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Case No. S
State Bar Court Case No. 17-O-01313

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GREGORY HARPER
State Bar Number 146119.
Petitioner,
v.
STATE BAR OF CALIFORNIA,
Respondent,

PETITION FOR REVIEW

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

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I. STATEMENT OF ISSUES PRESENTED

A. WHETHER HARPER WAS DISCRIMINATED AGAINST BASED ON RACE AND DENIED PROCEDURAL DUE PROCESS OF THE EVIDENTIARY HEARING BY THE LIMITATIONS OF THE SCOPE OF DISCOVERY AS ORDERED BY THE CALIFORNIA SUPREME COURT REMAND ORDERS OF AUGUST 12, 2020 AND, JANUARY 27, 2021

1. The California Supreme Court (Supreme Court) order of August 12, 2020 granting a petition for review remanded the matter to the State Bar Review Department (Review Department) to consider Harper's unaddressed claim that the discipline is based on a theory of disparate impact.
2. The Supreme Court order of January 27, 2021 remanded the matter to the State Bar Hearing Department (Hearing Department) for evidentiary hearing and ordered that discovery be reopened to permit Harper to obtain all data reviewed for the purposes of the Farkas study and the Robertson report with identifying information redacted to address the following issues:
   a. What specific facially neutral disciplinary policies and practices are at issue,
   b. The giving of undue weight given to the petitioner's previous remote

discipline for reportable action bank matters and whether they had the effect of discriminating against Harper on the basis of race,

c. Whether Harper was disciplined more harshly than any similarly situated while male attorney based on the data underlying the Farkas study and the Robertson report as a starting point.

3. To facilitate the discovery for the hearing, the parties were ordered to meet and confer and be prepared to inform the court of their discussions. The Hearing Department denied Harper's motions for discovery responses.

4. A key element in this matter is for Harper to identify specific State Bar policies and practices such as closing a complaint when a fee dispute is involved that result in racially disparate discipline. This is complex and time consuming. Harper was only able to obtain the intake policy only after discovery motions and a Writ to the Supreme Court and a confidential hearing with a different Hearing Department judge. Additional discovery is necessary to determine other applicable policies and practices and depose relevant individuals. This information is not readily apparent from those guidelines which are not uniformly applied, is time consuming and difficult to obtain.

   a. While the Hearing Department did reschedule discovery once after Harper received heavily redacted discovery responses. It cut off discovery after Harper received only the confidential State Bar intake guidelines via protective order.

   b. Once Harper received the confidential guidelines, the parties as ordered engaged in meet and confer regarding additional discovery. The Hearing Department denied Harper's timely motion for a continuance of trial and for discovery motions to investigate appropriate areas of relevant discovery that arose once the confidential guidelines were received.

c. The Hearing Department excluded germane and relevant evidence of State Bar policies relative to the Thomas Girardi matter and application of State Bar policies during the hearing although admitting the open letter from State Bar executive Ruben Duran as an exhibit at trial.

5. The application of those practices for example resulted, the Joseph Ruigomez case among others where Girardi owes 11 million dollars of settlement funds and due to State Bar discretion was not prosecuted while Black attorneys such as Harper were prosecuted.
6. Whether bias exists because the court refused recusal.

II. TABLE OF AUTHORITIES

US Supreme Court

California Supreme Court

Miscellaneous

III.INTRODUCTION

The stated mission of the State Bar of California (State Bar) is to "protect the

public". This underpinnings of this mission are that it is accomplished ethically, fairly and, without discrimination. The State Bar is granted tremendous discretion to fulfill that obligation, through the regulation, licensing and disciplining of attorneys limited by State Bar guidelines, California and Federal Law.[1] The State Bar has a further mission to eliminate bias and promote diversity in the legal profession. The State Bar has admitted through its own investigations, findings of the California State Auditor (Auditor) and, after the Farkas study and Robertson report its disciplinary system falls short of being fair and equitable and protecting the public.[2] The disciplinary process must not have a discriminatory effect, be applied equally, to all attorneys. and not have a discriminatory effect on a member

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[1]See https://www.calbar.ca.gov/About-Us/Our-Mission

[2] See Ruben Duran open letter disclosures of findings regarding Thomas Girardi, where the State Bar of California in addition to its disclosure of failure to act despite hundreds of complaints involving misappropriation and misconduct of a white male attorney the bulk of which occurred from 1990 through 2019 and two redacted reports on its past handling of complaints against Thomas V. Girardi where the clients were actually harmed and lost at least 18 million dollars yet only received a private reproval. However, the State Bar while admitting Harper caused no harm, was disciplined as was other Black attorneys for minor offenses when the cases could have been closed with no discipline or a warning. In one report prepared by attorney Alyse Lazar, who reviewed 115 files of past complaints against Girardi. The review identified numerous instances in which complaints were closed without complete investigations or, in light of facts warranting discipline. A second report was completed by Halpern May Ybarra Gelberg. That report details instances where Girardi's efforts to buy relationships and exercise influence at the State Bar—at all levels—likely impacted the handling of some complaints against him, causing those complaints to be closed improperly. Also See Auditor's Special Report 2022-030 *State Bar's Disciplinary Process,* April 2022

of any particular group. [3] Here, the State Bar in acknowledging the racial disparities in its discipline system formed an Ad Hoc Commission to address disparities in its disciplinary system which includes matters relevant to this case.[4]

In light of the foregoing and other information, the petitioner herein alleged that his discipline was unfair, unjust, unduly harsh and, racially discriminatory. In the petitions for review, Harper relied upon the issue of disparities in State Bar discipline, issues first raised by the study by professor Farkas and followed up by professor Robertson showing Black male attorneys are more susceptible to State Bar discipline. However, in sum, Black male lawyers are disbarred and treated more harshly than their white male counterparts.[5]

IV.WHY REVIEW SHOULD BE GRANTED

This is a matter of first impression. The State Bar has never addressed discrimination regarding Black attorneys in its disciplinary process although there is no explanation why they receive more complaints and are disbarred at a higher rate than any other group.[6] Specifically, discovery is critical to address those issues. The State Bar holds the necessary information and has not fully released such in this case. The Hearing Department limited the scope of discovery for the

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[3]See fn 1.

[4]https://www.calbar.ca.gov/About-Us/Who-We-Are/Archived-Committees/Ad-Hoc-Commission-on-the-Discipline-System

[5]See Farkas study executive summary.

[6]See Farkas study id.

evidentiary hearing thus denying the Petitioner a chance to fairly pursue available remedies.

The Supreme Court order of January 27, 2021 states "The hearing Department reopen discovery to permit Harper to obtain all data reviewed for purposes of the Farkas study and the Robertson report with identifying information redacted." Regarding Harper's discipline, upon a review of the confidential intake guidelines and the Farkas and Robertson papers, key elements in relative to analysis of disparate discipline regarding Reportable Action Bank Matters, (RABM) are of which all were the subject of discovery which Harper was not able to resolve 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.

V. FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

Remand to the review department

Upon petition to the Supreme Court, Harper alleged discrimination in his discipline based on disparate impact. On August 12, 2020, the Supreme Court

remanded the matter to the Review Department to address the issue. The Review department issued a modified order on September 25, 2020 and the matter was subsequently again addressed by the Supreme Court on January 27, 2021.

Remand to the hearing department

After petition for and further review, the California Supreme Court remanded Harper's discipline to the Hearing Department for an evidentiary hearing, with the inquiries focusing on:

A. Considering the State Bar's facially neutral disciplinary practices at issue including but not limited to the weight given to previous discipline for reportable action bank matters had the effect of discriminating based on race. The State Bar had to determine if the discipline was based on race. In sum, why the court recommended disbarment using prior discipline for reportable action bank matters that was virtually thirty years prior from events from 1991-1993,

B. Addressing the claim of discrimination based upon disparate impact theory, whether was Harper treated differently than a similarly situated white attorney.

