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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

RICHARD SANDER, JOE HICKS, and the CALIFORNIA FIRST AMENDMENT COALITION, Petitioners, v. STATE BAR OF CALIFORNIA, and the BOARD OF GOVERNORS OF THE STATE BAR, Respondents.	Case No. CPF 08-508880 **PETITIONERS' OBJECTIONS TO PROPOSED STATEMENT OF DECISION** Assigned to: Hon. Curtis E. A. Karnow [Complaint Filed: Oct. 3, 2008]

Pursuant to Code of Civil Procedure section 634 and the California Rules of Court, Rule 3.1590, Petitioners submit their objections to the Court's Proposed Statement of Decision ("Decision"), filed on March 24, 2010, as set forth below. In addition to the specific objections set forth below, Petitioners object that the Decision is ambiguous in that

it does not specifically identify any findings of fact nor specify any record evidence upon which the Decision based. Petitioners further object that the Decision does not accurately describe Petitioners' argument, either in their papers or at the hearing held on the Court's tentative decision, and hence is both ambiguous and fails to address controverted issues.

Petitioners further object on the following specific grounds:

1. Proposition 59. Petitioners object to the Decision because it misrepresents Petitioners argument regarding the public's right of access under Proposition 59, misconstrues Proposition 59, and erroneously concludes that the writings sought here are not the writings of a public official within the meaning of Proposition 59.

First, the Decision portrays Petitioners' argument as being that "[e]very document in the possession of the courts must be open to public access." (Decision, 10; *see also*, Decision, 12.) In addition, the Court attributes to Petitioners the position that "[a]ll documents not covered by [express] exemptions . . . must be disclosed." (Decision, 11.) As explained by Petitioners in their papers and at the hearing on the Court's tentative decision, this is not and never has been Petitioners' position. Petitioners have explained and indeed emphasized that, like other constitutional provisions, the right of access under Proposition 59 is not absolute; rather, Proposition 59 creates a ***qualified*** right of access to records not expressly exempt from disclosure under California constitutional or statutory provisions, and that disclosure is required if there is no compelling justification for secrecy. (Petitioners' Opening Brief, 20-23.)

Second, despite controlling authority to the contrary, set forth in Petitioners' papers, the Court construes Proposition 59 as a statement of policy rather than a self-executing constitutional right.

Third, the Court's conclusion that if Proposition 59 provided an independent basis for disclosure, then judge's notes and grand jury transcripts would be open to public inspection is incorrect. As explained at oral argument, grand jury transcripts are the subject of a statutory limitation on access, and all such limitations are expressly preserved by Proposition 59. (Cal. Const., Art. I, sec. 3, subd. (b)(5).) As also explained at oral

argument, authority construing other constitutional and statutory rights of access may be considered in determining that there is a compelling reason for non-disclosure of judge's notes.

Finally, without factual analysis or citation to evidence, the Court erroneously concludes that the data sought by Petitioners are "not even the writing of a public official but rather data collected from applicants," and therefore are not subject to Proposition 59. (Decision, 10.) The Court reaches this conclusion without any discussion of what the records *are* used for, thereby neglecting to include important factual findings which would necessarily preface any legal conclusion the court makes. This constitutes an "ambiguity or omission" which if not corrected could be subject to the doctrine of implied findings on appeal. (*See* Code Civ. Proc. § 634.) Furthermore, the Court's conclusion disregards analogous authority holding that records received by public agencies constitute "writings" subject to public access. (*See, e.g., Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496 [claim form submitted by minor pursuant to Tort Claims Act].)

2. Common Law Right of Access. The Court mistakenly conflates the constitutional and common law rights of access, and erroneously concludes that the common law right of access does not apply to the records requested from the State Bar. The Court appears to conclude that the First Amendment and subsequent statutory access regimes eliminated the common law right of access, such that "there is no useful distinction between the two." (Decision, 9.) This misstates the law. The common law right of access is separate from the Constitutional right, both in its origins and in the types of records to which it provides access. (*See* Petitioners' Opening Brief, 23-31; Petitioners' Reply Brief, 8-9.) The common law right of access provides a basis independent of the First Amendment and the California Public Records Act for release of the records sought here. (*Ibid.*)

In addition, the broad application of the common law right of access is not, as the Court apparently concludes, a justification for refusing to recognize that right. (Decision, 8.) Contrary to the Court's assertion, Petitioners' papers provide a detailed explanation of

the criteria for determining whether records are required to be disclosed by the common law right of access. (Petitioners' Reply Brief, 7.)

