STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	**Case No.: 16-O-12056-DFM**
LISA MICHELLE BASSIS,	**DECISION**
A Member of the State Bar, No. 87845.	

INTRODUCTION

Respondent Lisa Michelle Bassis (Respondent) is charged here with three counts of misconduct involving a single client. The counts include allegations of willfully violating rule 3-110(A) of the Rules of Professional Conduct[1] (failure to act with competence) and Business and Professions Code[2] section 6106 (moral turpitude – misrepresentation) [two counts].

The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) in this case was filed by the State Bar of California on June 23, 2017.

On July 17, 2017, Respondent filed her response to the NDC.

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

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

On July 24, 2017, the initial status conference was held in the case. At that time the case was given a trial date of October 11, 2017, with a two-day trial estimate.

Trial was commenced on October 11, 2017, and completed on October 16, 2017, followed by a period of post-trial briefing. The State Bar was represented at trial by Senior Trial Counsel Drew Massey. Respondent was represented at trial by Susan Margolis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the extensive stipulation of undisputed facts filed by the parties and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar at all relevant times.

Case No. 16-O-12056 (Borhan Matter)

Respondent is a sole practitioner, specializing in handling habeas corpus petitions on behalf of clients convicted of various criminal offenses. This action arises out of her failure to file a timely petition in federal court on behalf of Payman Borhan (Borhan), who on December 10, 2002, was convicted in the California state courts of two counts of committing a lewd act upon a child.

Respondent did not represent Borhan in the criminal trial, in the direct appeal of the conviction, or in Borhan's habeas corpus efforts relief in the state courts. Instead, she was only hired in September 2005 to file a petition in the federal courts after Borhan's state court habeas corpus efforts had proved unsuccessful and were exhausted.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) places a limitation on the time during which an individual may file a federal habeas corpus petition. The act generally provides for a one-year "statute of limitations" for the filing of such a petition but sets

forth various factors affecting when that statute begins to run and during which its running is tolled. These factors are largely tied to the history of the prior proceedings in the state courts.

The proceedings in the state courts were complicated and their specific timing was critical to determining the deadline for filing a timely federal habeas corpus petition. The parties have stipulated to the following history of those proceedings.

> On March 20, 2003, after denying Borhan's motion for a new trial, the trial court sentenced Borhan to state prison for a total of 15 years to life. Borhan timely appealed the decision in the Court of Appeal (Case number B166670).
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> On November 14, 2003, while the direct appeal was still pending, Borhan filed a petition for writ of habeas corpus with the California Court of Appeal (Case number B171202).
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> On November 20, 2003, the Court of Appeal denied the habeas petition.
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> On February 4, 2004, while the direct appeal was still pending, Borhan filed a letter with Court of Appeal. The Court construed the letter as a petition for writ of habeas corpus and denied the request on April 1, 2004 (Case number B173876).
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> On May 13, 2004, while his direct appeal was still pending, Borhan filed an additional letter with the Court of Appeal. The Court again construed the letter as a petition for writ of habeas corpus and denied the request on June 1, 2004 (Case number B175415).
>
> On May 24, 2004, the Court of Appeal rendered its decision in Borhan's direct appeal (B166670). The appellate court affirmed the judgment in all respects, with the exception of the calculation of presentence credit. Borhan timely filed a petition for review in the California Supreme Court on June 24, 2004 (Case number S125458).
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> On July 19, 2004, while Borhan's direct appeal with the Supreme Court was pending, Borhan also filed a habeas petition with the California Supreme Court (Case number S126391).
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> On July 28, 2004, the California Supreme Court denied Borhan's direct appeal (S125458).
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> On October 7, 2004, while Borhan's July 19, 2004 habeas petition was still pending, Borhan filed an additional petition for writ of habeas corpus with the California Supreme Court (Case number S128321).

On June 8, 2005, the California Supreme Court denied Borhan's July 19, 2004 and October 7, 2004 habeas petitions.

Even before Borhan's habeas corpus efforts in the California state courts had been denied by the California Supreme Court, Borhan (and his mother) began to seek out an attorney to file a habeas corpus petition on his behalf. One of those attorneys was Respondent; another was Cliff Gardner (Gardner). On March 10, 2005, Gardner, after talking with Borhan and reviewing materials provided to him by Borhan's state habeas corpus attorney, wrote a lengthy letter to Borhan to provide him, inter alia, with "a basic understanding of the federal habeas system." One of the topics addressed by Gardner in this letter was the deadline for Borhan to file a federal habeas corpus petition:

