

Section New Officers Orientation: Legal Essentials



August 26, 2024



STATE BAR *of* TEXAS

Topics



- Governing Law, Rules, and Policies
 - State Bar Act
 - Supreme Court State Bar Rules
 - State Bar Policy Manual
 - Bylaws
 - See texasbar.com
- Section Contracts
- Open Records
- ❏ *Keller, McDonald, and Advocacy*

State Bar Governing Documents



- State Bar Act (Tex. Gov't Code Ch. 81) – first adopted in 1939, sets out SBOT purposes and responsibilities
- State Bar Rules (Promulgated by SCOTX) – "adopted in aid of the Court's inherent power to regulate the practice of law"
- State Bar Board Policy Manual (adopted and updated by the Board) governs Bar operations (Part V addresses Sections)

State Bar Act



- Government Code § 81.026
 - **The [State Bar] board may create ... sections as it considers advisable and necessary to carry out the purposes of this chapter.**

State Bar Rules (Supreme Court)



- Article VIII, Section 1
 - A. ... [sections'] organizational structure, purpose and bylaws shall be subject to approval of the [State Bar] board....

State Bar Rules



- Article VIII, Section 2 - Reports
 - The sections and divisions of the State Bar shall deliver to the president and the executive director at least sixty (60) days before the annual meeting of the State Bar, annual reports and recommendations.

State Bar Board Policy Manual



- Part V addresses State Bar Sections and Divisions
- 5.01 – Sections
- 5.04 – Divisions (mirror Sections provisions)
- 5.01.01 – General
- 5.01.03 – Creation of New Section
- 5.01.08 – Section Name Change

State Bar Board Policy Manual



- 5.01.04(A)
 - Section bylaws must remain in compliance with the State Bar Act, the State Bar Rules, this Policy Manual, state and federal law, and any other applicable action of the Board.
 - Bylaw amendments must be approved by the State Bar Board
 - ✦ Submit proposed amendments to the Executive Director no later than 30 days before the next regularly scheduled Board meeting
 - ✦ The proposed amendments will be reviewed by the legal counsel's office and may be subject to review by the Section Representatives to the Board

Confidentiality (5.01.04(C))



- Confidential information concerning any section member may be used only for official section business and may not be disclosed to the public.
 - Email address
 - SSN
 - Home address
 - Home phone
- Take reasonable and necessary steps to protect information
- Don't publish members' private info on publicly available web page
- Require third-party vendors to protect member data

Contracts (5.01.04(D))



- All contracts for goods or services must be reviewed by State Bar Legal Counsel and signed by the State Bar – don't sign individually or on behalf of a section/division
- Send contracts to Office of Legal Counsel via the Sections department.
- We turn contracts around quickly

The Texas Public Information Act (PIA) – Govt. Code Ch. 552 (Open Records)

- The Texas PIA gives the public a right of access to government information
- Liberally construed in favor of disclosure
- State Bar Act §81.033 says SBOT records are subject to the TPIA. Grievance records and TBLS records are not.

State Bar Records



- State Bar records consist of information related to the official business of the State Bar (including sections)
- Information that is created, collected, assembled, maintained by the State Bar (*officers, directors, volunteers, staff*) or for the State Bar (*i.e. by vendors*)

What Does That Mean for You?



- If you write, send, or receive something in connection with the transaction of official Section business, it is subject to the TPIA
- Examples: letters, reports, notes, reimbursement requests, and emails (even if in your personal email account)

Be Professional



- So, treat what you write in letters, emails, etc. as if it might become public
- Be professional

Why Not Just Delete It?



- Governmental bodies, including the State Bar, are required to retain their records for set time periods
- Agendas and Meeting Materials
 - If they are created or maintained by someone else (State Bar staff), keep them as long as they are useful
- Keep correspondence that you send or receive

How Long Must I Keep Correspondence?



