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Superior Court of California
County of San Francisco

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CLERK OF THE COURT
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

RICHARD SANDER, ET AL., Petitioners, vs. THE STATE BAR OF CALIFORNIA, ET AL., Respondents.	CASE NO: CPF 08-508880 STATEMENT OF DECISION

I. Introduction

A.

Petitioners Richard Sander, The California First Amendment Coalition and Joe Hicks (together "Sander") have filed a petition for writ of mandate[1] seeking data from the State Bar of California, which is in turn controlled by respondents the Board of Governors of the State Bar (together "State Bar"). The State Bar is an agency of the judicial branch. Stipulated Facts For Trial Phase One, filed October 6, 2009 ("Fact") 1. The parties agree that the data should be treated as in the possession of the judicial branch

[1] In the alternative Petitioners seek declaratory and injunctive relief.

and are subject to disclosure to the extent documents in the possession of the courts must be made publicly available.

The data sought pertain to applicants for the state Bar exam, and include the applicants' race, law schools attended, year graduated from law school, Bar passage rate, and exam scores from their law schools and from the Law School Admissions Test (LSAT). Fact 23. Sander requested this data from the State Bar and was turned down. Fact 25.

This suit followed.

B.

The parties agreed to, and I ordered, a bifurcated trial. The first phase is based on the pleadings and stipulated facts. It decides whether Sander has any legal entitlement to the data in the State Bar's database. Specifically, in this Phase One I am to determine whether data in question are public records available to any member of the public and whether the provision of the requested data would require the creation of a 'new' record which, the State Bar contends, need not be created to comply with a public records request. If I decide in favor of Sander here, then Phase Two would address privacy and burden issues implicated by Sander's request.

Sander's petition is based on (1) the state common law right of access to court records and (2) Proposition 59, a ballot measure which passed in 2004 endorsing the public's right of access to information and directing access to "the writings of public officials." Cal. Constit. Art. 1 § 3 (b)(1).

While Sander spends some time in his brief describing the research for which Petitioners desire the data, their goals, and the asserted public interest and utility of the data sought,[2] I agree with the State Bar that these matters are not pertinent because the purpose of Sander's request is irrelevant. *City of San Jose v. Superior Court,* 74 Cal.App.4th 1008, 1018 (1999). The only issue here is whether *any* member of the public, for any reason, has a right to the data sought.

Following my written tentative ruling of March 10, 2010, the parties argued the case on March 19, 2010. On March 24, 2010, I signed a Proposed Statement of Decision, and received objections from Petitioners April 7, 2010. I also received Respondent's "Response" to those objections; I agree with Petitioners that there is no authority for that Response and so I have ignored it.

This decision follows.

II. Common Law Right of Access

Our starting point must be *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal.4th 1178, 1209 (1999). This case provided the basis for the statewide rules of court which govern public access to documents filed with the courts. CRC 2.550 et seq. (see accompanying Advisory Committee comments); *Mercury Interactive Corp. v. Klein,* 158 Cal.App.4th 60, 81, 84 (2007). Based on traditional analyses of First Amendment right of access to court proceedings, our Supreme Court noted the now classic distinction between (i) proceedings and documents related to adjudication[3] and (ii) other documents:

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[2] E.g., Petitioners' Opening Brief, filed December 7, 2009 at 2-6; 10-12.

[3] To be more precise, traditional access is to documents filed with the court *and* which become the basis for adjudication. That is the conclusion of the exhaustive analysis of *NBC Subsidiary* by the Sixth District Court of Appeal. *Mercury Interactive Corp. v. Klein,* 158 Cal.App.4th 60 *et passim* (2007).

> Numerous reviewing courts likewise have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication. .... Similarly, in *Copley Press, Inc.* v. *Superior Court* (1992) 6 Cal.App.4th 106 [7 Cal.Rptr.2d 841] (*Copley Press*), the Court of Appeal ruled that the press had a right to inspect the clerk's "rough minute" books of a California trial court. The reviewing court observed that "in general" the First Amendment provides "broad access rights to judicial hearings and records ... both in criminal and civil cases." (*Id.*, at p. 111.) By contrast, decisions have held that the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication. [Citations]
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> *NBC Subsidiary,* 20 Cal.4th at 1209 n.25.