To accomplish the foregoing discovery was to be reopened so Harper could obtain relevant discovery based on the information used for the Farkas study and Robertson report as a starting point.[7]

Upon receiving notice of the remand to the hearing department, Harper immediately moved to recuse Judge Chawla. The motion was denied.

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[7]See California Supreme Court Order, In Re: Harper January 27, 2021.

Further proceedings

Pursuant to California Rules of Court 9.17,the Hearing department requested the parties submit briefs suggesting the burden of proof required for this matter. The court fashioned guidelines for the evidentiary hearing. (See Order dated August 19, 2021 attached hereto.)

Discovery

Discovery in this case is critical. Notwithstanding, the issues in this case are complex and time consuming calling for the State Bar without a timely noticed motion requesting and being granted 90 days to ask the State Bar Board of Governors for a special allocation to obtain outside counsel. This is in addition to the involvement of approximately two dozen lawyers combined from the State Bar Office of the General Counsel (GC) and, Office of Chief Trial Counsel (OCTC) in the Supreme Court briefs and other matters relative to this case. During the pendency of this matter, several important and relevant issues that impacted the case; the State Bar admitting negligence in handling of complaints involving Thomas Girardi his misappropriation of millions of dollars in client funds where no discipline was imposed, the State Bar formed a panel to address those racial disparities and make recommendations and Special Audits by the California auditor which unearthed 8 attorneys who the Auditor felt should have been disciplined yet were not despite dozens of complaints against them.[8] The State Bar has not refuted that none of

[8]See Open Letter Regarding State Bar's Thomas v Girardi Disclosure; Id Ruben Duran State Bar Chair Board of Trustee November 3, 2022.

those attorneys are Black.[9]

VI. LEGAL DISCUSSION

A. HARPER WAS DENIED PROCEDURAL DUE PROCESS AND WAS PREJUDICED IN NOT BEING ALLOWED TO COMPLETE DISCOVERY.

The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner. *Mathews v. Eldridge (1976) 424 U.S 319, 333.* The California Constitution, Constitution, Article I, Section 7, provides: "A person may not be deprived of life, liberty, or property without due process of law including a fair hearing. Here, the failure to grant a continuance of the trial date for motions and discovery falls short of the requirements of complying with the Supreme Court's orders. While rule of court Rule 3.1332 of the California Rules of Court, allows a court to grant a continuance of trial on showing of good cause. Rule of Civil Procedure 2031.310 allows for a court to grant a continuance relative to discovery issues. In this case, the parties were addressing a very complex and time consuming issue. Discovery was served and the State Bar met and conferred with Harper. The State Bar indicated the information Harper was requesting was in different departments at the State Bar and was difficult and time consuming to obtain. Therefore Harper moved the court for additional time to complete discovery. This was only requested after Harper received the guidelines necessary. Given the

[9]See California Auditor's Report 2022-030

complexity of the discovery and motions Harper had to file to obtain such, the time available to the parties, and the lack of prejudice to the State Bar allowing for additional time to complete discovery is appropriate. This newly discovered evidence is sufficient to also allow for discovery to be completed. *(See People v Williams 58 Cal. 4th 197(2013); In re Brown (1998) 17 Cal.4th 873* .)

CONCLUSION

Here, the purpose of the evidentiary hearing was to show whether the discipline imposed is discriminatory. The court ordered the reopening of discovery to do so. The discovery process was unique, complex and arduous for all parties. There was no objection from the State Bar to continuing discovery for a full and fair hearing. Following discovery requests for the data underlying the Farkas study and Robertson report, the Supreme Court on July 20, 2022 ordered the parties submit particularized discovery requests. However, the Hearing Department was adamant and ordered the parties to meet and confer before filing any motions to compel. The State Bar communicated in the meet and confer it had difficulty but, in good faith would comply with the requests. A motion to vacate the trial date for motions and discovery was submitted and denied. The Petitioner has therefore been prejudiced. Considering the forgoing, Petitioner therefore requests Review of this Petition or other appropriate remedy.

Dated: October 10, 2023

Respectfully submitted,
/s/ Gregory Harper
GREGORY HARPER

VERIFICATION

I, GREGORY HARPER, declare:

I am the PETITIONER in the above-entitled matter. I have read the foregoing PETITION FOR REVIEW and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

Executed on November 23, 2020, at El Cerrito, Contra Costa County, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/Gregory Harper
GREGORY HARPER

CERTIFICATE OF WORD COUNT

(Rule 8.204)

I, Gregory Harper, Petitioner in Pro Se certify pursuant to the California Rules of Court, that the word count for this document is 2264 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed, at El Cerrito, California, on October 10, 2023.

/s/Gregory Harper
GREGORY HARPER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case No. 17-O-01313-MC
	)	
GREGORY HARPER,	)	DECISION PURSUANT TO
	)	SUPREME COURT'S
State Bar No. 146119.	)	JANUARY 27, 2021 REMAND
	)	ORDER
	)	

This matter is before the court on remand from the Supreme Court of California for the limited purposes of determining the merits of Gregory Harper's claim of racial discrimination under a disparate impact theory in this State Bar of California (State Bar) disciplinary proceeding. After carefully considering all evidence and analogous legal authority, the court finds insufficient evidence to support Harper's claim that specified State Bar policies or practices caused him to suffer harsher discipline because of his race.

Procedural History

On October 22, 2018, the Office of Chief Trial Counsel of the State Bar (OCTC) filed a Notice of Disciplinary Charges (NDC) alleging misconduct relating to Harper's handling of client funds. Following trial, on May 23, 2019, this court issued a decision finding Harper culpable on all three counts of wrongdoing and recommending his disbarment.

Harper sought review before the Review Department of the State Bar Court, raising for the first time, in a footnote, a claim that the recommended disbarment was the result of racial discrimination. On April 14, 2020, the Review Department issued an opinion affirming this court's culpability findings and recommended discipline. It did not expressly address Harper's

discrimination allegation. On August 12, the Supreme Court issued an order remanding the case back to the Review Department "for consideration of Harper's unaddressed claim that his discipline is based on a theory of disparate impact."

On September 25, 2020, the Review Department issued a modified opinion explaining its consideration and rejection of Harper's discrimination claim. It again recommended Harper's disbarment. On November 25, Harper filed a petition for review of the modified opinion.

Supreme Court Remand Order

In a January 27, 2021 order (Remand Order), the Supreme Court granted Harper's petition for review of the modified opinion and remanded this matter to the Hearing Department of the State Bar Court to conduct "evidentiary hearings to determine whether the State Bar's facially neutral disciplinary practices at issue, including but not limited to the weight given [Harper's] previous discipline for reportable action bank matters, had the effect of discriminating against Harper on the basis of race." It specified further that the "State Bar must 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." Finally, the Remand Order directed this court to "reopen discovery to permit Harper to obtain all data reviewed for purposes of the Farkas study and the Robertson report with identifying information redacted."

Proceedings on Remand

Discovery is reopened

Consistent with the Remand Order, this court reopened discovery and, on June 7, 2021, ordered OCTC to provide Harper, that same day, with "all data underlying the Farkas study and Robertson report." OCTC did so. On August 12, the court set deadlines for expert discovery and directed the parties to move for any other discovery by September 9.

On September 10, 2021, Harper filed a motion to compel further discovery, which he argued was required under the Remand Order. In an October 14 order, the court concluded that

OCTC had produced "all data reviewed for purposes of the Farkas study and the Robertson report" in compliance with the Remand Order. Still, the court afforded the parties additional time to file any motions for other discovery, provided any such motion complied with the requirements of the Rules of Procedure of the State Bar.

Harper's repeated requests for continuances of discovery deadlines

On October 29, 2021, the initial deadline for the disclosure of expert witnesses, Harper filed a request for a continuance, generally asserting that he needed more time to obtain an expert. The court granted the request and set a new expert disclosure deadline for February 2022.

