

Supreme Court Case No. S281974
State Bar Court Case No. 17-O-01313

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

In the Matter of GREGORY HARPER, et al.
Licensee No. 146119

APPEAL FROM A DECISION OF THE HEARING
DEPARTMENT OF THE STATE BAR COURT OF
CALIFORNIA

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I.	INTRODUCTION	4
II.	BRIEF PROCEDURAL BACKGROUND.....	7
III.	ARGUMENT	17
	A. Petitioner’s Arguments Lack Merit Because the State Bar Court Hearing Department Correctly Interpreted This Court’s Remand Order and Conducted An Appropriate Evidentiary Hearing That Included Ample Opportunities to Engage in Discovery, Present Evidence and Cross-Examine Witnesses.....	17
	1. Petitioner Fails to Identify Any Due Process Issue That Warrants Review.	17
	2. Petitioner’s Overly Broad Allegations Regarding Discovery Do Not Provide Any Grounds for this Court to Grant the Petition.	18
	3. Petitioner’s Own Failure to Conduct Expert Discovery Does Not Constitute a Denial of Due Process.	20
	4. Petitioner’s “Statement of Issues Presented” Contains Inaccurate Recitations of the Procedural History In This Matter and Does Not Support the Petition.	22
	5. Petitioner’s Contention that the Hearing Department Improperly Excluded his Evidence Relating to Girardi Does Not Constitute a Denial of Due Process.	24
	B. Petitioner’s Reference to Bias by the Hearing Department Judge Lacks Merit.	25
IV.	CONCLUSION	26

TABLE OF AUTHORITIES

Cases

Andrews v. Agricultural Labor Relations Bd.
(1981) 28 Cal.3d 781, 796..... 25

NLRB v. Pittsburgh S.S. Co.
(1949) 337 U.S. 656, 659 26

ANSWER TO PETITION FOR REVIEW

I. INTRODUCTION

Gregory Harper (Petitioner) seeks review of the State Bar Court Hearing Department's "Decision Pursuant To Supreme Court's January 27, 2021, Remand Order" (Decision) that found insufficient evidence to support Petitioner's claim that any facially neutral State Bar policies or practices, including but not limited to the weight given to Petitioner's prior discipline, had the effect of discriminating against him on the basis of race. In his petition for review (Petition), Petitioner claims, without any citations to the record or specific references to motions or court orders, that the State Bar Court Hearing Department (Hearing Department) imposed limitations on the scope of discovery that resulted in a denial of due process; improperly denied his motion in limine to either exclude the State Bar's expert report or continue trial; and, improperly excluded relevant evidence of State Bar policies related to disbarred attorney Thomas Girardi, State Bar No. 36603 (Girardi). In addition, Petitioner appears to assert that Hearing Department Judge Manjari Chawla was biased and should have recused herself.

The Petition is devoid of any facts to support Petitioner's claims or citations to the record and, as such, is fatally flawed on its face and should be denied. In addition, Petitioner's claims are overly broad and fail to identify with any particularity the State Bar Court orders/rulings that are being challenged. Most of the Petition is unintelligible and requires the State Bar to speculate regarding the subject(s) of the Petition; however, the State Bar will respond to what appears to be at issue.

First, the Decision speaks for itself and addresses Petitioner's claims with a detailed procedural history and analysis of the evidence presented. Second, Petitioner received a full and fair evidentiary hearing (over two years after the January 27, 2021 remand order (Remand Order)) with ample opportunities to conduct pre-hearing discovery, subpoena witnesses and present evidence, including expert reports and testimony. Third, the State Bar and the Hearing Department fully complied with the discovery directives contained in the Remand Order. Petitioner's arguments are "disagreements" with the Hearing Department's rulings, not a denial of due process and, as such, Petitioner's vague allegations that he was denied due process are meritless.

Regarding evidence relating to Girardi, the Petition fails to describe what evidence was excluded or the relevance of the excluded evidence. The Hearing Department Decision addressed the evidentiary rulings concerning Mr. Girardi and properly concluded that Girardi was not in the data studied by Professor Farkas. Finally, Girardi was disbarred so there is no obvious connection to Petitioner that would establish the relevance of Girardi to this proceeding. Petitioner fails to provide any analysis or facts to suggest that the exclusion of certain evidence about Girardi was prejudicial to his allegations of discrimination. Therefore, any issues concerning Girardi are merely anecdotal and not relevant to Petitioner's claims.

