

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Zachary Greenberg, *
 * Docket # 20-cv-03822-CFK
 *
 *
 Plaintiff, *
 *
 * United States Courthouse
 vs. *
 * Courtroom 6A
 * Philadelphia, PA
 James C. Haggerty, et al, *
 * January 20, 2022
 * 11:05 a.m.
 *
 Defendants. *

* * * * *

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT HEARING
BEFORE THE HONORABLE CHAD F. KENNEY
UNITED STATES DISTRICT COURT JUDGE

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E X H I B I T S

(NONE OFFERED)

1 THE CLERK: All rise, please. United States
2 District Court for the Eastern District of Pennsylvania is now
3 in session, The Honorable Chad F. Kenney presiding.

4 THE COURT: Good morning, everyone.

5 MR. ADAM SCHULMAN: Good morning, Your Honor.

6 MR. MICHAEL DALEY: Good morning, Your Honor.

7 THE COURT: So this is Greenberg vs. Haggerty, 03822
8 of '20. Counsel for the record?

9 MR. SCHULMAN: Good morning, Your Honor. Adam
10 Schulman for Plaintiff, Zach Greenberg, and I have Mr.
11 Greenberg at the table with me.

12 MR. ZACHARY GREENBERG: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. DALEY: Good morning, Your Honor. Michael Daley
15 for the Board Defendants and Disciplinary Counsel Defendants,
16 and I have Megan Davis, an attorney from our office, here as
17 well.

18 MS. DAVIS: Good morning, Your Honor.

19 THE COURT: You can identify yourself for the
20 record.

21 MS. DAVIS: I am Megan Davis. I am here with
22 Michael Daley.

23 THE COURT: Okay. And you don't have to wear the
24 mask unless you want to; that's fine.

25 MS. DAVIS: Okay.

1 THE COURT: Everybody is doing different things
2 these days. I hear better though when you don't have a mask
3 because I've reached the age where I'm reading lips as part of
4 my hearing capacity. My wife insists I wear hearing aids, but
5 I'm not going to do it. I tell her I'm at least 10 years from
6 that point, so she's annoyed that she has to talk louder. So
7 did you guys get through the snow this morning? I mean it was
8 a big snowstorm.

9 MR. DALEY: It was tough.

10 THE COURT: I know that I cancelled two hearings
11 this morning thinking, you know, I'm being accommodating to the
12 attorneys. I reached out and just did that thinking there'd be
13 snow, and I got up at 5:00 to beat the snow and here we are. I
14 have no complaints though. Weather people generally get it
15 right; don't they? I mean sometimes it's pretty amazing. So
16 every now and then it's amazing how one mile can make a
17 difference.

18 MR. DALEY: Uh-huh (yes).

19 THE COURT: So let's start with Mr. Daley.

20 MR. DALEY: Yes, Your Honor.

21 THE COURT: It's Daley; right?

22 MR. DALEY: Daley, yes.

23 THE COURT: Okay. You looked at me like maybe I got
24 the name wrong.

25 MR. DALEY: Oh, no, I'm sorry, like --.

1 THE COURT: Which I do a lot by the way. I just
2 throw it out there and then I eventually get it right. So do
3 you mind if we start with you --?

4 MR. DALEY: Not at all, Your Honor. Whatever you
5 prefer.

6 THE COURT: Yeah, I think we'll start and then we'll
7 see where it goes from there.

8 MR. DALEY: Okay. And I understand as far as we can
9 argue from counsel table; is that --?

10 THE COURT: You can sit, stand, use the podium. I
11 like counsel table because that way if you're up here you can't
12 see Counsel making faces at you.

13 MR. DALEY: Yeah.

14 THE COURT: And shaking his head and going no and
15 all those other things.

16 MR. DALEY: Yeah.

17 THE COURT: I think you're -- if you want to sit
18 there and argue, that's fine.

19 MR. DALEY: Okay. I'll do that, Your Honor, because
20 it might project better into the microphone.

21 THE COURT: Whatever makes you most comfortable.

22 MR. DALEY: Thank you. And I thought I was to the
23 age, Your Honor, where I didn't need reading glasses yet, but I
24 finally broke down. So you'll have to forgive my up and down.

25 THE COURT: Like your mother said, it makes you look

1 smarter.

2 MR. DALEY: I'll take all the advantages I can get.
3 Good morning, Your Honor. Certainly, you're familiar with the
4 case. I mean obviously we had this last year with the -- with
5 the old amendments to the rule. So you know, we're here again,
6 you know, after you enjoined the old rule, obviously we filed
7 an appeal, which was withdrawn, and the Supreme Court then
8 amended the rule to make it more narrow, to make it more
9 focused. We took out the language, which obviously I think
10 troubled Your Honor last year, of the words manifesting bias or
11 prejudice, which certainly in reading your injunction Opinion
12 was a big factor in your ruling. So we took that out, Your
13 Honor, and you know, the rule is more narrow. It's targeted
14 focused to harassing and discriminating conduct. So we have
15 the rule, and then of course, we still have our standing
16 argument, Your Honor, as you're aware.

