S194951

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD SANDER, JOE HICKS,
CALIFORNIA FIRST AMENDMENT COALITION

Plaintiffs and Appellants,

v.

THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Defendants and Respondents.

After a Published Decision by the Court of Appeal First Appellate District, Division Three Case No. A128647, Reversing a Judgment Entered by the Superior Court for the County of San Francisco, Case No. CPF-08-508880, The Honorable Curtis E.A. Karnow presiding

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Plaintiffs and Appellants Richard Sander, Joe Hicks, and the California First Amendment Coalition (hereinafter "Appellants") fail to make any substantive arguments in their Answer and instead attempt to deflect the Court's attention by making a series of meritless procedural contentions anchored by the position that this Court is biased and must recuse itself because of its inherent authority and institutional oversight over the State Bar in admission matters. This argument contradicts Appellants' position below that the Supreme Court and the State Bar are not intertwined enough such that the Bar should enjoy the established limitations on access to public records accorded to the judiciary. Appellants' shifting views underscore the confusion surrounding the relationship between the State Bar and the Supreme Court, as perpetuated by the Court of Appeal's decision misconstruing the Bar's status as a judicial branch entity, and only serve to highlight the need for this Court to grant review.

First, Appellants' argue that this Court's denial of their earlier petition is "law of the case" even though (1) the prior petition was an original proceeding; (2) neither full briefing nor oral argument were allowed and no written opinion was issued; and (3) the question of subject matter jurisdiction is *always* a live issue. There is no procedural

impediment to this Court's consideration of either its jurisdiction or the merits of this case.

Second, Appellants argue *ipse dixit* that this case presents no important question for the Court to decide, but merely extends existing law. They are unable or unwilling, however, to respond to the substantial showing in the State Bar's Petition for Review that the Court of Appeal misapplied all pre-existing case law, creating a new "right" of access to judicial branch records that has not previously been applied to any other arm of government.

Third, and finally, Appellants argue that this Court is disqualified from reviewing the Court of Appeal's decision because this case involves the State Bar, which is this Court's administrative arm. This argument is fatally flawed and in fact furthers the State Bar's position – the State Bar is this Court's adjunct in matters of attorney admissions, and this Court's exclusive and plenary power over the admissions process is precisely why this Court, and only this Court, is the proper entity to determine which admissions records are subject to public review. If Appellants' disqualification argument (which did not stop them from earlier petitioning the Court for the same relief) was valid, it would apply in every case where the State Bar was a party, and would prevent the Court from exercising its constitutional role of overseeing the State Bar and the admission and discipline of attorneys in this State.

There is simply no jurisdictional, prudential, or ethical reason why this Court should not grant the Petition for Review. As discussed in the Petition and not rebutted in Appellants' Opposition, this case presents numerous important questions central to the State Bar's role in the admissions process controlled by this Court, and this Court is uniquely empowered to control access to attorney admissions records collected on its behalf.

II. APPELLANTS PROVIDE NO BASIS FOR DENYING REVIEW OF THE COURT OF APPEALS' DECISION

A. THIS COURT'S DECISION NOT TO HEAR APPELLANTS' ORIGINAL PETITION IS NOT LAW OF THE CASE REGARDING THIS COURT'S JURISDICTION

Given this Court's exclusive jurisdiction over the attorney admissions process and the State Bar's sole role in that process as this Court's administrative arm, it is manifest that issues regarding public access to admissions records should be controlled by this Court, not the myriad lower courts. Appellants provide no argument in their opposition as to why the records request in this case does not fall within this Court's original and exclusive jurisdiction (as they, themselves, argued in 2008). Instead, Appellants assert that this Court *cannot* consider whether it has exclusive jurisdiction of this matter under the "law of the case" doctrine. Appellants' argument fails at numerous levels.

First, this is a question of the subject matter jurisdiction of this Court. "Jurisdictional issues are never waived and may be raised at any time." (*Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395, 1400 [86 Cal.Rptr.3d 396] [citing *Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 721 & n.8 [73 Cal.Rptr. 213]].) Indeed, this Court has the inherent, sovereign power as a co-equal branch of California government to determine which records of the bar admissions process are open to public review. (See *Bester v. Louisiana Supreme Court Committee on Bar Admissions* (La. 2001) 779 So.2d 715, 721-22 [Bar admissions records are records of the state supreme court and only that court has inherent, sovereign authority to determine whether such records are subject to public review].)

