



February 28, 2022

**Via Email**

Leah Wilson  
Executive Director  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
Email: leaht.wilson@calbar.ca.gov

**RE: State Bar Data Breach**

Dear Ms. Wilson:

I am writing to address significant First Amendment concerns raised by the State Bar's statements regarding the recent publication of attorney discipline case data. As the State Bar's press release on such publication acknowledges, a "public website that aggregates nationwide court case records was able to access and display limited case profile data" on "nonpublic State Bar attorney discipline case records."

The press release asserts the "nonpublic case profile data from the State Bar appears to have been displayed on this public website in violation" of Business and Professions Code § 6086.1(b) and the website engaged in "unlawful display of nonpublic data." The press release states, "We have notified law enforcement."

Intentionally or not, those statements represent unacceptable veiled threats of investigation or legal action for publishing information of public concern. The State Bar does not contend the data were unlawfully acquired, and it is highly unlikely that the operator of the website did anything unlawful. In such circumstances, the State Bar's veiled threats exert an improper chilling effect on protected speech. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

First, by its terms, § 6086.1(b) provides only that records of certain "investigations shall not be disclosed pursuant to any state law" such as "the California Public Records Act." It does not prohibit publication of such information if otherwise acquired.

Second, and more fundamentally, the First Amendment prevents the government from prohibiting the publication of such lawfully acquired information of public concern, even if that information is otherwise considered confidential. Over 40 years ago, the Supreme Court struck down a statute that prohibited a newspaper from identifying a judge investigated but not charged with misconduct. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Although that information was ordinarily confidential, the newspaper had a First Amendment right to publish it when lawfully acquired.

As the Court said, “The operations of the courts and the judicial conduct of judges are matters of utmost public concern,” and the operation of the state’s judicial commission, “no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media.” *Id.* at 839. By providing “accurate factual information about a legislatively authorized inquiry,” the newspaper “clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.” *Id.* Accordingly, the state could not punish the newspaper for publishing information of public concern that it lawfully acquired.

The same is true here. The public has a compelling interest in the operation, integrity, consistency, efficiency, and fairness of State Bar disciplinary investigations into attorney misconduct, as recent history only confirms. If the State Bar defaulted on its duty to avoid public disclosure of otherwise confidential information, it may have violated its own rules and procedures, but it may not make veiled threats against the publisher of such information absent any evidence that the publisher acquired the information unlawfully. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (“[A] stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”); *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (noting the “timidity and self-censorship which may result from allowing the media to be punished for publishing certain truthful information”).

The State Bar should immediately retract and disavow any statements asserting or implying that it is unlawful to publish legally acquired information of public concern. As an organization of lawyers dedicated to protecting the public and enhancing the administration of justice under rule of law, the State Bar above all others must respect and honor the First Amendment.

I am available at your convenience to discuss any questions or otherwise address any concerns.

Sincerely,

FIRST AMENDMENT COALITION



David Loy  
Legal Director