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State Bar Can't Withhold Data, Court Rules

By Don J. DeBenedictis

The State Bar has no greater right to withhold its documents and data from public access than other state agencies, an appellate court ruled Friday in a decision that may allow a UCLA law professor to research how race affects bar exam pass rates.

"The Bar is not a court," the 1st District Court of Appeal declared in rejecting the argument that most bar information is shielded from disclosure because the bar is part of the judicial branch. *Sander v. State Bar of California*, A128647 (Cal. App. 1st Dist., June 10, 2011)

The professor, Richard H. Sander, said the decision "could have ramifications beyond California" because the appellate court based its holdings on common law, rather than constitutional grounds.

"The common law right of access to public documents ... [is] deeply rooted in our democratic form of government," Justice Peter J. Siggins wrote in a 17-page opinion joined by Justices Stuart R. Pollak and William R. McGuiness.

That right is broader than the First Amendment right of access to adjudicatory court documents that developed later, Siggins held.

One of the attorneys representing the bar, James M. Wagstaffe of Kerr & Wagstaffe LLP, said in an e-mail that his client is "seriously evaluating" whether to appeal.

"The State Bar is indisputably an arm of the judiciary and today's opinion fails to recognize the different and important distinction as to the availability of judicial records," Wagstaffe wrote.

Sander for years has been seeking State Bar data to compare bar exam scores with the demographic data about test-takers, such as ethnicity, law schools, GPAs and standardized-test scores. He published a major study in 2004 indicating that law school affirmative action seems to have hurt minorities somewhat.

Citing law students' privacy concerns, the bar resisted turning over the data, and Sander sued, aided by the California First Amendment Coalition. A San Francisco Superior Court judge ruled against him in March 2010, and he appealed.

But Sander said he believes the bar's resistance is rooted in political pressure from people who fear his research will amount to an attack on affirmative action.

In court, the bar argued that First Amendment case law on open trials protects courts' behind-the-scenes memos and research and only allows public access to transcripts and official case files. That same protection should apply to bar exam records because they are not adjudicatory, according to the bar and the trial court judge.

Siggins held the common law access right is independent from the constitutional open-trials right.

Quoting James Madison, Siggins wrote that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." He also quoted Alexis de Tocqueville and U.S. Supreme Court Justice Lewis F. Powell's opinion in the Watergate tapes case.

He returned the dispute to the trial court to determine whether particular privacy concerns outweigh the general right of access. "The trial court is in the best position to weigh the competing interests and strike the appropriate balance," the justice noted.

Friday's ruling could cover requests for information to other judicial branch agencies, such as the Administrative Office of the Courts and the Commission on Judicial Performance.

Siggins' opinion noted that the bar's position would have exempted "all records of any administrative arm of the judicial branch of government from the longstanding common law presumption of access to public records."

For instance, the opinion might make a difference in the pending request by the Alliance of California Judges' for detailed judicial branch budget data.