



State Bar is Subject to Public's Eye

The Recorder

Commentary By Michael von Loewenfeldt

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Joshua King missed the point in his recent opinion piece regarding a lawsuit filed against the State Bar by an economist and law professor who is seeking sensitive information about applicants for the bar examination ("State Bar Should Let Some Sunshine In," April 9). This case is not about sunshine or transparency; it is about protecting the confidentiality of raw personal data submitted to the bar by applicants who never imagined their information would be made public.

Richard Sander, a UCLA law professor, sued the Bar in 2008 after both the Committee of Bar Examiners and the Board of Governors rejected his request that the Bar provide data about applicants for the bar exam. Sander wants to use the data to test his "mismatch theory" that affirmative action actually hurts minority students because they cannot compete successfully with nonaffirmative action students at top-tier law schools. The State Bar determined that releasing data about applicants' race, grades, LSAT scores and bar pass rates could violate promises to law students of privacy and limited use of the records.

When Sander came before the Board of Governors in 2007, a number of students testified that because they were the only one, or only one of a few, minorities at their law schools, the information would identify them even with names removed.

In its unanimous vote, the board agreed that Sander does not have a right to see or use personal and private information of bar exam applicants without their consent. That information is provided to the Bar with an assurance that it would be kept confidential.

San Francisco Superior Court Judge Curtis Karnow last month rejected Sander's arguments that the common law, Proposition 59 (the 2004 public records initiative) and a new rule of court enacted by the Judicial Council require disclosure of the records. Indeed, he rejected those arguments forcefully, finding that requiring the disclosure of this type of raw data would reverse "decades of legal development."

Contrary to King's assertions, it was entirely appropriate for Karnow to not reach the privacy issue. He had bifurcated the Sander case at the request of both parties, and once he determined that the public is generally not entitled to the raw data in question, the second phase — to address privacy and burden issues — became moot. The judge did not find that the State Bar is not subject to any rules of public disclosure, nor was that question before him.

Nonetheless, King's points deserve a rebuttal. Contrary to his colorful assertion that the Bar is a "free-floating entity immune from public review of its activities," it is in fact subject to substantial public scrutiny.

- Proceedings in the State Bar Court and filings with the court are public, just like in the civil and criminal courts.
- Most meetings and documents of the Board of Governors are subject to public access in a way similar to other public agencies.
- The Bar's financial activities are subject to substantial public scrutiny by the Legislature and the Board of Governors, and designated Bar staff are subject to financial disclosure requirements under statute and the Political Reform Act.
- As for admissions, the State Bar publishes a pass list and numerous studies and statistics after every bar examination, as required by the Committee of Bar Examiners.

In short, the official decisions and actions of the State Bar of California, as well as its use of funds, are subject to disclosure by statute and the Bar's own rules in much the same way as other government agencies. The assertion that the State Bar is somehow "not subject to any requirement of openness" may be titillating copy, but it is simply not true. Nor is it even at issue in this case.

Michael von Loewenfeldt, a partner with Kerr & Wagstaffe in San Francisco, represents the State Bar in Sander v. State Bar.

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