On November 4, 2021, Harper filed a second motion to compel further discovery. On December 8, the court issued an order denying in part and granting in part Harper's motion. The court ordered OCTC, within 14 days, to produce "any State Bar policies and procedures for investigators regarding (1) reportable action bank matters; (2) rules for reporting, investigating, and filing charges against an attorney for de minimis reportable action bank matters; and (3) rules for reporting, investigating, and filing charges against an attorney for reportable action bank matters." OCTC produced this document timely to Harper on December 22, with redactions.

Harper filed a petition for review with the Supreme Court, challenging this court's October 14 and December 8, 2021 discovery orders. On March 23, 2022, this court granted Harper's second motion to continue expert discovery deadlines pending disposition of his petition for review. On July 20, the Supreme Court denied Harper's petition for review of the discovery orders without prejudice to additional specified discovery.

On July 29, 2022, this court again reopened discovery, consistent with the Supreme Court's July 20 order, for the limited purpose of allowing the parties to propound "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." This court's order set new expert and non-expert discovery deadlines, with trial to commence on January 24, 2023.

Despite the multiple extensions of the discovery deadlines granted previously, on September 16, 2022, this court again granted Harper's third motion to extend the discovery deadlines. Harper did not propound additional discovery requests. Instead, on December 12, he filed another motion seeking to extend the discovery deadlines and asking for a continuance of the January 24, 2023 trial date. The motion was prompted by Harper's belated objections to OCTC's redacted production of its Intake Procedures Manual (Intake Manual) pertaining to reportable action bank matters. As stated, OCTC had produced this information to Harper a year earlier.

In view of the discrete nature of Harper's request—involving only two pages of the Intake Manual—and OCTC's voluntary agreement to produce the unredacted pages, subject to a protective order,[1] the court reopened non-expert discovery one final time for this limited purpose and reset expert discovery deadlines and trial dates accordingly. To facilitate the production of this discovery, the court ordered the parties to attend a discovery conference with a State Bar Court judge sitting as a discovery referee. The court set deadlines for this limited non-expert discovery and for all expert discovery, with trial scheduled to begin on April 24.

Evidentiary hearings on remand

On April 21, 2023, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation). A two-day trial was held on April 24 and 25. The court found good cause to permit closing argument briefs to assist with evaluating the evidence submitted at trial. (See Rules Proc. of State Bar, rule 5.111(A).) On May 16, the parties filed concurrent briefs and the matter was submitted for decision.

[1] This court granted the parties joint request for a protective order on February 16, 2023.

Jurisdiction

Harper was admitted to the practice of law in California on June 11, 1990, and has since been a licensee of the State Bar of California. Harper is presently not entitled to practice law as a result of the Review Department's September 25, 2020 modified opinion recommending his disbarment and involuntarily enrolling him as an inactive attorney pursuant to Business and Professions Code,[2] section 6007, subdivision (c)(4). The instant proceeding arises from Harper's petition for review of the Review Department's modified opinion.

Burden of Proof

As set forth in this court's August 16, 2021 order, the Remand Order does not call for a disparate treatment analysis; rather, it unambiguously directs this court to evaluate Harper's claim of disparate impact discrimination.

Because this is a case of first impression, the court looked to well-established case law analyzing disparate impact employment discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII) and California's Fair Employment and Housing Act (FEHA) to assess the appropriate burden of proof here. Borrowing from Title VII and FEHA, the court determined the following burden-shifting framework would be used to assess Harper's disparate impact claims.

First, Harper must establish a prima facie case of disparate impact, by a preponderance of the evidence. (See *Bazemore v. Friday* (1986) 478 U.S. 385, 400 [claimant "need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence"].) To do so, Harper must identify the specific practices or policies that he seeks to challenge. (See *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1486 [to establish prima facie case of discriminatory impact, "a plaintiff must identify a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class"].) Then, Harper must prove causation—that the identified practice or policy had

[2] Unless otherwise specified, all further statutory references are to this source.

a disproportionately adverse effect on Black male attorneys, a group of which Harper is a member, because of their membership in that group. (See *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [once "practice at issue has been identified, causation must be proved"], internal quotations omitted.)

If Harper establishes his prima facie case, the preponderance burden then shifts to OCTC to either (1) refute Harper's evidence or (2) demonstrate that the challenged practice or policy is a business necessity. (See *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.* (9th Cir. 1987) 833 F.2d 1334, 1338; see also *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432.)

Assuming OCTC fails to rebut Harper's prima facie showing, upon its demonstration of a legitimate business purpose for the challenged practice or policy, the burden would again shift to Harper to prove, by a preponderance of the evidence, the existence of an alternative practice or policy with less adverse impact that would comparably serve the State Bar's purposes. (See *Ricci v. DeStefano* (2009) 557 U.S. 557, 578 [claimant bears burden to show "legitimate alternative [practice] that would have resulted in less discrimination"]; *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, *supra*, 833 F.2d at p. 1338 [preponderance of evidence burden shifts back to disparate impact claimant if defendant proves legitimate business purpose for challenged practice].)

With this framework in mind, the court turns now to the factual findings.

Findings of Fact

These findings are based upon the parties' Stipulation, as well as the evidence and testimony at trial.

Harper's State Bar Disciplinary History

Harper's first discipline

Between February and May 1991, Harper issued at least eight checks from his client trust account (CTA) at Wells Fargo, that were returned due to insufficient funds (NSF). Wells Fargo reported the transactions to the State Bar pursuant to section 6091.1, requiring banks to report any transaction on an attorney's CTA that exceeds the balance, such as CTA checks returned due to, or paid against, insufficient funds.

On June 3, 1991, OCTC's Intake Unit (Intake) sent Harper a letter seeking an explanation for the NSF activity on his CTA. Thereafter, between June and July 1991, Wells Fargo reported additional NSF activity in Harper's CTA.

On July 9, 1991, Intake forwarded the reportable action bank matters (bank RAs) to OCTC's Trials Unit (Trials) for investigation and possible prosecution, under case No. 91-O-04542. The investigation revealed that Harper was using his CTA as a personal checking account by depositing personal funds and withdrawing them for personal use. Harper also failed to timely withdraw earned fees from his CTA and issued checks for business expenses directly from his CTA. Though Harper admitted to commingling funds, there was no evidence of any misappropriation of client funds.

Separately, OCTC received a complaint against Harper from a medical lienholder, arising from delayed payment of a disputed bill for $3,530, in a personal injury client matter. OCTC opened another investigation, under case No. 92-O-20050,[3] revealing that, after receiving settlement funds on behalf of his client, Harper kept the portion designated for the lienholder in cash. Although Harper intended to deliver payment to the lienholder, he was not able to do so as planned. Yet he did not deposit the funds back into his CTA—instead maintaining them out of trust for about two months before paying the lienholder with a check drawn upon his general account.

[3] Although the complaining witness ultimately asked to drop her complaint after receiving payment from Harper, the matter was converted to a State Bar Investigation as Harper paid the lienholder with a check drawn upon his general account.

On September 30, 1993, Harper signed a stipulation to resolve case Nos. 91-O-04542 and 92-O-20050, admitting to one count of misconduct for violating rule 4-100(A) of the Rules of Professional Conduct,[4] in each matter. No aggravating circumstances were identified. In mitigation, Harper received credit for candor and cooperation with his client to resolve the lien and cooperation with OCTC. Harper also received mitigation for lack of harm, good character, and prompt objective steps demonstrating recognition of his wrongdoing by hiring an accountant to assist with his CTA. Harper was represented by counsel in resolving these cases.

On April 13, 1994, the Supreme Court issued an order, case No. S037840 (State Bar Court case Nos. 91-O-04542 and 92-O-20050), suspending Harper from the practice of law for 90 days, execution stayed, and placing him on probation for 18 months subject to conditions.