Finally, Judge Chawla's decision not to recuse herself has already been addressed by the State Bar Court (and by this Court, which denied Petitioner's April 14, 2023 petition for review of the decision not to recuse (S279516)). There are no facts alleged that would require recusal by Judge Chawla, and Petitioner does not allege *any* grounds in this petition, let alone legitimate grounds, for recusal.

In sum, the State Bar complied with this Court's Remand Order and provided Petitioner with the statistical data

underlying the Farkas study and Robertson report. As discussed more fully below, Petitioner was afforded liberal opportunities after the remand proceedings commenced in approximately February 2021 to seek additional discovery beyond the statistical data provided to him by the State Bar and had multiple opportunities to file motions to compel if appropriate. Petitioner obtained State Bar manuals and other materials in discovery and through Public Records Act requests. The Petition fails to identify what discovery ruling or other order unjustly denied him due process in this proceeding. Notably, Petitioner never sought to depose the State Bar's expert witness who was timely disclosed approximately two years ago in November 2021. Petitioner cannot willfully fail to conduct expert discovery and now claim that his due process rights were violated. As such, the Petition should be denied.

II. BRIEF PROCEDURAL BACKGROUND

On April 14, 2020, the State Bar Review Department issued an opinion finding Petitioner culpable of three counts of misconduct and recommended that he be disbarred after review of the Hearing Department decision in case number 17-O-01313. The Review Department found Petitioner culpable of violating

former rule 4-100(A) and Business and Professions Code section 6106 (for a grossly negligent misappropriation and a misrepresentation). Petitioner filed a petition for review in the Supreme Court. On January 27, 2021, the Supreme Court granted review and remanded the matter to the State Bar Court for a further evidentiary hearing.

On February 16, 2021, Petitioner filed a motion to disqualify the Hearing Judge. On February 18, 2021, the Hearing Judge filed an Answer to the motion to disqualify, declining to recuse herself. On February 24, 2021, the Hearing Judge assigned to the disqualification motion denied Petitioner's motion to disqualify the Hearing Judge.

On August 12, 2021, the Hearing Department ordered the parties to provide expert disclosures by October 29, 2021, and to disclose any rebuttal experts by November 19, 2021. On October 29, 2021, Petitioner filed a motion to continue the last date to declare an expert witness. On October 29, 2021, the State Bar disclosed its expert witness.

On November 3, 2021, the State Bar filed a response to Petitioner's motion regarding the expert disclosure date, which did not oppose the extension of the disclosure date. On November

14, 2021, the Hearing Department granted Petitioner's request for an extension of time to disclose expert witnesses, ordering the parties to disclose any expert witnesses by February 28, 2022, and rebuttal experts by March 21, 2022. On December 8, 2021, the Hearing Department denied Petitioner's motion to reconsider a prior order regarding discovery, and denied the majority of Petitioner's requests for additional discovery.

In its December 8, 2021 order, the Hearing Department ordered the State Bar to produce the Office of Chief Trial Counsel's ("OCTC") policies and procedures relating to reportable action bank matters within 14 days. On December 22, 2021, the State Bar produced OCTC's intake and investigative manuals, which contain policies and procedures relating to the handling reportable action bank matters. OCTC's intake policies and procedures relating to reportable action bank matters were redacted where the information contained in the manual was considered confidential and protected by privilege.

On December 27, 2021, Petitioner filed a petition for interlocutory review of the December 8, 2021 order with the Review Department. On February 9, 2021, the Review Department denied Petitioner's petition. On February 8, 2022,

Petitioner filed a motion to stay the proceedings pending his appeal of the Review Department decision to the California Supreme Court. On July 20, 2022, the Supreme Court issued the following order: “The petition for review is denied without prejudice to additional discovery based on more particularized discovery requests covering theories of disparate impact, including but not limited to theories based on the reporting mechanisms regarding, and weight given to prior discipline for, reportable action bank matters in State Bar disciplinary proceedings.”