A fully integrated part of this scheme is the recognition that the common law or traditional First Amendment right of access cannot and does not extend to a variety of items, such as grand jury transcripts, judges' private deliberations and conferences, preliminary drafts of orders, and the like. *Id.,* 20 Cal.4th at 1212 n.29. *See also, Copley Press, Inc. v. Superior Court,* 6 Cal.App.4th 106, 114 (1992)(no disclosure of "preliminary drafts, personal notes and rough records"); *People v. Dixon,* 148 Cal.App.4th 414, 424 *et seq.* (2007)(variety of proceedings and documents not open to public). The California Supreme Court has reaffirmed the scope of the traditional right of access:

> [Our] decisions ... have been careful not to extend the public's right of access beyond the adjudicative proceedings and filed documents *of trial and appellate courts.*
>
> *Copley Press, Inc. v. Superior Court,* 39 Cal.4th 1272, 1303 (2006)(emphasis in original)(noting congruence with U.S. Supreme Court analyses).

The issue then devolves to whether the data requested by Sander fall within the scope of documents in the possession of the judicial branch traditionally subject to public

disclosure. They plainly do not.[4] None of the data at issue is presented to a court and none ever is used in *any* form of adjudicatory proceeding, even within the confines of the State Bar with respect, for example, to how any applicant is processed. That is, even were I to expand the notion of 'adjudication' to reach the work of the State Bar in evaluating its applicants, the data sought by Sander would not qualify.

III. Judicial Records

A.

Another series of cases requires review. Both sides cite *Pantos v. City and County of San Francisco*, 151 Cal.App.3d 258, 262 (1984) in support of their respective positions. Sander argues that it establishes a far more general right to documents than the 'adjudicatory' records I refer to above:

> The law favors maximum public access to judicial proceedings and court records. (See *Press-Enterprise Company v. Superior Court* (1984) 501 U.S. 464 [...]; *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 604-605 [...]. Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons. (See Code Civ. Proc., § 1904.) No such reasons have been presented.
>
> *Pantos*, 151 Cal.App.3d at 262-263.

Sander cites other cases to the same effect, that is, court records are public records, *Estate of Hearst,* 67 Cal.App.3d 777, 782 (1977), and unless there is a countervailing policy reason (such as privacy), the records must be disclosed. *See* Sander's Opening Brief at 24 et seq. Sander cites *Copley* to the same effect. "Court

[4] As Sander notes, the parties here agree that the records sought are "non-adjudicatory." Petitioners' Reply to Respondents' Phase I Trial Brief, filed February 16, 2010 at 18.

records are public records open to inspection." *Copley Press, Inc. v. Superior Court*, 6 Cal.App.4th 106, 112 (1992).

But the foci in all these cases are 'judicial records' as defined by C.C.P. § 1904, and the preliminary enquiry must be whether the documents sought so qualify. *E.g., Copley*, 6 Cal.App.4th at 112. That is, this entirely general right of access is limited to judicial records. While *Copley's* discussion reveals the sometimes difficult business of distinguishing some clerks' records from others, it is essential not to lose sight of the underlying definition of judicial records as "the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding." C.C.P. § 1904. The fact that *Copley, Pantos*, and other cases paint with a broad brush—broader than *NBC Subsidiary's* references to adjudicatory documents—is of no consequence outside the bounded universe of "judicial records" and does not, as Sander argues, provide authority for the general release of all non-adjudicatory documents. Sander's Opening Brief at 25.[5] And, of course, a review of the definition of 'judicial records' shows that the data sought by Sander cannot possibly qualify. *Compare, Copley*, 6 Cal.App.4th at 113 (judicial records represent and reflect work of the courts).

B.

At argument Sander objected to the schema outlined above. Sander disclaims reliance on *NBC Subsidiary*, dubbing it a constitutional approach which concededly does

[5] Sander notes that *Mack v. State Bar of California*, 92 Cal.App.4th 957, 962-963 (2001) authorizes the release of data which is plainly not a judicial record but, Sander argues, nevertheless compelled by traditional First Amendment principles. *Mack* does assume the state bar disciplinary records there are 'public records' and then invokes the strong policies which favor disclosure. But the reason *those*

not authorize the release of the contested data. Sander instead relies on what he distinguishes as the common law right of access, which pre-dates the constitutional rule, assertedly exemplified by cases such as *Copley* and *Pantos* but which is not limited to the scope of 'judicial records' or 'adjudicatory' records.

