acquisition and its terms are reasonable and fair to the client and are fully disclosed and transmitted in writing to the client in a reasonably understandable manner; the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so; and the client thereafter consents in writing to the terms of the transaction/acquisition.

In December 2014, either simultaneously with or after Respondent began representing Carrasco with respect to Oliver's eviction, Respondent entered into a business transaction with her client Carrasco. Specifically, she agreed to help Carrasco negotiate a lease agreement and an option to purchase agreement in connection with the Hopland property in exchange for one percent of the sales price should the option to purchase be exercised by the tenant. Respondent did not fully disclose in writing to Carrasco the terms of the business transaction in a manner which should reasonably have been understood by Carrasco; Respondent did not advise Carrasco in writing that he may seek the advice of an independent lawyer of Carrasco's choice;

Respondent did not give Carrasco a reasonable opportunity to seek that advice; and Respondent failed to obtain Carrasco's consent

in writing to the terms of the transaction. The record clearly establishes that Respondent failed to perform each of the foregoing acts in willful violation of rule 3-300 as charged in count 5 of the first amended NDC.

Count 6 – Section 6068, Subdivision (a) (Duty to Support Constitution and Laws)

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. In count 6, OCTC charges that Respondent violated this duty by breaching her common-law fiduciary duty of loyalty owed to Respondent's client Carrasco. Specifically, OCTC charges that Respondent violated her fiduciary duty of loyalty to Carrasco by (1) asking Carrasco for a one percent finder's fee in the event an option to purchase the Hopland property was exercised without disclosing all of the relevant facts to Carrasco; (2) altering the lease agreement and the option to purchase agreement against the interests of Carrasco; and (3) sending an email to Frank on January 11, 2016, stating: "I am not up to anything, it is [Carrasco] alone who seems to have backed out [of the lease agreement and option to purchase agreement] based on claims that you improved the property breaching the contract."

The court relied on Respondent's failure to make the appropriate disclosures to Carrasco before she entered into the business transaction with Carrasco in exchange for one percent finder's fee to find Respondent culpable of willfully violating rule 3-300. Thus, it would be duplicative for the court to rely on the same act of misconduct to find a breach of the fiduciary duty of loyalty.

As noted above, the court found that the record clearly establishes that, when Respondent changed the erroneous references to the year 2015 to correctly reference the year 2016, she did

nothing more than correct the clerical errors she previously made when she revised Franks' lease and option to purchase agreements so that the agreements accurately reflected the actual intent of the parties at the time they entered into the agreements. Accordingly, Respondent did violate her duty of loyalty when she corrected the clerical errors in Frank's lease and option agreements.

Finally, in light of Carrasco's request, in his December 29, 2015 email to Respondent, that Respondent inform Frank of his position regarding the option to purchase, it is clear that Respondent did not breach and could not have breached any fiduciary duty to Carrasco when she made the above-quoted statement in her January 11, 2016 email to Frank.

In sum, count 6 is DISMISSED with prejudice for want of proof.

Aggravation

The only aggravating circumstance that OCTC has established by clear and convincing evidence in this proceeding is that Respondent has a prior record of discipline.

In 2002, this court privately reproved Respondent and imposed minor reproval conditions on her in accordance with a stipulation regarding facts, conclusions of law, and disposition that Respondent entered into with OCTC and which this court approved in an order filed on April 23, 2002, in case number 01-O-00487. In that stipulation, Respondent stipulated to willfully violating rule 1-311(D) by failing to provide written notice to a client that a disbarred attorney would be working on the client's case as a paralegal and listing the activities that the disbarred attorney was prohibited from engaging in. There were no aggravating circumstance in Respondent's prior record of discipline. In mitigation, Respondent's misconduct did not result in any harm, and Respondent displayed candor and was cooperative with OCTC.

The aggravating weight of Respondent's prior record of discipline is limited because the underlying misconduct occurred many years and because respondent practiced law for many afterwards before she engaged in the present misconduct.

Mitigation

Good Character

Respondent presented significant evidence of her good character from five credible witnesses and declarants. Respondent is entitled to mitigation for her good character.

Lack of Bad Faith

The absence of bad faith is another mitigating circumstance in the present proceeding. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 779-780.) As noted above, Carrasco was pleased with Respondent's representation with respect Oliver's eviction and was not just pleased, but ecstatic when he entered into the lease and the option to purchase on the Hopland property with Frank. Clearly, Respondent did not act in bad faith, and her lack of bad faith lessens the seriousness of her misconduct. (*Id.* at p. 780.)