Second, the law of the case doctrine applies to prior *appellate* review of a trial court decision. "The doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [20 Cal.Rptr.3d 890] [emphasis in original, citation omitted].) The Court's prior summary denial of Appellants' Petition was *not* an *appeal* – it was an original proceeding in this Court. Essentially, the Court declined to hear the matter in the first instance. It did not *review* anything; only now is it being asked to review this issue. There has been no retrial or second appeal.

Appellants do not cite any authority ever applying the "law of the case" doctrine to an original proceeding in this Court, much less one that was summarily denied. This is the first appeal taken from a trial court proceeding, and the Court's prior decision not to hear Appellants' petition simply does not fall within the "law of the case" doctrine.

Third, even if the "law of the case" doctrine could be extended beyond the realm of multiple appeals for which it was created, it would not apply here. The doctrine does *not* apply to summary decisions, but only to prior decisions where there was full briefing, an opportunity for oral argument, and a written opinion. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894-95 [12 Cal.Rptr.2d 728]; see *People v. Medina* (1972) 6 Cal.3d 484, 489-90 [99 Cal.Rptr. 630].) None of these were present during this Court's summary denial of the petition in case number S165765. [1]

Fourth, and finally, "law of the case" is a matter of "procedure and not jurisdiction." (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434-35 [212 Cal.Rptr. 466].) It is "not inflexible," does not apply where it

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[1] (See and compare *In re Rose* (2000) 22 Cal.4th 430, 444, holding that "if a petition for writ of review in this [C]ourt is the *exclusive means of obtaining review of a quasi-judicial decision*, [the Court's] summary denial of such a petition is deemed a final judicial determination on the merits." [Italics added].) In this case, this Court's denial of Appellants' initial petition was "without prejudice to refile in an appropriate court" and, moreover, did not involve review of the determination of a quasi-judicial proceeding.

would be "unjust," and does not apply if the Court determines that a reversal is warranted for other reasons in any event. (*Id.*)

As discussed in the Petition for Review, the Court of Appeal's misunderstanding of the role of the State Bar and its relationship to this Court underscores the need for this Court to exercise its sole and exclusive jurisdiction over the admissions process to determine which admissions records, if any, are subject to public review, and under what circumstances. Appellants' Answer provides no reasoned basis for this Court to decline to exercise that jurisdiction.

B. THE PETITION PRESENTS SEVERAL IMPORTANT QUESTIONS OF LAW THAT WARRANT REVIEW

The Petition for Review explains in 18 pages of detailed argument how the Court of Appeal fundamentally misunderstood and misapplied the common law right of access to public records by (1) finding that the State Bar is "not a court" and not subject to the well established limits on access to records held by judicial branch entities, (2) finding that the admissions database is a public record subject to ***presumptive*** public access without applying any existing common law standard, or even a novel one, to reach that conclusion, and (3) subjecting the State Bar to a broad, undefined right of access unknown to the rest of government. (Petition pp. 15-33 [emphasis added].) Appellants do not respond to any of this detailed argument. Instead, they merely argue in a cursory and generic fashion that

the Court of Appeal's decision "extends" prior precedents, and that "in any event, public scrutiny of other government agencies ... has not impaired their operation." Appellants' inability to defend the numerous and substantial errors in the Court of Appeals' decision highlights the need for review by this Court.

C. THE JUSTICES OF THIS COURT ARE NOT DISQUALIFIED FROM HEARING AND DECIDING THE MERITS OF THE PETITION

Appellants imprudently argue that all of the Justices of this Court are disqualified from adjudicating a case involving the State Bar because of this Court's relationship to the State Bar. It is precisely because the State Bar acts as an administrative arm of this Court, subject to this Court's exclusive and plenary control, that this Court is the proper body to determine issues regarding access to admissions records.

This is not a novel question. Since the early inception of the Bar, disgruntled attorneys subject to discipline have tried unsuccessfully to disqualify the Court from reviewing State Bar matters. However, this Court has consistently refused to recuse itself from cases involving the State Bar. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592 fn.5 [79 Cal.Rptr.2d 836]; *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 41, fn. 1 [278 Cal.Rptr. 845]; *Johnson v. State Bar* (1935) 4 Cal.2d 744, 759-60 [52 P.3d 928].)

