No. 22-1733

In the United States Court of Appeals for the Third Circuit

ZACHARY GREENBERG,
Plaintiff, Appellee

v.

JERRY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court *of Pennsylvania, ET AL.*
Defendants, Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:20-cv-03822

BRIEF FOR *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLANTS

Deborah Enix-Ross
President
American Bar Association
321 North Clark Street
Chicago, IL 60654
(312) 988-5000

Abraham C. Reich
Robert S. Tintner
Beth L. Weisser
Fox Rothschild, LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
(215) 299-2000

Attorneys for Amicus Curiae
American Bar Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

The American Bar Association is a not-for-profit corporation incorporated under the laws of the State of Illinois. It has no parent corporation, shareholders, subsidiaries or affiliates.

STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") is the largest voluntary association of attorneys, law students, and legal professionals in the world. Its members include lawyers in private law firms, corporations, non-profit organizations, government agencies, and prosecutors', and public defenders' offices. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2] The goals of the ABA include "[p]romoting full and equal participation in the . . . profession[ ] and the justice system by all persons, "[e]liminat[ing] bias in the legal profession and the justice system," and "[a]dvanc[ing] the Rule of Law."[3]

Since its founding in 1878, the ABA has worked to promote the competence, ethical conduct, and professionalism of lawyers as they balance their responsibilities to their clients, to the legal system, and to their own professional interests. This work has included a continuing, intensive discourse and analysis of the standards and

[1] All parties consented to this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[3] ABA Mission and Association Goals, available at https://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited September 9, 2022).

policies that should govern attorneys in their endeavors. This work resulted in the ABA's adoption of the first Canons of Professional Ethics, in 1908, and the Model Rules of Professional Conduct, in 1983. The Model Rules serve as the basis for instruction on professional responsibility in the nation's law schools. The ABA's Standing Committee on Ethics and Professional Responsibility, charged with interpreting and recommending appropriate amendments and clarifications, issues opinions interpreting the Model Rules of Professional Conduct and the Model Rules of Judicial Conduct. All U.S. jurisdictions, with some jurisdictional variances, have adopted enforceable rules of professional conduct based on the ABA's Model Rules.[4]

SUMMARY OF ARGUMENT

Pennsylvania Rule 8.4(g) (the "Rule" or "Rule 8.4(g)") is based on, but is not identical to, ABA Model Rule 8.4(g).[5] The ABA adopted its rule in 2016 to prohibit "harassment or discrimination . . . in conduct related to the practice of law," because such behavior by lawyers undermines "confidence in the legal profession and the

[4] *See* American Bar Association, Alphabetical List of Jurisdictions Adopting Model Rules, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf (last visited September 9, 2022).

[5] The full text of both rules and their comments appear in the accompanying Appendix.

legal system."[6] It undoubtedly addresses misconduct that is antithetical to the administration of justice: attorney words and actions that constitute improper discrimination or harassment. The Rule is of a piece with many garden-variety laws and rules prohibiting discriminatory or harassing actions – indeed, the rules governing the conduct of federal judges similarly prohibit "[h]arassing [b]ehavior" and "[d]iscrimination"[7] – that are commonly upheld against challenges. Model Rule 8.4(g) is no different. It reflects decades of experience among legal practitioners that invidious discrimination and harassment by attorneys (who are government-licensed actors) are deeply corrosive and undermine public confidence in the American legal system. The Rule reflects the judgment of the world's largest voluntary association of lawyers and judges that previous measures have been insufficient to root out these evils – evils which remain alarmingly frequent despite efforts to prevent them. The ABA and the Pennsylvania State Bar decided, after years of careful debate and drafting, that the bar and disciplinary authorities must make clear that discriminatory and harassing actions by lawyers are unethical. This governmental interest – of

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[6] Model Rule of Prof'l Conduct R. 8.4(g), cmt. 3.

[7] Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 4(a)(2), (3), available at: https://www.ca3.uscourts.gov/sites/ca3/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf.

preserving the integrity of the legal system by eliminating unlawful discrimination and harassment – is of the highest societal import.

Once the importance of the governmental interest and the narrow focus on practicing and highly influential governmental actors are recognized, this Court should uphold Pennsylvania Rule 8.4(g) because it does not contravene the First Amendment. There is no constitutional right to engage in discrimination or harassment in the practice of law (or elsewhere). The Supreme Court has made clear on many occasions that invidious discrimination has no constitutional value. Pennsylvania Rule 8.4(g) targets only "knowing" discrimination or harassment. The intentional conduct that violates Rule 8.4(g) will often be directed at particularly vulnerable individuals or groups, such as directing racist or sexist epithets toward others, or engaging in unwelcome, nonconsensual physical contact of a sexual nature.