- Administrative – 4 years*
 - Substantive re: Section programs, projects, services, policies
- General – 2 years*
 - Routine operations of your Section
- Transitory – Until completed
 - Of temporary usefulness to completion of an action

How Do I Manage This?



- Keep it accessible
 - Create a “section” folder in your email box
- If we receive a Public Information Act Request asking for your State Bar communications
 - You will receive a call or email from us about the request
 - We will ask you to send us what you have
 - Statutory deadline – “promptly” but we only have 10 business days to seek exception from AG

Keeping Activities Germane: Keller and McDonald

Keller v. State Bar of California, 496 US 1 (1990)

- Held that State Bar of California could not use mandatory membership dues to finance political and ideological activities when such expenditures were not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.

McDonald



McDonald v. Longley, 4 F.4th 229 (5th Cir. 2021), *cert. denied sub nom.*

McDonald v. Firth, 142 S. Ct. 1442 (2022) and *cert. denied sub nom. Firth v. McDonald*, 142 S. Ct. 1442 (2022).

- Upheld the constitutionality of the vast majority of challenged State Bar of Texas programs and activities.
- The panel found the purposes justifying compelled association in a bar association are “regulating the legal profession” and “improving the quality of legal services.”
- In 2021, the State Bar, with approval of the Texas Supreme Court, changed the State Bar Board Policy Manual and the State Bar Rules to comply with the Fifth Circuit opinion regarding the Bar’s budgeting, legislative, and expenditure objection processes.

Keller and *McDonald* restrictions are not limited to legislative activities; rather, they apply broadly to activities of the State Bar. (Legislative activities are specifically addressed in Part XIII of the State Bar Board Policy Manual.)

Boudreaux v. Louisiana State Bar Association, et al.,
86 F.4th 620 (5th Cir. 2023).



- On Monday, November 13th, 2023, the United States Court of Appeals for the Fifth Circuit issued an opinion in *Boudreaux v. Louisiana Bar Association, et. al*, holding that it violated its members First Amendment free speech and free association rights because it communicated information regarding issues not inherently connected to improving the quality of legal services or the regulation of lawyers, including information about wellness, technology, student loans, holidays, and charitable events.
- Now, all communications to membership or the public on behalf of the State Bar or its sections or committees must be germane to improving the quality of legal services, the regulation of lawyers, or the functioning of the state's courts or legal system *and* it must be clear that they are connected to the practice of law.
- Proposed social media or mass communications are submitted to the State Bar by emailing them to **commreview@texasbar.com** for review and approval.

Public Statements and Advocacy



- Tex. Gov't Code Sec. 81.034
 - No funds received by the Bar can be used for influencing legislation unless it relates to:
 - ✦ Regulation of legal profession;
 - ✦ Improving quality of legal services; or
 - ✦ Administration of justice
- (Amount of expenditure must be reasonable & necessary)

Summary of Controlling Law (cont.)

***Keller v. State Bar of California* (U.S. Supreme Court)**

All expenditures must support the purposes of:

- Regulating the legal profession, or
- Improving the quality of legal services

***McDonald v. Longley* (Fifth Circuit)**

Expenditures are permissible if they relate to the above or:

- The regulation of lawyers,
- The functioning of state or federal courts, or
- The functioning of the legal system

***Boudreaux v. Louisiana State Bar Association* (Fifth Circuit)**

Communications must be germane to:

- The regulation of lawyers,
- The functioning of state or federal courts, or
- The functioning of the legal system

and it must be clear that they are connected to the practice of law.

Public Statements and Advocacy (5.01.04(B))



- Applies to Sections/Divisions, Section/Division members, and Section/Division councils
- Unless authorized by the SBOT Board, a section/division may not:
 - purport to **represent the State Bar** before any legislative body, administrative agency, court, or tribunal
 - purport to act, speak, or write on any subject **on behalf of the State Bar**
 - **take a position in the Section's name** that advances or advocates a political or social policy position

Call Us Anytime



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