

Case No. S273590
State Bar Court Case No. 17-O-01313

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY TO OPPOSITION TO PETITION FOR REVIEW

**APPEAL FROM A DECISION OF THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA**

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	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
REPLY TO OPPOSITION TO PETITION FOR REVIEW.....	1
INTRODUCTION.....	1
Discovery.....	1
BACKGROUND.....	1
FEE DISPUTE AND ITS RESOLUTION.....	1
HEARING DEPARTMENT TRIAL.....	2
AND REVIEW DEPARTMENT APPEAL	
THE FARKAS STUDY AND ROBERTSON REPORT.....	4
Farkas Study.....	4
Robertson Report.....	5
CALIFORNIA SUPREME COURT DECISION.....	6
AUGUST 19, 2020	
CALIFORNIA SUPREME COURT DECISION.....	7
JANUARY 27, 2021	
COMPLIANCE WITH THE SUPREME COURT ORDER.....	9
Discovery Stayed.....	9
DISCOVERY.....	9
Depositions Are Appropriate of Farkas and Robertson.....	9
RECENT DEVELOPMENTS.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES	Page
California Constitution	
Article I, Section 8.....	7
California Supreme Court Reports	
<i>Associated Brewers Co. v. Superior Court</i> 65 Cal.2d 583,.....	9
586-587, (1967)	
<i>Greyhound v. Superior Court</i> 56 Cal.2d 355, 378, 388,(1961).....	9
California Appellate Reports 3d Edition	
<i>Bolles v Superior Court</i> 15 Cal.App. 3d 962,963 (1971).....	9
California Appellate Reports 4th Edition	
<i>Community Youth Athletic Center v. City of National City</i>	10
220 Cal.App.4th 1385 ,1417-1418 (2013)	
Federal Rules Decisions	
<i>In Re Rail Freight Surcharge Antitrust Litigation</i> ,.....	10
281 F.R.D. 12 (2011);	
<i>Lincoln Jones v. Travelers Casualty Insurance</i>	10
Company of America,	
304 F.R.D. 677 (2015),	
Miscellaneous	
Calbar.gov Board of Trustee Meeting Item Cal Bar Journal.....	5,7
<i>Study on Racial Disparities in Attorney Discipline Fact Sheet</i>	
Revised 11/13/19 https://www.calbar.ca.gov/ (Farkas)	
<i>Report on Disparate Discipline</i> (Robertson).....	5
<i>State Bar Prosecutor in Tom Girardi Case Resigns After</i>	8
<i>Ties to Toms Son in Law Exposed</i>	
https://allaboutthetea.com/2021/10/29/state-bar-prosecutor-in-tom-girardi-case-resigns-after-ties-to-toms-son-in-law-exposed/	

REPLY TO OPPOSITION TO PETITION FOR REVIEW

Petitioner replies as follows:

INTRODUCTION

Discovery

This matter is before the California Supreme Court (hereinafter referred to as the Supreme Court) to address racial discrimination in the Petitioner's discipline by the State Bar of California. The primary issue here is discovery. The Petitioner's matter has been remanded two times, in August, 2020 and January, 2021 for resolution. To date, several issues, most recently discovery and compliance by the State Bar and State Bar Court¹ with the January 27, 2021 Supreme Court remand order² have precluded resolution of this case.

Notwithstanding, the petitioner, Harper has always asserted the disbarment recommendation was unduly harsh, unjust and unwarranted. The Petitioner here seeks review and, compliance with the January 27, 2021 order.

BACKGROUND

FEE DISPUTE AND ITS RESOLUTION

This case began with a concurrent State Bar complaint and untimely local fee dispute. The fee dispute involved the attorney fees for the resolution of two cases: an affirmative suit by the Petitioner's temporary assistant against their landlord and; the lender required

¹State Bar Court includes its Hearing Department and Review Department.

²Id.

global settlement of their prior related eviction case³. The fee dispute was resolved in August, 2017.

Although the fee dispute was resolved for almost two years, the State Bar continued its investigation of the Petitioner, later bringing charges related to reportable action bank matters. Any and all communications between the state bar, its investigators and the Petitioner were via Petitioner's counsel. Any communications forwarded to the Petitioner by counsel were also ratified by the Petitioner on advice of counsel. All responses or other communications with the State Bar were written by Petitioner's counsel.

HEARING DEPARTMENT TRIAL AND REVIEW DEPARTMENT APPEAL

³See *dejoie v. U. S. Bank* Alameda County Superior Court #RG15-77240;
U.S. Bank v. dejoie Alameda County Superior Court # RG13-671142.