To the extent the rule regulates discriminatory or harassing conduct by regulating an attorney's speech, the Pennsylvania Rule does not focus at all on the viewpoint of the lawyer who discriminates or harasses. As such, it is a content-neutral regulation of conduct – discrimination and harassment. Such regulations that incidentally also take in speech that is used toward unlawful goals – for example, criminal laws that prohibit harassment, threats, or civil rights violations – have long been upheld under the First Amendment. As the Supreme Court recently noted,

"States may regulate professional conduct, even though that conduct incidentally involves speech."[8]

The Pennsylvania Rule applies equally to all attorneys, regardless of their personal views. The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit a lawyer's speech or conduct in settings unrelated to the practice of law. For example, ABA Formal Opinion 493, interpreting the Model Rule, addresses a hypothetical involving a lawyer's expression of a controversial "point of view" during a CLE presentation and concludes such expression "that others may find . . . inaccurate, offensive, or upsetting cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g)." Accordingly, plaintiff's pre-enforcement challenge in this case based on alleged "chilling" of CLE presentations, fails – he has suffered and will suffer no injury at all. Moreover, the Rule expressly preserves the right of lawyers to engage in constitutionally protected advocacy even when acting in the practice of law. For these reasons, Greenberg's pre-enforcement, First Amendment facial challenge to the Pennsylvania Rule should be dismissed.

Discriminatory and harassing conduct by lawyers in the practice of law engenders distrust of those charged with ensuring justice and fairness. The bar and state disciplinary authorities, including State Supreme Courts, have a compelling

[8] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

interest in protecting individuals from discriminatory and harassing conduct by lawyers, and assuring the public that the legal system will not be infected by pervasive discrimination and harassment. Pennsylvania's Rule 8.4(g), like the similar ABA rule, is therefore critical to the government's interest in maintaining the public's confidence in the impartiality of the legal system and its trust in that system and the profession.

ARGUMENT

A. Pennsylvania Rule 8.4(g) Serves The Critically Important Governmental Interest Preserving the Integrity of the Legal System by Preventing Discriminatory Or Harassing Conduct By Attorneys.

For decades, the ABA has been concerned with discrimination and bias within the legal profession because such conduct undermines both the reality and the perception that justice is impartial. In 1998, the ABA House of Delegates adopted Comment [3] to Model Rule 8.4, *Misconduct*, explaining that conduct "prejudicial to the administration of justice" under paragraph (d) of Rule 8.4 would include when a lawyer "knowingly manifests by words or conduct, bias or prejudice" against certain groups of persons.[9] The Comment was a useful guide to interpretation of

[9] Comment [3] explains that a lawyer engages in "conduct prejudicial to the administration of justice," in violation of Rule 8.4(g), when a lawyer manifests bias or prejudice against certain groups of persons while in the course of representing a client, *but only* when those words or conduct are also "prejudicial to the administration of justice." (JA241-42.)

paragraph (d) but it was limited in scope and did not have the force equivalent to a Rule.[10]

In 2007, the ABA adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, which was also adopted in Pennsylvania, entitled "Bias, Prejudice and Harassment." This Rule prohibits judges from speaking or behaving in a way that manifests "bias or prejudice," and from engaging in harassment, based upon sex, race, religion and other personal characteristics. It also calls on judges to require lawyers to refrain from these activities in proceedings before the court.

In 2008, the ABA adopted as one of its four major objectives Goal III, entitled "Eliminate Bias and Enhance Diversity," with the following two objectives: (1) "Promote full and equal participation in the association, our profession, and the Justice System by all persons"; and (2) "Eliminate bias in the legal profession and the Justice System." In May 2014, the ABA's four Goal III commissions collectively urged that ABA Model Rule 8.4 be amended to expressly address bias, prejudice, and harassment, noting that Model Code of Judicial Conduct Rule 2.3 addresses these concerns in the court system but does not extend to the conduct of lawyers in other professional settings. The Commissions concluded that existing Rule 8.4(d) and Comment [3] were insufficient in breadth and force, explaining that harassment and bullying occurring in the practice of law on the basis of race and other protected

[10] *See* Model Rules, Scope cmt. [21].

categories should not be tolerated within the legal profession.[11] (JA49 at n. 3, *citing* ABA Formal Op. 493 (2020)).

