S194951

In the Supreme Court of the State of California

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 OF CALIFORNIA,
Respondents.

After a Decision of the Court of Appeal, First Appellate District, Division Three, Appeal No. A128647, on Appeal from the Superior Court of the County of San Francisco, Case No. CPF-08-508880, Hon. Curtis E. A. Karnow

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 of the California Rules of Court, Respondents reasonably believe that in deciding whether to disqualify themselves from the hearing or determination of the petition for review in this matter, the Justices of this Court should consider the direct interest they have in the outcome of this action. According to the petition, Petitioners are "an arm of this Court," and are "as much a part of this Court . . . as a court clerk, jury commissioner, or other administrative adjunct to a court." (Petition for Review, 12, 5-6.) Therefore, each Justice of the Court has an interest that may require disqualification under the Code of Judicial Ethics, Canon 3(E), sections (1), (4)(c), and (5)(d), at a minimum.

Dated: August 4 . 2011

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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I. INTRODUCTION

Petitioners, the State Bar of California and the Board of Governors of the State Bar of California ("State Bar"), seek review of a decision holding that records of the State Bar are subject to the same common law right of access applicable to all other agencies of the state government. Although it takes issue with the Court of Appeal's decision, the State Bar's principal argument is one presented neither to the Superior Court nor to the Court of Appeal: that the lower courts should never have heard or decided this matter, because it is subject to the exclusive jurisdiction of this Court.

Missing from the State Bar's petition is any mention of the fact that this proposition was previously presented to the Court in this action, and that the Court rejected it. The central premise of the petition, therefore, is barred by the law of the case.

Nor is there any other basis for review, at least at this time. There is no conflict in the lower court decisions. The importance of the only legal question addressed by the Court of Appeal—the application of the common law right of access to certain records of the State Bar—remains to be seen. The State Bar's protestations notwithstanding, there is no basis for contending that subjecting it to the public scrutiny that has long applied to all other government institutions is cause for alarm. On the contrary, experience suggests that such scrutiny will be highly beneficial.

Perhaps most fundamentally, there is a substantial question as to whether this Court is disqualified from hearing or deciding the petition. The State Bar is an arm of the Court. It is subject to the direction and control of the Court. In essence, the Court is a party to this action, or, at a minimum, is an active participant in the affairs of a party. "The Supreme

Court consists of the Chief Justice of California and 6 associate justices." (Cal. Const., Art. 6, § 2.) Therefore, Respondents respectfully submit that each of the Justices of the Court appears to have an obligation to disqualify himself or herself under the Code of Judicial Ethics.

II. THE PETITION SHOULD BE DENIED

A. The State Bar's Argument that This Court Has Exclusive Jurisdiction Is Barred by the Law of the Case

Although vaguely framed in term of "policy" considerations, the State Bar's principal argument for review is that the Superior Court and the Court of Appeal erred because this Court has "exclusive jurisdiction" over the claims asserted in this action. (Petition for Review, hereafter "Petition," 11-15.) However, this issue was squarely presented to and rejected by the Court in this very action.

Prior to bringing this action in the Superior Court, Respondents filed an original proceeding in this Court, asserting the same claims. (*Richard Sander, et al. v. State Bar of California, et al.*, S165765, filed August 7, 2008.)[1] The explicit basis for that action was precisely the same contention now asserted by the State Bar as justifying review: that this Court has exclusive jurisdiction over review of the State Bar's decision rejecting Respondents' requests for access to its records. (Verified Petition for Mandamus, Certiorari, Prohibition or Other Extraordinary Relief, filed August 7, 2008, 32-33.) Respondents brought the original action in this Court because Petitioners contended that this Court had exclusive

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[1] The records of this proceeding are subject to judicial notice pursuant to Evidence Code sections 452 and 453. Respondents' request for judicial notice is submitted herewith.

jurisdiction. And indeed, while arguing that the petition should be denied, the State Bar expressly contended that the Court had exclusive jurisdiction. (Respondents' Preliminary Opposition, filed August 18, 2008, 11.)

This Court did not agree. It denied the original petition, stating: "The petition for writ of mandate or other extraordinary relief is denied without prejudice to re-filing in an appropriate court." (Order, filed September 17, 2008.) In short, this Court itself determined that it did not have exclusive jurisdiction.

