

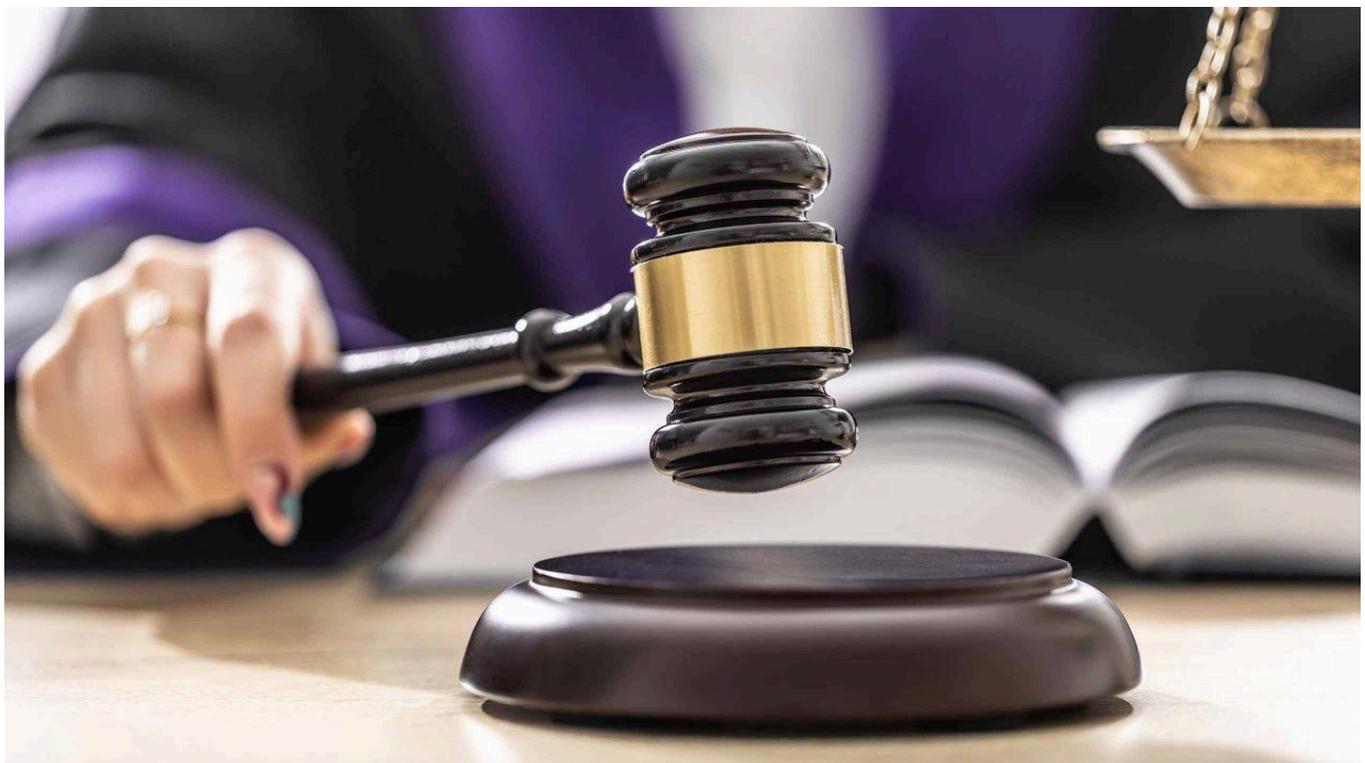
Mandatory Bar Association Speech Must Be Focused

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May 22, 2024 ⌚ 5 min read

Summary

- Activists bring litigation asserting freedoms of speech and association after court restricts speech to topics germane to practice of law.
- The decision restricts associations from not just political speech but also apolitical topics like health and wellness tips and promoting charity drives.
- Section leaders differ in their support of the decision but acknowledge that mandatory bar associations need to tailor their messages to comply with the First Amendment.



Mandatory bar associations are only permitted to speak on topics germane to the practice of law or they violate the [First Amendment](#) rights of their members to speak and associate freely, according to a federal appellate court. This restricts the associations from not just political speech but also apolitical topics like health and wellness tips and promoting charity drives. ABA [Litigation Section](#) leaders differ in their support of the decision but acknowledge that mandatory bar associations need to tailor their messages to comply with the First Amendment.

Challenge to Compelled Speech and Association by Bar Associations

In [Boudreaux v. Louisiana State Bar Association](#), the plaintiff challenged the constitutionality of mandatory membership in the [Louisiana State Bar Association](#) (LSBA) for all members of the Louisiana bar, as well as the topics on which the LSBA can speak. The plaintiff argued that mandatory bar associations violate the First Amendment freedoms of speech and association by compelling speech with which its members may not all agree.

In the most recent of two appeals in *Boudreaux*, the U.S. Court of Appeals for the Fifth Circuit held that mandatory bar associations are not de facto violations of the First Amendment, but their speech must be limited to that which is germane to the profession. Relying on previous decisions of the U.S. Supreme Court, the court stated that “lawyers do not have a categorical First Amendment right to disassociate from their state bar, [but] compulsory bar membership is unconstitutional if a bar’s speech is not germane to regulating lawyers or improving the quality of legal services in the state.”