When the ABA studied possible amendments to Model Rule 8.4, it was presented with evidence that discrimination and harassment in the legal system existed and would persist unless forceful measures are taken.[12] For example, in a 2015 survey undertaken by the Florida Bar, 43% of women lawyers responded that they had personally experienced gender bias in their profession, and 17% reported that they had personally experienced harassment in their legal career. In a study of

[11] Relatedly, in February 2015, the ABA House of Delegates adopted revised ABA Standards for Criminal Justice: Prosecution and Defense Function, which now include anti-bias provisions. The Standards explain that prosecutors and defense counsel should not, "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status." ABA Fourth Ed. Criminal Justice Standards for the Prosecution Function 3-1.6 (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; ABA Fourth Ed. Criminal Justice Standards for the Defense Function 4-1.6 (2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited September 9, 2022).

[12] Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity To Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. Det. Mercy L. Rev. 579, 580-82 (2018-2019)(providing anecdotal instances of harassment and discrimination including county attorney who rifled through female colleagues' gym bags and photographed their undergarments; male attorney who sent sexually explicit text message to his female clerk; former Chief Judge of the Ninth Circuit who was alleged to have engaged in sexual misconduct by 15 women; and male attorney and adjunct law professor who made unwelcome comments of a sexual nature to female law student and also exposed himself to her).

2,827 in-house and law firm lawyers, 25% of women reported sexual harassment in the workplace.[13] An FTI Consulting nationwide survey revealed that 50% of female attorneys reported that they experienced sexual harassment in their current or former employment.[14] The perception is also widespread that the legal system is tilted in favor of certain groups and against others. A 2015 report by the National Center for State Courts reported that "[b]eliefs in unequal justice are deep-seated and widespread"; 49% of respondents polled (including 79% of African-American respondents) stated that African Americans are treated worse than other groups in the justice system.[15]

In light of the evidence of the corrosive effect of discrimination, bias, and harassment in the legal system, a working group founded under the auspices of the ABA Standing Committee on Ethics and Professional Responsibility investigated for more than two years whether then-existing Model Rule 8.4 should be amended,

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[13] *See*, *e.g.*, ABA Commission on Women in the Profession and the Minority Corporate Counsel Association https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial--gender-bias-the-legal-profession (last visited Sept. 9, 2022).

[14] *See*, *e.g.*, FTI Consulting & Mine the Gap, #METOO at Work: Overall and Women by Industry Topline Report 2 (2018) https://gender.fticommunications.com/researchdetails.html (last visited Sept. 9, 2022).

[15] National Center for State Courts, State of State Courts Presentation (2015) at 6.

solicited comments from the legal community, and received extensive input on discussion drafts of a new Rule 8.4(g).[16] The Standing Committee ultimately concluded that elevating the comment to a black-letter rule made an important statement to the profession and the public that the profession could not tolerate prejudice, bias, harassment, and discrimination within its ranks because that conduct - when related to the practice of law and engaged in by lawyers - undermined the judicial system. The Rule also places lawyers on notice that refraining from such misconduct is more than an illustration in a comment, but rather a specific requirement.[17]

In August 2016, following the recommendation of the Standing Committee, the ABA House of Delegates adopted Model Rule 8.4(g).[18] Model Rule 8.4(g) makes clear that it is professional misconduct for a lawyer to

> engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

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[16] ABA Standing Comm. on Ethics & Prof'l Responsibility, Report to the House of Delegates: Rev. Res. 109 (Aug. 2016)(JA244-261)[ABA Report], at 3-4; Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 211-14 (2017).

[17] *Id.*at 4.

[18] *See* ABA Report (JA244-261).

The Model Rule also explains that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16" and "does not preclude legitimate advice or advocacy consistent with these Rules."

More than forty jurisdictions, including Pennsylvania, have antidiscrimination provisions in their rules of professional conduct.[19] Pennsylvania Rule 8.4(g) provides that it is misconduct for a lawyer

> in the practice of law, knowingly [to] 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.

Like the Model Rule, the Pennsylvania rule also explains that it does not limit a lawyer's ability to withdraw or "preclude advice or advocacy consistent with these Rules."

