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Supreme Court of California
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Supreme Court Case No. S265240
Supreme Court Case No. S265863
State Bar Court Case No. 17-O-01313

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**In re GREGORY HARPER on Discipline**
Member No. 257780
A Member of the State Bar

APPEAL FROM A MODIFIED DECISION OF THE REVIEW DEPARTMENT OF THE STATE BAR COURT OF THE STATE OF CALIFORNIA AND DENIAL OF MOTION

# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This matter involves the grossly negligent misappropriation of client funds and intentional misrepresentations to the State Bar Office of Chief Trial Counsel ("OCTC") made by Petitioner Gregory Harper ("Petitioner"). Petitioner was previously disciplined twice for other, similar client trust account violations. He did not learn his lesson, this time committing gross misappropriation that the Hearing Department found constitutes moral turpitude and "breach[ing] the high duty of loyalty owed to the client, violat[ing] basic notions of honesty, and endanger[ing] public confidence in the profession." (April 14, 2020 Decision of the Review Department as modified on September 25, 2020 ["RD Decision[1]"] at p. 14 [internal citations omitted].) After a careful consideration of the aggravating and mitigating factors, and applying the relevant standards for attorney discipline, the Hearing Department recommended disbarment, which was affirmed by the Review Department.

Petitioner does not contest culpability for his charged ethical violations—indeed, he stipulated to the facts establishing his misconduct. Nor does he argue that the disciplinary standards were inappropriately applied to his case. Rather, he argues that this case should be remanded because the Review Department did not properly comply with this Court's August 12, 2020 order that the Review Department consider Petitioner's unaddressed claims that his discipline was based on a theory of disparate impact. These claims were first raised by Petitioner in his reply brief to the Review Department in his appeal of the Hearing Department's disbarment recommendation.

[1] A true and correct copy of the RD Decision is attached as Appendix A.

Upon remand, the Review Department properly complied with this Court's directive by modifying its decision, adding an additional two and a half pages to carefully evaluate each of Petitioners' arguments. The Review Department ultimately concluded Petitioner could not demonstrate credible evidence of disparate impact. (RD Decision, at p. 15-7.) Petitioner contends that additional evaluation was required in the form of a "disparate impact analysis," based on his citation to a voluntary study conducted by the State Bar showing that Black attorneys are disbarred at a higher rate than White attorneys. While the Review Department took judicial notice of the study, further evaluation and/or the ordering of new evidence in response to the study is not legally required.

A "disparate impact analysis" is an evaluation of statistical evidence of disparate impact of policies or procedures undertaken when a plaintiff alleges discrimination in employment, housing, and other areas in which a protected class is designated by statute. A disparate impact claim must be brought pursuant to federal law, such as Title VII of the Civil Rights Act (the federal law prohibiting employment discrimination) and the Federal Housing Act that have explicit provisions preventing discrimination based on the theory that a facially neutral policy or procedure may have a disparate impact.

Petitioner does not—and cannot—state such a "disparate impact" claim as he is not asserting discrimination in the employment or housing context, or any other context in which there is specific authorization to bring a disparate impact claim. Accordingly, there was no legal requirement that the Review Department undertake any "disparate impact analysis" based on a study of disbarment rates alone.

Contrary to Petitioner's contentions, he also does not have any fundamental due process right for the Review Department to consider the State

Bar's study, or to re-open discovery to allow additional evidence regarding such study. Petitioner does not contest that he was provided an opportunity to respond to the charges against him and had a full evidentiary hearing, complying with federal due process requirements.

In sum, the Review Department properly considered all evidence in the record, including the proffered study, to conclude that Petitioner was unable to establish a disparate impact claim or any other type of discrimination in his case. Its disbarment recommendation is otherwise supported by record. Petitioner misappropriated substantial sums of money and made a knowing misrepresentation to the State Bar. Petitioner was prosecuted and found culpable by clear and convincing evidence for these ethical violations. The Review Department and the Hearing Department both recommended discipline for Petitioner's misconduct that falls squarely within guidelines established by the Standards for Attorney Sanctions for Professional Misconduct. Given these unassailable conclusions, the Court should deny review.

## II. STATEMENT OF RELEVANT FACTS

### A. The DeJoie Matter

On November 17, 2016, Petitioner deposited $59,000.00 into his Client Trust Account (CTA) from the settlement of two civil matters for former client Evigne DeJoie. (See May 23, 2019 Decision of the Hearing Department ["HD Decision[2]"] at p. 3; RD Decision, at p. 2].) On November 23, 2016, Petitioner provided Ms. DeJoie with a cashier's check for $37,913, withdrawn from the CTA and withheld $21,087 for attorney's fees and sanctions incurred during the litigation. (HD Decision, at p. 3; RD Decision at p. 2-3.) On the same day, Ms. DeJoie disputed the withheld amount. (*Ibid*.) On November 30, 2016,

[2] A true and correct copy of the HD Decision is attached as Appendix B.

Petitioner sent Ms. DeJoie notice of her right to request fee arbitration, which she submitted on February 7, 2017. (*Ibid*.) The dispute was settled following fee arbitration on July 28, 2017. (RD Decision, at p. 3.)

On February 8, 2017, Ms. DeJoie submitted a complaint to the State Bar. (HD Decision, at p. 4, RD Decision, at p. 3.) On June 13, 2017, in response to the State Bar's inquiry letter regarding this complaint, Petitioner provided a response through counsel in which he stated that he left the full amount of disputed funds in his CTA. (HD Decision, at p. 4-5; RD Decision, at 3.) However, bank records demonstrated that between December 2016 and June 2017, Petitioner's CTA repeatedly fell below the $21,087 disputed amount and at its lowest fell to $493.61 on May 8, 2017. (HD Decision, at p. 4; RD Decision, at p.3.) Moreover, on June 12, 2007, the day before Petitioner made his representation to the State Bar, the balance of the CTA was $5,600.22. (HD Decision, at p. 5; RD Decision, at p. 3.)

**B. Petitioner's State Bar Court Proceedings**

On October 22, 2018, OCTC filed a Notice of Disciplinary Charges advancing three counts of misconduct: (1) failing to maintain $21,087 of disputed funds in a CTA, in willful violation of former rule 4-100(A); (2) misappropriating over $20,000 of a client's funds, in willful violation of section[3] 6106[4], and (3) making a false and misleading statement to OCTC during a disciplinary investigation in violation of section 6106. (HD Decision,

[3] Unless otherwise noted, all references to section refer to the California Business and Professions Code.

[4] "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

at p. 1-2.) After a full evidentiary hearing, in which Petitioner stipulated to the facts underlying his misconduct, the Hearing Department found Petitioner culpable on all counts, concluding that Petitioner was grossly negligent of misappropriation of client funds and committed willful acts of dishonesty when making misrepresentations to OCTC. (HD Decision, at p 6.) After applying the Standards[5] and analogous discipline decisions, the Hearing Department recommended disbarment. (*Ibid*.)

One of the aggravating factors considered by the Hearing Department was Petitioner's record of two prior instances of discipline. (HD Decision, at p. 8-10.) Petitioner's first discipline was a 9-day stayed suspension and 18 month probation for misuse of his CTA in two different client matters, ordered in April 1994. (HD Decision, at p. 8.) His second discipline was a one year suspension, execution stayed, and a two year probation that included six month actual suspension and a requirement that he attend State Bar Client Trust Accounting School ordered, in February 2003. (*Id.*, at p. 9.) In this discipline, Petitioner stipulated to misconduct in three separate client matters, all involving similar misconduct as the prior matters: namely, misuse of his CTA accounts, with one also involving misappropriation of settlement funds by his employee. (*Ibid*.)

The Hearing Department gave Petitioner's prior disciplinary history significant weight in aggravation because the wrongdoing was similar to the misconduct in the current matter and the prior acts of discipline "demonstrates an inability or unwillingness to conform to ethical responsibilities." (HD Decision, at p. 10, 13.)

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

On April 14, 2020, the Review Department filed its Opinion, affirming the Hearing Department's culpability findings and disbarment recommendation. (See generally, RD Decision).

### C. The State Bar's November 2019 Study on Disparities in the Attorney Discipline System

On November 14, 2019, the State Bar published a voluntary study on disparities in the attorney disciplinary system. (Board of Trustees Agenda Item 705 dated November 14, 2019 ("Nov 14, 2019 BOT Item[6]").) This study was conducted by Professor George Farkas[7] and was commissioned pursuant to the State Bar's statutory mission and Strategic Plan – both of which give the State Bar a mandate to work to eliminate bias and promote diversity in the legal profession. (BOT Item 705, at p. 1.) The goal of the study was to conduct a "rigorous, quantitative analysis to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action." (*Ibid*.)

The study analyzed a data set of 116,363 attorneys from 1990 to 2018 who had the most serious discipline: probation or disbarment (including resignation with charges pending), and analyzed the outcomes for attorneys of different racial/ethnic groups and genders. (*Id*., at p. 2.) The study did not analyze racial/ethical or gender disparities in the handling of the same type of complaint (i.e. whether a complaint alleging the same misconduct was handled differently based on race) nor did it evaluate the differences in level of

[6] A true and correct copy of this BOT Item is attached as Appendix C.

[7] George Farkas is a Distinguished Professor in the School of Education at the University of California, Irvine. (Nov. 2019 BOT Item, Attachment A.)

discipline for the same charged misconduct by race/ethnicity or gender. (See generally, Nov 14, 2019 BOT Item, Attachment A.)

Without controlling for any factors, Dr. Farkas concluded that Black male attorneys were disbarred/resigned with charges pending at a rate of 3.9 percent compared to 1.0 percent for white attorneys. (*Id*., at p. 2.) Dr. Farkas, however, also examined the following factors and their impact on probation and disbarment/resignation levels: (1) complaint history (measured by number of complaints received, number of investigations open, counsel representation, number of times discipline was previously imposed, and number and type of various allegations); (2) number of years since first being admitted to the Bar; and (3) firm type/size. (*Ibid.*)

When controlling for these variables, the differences in probation and disbarment rates went down significantly. (*Ibid*.) For instance, when controlling for the number of complaints lodged against Black versus White attorneys, the disbarment rate for Black, male attorneys decreased from 3.9 to 1.6 percent (compared to 1 percent for White, male attorneys), making the difference in disbarment rates less than one percent. (Nov 14, 2019 BOT Item, Attachment A, at p. 13.) Ultimately, Dr. Farkas concluded that the racial disparity in disciplinary outcomes was "largely attributable" to these other variables. (*Id*., at p. 18.)

The State Bar took the results of the study seriously, and continued its evaluation of racial disparities in the discipline system through further studies and operational review. (See Board of Trustees Agenda Item 701 dated July 16, 2020 ("July 16, 2020 BOT Item[8]").) In late 2019, State Bar staff invited

[8] A true and correct copy of this BOT Item is attached as Appendix D.

Professor Christopher Robertson[9] to review Dr. Farkas' report and explore possible remedies. (*Id.*, at 2.) Professor Robertson reviewed Dr. Farkas' study, met with Stat Bar staff and OCTC leadership and presented ideas for the Board of Trustees to explore at its January planning meeting.[10] (*Ibid.*)

A few months later, at its July 2020 meeting, the Board of Trustees recommended staff take specified action to further address these issues. (July 16, 2020 BOT Item, at p. 8.) These actions included evaluating and taking steps to increase legal representation for respondent attorneys, evaluating the handling of Reportable Action Bank cases, determining whether modification to State Bar rules are necessary, and evaluating the handling of complaints closed without discipline. (*Id.*, at p. 8.)

### D. Petitioner's Allegations Concerning the Disparity Study and its Impact on His State Bar Proceedings

At the time Dr. Farkas' disparity study was published, Petitioner had already filed his appeal of the May 23, 2019 Hearing Department decision to the Review Department. Approximately one month after the disparity study was published, Petitioner filed his reply brief. (Petitioner's Reply Brief filed in

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[9] Professor Robertson is an N. Neal Pike Scholar and Professor at the School of Law of Boston University, and Visiting Scholar and Special Advisor at the James E. Rogers College of Law of the University of Arizona. (July 16, 2020 BOT Item, at p. 2.)

[10] Professor Robertson presented five areas for the State Bar to further explore: (1)the handling of Reportable Action Bank cases (reports that come to the State Bar from banks when a client trust account is overdrawn); (2) the treatment of prior complaints that are closed with no discipline imposed on an attorney; (3) options for encouraging the representation of attorneys in the discipline system; (4) "blinding" of respondent attorney identities to reduce the likelihood of implicit bias entering into the process;, and (4) the diversity of staff in OCTC. (July 16, 2020 BOT Item, at p. 2.)

the State Bar Review Department December 27, 2019 ["Reply Brief"[11]]). In this brief, Petitioner raised for the first time the allegation that his disciplinary proceeding was "discriminatory," citing to Dr. Farkas' study without explanation. (*Id.*, at p. 4-5.)

Petitioner also alleged that an unidentified African American "initial judge" recommended dismissal, while a second judge recommended disbarment and would not allow the prosecutor to negotiate any other discipline. (Reply Brief, at p. 4.) Petitioner also claimed his disbarment was improperly based on "prior discipline of cases 20 and 16 years old." (*Ibid.*) Based on these allegations, Petitioner summarily stated that "this matter is indicative of a discriminatory and disparate impact on black male attorneys and penalties are disproportionately harsh especially considered no harm was suffered." (*Id*., at p. 5.)

The April 14, 2020 Review Department decision upholding the Hearing Department's culpability findings and disbarment recommendation did not address Petitioner's disparate impact argument. (See generally RD Decision.) On June 15, 2020, Petitioner sought review of the State Bar Court decision by this Court. On August 12, 2010 this Court granted the Petition and remanded the matter to the State Bar Review Department "for consideration of Harper's unaddressed claim that his discipline is based on a theory of disparate impact." (Supreme Court Order in Case No. S262388, filed August 12, 2020 ["Remand Order[12]"].)

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[11] A true and correct copy of the Reply Brief is attached as Appendix E.

[12] A true and correct copy of the Remand Order is attached as Appendix F.

On September 21, 2020, Petitioner filed a motion in the Review Department requesting to be reinstated to active status pending the Review Department's consideration of his disparate impact claims.

### E. The Review Department's Modified Order and Denial of Petitioner's Motion for Reinstatement

On September 25, 2020, the Review Department published an order modifying its April 14, 2020 decision, stating that it inserted a new section in its order titled "IV. Consideration of Claim of Disparate Impact on Remand." (Review Department Modification Order, filed September 25, 2020.[13]) In a footnote, the Review Department explained that it interpreted the Supreme Court's remand order to address Petitioner's unaddressed claims "on the record before [them]" and not as "an order to remand the matter to the Hearing Department for further evidentiary hearings." (*Id*., at fn. 16.)

In its Modified Decision, the Review Department carefully considered, and ultimately rejected, each one of the arguments in Petitioner's reply brief regarding purported discrimination and disparate impact. (RD Decision, at p. 15- 17 ["there is no evidence in the record that supports [Petitioner's] claim that the discipline recommendation was based on the disparate impact of discipline on Black male attorneys. Accordingly, Harper's claims of disparate impact are rejected."].) It determined that there was no evidence to support Petitioner's contentions that the Hearing Department judge was biased or that a different African American judge recommended dismissal. (*Ibid*.) It also concluded that the standards were appropriately applied to support a disbarment recommendation. (*Ibid*.)

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[13] A true and correct copy of the Modification Order is attached as Appendix G.

On October 2, 2020, the Review Department denied Petitioner's motion for restoration to active status as moot. (Review Department Order filed October 1, 2020[14].)

**F. Petitioner's Two Underlying Supreme Court Petitions**

On November 25, 2020 Petitioner filed a Petition for Review of the Modified Review Department Order in Supreme Court Case Number S265240 ("Pet. I"). Petitioner argues that the Review Department did not adequately respond to this Court's remand order due to its failure to conduct a "disparate impact analysis" and/or order the additional examination of data so that such an analysis could be conducted. (Pet I., at p.10.) Petitioner claims that the Review Department's failure to conduct this analysis denied him fundamental due process. (*Id.*, at 9, 12.) He also alleges that the State Bar improperly withheld the disparate impact study, and follow up studies, from discovery. *Id*., at 12.)

On November 30, 2020, Petitioner filed a second Petition also seeking review of the RD Decisions, in Case No. 265863 ("Pet II."). This second Petition is substantively identical to the first Petition filed November 25, 2020 but states on the cover page that it is also an appeal of the Review Department's denial of his motion to return to active status. (*Ibid*.) Petitioner alleges that his motion for restoration to active status "provided an opportunity for the Review Department to meet the Supreme Court's mandate to address disparate impact "by reinstating him to active status until the appropriate disparate analysis could be conducted." (*Id*., at 5.)

[14] A true and correct copy of this Review Department Order is attached as Appendix H.

## III. ANALYSIS

### A. The Review Department Properly Complied with this Court's Order

On August 12, 2020, this Court ordered that this matter be remanded to the State Bar Review Department "for consideration of Petitioner's unaddressed claim that his discipline is based on a theory of disparate impact." (Remand Order.) The Review Department did precisely as directed. It took judicial notice of Dr. Farkas' study and added an additional two and half pages of legal analysis to its April 14, 2020 order to address, point-by-point, Petitioner's previously unaddressed arguments that his discipline was "discriminatory" and "reflective of the disparate impact" of the attorney discipline system on Black attorneys. (RD Decision, at 16-17.) The Review Department ultimately concluded that Petitioner's conclusory statements were insufficient to demonstrate he was discriminated against and that disbarment was still the appropriate level of discipline. (*Ibid*.)

Petitioner contends that to comply with this Court's directive, the Review Department was required to undertake additional analysis, including by ordering additional discovery or remanding the case back to the Hearing Department for "further factual findings" based on "new evidence." (Pet. I, at p. 6.) But this Court's Remand Order did not instruct the Review Department to remand the case back to the Hearing Department to re-open discovery. Nor did the Supreme Court make a finding that Petitioner stated a cause of action for a "disparate impact" or any similar cause of action that would necessitate a "disparate impact analysis" as a matter of law. Rather, the Remand Order instructed the Review Department to "consider" Petitioner's disparate impact claims. (Remand Order.) The Review Department properly did so by conducting a careful evaluation of each of Petitioner's previously unaddressed arguments. (RD Decision, at p. 16-17.)

Of course, if this Court had intended for the Review Department to conduct any specific type of analysis, or to re-open discovery, the State Bar respectfully requests that this Court clarify its directive to enable the State Bar Court to properly comply with its August 12, 2020 Remand Order. But on the current record, the State Bar respectfully submits that the State Bar Court has fully complied with the Remand Order and that its recommendation of discipline in this matter is correct and should be accepted.

1. Petitioner's Allegations Do Not State a Cause of Action for "Disparate Impact" that Would Require a Disparate Impact Analysis

The crux of Petitioner's argument is based on the inapplicable theory that the Review Department was required to conduct a "disparate impact analysis" because Petitioner had allegedly established a prima facie case of discrimination. (Pet. I, at p. 8, 10-11.) Petitioner supports this argument with case law on discrimination lawsuits brought as "disparate impact" claims under Title VII of the Civil Rights Act (Pet. I, at 11, 13), which specifically prohibits *employment* discrimination based on the application of facially neutral policies that have a disparate impact on employees or applicants solely because of their race. (Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2; *Watson v. Fort Worth Bank & Tr.* (1988) 487 U.S. 977, 988 ("[the Supreme Court] has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent."].) [15]

[15] The "disparate impact" analysis Petitioner repeatedly refers to appears to be the standard the Supreme Court has laid out for addressing disparate impact claims under Title VII employment discrimination cases: where a plaintiff has established a prima facie case of disparate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." (*Ricci v. DeStefano* (2009) 557 U.S. 557, 578.) If the employer meets that burden, the plaintiff may still

Yet a "disparate impact" claim is not a cognizable cause of action absent specific statutory authorization under specified federal statutes, such as Title VII and the Fair Housing Act. (See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* (2015)135 S. Ct. 2507, 2525 [affirming that disparate impact claims are cognizable under, among other federal statutes, the Fair Housing Act and Title VII].) It is not available—and thus irrelevant—to general claims of discrimination by governmental entities (which are only actionable as claims for discrimination under 42 U.S.C section 1983). (*Washington v. Davis* (1976) 426 U.S. 229, 239 ["We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today]; see also *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ["[T]he Fourteenth Amendment guarantees equal laws, not equal results."].)

Petitioner's reliance on case law that requires a "disparate impact analysis" is therefore inapposite as all such cases rely on specifically authorized disparate impact claims brought pursuant to Title VII as an employment discrimination claim. (Pet. I, at p. 10-11.) Petitioner does not—and cannot—explain how he is able to assert such a cause in the context of his disciplinary proceeding.[16]

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succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs. (*Ibid.*)

[16] Even if this court could somehow construe employment disparate impact claims as applying to State Bar disciplinary proceedings, Petitioner admits that a disparate impact analysis is only required if he is able to state a prima facie case of disparate impact. (Pet. I at p. 11 ["once a prima facie case is presented with statistical data such as the discipline study the [R]eview [D]epartment was compelled to conduct that analysis''].) The law is clear that the statistical

To the extent Petitioner is using a disparate impact theory to attempt to state a claim against the State Bar for discrimination or selective prosecution (a cause of action that applies the principles of the equal protection clause to the discriminatory enforcement of a law by government officials) statistical evidence of disparate impact is not sufficient to state a prima facie case without additional evidence of discriminatory purpose or intent. (*Wayte v. United States* (1985) 470 U.S. 598, 610 ["Even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result"]; *Washington, supra*, at 239–40, ["[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact."]; *Barren v. Harrington* (9th Cir. 1998) 152 F.3d 1193, 1194; *Draper v. Rhay* (9th Cir. 1963) 315 F.2d 193, 198 [inmate failed to show section 1983 violation in absence of "intentional or purposeful discrimination"].)

As Petitioner cannot state a prima facie case for "disparate impact," the Review Department had no legal obligation to conduct a "disparate impact analysis."

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evidence needed to establish a prima facie case must be "valid" which means it is "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.... [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation.'" (*Jumaane v. City of Los Angeles* (2015) 241 Cal. App. 4th 1390, 1405.) As Petitioner's proffered disparity study does not demonstrate any significant statistical disparity between the rates of disbarment between Black and White attorneys when controlling for various factors, the study is insufficient to establish a prima facie case of disparate impact that would necessitate a "disparate impact analysis." (Nov 14, 2019 BOT Item, Attachment A, at p. 12-16; 18.)

2. Petitioner Was Provided Adequate Due Process

Petitioner next argues that the Review Department did not adequately respond to this Court's order because he had a fundamental due process right to additional data analysis or renewed discovery. (Pet I., at p. 5, 10 [arguing that denial of an opportunity to augment the record and denial of his motion for reinstatement deprived him of his fundamental due process].) Petitioner's only due process entitlement in State Bar disciplinary proceedings is a "fair hearing," which includes notice and an opportunity to be heard. (*Rosenthal v. State Bar* (1987) 43 Cal. 3d 612, 634; *Coppock v. State Bar* (1988) 44 Cal. 3d 665, 676.)

Petitioner does not contest that he was provided notice of the charges against him and a full evidentiary hearing in which he was entitled to present evidence. (See RD Decision, at p. 17 ["Harper received a fair hearing, the result of which was our recommendation that he be disbarred in his third disciplinary cased, based on the evidence, the arguments, the case law, and our disciplinary standards."].)

Nor was any due process right violated by the State Bar's failure to affirmatively produce the disparity study and/or data underlying the study. (Pet., at 8, 10 [alleging that the State Bar should have turned over this information to Petitioner in pre -trial discovery].) The State Bar does not have an affirmative obligation to produce evidence outside of a proper discovery request, or upon court order, with the exception of exculpatory evidence. (State Bar Rules of Procedure, rule 5.65-66; Bus. & Prof. Code § 6085.[17])

[17] Respondents have a right "to receive any and all exculpatory evidence from the State Bar after the initiation of a disciplinary proceeding in State Bar Court, and thereafter when this evidence is discovered and available. . ."

As the disparity study has no bearing on Petitioner's culpability for the charged alleged ethical violations, nor is related to any substantive issue in his disciplinary proceeding, it is not exculpatory evidence the State Bar was required to affirmative disclose. (Black's Law Dictionary 566 (6th ed. 1990) [defining exculpatory evidence as evidence "which tends to justify, excuse or clear the defendant from alleged fault or guilt"].) As such, Petitioner is unable to establish any due process violation.

### B. The Review Department Correctly Rejected Petitioner's Discrimination Claims

After full consideration, the Review Department rejected Petitioner's disparate impact claims, concluding that "there is no evidence in the record that supports [Petitioner's] claims that the discipline recommendation here was based on the disparate impact of male attorneys." (RD Decision, at p. 17.) Petitioner fails to establish how the Review Department erred in its substantive rejection of Petitioner's disparate impact claims.

Petitioner's only "evidence" of the State Bar's purported discrimination is the existence of Dr. Farkas' disparity study, which purportedly demonstrates that Black male attorneys are disbarred at significantly higher rates than White male attorneys. (Reply Brief, at p. 5.) As the Review Department correctly found, the study itself is not "credible evidence" that *Petitioner* was discriminated against in the disciplinary process. (RD Decision, at p. 15-16 [Petitioner presents "no credible evidence" of disparate impact].) Rather, the study indicates that there are widespread, systemic, and social issues that result in Black attorneys being disbarred at higher rates than White attorneys. These factors include, *inter alia*, a higher number of complaints received against Black attorneys, a higher number of investigations opened against Black attorneys, lower representation by counsel of Black attorneys, and a higher

number of Black attorneys being solo practitioners. (Nov 14, 2019 BOT Item, Attachment A, at p. 12-16; 18 ["We found that these variables might explain all race/ethnic and gender differences in these outcomes. . . . Racial differences in the [disciplinary] outcomes may be largely attributable to racial differences in these variables."].)

While these disparities are undoubtedly important to address and the State Bar recognizes that systematic reform is needed, none of these disparities demonstrate discrimination in Petitioner's disciplinary proceeding or disbarment recommendation. The study compares discipline rate between race and gender for attorneys admitted to the State Bar between 1990 and 2009, and for whom race/ethnicity and gender information is available. (Nov. 2019 BOT Item, at p. 2.) The study does not break down individual cases in such a way that Petitioner could possibly demonstrate that a similarly situated White attorney was treated differently than him in the disciplinary process, much less demonstrate intentional discrimination by the State Bar. (*United States v. Armstrong* (1996) 517 U.S. 456, 456–57 [To establish a discriminatory effect in a race (selective prosecution)case, the claimant must show that similarly situated individuals of a different race were not prosecuted]; *Muniz v. Paramo* (S.D. Cal. Dec. 30, 2019) No. 319CV02051BASBGS, 2019 WL 7290969, at *6 [to establish discrimination under the Civil Rights Act, Plaintiff must allege that he was "intentionally treated differently from others similarly situated"]; *See also Vill. of Willowbrook v. Olech* (2000) 528 U.S. 562, 564; *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678 ["[U]nadorned, the-defendant-unlawfully-harmed-me accusation[s]" are insufficient to show entitlement to relief].)

For instance, nothing in the disparity study demonstrates that a White attorney whose client made a similar complaint was treated differently than Petitioner, that a White attorney with the same charges received a different

culpability determination, that a White attorney with the same culpability determinations received lower disbarment recommendation, or any other number of other individualized factors necessary to show differential treatment of a similarly situated white attorney.

Besides the disparity study, Petitioner's only other "evidence" of discrimination was conclusory statements unsupported by the record that were properly rejected by the Review Department. First, Petitioner argued that the Hearing Department's consideration of his discipline from 20 and 16 years ago was evidence of discrimination. (Reply Brief, at p. 4.) The Review Department correctly rejected this contention, as remoteness of prior discipline is only considered under Standard 1.8(a), where there is a single record of discipline. It is not applicable under Standard 1.8(b), when there are two or more prior record of discipline, as in Petitioner's case. As such, the Hearing Department was not required to address remoteness. (RD Decision, at p. 16.)[18]

The Review Department also appropriately rejected Petitioner's unsupported assertion that an African American judge initially recommended dismissal of his case, as there was nothing in the record to support these specious claims. (*Id*., at p. 16.)

Lastly, in this Petition, Petitioner claims that the State Bar's follow up report by Professor Robertson made suggestions for reform in the disciplinary

[18] In numerous other cases the Review Department has found that, particularly in cases of repeated, related misconduct, older records of discipline may be considered as aggravating factors. (see e.g., *In the Matter of Koehler* (Review Dept 1991) 1 Cal. State Bar Ct. Rptr 615, 628 [prior discipline had been imposed 14 years before the imposition of discipline in the new case and seven years before the commission of misconduct in the new case]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rpt. 416 [prior misconduct occurred between late 1980 and 1984 and subsequent misconduct spanned the period between 1994 and 1999].)

system that would have impacted his case. (Pet I. at p. 7 [claiming that Professor Robertson "opined the use of prior complaints over five (5) years old was inappropriate and called for a less restrictive means to achieve the purpose of the State Bar disciplinary system, even calling for in the instance of a trust account complaint the issuance of a warning letter instead of prosecution."].) Neither of these recommendations is relevant to Petitioner's case.

First, the recommendations regarding prior complaints dealt with the evaluation of *prior complaints that are closed without the imposition of discipline* (July 16, 2020 BOT Item at p. 4 [emphasis in original].) There is nothing in the record indicating that the State Bar Court used prior closed complaints in assessing Petitioner's level of discipline. Rather, the Hearing and Review Department considered two final prior records of discipline, which it was required to do under the Standards. (HD Department Decision, at p. 13-15; RD Decision, at p.13-15.)

Second, Professor Robertson did not call for a blanket revision of how the State Bar handles client trust account violations. Rather, Professor Robertson focused on the high number of "Reportable Action" bank cases, which are cases in which there is insufficient funds in client trust accounts. (July 16, 2020 BOT Item, at p. 3.) Professor Robertson suggested potential reforms for handling these cases, with a focus on preventing discipline action due to *de minimus* overdraft and other negligent errors. (*Id*., at 4-5.) His report did not address the specific level of discipline for intentional client trust account violations or misappropriation. (See generally July 16, 2020 BOT Item.) In fact, Professor Robertson acknowledged that "OCTC does not seek disbarment from attorneys merely due to even repeated negligence in client trust fund accounts – something more, like recklessness or willful misappropriation, is required." (Id., Attachment A at p. 10.) In short, none of

the potential reforms suggested by Professor Robertson are relevant to Petitioner's case, which dealt with grossly negligent conduct sufficient to constitute misappropriation. (HD Decision, at p. 6-7.)

### C. The Review Department's Disbarment Recommendation is Otherwise Appropriate

Petitioner's disbarment recommendation falls squarely within the Standards. The Review Department and Hearing Departments conducted extensive analysis of analogous cases applying Standard 2.11 and Standard 1.8(b) when an attorney misappropriates substantial sums of money, had two prior related disciplinary records, and made intentional misrepresentations to the State Bar. (HD Decision, at p.12-15; RD Decision, at p. 12-15.) Petitioner does not discuss or distinguish these cases, or the State Bar Court's application of the Standards to his case.

The Review Department even considered whether there were any compelling reasons to deviate from disbarment and found none. (RD decision, at p. 14 ["Harper has not identified an adequate reason for us to depart from applying Standard 1.8(b) and we cannot discern any."].) Ultimately, the Review Department concluded:

> [Petitioner's] misconduct does not overlap with his prior violations, demonstrating that he fails to adhere to his professional duties after being disciplined twice. Further, after attending CTA School, he has committed another CTA violation. Unlike his priors, however, Harper's present misconduct involves moral turpitude violations. His misappropriation of trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal 3d. 649, 656.) Moreover, his misrepresentation to the State Bar is of serious concern. (See *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 157 [misleading statements are troubling and oppose fundamental rule of ethics – common

> honesty - without which profession is "worse than valueless in administration of justice].) When an attorney makes a misrepresentation, it "diminishes the public's confidence in the integrity of the legal profession." (*Ibid*.)

Petitioner simply cannot avoid that both the Review Department and Hearing Department, which heard the evidence, recommended discipline fully consistent with guidelines established by both case law and the Standards.[19] Petitioner therefore fails to advance a viable legal argument for overturning the Review Department's discipline recommendation. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1307 ["[W]e accord great weight to the recommendation of the review department and petitioner bears the burden of proving the recommendation erroneous or unlawful."] [internal citation omitted].)

### D. Review Department Properly Denied Petitioner's Motion for Reinstatement

The Review Department properly considered Petitioner's previously unaddressed disparate impact arguments and still recommended disbarment. (RD Decision). Accordingly, Petitioner's Motion for Reinstatement was thereafter properly denied as moot. (*Ass'n of Irritated Residents v. Dep't of Conservation* (2017) 11 Cal. App. 5th 1202 [mootness is where the court expressly or impliedly "concludes there is no longer an existing controversy before it upon which effectual relief may be granted"].)

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[19] While the Standards are not binding on the Court, they are entitled to great weight and should be followed whenever possible. (See *In re Silverton* (2005) 36 Cal.4th 81, 92; *In re Naney* (1990) 51 Cal.3d 186, 190 ["[A]dherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct . . . Accordingly, we give the standards great weight"]; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933, fn. 5.)

## IV. CONCLUSION

As the State Bar Court concluded, the evidence in this case establishes that Petitioner engaged in misappropriation and made knowing and intentional misrepresentations to the State Bar. The Review Department's discipline recommendation for Petitioner's misconduct falls squarely within the guidelines of the Standards. After carefully evaluating Petitioner's claims of disparate impact, the Review Department properly found that Petitioner presented no evidence of disparate impact or discrimination. Accordingly, there is no basis for the Court to grant Petitioner the relief he seeks. The Petition should be denied.

Dated: January 8, 2021

Respectfully submitted,

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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 6,472 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: January 8, 2021

/s/*Suzanne C. Grandt*
SUZANNE C. GRANDT

# APPENDIX A

PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed April 14, 2020

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

| | | |
|---|---|---|
| In the Matter of | ) | 17-O-01313 |
| | ) | |
| GREGORY HARPER, | ) | OPINION AND ORDER |
| | ) | [As Modified on September 25, 2020] |
| State Bar No. 146119. | ) | |
| | ) | |

This is Gregory Harper's third discipline case, all involving client trust account (CTA) violations. He is charged with three counts of misconduct related to the improper handling of his CTA in one client matter, including misrepresentation to the State Bar. His client disputed the amount of his attorney fees and eventually complained to the State Bar. Instead of holding the disputed funds in his CTA, as required, Harper withdrew money, which caused his CTA balance to fall below the requisite amount. When asked by the State Bar about the complaint, he misrepresented that he had maintained the necessary funds in his CTA. The hearing judge found him culpable as charged and recommended he be disbarred.

Harper appeals, mainly disputing the factual basis for culpability. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and supports the hearing judge's decision. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the judge's culpability, discipline, and most aggravating and mitigating findings. Harper committed acts of moral turpitude and did not prove compelling mitigation. Disbarment is therefore appropriate under our disciplinary standards to protect the public, the courts, and the legal profession.

## I. PROCEDURAL BACKGROUND

On October 22, 2018, OCTC filed a three-count Notice of Disciplinary Charges (NDC) charging Harper with (1) failing to maintain client funds in his CTA, in violation of rule 4-100(A) of the Rules of Professional Conduct;[1] (2) misappropriation, in violation of Business and Professions Code section 6106;[2] and (3) misrepresentation, in violation of section 6106. On February 4, 2019, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation). Trial was held on February 19, 21, and 22, and posttrial closing briefs followed. The hearing judge issued her decision on May 23, 2019.