The cited case law does not support Sander. *Pantos*, for example, in fact focuses on "judicial records," rests on the logic of open judicial proceedings, and is fundamentally premised on the rationale of *Press-Enterprise Company v. Superior Court,* 464 U.S. 501 (1984). *Pantos*, 151 Cal.App.3d at 262 -263. *Press-Enterprise,* in turn, makes it plain both that (i) the common law history[6] of open trials focuses on the adjudicatory business of courts, and (ii) it is this tradition which informs the scope of the First Amendment. *Press-Enterprise Co.,* 464 U.S. 501, 509 n.8. Precisely the same historical analysis of the common law had been used to describe the import of the First Amendment in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 564-565 (1980). The Supreme Court is clear that "right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982).[7] *See generally,* D. Schulz et al., "2009 Update: Developments In The Law Of Access," *Communications Law in the Digital Age* 2009 988 PLI/Pat 345 (PLI 2009)(constitutional and common law right of access). The common law of access has in effect been absorbed by the constitutional rule.

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particular State Bar documents were public records was because Business & Professions Code § 6086.1 said so. *Mack*, 92 Cal.App.4th at 961. Sander does not argue that § 6086.1 applies here.

[6] The Supreme Court takes us back to before the Norman Conquest of 1066. 464 U.S. at 505 n.1.

[7] Earlier, the Supreme Court in *Nixon v. Warner Communications*, 435 U.S. 589 (1978) noted a 'common law' right to access "public" documents including judicial records. 435 U.S. at 597 & n.8. The cases cited by the Court in that footnote all exemplify access to judicial records, that is, those forming the basis for adjudication.

Finally, *NBC Subsidiary* itself—the case on which Sander now disclaims reliance—relies on and treats *Copley* as an example of the First Amendment right to access to judicial records. *NBC Subsidiary,* 20 Cal.4th at 1209 n.25. Sander's attempt to rely on *Copley* and avoid the logic of *NBC Subsidiary* must fail.

C.

Sander may mean to suggest that the common law contemplates not only the release of judicial records, but also 'public records' generally. This is so. *Nixon v. Warner Communications*, 435 U.S. 589, 598 nn.7 & 8. There, the Court cited a series of cases which recognize the common law right entirely apart from its impact on the courts. Most of these cited cases[8] simply assume that the records are 'public' and so by default ought to be disclosed. This does not help us here, because neither *Nixon* nor any other case nor argument presented by Sander[9] provides criteria by which I can determine whether the data sought in this case are 'public' records—except, as noted below in connection with Proposition 59, criteria which are so broad as to be self-defeating.

Ultimately, Sander does not provide a coherent description of the common law scope of 'public records' which would authorize the relief he seeks here. Indeed, the authority he seeks from that history is likely unavailable: the common law even after its

[8] The exceptions are *Fayette County v. Martin,* 279 Ky. 387, 395-396, 130 S.W.2d 838, 843 (1939)(state statute bars release, superseding common law); *State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes,* 29 Nev. 50, 82-86, 84 P. 1061, 1072-1074 (1906)(some records public, some are not). 435 U.S. at 598 n.7.
[9] Sander's argument on non-judicial common law access confusingly relies on cases which address judicial records. Petitioner's Opening Brief at 24 et seq.; Reply Brief at 6 et seq. But these records, as noted above, comprise a limited set of document not at issue here. Too, Sander relies on cases such as *Richmond Newspapers, supra,* to establish this more general common law right of access, despite the fact that those cases are peculiarly focused on the common law foundation of the constitutional right to open trials and court documents; again, not at issue here. Petitioners' Reply Brief at 8 et seq., *citing Richmond Newspapers, NBC Subsidiary, Nixon,* etc.

