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Lawyer Sues Penn. Ethics Authorities Over Anti-Bias Rule

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Updated: Aug. 7, 2020, 11:23 AM

- Attorney alleges rule chills his speech
- Rule 8.4(g) has faced opposition since ABA adopted it

A Pennsylvania lawyer is suing state disciplinary authorities, saying an anti-bias ethics rule scheduled to go into effect in December violates his free speech rights.

Zachary Greenberg, an attorney with the non-profit Foundation for Individual Rights in Education, filed the suit Thursday in a federal district court, seeking an injunction to block enforcement of the rule.

He alleges that Pennsylvania's Rule 8.4(g) will force him "to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice."

Greenberg says in his complaint that he "regularly speaks" at events to attorneys and educators on legal topics related to the First Amendment. According to FIRE's website, the mission of the Philadelphia-based organization founded in 1999 is "to defend and sustain the individual rights of students and faculty members at America's colleges and universities," including free speech.

But one ethics expert said there is no reason to fear discussing issues related to the First Amendment. "No lawyer has been disciplined under Model Rule 8.4(g) for simply discussing First Amendment case law," said Cozen O'Connor's [Thomas G. Wilkinson, Jr.](#) in an email. Wilkinson is a Philadelphia attorney whose practice includes professional responsibility.

In 2016, the American Bar Association adopted model rule 8.4(g), which prohibits a lawyer from conduct he or she "knows or reasonably should know" is harassment or discrimination against others in conduct related to practicing law that occurs outside the representation of a client or beyond the confines of a courtroom.

"The rule does not prohibit discussion and debate on legal issues, nor does it mandate "politically correct" viewpoints," said Wilkinson, who is the past chair of the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee and just completed service on the ABA Standing Committee on Professionalism. "Rather, it prohibits knowing harassment and discrimination that causes harm to a person in a protected category."

Mens Rea

And unlike the ABA's Model Rule, Pennsylvania's Rule 8.4(g) imposes a mens rea requirement, he said. The misconduct must be done "knowingly," Wilkinson explained. "This important distinction is ignored in the complaint," he said.

Greenberg alleges the Pennsylvania version, although not identical to the ABA's, is vague and that "the uncertainty surrounding the scope of Rule 8.4(g) will chill his speech."

He says that almost all the examples of free speech issues he uses at his talks "are considered biased, prejudiced offensive, and hateful by some members of his audience, and some members of society at large." Further, Greenberg says "every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under rule 8.4(g)."

Seven states have adopted a version of the ABA rule, most recently Pennsylvania. Several others, including Texas and Illinois, have rejected efforts to adopt it.



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The rule has faced organized opposition from some conservative religious groups and others who say it “presents an undue restriction on their First Amendment rights,” Wilkinson told Bloomberg Law in July.

Greenberg is also asking the court for a declaratory injunction that the rule violates the First and 14th Amendments. Greenberg is being represented by Adam E. Schulman of the Hamilton Lincoln Law Institute in Washington.

The case is [Greenberg v. Haggerty](#) , E.D. Pa., No. 2:20-cv-03822, 8/6/20



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