On April 14, 2020, we issued our opinion. On June 15, 2020, Harper filed a petition for review in the Supreme Court. On August 12, 2020, the Supreme Court remanded the matter to us to consider "Harper's unaddressed claim that his discipline is based on a theory of disparate impact." Pursuant to the remand, this modified opinion addresses Harper's claim.

## II. FACTUAL BACKGROUND[3]

### A. DeJoie Disputes Fee

In June 2015, Evigne DeJoie hired Harper to represent her in two matters relating to eviction proceedings, which Harper ultimately settled for a combined total of $59,000. On November 7, 2016, Harper received the settlement funds on DeJoie's behalf, and deposited them into his CTA on November 17. On November 23, he withdrew $37,913 from his CTA in the

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[1] All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted. Rule 4-100(A) provides, in part, that when a client disputes the portion of funds that an attorney has a right to receive, then the disputed portion "shall not be withdrawn until the dispute is finally resolved."

[2] All further references to sections are to this source. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

[3] The factual background is based on the Stipulation, trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

form of a cashier's check payable to DeJoie. Along with the check, he provided a settlement disbursement form that stated that he was withholding $19,667 of the funds for attorney fees and $1,420 for sanctions incurred during the litigation. DeJoie disputed these amounts. On November 30, Harper sent DeJoie notice of her right to request fee arbitration, which she submitted on February 7, 2017. DeJoie and Harper settled the matter after participating in arbitration on July 28, 2017.

**B. Harper's Misrepresentation to the State Bar**

On February 8, 2017, DeJoie submitted a complaint to the State Bar. On May 2, the State Bar sent Harper a letter, requesting his reply to the allegations. On June 13, Harper responded: "Evigne disputed my entitlement to any fee whatsoever. Thus, I have left the disputed amount of $21,087.00 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account." However, his bank records show that his CTA balance repeatedly fell below $21,087 from December 2016 through June 2017.[4] On June 12, 2017, the balance was $5,600.22. At trial, Harper testified that he maintained the entire $21,087 in his CTA from November 23, 2016 through July 28, 2017, and he was unaware that his CTA dropped below the requisite amount. He also testified that he reviewed his CTA bank statements monthly.

The hearing judge found Harper's testimony not credible. We give this credibility finding great weight. (Rules Proc. of State Bar, rule 5.155(A).)

[4] On December 22, 2016, Harper's CTA balance was $20,598.85, and on December 23, it dropped to $16,368.85. While he had over $21,087 in the CTA in January and February 2017, it dipped to $18,271.67 on March 8, 2017, and was as low as $5,341.67 during the month of March. In April, it fell to $15,843.49, and to $493.61 in May.

## III. CULPABILITY

### A. Count One: Failure to Maintain Client Funds in CTA (Rule 4-100(A)) Count Two: Misappropriation (§ 6106)

The NDC alleges that DeJoie disputed the amount Harper was entitled to keep when he disbursed settlement funds to her on November 23, 2016. Count one charges Harper with violating rule 4-100(A) for failing to maintain a CTA balance of $21,087 on behalf of DeJoie. Count two charges Harper with a moral turpitude violation for misappropriation of $20,593.39 of DeJoie's funds between November 23, 2016, and May 8, 2017. The hearing judge found Harper culpable on both counts. We agree. The judge correctly determined that Harper should have maintained $21,087, and thus he misappropriated $20,593.39[5] through gross negligence.

When a trust account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. The burden then shifts to the attorney to show that misappropriation did not occur and that he was entitled to withdraw the funds. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) After DeJoie disputed the attorney fees and sanctions on November 23, 2016, Harper was required to maintain $21,087 in his CTA for her.

On review, Harper argues that the Stipulation was ambiguous as to the date of the fee dispute. He asserts that it did not begin on November 23, 2016, as stated in the Stipulation and as found by the hearing judge. Harper contends that the dispute began in February 2017 when DeJoie requested fee arbitration. The Stipulation states, "On November 23, 2016, DeJoie met [Harper] at his residence, where [Harper] gave DeJoie the $37,913 cashier's check, and a settlement disbursement form. The disbursement form stated that [Harper] was withholding $19,667 of the settlement for attorney's fees and $1,420 for sanctions incurred during the

[5] This figure represents $21,087 (the disputed amount) minus $493.61 (the lowest CTA balance during the relevant time period).

litigation. DeJoie disputed the amount withheld for attorney's fees and the retention of funds to pay sanctions."

Harper concedes that the Stipulation states that DeJoie disputed the fees on November 23, 2016, but he argues that it was not Evigne DeJoie, but her father (with the same last name), who disputed the fees on that date. We reject Harper's argument as the record supports the factual finding that the fee dispute with DeJoie arose in November. DeJoie's father is not mentioned in the Stipulation, which is not ambiguous and clearly asserts that DeJoie disputed the fees on November 23, 2016. The hearing judge accepted the facts as stipulated by the parties, as do we. (*In the Matter of Rodriguez* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 884, 886 [unless parties' stipulation has been set aside, "it remains binding on the parties, and the facts recited in the stipulation are deemed established for purposes of this proceeding"].) In addition, Harper was directly asked at trial if the fee dispute occurred on November 23. He responded that Evigne DeJoie disputed the fees, as stated in the Stipulation.[6] Harper must accept these facts. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510–511 [attorney in disciplinary proceeding must accept facts to which he has stipulated].)[7]

The balance of the CTA fell below the required amount in December 2016 and in March, April, May, and June 2017. Harper did not rebut the presumption of misappropriation. He wrote several checks from the CTA, some to himself, which caused the CTA to dip below $21,087. Therefore, he is culpable of grossly negligent misappropriation under count two.

As to count one, we affirm the hearing judge's finding that Harper violated rule 4-100(A) by failing to maintain $21,087 in his CTA on behalf of DeJoie. Client funds in a CTA must be

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[6] On the first day of trial, OCTC asked, "So I'd like you to explain now when you understood there to be a fee dispute between yourself and Evigne DeJoie." Harper replied, "Now I understand that it was on November 23rd, I believe, that we said in the stipulation."

[7] Harper also testified that he knew when he delivered the check to DeJoie that she was dissatisfied with the amount. One week later, he notified her of her right to seek fee arbitration.

maintained until the balance owed to the client is settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277–278.) Like the judge, we assign no additional weight in discipline because this count is duplicative of the misappropriation violation. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

**B. Count Three: Misrepresentation (§ 6106)**

Count three alleges that Harper wrote to a State Bar investigator on or about June 13, 2017, maintaining that the $21,087 in disputed funds were kept in his CTA when he knew that statement was false and misleading. The NDC alleges that a violation of section 6106 may result from intentional conduct or grossly negligent conduct. The hearing judge found that Harper violated section 6106 by intentionally misrepresenting that the funds had remained in the CTA.[8] We agree.

In the statement attached to the June 13 letter, Harper wrote, ". . . I have left the disputed amount of $21,087 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account."[9] He contends that he was referring to the amount in his CTA at the time of the State Bar's inquiry letter, May 2, 2017, not the entire time the fees were in dispute. Therefore, he asserts that he is not culpable of the misrepresentation charged in count three. We reject this argument. Harper testified that he reconciled his client ledgers and his bank statements every month. We agree with the hearing judge that if that were true, it "would have revealed that DeJoie's disputed funds did not remain in his account in December 2016, and March and April 2017." Harper also testified that he reviewed his bank statements before sending the June 13

[8] We give great weight to the hearing judge's finding as to intent. (*In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155.)

[9] The June 13 letter was sent by Samuel C. Bellicini, Harper's attorney. It states that DeJoie "timely received her $37,913.00 share of the $59,000.00 settlement proceeds, and the balance in dispute, $21,087.00 has remained in Mr. Harper's CTA . . . ."

letter.[10] He claimed that even after doing so, he still believed that he was correct in asserting that he had maintained $21,087 on behalf of DeJoie since November 23, 2016. Harper's belief was not reasonable and he should have known that his statement was false and misleading. Harper's statement to the investigator was a misrepresentation that he knew was false and misleading, and constitutes moral turpitude. (*Grove v. State* Bar (1965) 63 Cal.2d 312, 315 [moral turpitude includes concealment as well as affirmative misrepresentations with no distinction to be drawn between "concealment, half-truth, and false statement of fact"].) Therefore, we find that his response to the State Bar's inquiry letter constituted intentional misconduct in violation of section 6106.

## IV. AGGRAVATION AND MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Harper to meet the same burden to prove mitigation.

### A. Aggravation

#### 1. Prior Records of Discipline (Std. 1.5(a))

Harper has two prior records of discipline. On April 13, 1994, he received a stayed suspension of 90 days and an 18-month period of probation including conditions. (State Bar Court Nos. 91-O-04542; 92-O-20050; Supreme Court No. S037840.) Harper stipulated to misconduct in two matters. In the first matter, 16 checks drawn on Harper's CTA were returned for insufficient funds in 1991, he used his CTA as a personal account, and he failed to properly maintain his banking records. In the second matter, Harper failed to promptly deliver settlement funds, which had been removed from his CTA for approximately two months in 1992, and he commingled funds in his general account. He stipulated to violations of rule 4-100(A) in both matters. There were no aggravating circumstances and he received mitigation for lack of harm,

[10] On June 13, 2017, his CTA balance was around $5,600.

cooperation, extraordinary good character, and hiring an accountant to help him properly maintain his bank accounts.

His second discipline involved three client matters. On February 6, 2003, the Supreme Court ordered Harper actually suspended for six months and placed on probation for two years with conditions, including attending State Bar CTA School. (State Bar Court Nos. 99-O-10958; 99-O-12126; 01-O-03596; Supreme Court No. S111512.) In the first matter, two checks drawn on Harper's CTA were returned for insufficient funds in 1998, he commingled funds in his CTA, and wrote personal checks from his CTA. He stipulated to a rule 4-100(A) violation. In the second matter, he failed to adequately supervise an employee who stole over $10,000 of entrusted client funds. Harper stipulated to a violation of rule 3-110(A) for failing to perform legal services with competence. In the third matter, Harper failed to promptly deliver funds to which the client was entitled until almost six years after he had collected the funds, in violation of rule 4-100(B)(4). He received aggravation for his prior record of discipline, which included similar misconduct, and for multiple acts of misconduct. Harper was afforded mitigation for excessive delay of the disciplinary proceedings.

The hearing judge assigned aggravation for Harper's two prior records of discipline, but did not specify any weight. We conclude that they merit substantial aggravating weight. The two previous disciplinary matters involved misconduct similar to that in the current matter, and, in the second discipline, he was required to attend CTA School. This indicates that his prior disciplines did not rehabilitate him, causing concern about future misconduct. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.)

**2. Multiple Acts of Wrongdoing (Std. 1.5(b))**

Harper repeatedly allowed his CTA balance to drop below the amount he was required to maintain on behalf of DeJoie. The hearing judge assigned moderate aggravation and we agree.

(*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts]; see also *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over an 18-month period].)

**3. Uncharged Misconduct (Std. 1.5(h))**

Aggravating circumstances may include "uncharged violations of the Business and Professions Code or the Rules of Professional Conduct." (Std. 1.5(h).)[11] The hearing judge found uncharged misconduct for commingling under rule 4-100(A) and moral turpitude under section 6106 because Harper acknowledged at trial that he paid one client's obligations with another one's funds, believing the practice was ethical as long as the payments were documented. We find this analysis unclear as it does not point us to evidence that commingling occurred.

When funds of multiple clients are deposited into a CTA, they become fungible assets that are used regardless of their original ownership. The essence of commingling, however, is that the attorney is improperly combining his or her own funds with those of the clients. "Commingling is committed when a client's money is intermingled with that of the attorney and its separate identity lost." (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.)

Upon our independent review of the record, we do not find clear and convincing proof of uncharged misconduct. It was established at trial that Harper allowed his CTA to fall below the requisite amount, as charged under counts one and two. Since there is no other evidence of an additional commingling violation, we assign no aggravation under standard 1.5(h).

[11] OCTC argued in its closing brief at trial for aggravation under standard 1.5(h) because Harper used his CTA for "any desired purpose throughout the month" and left unearned fees in the account. However, it abandoned this argument in its responsive brief on review.

**4. Pattern of Misconduct (Std. 1.5(c))**

Though OCTC did not seek review, it argues in its responsive brief that we should find a pattern of misconduct because this is Harper's third disciplinary matter related to his handling of client funds. To establish aggravation for a pattern of misconduct, the pattern must involve serious misconduct with a common thread over an extended period of time. (Std. 1.5(c); *Young v. State Bar* (1990) 50 Cal.3d 1204, 1217.) OCTC seeks to include Harper's *prior* records of discipline in order to establish the pattern.[12] We decline to find a pattern as an additional factor in aggravation. We have considered Harper's prior records of discipline in aggravation under standard 1.5(a), and have recognized their similarity in determining the appropriate level of discipline. Further aggravation would be duplicative and an overemphasis of the import of the prior matters.

**5. Indifference Toward Rectification or Atonement for the Consequences of Misconduct (Std. 1.5(k))**

OCTC also argues on review that Harper should receive aggravation for failure to accept responsibility due to his attempt to disavow the Stipulation in his opening brief. Harper's denial of culpability despite the Stipulation establishes his indifference and lack of remorse regarding the consequences of his misconduct. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [finding of additional aggravation for indifference where attorney continued to deny culpability despite stipulation that established conduct as charged].) We assign substantial aggravation for Harper's indifference.

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[12] OCTC cites *Twohy v. State Bar* (1989) 48 Cal.3d 502, 512–513 and *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564, fn. 15. These cases are distinguishable from the present matter. In *Twohy*, a pattern was established due to the involvement of his drug addiction as a common thread in each instance of the past and present misconduct. In *Kaplan*, we recognized the holding in *Twohy*, but elected not to apply it as there was sufficient indicia of a pattern without reliance on prior discipline.

## B. Mitigation

### 1. Extraordinary Good Character (Std. 1.6(f))

Harper may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) Nine witnesses, including three attorneys, testified at trial regarding Harper's good character. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) All of the witnesses were aware of the full extent of the misconduct and attested that the charges in the NDC did not change their high opinion of Harper. In addition, most knew that he had been disciplined twice before. Each of the witnesses has known Harper for a considerable length of time, at least 25 years, and some for much longer. They praised his integrity, honesty, and skills as a lawyer. We affirm the hearing judge's determination that Harper is entitled to substantial mitigation for his good character.

### 2. Candor and Cooperation with State Bar (Std. 1.6(e))

Harper's Stipulation is a mitigating circumstance. (Std. 1.6(e) [spontaneous candor and cooperation with State Bar is mitigating].) The hearing judge assigned nominal weight for the Stipulation. She stated that "the timing and nature of the stipulation, which admitted facts that were easily proven, obviated very little in terms of OCTC's preparation for trial." (Cf. *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to easily provable facts mitigating if facts assisted prosecution of case].) On review, Harper asserts that the Stipulation is ambiguous as to the date of the fee dispute and contradicts his trial testimony. As found above, this argument is without merit. His challenge of the facts in the Stipulation causes concern and, therefore, we assign no mitigation under standard 1.6(e).

### 3. Community Service

Community service is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Harper testified that he mentored young attorneys and represented juveniles in criminal proceedings by court appointment. He stated that he invites high schoolers to intern at his law practice, particularly those with criminal records who faced difficulty in finding employment. Harper also testified that he has dedicated himself to his community by serving on various Berkeley city and neighborhood commissions. As chairman of the Housing Advisory Committee, he oversaw housing funds, developed policy, and lobbied for the city. Harper testified that he currently serves on Berkeley's Fair Campaign Commission, and has done so for three years, where he reviews campaign contribution complaints and develops rules for campaign finance in Berkeley. His character witnesses also highlighted his commitment to Berkeley and his neighborhood, and two testified that they served on city commissions with him. Harper also stated that he has served on the California Lawyers Association's Tax Procedure and Litigation Committee since 2009 and was a published author in the California Journal of Tax Litigation. We find that he is entitled to substantial weight in mitigation for his community service. (Cf. *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

## V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young*

(1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Considering Harper's record of two prior disciplinary matters, we also look to standard 1.8(b),[13] which states that disbarment is appropriate where an attorney has two or more prior records of discipline 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. Harper's case meets two of these criteria. First, he was actually suspended for six months in his second disciplinary matter. Second, we find that the similarity of his misconduct in his prior and current disciplinary matters demonstrates his unwillingness or inability to conform to his ethical responsibilities.[14]

Standard 1.8(b) does not apply if (1) the most compelling mitigating circumstances clearly predominate; or (2) the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. These exceptions do not apply here. Harper has considerable mitigation, particularly his good character evidence and community service, but it does not clearly predominate over the serious aggravating circumstances. And the misconduct in the present matter occurred over ten years after his previous misconduct.

We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory in a third disciplinary matter, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v.*

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[13] Standards 2.1(b) and 2.11 are also applicable. Standard 2.1 provides for actual suspension for misappropriation involving gross negligence. Standard 2.11 provides for disbarment or actual suspension for an act of moral turpitude.

[14] All three of Harper's disciplinary matters involve violations related to his CTA.

*State Bar* (1991) 53 Cal.3d 495, 506-507 [analysis under former std. 1.7(b)]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill purposes of attorney discipline, "nature and chronology" of prior record must be examined].) Standard 1.8(b) is not applied reflexively, but "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 289.) Deviating from standard 1.8(b) requires the court to articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

Harper has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot discern any. His present misconduct is similar to his past wrongdoing. His misconduct does not overlap with his prior violations, demonstrating that he fails to adhere to his professional duties after being disciplined twice. Further, even after attending CTA School, he has committed another CTA violation. Unlike his priors, however, Harper's present misconduct involves moral turpitude violations. His misappropriation of client trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) Moreover, his misrepresentation to the State Bar is of serious concern. (See *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 157 [misleading statements are troubling and oppose fundamental rules of ethics—common honesty—without which profession is "worse than valueless" in administration of justice].) When an attorney makes a misrepresentation, it "diminishes the public's confidence in the integrity of the legal profession." (*Ibid.*)

Given the nature and chronology of Harper's violations, we find no reason to depart from the presumptive discipline of disbarment under standard 1.8(b). The State Bar Court has had to intervene three times to ensure that Harper adheres to the professional standards required of

those who are licensed to practice law in California. He has failed to meet his professional obligations since the early 1990s and did not present compelling mitigation. We conclude that further probation and suspension would be inadequate to prevent him from committing future misconduct that would endanger the public and the profession.

## VI. CONSIDERATION OF CLAIM OF DISPARATE IMPACT ON REMAND

In a footnote near the end of his rebuttal brief on review, Harper argues against disbarment, stating that such a discipline would be "indicative of the State Bar's study showing the discriminatory and *disparate* impact of discipline on Black male attorneys."[15] He concludes by asserting that disbarment would be "disproportionately harsh especially considering no harm was suffered and payment was made immediately." We did not address these claims in our original opinion, but we do so here as ordered by the Supreme Court.[16]

Harper presents no credible evidence of disparate impact as he alleges in several arguments within his footnote. First, he argues the hearing judge based her adverse credibility determination on her "subjective feelings" about him, even though he asserts he testified "honestly" and "truthfully." This argument is without merit. We give great weight to the hearing judge's credibility findings because that judge is best suited to resolve credibility having observed and assessed the witnesses' demeanor and veracity firsthand. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032.) Our record reveals that the judge made a specific determination that Harper was not credible when he stated that he maintained the disputed funds

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[15] Harper did not attach this study to his rebuttal brief or move to augment the record to include the study. The study is not a part of the record. On our own motion, we take judicial notice of the fact that in November 2019 the State Bar released a "Report on Disparities in the Discipline System." (Rules Proc. of State Bar, rule 5.156(B). The report was released after Harper filed his opening brief on review on October 17, 2019.

[16] We interpret the Supreme Court's remand order as an order to the Review Department to address Harper's unaddressed claims on the record before us and not as an order to remand the matter to the Hearing Department for further evidentiary hearings.

in his CTA and was unaware that it dipped below the requisite amount. The judge explained her finding, noting that Harper stated that he had reviewed his monthly statements; yet, the statements plainly show that he had not retained the disputed funds in his CTA.

Next, Harper argues that he was "never allowed to testify as to monitoring his trust accounts." In disciplinary proceedings, an accused attorney is obligated to appear and present evidence. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 792.) We find nothing in the record that suggests Harper was denied the opportunity to do so. He testified in his own defense and presented character testimony from nine witnesses. At the end of this testimony, the judge asked Harper's attorney whether he had anything further to present and he stated that he did not.

Harper also makes the argument that the remoteness of his prior disciplines was "ignored by non[-]African American judges," and his disbarment was largely based on his prior discipline cases that were "20 and 16 years old." The applicable standard here, standard 1.8(b), is not based on an analysis of whether the prior discipline was remote in time. As such, the hearing judge was not required to address remoteness.[17] Therefore, Harper's argument is without merit.

Harper further asserts that the "initial" judge, an African American, recommended dismissal while a "second" non-African American judge recommended disbarment, and did not permit the prosecutor to negotiate a lesser sanction. Harper's claim regarding the purported actions of the two judges is completely unsupported by the record. (*In re Morse* (1995) 11 Cal.4th 184, 207 [Review Department must independently review the record].)

Finally, Harper stated that he provided explanations and documentation from his banker and "worked to comply with the Trust accounting handbook" in defense to the charges in this

[17] Remoteness of a prior is only considered under standard 1.8(a) where there is a single prior record of discipline. Harper had two prior records of discipline, therefore, standard 1.8(b) is the controlling standard.

case. He argues that these "extraordinary circumstances" justify a lesser sanction, if any. We disagree as disbarment is appropriate.

It is well established that respondents are entitled to a fair hearing in disciplinary proceedings. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634.) Harper received a fair hearing, the result of which was our recommendation that he be disbarred in his third disciplinary case, based on the evidence, the arguments, the case law, and our disciplinary standards. There is no evidence in the record that supports his claims that the discipline recommendation here was based on the disparate impact of discipline on Black male attorneys. Accordingly, Harper's claims of disparate impact are rejected.

## VII. RECOMMENDATION

We recommend that Gregory Harper be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend that Harper comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

## VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Gregory Harper be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 26, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.

**CERTIFICATE OF ELECTRONIC SERVICE**

[Gen. Order 20-04; Code Civ. Proc., § 1013b, subds. (a)-(b)]

I, the undersigned, certify that I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on September 25, 2020, I electronically served a true copy of the following document(s):

OPINION AND ORDER FILED APRIL 14, 2020 [AS MODIFIED ON SEPTEMBER 25, 2020]

by electronic transmission on that date to the following:

GREGORY HARPER
ghlaw@pacbell.net

Kimberly G. Anderson
Kimberly.Anderson@calbar.ca.gov

I hereby certify that the foregoing is true and correct.

Date: September 25, 2020

Julieta E. Gonzales
Court Specialist
State Bar Court of California
Julie.Gonzales@calbar.ca.gov

# APPENDIX B

PUBLIC MATTER

FILED

MAY 23 2019

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT - SAN FRANCISCO**

| | | |
|---|---|---|
| In the Matter of | ) | Case No. 17-O-01313-MC |
| | ) | |
| GREGORY HARPER, | ) | DECISION AND ORDER OF |
| | ) | INVOLUNTARY INACTIVE |
| State Bar No. 146119. | ) | ENROLLMENT |
| | ) | |

## Introduction[1]

In this contested disciplinary matter, Respondent Gregory Harper is charged with three counts of misconduct in a single client matter: 1) failing to maintain $21,087 of disputed funds in his client trust account (CTA), in willful violation of former rule 4-100(A); 2) misappropriating over $20,000 of his client's funds, in willful violation of section 6106; and 3) making a false and misleading statement to the Office of Chief Trial Counsel of the State Bar of California (OCTC) during a disciplinary investigation, in willful violation of section 6106. OCTC has the burden of proving these charges by clear and convincing evidence.[2] The court finds that Respondent is culpable of the misconduct alleged in all counts and recommends that Respondent be disbarred.

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[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct and all statutory references are to the Business and Professions Code.

[2] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

## Significant Procedural History

OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on October 22, 2018. On November 16, Respondent filed his response. On February 4, 2019, the parties filed a Stipulation as to Facts and Admission of Documents. The court held a three-day trial on February 19, 21, and 22. The parties filed their closing argument briefs on March 11 and this matter was submitted for decision the same day.

## Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 11, 1990 and has since been a licensed attorney at all times.

**Background Facts Regarding Respondent's Trust Account**

Respondent maintained two law offices, one in the Bay Area and another in Southern California. He employed an independent contractor, Jeane Hua, to manage the bookkeeping for his law practice. Hua worked out of the Southern California office and worked for Respondent during all times relevant to this matter.

Respondent maintained a CTA at Chase Bank. He used an electronic and paper account journal which fails to match each transaction with each client and did not show accounting adjustments. Respondent believed that he could use funds in his CTA from one client to pay obligations for another client. At times, when issuing checks with funds from the CTA, Hua or Respondent would note on the check to which client the payment corresponded. However, in many instances when checks were made payable to Respondent, there was no indication what the payment was for and from which client's funds they were being withdrawn. Hua is authorized to make deposits into the CTA, and she has access to the electronic and paper account journals, but Respondent is responsible for maintaining them. Respondent reviews every transaction with Hua and relies on her to make sure the balance on the account is correct.

Based on his understanding of the rules, Respondent's practice was to ensure that his CTA was balanced at the end of the month. Hua assisted him with this monthly reconciliation. Although Respondent claimed to reconcile at the end of the month, the time period that the reconciliation occurred varied – sometimes it would take place within one, two or even three weeks after the month had ended. Respondent did not review his CTA balance daily, he was not sure what the balance was throughout the month, and he did not view his bank statements online. Hua informed Respondent about the balance, and if the account fell below a certain amount that was needed, they would make deposits into the account to "restore funds." At times, Respondent would waive attorney's fees or fail to pay himself on a matter to balance the account. Respondent's practice was to leave money in his account to cover any deficits.

**Case No. 17-O-01313 – The DeJoie Matter**

**Facts**

Evigne DeJoie briefly worked in Respondent's office while he represented her in two civil matters in 2015 and 2016. Respondent settled both matters on behalf of DeJoie for $59,000, and on November 17, 2016, Respondent deposited the settlement funds into his CTA. On November 23, Respondent provided DeJoie a cashier's check for $37,913, withdrawn from his CTA, and a settlement disbursement form. The disbursement form stated that Respondent was withholding $19,667 in settlement funds for attorney's fees and $1,420 for sanctions incurred during the litigation. On the same day, DeJoie disputed the amount withheld, which totaled $21,087.

On November 30, 2016, Respondent sent DeJoie a notice of her right to request fee arbitration. On February 7, 2017, DeJoie submitted a request for fee arbitration, and on July 28, DeJoie and Respondent attended California State Bar Mandatory Fee Arbitration. They reached

a settlement for Respondent to refund Dejoie $7,000. Respondent issued the refund three days later on July 31.

Respondent thought he was required to keep DeJoie's funds in the CTA once she filed the fee arbitration request on February 7, 2017. Prior to that date, Respondent believed he was entitled to the disputed funds, but he did not intentionally withdraw them. From December 2016 through June 2017, Respondent's CTA repeatedly fell below $21,087, the amount in dispute. Throughout the eight-month period, Respondent or Hua, who had Respondent's authorization, issued various checks, causing the CTA balance to fall below $21,087.[3]

At its lowest, Respondent's CTA balance fell to $493.61 on May 8, 2017. During that time, Respondent had received a large settlement check on behalf of a client, J. Vargas. Due to an error on the check, the funds were not credited to Respondent's account as expected. Even though Vargas' settlement funds were not available, Respondent paid a lien of over $42,000 on Vargas' behalf, causing the CTA to dip to $493.61. Respondent acknowledged that he should not have paid the lien before ensuring that the settlement funds were available. To offset the deficit from the Vargas transaction, Hua authorized Respondent to use settlement funds in Respondent's CTA that belonged to her.[4]

**OCTC's Investigation**

On February 8, 2017, DeJoie submitted a complaint to the State Bar of California. On May 2, OCTC sent Respondent an inquiry letter, requesting his response to DeJoie's allegations. On June 13, Respondent provided a response through counsel in which he stated "Evigne disputed my entitlement to any fee whatsoever. Thus, I have left the disputed amount of

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[3] Respondent's CTA balance dipped to the following amounts: December 2016: $16,368.85; March 2017: $6,941.67; April 2017: $15,843.49; May 2017: $493.61; and June 2017: $5,600.22.

[4] Vargas was a friend of Hua.

$21,087.00 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account." When preparing this response, Respondent reviewed his bank statements but did not review his account journals. During the hearing in this matter, Respondent stated that the entire $21,087 was held in trust from November 23, 2016 through July 28, 2017, and that he was not aware that his CTA balance fell to $493.60 in May 2017. Respondent claimed that at the time he sent this response, he had not yet received his May 2017 bank statement.[5] On June 12, 2017, the day before Respondent made the statement to OCTC about retaining the disputed funds, his CTA balance was $5,600.22.

**Conclusions**

***Count One - (Former Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])***[6]

***Count Two - (§ 6106 [Moral Turpitude])***[7]

In Count One, OCTC charged Respondent with willfully violating former rule 4-100(A) by failing to maintain $21,087 in disputed funds in his CTA on behalf of DeJoie. In Count Two, OCTC charged Respondent with dishonestly or grossly negligently misappropriating

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[5] Respondent's statement that he maintained the disputed funds in his account and was unware that his CTA dipped below the disputed amount is not credible. During the trial, Respondent was not forthcoming with his answers and the evidence demonstrates that in December 2016 and March, April, May and June 2017, Respondent's CTA fell below $21,087. Even if he was unaware of the shortfall in May 2017, Respondent knew he had not retained the disputed funds in his CTA because he reviewed his December 2016, and March and April 2017 bank statements.

[6] Former rule 4-100(A) requires an attorney to deposit and maintain in trust "[a]ll funds received or held for the benefit of clients . . . ." Former Rule 4-100(A)(2) requires that "when the right of the [attorney] or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

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

$20,593.39[8] of DeJoie's funds, in willful violation of section 6106. The court finds Respondent culpable of willfully violating former rule 4-100(A) and section 6106.

When DeJoie disputed the $21,087 Respondent withheld from her settlement for attorney's fees and sanctions, Respondent was required to maintain those disputed funds in his CTA until the disputed was resolved. However, Respondent's CTA balance repeatedly fell below $21,087, and at its lowest during the relevant time period, it fell to $493.61. The mere fact that Respondent's CTA balance fell below $21,087 raises an inference of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474 [inference of misappropriation if attorney's trust account balance drops below amount attorney should maintain for client].) Once the inference of misappropriation arises, the burden shifts to Respondent to prove that no misappropriation occurred. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.)

Respondent has failed to rebut the presumption of misappropriation. However, the court finds that the misappropriation was not intentional but grossly negligent. The evidence demonstrates that Respondent's management of his CTA is grossly inadequate. He did not match each transaction with the corresponding client, did not denote on each check what the payment was for and to which client's funds it was attributed, and he failed to remove his attorney's fees once earned. Although OCTC has failed to present clear and convincing evidence that Respondent intentionally misappropriated $20,593.39 of disputed funds, Respondent's gross negligence in maintaining his CTA constitutes an act of moral turpitude in willful violation of section 6106. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [moral turpitude finding proper for gross carelessness in failing to maintain trust account].)

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[8] The amount in dispute - $21,087 - minus the lowest amount of funds in the CTA - $493.60 - lead to this figure.

Moreover, Respondent violated former rule 4-100(A) by failing to maintain $21,087 in his CTA on DeJoie's behalf. The court assigns no additional weight for discipline to this rule violation, however, because the misconduct underlying the moral turpitude charge in Count Two supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)[9]

***Count Three (§ 6106 [Moral Turpitude - Misrepresentation])***

OCTC charged Respondent with willfully violating section 6106 by stating in writing to an OCTC investigator on June 13, 2017, that $21,087 of DeJoie's disputed funds remained in the CTA when Respondent knew his statement was false and misleading. Respondent's specifically stated, "I have left the disputed amount of $21,087.00 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account." When Respondent made this statement, his CTA balance was $5,600.00. Even if Respondent was not aware that his balance fell below $21,087 in June 2017 (or May 2017 as he contends), Respondent reviewed his bank statements before providing OCTC with his response. A review of his statements would have revealed that DeJoie's disputed funds did not remain in his account in December 2016, and March and April 2017. The court finds that Respondent intentionally misrepresented to OCTC that he kept $21,087 of DeJoie's disputed funds in his CTA through June 13, 2017. As such, Respondent is culpable of willfully violating section 6106.

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[9] Respondent maintains that he is not culpable of violating former rule 4-100(A) and section 6106 because at the end of each month the balance in his CTA had more than $21,087. The court rejects this argument because Respondent's ethical obligation was to maintain the disputed funds in his CTA at all times, not just to ensure they remained at the end of each month.

## Aggravation and Mitigation

### Aggravation

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5) [10]

**Prior Record of Discipline (Std. 1.5(a).)**

Respondent has two prior records of discipline.

***Harper I***

On April 13, 1994, the Supreme Court suspended Respondent from the practice of law for 90 days, execution stayed, and placed him on probation for 18 months subject to conditions. Respondent stipulated to misconduct in two matters. In the first matter, from February 5 through July 31,1991, 16 checks drawn on Respondent's CTA were returned for insufficient funds. In addition, Respondent used his CTA as a personal account. He failed to promptly withdraw his legal fees from the account, and deposited his own fees and then withdrew them from the account for personal expenses.

In the second matter, Respondent stipulated to misconduct that occurred in 1992. After receiving a client's settlement funds, Respondent traveled to Southern California to meet with the client to negotiate the settlement draft and provide the client with cash. Respondent's client did not have the requisite identification to cash a check. A portion of the settlement funds were owed to a medical provider pursuant to a medical lien. The medical provider's funds remained out of Respondent's trust for two months. Subsequently, Respondent paid the medical lien with a check drawn on his general account on November 2, 1992.

Respondent's misconduct did not involve any aggravating circumstances. His cooperation with his client and the lienholder, cooperation with the State Bar, good character,

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

and Respondent's employ of an accountant to assist him with maintaining his CTA were mitigating factors.

***Harper II***

On February 6, 2003, the Supreme Court suspended Respondent from the practice of law for one year, execution stayed, and placed him on probation for two years subject to conditions. Conditions included a six-month actual suspension and attending State Bar Client Trust Accounting School. Respondent stipulated to misconduct in three matters. In the first matter, Respondent stipulated that in 1998 he wrote two checks drawn on his CTA that were returned for insufficient funds. Again, Respondent deposited earned attorney's fees into his CTA and used the account to pay personal and general office expenses.

In the second matter, Respondent received a settlement check of over $30,000 on behalf of a client in February 1997. Respondent's employee forged Respondent's and his client's signatures and deposited the funds into Respondent's business checking account, on which the employee was a signatory. Respondent's employee misappropriated the settlement funds, and subsequently left Respondent's employ in January 1998. On April 28, 1998, Respondent filed a police report with the San Francisco police department alleging that his former employee had stolen over $10,000. Respondent obtained a second settlement draft in December 1999. Respondent's client received his portion of the settlement proceeds in 2000.

In the third matter, Respondent collected funds on behalf of a client in 1996, but he did not pay his client until after the client complained to the State Bar. Respondent did not pay the funds to which the client was entitled until July 10, 2002. Respondent's prior record, multiple acts of misconduct, and trust violations similar to those in *Harper I* were aggravating factors. Respondent was afforded mitigation for the excessive delay of the disciplinary proceedings, based on the reporting of the first matter.

Although Respondent's priors were not recent, the aggravating weight is significant because the wrongdoing is similar to the misconduct in the current matter.