arrival on these shores was restrictive, generally authorizing release of documents only to those with a e.g., pecuniary interest. *See, e.g.*, cases discussed in *State v. Grimes*, 84 P. 1061, 1072 (Nev. 1906)(*Grimes* is cited in *Nixon*, 435 U.S. at 598 n.8 as one the key cases exemplifying the non judicial records common law right of access). So too, dissatisfaction with the miserly scope of common law access likely was a central reason for Legislative action in enacting, for example, the California Public Records Act and its federal counterpart, the Freedom of Information Act, 5 U.S.C. § 552 (FOIA) "enacted to facilitate public access to Government documents," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991*). See e.g., BRV, Inc. v. Superior Court,* 143 Cal.App.4th 742, 750 (2006)(CPRA enacted in order "to give the public access to information in possession of public agencies"). Indeed, it is clear that "the CPRA was enacted for the purpose of *increasing* freedom of information by giving members of the public access to information in the possession of public agencies," *County of Santa Clara v. Superior Court,* 170 Cal.App.4th 1301, 1319 (2009)(internal quotes omitted and emphasis supplied). In short, were non-judicial records common law rights of access as broad as claimed by Sander, there would have been little need for the FOIA or CPRA.

Thus, while the common law rule by definition pre-dates the adoption of the constitutional requirement, here there is no useful distinction between the two.

IV. Proposition 59

Sander argues that Proposition 59, passed by the voters in 2004, provides an independent basis for the release of the data he seeks. But Proposition 59 did not change

the substantive law. As the Court of Appeal has repeated, "Proposition 59 is simply a constitutionalization of the CPRA [California Public Records Act]."[10]

It is true that court records are not covered by the CPRA in any event. *Copley Press, Inc. v. Superior Court*, 6 Cal.App.4th 106, 111 (1992). Access to court records, rather, has traditionally been a function of long standing common law and First Amendment interests such as those discussed above.

Thus the issue may be reframed whether Proposition 59, which did not modify the CPRA (a statute), nevertheless *did* modify traditional constitutional tests including for example Article 1 § 2 of our state Constitution which underlies the traditional test.[11]

Sander urges Proposition 59 as an independent basis for the data sought, arguing that it covers every writing without exception,[12] regardless of whether a public official wrote it or simply possessed it. Sander Opening Brief at 21. Every document in the possession of the courts must presumptively be open to public access.[13] This is a stunning shift from what I have termed the traditional test. Sander provides no evidence that the voters meant the Proposition to have such a remarkable reach in modifying the state Constitution and decades of legal development. The evidence of voter intent submitted by Sander,[14] too, is consistent with no more than the constitutionalization of extant rights.[15]

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[10] *Sutter's Place v. Superior Court,* 161 Cal.App.4th 1370, 1382 (2008), *citing, BRV, Inc. v. Superior Court,* 143 Cal.App.4th 742, 749 (2006). *See also, Savaglio v. Wal-Mart Stores, Inc.,* 149 Cal.App.4th 588, 597-598 (2007); *Los Angeles Unified School Dist. v. Superior Court,* 151 Cal.App.4th 759 (2007).

[11] This is California's 'free speech' provision, analogous to the federal First Amendment.

[12] That is, anything that the Evidence Code considers to be a writing. Sander's Opening Brief at 20.

[13] "The requested records are unquestionably writings of a public agency. They relate to the conduct of the people's business. They are, therefore, subject to the right of access created by Proposition 59....." Sander Opening Brief at 23.

[14] Sander's Opening Brief at 17-18; 19-20.

[15] Indeed, much of Sander's argument on the import of Proposition 59 is based on the meaning of similar terms in *pre-existing* statutes. Sander Opening Brief at e.g., 21.

Nor does the plain language of the Proposition support Sander's reading. The Proposition prescribes "public scrutiny" of (1) "meetings of public bodies" and (2) "writings of public officials." Cal. Constit. Art. 1 § 3(b)(1). On its face, this does not suggest the mandatory disclosure of documents aside from judicial records nor of the data sought by Sander (which is not even the writing of a public official but rather data collected from applicants). As the State Bar intimates, if Proposition 59 truly expanded the universe of documents to be disclosed to all papers in the possession of the government, parts of the Proposition which govern the construction of extant law on disclosure would be at best surplusage. See e.g., Cal. Constit. Art. 1 § 3(b)(2) & (3). Finally, the wording of the Proposition itself confirms the applicability of extant law—and by that I mean more than simply statutory law such as the CPRA, but also other "authority" which I take to mean the constitutional common law discussed above:

> A statute, court rule, *or other authority*, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.
>
> Cal. Const. Art. 1 § 3 (a)(2)(emphasis supplied).