The Judicial Canons cited by Appellants do not require otherwise. Appellants' argument that each Justice is a "director, advisor, or other active participant" in the affairs of the State Bar ignores most of the words of Canon 3(E)(5)(d), which is concerned with *financial* entanglements:

> (5) Disqualification of an appellate justice is also required in the following instances: (d) The appellate justice... has a financial interest or is a fiduciary who has a financial interest in the proceeding, or is a director, advisor, or other active participant in the affairs of a party. A financial interest is defined as ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding one thousand five hundred dollars. Ownership in a mutual or common investment fund that holds securities does not itself constitute a financial interest; holding office in an educational, religious, charitable, fraternal or civic organization does not confer a financial interest in the organization's securities; and a proprietary interest of a policyholder in a mutual insurance company or mutual savings association or similar interest is not a financial interest unless the outcome of the proceeding could substantially affect the value of the interest. ...

(Code of Judicial Ethics, Canon 3(E)(5)(d).) The Justices of this Court are not "directors, advisors, or other active participants" of the State Bar within the meaning of this rule.[2]

Indeed, Appellants' argument would apply to *any* case where the State Bar was a party. It would create a rule that made it impossible for this

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[2] Appellants' suggestion that a reasonable person would doubt the Justices' ability to be impartial is also wholly without merit. There is nothing about this case that is outside of the Court's ordinary role in overseeing attorney admissions and the State Bar's conduct and policies with respect to such oversight.

Court to review the attorney admission and discipline cases that fall within its *exclusive* jurisdiction, as well as any other case against the State Bar. The Court has *never* recused itself from proceedings involving the State Bar simply because the Bar acts as this Court's administrative arm.

Finally, even if disqualification were otherwise theoretically "required," which it clearly is not, it cannot occur where the disqualification would mean that any Court of Appeals' decision involving the State Bar is not subject to review by this Court, or that this Court could not exercise its plenary control over the State Bar. One cannot disqualify the entire senior level of the judiciary:

> It might be well to add, however, that the discharge of the exclusive jurisdiction of this court cannot be prevented by the disqualification of all or a majority of its members. We read in 33 Corpus Juris 989, as follows: 'The rule as to the disqualification of judges must yield to the demands of necesity [sic]. When disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought and thus effectually bars the doors of justice, the disqualified judge is bound to hear and decide the case.'

(*Johnson v. State Bar*, *supra*, 4 Cal.2d at 760; see *Olson v. Cory* (1980) 27 Cal. 3d 532 [178 Cal.Rptr. 568].)

Appellants had no objection to the Court considering this matter when they presented their initial petition to it in 2008. Their newfound belief that this Court is biased in State Bar matters is entirely nonsensical. This Court can, and regularly does hear cases involving the State Bar and should exercise its authority to hear the instance case as well.

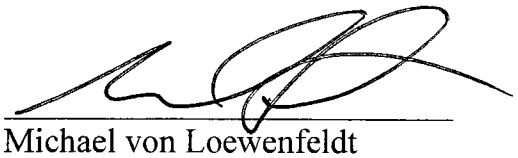
III. CONCLUSION

Appellants present no reason for this Court to deny review and, indeed, their inability to substantively rebut the points raised in the Petition highlights the need for review. As discussed in the Petition, the records sought in this action, as with all State Bar records related to the admission of attorneys, belong to this Court. Under its inherent and plenary authority, it is this Court that should determine whether the State Bar's admissions database, and similar admissions records held by the State Bar in its capacity as this Court's administrative arm, are subject to a presumptive public right of access.

DATED: August 15, 2011

Respectfully submitted,

KERR & WAGSTAFFE LLP

By 

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 2,329 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 brief.

DATED: August 15, 2011

KERR & WAGSTAFFE LLP

By _____

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CERTIFICATE OF SERVICE

I, Andrew Hanna, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, Suite 1800, San Francisco, California 94105.

On August 15, 2011, I served the following document(s):

REPLY IN SUPPORT OF PETITION FOR REVIEW

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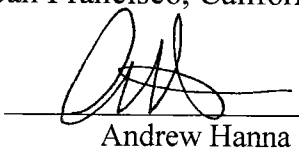
By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 15, 2011, at San Francisco, California.



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