**Multiple Acts (Std. 1.5(b).)**

Respondent's gross negligence repeatedly allowed his CTA balance to drop below the amount he was required to maintain on behalf of DeJoie. In addition, he made a material misrepresentation to OCTC. The nature and extent of Respondent's misconduct is afforded moderate aggravation.

**Uncharged Misconduct (Std. 1.5(h).)**

"[U]ncharged violations of the Business and Professions Code or the Rules of Professional Conduct are aggravating circumstances." (Std. 1.5(h).) In this case, pursuant to the misappropriation charge, Respondent was examined under oath to determine how his CTA balance fell below the amount of the disputed funds that he was required to maintain in his account. During his testimony, Respondent acknowledged a practice of commingling funds in his CTA and misappropriating funds by paying "one client's obligations with another client's funds." Respondent's testimony reveals violations of former rule 4-100(A) (commingling) and section 6106. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28 [evidence elicited for relevant purpose of inquiry into cause of charged misconduct may be used to establish aggravation].) The uncharged ethical violations are a significant aggravating factor because Respondent remains under the impression that it is not unethical to pay one client with another client's funds so long as the payments are documented.

**Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6)

**Good Character (Std. 1.6(f).)**

Respondent presented good character testimony from nine witnesses. The witnesses included three attorneys, friends, people he has mentored, and people involved with local civil commissions. Each of the nine witnesses had known Respondent for at least 25 years and in most cases, much longer. Respondent's character witnesses had a general understanding of the current disciplinary charges and notably, almost each one also knew that he had been disciplined twice before. Nevertheless, they praised his integrity, honesty, and skills as a lawyer. Many witnesses highlighted Respondents commitment to the City of Berkeley and his neighborhood. Two witnesses served with him on various city commissions. Respondent's extensive array of good character evidence warrants substantial weight in mitigation.

**Cooperation with OCTC (Std. 1.6(e).)**

Respondent demonstrated cooperation with OCTC by entering into a stipulation as to facts and admission of documents. However, the timing and nature of the stipulation, which admitted facts that were easily proven, obviated very little in terms of OCTC's preparation for trial. (*In the Matter of Riordan* (Review Dept.2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to easily provable facts mitigating if facts assisted prosecution of case].) In addition, Respondent knowingly made a false representation to OCTC during the investigation into this matter. Thus, the court affords nominal weight for Respondent's cooperation.

**Community Service**

Respondent's community service, as described by his own testimony and that of his character witnesses, included: 1) mentoring young attorneys; 2) representing young people and juveniles in criminal proceedings by appointment of the court for nominal payment; 3) serving on various Berkeley city and neighborhood commissions, which included serving as the chairman of the Housing Advisory Committee. Respondent is also on the board of the Allen

Temple Baptist Church Credit Union, helping with its legal and financial matters. The court gives Respondent's community service moderate weight.

Overall, the weight of the aggravating circumstances is greater than the weight of the mitigating factors.

**Discussion**

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) The discipline analysis begins with the standards, which promote the consistent and uniform application of disciplinary measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).) Standards 2.11 and 1.8(b) are most applicable to Respondent's misconduct.[11]

Standard 2.11 provides that "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty . . . intentional or grossly negligent misrepresentation or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the [attorney's] practice of law." Applying standard 2.11 to the facts of

[11] Standard 2.1(b) specifically addresses grossly negligent misappropriations and directs that an actual suspension is the presumed sanction.

this case, Respondent's misappropriation and misrepresentation to OCTC were serious ethical violations. There was no evidence that DeJoie was harmed or that OCTC was misled by Respondent's wrongdoing, but his misconduct was related to the practice of law. Although the misappropriation was the result of gross negligence, it totaled over $21,000. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1368 [misappropriation of $1,355.75 deemed significant].)

Standard 1.8(b) provides that, if an attorney has two or more prior records of discipline, disbarment is appropriate if: (1) an actual suspension was ordered in any of the prior matters; (2) the prior and current matters demonstrate a pattern of misconduct; or (3) the prior and current matters demonstrate an unwillingness or inability to conform to ethical responsibilities. Respondent's case meets at least two of these criteria. He was actually suspended for six months in *Harper II*. Respondent has committed the same trust account violations here that he committed in *Harper I* and *Harper II*, which demonstrates an inability or unwillingness to conform to ethical responsibilities.

Section 1.8(b) provides for a departure from the presumptive discipline of disbarment, where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Here the three mitigating circumstances of Respondent's good character, cooperation and community service are neither compelling nor do they predominate compared to Respondent's aggravating circumstances consisting of two prior discipline records, multiple acts of wrongdoing and uncharged violations of rule 4-100(A) and section 6106. Moreover, the current and former misconduct occurred at different time periods. Thus, Respondent's case does not fall within either exception outlined in standard 1.8(b).

The court is mindful that disbarment is not mandatory in every case of two or more prior disciplines, even where compelling mitigating circumstances do not clearly predominate.

(*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate].) But Respondent has provided no reason for this court to depart from the standards. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 776 [if the court deviates from the presumptive discipline, the court must explain the reasons for doing so].)

OCTC argues that the appropriate level of discipline for Respondent's misconduct is disbarment. Respondent argues that he should be "exonerated," but if the court finds him culpable of misconduct, a reproval or period of stayed suspension is warranted. The court finds that disbarment is the appropriate sanction for this case.

When an attorney misappropriates a client's funds by gross negligence and the attorney has no prior discipline, the discipline imposed by the Supreme Court ranges from a period of stayed suspension to a two-year actual suspension.[12] However, the Supreme Court has already sanctioned Respondent twice before. He has received a 90-day stayed suspension and a six-month actual suspension, but even with those prior disciplines, Respondent has committed the same misconduct as in his priors – misconduct that has escalated in severity to grossly negligent misappropriation and dishonesty. The court is also mindful that Respondent was required to attend State Bar Client Trust Accounting School as a condition of probation in *Harper II*, nevertheless he continued to commit trust account violations. Each of the prior "disciplinary orders provided him with the opportunity to reform his conduct to the ethical strictures of the [legal] profession," yet he failed to do so. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 727.) As

[12] See e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 (six-month stayed suspension for misappropriation of $24,000 that was caused by negligent supervision of secretary); *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465 (30-day actual suspension for grossly negligent misappropriation of $2,100 caused by poor staff supervision); *McKnight v. State Bar* (1991) 53 Cal.3d 1025 (one-year actual suspension for grossly negligent misappropriation of $17,165, which was deemed aberrational); *Snyder v. State Bar* (1990) 49 Cal.3d 1302 (two-year actual suspension for misappropriating over $3,000, which encompassed several dips in CTA over four years).

such, there is considerable risk that Respondent will repeat his misconduct if he is allowed to continue to practice.

In addition to grossly negligent misappropriation, Respondent made an intentional misrepresentation to OCTC. The Supreme Court has stated that "fraudulent and contrived misrepresentations to the State Bar may perhaps constitute a greater offense than misappropriation." (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128.)

This court concludes that disbarment is both necessary and appropriate when, as here, the current violations considered with prior misconduct, evidences the attorney's unwillingness or inability to conform to ethical responsibilities. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104 [attorney with three prior discipline records disbarred after attorney appeared unwilling or unable to learn from past professional mistakes]; *Arden v. State* Bar, *supra*, 43 Cal.3d at p. 728 (disbarment imposed on attorney with three priors, which indicated an unwillingness to conform conduct to ethical strictures]; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 [disbarment recommended where attorney had two priors and was unable to conform conduct to ethical norms].) "Further, because the lesser sanctions of probation and suspension 'have proven inadequate to prevent [Respondent] from continuing his injurious behavior towards the public' [citation], [this court] would be remiss in [its] duty to the public, the legal profession and the courts if [it] were to approve any sanction less severe than disbarment. [Citations.]" (*Twohy v. State Bar* (1989) 48 Cal.3d 502, 516.)

## RECOMMENDATIONS

**Discipline - Disbarment**

It is recommended that Gregory Harper, State Bar Number 146119, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

**California Rules of Court, Rule 9.20**

It is further recommended that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[13]

**Costs**

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a lawyer who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

## ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code, section 6007(c)(4), it is ordered that Gregory Harper, State Bar No. 146119, be involuntarily enrolled as an inactive lawyer of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules of Proc. of State Bar, rule 5.111(D)(1).[14] Respondent's inactive enrollment will

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[13] For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

[14] An inactive lawyer of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover,

terminate upon (1) the effective date of the Supreme Court's order imposing discipline; (2) as provided for by rule 5.111(D)(2) of the Rules of Procedure of the State Bar, or (3) as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: May 23, 2019

MANJARI CHAWLA
Judge of the State Bar Court

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an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

## CERTIFICATE OF SERVICE

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

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on May 23, 2019, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

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

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

SAMUEL C. BELLICINI
SAMUEL C. BELLICINI, LAWYER
1005 NORTHGATE DR # 240
SAN RAFAEL, CA 94903

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

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

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

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

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

Carla L. Cheung, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on May 23, 2019.

George Rue
Court Specialist
State Bar Court

# APPENDIX C

The State Bar of California

**OPEN SESSION**
**AGENDA ITEM**
**705 NOVEMBER 2019**

**DATE:** **November 14, 2019**

**TO:** **Members, Board of Trustees**

**FROM:** **Dag MacLeod, Chief of Mission Advancement & Accountability Division**
**Ron Pi, Principal Analyst, Office of Research & Institutional Accountability**

**SUBJECT:** **Report on Disparities in the Discipline System**

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## EXECUTIVE SUMMARY

A State Bar study on disparities in the attorney discipline system found that differences in rates of disbarment and probation of nonwhite attorneys are explained primarily by an attorney's previous discipline history, the number of investigations opened against the attorney, and the percentage of investigations in which the attorney was not represented by counsel. The State Bar plans to continue its evaluation of this topic through further data analysis and operational review, taking corrective action as warranted to ensure the integrity of the attorney discipline system.

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## BACKGROUND

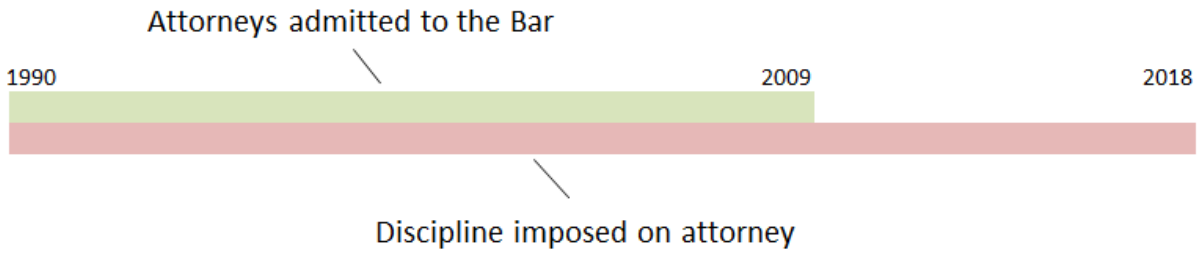
For years the State Bar has heard anecdotes regarding the over-representation of people of color in the attorney discipline system. In light of these assertions, and pursuant to the State Bar's statutory mission and Strategic Plan – both of which give the State Bar a mandate to work to eliminate bias and promote diversity in the legal profession – the State Bar initiated a rigorous, quantitative analysis to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action.

The study, attached to this agenda item, was conducted by George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine.

The data set that forms the basis of the analysis includes 116,363 attorneys admitted to the State Bar between 1990 and 2009, and for whom race/ethnicity and gender information is available, representing 95 percent of all attorneys admitted during the period. The study evaluated the two most serious types of discipline imposed on this cohort of attorneys: probation or disbarment (including resignation with charges pending). The quantitative analysis evaluated the likelihood of attorneys of different racial/ethnic groups and genders being placed on probation or being disbarred.

To track the entire history of each attorney's contact with the discipline system, all complaints received, as well as their outcomes through the end of 2018, were examined. Case outcomes were used to create two measures: (1) Was the attorney ever placed on probation at least once but never disbarred during this period?; and (2) Was the attorney disbarred or did the attorney resign with charges pending during this period?

**Figure 1. The study covered data on attorneys from 1990 through 2018**




## DISCUSSION

The analyses revealed that, without controlling for any factors potentially associated with case outcomes, there are statistically significant disparities with respect to both probation and disbarment. The largest gender/race disparities can be seen when comparing Black to White, male attorneys. The probation rate for Black, male attorneys over this time period was 3.2 percent, compared to 0.9 percent for White, male attorneys. The disbarment/resignation rate for Black, male attorneys was 3.9 percent compared to 1.0 percent for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females. There were no meaningful differences for Asians compared to Whites.[1]

As with any study of this kind, it is essential to attempt to control for other factors that may account for the different discipline rates between race/ethnicity and gender subgroups. Introducing control variables allows for the analysis to distinguish between different factors that may explain the outcomes.

[1] Although the statistical models shown in the full report look at different racial/ethnic groups and at gender differences, the discussion in the report focuses on the largest of these differences, comparing Black, male attorneys to White, male attorneys.

The selection of control variables is informed by hypotheses about what might explain attorney discipline, and by the availability of data that can be used in the statistical analysis. For the analysis conducted by Dr. Farkas, the following additional factors were examined:

- Complaint history as measured by:
  - The number of complaints received;
  - The number of investigations opened;
  - Counsel representation, measured by the percent of investigations without counsel;
  - Number of times discipline was imposed previously; and
  - Number and type of various allegations;
- Number of years since first admitted to the Bar; and
- Firm type/size.

*The Number of Complaints against Attorneys Explains Much of the Variance in Discipline across Groups*

Among the variables listed above, it is notable that the total number of complaints against attorneys varied widely by group. The range varies from 46 percent of Black, male attorneys having had at least one complaint filed against them during the study period, to only 17 percent of Asian, female attorneys having had a complaint filed against them during the same period. Another measure of the difference in the number of complaints is the percentage of attorneys against whom 10 or more complaints have been filed. Only one percent of Asian, women attorneys had received 10 or more complaints. In contrast, 12 percent of Black, male attorneys had received 10 or more complaints.

**Table 1. Attorneys Admitted from 1990 to 2009**
**By Race/Ethnicity, Gender, and the Number of Complaints Received**

| *Number of Attorneys* | | | | | | *Percent of Total* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | Asian | Black | Hispanic | White | Total | Asian | Black | Hispanic | White | Total |
| *Male* | | | | | | | | | | |
| 0 | 5,812 | 996 | 2,266 | 32,432 | 41,845 | 73% | 54% | 56% | 68% | 67% |
| 1-4 | 1,564 | 463 | 1,148 | 11,147 | 14,444 | 20% | 25% | 28% | 23% | 23% |
| 5-9 | 307 | 153 | 330 | 2,220 | 3,044 | 4% | 8% | 8% | 5% | 5% |
| >=10 | 275 | 217 | 314 | 1,911 | 2,758 | 3% | 12% | 8% | 4% | 4% |
| Total | 7,958 | 1,829 | 4,058 | 47,710 | 62,091 | 100% | 100% | 100% | 100% | 100% |
| *Female* | | | | | | | | | | |
| 0 | 7,709 | 1,678 | 2,671 | 29,375 | 41,798 | 83% | 68% | 69% | 77% | 77% |
| 1-4 | 1,357 | 584 | 965 | 7,259 | 10,266 | 15% | 24% | 25% | 19% | 19% |
| 5-9 | 128 | 121 | 152 | 993 | 1,412 | 1% | 5% | 4% | 3% | 3% |
| >=10 | 75 | 91 | 86 | 533 | 796 | 1% | 4% | 2% | 1% | 1% |
| Total | 9,269 | 2,474 | 3,874 | 38,160 | 54,272 | 100% | 100% | 100% | 100% | 100% |

The number of complaints against attorneys created special challenges for this evaluation because the bulk of complaints are received from the public, primarily clients; they are not a

function of the attorney discipline system, *per se*. To better understand the impact of this input on the system, a simulation analysis was conducted to hold the number of complaints against attorneys constant.

Looking at a scenario in which the same number of complaints is applied to attorneys across all racial/ethnic groups reduces the probation rate for Black male attorneys from 3.2 to 1.4 percent and reduces the disbarment rate for Black male attorneys from 3.9 to 1.6 percent. In other words, whereas almost four out of every one hundred Black, male attorneys (3.9 percent) in the sample was disbarred during the study period, if the number of complaints received against Black, male attorneys had been the same as the number of complaints against White, male attorneys, we would expect to have seen only 1.6 out of every one hundred Black, male attorneys disbarred.

While this simulation substantially reduces the differences between Black and White, male attorneys, it does not eliminate the difference altogether. After controlling for the number of complaints, the difference between White and Black, male attorney discipline remained: 1.4 percent of Black, male attorneys were placed on probation compared to .9 percent of White, male attorneys, and 1.6 percent of Black, male attorneys were disbarred, compared to one percent of White, male attorneys. Both of these differences were statistically significant.[2]

*Representation by Counsel and Prior Discipline History Provide Additional Explanatory Power*
Further analyses showed the impact of other variables on discipline rates. Statistically, these variables explained all of the differences in probation and disbarment rates by race/ethnicity. Among all variables included in the final analysis, prior discipline history was found to have the strongest effects on discipline outcomes, followed by the proportion of investigations in which the attorney under investigation was represented by counsel, and the number of investigations.

Thus, the disproportionate rate at which Black attorneys are put on probation and disbarred is associated with their having more complaints filed against them. This, in turn, makes it more likely that an attorney will be investigated and disciplined. To compound the disproportionate impact, Black attorneys in particular are less likely to be represented by counsel when they are under investigation by the State Bar. Looking at the total number of investigations by the State Bar, White attorneys were unrepresented in 7.9 percent of investigations of their cases; Black attorneys were unrepresented in 15.2 percent of the investigations of their cases.

*Impact of Firm Size on Discipline*
Although not the explicit focus of Dr. Farkas' report, the analysis does allow an exploration of another oft-cited anecdote about the attorney discipline system – that solo practitioners are disproportionately disciplined.

Currently, firm-size data are reported to the State Bar by complaining witnesses who may or may not know whether the respondent attorney is a solo practitioner. A pending State Bar rule proposal would mandate the reporting of firm size, which will enable more accurate analysis of

[2] The simulation also showed that the lower discipline rates for female attorneys compared to male attorneys were largely explained by the lower number of complaints received for female attorneys.

firm size-related issues going forward. In the interim, the present report provides for the analysis shown in Table 2 on the following page.

Table 2 shows data for attorneys with at least one complaint filed against them and for whom firm size data was available in the data set. It shows that solo attorneys represented in the study had higher rates of complaints filed against them than all other attorneys.

**Table 2. Number of Complaints Received, by Firm Size and Type**

| | Solo | | 2-10 | | >=11 | | No response | | Gov't lawyer | | Total | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | N | % | N | % | N | % | N | % | N | % | N | % |
| 1-4 | 6,801 | *64%* | 6,401 | *72%* | 2,747 | *89%* | 760 | *58%* | 2,826 | *84%* | 19,535 | *72%* |
| 5-9 | 1,947 | *18%* | 1,396 | *16%* | 241 | *8%* | 245 | *19%* | 416 | *12%* | 4,245 | *16%* |
| >=10 | 1,902 | *18%* | 1,060 | *12%* | 111 | *4%* | 296 | *23%* | 108 | *3%* | 3,477 | *13%* |
| Total | 10,650 | *100%* | 8,857 | *100%* | 3,099 | *100%* | 1,301 | *100%* | 3,350 | *100%* | 27,257 | *100%* |

At the low end of the distribution – attorneys with 1 to 4 complaints, 64 percent of solo attorneys fall in this category, compared to 72 percent for attorneys in firms with 2 to 10 attorneys, and 89 percent for those in firms with more than 11 attorneys. On the other hand, 18 percent of solo practitioners have more than 10 complaints filed against them, compared to 12 percent for small-firm (2-10) attorneys and only 4 percent for attorneys in firms with eleven or more attorneys. As a result of receiving more complaints than attorneys in large firms or other practice settings, solo and small firm attorneys are faced with a higher chance of being investigated and ultimately disciplined.

Without controlling for any other factors, Table 3 shows the difference in both probation and disbarment rates for solo attorneys compared to other practice settings. While the rate of probation and disbarment for solos is approximately 5 percent for both discipline outcomes, the rates of discipline for all other groups combined are 1.5 percent for probation and 1.9 percent for disbarment.

**Table 3. Probation and Disbarment Rates, by Firm Size and Type**

| | | Probation | | Disbarment | |
|---|---|---|---|---|---|
| Firm Size/Type | Total # of Attorneys | N | % | N | % |
| Solo | 10,650 | 535 | 5.0% | 564 | 5.3% |
| 2-10 | 8,857 | 168 | 1.9% | 191 | 2.2% |
| >=11 | 3,099 | 19 | 0.6% | 23 | 0.7% |
| No response or Don't know | 1,301 | 60 | 4.6% | 102 | 7.8% |
| Gov't lawyer | 3,350 | 7 | 0.2% | 6 | 0.2% |
| Total | 27,257 | 789 | 2.9% | 886 | 3.3% |

When other relevant factors are controlled for the disparate impact of solo practice was reduced by more than half, but remained statistically significant for the likelihood of an attorney being placed on probation. A separate model, looking at the impact of firm size on discipline, found that counsel representation plays a major role in explaining the differential rates of discipline for solo practitioners.

*Next Steps*
These findings raise a number of additional questions that should be investigated including:

Differential Rates of Complaints
It is unclear why the State Bar receives more complaints against Black, male attorneys than against other attorneys. Although the number of complaints across different allegation categories was largely similar across racial/ethnic groups, one notable exception is the number of Reportable Action, Banks (RAB). RABs reflect the circumstance where banking institutions notify the State Bar when there is NSF activity on a client trust account. Among attorneys with 10 or more complaints against them, Black, male attorneys had an average of 6.8 RABs whereas White, male attorneys had an average of 3.7. The State Bar will explore this differential rate of RAB matters, as well as overall disparities in complaint filings by race, gender, and solo practice status, as part of the next phase of discipline disparity work.

Impact of Practice Type
Another area that should be examined is practice type. The State Bar does not currently collect data on the type of law that attorneys practice, but it is plausible that the type of law an attorney practices has an impact on the likelihood of generating complaints from clients. The State Bar should seek data on the distribution of complaints across different practice areas or practice settings.

Impact of Counsel Representation
Another potential area for further investigation is the question of why a respondent's representation status has such a significant impact on disciplinary outcome. This assessment will explore the kinds of advocacy and procedural activities that occur in cases with and without counsel. In addition, reasons for disparities in the rate of representation, by race and solo practice status, will be assessed.

Impact of Prior Discipline
The way in which prior complaints and prior discipline are factored into decisions at intake and investigation stages will also be examined. These variables have a strong impact on whether an attorney is disciplined in the statistical models. The procedural and rule underpinnings for the ways in which prior complaint and prior discipline are taken into account in the discipline process need to be carefully reviewed.

To assist with these efforts, staff intends to enter into a contract with a consultant who has worked with justice systems on bias free decision-making and processes. It is anticipated that this consultant will make recommendations regarding areas including targeted preventative measures the State Bar can take, options for whether and how to take prior complaints into account in the discipline process, and decision-matrices and other standardized tools.
Staff plans to work closely with the Chair and Vice-Chair of the Committee on Regulation and Discipline in the selection of a consultant and development of an action plan. Staff will also present the findings contained in the study at a meeting of all OCTC staff. Staff will report back to the Board of Trustees as it develops and implements these plans to continue monitoring and improving the equity of attorney discipline system.

## FISCAL/PERSONNEL IMPACT

None at this time. Staff expects to enter into a contract for up to $100,000 to support the Next Steps as outlined in this report.

## RULE AMENDMENTS

None

## BOARD OF TRUSTEES POLICY MANUAL AMENDMENTS

None

## STRATEGIC PLAN GOALS & OBJECTIVES

None

## ATTACHMENT(S) LIST

**A.** Discrepancies by Race and Gender in Attorney Discipline by the State Bar of California: An Empirical Analysis

# DISCREPANCIES BY RACE AND GENDER IN ATTORNEY DISCIPLINE BY THE STATE BAR OF CALIFORNIA: AN EMPIRICAL ANALYSIS

**George Farkas**[1]
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**10-31-19**

[1] With the assistance of Ron Pi, Principal Program Analyst, Office of Research & Institutional Accountability, The State Bar of California.

## ABSTRACT

In order to understand the attorney discipline process by the State Bar of California, we focused on the two most serious outcomes of this process – probation or disbarment/resignation. The goal was to estimate attorney gender/race group differences in these outcomes. To do so we analyzed data for 116,363 attorneys admitted to the Bar between 1990 and 2009. Outcomes from 1990 to 2018 were used to create two measures: (1) was the attorney ever placed on probation at least once but never disbarred/resigned during this period, and (2) was the attorney disbarred or resigned during this period. We found that the largest gender/race disparities occurred when comparing Black to White male attorneys. The probation rate for Black male attorneys over this time period was 3.2%, compared to 0.9% for White male attorneys. The disbarment/resignation rate for Black male attorneys was 3.9% compared to 1.0% for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females. There were no meaningful differences for Asians compared to Whites.

The total number of complaints against an attorney varied widely, from none to well over a hundred during the study period. During the disciplinary process, each complaint was treated as a single case to be investigated. Where there were multiple complaints arriving close together, they were still treated as individual cases, but were often investigated together. We found that the number of complaints against an attorney over the entire study period was a strong predictor of the chance of probation or disbarment/resignation, and that Black male attorneys were subject to the highest average number of complaints. Arithmetically, other things being equal, a higher rate of complaints regarding a group of attorneys tends to be associated with a higher rate of negative disciplinary outcomes for that group. Since these complaints arrive at the Bar prior to the investigation process, we sought to remove this factor from our estimates of gender/race disproportionality. To do so we conducted simulations of the disciplinary rates that would have been experienced by Black male and other attorneys of color if they had the same distribution of number of complaints as Whites. Under these simulations, the probation and disbarment/resignation rates of Black male attorneys were greatly reduced, to 1.4% for probation and 1.6% for disbarment/resignation. We conclude that after adjustment for gender/race differences in the number of complaints received, differences between Black or Hispanic and White attorneys of the same gender averaged ½ percentage point or less. We also found that the lower discipline rates for female than for male attorneys were largely explained by the lower number of complaints received by females.

We also ran regression analyses to investigate the relationship between a host of attorney, attorney practice, and investigation characteristics on the probation and disbarment outcomes. We found that among attorneys with at least one investigation, the number of investigations opened, the % of investigations without counsel, and the number of prior disciplines might fully explained racial and gender differences in these outcomes. If further analyses are undertaken, they might usefully focus on understanding the sources of the greater average number of complaints experienced by Black and Hispanic than by White attorneys, as well as on how Bar staff take number of investigations, percent of these without counsel, and the number of prior disciplines into account during the investigation process.

## Introduction

The State Bar of California is responsible for managing the admission of lawyers to the practice of law, investigating complaints of professional misconduct, and prescribing appropriate discipline. This report estimates the magnitude of, and seeks to understand the mechanisms of, any discrepancies by race and gender in the resulting patterns of attorney discipline. To do so, we analyzed data for all attorneys admitted to the California Bar between 1990 and 2009[2]. Disciplinary records through 2018 were analyzed. These choices guaranteed that all of those analyzed had a minimum of nine years in practice. The methodology was to compare, within each gender, Asians, Blacks, and Hispanics to Whites. We will be investigating gender and race/ethnic discrepancies in the rates of disciplinary outcomes experienced by these attorneys. We will also examine mitigating circumstances that may help explain any such discrepancies.

We are examining the results of a process in which a complaint alleges professional misconduct against an attorney, and the Bar investigates this complaint. Each complaint involves one or more specific allegations, and each attorney may have been subject to no, one, a few, or multiple complaints during the time period under study. During the disciplinary process, each complaint was treated as a single case to be investigated. Where there were multiple complaints arriving close together, they were still treated as individual cases, but were often investigated together. The investigation of each case moves through a series of stages at each of which the case may be closed. Only a subset of the most serious cases lead to the most serious of the disciplinary outcomes -- probation (with or without suspension) of the attorney's license or disbarment/resignation. Such outcomes may occur at any time during an attorney's career. In this report we will focus on racial and gender disparities in the most serious outcome experienced by each attorney during the time period under study. Thus, the first of our studies will examine race/sex discrepancies in the chance that an attorney was placed on probation at least once during this period, but was never disbarred/resigned. The second study will examine the chance of disbarment/resignation during the time period.

Not surprisingly, we found that those attorneys who were subject to the greatest number of complaints also averaged the highest rates of probation and disbarment/resignation. This might be due to any of the following reasons: First, other things being equal, a greater number of complaints will likely be associated with a greater number of cases investigated, which should, as an arithmetic matter and on average, increase the probability of being disciplined, including severe disciplines. Second, more complaints per case may indicate that the case is more severe, raising the probability of a severe outcome. Finally, a greater number of complaints likely implies more past complaints, which may be taken into account during a particular

[2] The demographic information came from the Admissions database provided by the Bar Exam applicants prior to their being admitted to the Bar. Excluded from the analysis are a small percentage of attorneys (2.5%) for whom no gender or race/ethnicity information is available. Also excluded are those in the "Other" race/ethnicity category due to the small sample size; they represent less than one percent of the total.

investigation. Thus, in the analyses presented, we will group the attorneys within each gender/race group into categories according to the number of complaints received

Table 1 shows the sample of attorneys analyzed. There were a total of 62,091 males and 54,272 females. Among these, there was substantial variation in the number of complaints received. For males, 67% received no complaints; for females the figure was 77%. Table 1 also presents these results in percentages. Reading the top row of this table we see that no complaints were made against 68% of White males, while the comparable rates for Asian, Black, and Hispanic males were 73%, 54%, and 56%, respectively. The lower percentages of Black and Hispanic than of White male attorneys receiving no complaints suggest that a higher percentage of the members of these groups than of Whites may be subject to disciplinary action. A similar pattern is observed for females, with a lower percentage of Black and Hispanic females receiving no complaints than of White or Asian females.

**Table 1. Attorneys Admitted from 1990 to 2009**
**By Race/Ethnicity, Gender, and the Number of Complaints Received**

| *Number of Attorneys* | | | | | | *Percent of Total* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | Asian | Black | Hispanic | White | Total | Asian | Black | Hispanic | White | Total |
| *Male* | | | | | | | | | | |
| 0 | 5,812 | 996 | 2,266 | 32,432 | 41,845 | 73% | 54% | 56% | 68% | 67% |
| 1-4 | 1,564 | 463 | 1,148 | 11,147 | 14,444 | 20% | 25% | 28% | 23% | 23% |
| 5-9 | 307 | 153 | 330 | 2,220 | 3,044 | 4% | 8% | 8% | 5% | 5% |
| >=10 | 275 | 217 | 314 | 1,911 | 2,758 | 3% | 12% | 8% | 4% | 4% |
| Total | 7,958 | 1,829 | 4,058 | 47,710 | 62,091 | 100% | 100% | 100% | 100% | 100% |
| *Female* | | | | | | | | | | |
| 0 | 7,709 | 1,678 | 2,671 | 29,375 | 41,798 | 83% | 68% | 69% | 77% | 77% |
| 1-4 | 1,357 | 584 | 965 | 7,259 | 10,266 | 15% | 24% | 25% | 19% | 19% |
| 5-9 | 128 | 121 | 152 | 993 | 1,412 | 1% | 5% | 4% | 3% | 3% |
| >=10 | 75 | 91 | 86 | 533 | 796 | 1% | 4% | 2% | 1% | 1% |
| Total | 9,269 | 2,474 | 3,874 | 38,160 | 54,272 | 100% | 100% | 100% | 100% | 100% |

Table 1 also shows that a higher percentage of Black and Hispanic than of White attorneys were subject to 10 or more complaints. In particular, among Black, Hispanic, and White males, respectively, 12%, 8%, and 4% of each sample received 10 or more complaints. A similar pattern was observed for females, but at much lower levels; 4%, 2%, and 1%, respectively, were subject to 10 or more complaints. The 12% of Black males subject to 10 or more complaints is a particularly striking statistic. Because it is three times the share of White males with this many complaints we may expect that this disproportion will by itself create a disproportion in the percent of each group ultimately subject to the more severe disciplinary penalties.

Table 2 shows greater detail on group differences in complaints received. The table reports the average number of complaints for each race/gender and number of complaints category. We see that within the 1-4 and 5-9 complaints categories the Black and Hispanic averages, whether male or female, are quite close to those for Whites. The exception is the >=10 category, where

Black male attorneys, in particular, average 28.7 complaints compared to 24.7 for White males. This difference may also be producing more severe disciplinary penalties for Black male attorneys.

**Table 2. Average Number of Complaints Received by Gender, Race/Ethnicity, and Categories of Number of Complaints**

| Number of Complaints | Asian | Black | Hispanic | White | Total |
|---|---|---|---|---|---|
| *Male* | | | | | |
| None | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1-4 | 1.8 | 1.9 | 1.9 | 1.8 | 1.8 |
| 5-9 | 6.5 | 6.5 | 6.7 | 6.5 | 6.5 |
| >=10 | 27.1 | 28.7 | 24.5 | 24.7 | 25.2 |
| Total | 1.6 | 4.4 | 3.0 | 1.7 | 1.9 |
| | | | | | |
| *Female* | | | | | |
| None | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1-4 | 1.6 | 1.8 | 1.7 | 1.7 | 1.7 |
| 5-9 | 6.3 | 6.6 | 6.5 | 6.4 | 6.4 |
| >=10 | 17.8 | 20.6 | 23.5 | 20.5 | 20.7 |
| Total | 0.5 | 1.5 | 1.2 | 0.8 | 0.8 |

Each complaint is associated with one or more specific allegations. As with complaints, we may expect that attorneys subject to more allegations over their careers will have a greater risk of eventual probation or disbarment/resignation. Table 3 reports on the career volume of these allegations across the groupings. We see that, for males, when we restrict attention to any particular category of number of complaints, the average number of allegations for Blacks and Hispanics is close to that for Whites. However, when we look at the average number of allegations for the total (entire male racial groups), we see that these are 6.2 for Black males, 4.6 for Hispanic males, and 2.6 for White males. The Black male average is more than twice that for White males. This is entirely a compositional effect – it occurs because a higher percentage of White than Black males are in the zero complaints category, and a higher percentage of Black than White males are in the higher categories of number of complaints, where the average number of allegations is particularly high. This again draws attention to the category of attorneys with >=10 complaints.

Something similar is observed for females of differing race/ethnicity. Among females there is more variation in average number of allegations across races than among males (for example, Black females with >=10 complaints actually average fewer allegations than similar Whites). Because of the greater shares of Black and Hispanic than White females in the higher number of complaints categories, the overall average number of allegations for Black and Hispanic females are, respectively, 2.0 and 1.8, compared to 1.1 for White females. As was the case for males, the different distributions of gender/race groups across number of complaints categories, particularly the >=10 category, strongly influences the total number of allegations for the group. But what are the details of these allegations for attorneys in the >=10 complaints category? These are shown in Table 4.

**Table 3. Average Number of Allegations by Gender, Race/Ethnicity, and Categories of Number of Complaints**

| Number of Complaints | Asian | Black | Hispanic | White | Total |
|---|---|---|---|---|---|
| *Male* | | | | | |
| None | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1-4 | 2.4 | 2.4 | 2.5 | 2.3 | 2.3 |
| 5-9 | 9.2 | 8.6 | 9.3 | 8.5 | 8.7 |
| >=10 | 46.5 | 41.3 | 39.8 | 41.9 | 42.0 |
| Total | 2.4 | 6.2 | 4.6 | 2.6 | 2.8 |
| | | | | | |
| *Female* | | | | | |
| None | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1-4 | 2.0 | 2.1 | 2.2 | 2.1 | 2.1 |
| 5-9 | 8.8 | 9.0 | 9.0 | 8.4 | 8.5 |
| >=10 | 25.9 | 27.7 | 38.6 | 30.8 | 31.0 |
| Total | 0.6 | 2.0 | 1.8 | 1.1 | 1.1 |

Table 4 shows that most allegation types have relatively similar averages across race/ethnic groups. Among males, the primary categories where Blacks have higher average allegations than Whites are Performance and Reportable Action complaints from banks (note that there were no Reportable Action allegations at the initial intake stage). For females, the largest Black-White difference is also Reportable Action – Bank.

