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NCLA Encourages en Banc Third Circuit to End Viewpoint-Based Discrimination in Penn. Ethics Rule

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

Washington, DC (September 19, 2023) – Rule 8.4(g) of Pennsylvania’s Rules of Professional Conduct for attorneys establishes an unconstitutional speech code for lawyers, exposing them to discipline—including sanctions that threaten their livelihoods—if they knowingly communicate in a manner “constituting harassment or discrimination” in the practice of law. Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) in *Greenberg v. Lehocky*, calling on the *en banc* U.S. Court of Appeals for the Third Circuit to topple this Rule.

Rule 8.4(g) prohibits speech that expresses disparaging views of another person based on any of 11 listed characteristics but permits laudatory comments on the same subjects. Zachary Greenberg filed suit shortly before the Rule was scheduled to take effect in December 2020, alleging it violated the First and Fourteenth Amendments by imposing content- and viewpoint-based speech restrictions, and was void for vagueness. A district court preliminarily enjoined its enforcement. In March 2022, the district court granted summary judgment and permanently enjoined a revised Rule, holding that Greenberg had demonstrated his speech was being chilled.

In district court, the Disciplinary Board of the Supreme Court of Pennsylvania denied engaging in content- and viewpoint-based discrimination. However, the Board switched strategies before a Third Circuit panel, arguing that the Rule is not subject to normal First Amendment constraints when restricting attorney speech, claiming, “First Amendment Rules against viewpoint and content discrimination do not apply when the government regulates the practice of law.” However, speech restrictions on lawyers can still violate the First Amendment.

The Third Circuit panel reversed the district court, ruling that Mr. Greenberg lacked standing to challenge the Rule. The Board averred that it would not prosecute Mr. Greenberg for what he planned to say, but it never specified what he could not say that would violate the Rule. NCLA’s brief urges the Third Circuit to find standing and grant a rehearing *en banc*, because the Rule’s broad definition of “harassment” will inevitably chill attorney speech, including speech on behalf of one’s clients. Attorneys will be less likely to speak out on topics related to the 11 protected categories if they know that doing so could jeopardize their law licenses and careers.

Representing two Connecticut-based attorneys, NCLA recently presented oral argument at the U.S. Court of Appeals for the Second Circuit in a First Amendment [challenge](#) to a similar Connecticut ethics rule.

NCLA released the following statement:

“The panel held that attorneys may not raise a First Amendment challenge to Rule 8.4(g) until after they have been charged with violating the Rule. That holding places attorneys in an untenable position. It forces them to relinquish their First Amendment rights by self-censoring their speech based on a fear that they will face disciplinary proceedings if they speak freely.”

— 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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