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Second Circuit Revives NCLA's Lawsuit Against Ethics Rule Muzzling Connecticut Attorneys' Speech

Mario Cerame and Timothy Moynahan v. Christopher L. Slack, in his official capacity as Connecticut Statewide Bar Counsel, and Matthew G. Berger, in his official capacity as Chair of the Statewide Grievance Committee

Washington, DC (December 9, 2024) – Today, the U.S. Court of Appeals for the Second Circuit vacated the district court's dismissal of ***Cerame v. Slack***, an NCLA lawsuit challenging a Connecticut Rule of Professional Conduct that imposes a content- and viewpoint-based speech restriction. Rule 8.4(7) defines "professional misconduct" by a Connecticut attorney as including speech that the lawyer knows or reasonably should know "is harassment or discrimination on the basis of" any of 15 listed characteristics—among them race, sex, religion, disability, sexual orientation, and gender identity. NCLA represents Connecticut-licensed attorneys Mario Cerame and Tim Moynahan, who have felt compelled to censor their own speech to reduce their risk of facing charges under the Rule. NCLA looks forward to pursuing our case against this unconstitutional rule on remand.

Rule 8.4(7)'s overly vague terms fail to provide sufficient guidance on what speech it prohibits. The Rule also violates Plaintiffs' First and Fourteenth Amendment rights. Because Cerame and Moynahan frequently speak frankly on controversial topics in their roles as members of the Connecticut bar, they fear being charged with violating the Rule. The reasonableness of their fear is well supported. For example, one of the two initial Rule 8.4(7) sponsors testified that it will serve as a tool for sanctioning lawyers who engage in derogatory or demeaning speech, making clear that sanctions are appropriate even if speech does no more than offend a listener's sensibilities.

The district court dismissed Cerame and Moynahan's Complaint, holding that they lack standing to challenge the Rule because they have not yet been charged with violating it. The Second Circuit wisely disagreed today, finding that NCLA's clients have standing to challenge the Rule before enforcement since they have plausibly alleged that the Rule could plausibly be invoked to punish them. The appeals court has repeatedly held that pre-enforcement First Amendment challenges to speech restrictions face relaxed standing criteria because they risk chilling First-Amendment-protected speech. To establish injury-in-fact, plaintiffs need only allege facts suggesting "an actual and well-founded fear that the law will be enforced against" them, as Cerame and Moynahan have done. Today's decision remands the case to the district court, which must now consider whether the Eleventh Amendment bars Plaintiffs' claims. NCLA is determined to prevail on this issue as well.

NCLA released the following statements:

"This unanimous panel decision correctly applies controlling Supreme Court and Second Circuit precedents to reverse the district court's error dismissing our Plaintiff/attorneys' First Amendment challenge. The opinion lays out how the Connecticut rule will chill frank discussion of (and potentially subject attorneys to discipline for) speech on some of the most important and contentious issues of our time, including critical race theory, gender ideology, and religious expression. This is a major ruling in First Amendment standing law."
— Peggy Little, Senior Litigation Counsel, NCLA

"In upholding Mr. Cerame and Mr. Moynahan's ability to sue, today's Second Circuit ruling gets the rules of First Amendment standing right. The Court distinguished on two grounds the Third Circuit's recent case denying standing to plaintiffs challenging a similar rule. First, Pennsylvania's rule, unlike Connecticut's, focuses on intentional harassment or discrimination. Second, the Pennsylvania Office of Disciplinary Counsel interpreted the rule there not to prohibit general discussion of controversial ideas and specifically blessed plaintiffs' planned speech as not violating the rule. Not so in Connecticut, where the rule at issue is stricter."
— Mark Chenoweth, President, NCLA

For more information visit the case page here**.** NB: This case was previously captioned and listed on NCLA's website as ***Cerame v. Bowler***, but the Connecticut Statewide Bar Counsel has since changed.

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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