**Table 4. Average Number of Allegations by Allegation Type for Those with More Than Ten Complaints***

| | Asian | Black | Hispanic | White | Total |
|---|---|---|---|---|---|
| *Male* | | | | | |
| Performance | 14.0 | 14.3 | 14.0 | 13.1 | 13.4 |
| Fees | 8.2 | 6.5 | 6.7 | 7.3 | 7.2 |
| Duties to Client | 5.0 | 6.2 | 6.2 | 5.7 | 5.7 |
| Personal Behavior | 5.3 | 4.4 | 3.9 | 4.7 | 4.7 |
| RP Action - Bank | 5.8 | 6.8 | 3.7 | 3.7 | 4.2 |
| Funds | 4.0 | 4.2 | 3.5 | 3.5 | 3.6 |
| Interference w Justice | 3.1 | 3.0 | 3.0 | 3.4 | 3.3 |
| Loan Modification | 5.7 | 1.8 | 1.5 | 3.0 | 2.9 |
| | | | | | |
| *Female* | | | | | |
| Performance | 8.7 | 9.9 | 14.0 | 10.8 | 10.9 |
| Fees | 4.7 | 4.6 | 7.1 | 5.2 | 5.4 |
| Duties to Client | 3.6 | 4.6 | 5.5 | 4.9 | 4.8 |
| RP Action - Bank | 3.8 | 5.1 | 3.5 | 3.4 | 3.6 |
| Personal Behavior | 2.4 | 2.7 | 3.5 | 3.1 | 3.1 |
| Interference w Justice | 2.6 | 3.0 | 3.0 | 2.9 | 2.9 |
| Funds | 2.2 | 2.2 | 3.3 | 2.5 | 2.5 |

*Less frequent allegation types with an average of less than one are not included.

## Understanding Racial Differences in Probation

We turn now to the determinants of an attorney receiving probation at least once in their career, but never reaching disbarred/resigned status. The results are shown as the numbers and percentages of attorneys receiving probation in Table 5. We see that for each race/ethnic group and for both males and females, the probation rate increases dramatically according to the number of complaints received. For example, overall, among males receiving 1-4 complaints, only 0.9% ultimately received probation during the time period under study. By contrast, 3.8% of males subject to 5-9 complaints, and 13.5% of males subject to 10 or more complaints were put on probation at least once. Rates were similar, but slightly lower, for females.

Table 5 shows that overall, 0.9% of White males were subject to probation (this is calculated as a simple rate for all White males, including those who were not subject to any complaints). By contrast, the overall probation rates for Black, Hispanic, and Asian males were, respectively, 3.2%, 1.9%, and 0.8%. ***The largest racial probation rate discrepancy is the difference between 3.2% for Black males and 0.9% for White males. Understanding the sources of this gap is a major goal of this report.***

Females show a similar pattern but at much lower levels. Thus, 0.4% of White female attorneys were put on probation, compared to 0.9%, 0.5%, and 0.2% of Black, Hispanic, and Asian female attorneys, respectively. Thus, the largest racial probation discrepancy among females is the difference between 0.4% for White females and 0.9% for Black females.

**Table 5. Attorneys Disciplined by Probation**

| *Number of Attorneys* | | | | | | *Percent of Total* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | Asian | Black | Hispanic | White | Total | Asian | Black | Hispanic | White | Total |
| *Male* | | | | | | | | | | |
| 1-4 | 18 | 5 | 13 | 89 | 126 | 1.2% | 1.1% | 1.1% | 0.8% | 0.9% |
| 5-9 | 13 | 10 | 12 | 78 | 116 | 4.2% | 6.5% | 3.6% | 3.5% | 3.8% |
| >=10 | 30 | 43 | 53 | 242 | 373 | 10.9% | 19.8% | 16.9% | 12.7% | 13.5% |
| Total | 61 | 58 | 78 | 409 | 615 | 0.8% | 3.2% | 1.9% | 0.9% | 1.0% |
| *Female* | | | | | | | | | | |
| 1-4 | 3 | 5 | 4 | 39 | 53 | 0.2% | 0.9% | 0.4% | 0.5% | 0.5% |
| 5-9 | 6 | 1 | 5 | 32 | 44 | 4.7% | 0.8% | 3.3% | 3.2% | 3.1% |
| >=10 | 5 | 17 | 10 | 63 | 96 | 6.7% | 18.7% | 11.6% | 11.8% | 12.1% |
| Total | 14 | 23 | 19 | 134 | 193 | 0.2% | 0.9% | 0.5% | 0.4% | 0.4% |

Note: These are actual numbers receiving probation in the left panel, and the probation rate for each combination of sex, race, and number of complaints in the right panel.

### Number of Complaints as a Source of the Racial Gap in Probation

For each gender/race/ number of complaints combination, the number of attorneys disciplined with probation is arithmetically equal to the product of two numbers – the number of attorneys from that gender/race group subject to that number of complaints, and the rate at which

attorneys from that gender/race and number of complaints group are subject to probation[3]. We saw in Table 1 that Black and Hispanic attorneys tended to be more concentrated than Whites in the groups receiving greater numbers of complaints. We also see in Table 5, that within each of these number of complaint groupings, the percentage receiving probation was generally higher for Blacks than for Whites. This was particularly the case for Black compared to White males.

These two sources of the racial gap in probation -- the percentage distribution of the different numbers of complaints received by a group and the group-specific rate at which these complaints led to probation – result from very different processes. The number of complaints against an attorney results from her/his interaction with clients, and is determined prior to the Bar's investigation processes. However, the rate at which these complaints result in probation for each gender/race group of attorneys is a direct result of the investigation and decision-making processes of Bar staff. We wish to test these latter processes for race- or gender-related disparities***. As one step in doing so we undertook a statistical experiment: What would the racial/ethnic probation gaps be if Black, Hispanic, and Asian attorneys were subject to the same distribution of numbers of complaints as White attorneys?*** To do so we simply applied the gender/race and number of complaint specific probation rates of Table 5 to the White distribution of complaints in Table 1[4]. This simulation yields an estimate of the "counterfactual," the overall probation rates which attorneys of color would receive if their client complaint distribution were the same as Whites. These simulation results are compared to actual observed rates in Table 6.

The values in Table 6 show that a significant share of the race/ethnic probation rate differences in Table 5 may be attributable to the fact that, in general, Black and Hispanic attorneys tended to be subject to greater numbers of client complaints than White attorneys. (For example, in Table 1 we saw that 12% of Black male attorneys received 10 or more complaints, whereas this was the case for only 4% of White male attorneys.)

Table 6 shows that if Blacks and Hispanics are given the White distribution of numbers of complaints, their total percentage on probation declines. Thus, although Table 5 showed that 3.2% of Black male attorneys received probation as their most severe discipline, the simulated calculation reported in Table 6 shows that if Black males had the White male distribution of

[3] To take an example, Table 1 shows 1,564 Asian male attorneys received 1-4 complaints. The right hand side of Table 5 shows that the probation rate for these attorneys was 1.2%. Then 1,564 x .012 = 18 (approximately, with differences due to rounding), as shown on the left hand side of Table 5.

[4] For example, Table 1 showed that 12% of Black male attorneys, but only 4% of White male attorneys received >=10 complaints. To apply the White male percent in this category to the calculation, since there are 1,829 Black male attorneys, .04 x 1,829 = 73 (approximately, due to rounding). This is the number of Black male attorneys that would have received >=10 complaints if the Black male share had equaled the White male share. The Black male rate of 19.8% (Table 5) for this category of # complaints is then applied to these 73, yielding 14 (approximately), which is the simulated number on probation for Black male attorneys with >=10 complaints. Then apply this procedure to each of the categories of # of complaints for Black male attorneys, and add them up across categories. This yields the number of Black male attorneys simulated to receive probation. Divide this by the total number of Black male attorneys to get the overall rate of probation for Black male attorneys under the simulation.

complaints, there would be only 1.4% whose severest discipline was probation. The comparison of actual and simulated rates for all gender/race groups are summarized in Table 6.

**Table 6. Actual and Simulated[1] Probation Rates**

| | Asian | Black | Hispanic | White | Total |
|---|---|---|---|---|---|
| *Male* | | | | | |
| Actual | 0.8% | 3.2% | 1.9% | 0.9% | 1.0% |
| Simulated | 0.9% | 1.4% | 1.1% | 0.9% | 0.9% |
| Remaining Difference from White Rate[2] | 0.0% | .05%* | 0.2% | - | - |
| *Female* | | | | | |
| Actual | 0.2% | 0.9% | 0.5% | 0.4% | 0.4% |
| Simulated | 0.2% | 0.4% | 0.4% | 0.4% | 0.4% |
| Remaining Difference from White Rate[2] | -0.2% | 0.0% | 0.0% | - | - |

1. Simulated if all groups had the White distribution of number of complaints

2. These are the percentage points potentially attributable to factors within the Bar's control.

* Statistically significant at 5 percent level.

As just noted, the actual probation rate for Black male attorneys was 3.2%, whereas that for White male attorneys was 0.9%. The difference of 2.3 percentage points seems substantial. However, once the Black male rate is adjusted for the greater number of complaints they received, their probation rate is simulated to be only 1.4%. This is only 0.5 percentage point greater than the White male rate of 0.9%. ***Thus, Table 6 shows that after adjustment for the number of client complaints received by different gender/race groups, the largest gap is for Black compared to White male attorneys. This gap is 0.5 percentage point, and may be attributable to the different probation rates for different groups of attorneys (recall Table 5)***. ***It is statistically significant but relatively small in magnitude. We conclude that after the simulation to remove the effects of differences in the distribution of the number of complaints received, only Black and Hispanic male attorneys have higher probation rates than otherwise similar Whites, and these differences are less than 1/2 of a percentage point[5].***

**Regression Analyses to Measure the Effects of Multiple Variables on Probation Among Attorneys With At Least One Complaint**

We have seen that Black and Hispanic attorneys, both male and female, were subject to a greater number of complaints than White attorneys, and that these differences may account

[5] A further simulation could be undertaken to also remove Black-White male attorney differences in the average number of complaints received among those receiving >=10 complaints (Table 2 shows this average to be 28.7 for Blacks and 24.7 for Whites). Doing so would further reduce the gap between the simulated Black and the White male probation rates.

for much, but not all, of the higher probation rates for Black and Hispanic, compared to White attorneys. In this section we look more closely at those attorneys with at least one complaint, in order to discover whether additional characteristics of the attorneys, their practices, and the allegations against them can explain the race/ethnic differences in suspension remaining after controlling for racial differences in number of complaints. The variables to be controlled (accounted for) include the nature of their practice, the years since they were admitted to the bar, their firm size, whether they worked for the government, the number of investigations of them opened, the % of these investigations where they were not themselves represented by an attorney, and the specifics of the allegations against them. Of course, attorneys with no complaints would have no chance of suspension, so the analysis in this section focuses only on attorneys with at least one complaint.

Table 7 shows regression analyses of the probability of ever being placed on probation. Each of the models 1-6 is a separate calculation, with more control variables being added to the calculation as we move from left to right. The first model shows differences in the percent of attorneys ever on probation between the nonwhite and White groups, with no variables controlled. We see that when examined as a raw rate (without controls), the Black probation rate is 2.7 percentage points higher than that for Whites, and this is statistically significant.[6] The Hispanic rate is 0.98% percentage points higher than for Whites, and is also statistically significant.

Model 2 adds gender (coded female = 1) and the number of investigations opened as predictors. Both are statistically significant. Females are 1.3 percentage points less likely than males to be placed on probation. Attorneys subject to more investigations are more likely to be placed on probation. Results for Blacks and Hispanics are relatively unchanged. The third model in Table 7 adds the percentage of investigations in which the attorney being investigated did not have counsel. This variable is found to be a very strong and positive predictor of an individual's probability of being put on probation. With this variable controlled, the Black coefficient declines from .0258 to .0110, a major decrease of 57.4%. In other words, about half of the Black-White differential is explained by the fact that when being investigated by the Bar, more Black than White attorneys did not have counsel. (The difference was that 15% of Black attorneys did not have counsel, whereas for White attorneys it was 8%. For Hispanics, the rate was 10%.) Controlling this variable also strongly reduced the female-male probation differential, from -.0130 to -.0036, a 72.3% reduction! Much of the lower probation rate for female compared to male attorneys may be due to the fact that male attorneys are less likely to have counsel when being investigated.

[6] Note that only attorneys with at least one complaint are included in this calculation. So Model 1 with this population of attorneys partially controls for race/ethnic differences in the number of complaints because it excludes attorneys with no complaints (thereby removing the effect of Whites having a higher percentage of attorneys with no complaints) but does not control for the fact that among attorneys with at least one complaint, Blacks and Hispanics average more complaints than Whites. As variables are added to successive models, this racial difference in the number of complaints for those with at least one complaint will be accounted for.

**Table 7. Linear Regression on Probation, All Attorneys with Any Complaints**

| | Model 1 | Model 2 | Model 3 | Model 4 | Model 5 | Model 6 |
|---|---|---|---|---|---|---|
| Race/Ethnicity | | | | | | |
| Asian | -0.0023 | -0.0023 | -0.0019 | -0.0015 | -0.0023 | -0.0020 |
| Black | 0.0272*** | 0.0258*** | 0.0110** | 0.0100** | 0.0109* | 0.0061 |
| Hispanic | 0.0098** | 0.0090** | 0.0061* | 0.0060* | 0.0068* | 0.0059 |
| Other | 0.0141 | 0.0124 | 0.0037 | 0.0018 | 0.0006 | -0.0027 |
| | | | | | | |
| Female | | -0.0130*** | -0.0036* | -0.0030 | -0.0023 | 0.0004 |
| # of Investigations Opened | | 0.0030*** | | 0.0010*** | 0.0010*** | -0.0012*** |
| % of INV w/o counsel | | | 0.2265*** | 0.2142*** | 0.2180*** | 0.1163*** |
| Year Since Admitted | | | | -0.0000 | 0.0001 | -0.0002 |
| Prof Employment | | | | -0.0005 | -0.0005 | 0.0050*** |
| Fees | | | | -0.0021*** | -0.0024*** | -0.0015** |
| Funds | | | | -0.0021*** | -0.0022*** | -0.0013* |
| Performance | | | | 0.0009* | 0.0009* | 0.0002 |
| Duties to Client | | | | 0.0003 | 0.0003 | -0.0006 |
| Inteference w Justice | | | | 0.0046*** | 0.0045*** | 0.0046*** |
| Personal Behavior | | | | 0.0007 | 0.0005 | 0.0004 |
| No Complaint Articulated | | | | -0.0032 | -0.0029 | 0.0015 |
| Immigration Fraud | | | | -0.0086 | -0.0079 | -0.0015 |
| Loan Modification | | | | 0.0001 | 0.0003 | 0.0011*** |
| Duties to State Bar | | | | 0.0210*** | 0.0151** | -0.0125** |
| Debt Resolution Complaint | | | | -0.0011 | -0.0008 | -0.0033 |
| Unauthorized Practice of Law | | | | -0.1042*** | -0.1068*** | -0.1959*** |
| *Firm Size/Type (Solo = base)* | | | | | | |
| 2-10 | | | | | -0.0155*** | -0.0102*** |
| >=11 | | | | | -0.0187*** | -0.0123*** |
| No response/DK | | | | | -0.0139** | -0.0140** |
| Govt lawyer | | | | | -0.0185*** | -0.0133*** |
| Number of prior disciplines | | | | | | 0.1272*** |
| Constant | 0.0226*** | 0.0229*** | 0.0060*** | 0.0015 | 0.0116*** | 0.0098*** |
| R-Squred | 0.0018 | 0.0231 | 0.1557 | 0.1619 | 0.1651 | 0.2491 |
| N | 32,720 | 32,720 | 32,720 | 32,720 | 27,257 | 27,257 |

Model 4 has the number of investigations opened and % of these without counsel, as well as years since admitted to the Bar, and the number of times the attorney was charged with each possible specific allegation over their time as a member of the Bar as predictors. Several of these are statistically significant with one surprise being the relatively strong *negative* effect of the unauthorized practice of law on probation. As we shall when we analyze the predictors of disbarment, the reason this variable strongly reduces the probability of probation is that it strongly increases the probability of disbarment. Controlling these variables reduced the female-male difference in probation rates to insignificance. Model 5 added the firm size and government lawyer variables to the equation as predictors. The coefficients indicate that both variables are significant – larger firm size or being a government lawyer both reduce the probability of probation. However, controlling these variables made little further change in the race or gender differentials in probation.

Model 6 added the number of prior disciplines to the equation. This measures the sum of the following variables -- for each investigation the attorney underwent, the number of prior disciplines on the attorney's record at that time. This is found to be a strong positive predictor

of the probability of probation. With this variable controlled all the race/ethnic variables become insignificant. The remaining Black-White difference in the probation rate is now only 0.61 of a percentage point, and the Hispanic-White difference is now 0.59 of a percentage point, with neither being statistically significantly different from the White rate. Thus, it appears that, in addition to the greater number of complaints against Black than White attorneys, the strongest inference for the higher probation rates of Blacks is that a higher percentage of Black than White attorneys do not have counsel when they undergo an investigation, and that at each of these investigations, Black attorneys have a larger number of prior disciplines than White attorneys. This inference is supported very strongly by the beta weights (standardized regression coefficients) reported in the regression in the Appendix (p. 20). These are the usual way to compare the magnitudes of effect of different predictors in a regression. Larger beta weights imply a variable with a stronger effect. On p. 20 we replicated the equation in Model 6 of Table 7, but also computed beta weights. By far the largest coefficient (.374) is for the effect of # of prior disciplines (summed over all the investigations of each attorney) on probation. Next most important (.197) is the % of investigations that occurred without counsel. Compared to those variables, the beta weights for the other predictors in the equation are of much smaller magnitude[7]. We also find in the table of averages of all predictors, separately by race/ethnicity, in the Appendix on p. 19, that Black attorneys had a higher average on these two variables than any other race group. In particular, the Black average of # of prior disciplines was .222, whereas that for Whites was .100 (less than ½ the Black total). Regarding the % of investigations without counsel, the Black average was .152 while that for White was .079 (about half the value). There is little doubt that the primary reason that the Black suspension rate was 2.7 percentage points higher than that for Whites was because Blacks had higher average values on these variables, combined with their strong effects on probation rates.

## Racial Differences in Disbarment/Resignation

What about the most serious discipline – disbarment or resignation? Table 8 shows the number and percent of attorneys with this outcome, separately for groups defined by gender, race, and the number of complaints received. As was true for probation, the largest racial discrepancies occur for Black male attorneys subject to 10 or more complaints. These attorneys have a disbarment/resignation rate of 26.3%, compared with a rate of 17.9% for White males who also had >= 10 complaints.

Overall, 3.9% of Black male attorneys in our sample were disbarred or resigned during the period under study. The comparable rate for White male attorneys was 1.0%. This is by far the

[7] One anomaly in the estimated coefficients for Model 6 is that the coefficient for the number of investigations opened has now turned negative. However, in regressions with such a large number of control variables an issue of multicollinearity sometimes arises – this is when the joint distribution of several predictor variables is such that at least one of the predictors can be strongly predicted by a subset of others. Under these conditions the coefficients of one or more of the variables can suddenly switch signs. A test for this is to compute the variance inflation factors (vif) of all the predictors. We have done so, and the vif for # of investigations opened is particularly large. As a result we believe that the negative sign for this variable in Model 6 can be attributed to multicollinearity and safely ignored.

largest overall difference between Black or Hispanic and White attorneys in the table, and it is larger than the Black-White male probation rate difference in Table 5. As before, this is partly due to the fact that a higher percentage of Black than White male attorneys had 10 or more complaints, combined with the fact that among male attorneys with this number of complaints, Blacks are more likely than Whites to experience disbarment/resignation (26.3% versus 17.9% in Table 8). As before, we wish to remove the effect of the greater number of complaints

**Table 8. Attorneys Disbarred or Resigned**

| *Number of Attorneys* | | | | | | *Percent of Total* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | Asian | Black | Hispanic | White | Total | Asian | Black | Hispanic | White | Total |
| *Male* | | | | | | | | | | |
| 1-4 | 12 | 5 | 5 | 73 | 96 | 0.8% | 1.1% | 0.4% | 0.7% | 0.7% |
| 5-9 | 15 | 10 | 9 | 83 | 118 | 4.9% | 6.5% | 2.7% | 3.7% | 3.9% |
| >=10 | 58 | 57 | 54 | 342 | 521 | 21.1% | 26.3% | 17.2% | 17.9% | 18.9% |
| Total | 85 | 72 | 68 | 498 | 735 | 1.1% | 3.9% | 1.7% | 1.0% | 1.2% |
| *Female* | | | | | | | | | | |
| 1-4 | 8 | 6 | 2 | 30 | 48 | 0.6% | 1.0% | 0.2% | 0.4% | 0.5% |
| 5-9 | 3 | 4 | 2 | 31 | 40 | 2.3% | 3.3% | 1.3% | 3.1% | 2.8% |
| >=10 | 8 | 13 | 14 | 77 | 117 | 10.7% | 14.3% | 16.3% | 14.4% | 14.7% |
| Total | 19 | 23 | 18 | 138 | 205 | 0.2% | 0.9% | 0.5% | 0.4% | 0.4% |

Note: The left panel shows actual numbers disbarred or resigned, and the right panel shows the disbarment/resignation rate for each combination of sex, race, and number of complaints.

received by Black male attorneys so that we are left with the (simulated) percentage of Black males that would have been disbarred/resigned if the Black attorneys had the same distribution of number of complaints as the Whites. The results of doing so are shown in Table 9.

This table shows that after adjusting for gender/race group differences in the number of complaints, the Black male disbarment/resignation rate is reduced from 3.9% to 1.6%, and that for Hispanic males is reduced from 1.7% to 0.9%. ***Thus, the only meaningful race group difference in disbarment/resignation in Table 8, after the simulation to remove the effects of differences in the distribution of the number of complaints received by different race groups, are the remaining 0.6% gap between Black and White males and the remaining 0.3% gap between Asian and White males.[8] Both are statistically significant but small in magnitude.***

[8] As was the case for the simulation of probation rates, a further simulation could be undertaken for disbarment/resignation rates, to remove Black-White male attorney differences in the average number of complaints received among those receiving >=10 complaints (Table 2 shows this average to be 28.7 for Blacks and 24.7 for Whites). Doing so would further reduce the gap between the simulated Black and the White male disbarment/resignation rates.

**Regression Analyses to Measure the Effects of Multiple Variables on Disbarment/Resignation Among Attorneys With At Least One Complaint**

To bring multiple control variables into the analysis of race/ethnic and gender differences in disbarment/resignation, we repeat the analysis of Table 7, but for disbarment. The results are shown in Table 10.

Model 1 shows that when analyzing data for those attorneys with at least one complaint, and without any control variables, the Black disbarment/resignation rate is 3.2 percentage points higher than that for Whites, a statistically significant finding. Model 2 adds gender and the number of investigations opened to the regression. Both variables are statistically significant.

**Table 9. Actual and Simulated[1] Disbarment/Resignation Rates**

| | Asian | Black | Hispanic | White | Total |
|---|---|---|---|---|---|
| *Male* | | | | | |
| Actual | 1.1% | 3.9% | 1.7% | 1.0% | 1.2% |
| Simulated | 1.3% | 1.6% | 0.9% | 1.0% | 1.1% |
| Remaining Difference from White Rate | 0.3%* | 0.6%* | -0.1% | - | - |
| *Female* | | | | | |
| Actual | 0.2% | 0.9% | 0.5% | 0.4% | 0.4% |
| Simulated | 0.3% | 0.5% | 0.3% | 0.4% | 0.4% |
| Remaining Difference from White Rate | -0.1% | 0.1% | -0.1% | - | - |

1. Simulated if all groups had the White distribution of number of complaints

* Statistically significant at 5 percent level.

Females have disbarment/resignation rates 1.3 percentage points lower than males. A higher number of investigations opened increases the chance of disbarment/resignation. With these variables controlled, the Black-White difference in rates is reduced to 2.5 percentage points, which is still statistically significant.

Model 3 adds the % of investigations without counsel to the equation (and removes number of investigations opened). As was the case for predicting probation (Table 7), this is a very strong predictor of disbarment/resignation. In fact it is even stronger than for probation (coefficient of .227 in Model 3 of Table 7, .317 in Model 3 of Table 10). Importantly, with this variable controlled, the Black-White difference in rates declines from .025 in Model 2 of Table 10 to .009 in Model 3 of this table. This is a decline of 63%, and shows that this variable is a very important reason for the higher disbarment/resignation rates of Black compared to White attorneys.

Model 4 adds the # of investigations opened back in to the equation, and also adds years since admitted to the Bar and the number of each of the different allegation types. Many of these are statistically significant, with particularly strong positive effects from the % of investigations

without counsel and the allegation of the unauthorized practice of law. With all these variables controlled the Black coefficient has declined to a statistically insignificant 0.23 percent. This is a major finding – these two variables may play a particularly strong role in explaining Black-White differences in disbarment/resignation. Further, the Hispanic coefficient is negative, indicating that after adjustment for these variables, Hispanics actually have *lower* disbarment/resignation rates than Whites.

**Table 10. Linear Regression on Disbarment, All Attorneys with Any Complaints**

| | Model -1 | Model -2 | Model -3 | Model -4 | Model -5 | Model -6 |
|---|---|---|---|---|---|---|
| Race/Ethnicity | | | | | | |
| Asian | 0.0016 | 0.0005 | 0.0022 | 0.0021 | 0.0019 | 0.0023 |
| Black | 0.0319*** | 0.0250*** | 0.0092* | 0.0023 | 0.0010 | -0.0053 |
| Hispanic | 0.0023 | -0.0008 | -0.0030 | -0.0053* | -0.0065* | -0.0078** |
| Other | 0.0317*** | 0.0261** | 0.0170* | 0.0143 | 0.0163 | 0.0120 |
| Female | | -0.0132*** | -0.0040* | -0.0002 | -0.0003 | 0.0034* |
| # of Investigations Opened | | 0.0084*** | | 0.0062*** | 0.0059*** | 0.0030*** |
| % of INV w/o counsel | | | 0.3170*** | 0.2394*** | 0.2333*** | 0.0979*** |
| Year Since Admitted | | | | 0.0003* | 0.0002 | -0.0002 |
| Prof Employment | | | | -0.0165*** | -0.0168*** | -0.0094*** |
| Fees | | | | 0.0002 | 0.0006 | 0.0019*** |
| Funds | | | | 0.0014** | 0.0012* | 0.0025*** |
| Performance | | | | -0.0007* | -0.0008* | -0.0017*** |
| Duties to Client | | | | 0.0061*** | 0.0061*** | 0.0049*** |
| Inteference w Justice | | | | -0.0080*** | -0.0079*** | -0.0077*** |
| Personal Behavior | | | | 0.0031*** | 0.0034*** | 0.0033*** |
| No Complaint Articulated | | | | -0.0078* | -0.0071* | -0.0011 |
| Immigration Fraud | | | | -0.0575*** | -0.0569*** | -0.0484*** |
| Loan Modification | | | | -0.0027*** | -0.0028*** | -0.0017*** |
| Duties to State Bar | | | | 0.0681*** | 0.0722*** | 0.0354*** |
| Debt Resolution Complaint | | | | 0.0078*** | 0.0078*** | 0.0044** |
| Unauthorized Practice of Law | | | | 0.3314*** | 0.3325*** | 0.2139*** |
| *Firm Size/Type (Solo = base)* | | | | | | |
| 2-10 | | | | | -0.0070*** | 0.0001 |
| >=11 | | | | | -0.0042 | 0.0044 |
| No response/DK | | | | | 0.0124** | 0.0123** |
| Govt lawyer | | | | | -0.0007 | 0.0062* |
| Number of prior disciplines | | | | | | 0.1694*** |
| Constant | 0.0264*** | 0.0187*** | 0.0028* | -0.0057** | -0.0016 | -0.0040 |
| R-Squared | 0.0020 | 0.1356 | 0.2619 | 0.3392 | 0.3384 | 0.4716 |
| N | 32,720 | 32,720 | 32,720 | 32,720 | 27,257 | 27,257 |

Model 5 adds firm size and whether or not a government lawyer to the equation. The Black coefficient remains insignificant and becomes even smaller at .0010. The Hispanic coefficient remains negative. These variables might explain any disbarment/resignation differences between these groups and Whites. In fact, in Model 5 there are no remaining positive differences between any of the race groups and Whites, or between males and females. Model 6 adds the number of prior disciplines to the equations. As was the case for predicting probation, this is a strong positive predictor. Once again, there are no significant race/ethnicity or gender coefficients. Examining the coefficients in Model 6 in this table, it appears that # of

prior disciplines and % of investigations without counsel are particularly strong predictors, as is unauthorized practice of law. Once again we look at the Appendix table of beta weights for Model 6. By far the strongest predictor is # of prior disciplines, with a beta weight of .471. Next in importance are % of investigations without counsel (beta = .157) and number of investigations opened (beta = .132). This is a very similar finding as that for probation. Blacks have higher rates of disbarment/resignation than Whites because these variables are important predictors of that outcome, and because Blacks have higher values on these variables than Whites.

## Summary and Discussion

The goal of this report was to estimate and understand gender/race group differences in the discipline administered to attorneys by the State Bar of California. To do so, we analyzed data on 62,091 male and 54,272 female attorneys admitted to the Bar between 1990 and 2009. Disciplinary records for these attorneys were analyzed for the period 1990 to 2018. The outcomes examined were probation (at least once, and as the most severe discipline experienced) and disbarment/resignation.

Results show that male attorneys have higher probation and disbarment/resignation rates than females, and that racial discrepancies are higher among males than females. The largest racial differences were between Black and White male attorneys. The probation rate for Black male attorneys was 3.2% while that for White male attorneys was 0.9%. The disbarment/resignation rate for Black male attorneys was 3.9% while that for White male attorneys was 1.0%. For Hispanic males the probation rate was 1.9% and the disbarment/resignation rate was 1.7%.

These discipline differences between White male attorneys and male attorneys of color have two components. One is the distribution of the number of complaints that a gender/race group was subject to, and the other is the rate at which attorneys in a particular gender/race group and with a given number of complaints were disciplined. Complaints come to the Bar prior to their investigation, so that only the discipline rates applied to these complaints are attributable to actions of Bar staff. Further, Black and Hispanic attorneys averaged greater numbers of complaints than White attorneys. Accordingly, we undertook simulations to estimate the probation and disbarment/resignation rates that would have been experienced by Black and Hispanic attorneys if their distribution of complaints had been the same as those of White attorneys.

The result of these simulations was to greatly reduce the size of the gender/race group disparities in discipline. For Black males, the group with the largest differences from Whites, the probation rate declined from 3.2% to 1.4% and the disbarment/resignation rate declined from 3.9% to 1.6%. These simulated rates for Black males were only about ½ of a percentage point higher than the rates for White males. Similar results were found for Black females and for Hispanics.

We also used regression analysis to test for the ability of a range of attorney, attorney practice, and investigation characteristics as predictors of probation and disbarment among attorneys

with at least one complaint. We found that these variables might explain all race/ethnic and gender differences in these outcomes. While many of these predictors were statistically significant, a few stood out as being the strongest predictors and doing the most to explain racial/ethnic differences in probation and disbarment/resignation. These were the # of investigations opened, the percent of investigations without counsel, and the number of prior disciplines. Racial differences in the outcomes may be largely attributable to racial differences in these variables.

This study had several limitations. We did not examine outcomes for attorneys admitted to the Bar before 1990 or after 2009. We did not have information available on attorneys' areas of practice, which could affect both the number and type of complaints received against them. Other possible control variables were also unavailable. If further analyses are undertaken, they might usefully focus on understanding the sources of the greater average number of complaints experienced by Black and Hispanic than by White attorneys, as well as on how Bar staff take these into account during the investigation process. In particular, further investigation might profitably focus on the effects of an attorney not having counsel during an investigation, and the number of prior disciplines an attorney had during an investigation, on the outcome of the investigation.