Harper's second discipline

On September 11, 2002, Harper entered into a stipulation admitting to misconduct involving three OCTC investigations, case Nos. 99-O-10958, 99-O-12126, and 01-O-03596. Harper was again represented by counsel in settling these cases.

The first matter, case No. 99-O-10958, arose from a bank RA, following Harper's issuance of two checks from his CTA in July and August 1998, for $1,000 and $650, respectively, which had been returned NSF. Subsequent investigation revealed that, during the relevant time, Harper deposited personal funds into his CTA and issued checks from his CTA for personal and business expenses. There was no evidence that any client or lienholder was harmed by Harper's personal use of his CTA, apart from a short delay in payment of the funds. Harper stipulated to a violation of rule 4-100(A), commingling personal and client funds in his CTA, making personal payments from his CTA, and failing to maintain sufficient funds to honor the checks issued from his CTA.

[4] All further references to rules are to the former California Rules of Professional Conduct in effect until November 1, 2018, unless otherwise noted.

The second matter, case No. 99-O-12126, arose from a client complaint alleging that Harper forged a signature on a settlement check and did not provide the client with the settlement funds in a personal injury matter. Subsequent investigation revealed that one of Harper's employees forged the endorsement on the check, deposited the check into Harper's business account, and stole the client's $3,059.64 in settlement funds, along with other entrusted funds. Harper did not discover the theft until approximately three months after the employee left the job—and roughly a year after receipt of the settlement check—at which point he filed a police report. A year and a half later, the opposing party's insurance company issued another settlement check, which Harper deposited into his CTA and properly distributed to his client and the lienholders. Harper stipulated to a violation of rule 3-110(A), failing to supervise his employee, resulting in the theft of approximately $10,000 in client funds, and failing to promptly act on behalf of his client after discovering the theft.

The third matter, case No. 01-O-03596, also arose from a client complaint, again alleging that Harper failed to pay funds to which the client was entitled. Harper was hired to collect on an unsecured promissory note in exchange for one-third of the amount recovered. By October 1996, Harper had collected nearly $5,000, but failed to pay his client, as requested, the full portion of the funds to which the client was entitled, until July 2002. Harper stipulated to a violation of rule 4-100(B)(4), failing to deliver client funds for almost six years.

In mitigation, Harper received credit for the delay in prosecution of case number 99-O-10958. In aggravation, he had a prior discipline, committed multiple acts of wrongdoing, and this case again involved CTA violations.

On February 6, 2003, the Supreme Court issued an order, case No. S111512 (State Bar Court case Nos. 99-O-10958; 99-O-12126; 01-O-03596), imposing a one-year stayed suspension and placing Harper on probation for two years with conditions, including a six-month actual suspension and completion of State Bar Client Trust Accounting School (CTA School).

Harper's subsequent bank RAs not resulting in discipline

Between 2006 and 2017, OCTC received the following eight additional bank RAs concerning Harper, none of which resulted in discipline.

OCTC case No. 06-30691

On December 14, 2006, Wells Fargo notified the State Bar that a check for $1,700 was paid against insufficient funds in Harper's CTA. Intake contacted Harper, who explained that the NSF report was made in error with a confirmation letter from Wells Fargo. Intake closed the matter on January 30, 2007.

OCTC case No. 09-27723

On December 8, 2009, Wells Fargo notified the State Bar of NSF activity in Harper's CTA, relating to a branch withdrawal of $250. Wells Fargo subsequently notified the State Bar that the report was made in error. Intake closed the matter on July 20, 2010.

OCTC case No. 13-13506

On February 5, 2013, JP Morgan Chase & Co. (Chase) informed the State Bar that Harper's CTA held insufficient funds to disburse payment on a $12,489.95 check presented on the account. Intake reached out to Harper who explained that he accidentally wrote the check for litigation costs in excess of the amount owed and that a corrected replacement check had been issued and cleared. Intake closed the case on May 3.

OCTC case No. 13-15356

On March 14, 2013, Chase notified the State Bar that Harper's CTA held insufficient funds to disburse payment on a $7,860.94 check presented on the account. Intake reached out to Harper, who again explained that the NSF report was made in error with a letter from Chase acknowledging the mistake. Intake closed the matter on May 3.

OCTC case No. 14-10627

On December 18, 2013, Chase notified the State Bar that Harper's CTA held insufficient funds to disburse payment on a $2,166.67 check presented on the account. Intake contacted Harper who stated that the discrepancy was the result of a miscommunication with the bank. He provided a letter from the bank, and Intake closed the case on March 26, 2014.

OCTC case No. 14-28199

On September 29, 2014, Chase informed the State Bar that Harper's CTA held insufficient funds to disburse payment on a $2,000 check presented on the account. Intake asked Harper for an explanation. He acknowledged making an accounting mistake, resulting in the $56 discrepancy, and asserted that he had read the State Bar's Handbook on Client Trust Accounting (CTA Handbook). On January 27, 2015, Intake closed the matter and issued Harper, through his counsel, a letter directing him to various resources to assist in avoiding future NSF reports. The letter referred Harper to rule 4-100 and also provided information regarding CTA School, the CTA Handbook, and the State Bar Ethics Hotline.

OCTC case No. 16-16798

On March 30, 2016, Chase informed the State Bar that Harper's CTA held insufficient funds to disburse payment on a $7,666.66 check presented on the account. Intake contacted Harper, who admitted to another accounting mistake—accidentally overpaying a client approximately $600. Intake closed the matter on June 20.

OCTC case No. 17-13687

On August 14, 2017, Chase informed the State Bar that Harper's CTA held insufficient funds to disburse payment on a $3,233.33 check presented on the account. Because OCTC was already investigating a separate complaint, under case No. 17-O-01313, Intake forwarded the matter to Trials. No charges were filed related to this bank RA.

Harper's third discipline

On February 8, 2017, Harper's client Evigne DeJoie submitted a complaint to the State Bar, disputing the fee retained by Harper and complaining about his representation. Dejoie claimed, among other things, that Harper repeatedly missed deadlines in her case and was sanctioned by the court. OCTC opened an investigation, case No. 17-O-01313, revealing that, although the fee dispute was resolved through arbitration in July 2017, Harper had failed to maintain the disputed funds (totaling $21,087) in his CTA while the arbitration was pending. Harper's CTA balance fell well below the amount required to be held in trust on numerous occasions between December 2016 and June 2017. Further, in his November 2017 response to OCTC's inquiry letter, Harper falsely claimed that he had maintained the disputed funds in his CTA during the relevant time.

OCTC filed a three-count NDC alleging violations of rule 4-100(A) [failure to maintain client funds in trust]; section 6106 [moral turpitude–misappropriation]; and section 6106 [moral turpitude–misrepresentation]. Harper was represented by counsel during the investigation and trial.

This court found Harper culpable of all three charges of misconduct and recommended that he be disbarred based upon the applicable standards,[5] particularly standard 1.8(b), and the relevant case law. On appeal, the Review Department affirmed the culpability findings and discipline recommendations, as well as most of the findings in aggravation and mitigation.[6] The Review Department determined that the serious aggravation for Harper's two prior disciplines

[5] All references to standards (Stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[6] The Review Department did not agree with this court's findings in aggravation for uncharged misconduct or mitigation for candor and cooperation, declining to give any weight to those factors.

involving similar transgressions, indifference, and multiple acts of wrongdoing did not clearly predominate over his significant mitigation for good character and community service.

Relevant State Bar Policies and Practices

OCTC's Intake Policies and Procedures Relating to Reportable Actions

According to OCTC's Intake Manual, reportable actions are mandatory reports about matters such as criminal convictions, judgments, court orders, and NSF activity involving a CTA. These complaints originate from various sources, including criminal prosecutors, courts, and banks. Bank RAs make up the largest number of reportable actions.