"'The doctrine of the law of the case is this: That where . . . the reviewing court . . . states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal and . . . in any subsequent suit for the same cause of action . . . .'" (*People v. Murtishaw* (2011) 51 Cal.4th 574, 589, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841.) This is true even if a subsequent panel of the same court believes that the prior decision was erroneous. (*Id.*) In other words, when an appellate court decides "a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." (*Clemente* v. *State of California* (1985) 40 Cal.3d 202, 211.) The doctrine applies even though the court concludes that the prior decision was erroneous. (*Id.*, at 211.)

The Court's previous determination that it did not have exclusive jurisdiction is the law of this case. Respondents originally filed this action with the Supreme Court. They have litigated this action through the Superior Court and Court of Appeal as a direct result of the Court's

decision that it did not have exclusive jurisdiction. They may not now be required to start over in this Court.[2]

B. There Is No Other Basis for Review

Review by this Court is circumscribed by Rule 8.500(b) of the California Rules of Court Rule, which specifies the circumstances in which the Court may grant review. (Cal. R. of Court 8.500(b).) The only potentially applicable grounds for review in this case, other than lack of jurisdiction, are the need to secure uniformity of decision among the lower courts or settle an important question of law. (*Id.*)

The State Bar identifies no conflict among the lower courts with respect to whether California common law provides the public with a qualified right of access to records relating to the Bar admissions process. There is no such conflict. The decision of the Court of Appeal in this matter is the only one to directly address the application of the common law right of access to records of the State Bar.

Nor is review necessary to settle an important question of law. Prior decisions have made it clear that the common law right of access applies to all agencies of state government. (See, e.g., *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 262-263; *Mushet v. Dept. of Public Service* (1917) 35 Cal.App.630, 636-638; *Coldwell v. Bd. of Public*

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[2] There are exceptions to the law of the case. The summary denial of a petition for writ of mandate by a court of appeal may not establish law of the case. (See *Kowis v. Howard* (1992) 3 Cal.4th 888.) However, the Court's action on Respondents' petition was not a summary denial of a writ petition. Rather, it was a decision by this Court in an original proceeding addressing precisely the same claims. In denying the original petition and directing Respondents to re-file it in the "appropriate court," the Court necessarily determined that it does not have exclusive jurisdiction. Therefore, this exception to the law of the case doctrine does not apply.

Works (1921) 187 Cal. 510, 520-521; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220, fn. 3; *Kyberg v. Perkins* (1856) 6 Cal. 674.) The Court of Appeals' decision simply extends these precedents to the State Bar. Thus, the question of law presented by the Court of Appeal's decision is already well-settled.

In any event, public scrutiny of other governmental agencies, all of which are subject to one or more rights of access, has not impaired their operation. On the contrary, this Court has recognized the beneficial effects of public scrutiny. (*Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 625, 622-623 [recognizing "the salutary function served by the press in encouraging the fairness of trials and subjecting the administration of justice to the beneficial effects of public scrutiny"]; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1210 ["We believe that the public has an interest . . . in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access . . . ."].) Therefore, the possibility of litigation seeking to subject the State Bar to further scrutiny is not a reason for granting review, but rather for denying it.

C. The Justices of the Court Are Apparently Disqualified from Hearing or Deciding the Merits of the Petition

Canon 3(E) of the Code of Judicial Ethics specifies the circumstances in which disqualification is required. As amended by this Court, it applies to the Justices of this court, as it does to judges and justices of the lower courts. (Code of Judicial Ethics, Canon 3(E)(4); Press Release No. 68, California Supreme Court, *Supreme Court Amends Cannons on Recusal, Disqualification of Appellate Justices* (Dec. 13, 2000).)

Canon 3(E) requires a Justice to disqualify herself or himself in the following situations, among others:

- A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law;
- The circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial; and
- The appellate justice . . . is a director, advisor, or other active participant in the affairs of a party.