## Appendix Tables Related to the Regressions

Summary Statistics of Predictor Variables, p.19

Beta Weights (Standardized Regression Coefficients) for Predicting Probation, p. 20

Beta Weights (Standardized Regression Coefficients) for Predicting Disbarment/Resignation, p. 21

**Summary Statistics of Predictor Variables**

| | Asian (N=3,706) | | Black (N=1,629) | | Hispanic (N=2,995) | | White (N=24,063) | | Other (N=327) | | Total (N=32,720) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Mean | SD | Mean | SD | Mean | SD | Mean | SD | Mean | SD | Mean | SD |
| Female (0/1) | 0.421 | 0.494 | 0.489 | 0.500 | 0.402 | 0.490 | 0.365 | 0.481 | 0.398 | 0.490 | 0.381 | 0.486 |
| # of Investigations Opened | 1.725 | 14.151 | 2.511 | 6.365 | 1.918 | 6.183 | 1.497 | 5.652 | 2.209 | 5.887 | 1.619 | 7.217 |
| % of INV w/o counsel | 0.078 | 0.257 | 0.152 | 0.346 | 0.096 | 0.285 | 0.079 | 0.260 | 0.126 | 0.321 | 0.085 | 0.268 |
| Number of prior disciplines | 0.095 | 0.419 | 0.222 | 0.674 | 0.128 | 0.512 | 0.100 | 0.440 | 0.180 | 0.592 | 0.109 | 0.462 |
| Year Since Admitted | 10.062 | 5.549 | 11.605 | 5.610 | 10.683 | 5.702 | 12.201 | 5.690 | 10.067 | 5.834 | 11.769 | 5.726 |
| Prof Employment | 0.104 | 0.682 | 0.063 | 0.390 | 0.107 | 0.485 | 0.104 | 0.715 | 0.113 | 0.749 | 0.102 | 0.681 |
| Fees | 1.009 | 12.299 | 1.396 | 4.509 | 1.234 | 4.623 | 0.987 | 7.754 | 1.483 | 4.518 | 1.038 | 8.033 |
| Funds | 0.508 | 2.263 | 0.842 | 2.305 | 0.624 | 2.414 | 0.491 | 2.474 | 0.700 | 2.280 | 0.525 | 2.437 |
| Performance | 2.081 | 13.469 | 3.445 | 7.006 | 2.973 | 7.166 | 2.095 | 9.992 | 2.890 | 6.584 | 2.249 | 10.083 |
| Duties to Client | 0.831 | 2.927 | 1.554 | 3.012 | 1.275 | 3.348 | 0.981 | 3.476 | 1.260 | 2.674 | 1.022 | 3.381 |
| Inteference w Justice | 0.831 | 1.461 | 1.066 | 2.116 | 0.946 | 1.700 | 0.927 | 1.864 | 1.199 | 1.982 | 0.927 | 1.824 |
| Personal Behavior | 0.852 | 4.416 | 1.152 | 2.642 | 0.926 | 2.222 | 0.878 | 3.045 | 1.257 | 2.878 | 0.897 | 3.149 |
| No Complaint Articulated | 0.049 | 0.401 | 0.077 | 0.379 | 0.080 | 0.367 | 0.044 | 0.355 | 0.058 | 0.247 | 0.049 | 0.362 |
| Immigration Fraud | 0.008 | 0.125 | 0.001 | 0.035 | 0.009 | 0.169 | 0.001 | 0.036 | 0.000 | 0.000 | 0.003 | 0.074 |
| Loan Modification | 0.488 | 15.002 | 0.286 | 3.306 | 0.226 | 2.370 | 0.269 | 8.416 | 0.242 | 1.753 | 0.290 | 8.870 |
| Duties to State Bar | 0.031 | 0.192 | 0.060 | 0.264 | 0.031 | 0.191 | 0.031 | 0.195 | 0.067 | 0.263 | 0.032 | 0.200 |
| Debt Resolution Complaint | 0.006 | 0.077 | 0.015 | 0.317 | 0.005 | 0.091 | 0.013 | 0.629 | 0.000 | 0.000 | 0.011 | 0.545 |
| Unauthorized Practice of Law | 0.002 | 0.052 | 0.004 | 0.061 | 0.003 | 0.066 | 0.001 | 0.040 | 0.000 | 0.000 | 0.002 | 0.045 |
| Solo (0/1) | 0.412 | 0.492 | 0.428 | 0.495 | 0.383 | 0.486 | 0.385 | 0.487 | 0.468 | 0.500 | 0.391 | 0.488 |
| 2-10 (0/1) | 0.288 | 0.453 | 0.217 | 0.413 | 0.322 | 0.467 | 0.339 | 0.474 | 0.275 | 0.447 | 0.325 | 0.468 |
| >=11 (0/1) | 0.116 | 0.320 | 0.097 | 0.296 | 0.092 | 0.288 | 0.118 | 0.322 | 0.106 | 0.308 | 0.114 | 0.317 |
| No response/DK (0/1) | 0.039 | 0.193 | 0.069 | 0.253 | 0.048 | 0.214 | 0.047 | 0.213 | 0.060 | 0.238 | 0.048 | 0.213 |
| Govt lawyer (0/1) | 0.145 | 0.353 | 0.188 | 0.391 | 0.155 | 0.362 | 0.111 | 0.314 | 0.092 | 0.289 | 0.123 | 0.328 |

**Linear Regression on Probation, All Attorneys with Any Complaints**

| Dep: Probation | Coef. | Std. Err. | t | P>t | Beta | Sig |
|---|---|---|---|---|---|---|
| Race/Ethnicity | | | | | | |
| Asian | -0.002 | 0.003 | -0.720 | 0.471 | -0.004 | |
| Black | 0.006 | 0.004 | 1.500 | 0.134 | 0.008 | |
| Hispanic | 0.006 | 0.003 | 1.920 | 0.054 | 0.010 | |
| Other | -0.003 | 0.009 | -0.310 | 0.756 | -0.002 | |
| Female | 0.000 | 0.002 | 0.230 | 0.818 | 0.001 | |
| # of Investigations Opened | -0.001 | 0.000 | -4.290 | 0.000 | -0.056 | *** |
| % of INV w/o counsel | 0.116 | 0.004 | 28.840 | 0.000 | 0.197 | *** |
| Number of prior disciplines | 0.127 | 0.002 | 55.180 | 0.000 | 0.374 | *** |
| Year Since Admitted | 0.000 | 0.000 | -1.230 | 0.220 | -0.007 | |
| Prof Employment | 0.005 | 0.001 | 3.510 | 0.000 | 0.022 | *** |
| Fees | -0.001 | 0.000 | -3.120 | 0.002 | -0.078 | ** |
| Funds | -0.001 | 0.001 | -2.450 | 0.014 | -0.020 | * |
| Performance | 0.000 | 0.000 | 0.580 | 0.564 | 0.014 | |
| Duties to Client | -0.001 | 0.001 | -0.970 | 0.333 | -0.013 | |
| Inteference w Justice | 0.005 | 0.001 | 7.740 | 0.000 | 0.054 | *** |
| Personal Behavior | 0.000 | 0.001 | 0.720 | 0.474 | 0.008 | |
| No Complaint Articulated | 0.002 | 0.003 | 0.470 | 0.641 | 0.004 | |
| Immigration Fraud | -0.001 | 0.011 | -0.130 | 0.895 | -0.001 | |
| Loan Modification | 0.001 | 0.000 | 4.040 | 0.000 | 0.066 | *** |
| Duties to State Bar | -0.012 | 0.004 | -2.840 | 0.004 | -0.016 | ** |
| Debt Resolution Complaint | -0.003 | 0.002 | -1.950 | 0.051 | -0.012 | |
| Unauthorized Practice of Law | -0.196 | 0.018 | -10.800 | 0.000 | -0.058 | *** |
| *Firm Size/Type (Solo = base)* | | | | | | |
| 2-10 | -0.010 | 0.002 | -4.850 | 0.000 | -0.029 | *** |
| >=11 | -0.012 | 0.003 | -4.090 | 0.000 | -0.023 | *** |
| No response/DK | -0.014 | 0.004 | -3.250 | 0.001 | -0.018 | ** |
| Govt lawyer | -0.013 | 0.003 | -4.530 | 0.000 | -0.026 | *** |
| Constant | 0.010 | 0.003 | 3.82 | 0 | | |
| R-squared | 0.248 | | | | | |
| N | 27,257 | | | | | |

**Linear Regression on Disbarment, All Attorneys with Any Complaints**

| Dep: Disbarment | Coef. | Std. Err. | t | P>t | Beta | Sig |
|---|---|---|---|---|---|---|
| Race/Ethnicity | | | | | | |
| Asian | 0.002 | 0.002 | 0.920 | 0.356 | 0.004 | |
| Black | -0.005 | 0.004 | -1.480 | 0.138 | -0.007 | |
| Hispanic | -0.008 | 0.003 | -2.890 | 0.004 | -0.013 | |
| Other | 0.012 | 0.008 | 1.550 | 0.121 | 0.007 | |
| Female | 0.003 | 0.002 | 2.050 | 0.041 | 0.009 | * |
| # of Investigations Opened | 0.003 | 0.000 | 12.050 | 0.000 | 0.132 | *** |
| % of INV w/o counsel | 0.098 | 0.004 | 27.370 | 0.000 | 0.157 | *** |
| Number of prior disciplines | 0.169 | 0.002 | 82.870 | 0.000 | 0.471 | *** |
| Year Since Admitted | 0.000 | 0.000 | -1.250 | 0.213 | -0.006 | |
| Prof Employment | -0.009 | 0.001 | -7.380 | 0.000 | -0.039 | *** |
| Fees | 0.002 | 0.000 | 4.400 | 0.000 | 0.092 | *** |
| Funds | 0.002 | 0.000 | 5.290 | 0.000 | 0.037 | *** |
| Performance | -0.002 | 0.000 | -5.330 | 0.000 | -0.105 | *** |
| Duties to Client | 0.005 | 0.001 | 8.970 | 0.000 | 0.102 | *** |
| Inteference w Justice | -0.008 | 0.001 | -14.680 | 0.000 | -0.085 | *** |
| Personal Behavior | 0.003 | 0.001 | 6.460 | 0.000 | 0.063 | *** |
| No Complaint Articulated | -0.001 | 0.003 | -0.390 | 0.697 | -0.003 | |
| Immigration Fraud | -0.048 | 0.010 | -4.860 | 0.000 | -0.022 | *** |
| Loan Modification | -0.002 | 0.000 | -6.810 | 0.000 | -0.093 | *** |
| Duties to State Bar | 0.035 | 0.004 | 9.070 | 0.000 | 0.043 | *** |
| Debt Resolution Complaint | 0.004 | 0.002 | 2.880 | 0.004 | 0.015 | *** |
| Unauthorized Practice of Law | 0.214 | 0.016 | 13.300 | 0.000 | 0.060 | *** |
| *Firm Size/Type (Solo = base)* | | | | | | |
| 2-10 | 0.000 | 0.002 | 0.070 | 0.947 | 0.000 | |
| >=11 | 0.004 | 0.003 | 1.650 | 0.099 | 0.008 | |
| No response/DK | 0.012 | 0.004 | 3.230 | 0.001 | 0.015 | ** |
| Govt lawyer | 0.006 | 0.003 | 2.370 | 0.018 | 0.011 | * |
| Constant | -0.004 | 0.002 | -1.75 | 0.08 | | |
| R-squared | 0.472 | | | | | |
| N | 27,257 | | | | | |

# APPENDIX D

The State Bar of California

**OPEN SESSION**
**AGENDA ITEM**
**701 JULY 2020**

**DATE:** **July 16, 2020**

**TO:** **Members, Board of Trustees**

**FROM:** **Dag MacLeod, Chief of Mission Advancement & Accountability Division**

**SUBJECT:** **Consideration of Recommendations to Implement Changes to Address Key Findings of the Disparities in the Discipline System Study**

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## EXECUTIVE SUMMARY

This agenda item follows up on the January planning meeting at which the Board of Trustees directed State Bar staff to return to the Board with detailed recommendations to address the disparate discipline imposed on African American attorneys. Looking in detail at five issues presented to the Board of Trustees in January, this agenda item summarizes 12 potential reforms developed by Professor Christopher Robertson of Boston University and the University of Arizona. Detail on the methods and rationale for these potential reforms is provided in the attached report by Professor Robertson.

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## BACKGROUND

In 2019, the State Bar of California initiated a study to assess the impact of race / ethnicity on attorney discipline and determine whether there was disparate treatment of attorneys of color in the State Bar discipline system. The results of that study, conducted by Professor George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, were presented to the Board of Trustees in November, 2019.

Professor Farkas' study looked at over 110,000 attorneys admitted to the Bar between 1990 and 2009 and followed them throughout their careers up until 2018. The study found that, without controlling for any other factors, there was disproportionate discipline, in particular, against African American, male attorneys who were three times as likely to be placed on probation, and almost four times as likely to be disbarred as their white, male counterparts.

The study also looked at the mechanisms associated with the racial/ethnic disparities. Using multiple regression analysis to control for a range of different variables—for example, allegation type, firm size, and years of practice—the study found that the racial disparities were explained statistically by a higher number of complaints against African American men, more investigations opened against them, and a lower likelihood of being represented by defense counsel in State Bar discipline proceedings. When these factors were included in the multiple-regression model, the disparity based on race became statistically insignificant.

The fact that disproportionate discipline against African American, male attorneys can be explained statistically by these factors, however, does not change the fact that these attorneys are more likely to be disciplined by the State Bar. Moreover, many of the variables in the statistical model that explain the disproportionate discipline are likely also affected by race. Thus, after receiving the report from Professor Farkas, the Board of Trustees directed State Bar staff to evaluate the process of attorney discipline to understand and address the mechanisms that appear to contribute to disproportionate discipline.

In late 2019, State Bar staff invited Professor Christopher Robertson, N. Neal Pike Scholar and Professor at the School of Law of Boston University, and Visiting Scholar and Special Advisor at the James E. Rogers College of Law of the University of Arizona, to review the report on disproportionate discipline and explore possible remedies to address the problem. In January, 2020, Professor Robertson met with staff and leadership in the Office of Chief Trial Counsel (OCTC), reviewed documents related to OCTC process and policy, and delivered a preliminary "menu of ideas" to the Board of Trustees at its January planning meeting.

Professor Robertson's menu of ideas included five areas to explore further including:

1. The handling of Reportable Action Bank cases (reports that come to the State Bar from banks when a client trust account is overdrawn);
2. The treatment of prior complaints that are closed with no discipline imposed on an attorney;
3. Options for encouraging the representation of attorneys in the discipline system;
4. "Blinding" of respondent attorney identities to reduce the likelihood of implicit bias entering into the process; and
5. The diversity of staff in OCTC.

The Board of Trustees directed staff to examine these issues and any additional issues that came to light in this subsequent evaluation and report back to the Board in July.

The remainder of this agenda item summarizes the findings of Professor Robertson, detailed in the attached report, and makes recommendations for action that the State Bar can take.

In the preparation of his report, Professor Robertson drew heavily on the expertise of OCTC staff and leadership: his report could not have been written without their able, unguarded, thoughtful assistance which throughout the process was focused on improving the State Bar discipline system. In addition, early drafts of Professor Robertson's reports benefitted from stakeholder review including discussions with the State Bar's Bench-Bar Committee,

representatives from the Council on Access and Fairness, and the Chair and Vice-Chair of the Committee on Regulation and Discipline.

## DISCUSSION

It should be noted at the outset that the finding of disproportionate discipline does not, by itself, indicate that African American attorneys have been disciplined more harshly than is warranted by an objective standard. What it tells us is that they have been disciplined more than other racial/ethnic groups.

While there is abundant evidence of systemic racism and reason to believe that the disproportionate discipline is related to the larger social-political system in which we live, because disproportionate discipline necessarily refers to a comparison between groups, it could be that the cause of the disproportionality is less about excessive discipline against African American attorneys than about insufficient discipline imposed on other groups. Or the reverse could be true.

Because of this, in exploring potential remedies to the disproportionality, proposals that tend to make it more difficult to prosecute attorneys for misconduct may have the unintended consequence of making it more difficult to prosecute attorneys for legitimate misconduct. The potential remedies, then, need to be viewed through the lens of the State Bar's public protection mandate in addition to its access to justice and fairness mandates.

**Reportable Action Bank Cases**

Reportable Action Bank (RA-Bank) cases were not a separate component of the multiple-regression model looking at statistically significant variables associated with attorney discipline. These cases, however, presented an interesting and potentially useful area of inquiry for a number of reasons. First, among attorneys with large numbers of complaints against them, African American, male attorneys were more likely to have a large number of these types of cases. Second, because RA-Bank cases are generated by an objective trigger—the overdraft of a client trust account—the issue appears to relate more to systemic factors than individual discretion.

As Professor Robertson writes:

> the disparity [in this case type] likely depends on other institutional or systemic factors, which are correlated with race, including variations in practice settings, which may have Black attorneys being more likely to handle client funds at all and have more transactions on those accounts.[1]

In his exploration of this topic, Professor Robertson proposes a number of potential reforms related to the handling of RA-Bank cases. One of the recommendations relates simply to revising the rules for handling *de minimus* bank overdrafts, currently set at $50.

[1] Page 9.

Potential Reform 1.1 – For the purpose of *de minimus* closing of RA-Bank cases, OCTC could specify a higher monetary threshold and one that allows a number of prior cases over a period of time, before triggering investigation.

The other potential reforms that Professor Robertson proposes related to RA-Bank matters look "upstream" at the prevention of overdrafts in the first place. These proposals involve various different options including allowing attorneys to create a "cushion" with their own funds in a client trust account (similar to the way in which attorneys may deposit a reasonable amount of their own funds to cover bank fees), or by the adoption, encouragement, or (in cases of attorneys who repeatedly over-draw their accounts) a requirement that attorneys use services that prevent client trust account overdrafts.

Potential Reform 1.2 – The State Bar could clarify its rules to allow attorneys to deposit a specific amount of funds into client trust accounts as a cushion when errors occur.

Potential Reform 1.3 – The State Bar could revise its guidance to encourage attorneys to reasonably rely on systems of professionals and technologies to prevent trust accounting errors.

Potential Reform 1.4 – The State Bar could develop a turnkey banking, checking, bookkeeping, and accounting solution for client trust funds.

**Treatment of Prior Closed Complaints**

One of the variables most strongly associated with attorney disbarment in the report by Professor Farkas is the number of prior investigations opened against an attorney. Investigations are opened by OCTC attorneys when a complaint alleges misconduct that *if proven to be true* would be grounds for discipline. Given the disproportionate number of complaints filed against African American, male attorneys, this raised the question of whether prior complaints factor into the decision-making process in some manner that influences the determination to move a case forward for investigation.

Looking simply at the number of attorneys against whom complaints are filed, Professor Farkas found that while approximately 32 percent of white, male attorneys had at least one complaint filed against them, almost half (46 percent) of African American, male attorneys had at least one complaint filed against them. By increasing the scrutiny of African American attorneys, the disproportionate filing of complaints against Black attorneys, by itself, increases the odds of discipline.

However, while OCTC has no control over the complaints that are filed by clients, it does have control over how it assesses the complaints. One issue of particular interest with regard to how OCTC assesses complaints was the status of *prior complaints that are closed without the imposition of discipline*. In State Bar Court, prior complaints that are closed without discipline have no probative value. But closed complaints may be useful when evaluating whether a new complaint fits a pattern of misconduct.

Professor Robertson talked with intake attorneys in OCTC, reviewed OCTC policy for the handling of complaints, and discussed the issue with OCTC leadership. Because this issue bears some resemblance to the disproportionate impact of arrest records and criminal history information on African Americans, Professor Robertson also analogizes to the criminal justice system in his evaluation of this issue.

Two of the potential reforms in this area suggested by Professor Robertson overlap with the option of "blinding" insofar as they would shield decision-makers from information that is potentially prejudicial. The first of those potential reforms suggests that the value of closed complaints for establishing patterns of misconduct may decline over time, thus:

> Potential Reform 2.1 – The State Bar could expunge after five years complaints closed without discipline.

The second potential reform in this area would retain the information but archive it and establish a threshold for gaining access to it:

> Potential Reform 2.2 – The State Bar could archive complaints closed without discipline, so that they would be accessed rarely upon written application to a supervising attorney.

A third potential reform in regard to closed complaints dovetails with the work of the 2020 Governance in the Public Interest Task Force by proposing that the data from closed complaints be mined to identify attorneys at risk of future complaints.

> Potential Reform 2.3 – The State Bar could develop a proactive non-disciplinary system to support attorneys at higher risk of future complaints

**Increasing Attorney Representation**

The final issue evaluated by Professor Robertson was the fact that African American respondents were much *less* likely to be represented by counsel when facing a disciplinary investigation by the State Bar. As with the number of investigations opened against an attorney, the percentage of cases in which the respondent attorney is not represented by counsel was a statistically significant predictor of attorney discipline. Looking across the entire population of attorneys in the Farkas study, on average African American attorneys were about twice as likely *not* to be represented by counsel.

Citing this disparity in representation, Professor Robertson goes on to argue that:

> The racial disparity we see is problematic on its own, but it also suggests that the discipline system is resolving cases on factors other than the merits, and thus is failing to optimally achieve its policy goals of protecting the public.

As a starting point, Professor Robertson suggests the potential reform simply of tracking the rates of representation in the discipline system:

Potential Reform 3.1 – The State Bar could track and report the proportion of discipline cases lacking representation as a key performance indicator.

Moving beyond simply tracking rates of representation, Professor Robertson proposes that the State Bar evaluate different modes of communication with respondent attorneys to determine which messages are most likely to increase respondent representation. Although the State Bar already informs respondents of the value of representation, Potential Reform 3.2 would involve actual pilot testing of different messages to ensure their efficacy.

Potential Reform 3.2 – The State Bar could inform attorneys facing discipline about the increased statistical likelihood of probation or disbarment if they fail to secure counsel.

Going further still and recognizing that the State Bar discipline system has no equivalent to a public defender function, Professor Robertson interviewed attorney defense counsel in California and Arizona and examined models of representation in other states. To increase the rates of representation among respondent attorneys Professor Robertson proposes:

Potential Reform 3.3 – The State Bar could develop a roster of attorneys who agree to provide pro bono one-hour consultations and provide a subset of these along with the notice contemplated in PR3.2.[2]

Continuing along this same line of thinking:

Potential Reform 3.4 – The State Bar could facilitate sliding-scale fee representation by the private defense bar.

Finally, Professor Robertson proposes the creation of an office to oversee initiatives related to equity in the discipline system:

Potential Reform 3.5 – The State Bar could create a Discipline Equity Office to implement the foregoing reforms, minimize disparities, ensure that discipline decisions are rendered on the merits, and support unrepresented attorneys.

In addition to the three areas discussed here, Professor Robertson recommends continued study of two additional questions, which appeared in his January presentation: blinding and diversity of OCTC staff.

**"Blinding" of respondent attorney identities to reduce the likelihood of implicit bias entering into the process**

In January, Professor Robertson suggested the possibility of blinding OCTC staff to prevent exposure to the race of respondent attorneys. Blinding in the context of decision-making and organizational behavior involves the intentional shielding of information that may be prejudicial. Given research that has shown even names on applications can serve as proxies for

[2] An analysis would need to be performed to ensure the State Bar does not cross the line into becoming a lawyer referral service.

racial/ethnic identity and, thus, produce disparate outcomes, effectively blinding an entire record will require additional study.[3] The elements of a thorough blinding of the record touch on technology—the availability and display of data in case management systems—as well as organizational process, policy, and workflow. Under current conditions, with OCTC staff working remotely, a detailed workflow analysis may not be possible.

It should be noted, however, that Possible Reforms 2.1 and 2.2 contain elements of blinding: by expunging prior records, or archiving them to increase the cost of accessing them, potentially prejudicial information is shielded from view.

**Staff Diversity in OCTC**

In January, Professor Robertson also suggested a comprehensive statistical review of the diversity of the OCTC staff, because diversity in decision makers may be important for minimizing biases and increasing perceived legitimacy.

Data on the race / ethnicity of State Bar staff is compiled by staff in the Office of Human Resources. Upon joining the State Bar, new staff complete paperwork that includes forms providing for self-identification of race/ethnicity. In the process of evaluating data available to assess the racial/ethnic make-up of OCTC, staff learned that missing data from the self-identification forms has in the past been completed by Human Resources staff.

The tainting of the data by the ascription of race/ethnicity led staff to determine that new data will need to be collected to complete this portion of the work.

## FISCAL/PERSONNEL IMPACT

None

## AMENDMENTS TO RULES OF THE STATE BAR

None

## AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

## STRATEGIC PLAN GOALS & OBJECTIVES

None

[3] See "Whitened Resumes: Race and Self-Presentation in the Labor Market," Sonia Kang, Katy DeCelles, Andras Tilcsik, and Sora Jun, *Administrative Sciences Quarterly*, September, 2016.

## RECOMMENDATIONS

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees directs staff to develop plans to implement reforms 3.1, 3.2, and 3.3, specifically to:

1. Develop a metric and begin regular reporting of data on representation by respondent attorneys;

2. Pilot test different messages to respondent attorneys regarding the value of representation by counsel in attorney disciplinary proceedings and evaluate the most effective method of encouraging representation; and

3. Begin discussions with Attorney Discipline Defense Counsel representatives to develop and distribute a roster of attorneys who could provide low-cost and pro bono case evaluations to respondent attorneys.

**FURTHER RESOLVED**, that the Board of Trustees directs State Bar staff to evaluate reforms 1.1 and 2.3, specifically:

1. Evaluate RA-Bank matters to understand the impact on public protection of modifying the *de minimus* threshold for closing RA-Bank matters. Specifically, staff should evaluate:
   a. The volume of RA-Bank matters organized by the amount of the over-draft;
   b. Whether low-level RA-Bank matters are useful as predictors of subsequent malfeasance related to client trust accounts or other misconduct;
   c. Whether modifications of State Bar rules to allow for attorneys to place a specified amount of money in a trust account would have any impact on the incidence of over-drafts from client trust accounts.

2. Evaluate complaints closed without discipline to determine whether specific issues can be identified that allow for proactive regulation.

## ATTACHMENT(S) LIST

**A.** Potential Reforms to Mitigate Racial Disparities in the California State Bar Attorney Discipline Process – Interim Report to the California State Bar Board of Trustees by Professor Christopher Robertson.

# POTENTIAL REFORMS TO MITIGATE RACIAL DISPARITIES IN THE CALIFORNIA STATE BAR ATTORNEY DISCIPLINE PROCESS

Christopher T. Robertson, JD, PhD
University of Arizona and Boston University

*an interim report to*

The California State Bar Board of Trustees

*Comments to Robertson@arizona.edu*

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## EXECUTIVE SUMMARY

In 2019, the California State Bar commissioned a report by Dr. George Farkas to examine whether there were disparities in the attorney discipline system, in terms of race, gender, or firm size. The November 2019 report found that there were dramatic differences in the rates at which some populations of attorneys were disciplined, with the disparity being greatest for Black males compared to White males. Dr. Farkas identified several potential reasons for the disparity, including that Black males receive public complaints and reportable actions more often, and they are less often represented by attorneys when defending those complaints.

For the Board of Trustees to address the disparities in outcomes, it must work backwards to target the underlying factors that generate those outcomes. My work so far has focused on: (1) instances of insufficient funds in client trust fund accounts ("bank-reportable actions"), (2) the Bar's handling of prior complaints closed without discipline, and (3) representation of responding attorneys.

For bank-reportable actions, the type of complaint that Black male attorneys receive most disproportionately, I develop the theory that an underlying wealth disparity may be the mechanism, rather than disparities in the frequency at which attorneys misappropriate funds. Accordingly, when OCTC receives such notices, it could use a higher threshold for closing cases as *de minimus*, which alone would substantially reduce the number of times that Black attorneys are scrutinized for discipline. Going upstream to prevent problems and drawing on the safety-systems approach of healthcare and other fields suggests two insights: (1) that occasional lapses and errors are to be expected, but systems should be designed to minimize actual harm to clients, and (2) those systems will often require the incorporation of other technologies, professionals, and organizational supports, rather than individual-focused remedies such as discipline or retraining. Accordingly, I suggest allowing attorneys to deposit a cushion into client trust accounts and the development of a turnkey trust banking/accounting service leveraging technology. These reforms could reduce the number of insufficient funds cases that occur in the first place.

Since prior complaint history is infected by a racial disparity, the State Bar must be careful to avoid allowing that disparity to infect its decisions. It is important to distinguish between prior cases of discipline, which involve a finding of misconduct, versus prior complaints that were closed without discipline (like mere arrests on a rap sheet). Since State Bar Court rules are clear that mere closed complaints do not support an inference of misconduct, OCTC could expunge old closed complaints and quarantine more recent closed complaints in an archive, so they are not routinely used for evaluating new complaints. Instead, when OCTC is unsure about whether a new complaint should be formally investigated, and especially if the complaining witness (CW) appears to be a member of a vulnerable population, it could more often undertake preliminary inquiries to explore the plausibility of the complaint. In addition, the State Bar could develop a proactive non-disciplinary support system, which may use prior closed complaints as a factor for identifying attorneys at risk of discipline and intervening to reduce the likelihood of future actionable complaints against them.

For representation of attorneys facing discipline, I recommend focal study of several potential reforms, which could increase the proportion of respondents who get counsel, and moreover improve the performance of even those who do not get such help. First, the State Bar could begin systematically tracking rates of representation as a key performance metric for the discipline system. It could also notify all attorneys facing formal discipline about the statistical advantage of getting representation, and provide them with a referral to a specific attorney willing to provide a free one-hour consultation. Going further the State Bar could create a Discipline Equity Office to

facilitate these and other reforms to reduce disparities, and provide assistance to self-represented attorneys, following the model that California courts have adopted to provide resources for self-represented litigants. That new office might also help facilitate means-testing for sliding scale fees by private counsel.

In a concluding section, I suggest that these twelve potential policy reforms may reduce the disparity in attorney discipline, but each of them raises questions about feasibility and implementation. In addition, there are other areas suggested by the Farkas report for analysis and exploratory study. Finally, I emphasize that I have so far taken the Farkas report at face value, but future study should embrace other statistical methods and look at other racially disparate drivers of attorney discipline, including for example, interactions with the criminal justice system, where similar disparities have been documented.

## BACKGROUND

In 2019, the State Bar "initiated a rigorous, quantitative analysis to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action."[1] Dr, George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, was commissioned to perform the first phase of that work, which he provided in a November report, analyzing data for 116,363 attorneys admitted to the Bar between 1990 and 2009, using self-reported race information. From the Mission Advancement and Accountability Division, Dag MacLeod and Ron Pi summarized the topline findings:

> The analyses revealed that, without controlling for any factors potentially associated with case outcomes, there are statistically significant disparities with respect to both probation and disbarment. The largest gender/race disparities can be seen when comparing Black to White, male attorneys. The probation rate for Black, male attorneys over this time period was 3.2 percent, compared to 0.9 percent for White, male attorneys. The disbarment/resignation rate for Black, male attorneys was 3.9 percent compared to 1.0 percent for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females. There were no meaningful differences for Asians compared to Whites.[2]

I accordingly focus on the disparities (or disproportionalities) for Black men.[3]

Dr. Farkas found that once statistical control variables are applied—including previous discipline history, the number of investigations opened, and the percentage of investigations in which the attorney was not represented by counsel—the effects of race become statistically insignificant (for some outcomes, such as probation as in Table 7 Model 6) or even become slightly negative (for outcomes such as disbarment, as in Table 10 Model 6). Nonetheless, it bears emphasis that no statistical model includes the primary variable of interest (the underlying rates of misconduct, which we have no independent way of measuring), and other included variables are likely themselves infected by race, in both their real frequency and in their measurement.[4]

Accordingly, it would be wrong to infer that these other variables "explain away" any racial disparities.[5] Yet the models do suggest mechanisms driving the disparities in outcomes. These

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[1] Dag MacLeod and Ron Pi, "Cover Memorandum for Report on Disparities in the Discipline System, to Members of Board of Trustees," November 19, 2019 at 1, available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf.

[2] Id., at 2.

[3] A note on terminology: some scholars use the term "disproportionality" to refer to raw differences across races, but reserve the term "disparities" for only those differences that remain when all other factors are held equal. The latter has more of a normative sense. To the contrary, I use these terms interchangeably, for lack of any plausible mechanism of holding all other factors equal. Susan A. McCarter, *Racial Disparities in the Criminal Justice System.* in TERRY MIZRAHI AND LARRY E. DAVIS, ENCYCLOPEDIA OF SOCIAL WORK (2018).

[4] See D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics,* 93 REV. ECON. & STAT. 775, 783-84 (2011); Andrew Gelman, Alex Fiss, Jeffrey Fagan*, An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias,* 102 J. AM. STAT. ASSOC. 813, 818-20 (2007).

[5] See Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking about Detecting Racial Discrimination*. 113 NW U L. REV. 1163, 1171 (2019) ("One implication of the social constructivist theory is that race cannot be conceptualized as an isolated treatment in the counterfactual causal model, and accordingly, racial discrimination cannot be defined as the treatment effect of race. If we accept the constructivist theory of race, then we must reject attempts to detect racial discrimination that seek to isolate the causal effect of race alone because it rests on a sociologically incoherent conception of what race references and how it can cause a distinctive form of action called

variables are a roadmap for my initial work, allowing us to see where State Bar policy choices, even if facially-race neutral and well-intentioned, may be causing disparate outcomes, placing black attorneys at greater risk of disbarment.[6]

Because we are unable to observe the true rates of professional misconduct by California attorneys, we cannot in the aggregate say that Black attorneys are being disbarred too often or White attorneys being disbarred not enough (or both, or neither).[7] I am also mindful that the State Bar has multiple mission functions, including protection of the public and preserving access to justice, both of which may be impacted by the racial disparity in outcomes and potential reforms.[8] So, simply ratcheting up or down disbarments for one group or the other is unlikely to be a feasible or worthwhile solution.

In January 2020, I was asked to review the State Bar's practices and policies to develop potential reforms that could mitigate the disparity in outcomes. After some very preliminary interviews with key personnel, I made a framing presentation to the Board of Trustees, identifying potential reforms in each of five different areas: bank reportable actions, handling of attorneys' prior record of discipline, representation of attorneys facing discipline, removing racial identifiers from files at key stages (aka "blinding"), and diversity of Office of Chief Trial Counsel (OCTC) staff. In the intervening months, I have focused primarily on the first three of these.

My process has included:

- interviews with leadership of the State Bar and the Office of Chief Trial Counsel (OCTC);
- interviews with staff attorneys in OCTC;
- review of selected OCTC policies and excerpts of internal staff manuals;

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discrimination"). See also id., at 1188 (discussing the debate between Jeff Fagan and Dennis Smith, expert witnesses in the NYPD stop-and-frisk litigation, concerning which variables should be included in regressions).

[6] Similarly see Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor.* NYU JOURNAL OF LEGISLATION AND PUBLIC POLICY 16, 821–851 (2013) (discussing the Prosecution and Racial Justice Program of the Vera Institute of Justice, which collected and published data on defendant and victim race for each offense category and the prosecutorial action taken at each stage of criminal proceedings. These data exposed that similarly situated defendants of different races were treated differently at each stage of discretion: initial case screening, charging, plea offers, and final disposition.); Andrew Golub et al., *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City,* 6 CRIM. & PUB. POL'Y 131, 137 (2007) (showing how the massive increase in marijuana enforcement during the 1990s disproportionately affected Black and Latinos)

[7] Similarly see Michelle Alexander, THE NEW JIM CROW, The New Press, Kindle Edition (2020), at p.123 ("[R]ates and patterns of drug crime do not explain the glaring racial disparities in our criminal justice system. People of all races use and sell illegal drugs at remarkably similar rates."); Sunita Sah, Christopher T. Robertson, and Shima B. Baughman, *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System,* 1 BEHAVIORAL SCIENCE & POLICY 23, 27 (2015) ("Both unjustified leniency for Whites and unjustified harsher punishments for Blacks were revealed in 2015 by the U.S. Department of Justice Civil Rights Division's investigation of the Ferguson (Missouri) Police Department. … Whites were more likely to have citations, fines, and fees eliminated by city officials, whereas Blacks were punished for the same minor transgressions with expensive tickets and judgments punishing their perceived lack of personal responsibility.")(citing United States Department of Justice, Civil Rights Division. (2015). Investigation of the Ferguson Police Department, available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). See generally, R. Jensen (2005). THE HEART OF WHITENESS: CONFRONTING RACE, RACISM AND WHITE PRIVILEGE, San Francisco, CA: City Lights Books; B. S. Lowery, E. D. Knowles and M. M. Unzueta, *Framing Inequity Safely: Whites' Motivated Perceptions of Racial Privilege,* PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 33, 1237–1250 (2007); Daria Roithmayr. REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE, NYU Press (2014).

[8] Similarly see, Angel Onwuachi-Willig, *Just Another Brother on the SCT: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity,* 90 IOWA L. REV. 931, 962 (2004) (describing the complex politics of race and criminal justice, where some claim "that the 'real victims' … are law-abiding members of the black community, who are denied equal protection under the law of the death penalty because people who kill Whites are significantly more likely than those who kill Blacks to receive the death penalty.")

- review of attorney guidance documents, CLE curricula, and handbooks related to client trust fund management;
- a preliminary framing presentation to the Board of Trustees in January 2020 and discussion of potential next steps;
- interviews with accounting service providers and accounting software vendors regarding the prevention of trust account overdrafts;
- interviews with the leadership of the California Association of Discipline Defense Counsel (ADDC) and two other respondents counsel;
- an informal survey of a subset of OCTC intake attorneys followed by a Zoom focus group session, facilitated by Dr. MacLeod along with fellow consultants Tara Sklar and Leah Wilson;
- written surveys of disciplinary counsel in other jurisdictions;
- interviews with disciplinary counsels and respondent attorneys in other states;
- review of the scholarly literature and outreach to law professor experts in attorney discipline, racial disparities, and criminal justice; and
- legal research on relevant standards, admissibility of prior discipline, confidentiality of records, and retention of records.[9]

I have also had the opportunity to share drafts of this report with key people inside and outside the California State Bar to ensure that I accurately represent the complexity and nuance of the discipline system, and have revised the report where appropriate, based on my independent judgment. From outside the State Bar, I appreciate the scholarly experts who reviewed the report and provided feedback, including Tammi Walker (University of Arizona), Veronica Root Martinez (Notre Dame), Daria Roithmayr (University of Southern California), and Angela Onwuachi-Willig (Boston University). Of course, the report ultimately reflects my own judgments and professional opinions.