Several other states have adopted versions of Rule 8.4(g) since 2016,[20] and other states are considering either adopting such provisions for the first time or

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[19] 49 Pa.B. 4941 n. 1 (Aug. 31, 2019); JA251. *See*, *e.g.*, New Jersey Rule of Prof'l Conduct 8.4(g) and Delaware Lawyers' Rule of Prof'l Conduct 8.4, cmt. [3].

[20] JA251. These jurisdictions include Colorado, Connecticut, Indiana, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, New York, Vermont, U.S. Virgin Islands, American Samoa and the Northern Mariana Islands. California adopted a rule prohibiting a lawyer from unlawful harassment or discrimination in connection with the representation of a client or the operation of a law firm. CA R. Prof. Conduct 8.4.1 (2018). Only a handful of states have no provisions in their ethics rules that explicitly address harassment or discrimination within the legal profession, although they may address similar conduct through their rules against

amending their existing antidiscrimination rules to conform more closely to the Model Rule.[21]

These rules are all directed at the same compelling interest – maintaining the integrity of the judicial system by curtailing discrimination, bias, and harassment within it. [22]

There can be no doubt that the legal profession and the state authorities that regulate it have a compelling interest in protecting the integrity of the legal system and prohibiting discrimination and harassment related to the practice of law. They

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misconduct by attorneys, as was the case with Comment [3] to the ABA's Model Rule before its amendment to include Rule 8.4(g).

[21] On June 10, 2022, New York's four Appellate Division departments issued a joint order immediately adopting a Rule 8.4(g) broadly prohibiting discrimination and harassment related to the practice of law. In June 2021, after an extensive deliberative process, the Connecticut courts adopted Rule 8.4(7), prohibiting "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race [and other listed characteristics]." The supporting commentary confirms that "[c]onduct related to the practice of law under the rule includes participating in bar association, business or professional activities or events in connection with the practice of law." In addition, the Massachusetts Supreme Judicial Court approved an amended Rule 4.4(a), effective October 1, 2022, "to prohibit lawyers in representing a client to harass others or to engage in conduct that manifests bias or prejudice against a person based on race, sex [and other identified characteristics]."

[22] Model Rule 8.4(g) follows the approach of many anti-discrimination laws and prohibits certain forms of discrimination or harassment that our legal system has deemed invidious in many contexts, such as discrimination based on race, sex, religion, national origin, and sexual orientation. It retained the traits already protected under former Comment [3] to Rule 8.4(d), and added "ethnicity," "gender identity," and "marital status."

have a profound interest in eradicating invidious discrimination – especially discrimination that, in the past, the legal profession itself has perpetuated. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Local 28, Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 480 (1986). The perception – and, unfortunately, sometimes, the reality – that lawyers use their professional positions to perpetuate discrimination and harassment has a deeply corrosive effect on public confidence in the justice system.

Even today, after anti-discrimination laws have been in place across the country for more than a half-century, discrimination and harassment remain a widespread problem in the legal system. Such widespread perceptions that the legal profession is pervasively tainted by discrimination and harassment threaten to undermine the legitimacy of the American system of justice.[23] When the ABA adopted Model Rule 8.4(g) and when the Pennsylvania Supreme Court adopted its own Rule 8.4(g), they acted to restore that legitimacy by assuring those who need

[23] Roberta D. Liebenberg & Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice* 8 (Am. Bar. Ass'n & Am. Law. Media Intel., 2019) (unacceptably high percentage of women in the profession have reported being harassed or discriminated against in the workplace).
https://www.americanbar.org/groups/diversity/women/initiatives_awards/long-term-careers-for-women/walking-out-the-door/

the assistance of lawyers that they will not be subjected to discrimination or harassment.[24]

At the same time, neither the Model Rule nor Pennsylvania's Rule prevents a lawyer from freely expressing opinions and ideas, nor do they limit a lawyer's speech or conduct in settings unrelated to the practice of law. To the contrary, the Model Rule specifically protects the right of a lawyer to offer "legitimate advice or advocacy consistent with these Rules." Pennsylvania's Rule has a similar effect, shielding "advice or advocacy consistent with these Rules." The Rules therefore make clear that they are not intended to curtail a lawyer's right to speak or write on any topic, nor to dampen a lawyer's ability to advance a client's interests within the well-understood scope of legitimate professional activity that has been settled for years by the Model Rules and similar state rules.

