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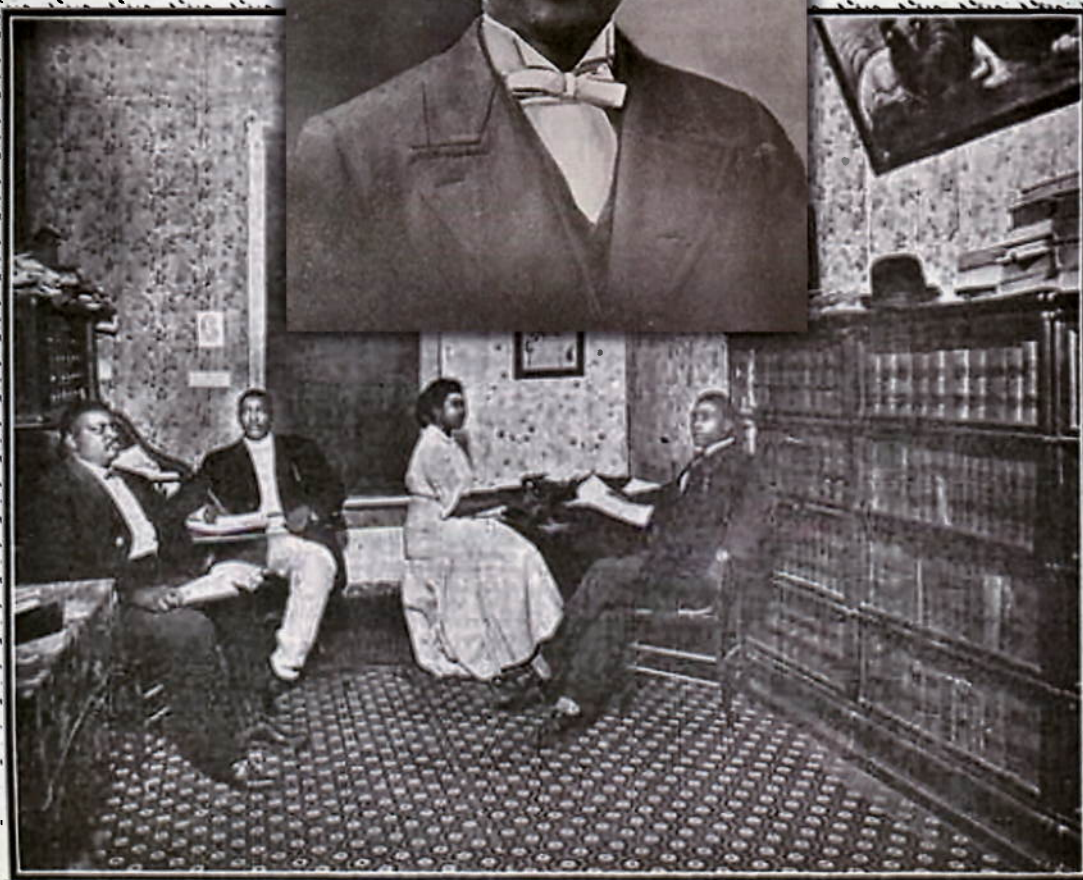
THE HOUSTON

lawyer

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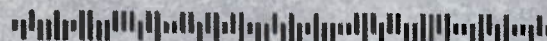
January/February 2024

Houston's Pioneering Black Leaders in Law



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- dents/diversity/2023/12/19/texas-institutions-prepare-anti-dei-law-go-effect#.
8. Act of June 17, 2023, 88th Leg., R.S., S.B. 17, (codified at Tex. Educ. Code § 51.3525).
9. *Id.*
10. *Id.*

Free Speech and Mandatory Bar Associations: The Fifth Circuit's Recent Clarification of the "Germane" Standard

By SUSHANT MOHAN

Lawyers in the United States belong to two different groups. And no, I'm not referring to trial lawyers and non-trial lawyers (though that makes for a fascinating divide). Rather, it's whether lawyers belong to *mandatory* bar associations or *voluntary* bar associations. The key difference—to state the obvious—is that attorneys practicing in a state that has a mandatory bar association *must* join the state bar to practice law.