As explained further in the concluding section, I have so far been working from the Farkas report and other publicly-available data summaries. I have not had access to raw data from the discipline system to perform additional analyses of my own. Importantly, I also have not yet had the opportunity to interview substantial numbers of attorneys who experienced the discipline process. There are other directions to investigate quantitatively and qualitatively, however, both to explore additional mechanisms and predict the likely impact of potential reforms. Each of these policy options can be viewed as a hypothesis subject to testing.

Ultimately, this report does not present recommendations so much as potential reforms that merit further development and study. I hope that my identification of concrete policy options -- informed by the broader literatures on race, professional discipline, economics, psychology, and criminal justice -- is helpful to focus that work.

[9] Nothing in this report should be construed as legal advice, but rather context for policymaking.

## 1) CLIENT TRUST FUNDS

Although most complaints concern White attorneys given their sheer numbers, Dr. Farkas found that on a *per capita* basis, Black attorneys were at a greater risk of receiving complaints. Yet, this disproportionality was heterogenous across complaint types. For some types of cases, such as fees and loan modification, Black attorneys were at a lower risk of receiving complaints compared to White attorneys. In contrast, Black attorneys received more complaints on a per capita basis in the category of "Reportable Action -- Bank" (RA Bank).[10] This sort of case is also quite frequent, with the State Bar receiving nearly 2,000 reports and OCTC filing about 100 such cases in State Bar Court, yielding about 55 closures with discipline annually.[11]

With both large disproportionality and high frequency, this issue is of priority concern, although the Farkas report does not allow us to separate out the causal impact of this particular case type on disciplinary outcomes. Courts consider trust fund accounting to be quite serious and even petty offenses may create a track record that motivates closer scrutiny, putting attorneys at greater risk of future discipline.[12] Indeed, the racial disparity related to this overtly economic factor echoes broader disparities in America and in California, which the judicial system reinforces.[13]

### A. Background and Analysis

Bank notifications to the State Bar flow from a statutory mandate, triggered by an attorney having insufficient funds on a client trust account (aka an overdraft or bounced check).[14] Because the reporting of these cases is triggered by an objective measure related to the client trust account, this mandated reporting mechanism suggests that implicit or explicit racial prejudice is not the cause of the disparity at this point in the process, since it does not depend on any individual discretion.[15] Instead, the disparity likely depends on other institutional or systemic factors, which are correlated with race, including variations in practice settings, which may have Black attorneys being more likely to handle client funds at all and have more transactions on those accounts. In addition, we do

[10] See Farkas Report supra note 1 at Table 4, showing that among attorneys with ten or more complaints, Blacks had an average of 6.8 bank reportable actions, while whites had an average only 3.7

[11] See State Bar of California, "2019 Annual Discipline Report," at SR-15-16, available at http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf.

[12] See Hal R. Lieberman, *How to Avoid Common Ethics Problems: Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims*, N.Y.L.J., Oct. 28, 2002, at p. 14 (noting that "failure... to adhere to the basic principles of client/fiduciary trust accounting is the single major reason today why lawyers are disbarred or suspended"); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 358 (2004) ("escrow account violations … are viewed as the most egregious violations of client trust, and therefore result in the most severe discipline.").

[13] See Alexandra Natapoff, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL, Basic Books (2018), p.__-__ ("The misdemeanor system widens the rich-poor gap by punishing low-income and working people on a grand scale. It makes it a crime to do lots of things that poor people can't help doing, like failing to pay fines, fees, speeding tickets, or car registrations. … This is not an entirely new problem: the American criminal system has an ignominious history of punishing the poor. It is equally if not more infamous for punishing people of color, especially African Americans, and misdemeanors have long been central players in that shameful drama. … Today, the misdemeanor system is the frontline mechanism through which many people of color are drawn into the criminal system in the first place, arrested, marked, and convicted for minor offenses, or sometimes for no crimes at all."); Issa Kohler-Hausmann, MISDEMEANORLAND, Princeton University Press (2018) (describing how New York's "Broken Windows" policing effort led to people who are marked, tested, and subjected to surveillance and control even though about half the cases result in some form of legal dismissal).

[14] Cal. Bus. & Prof. Code § 6091.1.

[15] Even if the bank exercises discretion to honor the check, it must still send the notice. *Id.*

know that Black attorneys are more likely to be in smaller firms and, as a result, presumably frequently lack staff to provide bookkeeping or accounting support.[16]

When a bank sends a reportable action notice, it is a red flag, which may reveal misappropriation of client funds (aka stealing) or negligent oversight of the client trust account, which present real risks to the public.[17] To be sure, attorneys are fiduciaries of client funds, and they must manage those funds appropriately, whether in an individual client trust account or an IOLTA account.[18] Yet, the Rules of Professional Conduct do not directly speak to this issue of having insufficient funds in a trust account.[19] Further analysis suggests two primary variables: (1) whether the client, or anyone else, is harmed by the overage, and (2) the state of mind of the attorney.

On the first factor (harm), even while issuing an RA Bank, the financial institution sometimes honors the check, and protects the payee from harm, by extending temporary credit, perhaps under discretion or with an "overdraft protection plan."[20] Even when there is harm, it is often temporary, rectified by simply re-presenting the check in a few days, once funds are available, and by the attorney paying any bank fees. Finally, when (if) someone learns that they are actually harmed by an overdraft, that victim is free to report it to the State Bar as a public complaint and of course litigate in civil court.[21]

On the second factor (intent), I am told that OCTC does not seek disbarment from attorneys merely due to even repeated negligence in client trust fund accounts – something more, like recklessness

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[16] The prefatory memo to the Farkas report, *supra* note 1 at 5, provides analyses of firms and concludes: "As a result of receiving more complaints than attorneys in large firms or other practice settings, solo and small firm attorneys are faced with a higher chance of being investigated and ultimately disciplined." Dr. Farkas shows that when adding a firm size variable to the regression on disbarment, the coefficient is significant and reduces the race coefficient, which suggests that the two factors are correlated. *Id.,* at Attachment A, p.15.

[17] See e.g., *Edwards v. State Bar*, 52 Cal. 3d 28, 36–37, 801 P.2d 396, 401 (1990) ("Petitioner received funds belonging to … client, and he deposited the funds in his client trust account. Petitioner then withdrew funds from the account and spent them for his own benefit without his client's authorization. When the time came to pay the client, the account contained insufficient funds.") See also id., at 38-39 (discussing a range of culpability from negligence to willful fraud).

[18] See California Rules of Professional Conduct, 1.15. "IOLTA" stands for "Interest on Lawyers' Trust Accounts." See generally, The State Bar of California, Client Trust Accounting & IOLTA, "Guidelines for Attorneys," https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Guidelines,

[19] See California Rules of Professional Conduct, 1.15. See also id. at (d) ("a lawyer shall … (3) maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm; (4) promptly account in writing to the client or other person for whom the lawyer holds funds or property"), and id., at (e)("The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what 'records' shall be maintained by lawyers and law firms in accordance with paragraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers."

[20] Given the broader social facts that Black Americans have more difficulty accessing credit, this dimension may also create further disparities, if Black attorneys are less likely to receive this forbearance. Therefore, I do not recommend that the State Bar consider whether the bank honors the check. See Board of Governors of the Federal Reserve System, "Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances," Sept 27, 2017 available at https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm ("Black and Hispanic families have the highest incidence of credit constraints, with about one-third reporting they were either denied credit or did not apply for credit because they feared denial."). See also *In the Matter of Robins* (Review Dept. 1991), 1 Cal. State Bar Ct. Rptr. 708 (Attorney disciplined despite the fact that the attorney genuinely was unaware of CTA shortfalls because they were masked by overdraft protection).

[21] This fact suggests another potential policy mechanism. Upon receiving a RA Bank, the State Bar could begin a practice of reaching out to the payee on the check, asking them to file a complaint with the State Bar if the issue is not resolved within 30 days. The logistics of such a reform would require further study (e.g., whether contact information for the payee could be secured, or whether this duty could be delegated to the attorney, with copy to the State Bar for confirmation).

or willful misappropriation, is required. Similarly, California law does not criminalize the mere writing of bad checks, without a willful intent to defraud and actual knowledge of insufficient funds.[22] Similarly the caselaw for attorney discipline does not generally ascribe malfeasance to bounced checks *per se*.[23] In some cases indeed, an attorney may be acting with a good purpose -- e.g., trying to rush a check to a client so she can make her own rent payment, even though a more prudent course would be to wait for an incoming check to clear before making that disbursement. When the incoming check bounces, it creates a chain reaction.

It goes without saying that bounced checks are less likely for those who have more money in their accounts, even if people are equally careful about their bookkeeping.[24] Like the United States a whole, California suffers from radical economic disparities along racial lines.[25] Nationwide, the median white family holds assets worth fifteen times those of the median black family.[26] Similarly, if Black attorneys are more likely to serve Black clients, who predictably have smaller stakes in their cases, we would expect a similar disparity in client trust fund account balances. Future research could test this hypothesis using as data the balances that IOLTA banks submit for purposes of monitoring compliance with the IOLTA program, cross-referenced with lawyer demographics.

In this way, smaller trust fund balances create a greater risk of RA Banks, even if Black attorneys are equally careful about trust fund bookkeeping as White attorneys. Figure 1 illustrates this phenomenon, where two attorneys (W & B), are each equally in error because they fail to record a $200 check written against their client trust fund account. One attorney (W) is protected against an RA Bank, simply because the client trust fund account has sufficient funds to cushion the error, at least until the attorney or a bookkeeper does a complete reconciliation. The other attorney, having equal levels of professionalism, nonetheless triggers a BA Rank because he has a smaller balance in his client trust fund account.

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[22] See Cal. Penal Code § 476a (West) ("Any person who … willfully, with intent to defraud, makes or draws or utters or delivers a check … for the payment of money, knowing at the time [that the account] has not sufficient funds in, or credit with the bank or depositary … is punishable by imprisonment in a county jail for not more than one year…").

[23] See also *Bowles v. State Bar*, 48 Cal. 3d 100, 109, 768 P.2d 65, 70 (1989) ("It is settled that the "continued practice of issuing [numerous] checks which [the attorney knows will] not be honored violates 'the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice.' " (quoting *Alkow v. State Bar* (1952) 38 Cal.2d 257, 264, 239 P.2d 871, with bracketed modifications made by the Bowles court, emphasis added by me). But see id., ("mere fact that balance in attorney's trust account is below total of amounts deposited supports conclusion of misappropriation")(citing *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474, 169 Cal.Rptr. 581, 619 P.2d 1005).

[24] See Alina Tugend, *Balancing a Checkbook Isn't Calculus. It's Harder,* NY TIMES, June 24, 2006, https://www.nytimes.com/2006/06/24/business/24shortcuts.html ("As Lewis Mandell, a professor of finance and managerial economics at the State University of New York at Buffalo, sees it: 'Some people don't need to balance their checkbooks. If they have sufficient assets and overdraft protection, there's no real need to worry about balancing their checkbook.'")

[25] See State Bar of California, The California Justice Gap: Measuring the Unmet Civil Legal Needs of Californians, 18 (2019) available at https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Report.pdf (22% of non-Hispanic Blacks live below 125% of the federal poverty rate, which is double the 11% rate of non-Hispanic Whites.)

[26] DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA. Univ of California Press, 1 (2010). See also Federal Reserve supra note 20 (showing that Black net worth is 15% that of White net worth).

**Figure 1: Illustration of Two Attorneys That Each Fail to Record a Check; Only One Gets Insufficient Funds**

| | **Attorney W** | **Attorney B** |
|---|---|---|
| Trust fund starting balance: | $5000 | $500 |
| Writes *but fails to record* check #1 of: | $200 | $200 |
| Actual balance: | $4,800 | $300 |
| Writes check #2 of: | $400 | $400 |
| Actual balance: | $4,400 | -$100 |
| **Result:** | Check clears – OCTC never learns of error | Check bounces – OCTC receives RA Bank |

It bears emphasis that attorneys are always acting as the fiduciaries of a clients' interests, and the actual funds in a bank account are only the most quantifiable aspect of that general duty. In this light, having insufficient funds in a client trust fund account is similar to other occasional bumps in the road, which occur in a busy legal practice. An attorney may submit a summary judgment brief without citing a new favorable case. Or an attorney may miss a key deadline for filing a response brief, which could in theory yield a default judgment. Of course, these problems *could* be due to a real problem of professionalism, *e.g.*, sheer incompetence, a debilitating addiction, or sabotaging the case due to a conflicting interest. And if someone reported them, OCTC could investigate them as potential violations of rules. But the vast majority of the time, it is simply an oversight, one that is frequently harmless. And rarely would such oversights come to the attention of the OCTC.

In contrast, for RA Bank, the legislature's automatic reporting scheme for the particular sort of violation would seem to have a disparate racial impact, since it is triggered by a confluence of two factors – bookkeeping accuracy and account balances, one of which is related to professionalism and the other likely infected by systemic racism.[27] To counterbalance this problem, the State Bar could increase scrutiny on other attorneys, for example, by instituting random audits of client trust fund accounts, even where there has not been an RA Bank. New Jersey has such a program.[28] Such an approach could reduce the disparity, but only by increasing enforcement and at some substantial cost to the State Bar.

In what follows, I explore two sets of potential policy reforms. One focuses on how OCTC handles the RA Banks that it receives. The other goes further upstream to consider how the State Bar could reduce the number of RA Banks in the first place.

## B. Case Handling

On its face, the California statute that requires banks to send these notices does not require that OCTC do anything in particular with them.[29] Thus, it is a question for State Bar policymakers. One way to reduce the impact of the incoming disparity is simply to screen out more of those cases from scrutiny for discipline.

Currently, upon receiving an RA Bank, OCTC intake attorneys first consider whether to perform a *de minimus* closing, which results in only a letter being sent to the responding attorney, with no required follow-up. The intake manual provides two criteria for the "typical" *de minimus* closing:

[27] Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, U. CHI. LEGAL F. (2016): 485 at 498 ("the choice to prioritize marijuana enforcement in the first place was a choice-one that did not have to be made, and could be reversed -- which had strongly racially disparate consequences.")

[28] See New Jersey Courts, What is the Random Audit Program, https://njcourts.gov/attorneys/oae.html#audits.

[29] Cal. Bus. & Prof. Code § 6091.1.

(1) "the amount of the NSF activity is under $50" and (2) "there are no other pending RA Banks or prior history of RA Banks."[30]

My interviews and research did not reveal any basis for using these particular thresholds of $50 and "no … prior history of RA Banks." Nor have I learned the date at which these thresholds were first set.

Having such a monetary threshold make sense, both because it suggests that any harm is small and that it is unlikely to be the result of illicit misappropriation (one does not put their license in jeopardy and risk prison for a trifling sum). Nonetheless if the $50 threshold was set a long time ago, its value may have eroded with inflation.

The review of prior history is for the putative purpose of determining whether there is a pattern of similar conduct (whether negligence or malfeasance). However, such a signal is nearly meaningless, without knowing the denominator of how many checks an attorney has written over a period of time. It's one thing if she bounces 5 checks per 1000; another if she bounces 5 checks per 50.[31]

Especially for high-volume practices, merely having one prior RA Bank, perhaps for a trivial amount many years ago, may not support an inference of negligence or misfeasance, and thus may not be the best use of OCTC resources to investigate. Accordingly, if it is necessary to consider prior history of RA Banks, the threshold could be made higher than zero (e.g., five prior RA Banks). The threshold could also be time-scaled (e.g., one prior RA Bank within the last year), and I understand that intake attorneys may already consider the passage of time informally. Finally, prior *de minimus* RA Banks could be treated differently than major overdrafts in the prior history.

These considerations suggest,

> Potential Reform 1.1 – For the purpose of *de minimus* closing of RA Bank cases, OCTC could specify a higher monetary threshold and one that allows a number of prior cases over a period of time, before triggering investigation.

In short, PR1.1 suggests that OCTC wait until there is a substantial overdraft, or at least a substantial number of smaller overdrafts, before it begins turning the expensive wheels of justice. Rather than chasing down the second case where someone has a $50 overdraft, it arguably should allocate those scarce staff resources elsewhere, including to the prevention of overdrafts in the first place, as I suggest below. OCTC could also clarify that prior *de minimus* RA Banks do not count against the threshold as well.

I have not done an empirical analysis of how rigidly the current thresholds are applied in practice. To the extent that intake attorneys are already using some of these or other considerations in their discretion, there is a risk of implicit bias.[32] Even an attorney's name often carries race cues.[33] It

[30] Office of Chief Trial Counsel Intake Manual, §5.2. Note: I have been provided with excerpts of the Intake Manual, but have not received or reviewed the full document.

[31] This problem of "denominator neglect" is common in many domains, including medicine. See e.g., Rocio Garcia-Retamero, Rocio, Mirta Galesic, and Gerd Gigerenzer, *Do Icon Arrays Help Reduce Denominator Neglect?,* 30 MEDICAL DECISION MAKING 672 (2010).

[32] See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, AM. ECON. REV. 991, 991 (2004) (showing that employers presented with resumes with racialized names were less likely to invite black applicants for interviews); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 866 (2016) (reviewing literature

may be worthwhile to revise the *de minimus* rule to implement these considerations more systematically, to reduce even the risk of bias.

An example of such a new guidance would be: The intake office would close RA Bank cases as *de minimus*, if the amount of the insufficient funds overage is less than $500 and the attorney has had no more than five RA Banks greater than $500 within the last three years. With some data modelling based on the archive of prior cases (or a sample thereof), the State Bar could predict the impact of various such reforms (*i.e.*, how many more cases will become *de minimus* at any proposed threshold). It may be reasonable to reduce the number of preliminary investigations by 50% or more.

## C. Upstream Prevention

Besides any case-handling reforms by OCTC, the State Bar may have the biggest effect on this problem if it works further upstream to reduce the number of times that attorneys have this sort of problem, which, if successful, will reduce the racial disparity and better protect the public. To do so will require a reconceptualization of this problem, from individuals to systems.

Currently, a bounced check is viewed as a failure of the particular attorney who has responsibility over that account—it is a potential violation of his or her professional responsibilities. Accordingly, the attorney is admonished or perhaps required to take continuing education courses on the topic. This notion of individual responsibility reflects a longstanding paradigm for legal ethics. To the extent that lawyers are unaware of whether and how to maintain client funds in trust, even more such training could be worthwhile – e.g., new attorneys could be required to take prophylactic education specifically on the topic, before opening their first client trust fund.

However, in many domains, the optimal protection of the public often requires more than individual discipline—it requires systemic solutions. By way of comparison, in a landmark study by the Institute of Medicine (IOM), "To Err is Human," a national task force confronted the devastating number of preventable medical injuries (which were estimated to impact 3-4 percent of all patients). It concluded that, "The focus must shift from blaming individuals for past errors to a focus on preventing future errors by designing safety into the system."[34] The IOM report relied on a range of prior studies of accidents, including the Three Mile Island nuclear disaster and the Challenger space shuttle explosion.[35] Occasional lapses and mistakes are to be expected in any system with humans, but the question is how to design larger systems to ensure that those errors are minimized and caught before they can hurt someone. Compared to any particular slipup, the latent failure to design the system appropriately is the greater error.[36]

The healthcare analogy suggests two insights: (1) that occasional lapses and errors are to be expected, but systems should be designed to minimize actual harm to clients, and (2) those systems will often require the incorporation of other technologies, professionals, and organizational supports, rather than individual-focused remedies such as discipline or retraining.

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supporting the proposition that, "it is probable that implicit racial biases will cause judges, prosecutors, and defense lawyers to draw adverse inferences from ambiguous facts more readily when defendants are Black.").

[33] See Sah, Robertson, & Baughman supra note 7 (discussing the need to redact names in order to protect prosecutorial discretion). See also Roland G. Fryer Jr, and Steven D. Levitt. *The Causes and Consequences of Distinctively Black Names.* 119 QUARTERLY J. ECON. 767 (2004).

[34] Linda T. Kohn, Janet Corrigan, and Molla S. Donaldson, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM, Washington, DC: National Academies Press, Vol. 6, p. 5 (2000).

[35] Id., at 51-52.

[36] See id., at 55-56.

For an example of the first principle in another domain: automobile designers now expect that there will be accidents, some caused by negligence, but they design cars with seatbelts and airbags to minimize the harm thereof. Similarly, the field of aviation builds in various alerts and alarms and copilots to ensure that human oversights do not lead to disaster. The analogy applied to client trust fund accounting would be to place a small amount of the attorneys' funds in the account as a hedge against the inevitable mathematical errors. To the contrary, the official State Bar Handbook on Trust Accounting says, "you can't deposit any money belonging to you or your law firm into any of your client trust bank accounts (except for the small amounts of money necessary to cover bank charges)."[37]

For the legal profession and RA Banks in particular, these insights suggest:

> Potential Reform 1.2 – The State Bar could clarify its rules to allow attorneys to deposit a specific amount of funds into client trust accounts as a cushion when errors occur.

To protect clients from insufficient funds, PR1.2 suggests specifying an amount (say, $1,000) of attorney funds, which could be kept in a client trust fund to prevent RA Banks from being issued for temporary errors, unless the error is repeated or goes above that amount. The motivation for this reform is similar to the existing policy for *de minimus* closings, recognizing that small overages are unlikely to reveal substantial violations of professional responsibility. It is, frankly, no more disturbing than the present practice of comingling various client funds into a single IOLTA account, where each can serve as the cushion for each other.

PR1.2 responds directly to the wealth-gradient phenomenon discussed above, which showed how even among people with equally careful bookkeeping, an occasional oversight or problem caused by others, will be inconsequential for those who have a cushion of other funds in the account.[38] Currently it is simply riskier to practice in a setting where trust fund balances are closer to zero, and PR1.2 allows attorneys to take the same sort of precaution that many of us take in our personal lives. Admittedly, this reform depends on attorneys having funds to deposit to create that cushion, which will suffer from this same wealth disparity, but it may be helpful on the margin, given that some attorneys will have more disposable wealth, and perhaps less volatility, than their clients have funds in trust.

Normally, the comingling of client and attorney funds is considered problematic, and the paradigm case is putting client funds in an attorney's personal account, where the attorney may draw upon it (misappropriation) or the attorney's creditors make seek to recover from the client's funds. To distinguish this proposal clearly from the real concerns related to comingling of funds, PR1.2 proposes to allow a *specific*, *relatively small*, amount of comingled *attorney funds in the client's own account*, which would seem to moot those policy concerns.

For similar reasons, current rules already allow this sort of comingling for the specific purpose of depositing funds foreseeably needed to pay bank maintenance charges on the account.[39] But the rules do not provide guidance on what amount that should be.[40] Clarity alone may motivate reform.

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[37] California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 2 (2018).

[38] See discussion supra surrounding note 24.

[39] California Rules of Professional Conduct, 1.15(c)("Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except: (1) funds reasonably* sufficient to pay bank charges…")

Importantly, PR1.2 may require a change to the rules governing lawyers.[41] In 1979, the California Supreme Court upheld a violation where an attorney engaged in precisely this practice of depositing personal funds and unearned fees into the CTA to provide a "margin" against overdraft.[42] However, many other factors were at play, including actual misappropriation of funds and failure to provide an accounting to clients, when repeatedly requested.[43]

If such a revised rule were adopted or clarified, and if attorneys utilized this new provision, it would reduce the number of RA Banks received by OCTC, allowing it to focus its scarce resources elsewhere. PR1.2 would, incidentally, also create more revenues for the State Bar's access-to-justice programs, by increasing average balances in IOLTA accounts.

The second insight from healthcare suggests a systems-based approach to problem-solving. For an example, consider that there is a basic professional duty for surgeons to use sterile equipment. We might well discipline a surgeon who failed in this duty by reusing a scalpel. However, if we truly care about infections, we will worry even more about hospitals' systems of equipment procurement and maintenance, and staff oversight and management, to prevent a dirty scalpel from reaching the surgery suite in the first place. To require the surgeon to attend a Continuing Medical Education program on the importance of clean scalpels or to suspend her license might well miss the point, because unless the systemic factors are addressed, more patients will be infected by that surgeon and other surgeons. Indeed, it is possible that the specialized surgeon may not even know *how* to check whether the scalpel has been sanitized or to operate the complex equipment required to sterilize a scalpel properly. Instead, he or she reasonably relies on other professionals to do so as part of a broader health care team.

For the legal profession and trust accounting in particular, this insight suggests,

> Potential Reform 1.3 – The State Bar could revise its guidance to encourage attorneys to reasonably rely on systems of professionals and technologies to prevent trust accounting errors.

In contrast, the California State Bar's present approach seems to be one of stark individualism. For example, the official State Bar publication's The Handbook on Client Trust Accounting, directs attorneys: "Don't rely on others to do your client trust accounting. It's your responsibility."[44] Imagine telling surgeons not to rely on janitors, phlebotomists, nurses, pharmacists, or fellow physicians in order to keep patients safe. Although I find no basis in the California Rules of Professional Conduct, the State Bar's guidance reflects caselaw holding that the attorney's duty is "nondelegable."[45]

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[40] Id.

[41] See State Bar Formal Op. No. 2005-169, available at: http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2005-169_03-0005_Published_Version_12-20-05-wpd-PAW.pdf ("...maintaining a cushion of attorney funds in a CTA beyond an amount reasonably sufficient to cover bank charges [is] a practice that has been prohibited")(citing *Silver v. State Bar* (1974) 13 Cal.3d 134, 145, footnote 7 [117 Cal.Rptr. 821]).

[42] *Jackson v. State Bar* (1979) 25 Cal.3d 398.

[43] Id.

[44] California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 43 (2018).

[45] In Matter of Marchiondo, No. 12-O-13556, 2015 WL 9260836, at *3 (Cal. Bar Ct. Nov. 16, 2015)(citing Coppock v. State Bar (1988) 44 Cal.3d 665, 680).

Of course, other caselaw reflects that reliance on others can be reasonable or unreasonable.[46] I would suggest greater emphasis on the concept of reasonable reliance, since in reality, both physicians and lawyers rely on others, and this is a mark of quality not irresponsibility. Individual lawyers may lack the skillset and demeanor to do careful bookkeeping, and their clients are often better served (with more value for money) if that work is performed by another professional, such as a bookkeeper or accountant, or with technology, such as an online banking solution. In healthcare, similarly, there is a growing movement towards "interprofessionalism," realizing that coordination of healthcare across the several professions is often more important than any one profession performing its role. But even there, the movement is in its adolescence.[47]

In the legal field, Rule 5.1 already recognizes that need for a systems approach. In a firm, lawyers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that lawyers in the firm" will comply with their professional responsibilities.[48] This approach provides a template for trust accounting as well.

Accordingly, I suggest revising and clarifying guidance as part of a broader culture change in how the State Bar and its attorneys approach trust fund accounting. In my view, that work could go so far as changing the Rules themselves, to explicitly require a systems-based approach rather than an individualistic approach.

However, changes in guidance alone are unlikely to be sufficient if the fundamental economics and industrial organization do not support such changes. In healthcare, "fragmentation" has been noted as a primary challenge to efficiency, quality, and safety.[49] With its robust sector of solos and small-firm practice, law is arguably even more fragmented, and the high rate of problems in these settings is to be expected. In contrast, larger firms reflect this sort of systems-approach, which explains why larger law firms have fewer disciplinary filings than solo and small-firm practitioners, and the mechanism is particularly obvious in the RA Bank context. Rather than relying so much on individual lawyers to be error-free, larger firms are presumably more likely to have robust bookkeeping and accounting services, often in-house, taking advantage of the skills of specialists employed by the firm.[50] For solos and small firms the solution is to outsource such services, using technology vendors and service providers, but even building such a working approach can involve heavy transaction costs.[51]

These considerations suggest,

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[46] See In re Blum, No. 96-O-03531, 2002 WL 1067225, at *5 (Cal. Bar Ct. May 24, 2002) (rejecting hearing judge's finding that attorney had reasonable relied, where there was "no evidence that respondent established or agreed … on procedures for the operation of the trust account.") Id. at *7 (Although "duties are nondelegable…[t]his does not mean that an attorney is culpable of a moral turpitude violation by not personally managing his or her trust account, provided that attorney reasonably relies on a partner, associate, or other responsible employee to care for that account. However, even that reasonable reliance on another to care for the trust account does not relieve the attorney from the professional responsibility to properly maintain funds in that account.")

[47] See Scott Reeves, et al., *Interprofessional Collaboration to Improve Professional Practice and Healthcare Outcomes,* COCHRANE DATABASE OF SYSTEMATIC REVIEWS 6 (2017).

[48] California Rules of Professional Responsibility 5.1. Comment 1 describes "internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised."

[49] See e.g., Stephen M. Shortell and Sara J. Singer, *Improving Patient Safety by Taking Systems Seriously*, JAMA 299, no. 4, 445-447 (2008).

[50] See generally, Bart Nooteboom, *Firm Size Effects on Transaction Costs*, SMALL BUSINESS ECONOMICS 5, no. 4, 283-295 (1993).

[51] Id.

Potential Reform 1.4 – The State Bar could develop a turnkey banking, checking, bookkeeping, and accounting solution for client trust funds.

When properly operating, this "solution" would make it virtually impossible for an attorney to be responsible for writing a check with insufficient funds in a client account. When a check needs to be written on a client trust fund, the attorney would call (or use an app) to request the check, but it would not be written against insufficient funds. PR1.4 implicates a broader movement towards "FinTech," and the State Bar should ensure that it is part of the solution rather than being part of the problem.[52]

My interviews suggest that there is a range of technologies and services available for this "solution"—including a mix of online banking, accounting software, and bookkeeping services, but it may be challenging for solo and small firms to determine the right mix and establish key workflows.[53] Rather than having thousands of individual attorneys attempt to figure this out, a single team of State Bar experts could do so. Moreover, the solution may ultimately achieve economies of scale, unavailable to solo attorneys or small groups cobbled together themselves. Indeed, a more centralized approach may lead to innovations and partnerships (e.g., with IOLTA Leadership Banks), that no single attorney could bring to fruition.

This potential reform leaves much to be determined, including the mix of technology and professional services to be provided. I would start with the working assumption that it should be self-sufficient financially, funded by service fees.

One model would be to create an office within the State Bar itself, or the California Lawyers Association (CLA), to contract with vendors and employ staff to create the solution, and then subcontract the package to attorneys. Alternatively, the State Bar could negotiate a deal or set of deals that a vendor or vendors agree to provide to California attorneys, contracting directly with them (making the State Bar or CLA into a mere facilitator or broker). Or, minimally, the State Bar could issue a set of criteria and workflows that any vendor could certify that they utilize. That standardization and accreditation alone might facilitate individual California attorneys knowing what they are getting, in apples-to-apples comparisons with other providers.

Notably, the CLA already works in partnership with CalBar Connect, which is managed by Cal Bar Affinity, a subsidiary of California ChangeLawyers (formerly California Bar Foundation). They offer several business services, including mechanisms to accept client credit cards, track time, and have virtual receptionists.[54] However, it does not currently include bookkeeping or banking service, and definitely not the sort of integrated turnkey solution, envisioned by PR1.4.

Once this turnkey solution is in existence, the State Bar could take various measures to support its adoption. Of course, it could be marketed to attorneys at greatest risk, using firm size and affinity groups to target and reach them. A stronger approach would be to make the solution the default rule, requiring that every attorney who takes client funds use the solution, unless they present an alternative plan for complying with their professional responsibilities. To minimize disruption and paperwork, this default rule could be rolled out gradually, applicable to only new attorneys or

[52] See generally, Rory Van Loo, *Making innovation More Competitive: the Case of Fintech*. 65 UCLA L. REV. 232 (2018).

[53] See e.g., Billpay.com ("Pay, get paid, and manage your payments process from one place. … Built to integrate and share financial data with your accounting system) and Trustbooks.com (bookkeeping software specifically for attorney trust funds). My interviews suggest that these two tools are not presently integrated to work together.

[54] See Cal Bar Affinity, Business Services, available at https://www.calbarconnect.com/business-services/.

attorneys changing practice settings. Finally, OCTC could mandate use of this solution as a condition of discipline, for attorneys who repeatedly receive RA Bank notices.[55] For such repeat violators, the turnkey solution could ensure no further violations that put the public at risk.

## 2) CONSIDERATION OF PRIOR CLOSED COMPLAINTS

The Farkas report (Tables 8 and 10) showed that, when various factors are accounted for in regression models, the racial disparity in probation and disbarment ("severe discipline") disappears.[56] One of these factors is that attorneys who have more formal investigations opened are more likely to then suffer severe discipline. That record of past formal investigations is a function of both complaints received by the State Bar, and how the State Bar handles those complaints.

### A. Background and Analysis

The Farkas report also shows severe racial disparities in the numbers of complaints received by the California State Bar, and this is especially true for Black males (see Tables 1, 2 and 4). This disparity could arise if attorneys have different frequencies of unprofessional conduct, but it could also arise from several other causes. If attorneys work in different practice settings (e.g., with higher volume, or more contentious parties, or smaller firms with fewer alternative mechanisms for dispute resolution), we would expect more complaints, even from attorneys with equal levels of professionalism.[57] Likewise, attorneys' different communication styles could produce different amounts of complaints, just as physician's communication styles have been shown to predict malpractice risk.[58] Finally, members of the California public may suffer from implicit (or more rarely, explicit) racism that could motivate the filing of complaints, not unlike the biases that have been shown to infect employers and the media.[59]

Future research could explore the reason for this disparity in complaints and seek upstream solutions. Yet, the point is that one cannot assume that the different rates of complaints reflect different rates of unprofessional conduct.

Even if it is a cause of disparate outcomes, the generation of complaints from the public is not directly within the control of the State Bar. The State Bar cannot simply decline to open formal investigations as a solution to racial disparities. However, in between these two observed disparities (complaints filed and formal investigations opened), there is an important opportunity for reform.

The State Bar presently retains the tens of thousands of prior closed complaints in its case management system, which is used to log new complaints and resolve them. The vast majority of

[55] See Cal. Bus. & Prof. Code § 6068 ("It is the duty of an attorney to do all of the following: … (k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney. (l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.")

[56] See MacLeod and Pi *supra* note 1, at Attachment A,

[57] Imagine, for example, an attorney working a large law firm, litigating a single case for a huge multinational corporation for more than a year. If that client is dissatisfied with the attorney's work because of a violation of the Rules of Professional Conduct, he may simply complain to the partner managing the client relationship, rather than complaining to the state bar.

[58] W. Levinson, D. L. Roter, J. P. Mullooly, V. T. Dull, and R. M. Frankel, *Physician-Patient Communication: The Relationship With Malpractice Claims Among Primary Care Physicians and Surgeons*, JAMA, 277(7), pp.553-559 (1997).

[59] See e.g., Bertrand and Mullainathan supra note 32 (employers); Scott W. Duxberry et al., *Mental Illness, the Media, and the Moral Politics of Mass Violence: The Role of Race in Mass Shootings Coverage*, J. RES. CRIME & DELINQ. 1, 1 (2018).

complaints received from the public do not directly lead to discipline, but are, instead, closed at some point along the way, without a finding of misconduct.[60] In most cases, OCTC does not even open a formal investigation, because the complaint does not allege a "colorable violation" of the Rules of Professional Conduct.[61]

According to the State Bar Standards, prior discipline can of course be a basis for increasing sanctions for new misconduct, since the prior discipline is predicated upon findings of actual misconduct.[62] A warning letter, resource letter, or directional letter may also be probative to show that an attorney was on notice of a problem. However, mere prior closed complaints have no probative value for the State Bar Court in determining whether discipline is appropriate or how severe it should be.[63] Indeed, state law considers mere complaints to be highly confidential and privileged information, which the public does not have a right to know when selecting their attorney.[64] This policy reflects the lack of probative value for mere complaints.