In this respect, there is no reasonable basis to contend that Greenberg's proposed continuing legal education (CLE) remarks would run afoul of Pennsylvania Rule 8.4(g). Greenberg presents CLE programs focusing on First Amendment topics and uses language that he claims may be perceived by some as

[24] *See* 51 Pa.B. 5190 (Jul. 26, 2021). Pennsylvania is a Model Rule state that has historically supported adoption of Model Rule amendments "to promote consistency in application and interpretation of the rules among jurisdictions[.]" *See* 49 Pa.B. 4941 (Aug. 31, 2019).

objectionable, including epithets, to discuss cases and provide background for the discussion. (JA149-50.)

In July 2020, the ABA released Formal Opinion 493: *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), providing extensive guidance on the Model Rule that directly addresses its application in CLE settings. The Opinion summarized the background of the Model Rule and illustrated a scenario strikingly similar to that presented here in Formal Opinion 493 at 12-13:

> A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using race-conscious process in admitting African-American students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel. Would the lawyer's remarks violate Rule 8.4(g)?
>
> No. While a CLE program would [constitute] "conduct related to the practice of law," the viewpoint expressed by the lawyer would not violate Rule 8.4(g). Specifically, the lawyer's remarks, without more, would not constitute "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of … race." A general point of view, even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of 'harm' required for a violation.

In another illustration, the Formal Opinion explained that a lawyer who is a member of a religious legal organization advocating, on religious grounds, for the ability of private employers to terminate or refuse to employ persons based on their sexual orientation or gender identity also does not violate the rule. *Id.* at 13.

Although ABA Formal Opinion 493 interpreting the Model Rule was brought to the district court's attention, the court made no reference to the Formal Opinion, nor did the court interpret the scope or application of Pennsylvania's similar Rule in a manner consistent with that guidance.

Plaintiff's allegations of a subjective chill, based on self-censorship, also fail to account for the fact that twenty-two states and the District of Columbia had already adopted anti-discrimination and/or anti-harassment provisions in the black letter of their rules of professional conduct before the ABA adopted Model Rule 8.4(g) and had not experienced a significant "surge" of complaints based on these provisions.[25]

Rule 8.4(g) as adopted by the Pennsylvania Supreme Court is not identical to the Model Rule (a departure that is not unusual in state courts' adoption of rules of professional conduct),[26] but the concerns to which the two Rules are addressed are

[25] *See* ABA Report, at 5 n. 11 (JA251). Neither the rules nor the associated comments have been struck down on First Amendment grounds. Further, note 15 illustrates conduct occurring under these rules "appropriate[ly]" resulting in discipline, such as sexually harassing four female clients and one female employee; texting a victim of domestic abuse with unwelcome sexual advances, making unwelcome comments about female students' physical appearances and sexual touching by an adjunct professor, communicating with a judge ex parte to deride an opponent's immigration status; and inferring in a custody hearing that a wife was an unfit mother because she was seen in the presence of a "black male."

[26] Specifically, Pennsylvania's amended rule formulation (a) incorporates a more stringent mens rea requirement ("knowingly" as opposed to the ABA's "know or reasonably should know") than the Model Rule; (b) limits its applicability to

the same. Despite the differences in the Rules' wording, both reflect the fundamental judgment that invidious discrimination has no place in lawyers' professional conduct. At the same time, both Rules also recognize that lawyers have the professional obligation to advance their clients' interests within the bounds of the law and rules of professional conduct, as well as the constitutional right to speak and write to express their views on issues arising within the legal practice. Both Rules therefore preserve lawyers' ability to do so by providing a safe harbor for advice or advocacy, and neither Rule changes the circumstances under which a lawyer may accept, decline or withdraw from a representation.[27] (JA260) In addition, both Rules have a knowledge or mens rea requirement, which serves to avoid discipline for inadvertent conduct.[28] Both Rules thus seek to advance the legal profession's – and

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"conduct constituting harassment or discrimination" as defined in the supporting Comments [4] and [5]; and (c) applies to conduct "in the practice of law" rather than the Model Rule's somewhat more expansive "conduct related to the practice of law." *See* 51 Pa.B. 5190. The practice of law includes interactions with others "in connection with representation of a client," "operating or managing a law firm," and participation in a number of bar-related activities, but not any communication "outside th[os]e contexts."

[27] JA260.

