

Third Circuit Upholds Pennsylvania Rule 8.4(g) Prohibiting Harassment and Discrimination in the Practice of Law

The U.S. Court of Appeals for the Third Circuit reversed an Eastern District court ruling striking down a Pennsylvania Rule of Professional Conduct prohibiting knowing harassment and discrimination in the practice of law. In *Greenberg v. Lehocky*, plaintiff, Zachary Greenberg, brought a pre-enforcement challenge to Pennsylvania's new Rule 8.4(g) based on the American Bar Association's Model Rule adopted in 2016 to prohibit harassment and discrimination based on race, sex, and other identified characteristics. In a unanimous, precedential decision, the three-judge panel concluded that Greenberg lacked standing to pursue his pre-enforcement challenge to Rule 8.4(g). In particular, the court ruled that the plaintiff "fails to establish an imminent future injury because his planned course of conduct is not arguably proscribed by Rule 8.4(g), and he faces no credible threat of prosecution."

The Third Circuit found that the new Pennsylvania Rule does not prohibit the plaintiff from speaking or teaching continuing legal education seminars on controversial topics. Rather, "[t]he Rule covers only knowing or intentional harassment or discrimination against a person." Further, the court pointed to compelling evidence that the plaintiff did not face a credible threat of prosecution. The plaintiff could only point to one instance where an attorney was disciplined for discriminatory speech, and the Pennsylvania Chief Disciplinary Counsel stated that Greenberg's planned speech does not violate the rule. In his concurrence, Judge Ambro, who joined the opinion in full, noted that attorneys disciplined under the rule may later bring constitutional challenges if their First Amendment rights are infringed by enforcement efforts.

Cozen O'Connor filed an *amicus curiae* brief on behalf of the Pennsylvania Bar Association, Philadelphia Bar Association, Allegheny County Bar Association, and Interbranch Commission for Racial, Gender, and Ethnic Fairness in support of the appellants in *Greenberg*. The brief was submitted by Thomas G. Wilkinson, Deborah A. Winokur, and Daniel Q. Harrington. Wilkinson and Harrington are past chairs of the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee, and Winokur is the co-chair of the Philadelphia Bar Association Professional Responsibility Committee. All three also serve on the Philadelphia Bar Association Professional Guidance Committee. Wilkinson and Winokur are members of Cozen O'Connor's Legal Profession Services Practice Group.



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