> As you know, your state appeal is over. I have checked the state appellate court's website, reviewed the docket in your case, and learned the appellate court issued its opinion in your case on May 24, 2004. Your attorney filed a Petition for Review which was denied by the state supreme court on July 28, 2004.
>
> Normally this would have two consequences. First, it would mean that the new one-year statute of limitations imposed by the 1996 amendments to the federal habeas statutes would begin [to] run 90 days after the state supreme court's July 28, 2004, ruling - on October 27, 2004. In turn, this would mean that your federal habeas petition could be filed no later than October 26, 2005. Second, it would mean that those issues presented to the state supreme court were "exhausted" in state court and ready to take to federal court.
>
> From my reading of the court docket, however, it also appears that your lawyer presented several additional claims in a state habeas petition filed in the appellate court. That petition was denied on November 20, 2003. On July 19, 2004- before the state supreme court denied the Petition for Review filed in your case - your lawyer presented these claims to the state supreme court in a second state habeas petition. In addition, it appears you personally filed a habeas petition with the state supreme court on October 7, 2004. Both state petitions are still pending. Under current law, this means that your one-year statute of limitations has not yet begun to run. It will begin when the state supreme court rules on your currently pending petitions.

On June 8, 2005, the California Supreme Court denied Borhan's two state habeas corpus petitions. Despite Gardner's March 2005 letter, Borhan did not hire him to handle Borhan's federal habeas corpus petition. Instead, Borhan retained Respondent on September 12, 2005, to file a petition.

In order to file an effective and successful habeas corpus petition, Respondent needed to have access to all of the pleadings, transcripts, and records generated during the underlying criminal case, as well as the companion state habeas corpus efforts. She had difficulty obtaining these materials. Concerned that she needed to calculate the deadline for her preparation and filing of the petition, she consulted her four-volume treatise and, among other factors affecting that calculation, saw that the 90-day extension of the one-year statute, referred to in Gardner's letter above, had also been found to apply to a state supreme court's final rejection of a state court habeas corpus petition in a case entitled *Abela v. Martin* (6th Cir. 2003) 348 F.3d 164 (en banc) cert. denied, 541 U.S. 1070 9204. What she did not learn from this treatise was that the *Abela* decision was at odds with the position taken by the Ninth Circuit Court of Appeals, which had held in a case entitled *White v. Klitzkie* (9th Cir. 2002) 281 Fed.3d 920, that the additional 90-day tolling period did not apply in such situations. Despite the conflicting views of the different federal courts of appeals on this issue, until the Supreme Court resolved the issue the view of the Ninth Circuit would control the handling of any federal petition to be filed in California.[3]

Anxious that she was correctly calculating how the different tolling periods operated to extend the deadline for her filing of a petition for Borhan, Respondent contacted two different attorneys who she knew to be quite experienced in habeas corpus matters: Jonathan Milberg and David Goodwin. In her conversations with each individual, she went over the procedural history

[3] The United States Supreme Court eventually granted certiorari in a case to resolve the conflict on this issue between the various circuits, and eventually rejected the holding of the *Abela* decision in 2007 in *Lawrence v. Florida,* 549 U.S. 327.

and dates of the activities in the state courts and jointly calculated for each tolling event the precise number of days the running of the one-year statute was tolled. At the conclusion of each of these conversations, she understood that these individuals had agreed to a specific deadline that included the additional 90-day tolling period reflected in the *Abela* decision, although that decision was apparently never discussed. Neither of the two attorneys corrected Respondent's misunderstanding that the *Abela* decision reflected good law in California.

During Respondent's review of documents she had received from Borhan, she came across attorney Gardner's letter of March 10, 2005, quoted above. Wanting to know why Gardner was not handling Borhan's matter, she then contacted him to "to find out the reasons why he wasn't retained, whether he had concerns about the case, what he knew about the case." (Ex. 9, p. 50.) Although Respondent's purpose in calling Gardner was not to seek his assistance in calculating the deadline for the petition's filing, she did discuss with him his letter during their conversation, which she understood to also indicate that the 90-day tolling period was to be included in the calculation. Unfortunately, Gardner did not correct this misimpression during the course of their conversation.

Respondent completed the petition on behalf of Borhan in July 2006, but withheld filing it at the request of her client, who had numerous additional legal issues he wanted Respondent to consider putting into the document. (Ex. 1021.) On September 5, 2006, Respondent lodged the petition for writ of habeas corpus in the United States District Court for the Southern District of California, where it was filed on September 22, 2006. Because the Southern District was not the correct venue for the petition, the matter was then transferred to the Central District of California on September 28, 2006, where it was filed on October 2, 2006.

On July 6, 2007, Respondent filed a motion to amend the petition.

On July 24, 2007, the Attorney General's Office of the State of California, representing the Mule Creek State Prison where Borhan was housed and its warden, filed an opposition to the petition. Among the arguments it raised was that the requested amendment would be moot because the petition was not timely filed. On August 16, 2007, Respondent filed a reply to the opposition.