[28] The Pennsylvania Rule is more narrowly drafted in this respect in requiring that the lawyer "knows" that conduct is harassing or discriminatory than the Model Rule which covers conduct that a lawyer "knows or reasonably should know" is harassing or discriminatory. Pennsylvania's definition of "knowledge" as set forth in Rule 1.0(f) denotes "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Pennsylvania's Rule, therefore applies to even less conduct than the Model Rule. (JA253-54.)

the State's – compelling interest in protecting the integrity of the legal system and curtailing invidious discrimination, bias, and prejudice within the legal system while not infringing on lawyers' (and their clients') legitimate interests, constitutional rights, and professional obligations.

B. Pennsylvania Rule 8.4(g) Does Not Run Afoul Of The First Amendment, Because It Is Narrowly Drawn To Reach Only Discriminating Or Harassing Conduct.

Pennsylvania Rule 8.4(g) is entirely consistent with the First Amendment. It is a content-neutral rule that, like many common laws and regulations, targets only harassment and discrimination. To the extent the rule regulates discriminatory or harassing conduct by regulating an attorney's speech, it does so in a manner that is content neutral. As the Supreme Court recently explained, a rule does not "inherently trigger[ ] heightened First Amendment concern" merely because it requires "*any* examination of speech or expression"; rather, "it is regulations that discriminate based on 'the topic discussed or the idea or message expressed' that are content based." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022).

The district court stated that it "fully commends and supports the aims and intentions of the [ABA] in its creation of ABA Model Rule 8.4(g) as a statement of an ideal and as a written conviction that we must be constantly vigilant and work towards eliminating discrimination and harassment in the practice of law." (JA47.)

The court also recognized that the Pennsylvania Supreme Court has a legitimate interest in the "administration of justice" but concluded that Pennsylvania Rule 8.4(g) unconstitutionally regulated attorney speech in non-judicial fora and therefore does not warrant deferential review. (JA93-107.)

The district court held that the Pennsylvania Rule regulates speech and not "merely conduct." (JA90.) Discriminatory conduct – such as sexual harassment, or the use of racial epithets – may take the *form* of speech, but the fact that it does so does not render it constitutionally immune from regulation.[29] As the Supreme Court has made clear, "States may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). A contrary rule would disable the government from prohibiting securities fraud, mail fraud, and conspiracy in many circumstances. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). If

[29] To illustrate, the Minnesota Supreme Court disciplined a lawyer under its state's Rule 8.4(g) after she made harassing personal attacks and discriminatory statements based on race and religion in eleven pleadings in five distinct bankruptcy matters. *In re Nett*, 839 N.W.2d 716, 729 (Minn. 2013); *see also In re Woroby*, 779 N.W.2d 825 (Minn. 2010)(harassment of former client on the basis of religion and national origin). The Minnesota rule expressly prohibits harassment "in connection with that lawyer's professional activities."

discrimination that took the form of speech were constitutionally shielded from regulation, then federal and state governments would be largely powerless to address sexual and racial (and other) harassment in the workplace, in education settings, and elsewhere, enfeebling landmark laws such as Title VII and Title IX.

That Pennsylvania Rule 8.4(g) has an incidental burden on speech is not unusual – indeed, various ABA Model Rules and state-adopted rules based on the Model Rules impose limitations on lawyer conduct that takes the form of speech in order to protect the integrity of, the fairness of, and public confidence in the legal system, just as Rule 8.4(g) does. Other Model Rules that have also been adopted in Pennsylvania that limit attorney speech include Rule 1.6 (client confidentiality); Rule 3.3 (lawyers cannot make false statements of fact or law to a tribunal); Rule 3.5 (prohibiting a lawyer from communicating ex parte with a judge, juror, prospective juror or other official); Rule 3.6 (restricting a lawyer's ability to comment publicly about an investigation or litigation matter when the comments "have a substantial likelihood of materially prejudicing and adjudicative proceeding"); Rule 4.1 (prohibiting a lawyer from knowingly making a false statement of material fact or law to a third person); Rule 4.4 (lawyers cannot use means that primarily embarrass, delay or burden a third person) and Rule 7.1 (limiting communications about a lawyer or a lawyer's services to those that are truthful and not misleading). Courts have consistently upheld these types of

professional conduct rules – which are similar to Rule 8.4(g) – against First Amendment challenges.[30] *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (rejecting challenge to state's prohibition against in-person lawyer solicitations and stressing that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

It is also well settled that state courts have a particularly compelling interest in regulating the conduct of lawyers, who by virtue of their profession play a fundamental role in ensuring the integrity of the legal system and ensuring that it treats all impartially. The Model Rule and the Pennsylvania Rule are both directed toward discrimination and harassment that detrimentally affect the legal system. As the Supreme Court has noted, "[e]ven in an area far from the courtroom[,]" the First Amendment rights of lawyers are not protected the same as those engaged in other businesses.[31] The Pennsylvania Supreme Court has the authority to regulate lawyer conduct to protect the integrity and fairness of the Commonwealth's legal system.