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, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Nonetheless, the standards are

not mandatory and may be deviated from when there is a well-defined reason to do so.

(*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; Aronin *v.* State *Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.7 provides that if an attorney commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed. Standard 1.7 further states that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any additional aggravating or mitigating factors. The most severe sanction is set forth in standard 2.4, which applies to Respondent's violations of rule 3-300. Standard 2.4 provides:

> Suspension is the presumed sanction for improperly entering into a business transaction with a client or knowingly acquiring a pecuniary interest adverse to a client, unless the extent of the misconduct and any harm it caused to the client are minimal, in which case reproval is appropriate. If the transaction or acquisition and its terms are unfair or unreasonable to the client, then disbarment or actual suspension is appropriate.

In addition to standard 2.4, the court finds that *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; and *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297 are relevant on the issue of discipline.

In *In the Matter of Lane*, *supra*, 2 Cal. State Bar Ct. Rptr. 735, discipline was imposed consisting of three years' stayed suspension and probation and 60 days' actual suspension for lending a client $100,000 without complying with former rule 5-101, the predecessor of rule 3-300. Part of the loan represented fees that the client owed Lane. The client executed a promissory note for the loan as well as a confession of judgment on the note. At various times, Lane sued the client, represented him, and was even a codefendant with him. Even though Lane

was culpable of significantly more serious misconduct than that found here, including that the business transaction that Lane entered into with his client was unfair to the client, Lane involved a much greater level of mitigation than does the present matter.

In *In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. 752, the attorney was placed on one year's stayed suspension and two years' probation on conditions, including 60 days' actual suspension for representing adverse parties, failing to obtain conflict waivers, and failing to obtain clients' informed consent before obtaining an interest adverse to the clients. The attorney in that matter had significant aggravation and mitigation, including aggravation for overreaching and mitigation for 25 years of practice without discipline.

In *In the Matter of Hultman, supra*, 3 Cal. State Bar Ct. Rptr. 297, the attorney was placed on three years' stayed suspension and three years' probation with conditions, including 60 days' actual suspension. Hultman was found culpable of violating rule 3-300 by making two loans to himself from a testamentary trust of which he was the trustee and of committing an act involving moral turpitude in violation of section 6106 by making a misrepresentation, through gross negligence, in an estate accounting to a court. There the misconduct was "serious and extensive" and, due to Hultman's grossly negligent record-keeping, "an accurate accounting of the transactions in question may never be made." (*Id.* at p. 309.) Mitigating factors included 13 years of discipline-free conduct, remorse, good character and community service and restitution.

On balance, after carefully considering the standards and the cased law, the court concludes that the appropriate level of discipline for the found misconduct is one year's stayed suspension and two years' probation on conditions, including 30 days' actual suspension.

RECOMMENDATIONS

Discipline – Actual Suspension

It is recommended that respondent LISA LYNN GYGAX, State Bar number 176029, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that Respondent be placed on probation for two years with the following conditions.

Conditions of Probation

Actual Suspension

Respondent must be suspended from the practice of law for the first 30 days of Respondent's probation.

Review Rules of Professional Conduct

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126 and (2) provide a declaration, under penalty of perjury, attesting to Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions

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

Maintain Valid Official Membership Address and Other Required Contact Information

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone

number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten (10) days after such change, in the manner required by that office.

Meet and Cooperate with Office of Probation

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

State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court

During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

Quarterly and Final Reports

a. Deadlines for Reports. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Respondent must submit a final report no earlier than ten (10) days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

c. Submission of Reports. All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

d. Proof of Compliance. Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of Respondent's actual suspension has ended,

whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

Commencement of Probation

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

Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Respondent provides satisfactory evidence of the taking and passage of the above examination after the date of this decision, but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward his duty to comply with this requirement.

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the

time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: October 3, 2018.

Pat E. McElroy

PAT E. McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist 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 San Francisco, on October 3, 2018, I deposited a true copy of the following document(s):

DECISION

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

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

SALLY KATHLEEN STEINHART
1535 FARMERS LN # 202
SANTA ROSA, CA 95405 - 7525

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

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

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

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

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

Robert A. Henderson, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on October 3, 2018.

George Hue
Court Specialist
State Bar Court