On August 22, 2007, the District Court issued a Report and Recommendation, concluding that the petition was untimely. On September 4, 2007, Respondent filed objections to the Report and Recommendation, arguing that Borhan was entitled to equitable tolling. On September 20, 2007, the Attorney General's office filed a Reply to those objections.

On September 24, 2007, the District Court ordered Respondent to file a declaration indicating the date on which she was retained to represent Borhan and any additional declaration regarding Respondent's reliance on the *Abela* case. On October 3, 2007, Respondent filed a declaration addressing those issues.

On October 12, 2007, the District Court issued a Minute Order in which it determined that Borhan was entitled to 90 days of equitable tolling; that the resulting deadline for the petition's filing was September 6, 2006; and, because the petition had been lodged with the federal district court on September 5, 2006, that the petition was timely filed. (Ex. 1037.) The Minute Order also vacated the August 22, 2007 Report and Recommendation.

On October 19, 2007, the Attorney General filed a motion for reconsideration of the October 12, 2007 Minute Order.

On October 23, 2007, the District Court vacated its October 12, 2007 Minute Order (thus reviving the August 22, 2007 Report and Recommendation) and ordered Borhan to file a response to the Attorney General's Motion for Reconsideration.

On November 26, 2007, Respondent filed a response on behalf of Borhan. On January 10, 2008, the Attorney General filed a reply.

On January 15, 2008, the District Court reversed itself and issued a Final Report and Recommendation which recommended dismissal of the action due to the untimely filing of the petition.

On January 17, 2008, the District Court dismissed the habeas petition with prejudice.

On January 28, 2008, Respondent filed a Motion to Vacate the Judgment and for Enlargement of Time to File Objections to the Report and Recommendation.

On February 8, 2008, Respondent filed objections.

On March 17, 2008, Respondent filed a Notice of Appeal to the Ninth Circuit and Requested a Certificate of Appealability (COA). On April 2, 2008, the District Court denied the request for a COA. Thereafter, on November 18, 2008, the Ninth Circuit also denied the request for a COA. On November 21, 2008, Respondent wrote to Borhan, advising him that her services had concluded. She returned his files to him on that date.

Even while the above proceedings were going on, Borhan, who had a history of acting in pro per in his own habeas corpus efforts, was submitting documents seeking relief from the dismissal of his petition based on his complaints of incompetence of counsel. This effort continued after the Ninth Circuit effectively affirmed the dismissal of the petition and Respondent notified him that her employment had concluded. No longer represented by Respondent, Borhan then filed motions for Relief from Judgment on March 27, 2009; September 25, 2009; February 16, 2010; and October 13, 2010. Each of those motions was rejected by the District Court.

In rejecting the last of these motions, the District Court emphasized that, while Borhan's petition had been dismissed due to Respondent's failure to timely file it, this failure by

Respondent did not entitle Borhan to equitable relief because Respondent's conduct was merely simple negligence:

> Petitioner asserts that relief from Judgment is warranted based on the United States Supreme Court decision in Holland v. Florida. 130 S. Ct. 2549,177 L.Ed.2d 130 (2010). In Holland, the Supreme Court held that statute of limitations in 28 U.S.C. "§ 2244(d) is subject to equitable tolling in appropriate cases." Id. at 2560. The Supreme Court further held that serious instances of attorney misconduct, rather than "a garden variety claim" of attorney negligence, might constitute extraordinary circumstances sufficient to warrant equitable tolling. Id. at 2562-65 (remanding the matter to the District Court to determine whether equitable tolling of the statute of limitations was warranted based on the facts of that case).
>
> Petitioner is not entitled to relief from Judgment. Although petitioner characterizes his attorney's actions as involving "gross negligence," petitioner's attorney's miscalculation of the statute of limitations was simply "a garden variety claim of excusable neglect." See id. at 2564 ("We have previously held that 'a garden variety claim of excusable neglect' . . ., such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline ... does not warrant equitable tolling.").
>
> In the Final Report and Recommendation adopted by the District Court, the Court rejected petitioner's assertion that he was entitled to equitable tolling based on his attorney's miscalculation of the statute of limitations. Moreover, in its October 2, 2009 Order Denying Motion for Reconsideration and Relief from Judgment, the District Court rejected petitioner's assertion that relief from Judgment was warranted based on his attorney's negligence in failing to file a timely federal habeas petition. Petitioner has failed to show extraordinary circumstances sufficient to justify relief under Rule 60(b)(6). See Gonzales v. Crosby, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005).

(Ex. 1053, p. 3.)

Borhan then sought review of this denial of relief by the Ninth Circuit Court of Appeals. On July 6, 2011, the Ninth Circuit granted Borhan's request for a certificate of appealability with respect to, "whether the district court abused its discretion in denying appellant's motion for relief from judgment under Federal Rule of Civil Procedure 60(b) based on federal habeas counsel's alleged misconduct." In that same order, the court stated, "These allegations suggest that counsel Bassis may be guilty of conduct unbecoming a member of this court's bar. Within

28 days after the date of this order, counsel Bassis shall show cause why the court should not impose sanctions or initiate disciplinary proceedings against her on the basis of her representation of appellant Borhan." (Ex. 6, p. 3.) This order to show cause was repeated on August 22, 2011. (*Id.* at pp. 5-6.)