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[30] ABA Formal Op. 493, at 9.

[31] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991). *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995)("States have a compelling interest in the practice of professions within their boundaries[.]"); *Orhalik v. Ohio State Bar Ass'n*, 501 U.S. 1030, 1073 (1991)("[T]he State bears special responsibility for maintaining standards among members of the licensed professions.").

When addressing a facial, overbreadth challenge to a law or regulation, like Greenberg's challenge here, a court must consider "the number of valid applications' of the statute," "the historic or likely frequency of conceivably impermissible applications," "the nature of the [government's] interest underlying the regulation," and "the nature of the activity or conduct sought to be regulated." *Free Speech Coal., Inc. v. Atty Gen. of the United States,* 677 F.3d 519, at 537–38 (3d Cir. 2012) (quoting *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 226 (3d Cir. 2004)). The Supreme Court has explained that, even in the First Amendment setting, where restrictions on pre-enforcement challenges are somewhat more relaxed, the courts "must be careful not to go beyond [a provision's] facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Where, as here, the state courts have "had no occasion to construe the [provision] in the context of actual disputes … or to accord the [provision] a limiting construction to avoid constitutional questions," the courts should exercise restraint in sustaining constitutional challenges based on "speculation." *Id.*

Greenberg has offered no reason to invalidate Pennsylvania Rule 8.4 in its entirety on a pre-enforcement, facial challenge. As explained above, it is highly improbable that Greenberg's conduct violates the Rule, and, in fact, there has been no such finding against him. His speculative contention that he may one day face

discipline for unspecified speech fails to establish the facial invalidity of the Rule in this kind of pre-enforcement challenge.[32]

Greenberg asserts that Pennsylvania Rule 8.4(g) is facially invalid because it is "overbroad in relation to any legitimate sweep[.]" (JA179.) But simply because a lawyer can conjure up some circumstances where protected speech could be subject to discipline is not sufficient to mount a successful facial challenge to the Rule. A plaintiff must carry the burden of establishing that invalid application of the Pennsylvania Rule makes it substantially overbroad. That is because the overbreadth doctrine "seeks to strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292 (2008). On one side of the scale, "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Id.* On the other side of the scale, "invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects." *Id.* To "maintain an appropriate balance," the

[32] Recently, a Connecticut District Court dismissed for lack of standing, a pre-enforcement challenge to Connecticut's version of Model Rule 8.4 because the plaintiffs failed to demonstrate a "real and imminent fear" that their rights were chilled. *Cerame v. Bowler, Civ.,* 3:21-CV-1502 , 2022 WL 3716422 (D. Conn. Aug. 29, 2022) at 18-21. Although the ABA does not take a position on this jurisdictional issue here, the ABA recommends its careful consideration to this court in light of the plaintiff's specific allegations and the amended content of Pennsylvania's Rule and Comments.

Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.*

There can be no doubt that Pennsylvania Rule 8.4(g) has many valid applications. There is no legitimate reason for an attorney to knowingly engage in harassment or discrimination in conduct related to the practice of law, whether taking a deposition or supervising an associate. The same is true of an attorney while presenting or attending a CLE program, participation in which is required of lawyers by many states, including Pennsylvania. Similarly, no lawyer has a First Amendment right to harass other lawyers, clients or participants in court proceedings or in CLE programs on the basis of their sex, race, religion or other protected characteristics. Rule 8.4(g) does not demand that lawyer speech be polite, politically acceptable or, as the district court suggested, "within the bounds of permissible cultural parlance." (JA41.) Rather, the Rule is a reasonable, limited, and necessary addition to the Pennsylvania Rules that makes clear that harassment or discrimination is misconduct, not just in the courtroom but also in other law practice settings.