Nonetheless, in making the decision about whether to formally investigate a case (and presumably also further downstream, when considering what disciplinary sanctions to pursue), OCTC attorneys are instructed to refer back to the prior closed complaints, which form something like a rap sheet.[65] This usage is well-intentioned to detect patterns and practices that may reflect attorney incompetence or negligence, and may yield commensurate benefits.

Yet, if done frequently (which is not completely clear based on my interviews), this use of complaint history is a plausible cause of disparate discipline outcomes, since we know the prior record of complaints is infected with a racial disparity. Exposure to this prior rap sheet can affect attorneys implicitly, even where the old prior complaints are completely frivolous or completely irrelevant. For example, a prior alleged failure to return a file not found to be colorable should have no bearing on whether a current complaint of a conflicting interest gets forwarded for investigation. But like an

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[60] See State Bar of California, "2019 Annual Discipline Report," at SR-4 available at http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf.

[61] See OCTC Intake Manual Section 4.3 ("To determine whether a complaint alleges a colorable violation and warrants investigation, intake staff will conduct a legal review of the complaint to identify the facts alleged by the complainant in order to answer three questions: 1. Are the facts specific enough to establish a violation? 2. Are the sources of facts credible? (Every complainant is presumed credible unless there is information to suggest otherwise.) 3. Could the alleged violations, if proved, result in discipline or an alternative to discipline such as a warning letter or agreement in lieu of discipline?")

[62] See "Standards for Attorney Sanctions For Professional Misconduct," Section 1.8 (predicating increased sanctions on "prior record of discipline"), available at https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure-State-Bar.pdf

[63] See "Rules of Procedure of the State Bar of California," Rule 5.108, available at https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure-State-Bar.pdf ("If the attorney introduces evidence that no complaints or charges have been made, then evidence of any complaints or charges is admissible in rebuttal. Evidence of the facts underlying a record of complaint or unproven charge may be admitted to prove a fact in issue. Otherwise, evidence of complaints or unproven charges is inadmissible.)

[64] Cal. Bus. & Prof. Code § 6094. See *Chronicle Pub. Co. v. Superior Court In & For City & Cty. of San Francisco,* 54 Cal. 2d 548, 567, 354 P.2d 637, 646 (1960) ("The State Bar will accept a complaint from any member of the public who feels, whether rightly or wrongly, that he has been aggrieved … These complaints are confidential unless they result in disciplinary action taken against the attorney.")

[65] See "Office of Chief Trial Counsel Intake Manual," Section 4.3 ("Intake will conduct a legal review of the entire complaint and attached documents and also review the case management system and member information to determine if the attorney has a history of closed complaints, closed investigations, discipline, or pending matters. Such a review is necessary to assess the possibility of a pattern of complaints or misconduct.")(emphasis added). See also discussion infra of how intake attorneys actually apply this guidance.

infection of someone exposed, even irrelevant information has been shown to bias decisions in all sorts of contexts.[66]

To illustrate this dynamic: consider that the Farkas report found that 68% of White male attorneys have zero complaints on their record, while only 54% of Black male attorneys have zero complaints on their record (see Table 1 of Farkas report, reproduced below with highlighted statistics). So when a new complaint comes in, if the intake attorney is unsure of whether to move it forward to formal investigation (what is sometimes called "a wobbler"), and looks to the record of prior complaints, the intake attorney is more likely to give a White attorney the benefit of the doubt for having a "clean" record, even if the intake attorney does not know the respondent's race. In this way, the prior complaint record becomes a proxy for race, which may exacerbate disparities, especially when a close case could go either way.

**Table 1. Attorneys Admitted from 1990 to 2009**
**By Race/Ethnicity, Gender, and the Number of Complaints Received**

| *Number of Attorneys* | | | | | | *Percent of Total* | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| # of Complaints | Asian | Black | Hispanic | White | Total | Asian | Black | Hispanic | White | Total |
| *Male* | | | | | | | | | | |
| 0 | 5,812 | 996 | 2,266 | 32,432 | 41,845 | 73% | 54% | 56% | 68% | 67% |
| 1-4 | 1,564 | 463 | 1,148 | 11,147 | 14,444 | 20% | 25% | 28% | 23% | 23% |
| 5-9 | 307 | 153 | 330 | 2,220 | 3,044 | 4% | 8% | 8% | 5% | 5% |
| >=10 | 275 | 217 | 314 | 1,911 | 2,758 | 3% | 12% | 8% | 4% | 4% |
| Total | 7,958 | 1,829 | 4,058 | 47,710 | 62,091 | 100% | 100% | 100% | 100% | 100% |

*Data source: Farkas report, supra note 1 at p.4 (partial table reproduced here).*

Even worse than the sheer disparity in numbers, this practice of consulting prior complaints may allow implicit biases to exacerbate the problem as well, given that it is not particularly clear what can be inferred from ambiguous prior records.[67] As noted for RA Bank cases above, the incoming complaints only reflect a numerator, but an evaluation of an attorneys conduct should be more like a proportion or ratio.[68] Decades of research show that especially in domains of ambiguity, even well-intentioned persons without explicit prejudices nonetheless rely on heuristics and stereotypes to make decisions that cohere with and reinforce those same heuristics and stereotypes.[69] Fortunately, it helps to mitigate the problem, if decision makers can rely on pre-specified explicit criteria to resolve ambiguous decisions, as I suggest below.[70]

[66] See e.g., Timothy D. Wilson and Nancy Brekke. *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*. 116 PSYCHOLOGICAL BULLETIN 117 (1994). Birte Englich, Thomas Mussweiler, and Fritz Strack. *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making.* 32 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 188 (2006).

[67] See sources cited supra note 32-33.

[68] See generally Garcia-Retamero, Galesic, and Gigerenzer *supra* note 31.

[69] See e.g., E. L. Uhlmann and G. L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, PSYCHOLOGICAL SCIENCE, 16(6), pp.474-480 (2005).

[70] Id.

## B. Record Retention

Criminal law presents a useful analogy as arrests are known to be racially disparate, not unlike bar complaints.[71] The Supreme Court has long recognized that arrests lack probative value.[72] Recognizing that consideration of arrests can have unfair and disparate impacts, scholars, prosecutors, and court officials have recently proposed a model law that would generally expunge arrest records after a period of time.[73] Justice Sonia Sotomayor recently explained: "Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check."[74]

California is a leading state in this wave of reform: the state's "ban the box" law not only prohibits employers from asking about or conducting a search for prior criminal convictions until after a provisional employment offer has been made, but altogether prohibits consideration of arrests not followed by conviction, except in vary narrow circumstances.[75] Even for convictions, in October 2019, Governor Newsom signed a criminal justice bill, AB1076, which automatically expunges records of low-level offenses.[76]

Similarly, at the very least,

> Potential Reform 2.1 – The State Bar could expunge after five years complaints closed without discipline.

Other states, such as Illinois and Minnesota, use a 3-year lookback before expunging closed complaints, which California could consider alternatively.[77] I selected the five-year period simply because it may already be legally authorized in California. Though a formal legal opinion could resolve this question more definitively, it appears that the California Legislature has already decided to allow the State Bar to expunge closed complaints after five years.[78] The California Supreme Court has also adopted a record retention policy for attorney discipline, which defines "complaint" to include only those that OCTC determined to warrant investigation, and requires permanent retention of records related to "formal disciplinary proceedings."[79] Arguably thus, the

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[71] See generally, Angela J. Davis, ed., POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, Vintage (2017). See also Shima Baradaran, *Race, Prediction, and Discretion*, GEO. WASH. L. REV., 81, p.157 (2013).

[72] *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957) ("[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.")

[73] "Model Law on Non-Conviction Records," Collateral Consequences Res. Ctr. (2019), available at http://ccresourcecenter.org/model-law-on-non-conviction-records/

[74] *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting) (citing G.J. Chin, *The New Civil Death*, 160 U. PA. L. REV. 1789, 1805 (2012)).

[75] Cal. Gov't Code § 12952 (West).

[76] See "Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime, and Sentencing Reform," October 8, 2019, available at https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/.

[77] See e.g., Illinois Supreme Court Rule 778; Minnesota Rule of Professional Conduct 20 (e). See also Michael Hoover, *Expunction Of Dismissed Complaints,* BENCH & BAR OF MINNESOTA (September 1983) available at http://lprb.mncourts.gov/articles/Articles/Expunction%20of%20Dismissed%20Complaints.pdf (explaining the process and reasoning.)

[78] *See* Cal. Bus. & Prof. Code § 6092.5 ("the disciplinary agency shall… (d) Maintain permanent records of discipline and other matters within its jurisdiction, and compile statistics to aid in the administration of the system, including, but not limited to, a single log of all complaints received…"); *id.* at §6080 ("In disciplinary proceedings in which no discipline has been imposed, the records thereof may be destroyed after five years.").

[79] *See* California Supreme Court Standing Order 8-22-2007. Closer review may suggest that the Supreme Court requires retention of complaints that were dismissed after formal investigation, which is somewhat narrower than the

State Bar has authority to adopt PR2.1 already. But if not, it could seek that authority to avoid perpetrating racial disparities.

Of course, the State Bar is often asked to provide discipline records, including closed complaints, to stakeholders including the Commission on Judicial Nominees Evaluation, out-of-state licensing agencies, and State Bar committees. Yet, here again, one should worry about the racial disparities and lack of probative value being passed over to those other entities. And of course, the State Bar has no obligation to share records that it has expunged according to explicit legal authority.

PR2.1 does not apply to records of prior discipline, which arguably has a more legitimate rationale for consideration in the context of subsequent discipline compared to mere closed complaints. PR2.1 could also exclude cases that resulted in warning letters, resource letters, or directional letters.

The current approach of permanently retaining disciplinary records reflects a notion that prior discipline reflects an indelible stain on a person's character. As scholars explain, "however, psychological research suggests a more complex story: that those who commit ethical infractions are not necessarily 'bad apples,' but are human beings. Many ethical lapses result from a combination of situational pressures and all too human modes of thinking."[80]

In this light, PR2.1 is, frankly, a modest reform, as it only applies to complaints that did not lead to discipline. More ambitiously, the State Legislature and Supreme Court could consider expunging a range of prior discipline cases, even where misconduct was found, just as the Legislature has done for low level criminal convictions.[81] The probative value of older discipline cases is also undermined, if some of those disciplinary outcomes were obtained because the attorney lacked representation to help the tribunal see both sides of the case, as the Farkas report suggests. Even if there is some probative value, such a move is necessary to ensure that the historical record of racially disproportionate attorney discipline does not continue to resonate disparities into the future.

## C. Case Handling

Even if the State Bar adopts PR2.1 (or a more ambitious version thereof), OCTC will still have more recent closed complaints in their files, and these could have disparate effects on their decision making. Figure 2 reflects the potential range of policies and practices for consulting prior complaints in deciding how to dispose of a new complaint. It shows the status quo, which appears to vary in the amount of consideration depending on the intake attorney, and a proposed reform, discussed below.

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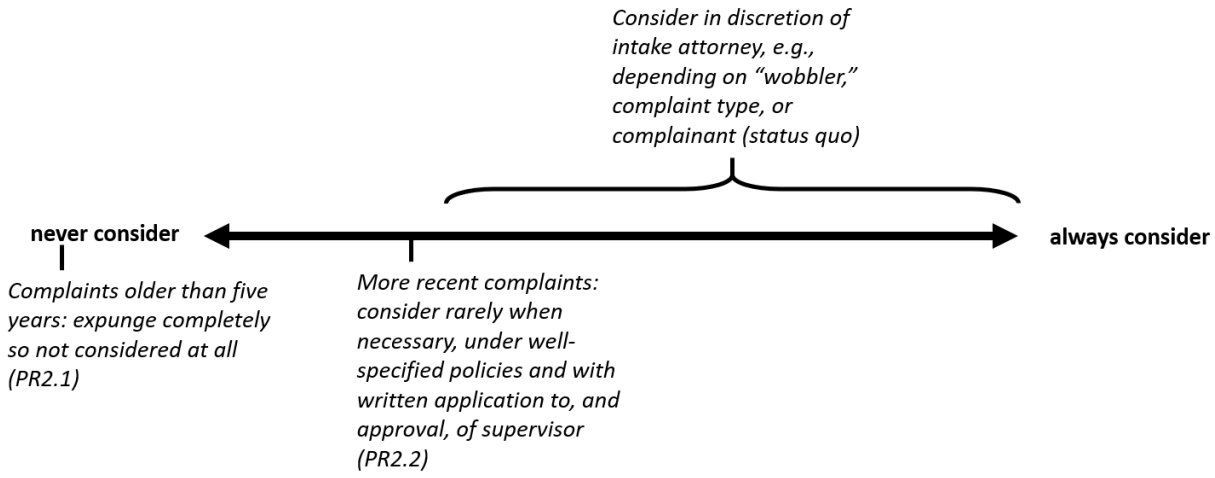
expungement allowed than the legislature, which depends on whether discipline was imposed. If there is a difference I would suggest that the Supreme Court consider revising its order to allow the broader expungement contemplated by the legislature.

[80] Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics,* 45 ARIZ. ST. L.J. 1107 (2013) 1107, 1111 (2013)

[81] See supra note 76.

**Figure 2 – Range of Potential Approaches to Considering Prior Closed Complaints in Disposing New Complaint**




Building on but also clarifying and revising current practice,

> Potential Reform 2.2 – The State Bar could archive complaints closed without discipline, so that they would be accessed rarely upon written application to a supervising attorney.

This reform is complementary to PR2.1 but could also be adopted independently, regardless of whether that reform is adopted. It bears emphasis that PR2.2 does not apply to concurrent open complaints, which should be reviewed to determine if they include evidence of the same or related allegations. Further study could refine PR2.2, for example to determine whether and how it should apply to past warning letters or resource letters that are issued for probable violations of the rules, which were not forwarded to formal investigation. Another possible exception would be for prior complaints that present a prima facie case of misconduct, but could not be sent to formal investigation due to the rule of limitations.[82] Finally, it may be worthwhile to have a paralegal routinely consult the archive just to determine whether a "new" complaint is actually just an additional communication from a complaining witness, providing more information.

For PR2.2, I considered simply recommending that while keeping the record fully available, intake attorneys should not *consider* the prior complaint record. However, cognitively, it is unrealistic for people to be exposed to information, but then be asked not to consider it.[83] This approach also would not allow robust tracking of how often and why prior complaints were consulted, or the results thereof. Nonetheless, I have not explored the logistical aspects of archiving prior closed complaints, whether within the Odyssey case management system or in a separate parallel system, including time and costs of doing so.

Importantly, PR2.2 should <u>not</u> be interpreted as making the disciplinary process more lenient. Since we do not have any independent way of knowing the optimal rate at which new complaints should be put forward to investigation, we cannot say whether the Black rate is too high or the

[82] See California State Bar Rule 5.21.

[83] See generally, Christopher T. Robertson and Aaron S. Kesselheim, Eds., BLINDING AS A SOLUTION TO BIAS: STRENGTHENING BIOMEDICAL SCIENCE, FORENSIC SCIENCE, AND LAW, Elsevier (2016).

white rate is too low. A racial disparity in formal investigations can arise if Black attorneys are suffering discipline too often and too much (a "false positive" problem), or it can arise if white attorneys are getting disciplined too rarely and too little (a "false negative" problem). Currently, the practice of consulting prior closed complaints plausibly causes either sort of error, depending on whether the subject attorney has a long history or no history of prior closed complaints.

It bears emphasis that considering prior closed complaints is only one tool in the toolbox of an intake attorney, and for OCTC more broadly. Alternatively, when there is a close call, intake attorneys may undertake additional intake workup -- e.g., calling the complainant to clarify the situation or reviewing a court docket.[84] Upon that basis, the intake attorney may then make a decision that falls within the four-corners of the enhanced material received. This sort of effort is especially important when the complaint appears to come from a more vulnerable population (e.g., an elderly person) or someone who may have difficulty communicating a *bona fide* violation of the rules (e.g., a non-native speaker).

These additional intake workups help to minimize false negatives, to ensure that OCTC opens formal investigations when appropriate, and especially for vulnerable populations. The State Bar's mission to protect the public requires that when complaints are filed, they are properly considered before being closed. Moreover, under current procedures, Complaining Witnesses may also request review of cases that they believe were improperly closed.[85] If these processes of consideration are working appropriately, then closed complaints truly have no evidentiary value for subsequent discipline, making PR2.2 appropriate.

Other State Bar consultants and I considered developing some sort of decision matrix specifying whether and how OCTC attorneys should routinely consider prior closed complaints. While that work may well continue, I am concerned that the underlying racial disparity in public complaints and their lack of probative value once closed are together strong enough to counsel against any routine use of prior complaints, even with a decision matrix.

While PR2.2's provision for accessing the archive on written application to the supervising attorney retains flexibility, it may help reduce implicit biases in both the decision about whether to consult prior complaints and in their interpretation. This process benefits from having an arms-length evaluation from the supervisor, but even if (hypothetically) he or she were to rubber-stamp every application, the process itself may be salutary. Research suggests that interrupting an automatic

[84] See OCTC Intake Manual Section 4.3 ("Additional Intake Work-Up- Some complaints have insufficient information to ascertain whether a colorable violation exists and require further information before intake can make an informed decision whether an investigation is warranted. Complainants are not expected to provide every fact needed to establish a violation or correlate their facts to specified violations. But, when a complainant raises facts that, in conjunction with additional facts, may result in a colorable violation, intake attorneys should seek to determine whether those additional facts exist. Intake attorneys may seek further information from a court docket, the internet, or conduct legal research in order to complete their legal review.")

[85] "Complainants are entitled to request that the State Bar Office of General Counsel's Complaint Review Unit (CRU) review OCTC's decisions to close a case. If CRU finds that the case was not closed properly, or if it the complaining witness presents new evidence it will refer the complaint back to OCTC with a recommendation that it be reopened for investigation. Should CRU decline to recommend reopening a case, it will notify the complainant and inform them of their right to request the California Supreme Court review the complaint pursuant to *In re Walker* , 32 Cal.2d 488 (1948) to determine if it should be reopened." California State Bar, 2019 Annual Discipline Report, at p.3, n2, available at http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf.

process and asking people to make an active choice, plan their work, and specify their goals, reduces bias.[86]

## D. Upstream Prevention

The foregoing recommendations suggest that prior closed complaints should not be accessible to OCTC attorneys in routine cases. However, it may be imprudent for the State Bar to ignore them altogether. Analogously, in April 2019, the California State Auditor faulted the Commission on Judicial Performance for, among other things, "not periodically evaluat[ing] its complaint data to identify when patterns of complaints exist that could merit investigation, even if the individual complaints themselves do not warrant investigations."[87] For the reasons stated above, I am concerned that such regurgitation of prior closed complaints may exacerbate racial disparities, but prior complaints may well be used for proactive support purposes that prevent subsequent problems from arising. Accordingly,

> Potential Reform 2.3 – The State Bar could develop a proactive non-disciplinary system to support attorneys at higher risk of future complaints.

In this way, prior closed complaints could be inputs into upstream solutions to reduce the number of cases that are filed. If that effort succeeds, it should disproportionately benefit Black attorneys who now disproportionately receive those complaints.

This reform contemplates that the California State Bar should consider a non-disciplinary program of identifying attorneys who more frequently have complaints, and then proactively reaching out to them to determine whether the underlying problems, if any, can be identified and resolved. The Governance in the Public Interest Task Force (GTF) recently released a report on such efforts of "proactive regulation," explaining that it should not be punitive, both for the sake of due process and to avoid replicating the same racial disparities explained above.[88] "However, such a predictive model could be the basis of supportive interventions such as providing information, conducting outreach, educating the regulated population about the risks, and providing resources to mitigate them."[89] This proactive mechanism could initially rely on a merely qualitative triage process. For example, an intake attorney may decide, upon closing a complaint for lack of an allegation meriting discipline, to refer it to the proactive support team for outreach.[90] Alternatively or in addition, a risk score could be calculated for each practicing attorney, based on a range of factors including, but not limited to prior complaint history (if it is shown to have statistical reliability for that purpose).

To the extent that, on the merits, either the qualitative or quantitative approach tends to disproportionately identify Black male attorneys for outreach and support, and to the extent that it helps successfully reduce the number of complaints and formal investigations entered against them, it will help resolve the upstream disparity in public complaints. The downstream disparity in severe discipline will be improved as well.

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[86] See J. B. Soll, K. L. Milkman and J. W. Payne, *A User's Guide to Debiasing*, THE WILEY BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, 2, pp. 924-951 (2015).

[87] http://bsa.ca.gov/pdfs/reports/2016-137.pdf at p 2.

[88] The State Bar of California, "Report of the 2020 Task Force on Governance in the Public Interest," p. 12 (May 15, 2020), available at http://www.calbar.ca.gov/Portals/0/documents/reports/2020-Governance-in-the-Public-Interest-Task-Force-Report.pdf.

[89] Id., at 14 (citing Philip K. Dick's 1956 short story, "The Minority Report" and 2002 movie of the same name, directed by Steven Spielberg and starring Tom Cruise.)

[90] While it's true "where there is smoke there is fire," the difference is between assuming it's arson and sending the police to arrest the homeowner, versus sending the firetrucks to put out the fire.

This approach towards proactive regulation is in its infancy. In addition to the triage challenge of identifying *which* attorneys to select for proactive outreach and support, a second challenge will be developing interventions that actually reduce the risk of subsequent complaints and discipline. These are likely to be domain specific—for example, a resource letter may suffice to help attorneys avoid breaching a certain rule, if they are actually unaware of the rule's existence. But a resource letter is unlikely to help to solve more complicated problems. Ideally, such interventions should be tested empirically.

The OCTC operates in a resource-constrained environment, as does the State Bar more generally.[91] Thus it is essential to test any of these potential reforms against a realistic cost estimate, which has not yet been done. Hypothetically, by removing closed complaints from routine consideration (as in PR2.1 and PR2.2), it may be possible that intake attorneys will process cases more efficiently and/or forward to investigation fewer "false positive" cases that turn out to be meritless. Further, it is possible that the proactive intervention team contemplated by PR2.3, may succeed in preventing future complaints from being made at a rate more substantial than if those same resources could have been deployed to clear complaints once filed (having fewer harmed or dissatisfied members of the public). Ultimately, even if these reforms do have net costs in the end, those costs must be weighed against any improvements in the racial disparities shown by the Farkas report.

## 3. REPRESENTATION OF RESPONDING ATTORNEYS

"Lawyers are necessities, not luxuries," said the U.S. Supreme Court in 1963, establishing a Federal Constitutional right to representation in criminal cases.[92] Indeed, Dr. Farkas found that when California attorneys face disciplinary charges without representation by counsel, they were much more likely to be disbarred.[93] Black respondents are approximately twice as likely not to be represented by counsel during the investigation phase of a discipline case. Together, these two differences – between races getting representation and rates of disbarment conditional on representation -- are a plausible mechanism for the ultimate disparity in racial outcomes.

### A. Background and Metric Tracking

The statistics tell us that without representation, respondents are more likely to suffer disbarment (all other observable factors being equal), but they do not necessarily tell us whether the association is causal.[94] It may be, for example, that respondents with stronger cases are more likely to retain counsel, or that respondents who retain counsel are also better able to promote their own cases in other ways. For example, there are presumably cases in which the respondent is so incapacitated by an addiction that she altogether defaults on her case, and that same addiction precludes the securing of counsel. The underlying functional incapacity of the respondent may be

[91] The recent Bar Discipline report makes this clear. See note 60 supra.

[92] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[93] Farkas report *supra* note 1.

[94] Compare D. J. Greiner, C. W. Pattanayak and J. Hennessy, *The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future,* HARV. L. REV. 126, p.901 (2012) (reviewing literature and presenting a randomized study of the effects of representation for clients facing eviction, finding that, "Approximately two-thirds of occupants in the treated group, versus about one-third of occupants in the control group, retained possession of their units at the end of litigation.") James Grenier and Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, YALE L.J. 121, 2118 (2011). ("Our randomized evaluation [in the context of a law school clinic handling administrative appeals to a to state administrative law judges of eligibility for unemployment benefits] found that the offers of representation from the clinic had no statistically significant effect on the probability that unemployment claimants would prevail in their 'appeals,' but that the offers did delay proceedings by, on average, about two weeks.")

the real problem. Thus, more quantitative and qualitative study on the issue of representation could be worthwhile, as the subject of its own report.

Nonetheless, my interviews suggest that representation is indeed effective by helping respondents meet key deadlines, develop a more objective view of the complaint, understand the nuances of this relatively technical and obscure legal specialty, and develop mitigation strategies in particular – all of which help ensure that discipline cases are resolved on the merits. The racial disparity we see is problematic on its own, but it also suggests that the discipline system is resolving cases on factors other than the merits, and thus is failing to optimally achieve its policy goals of protecting the public.

For these reasons, it would be wrong for the State Bar to approach this issue with either an adversarial attitude (supposing that we seek the most severe sanctions in every case and representation of respondents would only create obstacles to that goal) or a *laissez faire* attitude (supposing that respondents can get representation if they want it, and that there is a free market of attorneys who can try to sell their services to those respondents). Instead, at least for cases that threaten disbarment, the California State Bar should view any disciplinary case where the responding attorney is unrepresented as a risk-factor for failing to achieve its policy goals.

In this light, I recommend minimally,

> Potential Reform 3.1 – The State Bar could track and report the proportion of discipline cases lacking representation as a key performance indicator.

It has been said that you cannot manage what you do not measure. So, for starters, this approach simply suggests that the State Bar should keep an eye on this metric just as it does other metrics in its annual discipline report. The effort to track and report the data will hopefully direct sustained attention to this particular issue, allowing leadership to monitor the success of implementing subsequent recommendations. Over the longer term, attention to that metric may also generate other solutions, beyond those considered here.

## B. Improving the Rates of Representation

Moving from merely tracking this metric to attempting to improve the metric will require some theory about *why* attorneys facing discipline, and especially Black ones, fail to secure representation. Research could explore that question with focus groups and surveys of attorneys who have faced discipline without attorneys.

But for now we can speculate: If we consider this outcome of being non-represented to be the result of the respondent's own decision (which is just one possible frame for analysis), several well-documented heuristics and biases may be relevant. These include optimism bias, having an unrealistic view of one's own case, assuming that a favorable outcome is likely regardless of having an attorney, making the effort to secure one unnecessary.[95] Overconfidence is another documented bias, which involves having a rosy view of one's own abilities, here the ability to serve as one's own lawyer, and thus produce a favorable outcome without help.[96] Indeed, some research suggests that

[95] See Linda Babcock et al., *Biased Judgments of Fairness in Bargaining,* 85 AM. ECON. REV. 1337, 1338–39 (1995) and Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659–63 & n.23 (1998) (reviewing literature on "optimism bias"). See also D. Dunning, E. Balcetis, *Wishful Seeing: How Preferences Shape Visual Perception*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 22 (1), 33–37 (2013).

[96] See A. O. Baumann, R. B. Deber, G. G. Thompson, *Overconfidence Among Physicians and Nurses: the 'Micro-Certainty, Macro-Uncertainty' Phenomenon,* SOCIAL SCIENCE AND MEDICINE 32 (2), 167–174 (1991); Catherine O'Grady, *A*

confidence is poorly correlated, or even inversely correlated, with competence, such that the most confident people may actually be the least likely to succeed.[97] These sorts of biases thrive in situations of uncertainty, where someone is undertaking guesswork that succumbs to motivated reasoning.

As a solution, it is sometimes helpful simply to provide true information. This suggests,

> Potential Reform 3.2 – The State Bar could inform attorneys facing discipline about the increased statistical likelihood of probation or disbarment if they fail to secure counsel.

This approach is a form of "nudge" a term which is used in the policy and law literature to indicate a concerted effort to change behavior.[98] Accordingly it should be more than just a pro forma or milquetoast advisory, but rather should be developed and tested as an intervention that will actually change the behavior of responding attorneys, measurably increasing the proportion of cases in which they secure representation. The goal is to make this information very salient to the responding attorney, not mere boilerplate to gloss over (as might be given in a *laissez faire* mindset).

There are a range of questions that still need to be resolved, including the timing of this intervention (whether at the opening of a formal investigation or the filing of charges), the mode (whether as a mailed letter and email or a call); the specific language, numbers, and graphics to utilize (e.g., whether to use a figure showing differential rates of discipline with versus without representation, and/or use quotations from prior attorneys explaining why being represented was valuable to them), the customization of the letter (e.g., to show statistics tailored to the particular charge), and potential follow-up related thereto (e.g., weekly reminders perhaps even including a phone call by an ombudsperson, see below).

Because the rate of representation is a very proximate and measurable outcome (tracked as per PR3.1), it would be feasible to approach these questions through experimentation. For example, at no additional cost, the State Bar could roll out a letter gradually, initially to 25% of attorneys facing new investigations, then 50%, then 100%, and randomly assign respondents to receive two or more different versions of the letter. This stepwise process would allow rigorous evaluation of what tactics optimize the proportion securing representation.

Overall, the notice contemplated by PR3.2 is a relatively simple and inexpensive proposal. However, even if optimized, I would expect the impact to be relatively modest, as the provision of mere information is rarely a complete solution to a policy problem. The fundamental problems are rarely just decisional – they are often fundamentally economic.

In economic terms, legal representation is a "credence good," meaning that it is difficult for the consumer of the service to evaluate its value.[99] If I spend $5,000 to have an attorney help me with

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*Behavioral Approach to Lawyer Mistake and Apology.* 51 NEW ENG. L. REV. 7, 17 (2016) (reviewing the literature in the legal setting).

[97] See David Dunning, "*The Dunning–Kruger Effect: On Being Ignorant of One's Own Ignorance,* in "Advances in Experimental Social Psychology", vol. 44, pp. 247-296. Academic Press (2011).

[98] See Christopher T. Robertson and I. Glenn Cohen and Holly Fernandez Lynch, Introduction, NUDGING HEALTH: HEALTH LAW AND BEHAVIORAL ECONOMICS, Johns Hopkins University Press, 2016, available at SSRN: https://ssrn.com/abstract=2805664.

[99] See U. Dulleck and R. Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, JOURNAL OF ECONOMIC LITERATURE, 44(1), pp.5-42 (2006).

this discipline complaint, will I get more than $5,000 of value in return? To start to answer that question, a respondent might start calling specialist attorneys and begin interviewing them, but unlike criminal defense or personal injury (for examples), the legal practice of attorney discipline is relatively obscure. Finding and then evaluating such a specialist attorney can be time consuming -- what economists call "search costs," which must be sunk before you even get a chance to evaluate the potential service provider.[100] For these reasons, a rational respondent might just shrug and decide to go it alone – forgoing the potential benefits of getting representation to at least avoid the risks of wastefully searching for and selecting one.

For these reasons, the State Bar should make the steps from intention to action as small as possible. This suggests,

> Potential Reform 3.3 – The State Bar could develop a roster of attorneys who agree to provide *pro bono* one-hour consultations and provide a subset of these along with the notice contemplated in PR3.2.

Having a list of qualified specialists and their phone numbers is quite helpful to reduce the respondent attorneys' search costs and support the desired behavior to get representation. Of course a simple link to a statewide directory could suffice, however to avoid "choice overload," some research suggests that a curated list, tailored at least by geographic proximity, or perhaps even with random selection to a single name, may be more effective.[101] A long list can cause people to procrastinate or avoid choosing altogether, out of implicit concern with making a poor choice.[102] In this way, PR 3.3 is designed to make it extremely clear what the respondent should do next (i.e., pick up the phone to call the suggested attorney), without any handwringing. Just do it. Of course, respondents are still free not to use an attorney or to select a different one.

In addition, PR3.3 suggests making that first phone call to an attorney specializing in bar discipline cases be offered for free and be substantial enough (one hour) to help the respondent temper her overconfidence about her case, get a sense of how to proceed with the complaint, and really evaluate whether the attorney is likely to be helpful. The State Bar could, of course, secure funding actually to pay for these initial consultations for all attorneys that utilize them. However, I am envisioning a *simple quid pro quo* – for an attorney to get the State Bar's marketing help, in exchange they have to agree to free one-hour consultations.[103] Attorneys may find that doing this service to their fellow attorneys rebounds in goodwill, and some substantial subset of the free consultations will convert to paid representation thereafter.

Other states, such as Arizona and Oregon, approach this issue by coordinating volunteer attorneys. In Arizona, the Association for Defense Counsel's *pro bono* committee coordinates a panel of attorneys with expertise in professional discipline cases. Along with notice of a formal investigation, the Arizona State Bar provides an explanatory flier with a number for respondents to call to get matched with a willing attorney, who then provides a one-hour free consultation. My interview with one of the co-chairs of this service suggests that the consultations are often

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[100] See J. Yannis Bakos, *Reducing Buyer Search Costs: Implications for Electronic Marketplaces,* MANAGEMENT SCIENCE 43, no. 12, 1676-1692 (1997).

[101] See Christopher Robertson, EXPOSED: WHY OUR HEALTH INSURANCE IS INCOMPLETE AND WHAT CAN BE DONE ABOUT IT, Cambridge, Harvard U Press: 2019, Chapter 2 (reviewing the literature on choice overload).

[102] See also the literature on omission bias. Id.

[103] The fact that the respondent will receive a pro bono consultation, not merely a sales pitch, distinguishes PR3.3. from lawyer referral services. Business & Professions Code section 6155(c)(3).

substantive, giving respondents a clear sense of the severity of the charges they face, how the complaint should be appropriately addressed, and the potential benefits of getting representation.

My preliminary interviews in California suggest that the bar of attorneys specializing in lawyer discipline is somewhat more robust, not merely a subset of the more general defense bar, as in Arizona. I am told that California discipline bar members typically already provide free phone consultations for potential new clients, but these are often limited to about 20 minutes and typically are more like sales pitches, rather than case evaluations.

To the extent that these conversations are substantive, involving an actual evaluation of the case based on information shared on the phone (which seems to be the Arizona model, at least), it raises concerns about malpractice liability, confidentiality and privilege, scope of representation, and conflicts with other clients.[104] Some of these issues arise even from the status quo practice of offering 20-minute sales conversations.[105] Enforceable liability waivers may be part of the solution, but would require revision of the California Rules of Professional Conduct.[106] I expect that all these questions are resolvable, but require some prospective thought and guidance, possibly from the courts. It is key to ensure that antiquated formalism does not get in the way of solving the policy problem.

The foregoing potential policy reforms may substantially increase the proportions of respondents who get representation, and PR3.3 will even give a clear-headed case evaluation to those who do not get representation. But there will likely remain a substantial number of attorneys who fail to do so, and it may reflect the same racial disparity presently observed.

Frankly, many social problems are ultimately problems of wealth distribution, and mechanisms that do not address that fundamental problem will only have marginal effects. Here, I would speculate that a substantial proportion of attorneys who proceed through the discipline process without representation are doing so because they simply cannot afford to hire an attorney, and that may be more often true for Black attorneys. To remedy that problem, the Legislature or the State Bar could, ambitiously, create a public defender system for attorneys charged with misconduct, creating a rules-based or statutory right to representation, even if not recognized by the state or federal constitutions. Given the relatively small numbers of attorney discipline cases per year, it may only require a few fulltime staff to provide that support. However, the finances and politics of such a move might be challenging, and a poorly funded and overworked public defender might not provide substantial benefits, due to sheer lack of bandwidth.[107] This suggests,

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[104] See *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147–48, 980 P.2d 371, 379–80 (1999) ("The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result. … When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie. … The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising.")(quoting prior cases).

[105] See *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214, 1225, 180 Cal. Rptr. 3d 620, 628 (2014) ("California's attorney-client privilege is embodied in section 950 et seq. and protects confidential communications between a client and his or her attorney made in the course of an attorney-client relationship. … Section 951 defines 'client,' for purposes of the privilege, as 'a person who … consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity....")