Plaintiff Loses Twice at Trial

The plaintiff brought his action in 2019. The U.S. District Court for the Eastern District of Louisiana dismissed his claims, concluding that the plaintiff lacked standing because he did not formally object to the LSBA’s speech. The plaintiff appealed to the Fifth Circuit, which reversed the trial court’s decision, finding that the plaintiff “would have a valid free association claim if the LSBA engaged in non-germane speech.”

On remand, the parties stipulated to a list of the LSBA’s disputed speech. Following a bench trial, the court found that each item of speech was either germane or not a “major activity” of the LSBA. Thus, the speech was constitutional, and the association did not violate the First Amendment.

Bar Association Ceases Political Activity

The plaintiff appealed again. This time, the appellate court found that the bar association violated the First Amendment by engaging in non-germane speech.

The initial *Boudreaux* appeal was heard by the same panel that heard a First Amendment challenge to Texas's mandatory bar association. Both decisions were released the same day. In *McDonald v. Longley*, the court held that mandatory bar associations violate their members' freedom of speech when they engage in political advocacy or other speech that is not germane to the profession. Accordingly, the LSBA stopped nearly all of its political activity, stopped paying for a lobbyist, and budgeted only \$10,000 to monitor legislation that may be germane to the profession.

Despite these drastic changes, the plaintiff continued to assert that the LSBA violated his First Amendment rights by engaging in non-germane speech. In particular, the plaintiff objected to "Wellness Wednesday" tweets that urged members to work out regularly and get vitamin D, messages about community activities such as holiday charity drives, and a link to a History.com article concerning [LGBTQ Pride Month](#). The LSBA argued these messages were germane to the health and welfare of lawyers, goodwill toward the profession, and the diversity of the profession.

In *McDonald*, the court held that a bar association's speech is germane if it relates to regulating the legal profession or improving the quality of legal services. Applying this standard, the court determined that the "Wellness Wednesday" tweets were not germane. Even though healthier lawyers may be more effective lawyers, germaneness "requires inherent connection to the practice of law and not mere connection to a personal matter that might impact a person who is practicing law," the court concluded. Allowing bar associations to speak on anything that may improve legal services, however tangentially, allows them to speak on just about any subject.

Similarly, the court found that announcements of holiday charity drives is not germane. Unlike the promotion of pro bono legal services, which is germane, promoting generic charitable activities is not tied directly to the delivery of legal services. If the mere promotion of goodwill toward the profession were sufficient to satisfy the germaneness standard, observed the court, there would be no limit to what bar associations could do in the name of increasing goodwill.

That a subject may be controversial is not dispositive of whether a subject is germane. The link to the Pride Month article, for example, was not germane to the profession because it concerned diversity in society in general. If the message concerned diversity within the profession, it would be germane.

Leaders Advise Caution

Litigation Section leaders caution mandatory bar associations to follow the decision in *Boudreaux*. The Fifth Circuit “did not take the step that the plaintiff was seeking—to declare mandatory bar associations unconstitutional—but it seems like the court of appeals is leaving it for the Supreme Court to tackle,” explains [Alexander R. Bilus](#), Philadelphia, PA, cochair of the Section’s [Civil Rights Litigation Committee](#). “Mandatory bar associations should be taking steps now to change their practices,” continues Bilus. “This case is an alert that they could be heading into trouble.”

Some Section leaders are worried about the chilling effect the *Boudreaux* decision will have on what mandatory bar associations can do or say. “I think it is problematic because bar associations need the ability to talk about things that are socially relevant,” challenges [Elizabeth S. Fenton](#), Philadelphia, PA, cochair of the Section’s [Mental Health & Wellness Task Force](#). “Mental health and wellness, for example, are particularly relevant to the legal profession because the statistics show that there are a lot of problems with untreated substance abuse in the profession,” urges Fenton. “This decision basically cuts the bar association off at its knees because it limits what the bar association can do and renders it a lot less relevant to the profession.”

Other Section leaders are less concerned about stifling the speech of bar associations. “Not every matter of importance to society needs to be supported or opposed by a mandatory bar association,” remarks [Gregory R. Hanthorn](#), Atlanta, GA, cochair of the Section’s Federal Practice Task Force. “Voluntary bar associations are already incentivized to prioritize advocacy that is supported by their respective memberships,” maintains Hanthorn. “There are plenty of areas where a mandatory bar association can still speak.”

Mandatory bar associations can tailor their speech to ensure it is germane. “They can still take positions on the issues of the day as long as those issues and those positions are tied to regulating the legal profession or improving the quality of legal services,” suggests Bilus. “This decision makes the test a little bit less murky, and allows mandatory bar associations to better train their spokespersons to understand what is, and is not, germane.”

Finally, some leaders are optimistic that limitations on the speech of mandatory bar associations can result in more robust speech in the profession. “If the mandatory bar associations bow out of speaking on the more borderline issues, it may drive lawyers to voluntary bar associations that can speak in a more full-throated approach manner,” suggests Hanthorn.

Resources

- [*Keller v. State Bar of Cal.*](#), 496 U.S. 1 (1990).
- [*Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*](#), 138 S. Ct. 2448 (2018).
- Tyce Walters, "[Facing Goliath: Litigating Appeals Against the Government](#)," *App. Prac.* (July 27, 2020).

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