Nor is Rule 8.4(g) likely to chill protected lawyer speech. Chill arises from realistic possibilities of enforcement based on reasonable interpretations of a law or

regulation, not on potential misapplications.[33] As explained above, in light of formal ABA guidance, there is no reason to expect that Rule 8.4(g) would be triggered by Greenberg's contemplated CLE presentations. As ABA Formal Opinion 493 explained, a lawyer's remarks as a CLE program, "without more, would not constitute 'conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race.' A general point even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of 'harm' required for a violation." Greenberg's proposed CLE presentations – which, he submits, touch on contentious areas of the law so as to provide attendees with a complete and nuanced understanding of legal doctrine – appear to fall squarely outside the bounds of the Rule. Courts and disciplinary authorities are fully capable of discerning the difference between educational programs that involve and discuss case law bearing on race, sex, religion, and other provocative topics, which do not violate the Rule, and outright targeted harassment or discrimination, which do. Moreover, in the unlikely event that disciplinary proceedings would be brought against any attorney in a borderline case – which Greenberg's is not – Rule 8.4(g) should be interpreted

[33] The Model Rules are "rules of reason" that must be interpreted "with reference to the purposes of legal representation and of the law itself." Pa.RPC, Preamble ¶ 14.

in light of the well-established doctrine of constitutional avoidance to prevent any constitutional problem.[34] In short, there is no need for the Court to invalidate Pennsylvania Rule 8.4(g) on its face, before it has even been applied to any conduct that even arguably is protected speech, and any constitutional concerns raised by an unreasonable enforcement of the Rule can be addressed on an as-applied basis.

CONCLUSION

Rule 8.4(g) is narrowly tailored and consistent with other rules of professional conduct which may have the incidental effect of restricting lawyer speech under certain circumstances. As such, the preliminary injunction entered by the district court should be reversed.

Respectfully submitted,

/s Abraham C. Reich

Abraham C. Reich
Robert S. Tintner
Beth L. Weisser
Fox Rothschild, LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
(215) 299-2000

[34] *E.g.*, *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979)(statutes "ought not be construed to violate the Constitution if any other possible construction remains available"); s*ee also* Robert N. Weiner, *Nothing to See Here: Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 Harv. J.L. & Public Policy 125 (2018) at 134 (explaining that there are "well-established pathways" to deal with transgressions against First Amendment rights, including First Amendment challenges to unlawful applications of the Rule, and the defense against unwarranted disciplinary charges).

Deborah Enix-Ross
President
American Bar Association
321 North Clark Street
Chicago, IL 60654
(312) 988-5000

Attorneys for Amicus Curiae
American Bar Association

RULES ADDENDUM

ATTORNEY RULES OF PROFESSIONAL CONDUCT

American Bar Association Rules of Professional Conduct
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * * *

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. 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 legitimate advice or advocacy consistent with these Rules.

Comment:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect

reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Pennsylvania Rules of Professional Conduct
Rule 8.4 Misconduct

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.

Comment:

* * * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes: (i) 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; (ii) operating or managing a law firm or law practice; or (iii) 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 (i)-(iii).

[4] ''Harassment'' means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). ''Harassment'' includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[5] ‘‘Discrimination’’ means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

COMBINED CERTIFICATIONS

1. This brief complies with the type-volume limitation of FRAP 29(a)(5) because this brief contains 6,392 words, excluding the parts of the brief exempted by FRAP 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. Abraham C. Reich, Robert S. Tintner and Beth L. Weisser are all members of the bar of this Court.

3. The text of the electronic brief is identical to the text in the paper copies.

4. A virus detection program, Crowdstrike Falcon, Version 6.16.13008, has been run on the electronic version of this brief, and no virus has been detected.

5. By filing this brief, I will be causing all counsel of record to be served electronically through this Court's electronic filing system.

Dated: September 13, 2022

/s/ Abraham C. Reich
Pa. ID 20060

CERTIFICATE OF SERVICE

The undersigned certifies that all parties required to be served have been served. Further, the foregoing Brief of Amicus Curiae American Bar Association was filed with the Clerk and served this date on counsel of record for all parties through the Court's electronic filing system and via email as follows:

Adam E. Schulman, Esquire
Hamilton Lincoln Law Institute
1629 K Street NW, Suite 300
Washington, DC 20006
Adam.schulman@hlli.org
(610) 457-0856

Attorney for Plaintiff-Appellee
ZACHARY GREENBERG

Lisa S. Blatt
Amy Mason Saharia
Aaron Z. Roper
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
ASaharia@wc.com
(202) 434-5847

Attorneys for Defendants-Appellants
JERRY M. LEHOCKY, ET AL.

/s/ Abraham C. Reich
Abraham C. Reich

Dated: September 13, 2022