[106] See California Rules of Professional Conduct, Rule 1.8.8 Limiting Liability to Client ("A lawyer shall not: (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice.").

[107] See Alexander supra note 7 at 289 ("Public defender offices should be funded at the same level as prosecutor offices.").

Potential Reform 3.4 – The State Bar could facilitate sliding-scale fee representation by the private defense bar.

Differential pricing is an important economic tool that can increase access for lower-income consumers while also increasing profits to sellers, enhancing overall welfare, but it is difficult to organize in a competitive market.[108] My interviews suggest the defense bar may be interested in providing services on a sliding scale but is uncomfortable with the role of actually doing the means-testing required to determine whether a given respondent qualifies for a given level of discount, based on assets and income. This is a challenge for any scheme of pure differential pricing, since individuals would always prefer to pay less, even if they are able to pay more, making the sorting task essential and potentially resource-intensive, *i.e.,* to secure and review reliable documentation of assets and income. Nonetheless, the California State Bar already takes into consideration "ability to pay" for various programs, including the lawyer assistance program, licensing fees, and court transcripts. These mechanisms could be unified and the State Bar could then certify that a given attorney is also eligible for reduced fee representation.

To ensure that the State Bar court gets the full benefit of the adversarial process in every case, the sliding scale for attorneys fees should go all the way to zero, where necessary.[109] Anecdotally, I understand that some lawyers may be struggling financially to such a great extent that even a small fee could be preventative. It bears emphasis that a robust adversarial process benefits the State Bar and the public it is trying to serve and protect, not just the accused attorney.

Even more than the other suggestions, PR3.4 requires further study. It is difficult to tell whether the private defense bar will be willing to provide substantial enough discounts for large enough numbers of responding attorneys or even provide pro bono representation to some attorneys on the extreme. Price discrimination works in other contexts, such as pharmaceutical drugs being sold in relatively rich countries at a high price and in relatively poor countries at a much lower price, in part because the marginal cost to produce pills is quite low and the cost to research and develop the drug is sunk. Legal services, on the other hand, have higher marginal costs of production – an attorney has to give up his or her time, which could be spent serving another full-price client instead. To help address this problem, PR3.4 could be fleshed out to include an allocation of funds from the State Bar, to "top up" the reduced fees paid by the responding attorney.

## C. Improving Outcomes for Those Without Representation

The foregoing suggestions are unlikely to get representation for all the respondents who could benefit. Accordingly,

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[108] See Christopher T. Robertson, *Scaling Cost-Sharing to Income: How Employers Can Reduce Healthcare Spending and Provide Greater Economic Security*, 14 YALE JOURNAL OF HEALTH POLICY, LAW, AND ETHICS 239, 265 (2014) ("Variants of this strategy include pure price discrimination, as well as the differentiation of very similar products (e.g., Honda and Acura), so that individual consumers can reveal their own willingness to pay. Coupons are thought to have a similar effect, allowing consumers with greater price sensitivity (and lower opportunity costs for their time) to gain access to consumer products that would otherwise be too expensive"). See generally Daniel J. Gifford & Robert T. Kudrle*, The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?,* 43 U.C. DAVIS L. REV. 1235, 1241–42 (2010) (discussing the varieties of differential pricing). The concept is often called "price discrimination," but not in the pejorative sense.

[109] The State Bar could alco consider partnering with a law school to operate a clinic focusing on defense of attorney discipline cases. Such a clinic could be an excellent way to teach professional responsibility to future California attorneys, while helping to ensure an adequate defense for financially destitute attorneys. It might also introduce more young lawyers to this area of practice, which could then further expand the availability of private representation.

**Potential Reform 3.5 –** The State Bar could create a Discipline Equity Office to implement the foregoing reforms, minimize disparities, ensure that discipline decisions are rendered on the merits, and support unrepresented attorneys.

This is a complex and novel set of functions to be performed by this new entity. Of course, attorneys facing discipline are a distinct population from the typical civil litigant trying to resolve a divorce or eviction without the support of counsel, but the Farkas report suggests a similar need for representation, or at least support.

PR3.5 uses the working title "Discipline Equity Office" (DEO), but some of these functions are similar to an "ombudsperson," which other California state agencies employ.[110] Similarly, the U.S. Food and Drug Administration has an Office of the Ombudsman, which "serves as a neutral and independent resource for members of FDA-regulated industries when they experience problems with the regulatory process that have not been resolved at the center or district level."[111] The Federal Internal Revenue Service has an independent organization called the Taxpayer Advocate Service, which helps individuals resolve problems and also addresses systemic issues.[112] Regardless of the label, the idea is to have someone in the State Bar, independent of OCTC, who can engage with and support members who are facing discipline.

Another analogy is to a trend in district attorneys' offices to create "conviction integrity units," whose role is "to prevent, identify, and remedy false convictions."[113] We have no reason to believe that there are analogously "false disbarments." But these offices reflect a similar insight that the prosecutor does not merely exist to get convictions, but to pursue justice in protecting the public, and sometimes that requires an independent second look at a case.[114]

The DEO could answer questions and produce self-help materials, such as procedural roadmaps, explainers, smart forms (like TurboTax), and exemplar pleadings for attorneys representing themselves, which is analogous to the self-help centers that exist in every California State Court, a national model that other states are only beginning to implement.[115] Such centers, "help unrepresented litigants with their cases in any way possible, short of giving legal advice."[116]

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[110] See S. Van Roosbroek and S. Van de Walle, *The Relationship Between Ombudsman, Government, and Citizens: A Survey Analysis,* NEGOTIATION JOURNAL, 24(3), pp. 287-302 (2008) ("The first modern ombudsman's office was established in Sweden in 1809. Its task was to protect the rights of citizens against the executive branch. … For citizens …[i]ndividual problems are often solved in a quick and flexible way. This is the individual role of ombudsmen. Based on their experience with citizens' complaints, ombudsmen give recommendations that seek to alter laws, regulations, and/or organizational structures. This is the collective dimension of the ombudsman function. The ombudsman does not have the power to make binding decisions but does have the right to reveal problems within organizations and persuade those organizations to follow his or her recommendations.") See e.g., California Department of Corrections and Rehabilitation, Office of the Ombudsman, https://www.cdcr.ca.gov/ombuds/.

[111] U.S. Food and Drug Administration, Office of the Ombudsman, https://www.fda.gov/about-fda/office-chief-scientist/office-ombudsman.

[112] U.S. Internal Revenue Service, Taxpayer Advocate Service, https://www.irs.gov/taxpayer-advocate.

[113] See National Registry of Exonerations, Conviction Integrity Units, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx.

[114] See also California Rules of Professional Conduct, Rule 5-110 Special Responsibilities of a Prosecutor (discussion: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[115] See California Courts Self-Help Center, https://www.courts.ca.gov/selfhelp.htm. See e.g., San Francisco Superior Court, Assisting Court Customers with Education and Self-help Services, https://www.sfsuperiorcourt.org/self-help. See generally, Self-Represented Litigation Network, https://www.srln.org/.

[116] Deno Himonas & Tyler Hubbard, *Democratizing the Rule of Law,* 16 STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES 47, 53 (2020).

Still, research on self-help suggests that it is not always effectual, especially where focused on "educating[individuals] about formal law, and second, by considering the task complete once the materials have been made available to self-represented individuals. In particular, modern self-help materials fail to address many psychological and cognitive barriers that prevent individuals from successfully deploying the substance of the materials."[117] Some respondents may feel overwhelmed and suffer from anxiety, and some may be coping with denial, which threatens disbarment out of sheer inaction on a pending complaint.[118] These considerations suggest that psychology and social work will be as important as legal advocacy.

PR3.5 also suggests that the DEO could perform a casefile review, seeking to find instances where the discipline standards may be yielding unnecessarily harsh sanctions and where the adversarial process may be breaking down. As a matter of triage, the process would presumably focus on the cases where an attorney is unrepresented, but is facing disbarment.

Further study will be required to determine the optimal institutional structure for the DEO. It would presumably not be housed within OCTC itself, but may be part of the broader State Bar, perhaps related to the Lawyer Assistance Program, or in the State Bar Court, not unlike the self-help centers in California civil courts.[119]

Altogether, PR3.1 to PR3.4 are designed to try to increase the proportion of attorneys, especially Black attorneys, who get representation, which may then help them avoid disbarment. PR3.5 tries to narrow the performance gap, so that even attorneys who do not get representation may nonetheless have greater success in representing themselves.

## NEXT STEPS

I have suggested twelve potential reforms across three primary areas of inquiry – bank reportable actions, the use of prior closed complaints, and the representation of attorneys facing discipline. To the extent that State Bar leadership is persuaded that any of these deserve further study towards implementation, I would suggest that it appoint a State Bar staff member to "own" each initiative, with the support of consultants and volunteers as may be helpful.

To be sure, these insights do not exhaust the range of potential opportunities suggested by the Farkas report. I recommend further study of the other hotspots where the State Bar receives disparate numbers of complaints. Table 4 in the Farkas report shows that, in addition to Bank Reportable Actions, Black male attorneys are more likely to receive complaints about Performance, Duties to Client, and Funds.[120] Future work could explore each of those areas, both upstream trying to understand the underlying problems that give rise to complaints and downstream how those complaints are handled by the State Bar once received. My analysis of the bank reportable actions issue is an example of how that work may proceed.

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[117] See D. James Greiner, Dalie Jimenez, and Lois R. Lupica. *Self-help Reimagined*. 92 IND. LAW JOURNAL 92 (2016).

[118] Id., citing Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and the Importance of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 126–27 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007) (reviewing the reasons that many individuals do nothing in response to legal problems) and SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

[119] See Administrative Office of the Courts, Guidelines for the Operation of Self-Help Centers in California Trial Courts (2011), available at https://www.courts.ca.gov/documents/self_help_center_guidelines.pdf (discussing need for independence).

[120] Farkas report *supra* note 1.

I would also recommend another round of quantitative analysis, building on and extending beyond the work done for the Farkas report. Statistical analysis of race is profoundly difficult.[121] Even prosaically, I will note that I have relied heavily on Farkas Table 4 to prioritize study of the types of allegations where the racial disparity is greatest, but that table only shows averages for attorneys with ten or more complaints, and it does not disaggregate particular complaint categories (e.g., particular types of Performance problems).

The Farkas report also does not explore the fact that Black Americans are disproportionately targeted for arrest and criminal prosecution.[122] This may be an additional source of the ultimate disparity in attorney disbarment, since felony convictions are a substantial cause of disbarment.[123]

Longitudinal analyses would be worthwhile as well, to see if the racial disparity is changing over time. The Farkas report had impressive statistical power, but only at the cost of merging recent and older data into a single pool.

Most fundamentally, I would note that Dr. Farkas's regressions focused on the licensed attorney as the unit of analysis, and examined variables associated with being put on probation or disbarred, across the attorney's career. Another approach would be to examine complaints (or cases) as the unit of analysis and explore the variables that are associated with each complaint being resolved with probation or disbarment.[124] The case-approach may yield new insights, e.g., showing which sorts of complaints create the greatest racial disparity in outcomes once filed, or show which sorts of complaints provide the greatest benefit of representation.[125]

In addition, I recommend ongoing study of several contextual factors, including the racial demographics of the Office of Chief Trial Counsel staff and the risk of complaints and discipline by attorneys in various practice areas, which may disproportionately involve attorneys of certain races. My understanding is that both of these sets of data are being collected and analyzed.

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[121] See sources cited *supra* note 4.

[122] See generally Alexander, *supra* note 7.

[123] See Annual Discipline Report, *supra* note 11 at SR-27 (showing 23-33 disbarments per year based on felony convictions). See also *id* at SR-16 (showing 31-59 cases per year filed in State Bar Court around filing of misdemeanor or felony charges, and 2-21 cases filed over criminal convictions).

[124] See *Starr* supra note 27 at 502 ("Usually, when we ask causal questions about racial discrimination, we are not asking about the lifelong effects of race, but rather about discrimination in a particular decision process (e.g., arrest). The counterfactual is how the decision-maker would have responded had she encountered a person of a different race whose relevant characteristics (as perceived by the officer) were otherwise similar.")

[125] For an example of some of the sophisticated empirical work around detecting and analyzing disparate treatment, see Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, AM. J. CRIM. L. 45, 95 (2018) (showing "how prosecutors' differential treatment of specific case characteristics based on the victim 's race contributes to the overall racial disparity").

# APPENDIX E

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Respondent
GREGORY HARPER

FILED
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STATE BAR COURT
REVIEW DEPARTMENT – SAN FRANCISCO

In the Matter of
GREGORY HARPER
Member No. 146119

A Member of the State Bar.

_____/

Case Nos.: 17-0-01313

**RESPONDENT/APPELLANT'S REPLY TO APPELLEE'S LATE BRIEF OF HEARING DEPARTMENT DECISION AND REQUEST FOR ORAL ARGUMENT**



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Respondent
GREGORY HARPER

STATE BAR COURT
REVIEW DEPARTMENT – SAN FRANCISCO

In the Matter of
GREGORY HARPER
Member No. 146119

A Member of the State Bar.

Case Nos.: 17-0-01313

**RESPONDENT/APPELLANT'S REPLY TO APPELLEE'S LATE BRIEF OF HEARING DEPARTMENT DECISION AND REQUEST FOR ORAL ARGUMENT**

_____/

**TO: THE HONORABLE PRESIDING JUDGE, AND TO THE ASSOCIATE JUDGES OF THE REVIEW DEPARTMENT OF THE STATE BAR COURT AND TO ALL OTHER PARTIES AND COUNSEL OF RECORD:**

Respondent GREGORY HARPER, acting in Pro Per, hereby requests Oral argument and opposes appellee review Department appearing in the above referenced matter, case no. 17-0-01313 pursuant to Rules 5.151, 5.152 and 5.154 of the Rules of Procedure of the State Bar of California. Appellant further reserves their rights as to this matter and, alternatively opposes any opposition to Appellant in this matter.

**BACKGROUND**

Appellant represented the complaining party Evigne dejoie in two (2) cases. One was a post foreclosure eviction and the other an affirmative case against US Bank for habitability violations at the premises. Evigne's former attorney withdrew from the case for failure to pay

fees. Her father, Duane dejoie a law school graduate and non attorney requested an internship and help with her eviction. Evigne executed a written fee agreement calling for a 1/3 recovery to Appellant for attorneys fees. Evigne sought a $100,000 settlement from the bank. Unknown to the Appellant Evigne while contesting the habitability of the premises rented rooms to tenants. Evigne was not cooperative with her case and her father interfered constantly and threatened the Appellant. Shortly before trial the bank offered a settlement of which Evigne accepted. Appellant represented her in the two cases and obtained a settlement of nearly $60,000 with a waiver from the bank of back rent and attorneys fees of approximately $30,000. Evigne accepted her settlement check minus attorneys fees and costs she agreed to pay. Upon payment Evigne's father Duane dejoie demanded that Appellant not accept any attorneys fees as Evigne wanted $100,000. Evigne however accepted the settlement as agreed. Since Evigne was the client and Duane had absconded with funds of his relatives and had a Federal conviction for embezzlement Appellant shortly thereafter in November of 2016 served an itemization of work done on her case of approximately $30,000 and a Notice of Mandatory Fee Arbitration as required under Business and Professions code sections 6200-6204 and specifically 6201. Evigne did not respond until mid-February, 2017.

**INTRODUCTION**

Appellant Gregory Harper [hereinafter referred to as Appellant] timely delivered payment for transcripts to the State Bar Court [hereinafter referred to as Court] two times before payment was accepted on the third attempt. Counsel for the review department [Hereinafter referred to as Appellee] queried the Court whether the Appellant made a timely request and was informed the Appellant made a timely request.

Appellant timely filed their opening brief on October 17, 2019. The Court rules of Procedure require an opposition be filed within 30 days. On December 4, the Court served an Order on the Appellant and Appellee informing the parties the Appellee's opposition brief was late. The Order also mandated the Appellee file its brief by December 9, 2019.

Moreover, if the Appellee failed to comply with the Order the Court would either make a decision on the Appellant's brief or, if the Appellant requested oral argument the Appellee be prohibited from opposing the Appellant. The Appellee was also required to serve the Appellant upon filing. The Appellee filed their brief on December 10, 2019.

On December 12, 2019 Appellant contacted the Court via telephone and requested the status of filings in this case. The clerk informed Appellant the brief was filed on December 10, 2019 and was served on Samuel Bellicini and to contact the Appellee. The Appellant contacted the Appellee who emailed a copy of the unserved brief on December 12, 2019. Appellee also informed Appellant they would re-serve the brief. As of December 26, 2019 the Appellant has not been served with Appellee's brief. Samuel Bellicini has not forwarded the brief to Appellant. Appellant did not stipulate to electronic service and is responding based upon Appellee's email. No Request for late filing was made by the Appellee. Appellant hereby reserves their rights and files this response to avoid a default.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Pursuant to the Court's Order Appellant Requested Oral Argument

A. According to Court Order Appellee is Precluded from Appearing.

## II The Instant Disciplinary Process is Discriminatory [1]

### A. Remoteness of priors ignored by non African American judges.[2]

Initial judge, African American recommended dismissal. The Second judge recommended disbarment and, would not allow prosecutor to negotiate anything different. Disbarment based. on prior discipline of cases 20 and 16 years old.[3] Additionally, the appellant provided explanations according to information he had available. He provided reconciliations and a letter from his banker explaining the banker held a check for $120,000 by mistake after telling the Appellant the check for $120,000 had been deposited. Another check was written by mistake

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[1]See New California Bar Study finds racial disparities in lawyer discipline. See exhibit A Farkas State Bar Study and, ABA Journal November 8, 2019

[2]Silverton provides Standard 1.7(a) directs that the degree of discipline imposed on a member with a prior record of discipline "shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

[3]See *In re Silverton* (2005) 36 Cal 4th 81. Discipline rule 17a applicable when discipline is remote or dissimilar. Silverton had prior felony convictions and disbarment. Here, there was no harm and no case should have been initiated as the policy of the State Bar is to have fee disputes decided on the local bar association level. Here, court followed policy of disbarment for third trust account matter regardless of circumstances. The, alleged fee dispute arose from case where the complaining party Evigne dejoie who was not at trial was a defendant in a post foreclosure eviction case and had been abandoned by their prior attorney. The subject Premises previously owned by her father, Duane dejoie were in dangerous substandard condition with dozens of code violations from City of Berkeley. Complainant sued the owner, US Bank for habitability issues. Notwithstanding the habitability defects dejoie illegally rented rooms to tenants. Months after she spent her settlement funds dejoie in February 2017 filed a complaint. She was former paid intern of Appellant who he discharged for improper conduct. She took her file from the office which contained the retainer agreement and failed to post it in electronic filing system of Appellant then claimed no agreement existed. She also failed to cooperate with the handling of her cases. Even the state Bar agrees she was served with the arbitration paperwork in November, 2016 and used as an exhibit the mandatory fee arbitration notice requiring a response within 30 day of which dejoie failed to avail herself. The investigator obtained interviews with the complaining party's father a failed former law student who was not a party to the case who had been terminated from employment by appellant for several reasons including failing to disclose embezzlement thefts from his mother resulting in a conservator being appointed to handle her finances. Father is also has a theft and embezzlement conviction resulting in his removal as a Federal employee union president. He failed to disclose to the Appellant his conviction for embezzling from his union. ( See United States of America v Duane Dejoie Case No. CR 10-0569 ) After this disclosure the Appellant was extremely reluctant to discuss any matters with him and sent paperwork for fee arbitration to Evigne dejoie who failed to respond for several months. ( While this is not technically a criminal case elements of equal protection are present in rendering discipline. See Exhibit B *Primer on Criminal History* by the Federal Sentencing Commission [2018] at page 6 which discourages use of priors 10-15 years old attached hereto.)

notwithstanding the Appellant should not have had to maintain a balance of fees pursuant to a fee dispute. These are extraordinary circumstances justifying a lesser sanction if any.

B. Appellant worked to comply with the Trust accounting handbook via reconciliation of any mistakes.

1. This matter is indicative of a discriminatory and disparate impact on Black male attorneys and the penalties are disproportionately harsh especially considering no harm was suffered.[4]

A. Irregularities in process skewed toward discipline.

The process used against the Appellant herein included:

**MANDATORY FEE ARBITRATION**

**III. Waiver**

1. Attorneys are Required to submit to Mandatory Fee Arbitration. Those rules were waived for the complaining party[5]Under fee dispute jurisdiction per: policy and rules of conduct. Business and Professions Code section 6201 provides a limited window for a complaining party to exercise their rights. *Huang v Cheng* (1998) 66 Cal.App. 4th 1230. (Father had no rights) *Rosenson v. Greenberg Glusker Fields* (2012) 203 Cal. App. 4th 688 Once served, the complaining party has 30 days to respond. mandates the complaining party exercise their right to fee arbitration. *Aheroni v Maxwell* (1988) 205

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[4]Report on Disparities in the Discipline System by George Farkas for State Bar of California November 14, 2019,

[5]The State Bar submitted the Mandatory Fee Arbitration form served on November 27, 2016. Said form has a 30 day response time. Requirement waived by fee arbitrator over Appellant's objection. Form not submitted for 75 days

Cal. App. 3d 284

2. State Bar Policy is to resolve disputes involving fees in Mandatory Fee arbitration. Any fee dispute arbitration was requested too late[6] and the attorney not obligated to hold money. No harm was suffered by the complaining party.[7]

**TRIAL**

3. No charges should have been levied. The charges were based on an obligation that did not exist as fee arbitration was not timely demanded. Arguably any fee dispute with same facts resolved August 2017. Charges made October 2018. Penalty is to harsh because the prior discipline is remote.[8]

4. Trust account balance and deposit issues were explained by the depositing banker's letter[9].

5. Voluntarily went to trust account school mistake, check held by banker as indicated in letter from banker[10]

6. The Judge had her daughter in the court room and in conversations in discussions with

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[6]California Attorneys are required to submit to Mandatory Fee Arbitration for fee disputes. The attendant notice form California is provided by the state bar and requires a response within 30 days Attorneys are required to submit this form and accede to its rules (Business and Professions Code, Article 13 Arbitration of Attorney's Fees (§§ 6200-6206)

[7]Ordinary and reasonable fees in the underlying matter that before trial are 40% of any recovery. Appellant agreed to charge 1/3. Itemized fees were in excess of $30,000 for two cases on a recovery of $60,000 and waiver of back rent of $30,000 and attorneys fees and costs were waived. Authority relied on by the prosecution has cases where actual harm and loss resulted to the complaining party. The complaining party and her father did not want to pay any attorneys fees.

[8]See *In re Silverton at p 91*

[9]Banker submitted a letter on bank letterhead.

[10]Banker threatened with loss of job if called to testify

opposing counsel James Cook in a case of which the Appellant was trial counsel. Cook harassed witnesses and likely the judge's daughter[11]

**POST TRIAL**

7. Appellant timely requested transcripts and filed a timely Notice of Appeal and opening brief. Notwithstanding, the Appellant was pressured to not pursue this appeal.[12]

**CONCLUSION**

Here, the Appellee based their case on ambiguous stipulated facts that are not supported by the record. Any dispute that arose in 2016 is supported by state bar interviews with the complaining party's father, a convicted embezzler. The Appellant sought resolution of any dispute with the complaining party who refused to act until she spent her settlement funds months later. The prosecution did not properly support the record and the court appeared to give little credence to the fact the complaining party did not respond to the notice of fee arbitration for several months. It is unreasonable to require an attorney to withdraw their funds when they are earned yet replace said funds months afterwards even when the party involved was given written notice they could dispute any fees and failed to act. It appears the rules are interpreted against the attorney and unreasonably require an attorney to commingle funds that have been earned. Finally, one cannot

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[11] *Carr v Gilmore*, Alameda County Superior #RG16814012. Appellant represented the plaintiff in nuisance trial against a crack house owner. Cook represented the defendant. Cook appeared at trial and had discussions with the prosecutor and offered to help the prosecutor with her case. Additionally, Cook had discussions with the judge's daughter in the courtroom, harassed appellants witnesses and had his clients appear at appellants trial who had a lengthy conference with the prosecutor during the trial. Additionally, Cook listed the investigator J, Buteyn, Evigne dejoie and Duane dejoie as witnesses in the case. The identity of witnesses in the bar's investigation is supposed to be confidential.

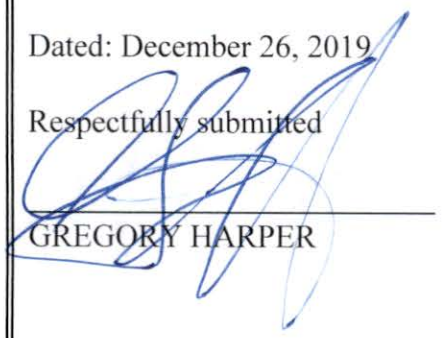
[12] The prosecutor requested Appellant provide attorney client privileged financial information via subpoena. The appellant refused to provide said information as they had been previously misinformed said information was not privileged. The Appellant is extremely concerned about reprisals for failing to provide said information.

ignore in light of the study by the state bar itself the initial judge in the case, the African American judge thought the case should have been dismissed while the subsequent non-African-American judges felt disbarment was appropriate.

Therefore, in light of the foregoing Appellant requests this decision below be reversed.

Dated: December 26, 2019

Respectfully submitted



GREGORY HARPER

Exhibit A

# PRIMER


# CRIMINAL HISTORY

April 2018

*Prepared by the Office of General Counsel, U.S. Sentencing Commission*

*Disclaimer: This document provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive. The information in this document is not binding upon the Commission, courts, or the parties in any case. Pursuant to Fed. R. App. P. 32.1 (2007), some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.*

of 18.[31] Likewise, the status of the defendant at the time of the instant federal offense matters and may result in criminal history points.

### *a.* Fifteen-year window for prior sentences greater than 13 months

Three points are assigned to each adult sentence of imprisonment exceeding one year and one month imposed within 15 years of the instant offense *or* resulting in incarceration of the defendant during any part of the 15-year period.[32] Section 4A1.2(e)(1) may result in the scoring of remote convictions, especially where a defendant was on parole or supervised release and was revoked and incarcerated during the 15-year period immediately preceding the instant offense.[33] The court will count a conviction of a defendant whose parole is revoked during the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation.[34] A defendant on escape status is deemed incarcerated.[35]

### *b.* Ten-year window for sentences less than 13 months

For prior sentences less than 13 months, there is a 10-year time limitation, which runs from the date the prior sentence was imposed, not when it was served.[36] Likewise, the time limit runs *from the original imposition date*, not the revocation date, *unless* the original sentence added to the revocation sentence exceeds 13 months.[37]

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31 USSG §4A1.2

32 *Id.* §§4A1.1(a), 4A1.2 (e)(1).

33 *Id.* §4A1.2(k)(2)(A). *See, e.g.*, United States v. Semsak, 336 F.3d 1123 (9th Cir. 2003) (revocation of parole).

34 United States v. Ybarra, 70 F.3d 362 (5th Cir. 1995).

35 United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993) ("[the defendant] *would have* been in custody during the 15-year period preceding commencement of the instant offense had he not escaped from custody while serving the eight-year sentence.").

36 USSG §4A1.2(e)(2).

37 *Id.* §§4A1.2 (a)(1), (e)(2), (k)(2)(B). *See also* United States v. Arviso-Mata, 442 F.3d 382 (5th Cir. 2006) (sentence imposed when defendant found guilty and sentence was suspended); United States v. Arnold, 213 F.3d 894, 895–96 (5th Cir. 2000) ("a sentence is 'imposed' when it is first pronounced by the court, and not when the term of imprisonment begins .... [S]entence pronouncement is the sole, relevant event for purposes of § 4A1.2(e)(2) ....").

Exhibit B

The State Bar
*of California*

**OPEN SESSION**
**AGENDA ITEM**
**705 NOVEMBER 2019**

**DATE:** November 14, 2019

**TO:** Members, Board of Trustees

**FROM:** Dag MacLeod, Chief of Mission Advancement & Accountability Division
Ron Pi, Principal Analyst, Office of Research & Institutional Accountability

**SUBJECT:** Report on Disparities in the Discipline System

## EXECUTIVE SUMMARY

A State Bar study on disparities in the attorney discipline system found that differences in rates of disbarment and probation of nonwhite attorneys are explained primarily by an attorney's previous discipline history, the number of investigations opened against the attorney, and the percentage of investigations in which the attorney was not represented by counsel. The State Bar plans to continue its evaluation of this topic through further data analysis and operational review, taking corrective action as warranted to ensure the integrity of the attorney discipline system.

## BACKGROUND

For years the State Bar has heard anecdotes regarding the over-representation of people of color in the attorney discipline system. In light of these assertions, and pursuant to the State Bar's statutory mission and Strategic Plan – both of which give the State Bar a mandate to work to eliminate bias and promote diversity in the legal profession – the State Bar initiated a rigorous, quantitative analysis to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action.

The study, attached to this agenda item, was conducted by George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine.

**PROOF OF SERVICE**

*In Re GREGORY HARPER No. 17-0-01313*

I, declare:

I am over the age of eighteen years and not a party to the cause of action. My business address is 54 Railroad Avenue Point Richmond, California 94801. On December 27, 2019, I served the documents described as

**RESPONDENT/APPELLANT'S REPLY TO APPELLEE'S LATE BRIEF OF HEARING DEPARTMENT DECISION AND REQUEST FOR ORAL ARGUMENT RESPONDENT/APPELLANT'S REQUEST FOR EXTENSION OF TIME TO FILE LATE BRIEF, REQUEST FOR ORAL ARGUMENT**

on the interested parties in this matter by true copy thereof in a sealed envelope(s) addressed as follows:

Manuel Jiminez State Bar of California Review Department
180 Howard Street, San Francisco, California 94105-1639

Carla Cheung, State Bar of California
180 Howard street, San Francisco, California 94105-1639

Service of the above document(s) was effectuated by the following means of service:

[ x] **By First Class Mail** -- I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service. It is deposited with the United States Postal Service in the ordinary course of business on the same day it is processed for mailing. I caused such envelope(s) to be deposited in the mail at Point Richmond, California. The envelope was mailed with postage thereon fully prepaid.

[ ] **By Personal Service** -- By causing to personally deliver a true copy thereof in a sealed envelope.

[ ] **By Overnight Delivery Service** -- I caused such envelope(s) to be deposited in a box or other facility regularly maintained by the express service carrier or delivered to an authorized courier or driver authorized by the express service carrier to receive documents. The envelope was deposited with the express service carrier with delivery fees paid or provided for.

[ ] **Facsimile Transmission** -- I served the documents in this matter via facsimile transmission to:

[ ] **Email Transmission** -- I served the documents in this matter via facsimile transmission to:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and executed:

December 27, 2019, at Pt. Richmond, California

Phyllis Carr

# APPENDIX F

SUPREME COURT
FILED

AUG 12 2020

Jorge Navarrete Clerk

Deputy

State Bar Court No. 17-O-01313

**S262388**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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In re GREGORY HARPER on Discipline.

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The petition for review is granted and the matter is remanded to the State Bar Review Department for consideration of Harper's unaddressed claim that his discipline is based on a theory of disparate impact.

Cantil-Sakauye
*Chief Justice*

Chin
*Associate Justice*

Corrigan
*Associate Justice*

Liu
*Associate Justice*

Cuéllar
*Associate Justice*

Kruger
*Associate Justice*

Groban
*Associate Justice*

# APPENDIX G

FILED

SEP 25 2020

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

**En Banc**

| | | |
|---|---|---|
| In the Matter of | ) | 17-O-01313 |
| | ) | |
| GREGORY HARPER, | ) | ORDER |
| | ) | |
| State Bar No. 146119. | ) | |
| | ) | |

THE COURT:*

It is ordered that the opinion filed herein on April 14, 2020, which was not certified for publication, be modified as follows:

On page two, insert a second paragraph to Section I. Procedural Background, as follows:

"On April 14, 2020, we issued our opinion. On June 15, 2020, Harper filed a petition for review in the Supreme Court. On August 12, 2020, the Supreme Court remanded the matter to us to consider "Harper's unaddressed claim that his discipline is based on a theory of disparate impact." Pursuant to the remand, this modified opinion addresses Harper's claim."

On pages 15-17, insert new section titled Section VI. Consideration of Claim of Disparate Impact on Remand.

This modification does not alter any of the factual findings or legal conclusions set forth in the opinion, and it does not extend any deadlines. (Cal. Rules of Court, rule 8.264(c) [modification of reviewing court that does not change appellate judgment does not extend finality date of decision].)

* Before Purcell, P. J., Honn, J. and McGill, J.

**CERTIFICATE OF ELECTRONIC SERVICE**

[Gen. Order 20-04; Code Civ. Proc., § 1013b, subds. (a)-(b)]

I, the undersigned, certify that I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on September 25, 2020, I electronically served a true copy of the following document(s):

ORDER FILED SEPTEMBER 25, 2020

by electronic transmission on that date to the following:

GREGORY HARPER
ghlaw@pacbell.net

Kimberly G. Anderson
Kimberly.Anderson@calbar.ca.gov

I hereby certify that the foregoing is true and correct.

Date: September 25, 2020

Julieta E. Gonzales
Court Specialist
State Bar Court of California
Julie.Gonzales@calbar.ca.gov

# APPENDIX H

FILED

OCT - 1 2020

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

**En Banc**

| | | |
|---|---|---|
| In the Matter of | ) | 17-O-01313 |
| | ) | |
| GREGORY HARPER, | ) | ORDER |
| | ) | |
| State Bar No. 146119. | ) | |
| | ) | |

On September 21, 2020, respondent Gregory Harper filed a motion for restoration to active status and dismissal of all charges based on the Supreme Court's remand order filed August 12, 2020. In his motion, respondent also included a request for oral argument. On September 29, 2020, the Office of Chief Trial Counsel of the State Bar filed a response in opposition, asserting that respondent's motion is moot.

Lacking good cause, respondent's requests are denied as moot considering we have filed a Modified Opinion and Order on September 25, 2020, addressing the Supreme Court's remand order.

PURCELL

Presiding Judge

**CERTIFICATE OF ELECTRONIC SERVICE**

[Gen. Order 20-04; Code Civ. Proc., § 1013b, subds. (a)-(b)]

I, the undersigned, certify that I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on October 1, 2020, I electronically served a true copy of the following document(s):

ORDER FILED OCTOBER 1, 2020

by electronic transmission on that date to the following:

GREGORY HARPER
ghlaw@pacbell.net

KIMBERLY G. ANDERSON
Kimberly.Anderson@calbar.ca.gov

I hereby certify that the foregoing is true and correct.

Date: October 1, 2020

Julieta E. Gonzales
Court Specialist
State Bar Court of California
Julie.Gonzales@calbar.ca.gov

## 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 January 8, 2021.

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 8th day of January, 2021.

*/s/ Joan Randolph*
JOAN RANDOLPH

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/8/2021 by Karissa Castro, Deputy Clerk

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **HARPER ON DISCIPLINE**
Case Number: **S265240**
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.

2. My email address used to e-serve: **suzanne.grandt@calbar.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

| Filing Type | Document Title |
|---|---|
| RESPONSE FROM STATE BAR | Harper_Ans_to_Sup_Ct_Petition |

Service Recipients:

| Person Served | Email Address | Type | Date / Time |
|---|---|---|---|
| Gregory Harper<br>Court Added<br>Pro Per | ghlaw@pacbell.net | e-Serve | 1/8/2021 2:41:52 PM |
| Suzanne Grandt<br>Office of the General Counsel<br>304794 | suzanne.grandt@calbar.ca.gov | e-Serve | 1/8/2021 2:41:52 PM |

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

1/8/2021
Date

/s/Joan Randolph
Signature

Grandt, Suzanne (304794)
Last Name, First Name (PNum)

The State Bar of California
Law Firm