OCTC's Intake Manual sets forth the policies and procedures that Intake staff must follow when evaluating bank RAs, in a section entitled "Reportable Action Work Flow." (Exh. 5, p. 1.) After receiving a report of NSF activity from a bank, Intake staff perform a number of tasks, including conducting an initial review and obtaining a response from the attorney, where appropriate. Each bank RA is read and reviewed by an Intake attorney, who determines how the matter should be handled, consistent with the stated policies. OCTC is particularly concerned where there is repeated conduct—considering a single, small overdraft less significant than larger and/or recurrent overdrafts. Intake staff never meet with the respondent attorneys and have no data or information regarding the attorneys' race, as race is not collected in OCTC's system.

Intake staff have discretion to close a bank RA matter before obtaining a response from the attorney if (1) the report was due to bank error; or (2) the amount of the NSF activity is less than $50[7] *and* there are no other pending bank RAs or other disciplinary matters. In the event of a single overdraft of less than $50, OCTC may decide to issue a letter to the attorney recommending better management of the CTA and corrective action to avoid such future reports. No letter is sent if the report was due to bank error.

[7] This "de minimis" amount is set by OCTC policy. (Exh. 5, p. 1.)

If a bank RA matter is not closed immediately, Intake staff may either forward it directly to Trials for investigation, e.g., in cases involving repeated conduct, or send the attorney a letter requesting an explanation for the NSF activity. If a letter is sent and a response is received, Intake staff review the matter again and decide whether to close it or forward it to Trials for investigation. The Intake Manual dictates that bank RA cases are closed where the facts do not support a violation or show the violation was an error or do not otherwise warrant discipline. In these cases, Intake staff will issue a closing letter to the attorney, which can be a warning or resource letter. The Intake Manual instructs that bank RA matters are forwarded to Trials where the facts reveal a violation warranting discipline or where the attorney fails to provide a sufficient (or any) explanation.

If OCTC needs to subpoena CTA records, the matter must be forwarded to Trials because Intake does not issue subpoenas. OCTC's guidelines provide that CTA records should be subpoenaed where the attorney has a history of closed bank RAs with resource and/or warning letters, prior discipline for CTA violations, or multiple closed investigations involving allegations of CTA misconduct.

OCTC's Intake Policies and Procedures Relating to Fee Dispute Complaints

It is OCTC's policy to close a complaint and refer the complainant to fee arbitration if the allegations solely demonstrate a fee dispute (i.e., a disagreement over the appropriate value of services rendered) and fail to allege facts that may establish any other violation of the Rules of Professional Conduct or State Bar Act. However, if any indications of wrongdoing are apparent from the face of the complaint that, if true, would support a disciplinable violation, then the matter is forwarded to Trials for investigation—even if the complaint arose primarily from a fee dispute that has since resolved. This was the case with Harper's third discipline.

Standard 1.8(b)

The standards were adopted in 1986 to assist with determining the appropriate discipline in a given case and to promote consistency in disciplinary outcomes in matters involving similar misconduct and surrounding circumstances. In 2012, a taskforce was created to revisit the standards, specifically to update them based on changes in the law and to write them more clearly. This taskforce consisted of criminal attorneys, a former State Bar Court judge, principal attorney to the Chief Judge of the Supreme Court, staff from the Office of General Counsel of the State Bar, OCTC staff, and State Bar board members. Race was not taken into consideration and was not part of the taskforce's discussion.

Based upon the taskforce's efforts, standard 1.8(b) (formerly standard 1.7(b)) was revised to state that, with limited exceptions, disbarment *is appropriate* where an attorney has two or more prior disciplines if: (1) an actual suspension was ordered in any prior disciplinary matter; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Originally the standard stated that an attorney *shall* be disbarred upon a third discipline case, but the taskforce found that this was not usually followed and there were deviations in how the standard was applied. In light of the case law, the revisions sought to create better guidance for evaluating the impact of an attorney's preceding discipline. Notwithstanding the revisions to standard 1.8(b), the principle of progressive discipline remained an important consideration.

Disparate Impact Evidence

Farkas Study and Robertson Report

In November 2019, the State Bar published its "Report on Disparities in the Discipline System," which included a quantitative analysis of racial and gender disparities in attorney

discipline in California (Farkas study).[8] The Farkas study looked at data consisting of 116,363 attorneys admitted to the State Bar between 1990 and 2009, for whom race/ethnicity and gender information was available. Utilizing that data, the Farkas study evaluated the likelihood of attorneys of different racial/ethnic groups and genders being placed on probation or being disbarred/resigning with charges pending—examining all complaints received against the attorneys in the data set and the outcomes of any such complaints, through the end of 2018. Relevant here, the Farkas study found a statistically significant disparity in the probation and disbarment/resignation rates of Black male attorneys as compared to White male attorneys, showing that Black male attorneys were more than three times more likely to be placed on probation (3.2% vs. 0.9%) or be disbarred/resign with charges pending (3.9% vs. 1.0%).

Utilizing various simulations and regression analysis,[9] the Farkas study concluded that the differences in disbarment/resignation and probation rates of nonwhite attorneys can be explained primarily by looking at racial difference in the number of investigations opened against an attorney, the percentage of investigations in which the attorney was not represented by counsel, and the attorney's number of prior disciplines. The Farkas study also observed an average difference in the number of complaints received and allegations made against Black male attorneys as compared to White male attorneys.

Notably, the Farkas study recognized its limitations—it did not include outcomes for attorneys licensed before 1990 or after 2009. It did not analyze other potentially relevant control variables, including but not limited to an attorneys' practice area. Particularly relevant, the

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[8] The analysis was conducted and reported by George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine. State Bar Program Analyst, Chung Ron Pi, assisted with the collection of data and statistical analysis.

[9] Regression analysis is a statistical method showing the relationship between two or more identified variables. The Farkas study characterized the data using a number of variables, including gender, race/ethnicity, number of complaints received, number of investigations opened, whether the attorney was placed on probation or disbarred, firm size, number of prior disciplines, percentage of investigations without counsel, and allegation types.

Farkas study suggested that further analysis be undertaken to understand the source of the identified racial disparities.

In July 2020, the State Bar released a further report, "Consideration of Recommendations to Implement Changes to Address Key Findings of Disparities in the Discipline System Study" (Robertson report).[10] Taking the Farkas study at face value, the Robertson report made recommendations for potential reforms to address some of the racial disparities identified in the study—focusing primarily on bank RAs, the State Bar's handling of closed previous complaints, and representation of attorneys in disciplinary matters. Pertinent here, the Robertson report suggested reforms to the Intake policy related to de minimus bank RAs, suggesting an increase in the threshold amount from $50 to $500 and allowing for up to five bank RAs under $500 in a three-year period. Significantly, the Robertson report did not gather any new data and pointed out that the suggested reforms would require further study and analysis before implementation.

The State Bar specifically considered and rejected implementing a change to the de minimus threshold overdraft amount for the discretionary closing of bank RA matters. Following the Robertson report, the State Bar's Office of Research and Institutional Accountability (ORIA) conducted an analysis of over 100,000 bank RA cases opened between 1991 and 2018. ORIA found that more than half of the bank RAs involved less than $500, a pattern of bank RA matters is correlated with an increased likelihood of future discipline, and the chance of an attorney being disciplined peaked when the overdraft amount was $100 and decreased as the amounts increased. ORIA did not factor race into its analysis.

Though OCTC ultimately made some revisions to its policies and practices, where consistent with the purposes of attorney discipline, this court did not receive any evidence as to what impact, if any, that may have had on disciplinary rates across racial groups. There was also

[10] The report was prepared by Christopher Robertson, N. Neal Pike Scholar and Professor at the Boston University School of Law and Visiting Scholar and Special Advisor at the University of Arizona, James E. Rogers College of Law.

no evidence presented to suggest that the changes would have led to a different result in Harper's case.