The mandatory bar structure, which now exists in a world where state bar social media accounts are the norm, has resulted in numerous legal challenges. Recently, in *Boudreaux v. Louisiana State Bar Association*,¹ the Fifth Circuit provided insight into its stance on the speech of mandatory bar associations, such as those in Texas and Louisiana. Although the opinion focuses on mandatory bar organizations, legal organizations that disseminate content within the Fifth Circuit's jurisdiction—whether via email, publications, or social media—should take note of the court's guidance on how to steer clear of any future challenges that on the horizon for organizational speech.

The Speech at Issue

In *Boudreaux*, the Louisiana State Bar Association ("LSBA") "took positions on antidiscrimination laws for LGBT individuals, com-

pliance with a state equal pay act, a rewriting of the state's high school civics curriculum, a moratorium on executions in Louisiana pending certain criminal justice reforms, licensure of midwives, and concealed carry by school officials."² This did not sit well with the plaintiff-appellant, Boudreaux, who joined LSBA in 1996.³ Boudreaux sued LSBA, claiming that mandatory membership in the organization violated his rights to free speech and association.

The Standard: "Germane to a Bar Association's Purposes"

Under the current standard, a mandatory bar association's speech must be "germane" to a bar association's purposes; that is, it must be "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"⁴

Was LSBA's Speech Germane? No.

The Fifth Circuit ruled that posts on X relating to the health and well-being of lawyers were not germane to the LSBA's purposes.⁵ Specifically, LSBA "tout[ed] the purported benefits of walnuts," "urg[ed] readers to... work out at least three times per week," and encouraged lawyers to get "sunlight." Those statements failed the germaneness test "because they do not sufficiently relate to legal practice or the legal profession." The court reasoned that if a bar association may tout health benefits, may it also advise attorneys to practice Vinyasa yoga or get married and have children, if it believes that those activities improved attorney wellness and therefore the quality of legal services in the state?⁶

Next, the court found that speech relating to the 69th Annual Red Mass at St. Louis Cathedral and holiday charity drives were not germane.⁷ The court noted that although

[g]eneric Christmas and Halloween charity drives may be helpful to the community, and they may even—in some diffuse sense—increase goodwill toward the legal profession... unlike the pro bono provision of legal services, they are not sufficiently germane to the regulation of the legal profession or the improvement in quality of legal services.

Similarly, the court looked unfavorably upon LSBA sharing a news article relating to student debt of young attorneys. Although the court conceded that "the article is specific to lawyers," it held that "[t]he test... is not about whether speech is 'law-related,' but whether it is related to 'regulating the legal profession and improving the quality of legal services.'" The court did not see how "merely reading the article would improve a lawyer's practice."

Last, the court scrutinized a link LSBA provided to a [history.com](https://www.history.com) article about gay rights, which featured a large rainbow flag icon that read "LGBT Pride Month." Although LSBA argued that Pride Month is nationally recognized and related to diversity in the profession, the court did not find the argument convincing and instead ruled that "there is a difference between diversity in the profession and diversity in broader society, with which LSBA lawyers may be concerned[.]; [o]ne is germane, the other not."

The Fifth Circuit has made clear that, for mandatory bar associations, speech must be "germane" to its purpose of regulating the legal profession or improving the quality of legal services. It will behoove organizations—mandatory or voluntary—to keep this test in mind when disseminating content. 

Sushant Mohan is a partner in BakerHostetler's Commercial Litigation group, serves as a director for the Texas Young Lawyers Association, and as the south regional lead for the Leadership Council on Legal Diversity. Outside of work and service, Sushant enjoys being outside and staying active.

Endnotes

1. *Boudreaux v. Louisiana State Bar Ass'n*, 86 F.4th 620, 624 (5th Cir. 2023).
2. *Id.* at 625.
3. *Id.* at 626.
4. *Id.* at 629.
5. *Id.* at 632.
6. *Id.* at 632-33.
7. *Id.* at 633-34.
8. *Id.* at 634.
9. *Id.* at 635.
10. *Id.* at 635-36.