Complainant only wanted to pay a contingency fee of 15% for the affirmative case and nothing for the eviction. Petitioner asserted a 1/3 contingency. Complainant who was the Petitioner's temporary assistant handled the documents of her case. However, the complainant's case file was not found by the Petitioner after the Complainant was dismissed following the discovery they had filed a false claim with the State of California. Complainant's father, a convicted embezzler and UC Berkeley law graduate prepared pleadings for the attorney of record on the case. The state bar investigator accepted the claim from *dejoie* the Petitioner was not entitled to any fees. See *United States v. Dejoie* (4:10-cr-00569) Northern District USDC Case Number: CR-10-00569-001 SBA, BOP Case Number: DCAN410CR000569-001. *dejoie* demanded an illegal split of fees for work done for prior counsel on the eviction matter. The client did not want his demand paid.

Notwithstanding the resolved fee dispute, the State Bar Office of Chief Trial Counsel (Hereinafter referred to as OCTC.) brought charges. The Petitioner, who was admitted in 1990 was charged with reportable action bank matters (Hereinafter referred to as RABM.). This case did not involve fraud or theft, only a dispute as to attorneys fees months after the complainant had promptly received their funds only a few days after Petitioner received their settlement drafts.

The Petitioner was represented by Samuel Bellicini from the filing of the State Bar complaint and fee arbitration through trial. In this case, there was no fraud or theft of any funds. The fee dispute was resolved at the fee arbitration level with the local county bar association 2017. At pretrial conference, the court⁴ indicated it would dismiss the matter if they were not retiring. The subsequent judges were diametrically opposed to this position.

The hearing department, Honorable Judge Manjari Chawla heard the Petitioner's case and recommended disbarment.⁵ Chawla relied on the optional State Bar policy regarding a third RABM case which calls for disbarment. Not all similarly situated attorneys are disbarred for a

⁴Judge McElroy.

⁵Would later state in her ruling recounting of hearsay evidence on Harper's recusal motion the entire contents of a conversation between an attorney, James Cook and her daughter; a conversation that is not on the record and no one heard except the participants. Cook, opposing counsel on a different case involving Petitioner, was trying to interject himself into the proceedings even offering to help the prosecution.

third RABM. To support her decision, Judge Chawla gave great weight to the Petitioner's prior discipline in 1992 (27 years prior, no theft or fraud) and 2003 (16 years prior, no theft or fraud) with little credit for extensive volunteer work for the local, State and National Bar Associations, the courts or municipal or private organizations.⁶ Petitioner appealed in Pro per to the Review Department and was unsuccessful. The Petitioner in Pro per then petitioned the Supreme Court for review.

THE FARKAS STUDY AND ROBERTSON REPORT

Farkas Study

The State Bar in addressing disparities in discipline of Black male attorneys, commissioned a study of attorney discipline from 1990 through 2018 by Dr. Andrew Farkas of the University of California Irvine. (Hereinafter referred to as the ("Farkas study"). The entirety of the information Farkas reviewed for the study is unknown. However, Farkas received statistical information from the State Bar and, had interviews and communications with various individuals⁷.

⁶The Petitioner had the maximum of 10 character witness. Petitioner has served as a volunteer Judge Pro Tem, Chairman of a municipal housing commission, a member of a credit union board of directors, trustee at one of the largest church's in the Bay area and architect of its financial accounting matters as well as representing low income juvenile criminal defendants and domestic violence victims pro bono or at greatly reduced rates. Harper also wrote a column for the Taxation section Journal of Tax Litigation and regularly had interns.

⁷After refusal to provide such by Office of Chief Trial Counsel, some email communications were obtained by Petitioner via Public Records Act demand to the

The study found great disparities in discipline with the largest gender/race disparities being found between Black male attorneys and their white male counterparts. For example, the study fact sheet shows:

- *“During the study period, 3.9 percent of Black male attorneys were disbarred or resigned, compared to 1.0 percent of white males.”*
- *During the study period, 3.2 percent of Black male attorneys were placed on probation, compared to 0.9 percent of white male attorneys.*⁸

Robertson Report

The Robertson report specifically follows up on disparate discipline regarding reportable bank action matters and disparities in discipline of Black male attorneys. Again, the entirety of the information he reviewed is unknown. To prepare his report, at minimum professor Robertson reviewed the Farkas study, and worked extensively with the OCTC staff and leadership. Robertson further acknowledged he could not have written the report without their assistance. Robertson also acknowledged his report benefitted from unguarded 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” (Emphasis added) (*See fn 13 Id Robertson report executive summary at page 3*) No information as to those contacts has been provided.

State Bar.