Harper's statistical analysis

Harper performed his own statistical analysis of the data underlying the Farkas study. His evaluation focused solely on the percentage of Black male attorneys that had one or more complaints or inquiries involving funds, or Allegation C.[11] Harper did not look at the relationship between Allegation C matters and any particular outcome, such as disbarment. And instead of using the data for White male attorneys in his comparison, Harper mistakenly used the data for Asian male attorneys. Moreover, OCTC's expert pointed out critical flaws in Harper's calculations, rendering them meaningless to establish a statistically significant disparity. Finally, although Harper had some outside help with his mathematical calculations, he has no experience in statistical analysis and was unable to adequately explain the statistical significance of the tables he created as they relate to the issues here.

Harper's ancillary evidence

Harper presented a document entitled "Open Letter Regarding the State Bar's Thomas V. Girardi Disclosure" (Girardi Letter) and two news articles discussing Thomas Girardi. The Girardi Letter, published by the State Bar Board of Trustees on November 3, 2022, disclosed information about 205 disciplinary matters involving Girardi that had been opened and closed for various reasons between 1982 and 2022. Three of these ultimately resulted in Girardi's disbarment, his only public discipline. The Girardi Letter provided limited particulars about the matters—i.e., case number, dates the matters were opened and closed, generic descriptions of the

[11] OCTC classifies complaints/inquiries at the Intake stage by lettered allegation codes, dependent upon the complaint/inquiry type and the rule violations alleged. Allegation C refers to complaints/inquiries related to funds, including allegations of commingling, misappropriation, failure to account, failure to deposit funds in trust, withdrawal of disputed funds, failure to honor liens, and failure to maintain CTA records. Allegation C does not include bank RAs, which are categorized with other reportable action matters under Allegation P.

alleged violations, and case disposition. However, the details of the complaints/inquiries giving rise to the individual matters and any resultant investigations were not disclosed. The Girardi Letter also provided information about the State Bar's efforts to address concerns regarding the handling of these matters, including commissioning an independent investigation into the actions taken by State Bar staff.

Harper also offered two Los Angeles Times articles related to Girardi. The first from December 16, 2022, discussed Girardi and the results of the Farkas study.[12] The article included anecdotal examples of several Black male attorneys who had been disciplined by the State Bar for varying acts of wrongdoing, in contrast with White male attorneys, like Girardi, who had dozens of closed complaints over an extended time. Another article on March 10, 2023, set forth the results of the above-referenced investigation, which revealed inappropriate relationships between Girardi and State Bar staff.

Harper also presented a Review Department opinion in which attorney Albert Miklos Kun, received less than disbarment in a third disciplinary proceeding involving misappropriation of client funds, despite the application of standard 1.8(b). Remarkably, Kun's race was not established and, unlike Harper, Kun's prior disciplines did not also involve CTA violations nor did his subsequent misconduct include dishonesty.

Finally, Harper presented evidence from the April 2022 report on the State Bar's attorney discipline process (Audit Report), illustrating specific instances where OCTC either failed to act timely to prosecute clear misconduct or did not pursue disciplinary action altogether. However, the nine case examples in the Audit Report had no identifying information about the gender or race of the attorneys.

[12] Girardi was not part of the data set evaluated by the Farkas study as he was admitted to the practice of law prior to 1990.

Statistical analysis by OCTC's expert

The court designated Jora Stixrud as a qualified expert in the field of statistics, particularly relating to the application of statistical methods and analysis in evaluating data in support of race-based and gender-based discrimination claims.

In formulating her opinions, Stixrud reviewed the Farkas study and underlying data, the Robertson report, and the entirety of Harper's discipline file. Stixrud also performed her own statistical analysis of the data underlying the Farkas study, as it pertains to Harper's specific claims of disparate impact discrimination.

Stixrud concluded that (1) the Farkas study does not analyze the relationship between any particular State Bar policy or practice and the race gap in disbarment rates; (2) according to the Farkas study data, Harper "had multiple factors that are correlated with disbarment such that, regardless of race, he had a very high predicted probability of disbarment[;]" and (3) the Farkas study does not demonstrate a causal relationship between race and disbarment. (Exh. 34, p. 5.)

At the outset, Stixrud points out that the Farkas study did not attempt to establish causation. It also did not assess the effect of any specific State Bar policy or practice. Rather, the Farkas study observed gender and racial disparities in probation and disbarment/resignation rates and correlated certain variables to a higher probability of probation or disbarment/resignation for Black male attorneys, compared to White male attorneys. Stixrud states that the differences highlighted in the Farkas study are largely explained by factors outside of OCTC's control, such as the number or type of complaints received and the percentage of investigations where an attorney is unrepresented.

Similarly, Stixrud explains that, while the Robertson report offers potential reforms to OCTC's policies and practices to address racial disparities identified in the Farkas study, it does not provide any empirical evidence demonstrating the effect the proposed reforms might have on

the racial differences in probation and disbarment rates or the effect they might have on protecting the public.

Stixrud also performed her own analysis using the Farkas study data. She used two different types of statistical models, Probit and Logit, to ensure that the outcome was not impacted by the type of model used. The two models used by Stixrud are designed for discrete outcomes, such as the binary outcome being evaluated here (disbarment vs. not disbarment), as opposed to the linear probability model used by the Farkas study. Stixrud studied only male attorneys and considered any deviation below 1.96 to be statistically insignificant—a standard that she asserts is typically used by the courts in evaluating disparate impact claims. Under these parameters, Stixrud presented models with three sets of control factors.

First, Stixrud controlled for the number of complaints/inquiries[13] and the percentage of investigations the attorney faced without counsel. After controlling for just these factors, Stixrud observed that the difference in disbarment rates between Black and White male attorneys was statistically insignificant. Stixrud then performed two additional analyses, one adding firm size to the above-noted control factors and another adding in a fourth factor, controlling for the number of allegations related to reportable actions.[14] With each subsequent model, the difference in rates of disbarment between Black and White male attorneys decreased, and again, the difference was below the threshold of statistical significance. In fact, in her third model, controlling for reportable actions, Stixrud found that Black male attorneys were somewhat *less* likely to be disbarred than White male attorneys, although this difference was not statistically significant.

Stixrud also specifically evaluated the probability of disbarment for a White male attorney with the same characteristics as Harper, relying on the estimates from the Farkas study

[13] Stixrud excluded those with no inquiries/complaints because disbarment is not a possible outcome for those individuals.

[14] Although Stixrud's third model controlled for *all* reportable actions, she also estimated the model controlling for only bank RAs and the results were similar.

regression models. She found that such an attorney would have a "predicted probability of disbarment varying between the 92nd and 99th percentiles." (Exh. 34, p. 6.) In fact, such an attorney would have a disbarment rate "between 5 and 14 times higher than the average predicted probability among attorneys with at least one complaint." (*Ibid*.) In sum, Stixrud concludes that, regardless of race, an attorney presenting with the same characteristics as Harper is highly likely to be disbarred.

Discussion

After careful evaluation of the evidence and consideration of the parties' arguments, the court finds insufficient support for Harper's claim of disparate impact discrimination in this proceeding.[15]

Harper failed to establish a prima facie case of disparate impact discrimination

As stated, Harper bears the initial burden of establishing a prima facie case of disparate impact discrimination, requiring him to (1) show a racial disparity in the disciplinary system; (2) identify the specific policy or practice which allegedly caused the racial disparity; and (3) prove causation.

It is undisputed that the Farkas study demonstrates a disparity between the rates of disbarment for Black male attorneys and White male attorneys. Nonetheless, Harper must identify a specific State Bar disciplinary policy or practice that caused such disparity. (See *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519, 542 ["disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity"].)

