NO. 22-1733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ZACHARY GREENBERG,
Appellee

v.

JERRY M. LEHOCKY, *et al*.,

Appellants

On Appeal from an Order Granting Summary Judgment
In Civil Action 2:20-cv-03822-CFK in the United States District Court
for the Eastern District of Pennsylvania (Honorable Chad F. Kennedy)

AMICUS BRIEF OF PATRICK G. GOULD AS *AMICUS CURIAE* SUPPORTING APPELLEE AND SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DETERMINATION OF SUMMARY JUDGMENT IN FAVOR OF APPELLEE

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Table of Contents

Table of Authorities

Constitutional Provisions

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus is a Professor of Law with the Handong International School of Law in Pohang, Gyeongbuk, South Korea, and supports efforts to advance correct interpretation of important constitutional rights along with preservation of a form of government dictated by the Constitution of the United States of America.

Amicus states that in accordance with L.A.R.29.1(a), that Amicus has considered the briefs of both the Appellee and Appellants in this matter, and has written the amicus brief with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief.

Amicus states that in accordance with L.A.R. 32.1(d), that Amicus formatted the brief in PDF format, and that the entire brief is contained in one electronic file.

Amicus states that in accordance with L.A.R.29.1(a), F.R.A.P. 29(4) that this brief was not authored in whole or in part by counsel, and no person or entity other than Amicus made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Rule 8.4g is not an innocent experiment in civility. Rather, it signifies that Attorneys must now exhibit forced compliance with a corporate goal of an Illinois not-for-profit corporation, in replacement of every Commonwealth Attorney's duty to protect and defend the Constitution of the United States of America.

Documents generated by the ABA indicate their awareness that Rule 8.4g lacks proper constitutional justification, and that when paired with State-based application and enforcement, the Rule is constitutionally void for vagueness, unconstitutionally void for overbreadth, and entails an abrogation of the Free Speech Rights of Attorneys under the First Amendment to the Constitutional of the United States of America.

In October, 2015, the Standing Committee on Professional Disciple of the ABA took a strong evidence-based stance to **OPPOSE** Rule 8.4g. Their strong opposition to the Rule was based upon their own independent research and analysis which found pervasive constitutional fissures in the Rule.

In March, 2016, shortly before the Rule was slated to be voted upon by the ABA's House of Delegates, the Standing Committee on Professional Disciple still held to their conviction that the Rule was pervasively unconstitutional.

However, in March, 2016, the Discipline Committee approved Rule 8.4g.

How did the members of the Discipline Committee reconcile their knowledge of the rife unconstitutionality of the Rule with their sudden about-face approval of the Rule?

They did not.

Rather, they simply elevated the ABA's Corporate Goal III, upon which Rule 8.4g is premised, above the Constitution of the United States of America. Shortly after their unfortunate reversal from strong evidence-based opposition of the Rule, to sudden approval of the Rule, Rule 8.4g was given wider corporate approvable through a favorable vote of the ABA's House of Delegates.

The ABA's awareness of the pervasive constitution faults of Rule 8.4g pre-dates their decision to elevate Rule 8.4g above the Constitution. Their rationale in promoting application and enforcement of Rule 8.4g in all of the States is based upon the ABA's desire to promote their own Corporate Goal III in replacement of vital constitutional protections.

The Rule is an impermissible prior restraint on the First Amendment Constitutional Rights of every Attorney in Pennsylvania, now, and into the future. If implemented in Pennsylvania, Pennsylvania's Attorneys will stumble on a daily basis in order to conform their thoughts and speech to comport with Corporate Goal III of the ABA, instead of unilaterally focusing their efforts upon full and competent representation of their Commonwealth clients.

The vital governmental structures of both Federal and State Governments will suffer as well. Every single Federal and State Government Official holding a bar card, will struggle under the continual fear of having their bar card stripped from them for words they say or write in furtherance of their governmental duties to the Commonwealth and its People.

This court must ratify the decision of the lower court.

ARGUMENT

I. THE STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE OF THE ABA APPROVED RULE 8.4g IN SPITE OF TWO REPORTS WHICH ELUCIDATED THE RULE'S OBVIOUS CONSTITUTIONAL FISSURES, IN ORDER TO PROMOTE CORPORATE GOAL III OF THE ABA FROM WHICH RULE 8.4g IS DERIVED, THUS EVIDENCING THE ABA's DISREGARD OF ATTORNEY CONSTITUTIONAL RIGHTS IN FAVOR OF THE PROMOTION OF A CORPORATE GOAL OF THE ABA, AND THUS EVIDENCING THAT RULE 8.4g IS CONSTITUTIONALLY INVALID.