On September 6, 2011, Respondent filed a response to the order to show cause. In it, she indicated, among other things, that she had "consulted with two other attorneys experienced in federal habeas corpus regarding the calculation of the limitations period." She also stated that she had consulted with attorney Clifford Gardner, who had written his letter of March 10, 2005, to Borhan. She characterized Gardner as concluding in this letter that Borhan "had one year and 90 days from the denial of the state habeas petition in which to file the federal writ." (Ex. 6, pp. 10-11.)

Ultimately, there is no evidence that sanctions were ever imposed by the federal court against Respondent. Instead, on August 15, 2013, the Ninth Circuit vacated the District Court's judgment and remanded for an evidentiary hearing on the claim that Borhan was entitled to equitable tolling based on Respondent's alleged misconduct.

In an obvious attempt by Borhan to obtain relief from the prior denial of his habeas petition, and guided by the case law addressing the circumstances warranting relief under Federal Rule of Civil Procedure 60(b), Borhan now alleged that he was the victim of abandonment by Respondent.

On February 25, 2014, the District Court held the evidentiary hearing. Borhan was represented at this hearing by the Office of the Federal Public Defender. The prison warden, who was the nominal opposing party in the habeas corpus proceeding, was represented by the California Attorney General's Office. While the sole issue in that proceeding was the veracity of Borhan's allegations of misconduct by Respondent, Respondent was not a party in that

proceeding; nor did she have counsel representing her in it. Further, because she had been subpoenaed to testify as a witness in it, she was excluded from otherwise attending the proceeding.

During the hearing, attorney Gardner testified that he had no recollection of any discussion with Respondent regarding the Borhan matter, although he did not dispute that a conversation had taken place. He was then asked about his March 10, 2005 letter to Borhan, upon which Respondent had indicated that she had partially relied. He explained his letter as follows:

> Q: Okay. Now, I'd like to just point you to the third full paragraph on the second page of the letter that starts, "Normally, this would have two consequences."
> A Yes.
> Q: Okay. Now, when you said that the statute of limitations would begin to run 90 days after the state Supreme Court's July 2004 ruling, what ruling were you referring to?
> A: I was referring to the state Supreme — the state Supreme Court, as I say, in the prior paragraph. The state Supreme Court had denied his petition for review on appeal on July 28th, 2004. That's the ruling I was referencing. I was talking about what we know to be the 90-day cert window you get in terms of when the statute starts under — well, now *Bowen versus Roe* and under the case law.
> Q: Looking at the very next paragraph, what did you tell Mr. Borhan about when his one-year statute of limitations would actually begin to run?
> A: Okay. Well, Mr. Borhan's case was a little unusual in the sense that he didn't just file a petition for review in connection with his case. He also had pending a — a habeas petition in the state Supreme Court. So although his statute of limitations would start on October 26th, 2005, normally, it wasn't going to start in his case because he had a properly filed state habeas petition. In other words, his — his one-year statute had started, but it was immediately tolled. **But it had been tolled for so long that he was no longer going to get the benefit of the 90-day cert window because, by the time he wrote me, that 90 days had already passed.** So I explained at the end of that paragraph that the statute of limitations would begin immediately when the state Supreme Court ruled.

(Ex. 9, pp. 24-25 [underlining and emphasis added].)

Although Gardner had indicated that he had no recollection of any conversation he might have had with Respondent, he was allowed, without objection, to speculate that he would have

given Respondent the same advice in any such conversation that he had given Borhan in his letter. (Id., at p. 26.)[4] In the instant disciplinary trial, Gardner was shown copies of Respondent's phone records and acknowledged that they showed calls with him on November 23, 2005 (for more than 17 minutes) and on December 7, 2005 (for another 15 minutes). He also testified that the issue of the running of the federal habeas corpus statute of limitations as "a confusing area."

