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NCLA Calls on Third Circuit to Strike Down Viewpoint-Based Discrimination for PA Attorneys

Zachary Greenberg v. Jeremy M. Lehocky, et al.

Washington, DC (October 31, 2022) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed an [amicus curiae brief](#) in *Greenberg v. Lehocky, et al.* NCLA opposes Pennsylvania officials’ attempt to revive a rule that would use overly vague language to govern objectionable speech by members of the legal profession. Pennsylvania’s Rule 8.4(g) exposes attorneys to discipline—including sanctions that deprive lawyers of the ability to earn a livelihood—if, while in the practice of law, they knowingly communicate in a manner “constituting harassment or discrimination.” The Rule creates an unwarranted speech code for lawyers. Both the Supreme Court and the Third Circuit have repeatedly stated that speech restrictions that discriminate on the basis of content or viewpoint expressed are constitutionally impermissible.

Pennsylvania has a long history of regulating both the conduct and speech of attorneys, where necessary, to maintain the integrity of the judicial system. Before Pennsylvania adopted Rule 8.4(g) of the Rules of Professional Conduct in 2020, it did not engage in viewpoint discrimination when regulating attorney speech. As the Disciplinary Board of the Supreme Court of Pennsylvania readily concedes, Rule 8.4(g) imposes viewpoint-based restrictions on speech: it prohibits speech that expresses disparaging views of another on the basis of any of eleven listed characteristics but permits laudatory comments on the same subjects.

Zachary Greenberg filed suit shortly before Rule 8.4(g) was scheduled to take effect in December 2020, alleging that the new rule violated the First and Fourteenth Amendments because it imposed content- and viewpoint-based speech restrictions and was void for vagueness. On December 7, 2020, the district court preliminarily enjoined enforcement of the Rule. In March 2022, the district court granted Greenberg’s motion for summary judgment and permanently enjoined a revised rule, holding that Greenberg had demonstrated a chilling effect on his speech.

In the district court proceedings, the Disciplinary Board of the Supreme Court of Pennsylvania denied engaging in content- and viewpoint-based discrimination. Now, in a change of tack before the U.S. Court of Appeals for the Third Circuit, they boldly assert that the Rule is not subject to normal First Amendment constraints when restricting attorney speech, arguing that “First Amendment rules against viewpoint and content discrimination do not apply when the government regulates the practice of law.” But the First Amendment analysis does not change simply because the speech restriction is imposed on a lawyer. The Rule’s broad definition of “harassment” will inevitably lead to the chilling of attorney speech, NCLA argues, including speech on behalf of one’s clients. An attorney will be less likely to speak out on topics related to the eleven protected categories if he or she knows that doing so could jeopardize his or her law license—and hence career.

NCLA also represents two Connecticut attorneys who have filed a First Amendment [challenge](#) to a Connecticut rule of professional conduct that is similar to Pennsylvania’s Rule 8.4(g).

NCLA released the following statement:

“Bar authorities are attempting to create a Constitution-free zone in Pennsylvania, a zone that, per Rule 8.4(g), encompasses not only courthouses, law offices, and client communications but even continuing legal education seminars and bar association activities. But the Supreme Court has held explicitly that lawyers are entitled to the same First Amendment rights enjoyed by all other citizens.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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