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Judge rejects public release of bar admissions data

By Nancy McCarthy
Staff Writer



Sander

A UCLA professor's ongoing effort to obtain data about bar examination applicants hit a wall last month when a judge ruled that he has no right to the information. San Francisco Superior Court Judge Curtis E.A. Karnow denied a petition by economist and law professor Richard Sander, finding that turning over information about would-be lawyers who take the bar exam would reverse "decades of legal development."

Sander was joined by the First Amendment Coalition and former State Bar governor Joe Hicks in a lawsuit that asks for bar records for use in evaluating law school admission policies. They are seeking applicants' race, law schools attended, year graduated from law school, bar pass rate, law school grades and LSAT scores. The Committee of Bar Examiners and the Board of Governors rejected Sander's request in 2007 and the Supreme Court declined to hear the matter last year. The bar groups contend that releasing the data would violate their promises to law students of privacy and limited use of the records.

Sander wants to use the data to test his "mismatch theory," which concludes that affirmative action actually hurts minority students. He believes students of color who are admitted to top schools because of race-based standards have trouble competing with non-affirmative action students. They would do better, he believes, at less competitive schools. The First Amendment Coalition is seeking the records for use by scholars, researchers, government officials and members of the public.

Karnow split the case in two, but because he determined that the public (including Sander) is not entitled to the data, the second phase – to address privacy and burden issues – became moot. He found that the public has no right to State Bar admissions data under common law, Proposition 59 or a new California rule of court.

Karnow affirmed an earlier tentative decision after a hearing where James Chadwick, representing the First Amendment Coalition, cited several court rulings that he said supported his contention that Sander is entitled to public documents. But the judge said Sander and the other plaintiffs "are unable to articulate a principled definition of the notion save and except an overbroad definition that includes all information in the possession of a public agency."

Although Sander argued that he has a right of access to data about applicants for the bar exam, Karnow said that traditional First Amendment rights do not extend to a variety of non-adjudicatory items, such as grand jury transcripts, preliminary drafts of orders and judges' private deliberations and conferences. He said the question becomes whether the data sought by Sander "fall[s] within the scope of documents in the possession of the judicial branch traditionally subject to public disclosure. They plainly do not."

He also rejected Sander's argument that Prop 59, the 2004 public records initiative, requires public access to every document in possession of the courts. Such an interpretation represents a "stunning shift" from what the judge called the traditional test. "Sander provides no evidence," he wrote, "that the voters meant the proposition to have such a remarkable reach in modifying the state Constitution and decades of legal development."

Finally, the judge addressed Rule of Court 10.500, enacted by the Judicial Council at the request of the legislature to require the judicial branch to allow inspection and copying of judicial

records. Despite the council's express rejection of expanding the rule to cover the State Bar, Sander asked the court to interpret it broadly. "It is a heady suggestion, but I must decline," Karnow wrote. The underlying legislation did not require the Judicial Council to enact rules governing the bar, he said, and even if it did so, a trial court does not have the ability to re-write a rule.

The State Bar's counsel, Michael von Loewenfeldt, said he was pleased but unsurprised by the ruling. "California case law regarding access to judicial records is very clear," von Loewenfeldt said. "Public access is limited to documents that reflect decisions of the courts or that were submitted to the courts during an adjudicatory process. The internal admissions database of the State Bar contains highly sensitive and confidentially collected information about all bar applicants. It is the antithesis of a public record; indeed, lawyers who pass the bar cannot even learn their own bar examination scores."

Sander said he will appeal Karnow's ruling.

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