With regard to Jonathan Milberg (Milberg), one of the other attorneys consulted by Respondent regarding the Borhan matter, the parties in the federal evidentiary hearing stipulated to the admission of a declaration from him in lieu of live testimony. In that declaration, Milberg stated that he did not recall having any conversation with Respondent regarding the Borhan matter. In fact, he even declared under penalty of perjury that he did not have "any recollection of who Lisa Bassis is." Nonetheless, his declaration, by stipulation, included his self-serving speculation about what he would not have said to her in a conversation in 2005. (Ex. 10, pp. 25-27.) There was, of course, no cross-examination conducted of him by the attorneys representing the prison warden. During the trial of the instant disciplinary matter, Milberg appeared in person to testify. In this proceeding, he admitted that he did know who Respondent was; initially did not recall ever providing a declaration in the federal matter; and acknowledged that Respondent "probably" did contact him about Borhan. Like Gardner, Milberg also described the statute of limitations issue in a federal habeas corpus matter as "a very complicated area of the law."[5]

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[4] Of significance, the advice given by Gardner to Borhan did not include Gardner's explanation of the critical distinction, highlighted above in his explanation given to the court, that, when the statute of limitations started after the denial of the state habeas petition, it would not be tolled for 90 days (as it had been when it had previously started) because "**it had [already] been tolled for so long.**" That Gardner's letter did not include this explanation may well explain Respondent's misunderstanding of it. It may also explain why Borhan also understood that Gardner had told him that the statute might be tolled for 90 days. (Ex. 9, p. 161.)

[5] Attorney Goodwin, the other attorney with whom Respondent consulted, was not called as a witness and did not provide testimony.

On October 9, 2014, the District Court rendered its decision in which it found that Borhan was entitled to equitable tolling due to the court's conclusion that extraordinary circumstances existed because Respondent's actions were "tantamount to abandonment" and, therefore, deemed the habeas petition timely filed.[6]

Borhan's habeas writ was subsequently considered on the merits and dismissed with prejudice on May 8, 2017.

Count 1 – Rule 3-110(A) [Failure to Perform with Competence]

In this count the State Bar alleges:

> On or about September 12, 2005, Payman Borhan employed Respondent to perform legal services, namely to file a post-conviction federal habeas petition, which Respondent intentionally, recklessly, or repeatedly failed to perform with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A), by failing to file the petition until more than three months after the statute of limitations had passed.

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." While this rule applies to attorneys' duty to communicate correct legal advice to their clients, the law is well-settled "that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation. (See *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113; *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 711; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 633; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.)

The evidence is undisputed that calculating the deadline for the filing of a federal habeas corpus petition is a complicated matter, made especially difficult in 2006 because of the

[6] On October 15, 2014, the District Court rendered an amended decision, making minor alterations not material to these proceedings.

conflicting views of the different circuits. It is undisputed that Respondent sought to research the issue and even consulted with numerous other attorneys about the issue. Unfortunately, she got it wrong. It is also uncontradicted that, once Respondent realized her mistake, she endeavored to obtain relief for her client from it.

The District Court concluded that Respondent's "miscalculation of the statute of limitations was simply 'a garden variety claim of excusable neglect.'" This court agrees with that assessment.

This count is dismissed with prejudice.

Count 2 - Section 6106 [Moral Turpitude – Misrepresentation]

In this count the State Bar alleges:

> On or about February 25, 2014, Respondent falsely testified in an evidentiary hearing in the matter of *Borhan* v. *Davis*, case number CV 06-6278 then pending before the United States District Court, Central District of California, that Respondent had consulted with three other attorneys regarding the statute of limitations for filing a federal habeas petition when Respondent knew or was grossly negligent in not knowing the statement was false, and thereby committed an act of moral turpitude, dishonesty, or corruption in willful violation of Business and Professions Code, section 6106.

Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." For purposes of State Bar disciplinary proceedings, moral turpitude is "any crime or misconduct reflecting dishonesty, particularly when committed in the course of practice . . . ." (*Read v. State Bar* (1991) 53 Cal.3d 394, 412.)

The State Bar failed to present clear and convincing evidence of any act of moral turpitude, as alleged in the NDC. Respondent testified during the federal evidentiary hearing that she had consulted with the three identified attorneys about how to calculate the deadline for the filing of the statute of limitations. She even has records generated at the time regarding her

conversations with Goodwin and Milberg. During her federal testimony, she described her conversation with Gardner as being primarily for other purposes, although they did discuss the content of his letter.

In the trial of this proceeding, none of the three attorneys denied Respondent's recollection that she had discussed the Borhan case with them, including the statute of limitations. Moreover, as noted above, attorney Milberg repudiated his prior statement in the federal case that he did not even know who she was.

After the evidentiary record in this matter had been closed, the State Bar asked to amend this count to conform to proof pursuant to rule 5.44(C) of the Rules of Procedure of the State Bar of California. That oral motion was non-specific as to the specific amendment that was being proposed but described the modification as stating that Respondent's description of the "content" of her conversations with the three attorneys was dishonest. While counsel for the State Bar acknowledged that the allowance of such an amendment would normally not be allowed, he sought to justify it by complaining that certain documentary evidence had not been received by the State Bar until a day before the trial commenced. The motion was opposed by counsel for Respondent. While the motion was denied by this court at that time, the State Bar has reiterated in its closing brief its desire to modify the language of Count 2.