The Courts have, in fact, usually executed this mandate to broadly construe the people's right of access. The Court did so in, for example, *NBC Subsidiary* back in 1999 long before Proposition 59. 20 Cal.4th at 1212 -1213.

At argument, Sander pressed an additional 'plain language' contention. He notes that Proposition 59 itself carves out the areas of existing law which are preserved, and by implication other areas are not. Cal. Constit. Art. 1 § 3(3)-(6).[16] These provisions, in

[16] Sander's argument here of implicit repeal—that is, that Proposition 59 creates new law entitling him to the data sought in this case—impliedly concedes that he is not entitled to the data under traditional common law or First Amendment tests.

order, preserve law on privacy, constitutional and statutory bases, and legislative confidentiality. All documents not covered by such exemptions – presumably exemptions described only in case law (aside from those related to privacy)—must be disclosed, Sander argues. This obliterates centuries of common law analyses. Whatever the other merits of this contention (and it contradicts *Sutter's Place*, *supra* note 10), it must rely, at least, on a clear and precise distinction between the constitutional and common law analyses which, for reasons stated above, is not available.

As a commentator has noted, the Proposition states policy, but does not create a specific right:

> But with the arguable exception of a subdivision affirmatively shielding the legislature from sunshine laws, the amendment is largely a policy statement and a positioning of the newly declared access right relative to other constitutional rights, rather than a guarantee of particular rights and responsibilities. Those tasks are left to existing open-government legislation.[17]

In the end, Sander's argument proves too much. If Proposition 59 were an independent basis for disclosure, eviscerating traditional common law first amendment analyses and presumptively requiring the production of every document in the hands of the judicial branch—and that <u>is</u> Sander's argument here, *supra* notes 12-13—then judges' rough notes and other internal documents, which under traditional law are not to be disclosed (*Copley Press*, 6 Cal.App.4th at 114-115) would be open for public inspection. So too grand jury transcripts would have to be disclosed—but they are not:

> The amendments under Proposition 59 do not affect our interpretation of section 938.1. Article I, section 3, subdivision (b)(5) of the California Constitution, provides, "This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this

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[17] Karen Petroski, "Lessons For Academic Freedom Law: The California Approach To University Autonomy And Accountability," 32 J.C. & U.L. 149, 203-04 (2005).

subdivision...."

Alvarez v. Superior Court, 154 Cal.App.4th 642, 657 (2007). *See also Mercury Interactive Corp. v. Klein,* 158 Cal.App.4th 60, 101 (2007)(Proposition 59 as a rule of construction).

For this reason, *Alvarez* rejected the argument that Proposition 59 had gutted earlier traditional common law on the right of access to grand jury transcripts. Indeed, I have found no case that supports the notion that Proposition 59 overturns former law on disclosure of documents; quite the contrary.[18]

V. California Rule of Court 10.500

Following the opening salvo of briefs in this case the Judicial Council enacted CRC 10.500 which requires the judicial branch to allow inspection and copying of judicial records. Thus, I invited the parties to comment on the applicability of this Rule to the present dispute, Order of January 25, 2010, and both sides have done so. As the State Bar notes, the Rule itself states that it applies solely to the courts (as well as the Administrative Office of the Courts), CRC 10.500(c)(3). The Council expressly considered and rejected efforts to expand the Rule's coverage to the State Bar.[19]

Sander argues that I should nevertheless supersede the Judicial Council's view of the scope of its Rule and more broadly construe it, in conformity with the legislation which originally directed the Council to enact the Rule. Petitioners' Reply to Respondents' Phase I Trial Brief, filed February 16, 2010, at 19-20.

[18] Compare cases cited *supra* n.10.

[19] Report Summary and Report, Request for Judicial Notice in Support of Respondents' Phase I Sur-Reply, Etc., filed on or about February 22, 2010, at 91. This includes documents prepared in conjunction with the Council public comment process. Petitioners' request for judicial notice of the document, dated February 22, 2010, is granted.

