Challenging the Brain

Nothing challenges the brain like a good First Amendment case. I remember some time ago, when a partner of mine and an associate represented a group of prisoners who wanted to read “The Burning Spear” in prison. I did not think much of it, until I looked at the publication and saw that it was a crudely anti-Semitic, violence-filled rag. I agreed with the prison authorities that the publication had no place in the prison setting, and that the entirety of the First Amendment does not inure to the benefit of inmates. Although I disagreed with the position my colleagues took on that occasion, I have always considered myself a First Amendment advocate, and I have handled a variety of First Amendment cases previously, both in the speech and religion areas.

Recently, some members of the Pennsylvania Bar Association suffered great consternation over an opinion in *Greenberg v. Goodrich*, Civ. No. 20-03822, 2022 U. S. Dist. LEXIS 52881, (E.D. Pa. March 24, 2022) (Kenney, J.). In this Eastern District of Pennsylvania federal court case, Judge Kenney struck down Pennsylvania Disciplinary Board Rule 8.4(g) and its accompanying comments.

Rule 8.4(g) states:

> It is professional misconduct for a lawyer to:
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> * * *
>
> (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Pa. R.P. C. 8.4(g).

The comments define the context within which the regulation applies:

> For the purposes of paragraph (g), conduct in the practice of law includes (1) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (2) operating or managing a law firm or law practice; or (3) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)- (3).

Pa. R. P. C. 8.4, Comment 3.

The comments also define “harassment” and “discrimination,” *See id.,* Comments 4 & 5.

Enforcement of the disciplinary rule is through the Office of Disciplinary Counsel (“ODC”), which is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement.

The Rule under consideration was an amended version of a prior regulation, enforcement of which the Court had preliminary enjoined due to First Amendment concerns. The Rule was thereafter amended apparently in an attempt to address these concerns.

The Court first addressed the issue of standing. Standing, however, is measured at the commencement of the litigation. Therefore, the Court agreed that because standing was previously found to exist, the changes or revisions to the prior version forming the current Rule should instead be evaluated under the doctrine of mootness and not standing.

The doctrine of mootness "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *Id.* at *15, quoting *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993). The burden always lies with the party claiming mootness. *Greenberg v. Goodrich, supra,* at *30. Although the chief disciplinary counsel had declared that the Plaintiff’s conduct did not violate the amendments, the Court observed that this declaration was not binding upon a future change in policy, particularly in light of Defendants continued argument that the Rule did not violate the First Amendment in the first place. Further, the latest changes, apparently designed to address the portions of the Rule found problematical by the Court, still did not resolve the chilling affect of the latest version on lawyers. The Court found that defendants -did not met their formidable burden to prove that it is absolutely clear that there is no reasonable expectation that plaintiff could be affected by the Amendments and thus the Court continued to the merits of the constitutional challenge.

The Court first held that the Amendments regulate speech, not merely conduct, and therefore the burden placed on freedom of expression is not incidental to the enforcement of Rule 8.4(g). “[T]he government cannot regulate speech by relabeling it as conduct." *Greenberg v. Goodrich, supra,* at *65. In addressing “overbreadth”, the Court noted that there is no genuine dispute as to any material fact that the Rule limits what a lawyer may say and it serves as a warning to Pennsylvania lawyers to self-censor during the course of their interactions that fall within the Board’s broad interpretation of the practice of law. “[B]oth the plain language of the Amendments and the statements made by Defendants during oral argument prove there is no genuine dispute that the regulation restricts speech on its face and not incidentally. Comment Three to Rule 8.4(g) states that ‘the practice of law does not include speeches,

communications, debates, presentations, or publications given or published outside the contexts described' earlier in the Comment. Pa.R.P.C. 8.4 cmt. 3. The Court interprets that plain language to mean all of those *are included* within the scope of Rule 8.4(g) if they occur within the listed contexts of a legal proceeding, representation of a client, operating or managing a law firm or practice, and various activities and conferences where CLE credits are offered.
Greenberg v. Goodrich, supra, at *67-68.