This court reaffirms its prior rejection of the State Bar's oral motion to amend the language of Count 2 to "conform to proof." This denial is based on numerous grounds. First, the requested amendment is completely vague and fails to identify what Respondent specifically said during the federal hearing that has now been shown by clear and convincing evidence to be an act of moral turpitude. Second, it is clear that this motion was and is being made because it became apparent to the State Bar prior to the commencement of the trial that the specific allegations of the existing Count 2 lacked merit. Respondent had testified that she had talked

with all three individuals about the Borhan statute of limitations issue and all of them agreed that, while they did not specifically remember the conversation, they could not say that it did not happen. Rather than dismissing the existing charge or asking for permission to amend it prior to the commencement of trial (thereby giving Respondent notice of whatever new allegation needed to be defended), the State Bar instead endeavored to prove a different case while the original charge was being successfully defended by Respondent at trial and then asked to have discipline be imposed on its previously unannounced (and still uncertain) accusation. This court declines to condone any such prosecutorial technique. Finally, the State Bar has failed to provide clear and convincing evidence that any portion of Respondent's testimony regarding her dealings with the three attorneys represented some act of moral turpitude. At most, the evidence merely shows that there was a failure to communicate between the attorneys – just as there apparently was between attorney Gardner and Borhan on the same issue.

This count is dismissed with prejudice.

Count 3 - Section 6106 [Moral Turpitude – Misrepresentation]

In this count the State Bar alleges:

> In or about February 2014, Respondent requested the mail logs of her former client, Payman Borhan, from Mule Creek State Prison. Upon doing so, Respondent received an e-mail from Desiree Azevedo, the Litigation Office Technician at Mule Creek State Prison, which requested a signed authorization from Borhan. Although Respondent knew, or was grossly negligent in not knowing, that she no longer represented Borhan, she provided an authorization to Azevedo which Borhan had signed when he first retained Respondent and which expressly stated that Respondent represented Borhan. When Respondent provided this authorization, she did not disclose its age, the fact that she no longer represented Borhan, or that her interests were then in conflict with Borhan's. In doing so, Respondent committed an act of moral turpitude, dishonesty, or corruption in willful violation of Business and Professions Code, section 6106.

As previously noted, Respondent was not a party to the proceeding that included the federal evidentiary hearing. The developing issue in that hearing was whether Respondent had

abandoned her client or was guilty of other misconduct over and above her "garden-variety negligence" in failing to properly calculate the statute of limitations.

Shortly before the hearing was scheduled to take place, Respondent became aware that Borhan was making allegations which Respondent felt could be disproved by use of the prison mail logs, which record the sending and receipt of correspondence between a prisoner and his or her attorney. However, when Respondent raised with one of the deputy attorney generals handling the evidentiary hearing the desirability of obtaining those mail logs, she concluded that he was uninterested and that no effort was going to be made to secure them. As a result, she took matters into her own hands.

On February 2, 2014, Respondent sent a letter to officials at the prison where Borhan was incarcerated and requested that they provide her a copy of the log of Borhan's outgoing mail. (Ex. 9, p. 70.) In response, she received the following email from Desiree Azevedo (Azevedo) on February 10, 2014:

> We have received your request for the legal mail log of Inmate Borhan, Payman. We will need an original signed authorization from the inmate allowing you to have the information. Once you have the authorization you can request the log once again.
>
> Please let me know if you have any questions. Thanks!
>
> Desiree Azevedo

On February 13, 2014, Respondent sent the following email to Azevedo:

> Dear Desiree,
>
> Attached please find a copy of the signed authorization.
>
> Best,
> Lisa Bassis

The copy sent by Respondent was of an authorization signed by Borhan at the time that he first retained Respondent to be his attorney. (Ex. 9, p. 73.) In the authorization, it states,

"This document, or a photocopy thereof, will verify that Lisa M. Bassis is my attorney, and will authorize her to communicate with probation officers, prior attorneys, and all other persons having information which he [sic] deems necessary in her representation of me, and will further authorize her to examine, inspect, and make photocopies of all probation reports, documents in the possession of my prior attorneys, employment records, medical records, and all correspondence, reports, charts, and any other documents pertaining to me." (Ex. 1004; *id.*, at pp. 73, 76.) At the time that Respondent was sending this authorization to the prison in 2014, she was, of course, no longer the attorney for Borhan. She was also aware that she was seeking the mail log for a purpose that was adverse to Borhan, not because it was "necessary in her representation of [him]."

On February 18, 2014, Respondent received the following email from Azevedo:

> Hello,
>
> The Litigation Coordinator has looked over your request along with the authorization and she has requested that the attached authorization be used. We will need the original signed authorization in our office before we can process your request. You can send this directly to Inmate Borhan and ask that he return it to our office to expedite the process, or he can return to you and you can forward to us. Please advise as to how you will proceed so I know where the authorization will be coming from.
>
> Also, we noticed that currently he is working with the Federal Public Defender in Los Angeles. Can you please clarify how you are representing Inmate Borhan?
>
> Kindly,
>
> Desiree Azevedo

On the same day that Respondent received the above email, she sent the following email response to Azevedo:

> Dear Desiree,
> The authorization specifically provides that a photocopy is sufficient. I doubt I will be provide [sic] an original within the time required. The hearing date is February 24.