On July 29, 2022, the Hearing Department reopened discovery, on a limited basis, to allow the parties to propound further discovery requests consistent with the Supreme Court’s July 20, 2022 order. In its Order, the Hearing Department set the last date to propound discovery requests as August 26, 2022, as well as a trial date of January 24, 2023. The July 29 order stated that the “parties must provide expert disclosures as set forth under Rule 5.65.1 and following the deadlines therein.” On August 26, 2022, Petitioner filed a request for an extension of time for propounding discovery and for discovery deadlines. On September 16, 2022, the Hearing Department granted, in part,

Petitioner's motion to continue the discovery deadline, extending the last day to propound discovery to October 7, 2022, and the cutoff date for non-expert discovery to November 22, 2022.

In November 2022, Petitioner met and conferred with the State Bar regarding OCTC's policies and procedures, which were redacted and produced by the State Bar in December 2021.

During the meet and confer, the State Bar offered to voluntarily produce the unredacted version of the pages related to reportable action bank matters from OCTC's Intake Manual, subject to a protective order. On December 9, 2022, the State Bar filed a brief requesting the Hearing Department issue a protective order. On December 9, 2022, Petitioner filed an opposition to the State Bar's request for a protective order.

On December 12, 2022, Petitioner filed a motion to reopen discovery, continue the deadline to disclose expert witnesses, and continue the trial date. On December 20, 2022, the State Bar filed its response to Petitioner's motion.

On January 4, 2022, the Hearing Department granted Petitioner's motion to continue the trial date and continued the deadline for the exchange of expert information to March 10, 2023, and rebuttal experts by March 21, 2023. The Hearing

Department continued the trial date to April 24, 2023. The Hearing Department denied Petitioner's motion to reopen non-expert discovery for the purposes of additional discovery and motions to compel. However, the Hearing Department ordered that non-expert discovery be reopened on a narrow basis, solely for the purpose of addressing the potential production of an unredacted version of OCTC's Intake Manual relating to reportable action bank matters. The Hearing Department also denied the State Bar's request for a protective order and ordered the parties to attend a discovery conference to facilitate an agreement between the parties with respect to the production of the unredacted policy and any related protective order.

On January 30 and February 8, 2023, the parties attended two discovery conferences to resolve the issue of the unredacted document and to come to an agreement on a protective order. On February 10, 2023, the parties filed a joint request for a protective order. On February 16, 2023, the Hearing Department granted the motion and issued the request protective order with minor amendments. On February 24, 2023, the State Bar served Petitioner with the unredacted pages from OCTC's Intake

Manual, which later was identified as the State Bar's trial exhibit number 5.

Per the Hearing Department's January 4, 2023 order, the last day for Petitioner to serve or file his expert designation was March 10, 2023. Petitioner did not serve or file a designation of expert by March 10, 2023. On March 24, 2023, Petitioner filed a motion to vacate the protective order. On April 5, 2023, the State Bar filed its opposition to Petitioner's motion to vacate the protective order. The State Bar also filed a motion to seal its exhibit 5, the unredacted copy of the Intake Manual. On April 12, 2023, the parties attended an ordered discovery conference in an effort to resolve Petitioner's request to vacate the protective order.

On April 19, 2023, the State Bar served and lodged its exhibit 34, a report prepared by the State Bar's retained expert. On April 21, 2023, Petitioner filed a motion in limine to exclude the State Bar's expert report, or, in the alternative, continue trial for 30 days. Petitioner argued in his motion in limine that the State Bar unreasonably failed to produce its expert report when it filed its expert witness disclosure on October 29, 2021.

Trial was scheduled to commence on April 24, 2023, at 9 a.m. Prior to the start of trial, on the record, the Hearing Judge heard argument related to Petitioner's motion in limine to exclude the State Bar's expert report or to continue trial. The Hearing Judge inquired whether Petitioner had made attempts to depose the State Bar's disclosed expert or whether there was information contained within the expert report that was outside the scope of the State Bar's expert disclosure. Petitioner conceded that he had not attempted to depose the State Bar's expert. Petitioner also stated that he felt the report contained legal conclusions and he wanted to speak to an expert about the contents of the exhibit. The Hearing Judge allowed the State Bar to orally oppose the motion.

