CALIFORNIA
FIRST AMENDMENT
COALITION
Promoting And Defending The People's Right To Know

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Justice Rick Sims Superior Court of California County of Contra Costa 725 Court Street, Rm. 103 Martinez, CA 94553	

Re: Coleman v. Torre, et al., Case No. MSN07-0867
Amicus Letter of the California First Amendment Coalition in Support of Petitioner David C. Coleman

Dear Justice Sims:

The California First Amendment Coalition respectfully requests leave to submit this letter as *amicus curiae* in support of Petitioner David C. Coleman, the Public Defender for Contra Costa County.

Statement of Interest and Request for Leave to Submit Letter Brief

The California First Amendment Coalition (CFAC) is a non-profit, public benefit corporation dedicated to advancing government transparency, public participation in governmental affairs, and free speech. Since its founding in 1988, CFAC has been a counterweight to the tendency at all levels of government toward greater secrecy and less accountability. CFAC is a true coalition. Its members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and individuals seeking help in asserting the rights of citizenship.

CFAC consistently has been involved in legislation, the adoption of court rules, and litigation relating to open government and access to the California courts. CFAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California state constitution, enacted by voters in 2004 as Article I, section 3(b), of the California Constitution. Petitioner has relied on Proposition 59 in bringing the present action.

Thus, CFAC has a vital interest in the proceedings in this case, and is uniquely qualified to provide insight on the issues that it raises.

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There are no statutes or rules of court governing the submission of *amicus* briefs in Superior Court proceedings. However, it is well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377.) "Courts have inherent power . . . to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th at 967; *Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813.) Therefore, the Court has the power to accept this letter in support of Petitioner. CFAC respectfully requests that it do so.

The Public's Constitutional Right of Access to Records Regarding the Administration of the Courts and the Vital Public Interest in the Efficacy and Cost of Representation for Participants in Juvenile Dependency Proceedings Support the Petition in this Case.

Access to information regarding the conduct of governmental institutions and officials is a fundamental condition of a democratic society. "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.)

In recognition of this fact, the right of access to public records has been raised to constitutional stature in California. Proposition 59, approved in November, 2004, by 83 percent of California voters, amended the California Constitution to provide, in part, as follows:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) 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. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Cal. Const., Art. I, section 3(b). As explained in the ballot argument in support of Proposition 59, these provisions of the California Constitution "create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how." (*See* 2004 Official Voter Information Guide, http://www.sos.ca.gov/elections/elections_viguide_pg04.htm.)

Moreover, Proposition 59 was specifically designed to "ensure that public agencies, officials, and courts broadly apply laws that promote public knowledge [and] compel them to narrowly apply laws that limit openness in government." (*Id.*)

Thus, "Californians have a constitutional right to access the records of their public agencies. They have a strong interest in knowing how government officials conduct public business, particularly when allegations of malfeasance by public officers are raised." (*BRV v. Superior Court* (2006) 143 Cal. App. 4th 742, 746.) The right of access created by Proposition 59 applies to records of the California courts. (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal. App. 4th 588, 597.) In addition, the requirement of broad construction of access rights and narrow construction of any limitations on access is consistent with the long established interpretation of the Public Records Act. (*Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469, 476; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 772-73).[1]

Superior Courts exist pursuant to the California Constitution, and hence are agencies of the State of California. (Cal. Const., Art. VI, sec. 4; *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354 [in order to be considered a public agency, entity has to be created by statute or Constitution].) The Chief Executive Officer of the Court is a public official under California law. (*See* Gov't Code § 82048, subd. (a); *Bennett v. Superior Court* (1955) 131 Cal.App.2d 841, 844-845 [clerk of the Superior Court is a public officer].) The Legislature that exempted the judicial branch from compliance with the Public Records Act (Gov't Code § 6252, subd. (a)) pointedly did not do so in crafting Proposition 59 (Cal. Const., Art. I, sec. 3(b)).

In short, the records of the Contra Costa Superior Court and its Chief Executive Officer requested by Petitioner are subject to an express constitutional right of access. That constitutional right of access is reinforced, but not altered or superseded by, Government Code 71675(b) and California Rules of Court 10.802 and 10.803.

CFAC has not been able to determine the basis for the Respondents' rejection of Petitioner's request. However, their answer to the petition for writ of mandate suggests that it may be based on concerns regarding the privacy of persons identified in submissions to the Superior Court, or about protecting the Superior Court's "deliberative process."