> Also, your file should indicate that this is my second request for mail logs--a previous request was made on 9/21/06 and records were provided--accordingly you should already have an authorization.
> If your Litigation Coordinator could kindly make an exception, I would appreciate it.
>
> Best Regards,
> Lisa Bassis

In response to the Respondent's request that a Litigation Coordinator make an exception for her request, Respondent received the following email on February 20, 2014, from Riann Giovacchini (Giovacchini):

> Good evening Lisa, I would like to accommodate your request for mail logs. If you can have inmate Borhan complete the authorization Desiree sent to you that would be fantastic. We do not have the 2006 authorization that you mention below.
>
> Also, the attorney of record we have for the case that I believe you are asking records for, is the Federal Public Defender's office. It might be helpful to work in conjunction with them since it appears you both are seeking similar items and there is a hearing on the 24th.
>
> I apologize for the inconvenience. Another way to possibly obtain the documents is to ask Borhan to send them to you, or I would even allow him to send a CDCR Form 22 to the Litigation office requesting that we provide you with such documents. That would suffice and get you the documents you need in a timely matter.
>
> Thank you,
>
> Riann Giovacchini

On the same day that Respondent was sent the above email, she sent to Giovacchini the following reply, again urging the prison to rely on the authorization previously signed by Borhan:

> Dear Mr. Giovacchini,
>
> Thank you for your response.
>
> Desiree did not send me an authorization. Rather, I sent you a signed authorization. You state that you need an original. Given that the hearing date is February 24 it is physically impossible to provide you with an

> original within the time remaining. The terms of the authorization expressly provide that a photocopy may be used in lieu of an original.
>
> Accordingly, in view of your interest in accommodating my request, I appreciate your immediate compliance.
>
> Best Regards,
> Lisa Bassis

On the following day, Respondent was notified by Azevedo that the logs would not be provided without a different, original-signed authorization by Borhan, a subpoena, or a court order:

> Ms. Bassis, I apologize for the inconvenience but we will be unable to accommodate your request. Should you choose to have the inmate use our authorization and provide us an original signature, or if you would like to produce a subpoena or court order we would happy to fulfill your request.
>
> Riann

This court agrees with the State Bar that Respondent's conduct in sending the authorization indicating that she was still the attorney for Borhan, was an act of moral turpitude and a willful violation by her of the prohibition of section 6106. At the time that Respondent sent this authorization, she was aware that her representation of Borhan had been terminated by her years before; she sent the authorization for a purpose adverse to the interests of her former client; and she did so without simultaneously disclosing to the prison that she no longer represented Borhan.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,[7] std. 1.5.) The State Bar has failed to provide clear and convincing evidence of any aggravating circumstance here.

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

Mitigating Circumstances

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

No Prior Discipline

Respondent had practiced law in California for more than 34 years prior to her misconduct set forth above. During that lengthy timespan, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in mitigation even though the misconduct here was serious. (Std. 1.6(a); *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [noting that the Supreme Court has repeatedly applied former standard 1.2(e)(1) in cases involving serious misconduct and citing *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [entitled to significant mitigation]; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589 ["an important mitigating circumstance"]; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350 ["significant" mitigating factor]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49; *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 613 ["We attribute great significance to this factor."]; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 192-193; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 764-765 ["strong mitigation" and "his long service at the bar and for his community counterbalances misconduct that would otherwise warrant substantial discipline"]; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749 [entitled to "considerable weight in mitigation"].)

No Harm

Respondent is entitled to some mitigation credit because her misconduct caused no actual harm to the client or person who is the object of the misconduct. (Std. 1.6(c).)

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, albeit limited. (Std. 1.6(e); see also *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 185; *In the Matter of Riordan, supra*, 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/Community Service

Respondent presented good character testimony from two witnesses, both attorneys, regarding Respondent's character. Because these two witnesses do not constitute "a wide range of references in the legal and general communities" (std. 1.6(f); *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [character testimony from three attorneys not sufficiently wide range of references]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [testimony of three clients and three attorneys familiar with charges against attorney was entitled only to limited mitigation because they did not constitute a broad range of references]), this testimony warrants only limited mitigation. In addition, Respondent presented evidence of her past pro bono and community contributions. This court assigns additional mitigation credit, albeit modest, based on that evidence. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service as mitigating

factor]; but see *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited mitigation weight for community service established only by respondent's testimony].)