The State Bar argued that the expert report had been finalized/submitted by the State Bar's expert Dr. Jora Stixrud and disclosed to Petitioner on the same day, April 19, 2023. The State Bar noted that Petitioner had not articulated which State Bar policies he was challenging in the hearing prior to a meet and confer on April 18, 2023. The State Bar stated that the expert report had not been prepared prior to that date precisely because Petitioner had not identified which specific practices or

policies he intended to challenge during the hearing. The Hearing Judge confirmed that the State Bar provided the unredacted Intake policy relating to reportable action bank matters on February 24, 2023.

The Hearing Department denied Petitioner's motion in limine to exclude the expert report, and denied Petitioner's request for a continuance. In its written order, issued April 24, 2023, the Hearing Department noted that Petitioner had not made efforts to depose the State Bar's expert and was not seeking a continuance to do so. The Hearing Department found that the State Bar's actions were not unreasonable and that Petitioner had ample opportunity to engage in expert discovery. The Hearing Department also noted that Petitioner would have the ability to examine the expert at trial.

Following her oral ruling denying Petitioner's motion in limine, trial commenced. The Hearing Department admitted Petitioner's exhibits relating to disbarred attorney, Thomas Girardi, and other allegedly similarly situated white males. During Petitioner's testimony, the State Bar objected to Petitioner's testimony relating to Girardi. Petitioner attempted to establish that the State Bar Intake policies had been applied

differently to Petitioner than Girardi, and cited to Girardi as a “similarly situated white male attorney.” The State Bar objected based on foundation, given that Girardi was not included in the data underlying the Farkas study or Robertson report. The Hearing Department determined that the plain language of the January 27, 2021 remand order required the State Bar to determine “whether Harper was disciplined more harshly than any similarly situated white male attorney based on the data underlying the Farkas study and the Robertson report.” Based on State Bar Exhibit 28 and Petitioner’s Exhibit 1008, the Hearing Department sustained the State Bar’s objection to Petitioner’s testimony related to Girardi.

Trial concluded on April 25, 2023. The Hearing Department issued its decision on August 13, 2023.

III. ARGUMENT

A. Petitioner's Arguments Lack Merit Because the State Bar Court Hearing Department Correctly Interpreted This Court's Remand Order and Conducted An Appropriate Evidentiary Hearing That Included Ample Opportunities to Engage in Discovery, Present Evidence and Cross-Examine Witnesses.

1. Petitioner Fails to Identify Any Due Process Issue That Warrants Review.

Petitioner appears to claim that the Hearing Department's discovery/evidentiary rulings and denial of his motion in limine to continue trial constitute a denial of due process. Petitioner, however, conflates "due process" that is associated with evidentiary hearings with his disagreement over the Hearing Department's orders/rulings. The Decision speaks for itself and rebuts Petitioner's due process claims by describing in detail the numerous continuances and opportunities for discovery that the Hearing Department provided Petitioner since the remand proceeding commenced almost three years ago. For example, in the Decision (see pages 3-4), the Hearing Department referenced Petitioner's motions to compel and production of the State Bar's unredacted intake policy regarding reportable action bank matters. Therefore, Petitioner's claim that he was denied

discovery, and consequently, that he was denied due process, is contrary to the facts as recited in detail by the Hearing Department in its Decision.

Petitioner simply disagrees with Hearing Department's discovery rulings and/or failed to move to compel production of certain information. Because the Petition is devoid of any specific reference(s) to the record that would support a denial of due process or other facts to support his arguments, the Petition should be denied.

2. Petitioner's Overly Broad Allegations Regarding Discovery Do Not Provide Any Grounds for this Court to Grant the Petition.

Petitioner alleges that he was denied access to certain information as follows and claims that it constitutes a denial of his due process rights

because discovery was not allowed:

1. The race and sex of the attorney against whom the complaint is made,
2. The amount of money if any, involved,
3. The race and sex of the person handling the complaint,
4. The age of any prior discipline,
5. The harm if any, to the client,
6. The disposition of any prior matters if any,
7. Whether a fee dispute was involved and if so, was it resolved.
8. Whether the fee dispute was timely filed.

(Petition, p. 8.)