[15] The court does not address Harper's claim of disparate treatment discrimination, as it falls outside the limited scope of the Supreme Court's Remand Order. This issue was expressly addressed in this court's August 19, 2021 Order re Applicable Burden and Standards of Proof on Remand, which Harper did not appeal.

Though difficult to discern, Harper ostensibly identifies two broad policies or practices that he claims are responsible for the disparity: (1) OCTC's Intake process, particularly relating to bank RAs and/or complaints involving a fee dispute; and (2) the application of standard 1.8(b), which essentially creates a rebuttable presumption that disbarment is appropriate in a third discipline case.

OCTC's Intake Process

Harper challenges OCTC's Intake process as a whole. Specifically, he objects to the practice of treating "virtually identical statutory violations involving different amounts…vastly differently[,]" such as treating a bank RA involving more than $50 the same as a bank RA involving "a million dollars." (Harper's Closing Brief, p. 4.) Harper also contests the generalized discretionary nature of the Intake process, claiming that OCTC attorneys have the "unfettered discretion" to decide whether to close a matter without acting, close it with some non-disciplinary resolution, or refer it for prosecution. (*Id.* at p. 11.)

Initially, the court finds that the "practices" identified by Harper are not specific policies or practices but rather generalized and vague concepts. Further, although subjective decision-making processes may, in some cases, be challenged under a disparate impact theory, Harper must still isolate and identify how such a practice was applied discriminatorily. (See *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 991 ["subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases"].) Here, instead of pinpointing any aspect of the OCTC Intake process, Harper is effectively asking this court to guess as to what practice he is challenging and how it was applied discriminatorily to his case. The court declines to engage in such speculation.

Even assuming that the alleged overall discretion afforded in OCTC's Intake policies and procedures is a specific recognized practice subject to disparate impact analysis, as discussed below, Harper fails to establish that such a practice even existed, let alone that he was harmed by

it. (See *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 750 [claimant must show he was subject to practice with alleged disparate impact].) Nor did Harper produce reliable statistical evidence that such a practice had a disparate impact on Black male attorneys and was more likely than not causally related to the disparity in disciplinary outcomes. (*Jumaane v. City of Los Angeles*, *supra*, 241 Cal.App.4th at p. 1405, italics added ["valid statistical evidence is *required* to prove disparate impact discrimination"].)

Preliminarily, Harper fails to even establish that OCTC, in fact, had a general practice of leaving the decision to forward a bank RA matter for investigation up to the subjective discretion of Intake staff. Rather, the evidence shows that OCTC's policy only gives Intake staff the option to close bank RA matters in narrow circumstances—none of which applied to the repeated bank RAs or client complaints that led to Harper's three disciplinary matters. Indeed, Harper's first discipline involved more than a dozen bank RAs within a six-month period. His second included three cases, only one of which arose from bank RAs. And Harper's third discipline did not arise from a bank RA.

Even if all of the bank RAs underlying Harper's earlier disciplines involved de minimus amounts (less than $50), which they did not, OCTC's policy did not allow closing the matters in Intake without, at a minimum, seeking a response from Harper because of the repeated nature of his violations. Then, based upon a review of Harper's response, OCTC's Intake policies directed what action to take. In some cases, such as seven of the eight bank RAs following Harper's second discipline, there were insufficient facts to move the case forward and the matters were closed in Intake, notwithstanding his two previous disciplines. However, in each of Harper's earlier disciplines, the facts suggested that the conduct was not accidental or the result of bank error. Thus, the matters were forwarded to Trials for further investigation and possible prosecution.

Similarly, with regard to the individual complaints underlying Harper's disciplinary matters, Intake staff did not have unlimited discretion to close the complaints. Contrary to his assertion, OCTC did not have a policy directing Intake staff to close any complaint where there is a fee dispute. Rather, a client complaint, whether or not involving a fee dispute, would be closed if, on its face, it failed to allege any conduct supporting a violation of the Rules of Professional Conduct or the State Bar Act. The DeJoie complaint, which precipitated the third discipline, did not *solely* involve a fee dispute. It alleged additional facts that, if true, would support a disciplinable violation. Thus, Intake staff forwarded the matter to Trials for investigation, consistent with its policy directives.

Even assuming that Harper had properly identified facially neutral OCTC policies and practices that applied to his disciplinary cases, he did not establish the element of causation, i.e., that any such policy or practice caused Black male attorneys, like him, to be disbarred at a disproportionate rate compared to similarly situated White male attorneys.

To the extent that Harper is arguing that OCTC's clearly defined policy of setting $50 as the threshold for "de minimus violations" had a disparate impact on Black male attorneys, he did not present statistical data to that effect. (Exh. 5, p. 1.) Although the Farkas study may have shown that Black male attorneys had higher numbers of bank RAs, there was no disaggregation of the amounts involved in those bank RAs and the subsequent ORIA analysis of bank RAs did not consider race. Moreover, the Farkas study did not analyze the connection between bank RAs and disciplinary outcomes nor did it evaluate the connection between fee dispute complaints and disciplinary outcomes. Further, Harper's flawed statistical analysis, purporting to show that Black male attorneys have disproportionately higher funds-related allegations, did not include bank RAs and was not analyzed in relation to disciplinary outcomes.

Finally, the specific case examples provided by Harper, such as Girardi, Kun, and the anonymous attorneys in the Audit Report, do not establish causation. The Supreme Court's

remand order tasks this court with evaluating whether Harper was disciplined more harshly than any similar situated White male attorney *based on the data underlying the Farkas study*. Harper did not establish that Kun or the anonymous attorneys in the Audit Report were part of that data set and Girardi's admission date places him decidedly outside of it. Even if the specific case examples were part of the Farkas study data, they do not establish that any particular practice or policy caused the racial disparity in disciplinary outcomes. There is simply insufficient information before this court concerning the relevant variables to make a statistically useful comparison between the individual case examples and Harper.

As to Kun and the individuals in the Audit Report, Harper fails to establish the race of those attorneys, rendering such evidence useless for analyzing racial disparities. And, as to Girardi, whose race is known, the record does not state what specific policies and/or practices applied in his matters. Therefore, it is entirely unknown if Harper was disciplined more harshly because of the racially disparate impact of a specific State Bar policy or practice that should have applied equally to the both of them or because of some other reason. In fact, the Los Angeles Times articles offered by Harper suggest that other considerations, such as wealth and/or improper influence, were the determinative factors resulting in the improper closure of some of Girardi's investigations.

In sum, Harper failed to meet his burden of establishing that any aspect of the Intake process was the cause of the disparate disciplinary outcomes for Black male attorneys and, specifically, was a substantial factor causing Harper to face disbarment in this proceeding. This is equally true to the extent that Harper is arguing that discretionary decisions in the investigative process are the cause of the disparate disciplinary outcomes.

Standard 1.8(b) and weight given to prior discipline

Harper also challenges the application of standard 1.8(b) to this proceeding, essentially arguing that it places too much weight on preceding discipline, even when remote in time, and disproportionately affects Black male attorneys.

Although the Remand Order focuses on his prior discipline for bank RAs, regardless of the nature of the earlier disciplines, Harper must establish that the application of standard 1.8(b) is a practice that disproportionately affects Black male attorneys, resulting in higher rates of disbarment. He has failed to do so.

The application of standard 1.8(b) is a practice that Harper was subject to and was unquestionably a substantial consideration in his disbarment recommendation. But that does not prove that the application of standard 1.8(b) is a practice that disproportionately affects Black male attorneys as a group. Significantly, Harper did not produce any statistical evidence relating to the disparate impact of applying standard 1.8(b). Instead, he relied entirely on the Farkas study, which found that the number of earlier disciplines was one of several variables that was a strong predictor of disbarment and that racial disparities in the number of prior disciplines *may* contribute to the increased disbarment rates for Black male attorneys. However, the Farkas study does not establish causation nor did it specifically look at the probability of disbarment for attorneys with at least two prior disciplines, the circumstances under which standard 1.8(b) may apply. Similarly, there was no statistical evidence evaluating the differences in the weight given to former disciplines and the effect that has on disbarment rates.