In an October 8, 2015 report from the ABA Standing Committee on Professional Discipline to the ABA Standing Committee on Ethics, the Discipline Committee took a strong stance in OPPOSITION to Rule 8.4g by stating then that the Discipline Committee "opposes the creation of such a black letter provision." (Appendix A, page 2).

The Discipline Committee elucidated that their staunch stand against the Rule centered around numerous constitutional faults. More specifically, their October 8, 2015 report elaborated constitutional problems concerning a lack of a suitable

governmental justification for 8.4g, vagueness and overbreadth "constitutional issues" (Appendix A, page 8), and "infringement upon lawyers' exercise of their First Amendment rights." (Appendix A, page 4).

In their follow-up report to their October 8, 2015 report, which they published on March 10, 2016, the Discipline Committee chronicled that the same pervasive constitutional fissures which existed in the Rule at the time of their October 8, 2015 report had not been ameliorated in any manner in the interim period between October 8, 2015 and March 10, 2016. In other words, both Disciple Committee reports provide identical and penchant evidence-based elucidation of the Rule's constitutional abrogations.

At the time of the Discipline Committee's March, 2016 report, Rule 8.4g was scheduled to be voted upon by the wider corporate body of the ABA at the ABA's next corporate meeting.

And, in an unfortunate about-face which is untenable to contemplate, the Disciple Committee decided to fully invalidate their fact and law-based constitutional opposition to Rule 8.4g, to instead approve of the Rule in their March 10, 2016 report.

In other words, at the time of their approval of Rule 8.4g on March 10, 2016, and with the wider corporate vote on Rule 8.4g clearly visible on the horizon, the

Discipline Committee voted to approve a Rule which they professionally considered to be facially unconstitutional.

In their March 10, 2016 report on Rule 8.4g, there was absolutely no change in the Discipline Committee's detailed evaluation that the Rule was constitutionally impermissible for lack of a suitable rationale, for vagueness, for overbreadth, and due to abrogation of First Amendment rights. In other words, the bulk of the March 10, 2016 Discipline Committee Report tracks squarely with the Discipline Committee's oppositional report to Rule 8.4g from October 8, 2015.

Fortunately, the Discipline Committee revealed the rationale for their sudden and shocking approval of Rule 8.4g in the same paragraph of their March 10, 2016 report wherein they removed their opposition to the Rule, stating, "The development of appropriately tailored language to add to the black letter of Model Rule 8.4 would be consistent with ABA Goal III…" (Appendix B, page 2),

Thus, the ABA's own Standing Committee on Discipline elevated Corporate Goal III fully above the Constitution of the United States of America, while employing Corporate Goal III of the ABA as pretextual leverage for implementing what they clearly understood was an unconstitutional Rule. In spite of the rife unconstitutionality of Rule 8.4g, the Discipline Committee decided that Corporate Goal III of the ABA would unceremoniously trump invaluable constitutional

protections of Attorneys, and that Goal III would serve as the lone justifying rationale for State-based application of Rule 8.4g.

Importantly, in their March, 2016 report, the Discipline Committee admitted that there was absolutely no justification for the Rule, when they wrote regarding lack of a need for the Rule, that, "The Discipline Committee is not aware, from its own extensive research or from the Ethics Committee's Memorandum, of any reliable information indicating that there exists a systemic problem in this regard that black letter language is needed to address" (Appendix B, page 2). Additionally, they stated "a very small percentage of the approximately 1.4 million lawyers in this country engage in misconduct necessitating discipline" (Appendix B, page 2), while observing that, "the Model Rules of Professional Conduct and existing Comments adequately address the type of conduct at issue…" (Appendix A, page 3). These passages are vitally important, because they point to the fact that the ABA was fully aware of the fact that the supposed rational for the Rule --- to ameliorate a problem with Attorneys throughout the nation --- was false. The Discipline Committee had looked for evidence of a rationale upon which the Rule would survive constitutional muster, and they found none. The Discipline Committee even asked the Ethics Committee for some kind of evidence-based rationale for the Rule, and they (the Discipline Committee) received no such evidence from the Ethics Committee.