⁸See Racial Disparities in Attorney Discipline Fact sheet revised 11/13/19

The Petitioner relied on the Farkas study as prima facie proof of disparate impact and, a follow up report on racial disparities by the Petitioner asserted the Farkas study is definitive proof the State Bar of California treats white male attorneys much differently and more leniently than Black male attorneys. Moreover, the Petitioner's disbarment recommendation is due to such disparities in discipline. In the weeks following the release of the report it appears professor Farkas sought to diminish the impact of his findings as evidenced by communications with the State Bar providing that Black male attorneys suffer from disparate discipline because they have more complaints.⁹ Media reports have also echoed that Black male attorneys are disbarred at a rate of 4 times that of their white male counterparts.¹⁰ Harper has always asserted the disbarment recommendation was unduly harsh, unjust and unwarranted.

CALIFORNIA SUPREME COURT DECISION

AUGUST 19, 2020

The Petitioner's appeal to the Supreme Court went unopposed by the State Bar. Notwithstanding, the Petitioner contended the hearing department recommendation is racially discriminatory due to disparate

⁹This information was derived from email communication first obtained by the Petitioner outside of discovery and through Public Record Act demands on the State Bar of California not OCTC who refused to provide the documentation.

¹⁰Farkas study executive summary. *State Bar Conducts First of Its Kind Study on Racial Disparities in Attorney Discipline* Revised 11/13/19
<https://www.calbar.ca.gov/> *Racial Disparities in Attorney Discipline Fact Sheet*

impact.¹¹ The Petitioner principally relied upon the State Bar commissioned study of the racial disparities in its disciplinary system by Dr. Andrew Farkas of the University of California Irvine. (Hereinafter referred to as the “Farkas study”.) In response to the results of the study, the State Bar acknowledged its rates of discipline differ, especially when it involves Black male attorneys.¹²

The Petitioner argued the Hearing Department recommendation is also a violation of the California Constitution article I, section 8 and that he was discriminated against based upon his race through disparate impact.¹³

On August 19, 2020, the California Supreme Court issued an order stating:¹⁴

“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.”¹⁵

The Petitioner also asked the Supreme Court for readmission to

¹¹Petitioner alleged disparate impact and treatment as pursuant to the Farkas study and subsequent follow up report by Professor Christopher Robertson of Boston University and the University of Arizona.

¹²See *Racial Disparities in Attorney Discipline Fact Sheet* Revised 11/13/19.
<https://www.calbar.ca.gov/> *Racial Disparities in Attorney Discipline Fact Sheet*

¹³See Farkas Study

¹⁴In Re Harper on Discipline S262388

¹⁵Id

the active ranks pending resolution of the remand. The petition was denied with conditions.¹⁶ The Review Department nevertheless was unable to comply with the Supreme Court order. Petitioner again requested review.¹⁷

CALIFORNIA SUPREME COURT DECISION

JANUARY 27, 2021

The Review Department rendered a decision that essentially admitted it was unable to address the Petitioner's claim of disparate impact. Harper therefore again petitioned the Supreme Court for review.¹⁸ This time the State Bar opposed the petition. Approximately 16 lawyers from OCTC and the State Bar Office of General Counsel were involved.¹⁹ The California Supreme Court again remanded the

¹⁶In re Harper on Discipline

¹⁷State Bar study on hiring and Farkas study.

¹⁸Justice Jenkins was recused.

¹⁹Petitioner arrived at the number by examining the briefs in this case and the briefs to the Supreme Court. It must be noted that from reviewing State Bar email communications, State Bar prosecutor Dale Nowicki was involved in this matter. Nowicki has since apparently resigned from his employment for failing to disclose to the State Bar that he was working for attorney Thomas Girardi SBN 36603 while complaints against Girardi were pending. Nowicki's supervisor was reportedly "overseeing the bar's prosecution of Girardi for allegedly stealing from clients' settlements." Nowicki has not been disciplined outside of administrative leave before he resigned his position.

<https://allaboutthetea.com/2021/10/29/state-bar-prosecutor-in-tom-girardi-case-resigns-after-ties-to-toms-son-in-law-exposed/>

case back to State Bar Court. The decision stated:

“The petition for review is granted and the matter is remanded to the State Bar Hearing Department for further evidentiary hearings to determine whether the State Bar's facially neutral disciplinary practices at issue, including but not limited to the weight given to the petitioner's previous discipline for reportable action bank matters, had the effect of discriminating against Harper on the basis of race. The State Bar must determine whether Harper was disciplined more harshly than any similarly situated white male attorney based on the data underlying the Farkas study and the Robertson report (California-Rules of Court rule 9.17.) The Hearing Department shall reopen discovery to permit Harper to obtain all data reviewed for purposes of the Farkas study and the Robertson report with identifying information redacted.”