The court finds that Harper has failed to meet his burden of establishing that the application of standard 1.8(b) and/or the practice of giving aggravating weight to prior disciplines caused the disparate disciplinary outcomes for Black male attorneys.

OCTC presented countervailing evidence

Assuming arguendo that Harper had met his initial burden of proof, OCTC presented countervailing evidence through the expert testimony of Stixrud. Using two different statistical models and looking solely at disbarment outcomes (the adverse impact alleged here), Stixrud found no statistically significant difference in disbarment rates after controlling for just two factors—the number of complaints/inquiries and the percentage of investigations without attorney representation—neither of which relate to a State Bar policy or practice. In fact, Stixrud concluded that there was no data to suggest that *any* specific State Bar policy or practice had a disparate impact on Black male attorneys, including but not limited to those identified by Harper, i.e., discretionary practices in closing complaints or the weight given to prior disciplines. Finally, Stixrud found, based upon the data underlying the Farkas study, that there was a very high probability that *any* attorney similarly situated to Harper would have been disbarred, regardless of race.

In sum, the evidence from Stixrud demonstrates, by a preponderance of the evidence, that the observed racial disparity in disbarment rates is not attributable to any specific State Bar policy or practice. Instead, the racial disparity is likely ascribed, in large part, to two factors outside of the State Bar's control—the number of complaints received and the percentage of investigations without counsel.

Challenged practices are necessary to fulfill legitimate business purpose

Alternatively, and again assuming that Harper established a prima facie case of disparate impact, the court finds that OCTC demonstrated, by a preponderance of the evidence, that its Intake policies and practices and standard 1.8(b) are necessary to fulfill a legitimate business purpose. OCTC showed that these policies and practices have a "manifest relationship" to the purposes of attorney discipline—protection of the public, the courts, and the legal profession;

maintenance of the highest professional standards; and preservation of public confidence in the profession. (*Griggs v. Duke Power Co., supra,* 401 U.S. at p. 432; see also std. 1.1.)

The Intake policies relating to bank RAs are designed to determine which bank RAs may indicate misconduct threatening to the public and requiring additional investigation versus those that are more likely to result from an excusable oversight or bank error. To that end, OCTC created its bank RA workflow, setting forth various factors to consider in determining whether to forward a bank RA for investigation. One such consideration is whether the bank RA involves NSF activity less than $50 and appears aberrational. OCTC defends this policy as necessary and appropriate to assist with determining which cases merit further investigation. That is because even small but repeated NSF overdrafts are often indicative of more serious transgressions, such as commingling or misappropriation, and thus must be looked at more closely. (See *Howard v. State Bar* (1990) 51 Cal.3d 215, 221 [misappropriation of client funds amounts to theft, one of the most serious professional trust violations lawyer can commit]; see also *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916 [prohibition against commingling adopted to check against "the danger in all cases that such commingling will result in the loss of clients' money"].) OCTC's policy does not require prosecution of such matters but rather allows for further investigation into the cause of the NSF activity. This is a legitimate business purpose, relating directly to the public protection goal of attorney discipline and helping to ensure the highest professional standards relating to CTA management. (§ 6091.1, subd. (a) [overdrafts and misappropriations from CTAs are serious problems and it is in the public interest to promptly detect and investigate them].)

Likewise, the standards exist to fulfill the primary purposes of attorney discipline and to promote consistency. (Std. 1.1.) 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.) The Supreme Court has repeatedly stated that, although the standards are

not mandatory, a compelling, well-defined reason must be provided for any deviation from them. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Notably, standard 1.8(b) applies only where the concern of recidivism is high—i.e., where an actual suspension was previously imposed or where the prior and current disciplinary matters demonstrate a pattern of misconduct or an unwillingness or inability to conform to ethical responsibilities. It carves out specific exceptions if the most compelling mitigating circumstances clearly predominate or the misconduct underlying the earlier discipline occurred during the same time period as the current misdeeds. (Std. 1.8(b).) This is because "part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation]." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) In fulfilling the primary purposes of discipline, the presumption created by standard 1.8(b) appropriately recognizes that an attorney who has twice received a chance to conform his or her conduct to ethical norms and/or has again been found culpable of similar transgressions raises serious public protection concerns. This is a legitimate business purpose.

Harper fails to identify any legitimate alternative practice or policy

Assuming that Harper met his prima facie burden and having found that the Intake policies and practices and standard 1.8(b) bear a compelling relationship to the State Bar's disciplinary purposes, the burden shifts back to Harper to identify an alternative practice that comparatively serves the State Bar's purposes and results in less discriminatory impact. (See *Ricci v. DeStefano, supra,* 557 U.S. at p. 578 [proponent of disparate impact claim bears burden to show "legitimate alternative [practice] that would have resulted in less discrimination"].)

Instead of proposing a legitimate alternative practice, Harper argues that he should not have been disciplined at all. And, rather than submitting evidence of a different policy resulting

in diminished discriminatory impact on Black male attorneys as a group, Harper argues against the application of certain practices to his case. He also contends that OCTC's and the court's discretion should have been exercised differently towards him. That does not satisfy his burden.

Further, as discussed, the Robertson report does not assist with this analysis. The report did not collect any new data or perform additional statistical analysis such that the court could reasonably infer that any of its proposed reforms would have resulted in less disparity. Therefore, even if Harper had met his prima facie burden, he has failed to identify an alternative business practice in response to OCTC's demonstration of a legitimate business purpose.

Conclusion

Based on the further evidentiary hearing, the court finds insufficient evidence to establish that any facially neutral disciplinary policy or practice of the State Bar, including but not limited to the weight given to Harper's prior discipline, had the effect of discriminating against him on the basis of race.

Dated: August 11, 2023

MANJARI CHAWLA
Judge of the State Bar Court

PROOF OF SERVICE

In Re Harper on Discipline

Supreme Court Case No

State Bar Court Case No. 17-O-01313

I, Phyllis Carr, hereby certify that I electronically filed and served the attached **PETITION FOR REVIEW** with the Clerk of the California Supreme Court and to the following:

Honorable Manjari Chawla, Courtroom1 State Bar of California

Counsel for the State Bar of

California Christopher Jagard at Christopher.Jagard@calbar.ca.gov by transmitting a true copy via this Court's TrueFiling system on October 10, 2023, and on: Clerk of The State Bar Court 845 South Figueroa Street Los Angeles CA 90017

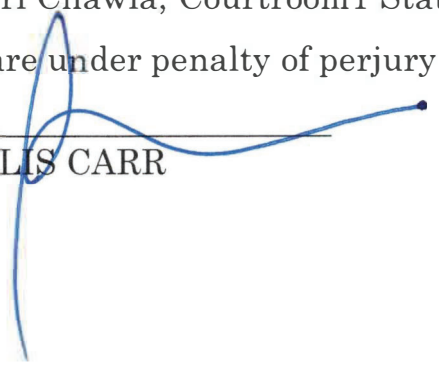
Email: michelle.cramton@calbar.ca.gov

and by US Mail to: Christopher Jagard 180 Howard Street, San Francisco, CA 94105

Clerk of The State Bar Court 845 South Figueroa Street Los Angeles CA 90017

Manjari Chawla, Courtroom1 State Bar of California

I declare under penalty of perjury October 10, 2023



PHYLLIS CARR

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE HARPER ON DISCIPLINE**
Case Number: **TEMP-1WJRYZYQ**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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/s/GREGORY HARPER
Signature

HARPER, GREGORY (Pro Per)
Last Name, First Name (PNum)

Harper Legal Group
Law Firm