3. New Records. First, Petitioners object to the Decision on the ground that it failed to decide a principal controverted issue, namely whether requiring the State Bar to provide the requested records sought would necessitate the production of "new records." (*See In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1136.)

Second, the Court erroneously concluded that the new-records issue "is not ripe for adjudication." (Decision, 17.) All that is required under the ripeness doctrine is that there be an "actual controversy . . . which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal. App. 4th 1716, 1722.) That standard is met here. In the first instance, all the Court needed to decide was whether Petitioners were bound by their original document requests, or whether, on the contrary, the requests could be modified during the course of litigation or the required response to the requests could be determined by the Court. If the Court determined that modification of the requests is acceptable, which the law presented by Petitioners demonstrates it is, then Petitioners have demonstrated that they can specify a process for redacting the existing records that would not entail the creation of a "new record." If the Court recognized that it has the power to establish a response process that does not entail the creation of a new record, as the law presented by Petitioners shows, again there would be no need for the creation of a "new record."

Third, whether the creation of a new record is entailed does not turn on the extent of the "efforts in making the production." (Decision, 16.) As explained in Petitioners' papers, the burden of production generally does not justify nondisclosure, particularly when the requesting party has agreed to pay the reasonable expenses of production. In any event, Petitioners have presented evidence that producing the records in the manner requested would produce a burden far less onerous than that undertaken by other state

agencies to release public data. (Declaration Felicia LeClere, ¶¶8-9, 15-16; Supplemental Declaration of Richard Sander, ¶3.) Petitioners have also provided evidence that the information sought could be released using only a series of redactions rather than clustering certain variables together, demonstrating that, even under Respondents' conception of a new record, the creation of any new record could be avoided, if necessary. (Supplemental Declaration of Richard Sander, ¶¶4-10.) The Court's failure to address this evidence and its significance renders the Decision ambiguous and incomplete.

Finally, contrary to the Court's statement (Decision, 14), Petitioners ***do*** disagree that new records need not be created, at least under California law. California statutory law contemplates the creation of new records in response to requests under the Public Records Act, and no California decision holds that the creation of new records bars a request for disclosure of information in the hands of state or local government agencies.

The Court should have addressed and resolved the question of whether Petitioners' requests actually require the creation of a new record, and whether any need to create a new record relieves Respondents of any obligation to respond, as they contend. At a minimum, the Court should have provided an opportunity to address the issue further, as it indicated it would at the hearing on the court's tentative decision.

4. Evidentiary Objections. The Court erred in not ruling on the evidentiary objections. The evidence submitted by Petitioners in addition to the stipulation of material facts is relevant and material, particularly to the common law and new-records issues. To the extent that the Court has disregarded that evidence (*see* Decision, 17), it has erred in doing so. The court should therefore have ruled on the objections.

Dated: April ___, 2010

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
DAVID SNYDER
Attorneys for Petitioner CALIFORNIA FIRST AMENDMENT COALITION

Dated: April 6, 2010

By _____
JANE YAKOWITZ
Attorney For Petitioners RICHARD SANDER and JOE HICKS

PROOF OF SERVICE

Richard Sander, et al. v. State Bar of California, et al.
San Francisco Superior Court, Case No. CPF-08-508880

I declare I am over eighteen years old, not a party to the within action, and am employed by Sheppard, Mullin, Richter & Hampton LLP, Four Embarcadero Center, 17th Floor, San Francisco, CA 94111. I am readily familiar with the practice at my place of business for collection and processing of mail. All such mail is deposited with the United States Postal Service on the same day it is collected in the ordinary course of business.

On April 7, 2010, I served the following document:

PETITIONERS' OBJECTIONS TO PROPOSED STATEMENT OF DECISION

by enclosing a true and correct copy in envelopes addressed as shown below, then sealing and placing in the designated location at my place of business for prepaying first class postage and depositing in the U.S. Mail in San Francisco, California, on today's date, in accordance with ordinary business practices.

James M. Wagstaffe Michael von Loewenfeldt, Esq. Kerr & Wagstaffe LLP 100 Spear Street, Suite 1800 San Francisco, CA 94105-1528 Tel 415.371.8500 Fax 415.371.0500 Email wagstaffe@kerrwagstaffe.com mvl@kerrwagstaffe.com Counsel for *Respondents State Bar of California and the Board of Governors of the State Bar of California*	Jane Yakowitz c/o UCLA School of Law Box 951476 Los Angeles, CA 90095-1476 Tel 310.267.4576 Counsel for *Petitioners Richard Sander and Joe Hicks*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 7, 2010, at San Francisco, California.

Karen Hollenbeck