It is a heady suggestion, but I must decline. First, the enabling legislation does not instruct the Council to enact rules governing the State Bar. Govt. C. § 68016.2. Second, even if the legislation did contain the mandate, there is no authority permitting a trial court effectively to bypass the procedures of the Judicial Council (including its use of committees, votes by the Council proper, and public comment process), and enact a rule of court which the court believes is required by enabling legislation. It would be a very odd situation indeed if trial courts had that authority. Where a rule of court conflicts with superseding law, such as legislation, the remedy is to invalidate the rule, not re-write it. *E.g., California Court Reporters Assn. v. Judicial Council of California,* 39 Cal.App.4th 15, 33-34 (1995). *See generally, Elkins v. Superior Court,* 41 Cal.4th 1337, 1352 (2007)(invalidation of rules when inconsistent with superseding authority). Of course, Sander does not ask me to invalidate the Rule, nor would doing so provide him the relief he seeks.

VI. Production of Records

This first phase of the trial contemplates my evaluation of the extent to which Petitioners are seeking the production of 'new' records, because if I hold that this is so, then I may find for the State Bar in any event.

I do not reach a decision on the matter here for two reasons. First, given my conclusions above, I need not reach it. Second, as discussed below the record is insufficient.

I note that the parties do not, exactly, disagree that 'new' records need not be created by the State Bar.[20] Nor do the parties disagree that the State Bar has in its possession all the data sought by the Petitioners. The crux of the dispute is the extent to which data in electronic records, which must be massaged to some extent for production, thereby become 'new' records. *See e.g.,* Petitioners' Reply to Respondents' Phase I Brief at 26 & n.9. As Sander notes, in other contexts it is understood that a governmental agency, or indeed any producing party, may need to engage in some such programming.[21] *See generally, County of Santa Clara v. Superior Court,* 170 Cal.App.4th 1301, 1336, *citing* Govt. C. § 6253.9(b). *See e.g., Schladetsch v. U.S. Dept of H.U.D.,* 2000 WL 33372125, 3 (D.D.C. 2000). In the context of digital data, it does not make much sense to consider simply whether a document demand requires the creation of a 'new' document since every production of electronically stored data literally creates a 'new' document on screen, on paper, or in a 'new' digital file.[22] In some contexts, merely transforming a document from one electronic format into another might be treated as the creation of a 'new' document. *E.g., Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006). In other contexts, it is routine to direct the compilation of extant data, e.g., *Person v. Farmers Ins. Group of Companies*, 52 Cal.App.4th 813, 818 (1997), including the use of queries to a database. *E.g., Jinks-Umstead v. England,* 227 F.R.D. 143, 148 (D.D.C. 2005).

[20] Nevertheless the parties were unable to cite California authority on the issue whether public agencies have a duty to create 'new' record from the data available. Petitioners instead rely on for example constructions of federal and others states' public disclosure statutes. *E.g., N. L. R. B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 162 (1975)(construing federal Freedom of Information Act); *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 274, 695 N.E.2d 256, 258 (Ohio,1998).
[21] "Programming" in this lay sense generally includes any form of provision of instructions to a computer, including the creation of a report form by which data is assembled for viewing. *See generally,* http://www.wordreference.com/definition/programming.

The very notion of what comprises a digital 'document' depends on a variety of factors, for a 'document' may or may include, for example, metadata, drafts, attachments, and data otherwise "pointed to" and in effect incorporated into a file. As the Sedona Conference has noted, the data at stake here is "Dynamic and Changeable":

> Computer information, unlike paper, has content that is designed to change over time even without human intervention. Examples include: workflow systems that automatically update files and transfer data from one location to another; backup applications that move data from one storage area to another to function properly; web pages that are constantly updated with information fed from other applications; and email systems that reorganize and purge data automatically. As a result, unlike paper documents, much electronically stored information is not fixed in a final form.
>
> More generally, electronically stored information is more easily and more thoroughly changeable than paper documents. Electronically stored information can be modified in numerous ways that are sometimes difficult to detect without computer forensic techniques. Moreover, the act of merely accessing or moving electronic data can change it. For example, booting up a computer may alter data contained on it. Simply moving a word processing file from one location to another may change creation or modification dates found in the metadata.[23]

Whether a production involves the creation of a 'new' document likely implicates spectra of (i) efforts in making the production and (ii) relationship between extant data and that demanded. At one end, the wholesale substitution of one kind of data for another may be so close to the creation of a substantively new record that it should not be ordered, as Respondents suggest. Respondents' Phase One Trial Brief at, e.g., 23. And at the other end of a spectrum the level of 'manipulation' may be no more than creating a simple form identifying which extant data to print out, 'redacting' (or not selecting) other data. E.g., Petitioners' Reply to Respondents' Phase I Trial Brief at e.g., 22.[24] *See*

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[22] Typically data stored in databases are contained in fields, which are then collected on a as-needed basis pursuant to varying criteria to create a report. E.g., http://encyclopedia2.thefreedictionary.com/database

[23] http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf at 3.