A minute percentage of Attorneys require guidance in their Lawyering skills, but Rule 8.4g is not intended for those minute instances, because other Rules suffice which address such rare instances where guidance is needed. Further, Rule 8.4g would entail a night-and-day constant prior restrain on every single Attorney's speech.

The omnibus and preventive nature of Rule 8.4g is specious, because, forsooth, there is nothing to prevent! There is nothing to prevent from a statistical standpoint. There is nothing to prevent from an evidence-based standpoint. There is nothing to prevent from a legal standpoint. And there is nothing to prevent from a practical standpoint. Rule 8.4g is totally lacking in justification from any standpoint.

A corporate goal by a not-for-profit corporation in Illinois cannot serve as the lone justifying premise to destroy the Constitutional Rights of Attorneys throughout the Commonwealth of Pennsylvania.

Rule 8.4g must be ruled to be unconstitutional for lack of a valid justifying rationale, for vagueness, for overbreadth, and due to its restriction on free speech.

II. EFFECTIVE LAWYERING BY ATTORNEYS IN PENNSYLVANIA TO PROTECT AND DEFEND THE CONSTITUTIONAL RIGHTS OF THE PEOPLE OF THE COMMONWEALTH WILL CEASE, AND BE REPLACED WITH FEARFUL OBEISANCE TO FORCED COMPLIANCE WITH THE ABA's MERCURIAL AND EVER-EXPANDING CORPORATE GOAL III AGENDA, THUS SILENCING THE SPEECH OF ATTORNEYS AND COMPROMISING THE CONSTITUTIONAL RIGHTS OF PEOPLE THROUGHOUT THE COMMONWEALTH, BY REPLACING THE DUTY OF ATTORNEYS

TO PROTECT THE CONSTITUTION, WITH A REQUIREMENT THAT COMMONWEALTH ATTORNEYS MUST FEARFULLY COMPLY WITH THE ABA's CORPORATE GOAL III.

What is the value of an Attorney's representational duty, when they have no bar card through which to provide representation?

Not much.

An Attorney's representational duty without a bar card is effectively inert and valueless, to themselves, their potential clients, and to the Commonwealth in general. Yet, in order to protect their bar cards (and their careers) which will allow them to enact valuable duties on behalf of the People of Pennsylvania, all Commonwealth Attorneys will be forced through the coercive penalty-based regime imposed under Rule 8.4g, to sacrifice their full efforts at client representation, and instead focus first and foremost at displaying thought and speech-based obeisance to the mercurial predilections imposed by Rule 8.4g.

If Rule 8.4g is allowed in Pennsylvania, the purpose of the Office of Attorney to protect and defend the Constitution will effectively cease, to be replaced with a duty of adherence to the ABA's fiat on free speech. The inherent vagueness of the Rule, will mean that Attorneys will run far away from their normal thought and speech, in order to reach speech code areas that they ascertain are relatively safe from censure. The inherent overbreadth of the Rule, will mean that Attorneys will have trouble

engaging in a conversation over coffee, for fear that anything they say at any point throughout a day might be used as fodder under Rule 8.4g to destroy their careers.

State-based application of Rule 8.4g will initiate a State-wide chilling effect on the ability of the noble Attorneys of Pennsylvania to provide needed counsel, advice, and comfort to the good citizens of the State of Pennsylvania, because at every moment each Pennsylvania Attorney will fear that anything they utter or write will subject them to loss of their bar card pursuant to the dictates of Corporate Goal III of the American Bar Association.

Rule 8.4g is an abrogation of vital Constitutional Rights of Pennsylvania Attorneys. If implemented in Pennsylvania, the entire Commonwealth will suffer because Attorneys will be hindered from supporting and defending the Constitutional Rights of the People, due to fear of losing their bar cards in furtherance of their duties.

The result will be that Commonwealth Citizens wishing to forward sensitive and noble claims, will nevertheless find themselves bereft of competent representation. And a client that is fortunate enough to secure representation, will likely find that their Attorney is stilted and mechanical in their presentation style, and does not evince their normal array of intricate persuasive techniques necessary for fervent and effective representation, due only to their (the Attorney's) pervasive and ever-present fear of unconstitutional reprisal pursuant to Rule 8.4g.