(Code of Judicial Ethics, Canon 3(E)(1), 3(E)(4)(c), 3(E)(5)(d).) "Canon 3(E)(1) sets forth the general duty to disqualify applicable to a judge of any court. Sources for determining when recusal or disqualification is appropriate may include . . . other provisions of the Code of Judicial Ethics . . . ." (Code of Judicial Ethics, Cannon 3(E), Advisory Committee Comments.) "Canon 3E(4) sets forth the general standards for recusal of an appellate justice. The term 'appellate justice' includes justices of both the Courts of Appeal and the Supreme Court." (*Id.*)

It appears to Respondents that, in the unique circumstances of this case, the Justices of the Court are required to disqualify themselves. In matters of admission, the State Bar acts as an "arm" of the Supreme Court. (Bus. & Prof. Code §§ 6064, 6075, 6078; *In re Rose* (2000) 22 Cal.4th 430, 439; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557-558 (*Saleeby*).) The Court retains ultimate authority over matters of attorney admission and discipline. (Bus. & Prof. Code §§ 6064, 6076, 6100; *Saleeby*, *supra,* 39 Cal.3d at p. 557.) Thus, the State Bar is an extension of the Supreme Court. (See, e.g., *In re Attorney Discipline* (1998) 19 Cal.4th 582, 600 [in the areas of admissions and discipline "the bar's role has consistently been

articulated as that of an administrative assistant to or adjunct of this court . . . ."]; *Saleeby*, *supra,* 39 Cal.3d at p. 557 [same].)

The State Bar itself insists that it is "an arm of this Court," and is "as much a part of this Court . . . as a court clerk, jury commissioner, or other administrative adjunct to a court." (Petition, 12, 5-6.) "The Supreme Court consists of the Chief Justice of California and 6 associate justices." (Cal. Const., Art. 6, § 2.) In other words, the Justices of this Court ***are*** the Supreme Court. Hence, each of the Justices of this Court is a "director, advisor, or other active participant in the affairs" of the State Bar. As a result, this case presents circumstances that would cause any reasonable person to "doubt the justice's ability to be impartial." Under the Code of Judicial Ethics, it therefore appears that each of the Justices has a duty to disqualify himself or herself.

Respondents urge the Court to carefully consider whether it can hear and determine the merits of the petition in a manner consistent with the Code of Judicial Ethics. Under Cannon E(4)(c), a Justice must disqualify himself or herself if "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." A decision is void if rendered through the participation of a judge or justice whose disqualification is apparent from the record. (*Giometti v. Etienne* (1934) 219 Cal. 687, 689. Accord, *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776, 779-780; *In re Harrington* (1948) 87 Cal.App.2d 831, 834-35.) There are means for addressing the petition and determining whether review should be granted even if all of the Justices of this Court recuse themselves. (*See, e.g., Carma Developers (California), Inc. v. Marathon Development Corp.* (1992) 2 Cal.4th 342, 350, fn. 1.)

In any event, it is not necessary for the Court to hear or decide the petition. The petition presents no issues that merit review, and review should be denied for that reason alone.

III. ADDITIONAL ISSUES TO BE ADDRESSED IF REVIEW IS GRANTED

Respondents do not agree with the State Bar's characterization of the issues presented. What the State Bar describes as issues are merely arguments, and do not accurately reflect the subject matter or conclusions of the Court of Appeal's decision. If the Court grants review, is should specify the issues to be briefed and argued. (Cal. R. of Court 8.516(a).) In doing so, it should determine whether the following additional issues should be addressed:

1. Whether the State Bar's assertion that this Court has exclusive jurisdiction over the claims asserted by Respondents is barred by the law of the case, and whether it has been waived.

2. Whether the Justices of this Court should disqualify themselves from the hearing or determination of the petition.

IV. CONCLUSION

The State Bar's primary argument has been considered and rejected by the Court. Neither this nor any other issue raised by the State Bar merits review. Were the Court to consider granting review, it would need to determine whether the Justices of the Court are disqualified. Respondents respectfully request that the petition for review be denied.

Dated: August 4, 2011

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CERTIFICATE OF WORD COUNT

The text of this petition consists of 2,350 words, including all footnotes but excluding the table of contents, table of authorities, and signatures, as counted by the computer program used to generate this petition.

Dated: August 4, 2011

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PROOF OF SERVICE
By U.S. Mail
Sander v. State Bar,
California Supreme Court Case No. S194951

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, 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 August 5, 2011, I served the ANSWER TO PETITION FOR REVIEW 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.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 5, 2011, at San Francisco, California.

Margaret Wong