Regardless of the laudatory purpose, the state simply does not have the authority to police professionals in their daily lives to root out speech that the state deems to be below "common decency". "That nebulous notion of decency, combined with the exceptional authority the state would have if allowed to monitor attorneys outside of judicial proceedings and representation of a client and determine whether they are "decent" enough causes this Court grave concern." *Id.* at *73. The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *Id*. at *70. Attorney speech under Rule 8.4(g) will be given the full protection of the First Amendment, and the Court found that the Amendments, including Rule 8.4(g) and comments 3 and 4 constitute viewpoint-based discrimination in violation of the First Amendment.

The Court also ruled that Rule 8.4(g) regulates speech based on the message a speaker conveys and is, therefore, subject to strict scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008).

It is not the role of the government to ensure that all lawyers are noble guardians of the profession or well-liked by the public. That is equivalent to requiring that all public school teachers love children or insisting all doctors develop a good bedside manner.

> Would we prefer that in an ideal world? Sure. But it is not for the government to enact regulations that monitor the type of people who work in a particular profession. Ultimately, Defendants want the Court to blindly accept anti-harassment and anti-discrimination policy as an overwhelming good that is justified in and of itself, and the Court cannot do so without more focus in the state's interests for enacting this particular rule. This nebulous good is insufficient to serve as a compelling interest to restrict freedom of speech and expression.

Greenberg v. Goodrich, supra, at *89.

Even so, for the sake of the government at this procedural stage in summary judgment, the Court evaluated the rest of the test assuming the government has a compelling interest in regulating attorneys through Rule 8.4(g). The Court found that Rule 8.4(g) does not pass the strict scrutiny test for constitutionality.

Finally, considering limiting constructions offered by ODC does not solve the problem of overbreadth. ODC may promise not to enforce Rule 8.4(g) in the way its

plain language suggests, yet the investigatory process itself has a chilling effect on Mr. Greenberg's speech and will cause him, and likely other attorneys, to self-censor. There is no dispute that each complaint ODC receives triggers an investigatory process and that ODC may contact an attorney during that investigation. Even if ODC promises not to enforce the Rule against attorneys in situations like Mr. Greenberg's, there are still First Amendment concerns regarding the initial complaint and investigation process that ODC's promises do not resolve. Therefore, even after considering a limiting construction, the Amendments still prohibit a substantial amount of protected speech and are unconstitutionally overbroad.

The Court concluded that Rule 8.4(g) is an unconstitutional infringement of free speech according to the protections provided by the First Amendment. The Court reiterated that Rule 8.4(g) is unconstitutionally vague under the Fourteenth Amendment. Therefore, the Court grants Plaintiff's Motion for Summary Judgement and denied Defendants' Motion for Summary Judgment.

Bullet point takeaways:

- The Disciplinary Board of the Supreme Court of Pennsylvania Rule 8.4(g) banning discrimination on the part of a lawyer is found to be unconstitutional as a violation of the First Amendment.
- The Rule states as follows:

  It is professional misconduct for a lawyer to:
  * * *
  (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules. Pa. R. P.C. 8.4(g).

- The Court found that there was standing and the matter was not moot.
- The Court found that the Rule was susceptible of overbreadth and that it cannot survive strict scrutiny.
- The government cannot regulate speech by labelling it conduct and the Court found that this Rule clearly regulated speech.
- There is no separate category of "professional speech" and attorney speech is entitled to full First Amendment protection.
- Even if the Board said it would not enforce the Rule or would not enforce it against this particular plaintiff, the Rule would still have a chilling effect and obviously would still be on the books.
- The Rule is unconstitutionally vague and governed conduct of lawyers even outside the courtroom and outside their relationship with clients.
- For the state to assert authority to monitor attorneys outside of judicial proceedings and determine whether they are "decent enough" was a matter of grave concern.

    - It is not the role of government to ensure that all lawyers are noble guardians of the profession or well-liked by the public.
- Considering the limiting construction of the language of the Rule offered by the ODC does not solve the problem of overbreadth.
- The ODC may promise not to enforce the Rule, yet the investigatory process itself has a chilling effect on a lawyer's speech and will cause lawyers to self-censor.

While lawyers and lawyer groups may be uncomfortable with a decision which strikes down that which is a laudatory goal, the elimination of discrimination and harassment by lawyers against others, the First Amendment stands as a bulwark against government censorship. This case challenge us to delve into the nuances of First Amendment jurisprudence and its societal implications. The views of the Third Circuit, should the case be appealed, and the United States Supreme Court, should the case go that far, will undoubtedly be interesting and thought-provoking.

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