Candor

This court declines to provide mitigation for candor in this matter. Although Respondent has always been forthright in acknowledging her mistake in miscalculating the deadline for the filing of the habeas corpus petition, the mitigation credit she might otherwise receive for such candor is negated by the questionable February 20, 2014 email she provided the State Bar (Ex. 8, p. 2). This email purports to have been sent to Giovacchini at the prison shortly before the other email sent by her to Giovacchini on February 20, 2014. In that purported first email, sharply contested in the State Bar's closing brief but received in evidence as one of its exhibits, she purports to have explained to the prison representatives, in response to their inquiries about her representation of Borhan at the time she was seeking the mail logs, that she then no longer represented Borhan and was, in fact, adverse to him. That email conflicts with her testimony during the federal hearing (Ex. 9, pp. 70-79, 101-104), and does not correlate with the subsequent email correspondence between Respondent and the prison officials on February 20 and 21, 2014.

DISCUSSION

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

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional

law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In the present proceeding, the sanction for Respondent's misconduct is found in standard 2.11, which provides: "Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law."

In assessing the factors spelled out in this standard, this court finds that Respondent's misconduct was of a serious magnitude and was intentional. Further, the misconduct was, of course, directly related to Respondent's practice of law. On the other hand, the misconduct resulted in neither any harm to Borhan nor any impact on the administration of justice, primarily because the prison officials, despite Respondent's urgings, declined to rely on the proffered authorization.

In fashioning what discipline is appropriate here, this court has not been unmindful of the extremely unusual and highly stressful situation in which Respondent found herself prior to the federal evidentiary hearing. Respondent's lack of knowledge about a controlling Ninth Circuit decision had caused her to miss the deadline for filing a habeas corpus petition on behalf of a very difficult client/prisoner. While Respondent had readily conceded her mistake her acknowledgement of negligence was not legally sufficient for the court to relieve her client from the consequence of her mistake. As a result, when the evidentiary hearing was ordered, Respondent was faced with the possibility of having sanctions ordered against her and her reputation sullied (if not ruined) by the allegations of client abandonment being generated by a convicted felon seeking to avoid a potential life-time in jail. Respondent felt these allegations were untrue, and she fervently - and not unreasonably - believed that the credibility of her accuser could be successfully attacked by an aggressive defense on her behalf. To her great consternation, she found herself neither a party to the proceeding nor even allowed to be present during it. Worse, from her anxious perspective, the only attorneys involved in the case with any interest in coming to her defense were the same attorneys who had been completely adverse to her at all times while she had previously been counsel in it – and their lack of responsiveness to her strategic suggestions caused her to be concerned that they were not being sufficiently energetic in defending her interests. Unfortunately, confronted with this "perfect storm," Respondent panicked and resorted to a clearly improper tactic in seeking to protect her personal interests through the exercise of some frantic self-help.

While Respondent's exercise of bad judgment is perhaps understandable, that does not make it excusable. It was a serious violation of her professional and ethical obligations and places the profession in a bad light. Moreover, if Respondent's reaction in a pressure situation results in acts of moral turpitude, "then the public needs protection in the future from any further

reactions from respondent to pressure-filled legal disputes." (*In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 549.)

Having reviewed the numerous cases imposing discipline because of misrepresentations by an attorney in violation of section 6106, this court notes that the resulting disciplines have ranged from public reprovals to disbarments. Here, given the nature and highly unusual circumstances of Respondent's misconduct, the lack of any resulting harm, and Respondent's 34 years of discipline-free practice, this court concludes that a one-year period of stayed suspension, coupled with a two-year period of probation, with conditions including, inter alia, Respondent's passage of the State Bar's Ethics School, is discipline that is appropriate; sufficient to prevent any future misconduct by Respondent; and consistent with both the case law (see, e.g., *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211) standards 2.7.

RECOMMENDED DISCIPLINE

Stayed Suspension/Probation

For all of the above reasons, it is recommended that **Lisa Michelle Bassis**, State Bar number 87845, be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Membership Records and Compliance Office (Membership Records) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, she must provide the mailing address, email address, and telephone number to be used for

State Bar purposes. Respondent must report, in writing, any change in the above information to Membership Records, within ten (10) days after such change, in the manner required by that office.

3. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

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

   (a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

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

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report

required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

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

6. Within one year after the effective date of the Supreme Court order in this matter, Respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

At the termination of the probation period, if Respondent has complied with all of the terms of her probation, the period of stayed suspension will be satisfied and the suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State*

Bar (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: February 14, 2018

DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 14, 2018, I deposited a true copy of the following document(s):

DECISION

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

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

SUSAN LYNN MARGOLIS
MARGOLIS & MARGOLIS LLP
2000 RIVERSIDE DR
LOS ANGELES, CA 90039

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

DREW D. MASSEY, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 14, 2018.

Marc Krause
Case Administrator
State Bar Court