Similarly, it bears noting that some Attorneys in Pennsylvania sit on the Federal Bench. Rule 8.4g strikes a sour note indeed when one considers that an anonymous complaint lodged against Attorneys sitting on the Federal Bench, would, pursuant to rule-based necessity, activate the considerable machinery of the State regulatory commission directly against such Federal Judges.

In other words, if Rule 8.4g were to be validated as constitutional, the State of Pennsylvania would be handed the power to unilaterally strip Pennsylvania's Federal Judges of their duly earned bar cards, merely upon an anonymous complaint by a nameless, random, overly sensitive person who might potentially take umbrage at anything that a Federal Judge in Pennsylvania might say or write. There is no comfort in contemplating that such a ruling by the State would not be based upon constitutional principles and requirements, but rather upon Corporate Goal III of a not-for-profit corporation in Illinois.

Members of Congress from Pennsylvania holding bar cards, will not be immune from the Rule. Members of the Pennsylvania Legislature holding bar cards, will not be immune from the Rule. Members of the Federal Executive Branch from Pennsylvania holding bar cards, will not be immune from the Rule. Members of Pennsylvania's Executive Branch holding bar cards, will not be immune from the Rule. Rule 8.4g of the ABA, a not-for-profit corporation in Illinois, will reach its ominous hand into every nook and cranny of the legislative, executive, and judicial

branches of Federal and State Government in Pennsylvania. All Government Officials holding Pennsylvania bar cards, will suffer chilled speech while enacting their governmental duties. And any anonymous person, may easily initiate the machinery of the State to punish such Government Officials for their freedom of speech with the mere click of a "Submit" button on their computer.

In myriad ways, unnoticeable and untraceable, government of the people, by the people and for the people, will effectively perish in Pennsylvania, because Government Officials holding bar cards will silently confine their speech to the boundaries imposed under the ABA's Corporate Goal III fiat, instead of meeting the needs of the People of the Commonwealth through robust and open discourse and fruitful evaluative discussion.

In addition, complaints against Attorneys may be initiated so easily, that fraudulent complaints will likely be filed in order to harass and intimidate Attorneys.

Further, the hair-trigger sensitivity of the 'woke' culture, the context of intersectionality, the pressures of the 'cancel' culture, the doctrine of micro-aggressions, the concept of implied bias, the eventual reality of additional restrictive speech categories which will be added to the Rule, and the probability of more ABA Corporate Goals to intensify rigid application of the Rule, all go to support the observation that in the not-too-distant future, no thought or statement by any Attorney in Pennsylvania will be impervious to application of the Rule and its

speech-restrictive penalty regime. The speech of Attorneys throughout the Commonwealth will first be chilled, and then frozen, due to the necessity of their forced compliance with Corporate Goal III of the ABA. Noble Attorneys throughout the Commonwealth will focus primarily on preventing unconstitutional deprivation of their bar cards, instead of on zealous representation of their clients, in an effort to prevent the State from unconstitutionally stripping them of their bar cards.

The days of noble and effective lawyering on behalf of the People --- will cease. Attorneys will be transformed into servile minions, checking the air direction of social media agendas daily, in futile efforts to appease potential unnamed and anonymous accusers.

The ABA not only 'jumped the shark'[1] with their corporate approval of and nation-wide promotion of Rule 8.4g, they also jumped clear over the Constitution of the United States of America.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

[1] A reference to the sitcom Happy Days, where the show suffered public ridicule when one of its major characters supposedly performed an impossible feat.

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Rule 28.3 of the Rules of the Third Circuit Court of Appeals, undersigned counsel, Larry L. Crain, does hereby certify that he is a member in good standing of the bar of the Third Circuit Court of Appeals, having been admitted on May 5, 1988.

CERTIFICATION OF IDENTITY STATEMENT

Undersigned counsel for the *Amicus Curiae* hereby certifies that the electronic submission of the Plaintiffs-Appellants' Reply Brief and the hard copy paper brief are identical.

CERTIFICATION OF VIRUS SCAN

Undersigned counsel certifies that a virus program known as Avast One has been run against the final PDF version of this *Amicus Curiae* Brief, and no virus was detected.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Amicus Curiae* Brief of Patrick Gould was served on the following individuals via the Court's ECF-Filing System and via U.S. Mail on this the 27th day of October, 2022:

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