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[1] Proposition 59 also provides that "[n]othing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects that construction of any statute, court rule, or other authority to the extent that it protects that right to privacy . . . ." This provision leaves unaltered the preexisting authority requiring narrow construction of privacy-based exemptions from public access, such as Government Code sections 6254(c) and 6255. *See, e.g., Bakersfield City School Dist. V. Superior Court*, 118 Cal. App. 4th 1041, 1045 (2004).

The ballot argument in favor of Proposition 59 expressly stated that the constitutional amendment "will ***allow the public to see and understand the deliberative process*** through which decisions are made." (*See* 2004 Official Voter Information Guide, http://www.sos.ca.gov/elections/elections_viguide_pg04.htm [emphasis added].) This language demonstrates that Proposition 59 was intended to expose the deliberative process to public scrutiny, and to eliminate the deliberative process privilege previously recognized by the courts. Extrinsic aids that were before the voters, such as analyses and arguments contained in official ballot pamphlets, should be used to ascertain voters' intent. (*People v. Rizo* (2000) 22 Cal. 4th 681, 685; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal. 4th 537, 560; *Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 903-05.)

Moreover, the deliberative process privilege is entirely a judicial construct, and constitutes a broad (rather than a narrow) interpretation of a statutory limitation on disclosure. (*See* Gov't Code § 6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.) Such constructions are expressly vitiated by Proposition 59. (Cal. Const., Art. I, sec. (b), subd. (2) ["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."] [emphasis added].)

Therefore, the deliberative process privilege no longer constitutes valid justification for the denial of access to public records.

Nor are there any privacy concerns that justify nondisclosure in these circumstances. Apparently, Respondent withheld the resumes of certain individuals included in bids submitted to the Superior Court. However, there is no legitimate expectation of privacy with respect to the qualifications of people who seek to provide critical services to the public and be paid by the government to do so:

> "We are mindful that respondents may have legitimate privacy interests to protect, yet, the interests on the part of the [government] in not chilling future information-gathering abilities in business transactions, and on the part of the [bidder] in jeopardizing competitive advantages, does not outweigh the public's need to be informed of the provision of governmental services contracted on behalf of the residents."

San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 780. Clearly, the public has a vital interest in knowing the qualifications of the attorneys that will be providing critical legal services to some of the most vulnerable members of society. Basic information regarding any attorney is already available from the California State Bar. (*See* www.calbar.org.) Attorneys routinely advertise their qualifications on websites and in legal publications. An attorney simply has no legitimate interest in maintaining the privacy of his or her qualifications, especially when seeking to become the counsel from whom indigent citizens will be compelled to seek representation. Vastly more sensitive information has been held to be subject to public disclosure when

submitted to the government in an effort to obtain compensation. (*See, e.g. Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496 [settlement demand letter submitted to school district on behalf of a student who was attacked and sexually molested at school].)

The contract for representation of indigent clients in juvenile dependency proceedings was awarded to Santa Clara Legal Aid Society (LAS) in April, 2007. In comments to the press, the Presiding Judge assured the public that the quality of legal services would not be compromised.

However, in January, 2007, Santa Clara County completed an audit of indigent legal services in that county. ("Management Audit of the Office of the Public Defender and Indigent Defense System of the County of Santa Clara," January 2007 ["Audit"].)[2] LAS provides "tertiary" defense services in cases involving multiple defendants. Among the findings of the Audit: "***Regarding Legal Aid Society services, the responding judges almost unanimously had very strong criticisms of the quality and abilities of the attorneys***."

It is not clear that the Superior Court has abandoned the effort to provide high quality legal representation in its effort to cut costs. (Although it is difficult to believe that the quality of legal representation will not be severely compromised when attorneys are paid only $500 to $1,000 per case, as the executive director of LAS has indicated.) However, there is more than a credible basis for concern. Petitioners seek access to records that will help the public determine whether that concern is truly justified.

Conclusion.

Although CFAC takes no position on the Superior Court's selection of an organization to represent indigents in juvenile dependency cases, we believe strongly that Petitioner, and the public generally, are entitled to records and information relating to the selection process. That process is presumptively open. Respondents have not identified any legitimate basis for refusing to make it open. The Superior Court should welcome and embrace public scrutiny of the administrative process for providing critical legal services. Only such scrutiny can ensure trust, and public trust is essential to the effective functioning of the judicial system. CFAC urges the Court to grant the petition, and to make public the requested records.

Thank you for your consideration of this letter. If you need any further information regarding CFAC or its interest in this matter, we will be happy to submit it.

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[2] The audit is available on the Santa Clara County Internet web site: http://www.sccgov.org/SCC/docs%2FClerk%20of%20the%20Board%20of%20Supervisors%20%28DEP%29%2Fattachments%2FPublicDefenderAudit.pdf

Respectfully submitted,

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