COMPLIANCE WITH THE SUPREME COURT ORDER Discovery Stayed

In an effort to comply with the January 27, 2021 order, the Hearing Department directed the parties to meet and confer as to the process, including proposing a burden of proof, and discovery. However, the State Bar, feeling that it was not equipped to handle the matter on its own filed a late short noticed motion for a stay of discovery and a continuance of 90 days to obtain outside employment counsel.²⁰

It is undisputed the State Bar Court has never had to address, any racial discrimination invested in its disciplinary process as specified by the Supreme Court. However, it is interesting or just plain

²⁰Petitioner also requested a stay of dates to name expert witnesses because one expert discovered a conflict of interest and others demanded all of the information Farkas and Robertson reviewed.

odd that an agency with hundreds of millions of dollars available and several attorneys and staff would need outside counsel to oppose a party who is self represented especially given there was no fraud, theft or harm to the public.

DISCOVERY

Depositions Are Appropriate of Farkas and Robertson et al.

Good cause to depose the author of a report should be liberally construed. *Bolles v Superior Court* 15 Cal.App. 3d 962,963 The request may be granted without abuse of the rights of the adversary. *Associated Brewers Co. v. Superior Court* (1967) 65 Cal.2d 583, 586—587, 55 Cal.Rptr. 772, 422 P.2d 332; *Greyhound v. Superior Court* (1961) 56 Cal.2d 355, 378, 388, 15 Cal.Rptr. 90, 364 P.2d 266.)

Notwithstanding, after waiting several weeks for any movement, the Petitioner took a Writ to the Supreme Court to expedite the discovery process. Discovery in State Bar Court must be ordered upon a showing of good cause. The Hearing Department has determined that Petitioner has not shown good cause for discovery outside of what the OCTC produces. The Hearing Department, OCTC, State Bar and Petitioner have different interpretations of what should be discovered and what is relevant. Notes and memoranda are discoverable underlying data. See *In Re Rail Freight Surcharge Antitrust Litigation*, 281 F.R.D. 12 (2011); *Lincoln Jones v. Travelers Casualty Insurance Company of America*, 304 F.R.D. 677 (2015), *Community Youth Athletic Center v. City of National City* 220 Cal.App.4th 1385 ,1417-1418 (2013). The Petitioner must be allowed at minimum to depose Farkas and Robertson.

RECENT DEVELOPMENTS

In the interim, the State Bar admitted to mishandling RABM complaints against Thomas Girardi.²¹ He has tens of millions of dollars he cannot account for. The State Bar admitted it's system for addressing RABMs is inadequate to serve members and to protect the public commissioned another study on the handling of attorney client trust accounts. The study results called for wholesale changes to trust accounting rules.

CONCLUSION

In sum, the January 27, 2021 order has not been complied with and discovery has not been reopened. The Petitioner is left to have an evidentiary hearing without evidence. The State Bar cannot conclusively state it knows and has provided the information Farkas and Robertson reviewed.

The Robertson report states it had stakeholder review and unguarded communications with OCTC and others. Farkas was the same. The State Bar was compelled to produce some discovery only

²¹The State Bar recently recommended disbarment of white male attorney Thomas Girardi for misappropriating over two million dollars of client monies. His law firm Girardi-Keese is subject to an involuntary Chapter 7 bankruptcy liquidation as there are over \$517 million dollars in creditor's claims. One Girardi client alone in San Bruno is owed \$11 million dollars. Girardi had outstanding complaints for the entirety of the study from 1990-2018. The State Bar has been under investigation since September 2021 by the State Assembly for failure to protect the public. It begs the question "Why did the State Bar fail to use the same scrutiny of the Petitioner, on Thomas Girardi?"

after the Petitioner made Public Record Act requests. The State Bar is acting in bad faith. The only way to determine what Farkas and Robertson reviewed is by communicating with them. They have refused to communicate with the Petitioner without a court order. The Hearing Department refuses to issue any. It is obvious Harper has not been able to obtain the information Farkas and Robertson reviewed. The State Bar needs instruction, sanctions or both. An equitable remedy is to readmit the Petitioner to the active rolls until this is resolved. Therefore, the court should grant review.

Respectfully Submitted,

Dated: April 11, 2022

/s/ GREGORY HARPER
Attorney in Pro per

**CERTIFICATE OF WORD COUNT 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 2794 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: April 11, 2022

/s/ GREGORY HARPER
GREGORY HARPER

PROOF OF SERVICE
In Re Harper on Discipline
Supreme Court Case No. S273590
State Bar Court Case No. 17-O-01313

I, Phyllis Carr, hereby certify that I electronically filed and served the attached **REPLY TO OPPOSITION TO PETITION FOR REVIEW** with the Clerk of the California Supreme Court and to counsel for the State Bar of California Robert Retana at robert.retana@calbar.ca.gov by transmitting a true copy via this Court's TrueFiling system on April 11, 2022, and on:

Clerk of The State Bar Court 845

South Figueroa Street Los Angeles CA

90017

Email: michelle.cramton@calbar.ca.gov

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HARPER ON DISCIPLINE**

Case Number: **S273590**

Lower Court Case Number:

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