Petitioner's allegations with respect to the above discovery requests are unintelligible. Petitioner has not specified how the discovery enumerated above would aid in proving his claims. His apparent disagreement over how the Hearing Department handled discovery does not constitute a denial of due process.

There are no citations to the record, court orders or any reference as to why information about "harm to client," "fee disputes," "race and sex of the person handling the complaint," et al. are relevant to his disparate impact discrimination claims. For example, there is no allegation in this matter that any particular State Bar staff person *intentionally* discriminated against Petitioner.

Therefore, the race/sex of staff attorneys and investigators at the State Bar for the past twenty to thirty years (the period of the Farkas study) is not relevant to Petitioner's claims. Petitioner never established the relevance or meaning of any of the references noted above such as "fee disputes" and, therefore, cannot artificially manufacture a due process issue because the State Bar did not produce irrelevant or indecipherable information in discovery. Also, both in this Petition and during the evidentiary hearing, Petitioner failed to establish any

connection between the evidence he claims was withheld and a State Bar policy or practice that “caused” a disparity in discipline for black male attorneys. Petitioner failed to even identify any connection between Petitioner’s discovery demands and Professor Farkas’ study/Professor Robertson’s report.

Finally, Petitioner’s arguments are unsupported by any citation to the specific discovery requests, objections, motions to compel, etc. that Petitioner served/filed. Therefore, because it is impossible to ascertain what Petitioner’s arguments are with respect to the eight enumerated discovery items that Petitioner claims were not produced by the State Bar, there is no evidence to support Petitioner’s argument that he was denied due process.

3. Petitioner’s Own Failure to Conduct Expert Discovery Does Not Constitute a Denial of Due Process.

Petitioner appears to contend that he was denied due process because he was denied additional discovery and because his motion to continue trial was denied after he received the State Bar’s unredacted version of its intake policy regarding reportable action bank matters approximately two months before trial. While difficult to determine exactly what is being alleged, the State Bar understands the argument to be based on the State

Bar Court's denial of Petitioner's motion in limine to exclude the State Bar's expert report or to continue trial. In its written order, issued April 24, 2023, the Hearing Department explained its ruling and noted that Petitioner had not made efforts to depose the State Bar's expert and was not seeking a continuance to do so. Petitioner's claim essentially is that he was "surprised" by the State Bar's expert's report served shortly before trial despite having knowledge since approximately October 29, 2021, that the State Bar designated Dr. Jora Stixrud as its expert witness.

The Hearing Department further found that the State Bar's actions in producing an expert report shortly before trial were not unreasonable and that Petitioner had ample opportunity to engage in expert discovery and failed to do so. The Hearing Department also noted that Petitioner would have the ability to examine the expert at trial given that Petitioner was not seeking an opportunity to depose the State Bar's expert. Petitioner suffered no prejudice as the State Bar's expert was properly designated in 2021 and would have been allowed to testify at trial with or without the report. The report merely provided Petitioner a preview of the testimony offered at the hearing.

Finally, Petitioner's arguments concerning the State Bar's expert constitute a disagreement with the Hearing Department's orders, not a denial of due process. The Hearing Department granted Petitioner's numerous requests for continuances of the trial date and discovery deadlines as well as issued a written order explaining its rationale for denying Petitioner's motion in limine. There is no evidence that the Hearing Department failed to properly consider Petitioner's motion in limine to continue trial/exclude Dr. Stixrud's expert report nor is there any evidence that the Hearing Department abused its discretion with respect to its April 24, 2023, order.

4. Petitioner's "Statement of Issues Presented" Contains Inaccurate Recitations of the Procedural History In This Matter and Does Not Support the Petition.

Petitioner claims that after the State Bar produced the unredacted intake guidelines for reportable action bank matters, the parties engaged in a meet-and-confer regarding additional discovery and that the Hearing Department denied his "timely motion to continue trial and for discovery motions to investigate appropriate areas of relevant discovery..." (See p. 4, subheading 4.b of the Petition.) This is factually incorrect. On February 24, 2023, the State Bar served Petitioner with the unredacted pages

from OCTC's Intake Manual, which later was identified as the State Bar's trial exhibit number 5. Petitioner did not make any further motions for additional discovery (expert or non-expert) after that date. As discussed above, Petitioner filed a motion in limine on the eve of trial to either continue trial or exclude the State Bar's expert's report. Petitioner's motion did not request that the Hearing Department re-open non-expert or expert discovery.