[24] In analogous discovery contexts, courts understand that databases may need to be queried to produce selected series of data. E.g., *Powerhouse Marks, L.L.C. v. Chi Hsin Impex, Inc.*, 2006 WL 83477 (E.D. Mich. Jan. 12, 2006). I recognize that CRC 10.500(e)(1)(B) provides where that Rule controls, no new

generally, Lisa M. Arent, et al., "Ediscovery: Preserving, Requesting & Producing Electronic Information," 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 156 *et seq.* (2002).

Fundamentally the issue is likely to devolve to the complexity of the tasks involved in generating the reports sought by Petitioners. Diagrams of the steps involved (Respondents' Phase One Trial Brief at 25) are not entirely useful in this regard. It appears that the relational database maintained by the State Bar (Fact 26) includes the data sought by Sander (Facts 28 *et seq.*), and thus it is likely that a query can be formulated to extract the data sought.[25] But without expert declarations on the matter, which do not beg the question of the extent to which 'new' data or its arrangement are involved, this issue is not ripe for adjudication.

VII. Evidentiary objections

None of the items subject to evidentiary dispute is material to the discussions above. I had originally declined to rule on the objections, but Sander has repeatedly asked me to do so. On reconsideration, my earlier approach appears tantamount to ruling that the relevancy objections were sustained and with the exception noted, I do now make that ruling. Details pertaining to the evidence are found in Appendix A, appended here.

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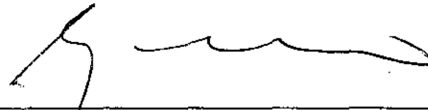
compilation or assemblage of data need be undertaken. But to date I have not seen any authority that suggests Respondents are correct I should follow this Rule here, and indeed in a different context Respondents urge I not follow it. Respondents' Phase One Sur-Reply Brief re Rule of Court 10.500, dated February 22, 2010.

[25] Relational databases generally permit the use of query languages such as SQL to extract and then sort data for presentation. *See generally,* http://en.wikipedia.org/wiki/SQL; http://searchsqlserver.techtarget.com/sDefinition/0,,sid87_gci212885,00.html#; http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf (definition of 'Database' by Sedona Conference).

VIII. Conclusion

Petitioners both rely on the common law and on Proposition 59's asserted evisceration of the common law. In both cases, Petitioners' contentions reduce to the assertion that they are entitled to 'public documents,' but they 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. The law applicable to the courts before Proposition 59 was not that broad; and there is no evidence that the Proposition was intended to work such a radical change.

The Petition and alternate relief sought by Petitioners should be denied, and judgment accordingly should be entered. Respondents should now promptly prepare a form of judgment for my signature.



Dated: April 13, 2010

Curtis E.A. Karnow
Judge of the Superior Court

Appendix A

Evidentiary Objections

Petitioners have objected to portions of

- Declaration of Gayle Murphy, filed January 10, 2010

Respondents have objected to portions of

- Supplemental Declaration of Richard Sander in Support of Petitioner's Reply To Respondents' Phase I Opening Brief (entirety of Declaration)
- Declarations of James Chadwick, Richard Sander and Felicia LeClere

The relevancy objections are sustained, except as noted above. Where a party failed to make such an objection, I sustain it on my own motion. Whether the Bar has or has not previously released in information (Murphy Declaration), the reasons for Sander's work and his hypotheses (Sander Declaration), what various agency's practices are (LeClere Declaration), the Bar related correspondence proffered via the Chadwick Declaration, and the balance of the objected to evidence, are all irrelevant to the issue decided in the accompanying memorandum.

The hearsay objection to Sander Dec. ¶ 11 p.7 ll.1-3, is overruled. However, the evidence is immaterial in light of the Stipulated Facts in this case.