As such, it is unclear what "issue presented" Petitioner is referring to in the Petition that resulted in a denial of due process. While it is true that the Hearing Department issued an order on January 4, 2023, regarding discovery (the Hearing Department continued the trial date pursuant to Petitioner's request, continued expert disclosure deadlines and reopened non-expert discovery narrowly to allow for the production of the unredacted intake guidelines), there was no further motion by Petitioner to reopen non-expert discovery as Petitioner indicates on p. 4, subheading 4.b. of the Petition. See State Bar Court online docket: <https://discipline.calbar.ca.gov/portal/Home/WorkspaceMode?p=0>

As such, no due process allegation exists because Petitioner never filed a motion for additional discovery as stated on p.4 of the Petition.

5. Petitioner's Contention that the Hearing Department Improperly Excluded his Evidence Relating to Girardi Does Not Constitute a Denial of Due Process.

Petitioner contends that the Hearing Department excluded relevant evidence relating to disbarred attorney Girardi and the application of State Bar policies to Girardi. However, the Petition fails to describe what evidence was excluded or the relevance of the excluded evidence given that Girardi was disbarred. The Hearing Department admitted Petitioner's exhibits related to Girardi and allowed some testimony regarding Girardi. While the Hearing Department ultimately excluded further testimony regarding Girardi, the Decision addressed the evidentiary rulings concerning Girardi and properly concluded that Girardi was not in the data studied by Professor Farkas. Therefore, any issues concerning Girardi are merely anecdotal and not relevant to Petitioner's disparate impact claims.

Furthermore, the Decision notes that even if Girardi or the other case examples provided by Petitioner were included within the data studied by Professor Farkas, there was insufficient

information to make a statistically useful comparison between the individual case examples and Petitioner to show causation. (See Decision pages 25-26.) Petitioner's speculative testimony relating the application of the State Bar's policies and procedures to Girardi would not have provided the necessary statistical information needed in order to establish causation. Accordingly, the Hearing Department's exclusion of Petitioner's irrelevant evidence regarding Girardi does not constitute a denial of his due process.

B. Petitioner's Reference to Bias by the Hearing Department Judge Lacks Merit.

The Petition notes as an issue for review, "[W]hether bias exists because the court refused recusal." It is difficult to determine exactly what is meant by Petitioner's inclusion of this "Statement of Issues Presented." To the extent that Petitioner is challenging the Hearing Department judge as being biased, there is a complete lack of facts to support such a challenge. Further, "[A]s the Supreme Court declared, 'total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'" (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 796 [citing *NLRB v. Pittsburgh S.S. Co.* (1949) 337

U.S. 656, 659].) Petitioner's disagreement with the Hearing Department's orders/rulings does not indicate unlawful bias by the Hearing Department. Without more detail regarding the nature of the alleged bias and evidence to support such claims, a mere conclusory assertion of bias, without more, is insufficient to justify review and the Petition should be denied.

IV. CONCLUSION

For all of the foregoing reasons, the State Bar requests that Petitioner's Petition for Review be denied.

Dated: November 9, 2023

Respectfully submitted,

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By: /s/ Brady R. Dewar

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WORD COUNT CERTIFICATE PURSUANT TO
CALIFORNIA RULE OF COURT 8.520(C)(1)

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 4,175 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: November 9, 2023

/s/Brady R. Dewar
BRADY R. DEWAR

PROOF OF SERVICE

I, Joan Randolph, hereby certify that I electronically filed and served the attached **ANSWER TO PETITION FOR REVIEW** with the Clerk of the California Supreme Court and to Petitioner Gregory Harper in pro per at ghlaw@pacbell.net by transmitting a true copy via this Court's TrueFiling system on November 9, 2023, and on:

Clerk of The State Bar Court
845 South Figueroa Street
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Francisco, California this 9th day of November, 2023.

/s/ Joan Randolph
JOAN RANDOLPH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HARPER ON DISCIPLINE**

Case Number: **S281974**

Lower Court Case Number:

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Dewar, Brady (252776)

Last Name, First Name (PNum)

State Bar of California

Law Firm