17 And certainly, we understand last year that you had
18 found that Mr. Greenberg had standing to bring the claim.
19 Certainly, Your Honor is aware of the standards based on your
20 Opinion that there has to be specific objective harm to
21 Plaintiff. So in -- has to engage, number one, to engage or
22 intend to engage in conduct that the rule covers is the first
23 requirement, and then there has to be a credible threat of
24 prosecution. Plaintiff's burden is to meet these. They can't
25 be hypothetical fears don't go -- that's the Clapper and the

1 Reilly cases, which we cite in the brief; I'm sure Your Honor
2 is aware of. And in this case, Your Honor, Plaintiff fails to
3 meet both of those, which is the conduct that he's engaged in
4 and intends to engage in is not covered by the rule. As laid
5 out, the conduct that he intends to engage in is presenting at
6 CLE's, quoting from cases that have language, I guess, that
7 some people may consider offensive, advocating for certain
8 positions, and maybe advocating that certain cases were wrongly
9 decided.

10 The rule on its face doesn't cover that, Your Honor.
11 The rule on its face covers direct conduct that's targeted to
12 an individual harassing and discriminating. So quoting cases
13 and that is not -- doesn't come within the rule. And besides
14 the rule itself, we also have the declarations and the evidence
15 that's been provided at this summary judgment stage, which
16 clarifies that Disciplinary Counsel doesn't consider Mr.
17 Greenberg's conduct, what he's done, or what he's intended to
18 do to come within the bounds of the rule and wouldn't be
19 investigated or charged for it. So that's the first step.

20 The second step then is even if the rule covers it is
21 that there has to be a credible threat of prosecution. And
22 here, there is no credible threat of prosecution, Your Honor.
23 It's -- first off, the ODC, Office of Disciplinary Counsel, has
24 disavowed the Plaintiff's activities come within the rule as
25 written on its face. There's no reason to believe that there's

1 a credible threat of prosecution based on Mr. Greenberg's
2 intended conduct, especially here where the ODC has disavowed
3 that. And as well, there's no evidence or examples of other
4 attorneys not only in Pennsylvania, of course, the rule hasn't
5 gone into effect yet, but in other states that have
6 incorporated the rule and the rule has been in place that have
7 been investigated or charged for conduct that Mr. Greenberg
8 intends to engage in. And I know certainly Mr. Greenberg
9 provides a laundry list of what may be happening on college
10 campuses or other things outside the practice of law and don't
11 involve attorneys. But that in and of itself isn't sufficient.
12 It's too speculative, Your Honor. It's sort of apples and
13 oranges. The question is whether or not there's been attorneys
14 who have been charged with these type of violations based on a
15 rule like this that the Plaintiff for his conduct that he
16 intends to engage into.

17 So what -- and the other issue we have here with the
18 speculation, Your Honor, is when you look at the Clapper case,
19 the Reilly case, other cases cited in our briefs is that it's
20 too attenuated because it's based on unknowable actions by
21 third parties. So it is, you know, the actions of somebody
22 may, well, be offended but be offended doesn't come within the
23 rule, but a third party would have to bring a complaint. ODC
24 would have to not dismiss it as frivolous based on the conduct
25 that he intends engaged into, and we have the evidence is

1 roughly 87 percent of complaints, the attorney is not notified,
2 there's no DB-7 letter, which is a formal notification. So
3 there'd have to be a complaint. There'd have to be ODC action.
4 And the ODC then despite what is plain on the face of the rule
5 would then have to bring some type of charges against Plaintiff
6 based on that. So when you look at the steps, there's just too
7 many ifs and speculation involved, Your Honor.

8 The Plaintiff raises the fact that this should be a
9 mootness, not a standing in the briefs, and we address this in
10 the briefs, Your Honor. Standing is relevant at all stages.
11 It's not a mootness case because the Disciplinary Counsel or
12 Disciplinary Board has not changed its position on Mr.
13 Greenberg's activities and whether they come within the rule.
14 Even under the old rule, our position was that Mr. Greenberg's
15 activities didn't come within the rule. And the fact that it's
16 been changed, we haven't changed our position. When you look
17 at those cases, they talk about whether or not, you know, a
18 defendant is going to go back to their old ways, or you know,
19 they're just changing something or saying, well, we're not
20 going to prosecute somebody but then once the case is over go
21 prosecute somebody. I mean there's no evidence of that here.
22 It's not a mootness case. It's not a voluntary cessation case.
23 So it's our position, Your Honor, that it's standing. Of
24 course, even if it was mootness, although that would shift the
25 burden to us, we believe that based on the amendment rule and

1 the evidence, the uncontradicted evidence in the record, that
2 the case would be moot because of the new rule. But again, our
3 position is that it should be standing.

4 That's what I have for standing, Your Honor, other
5 than what's in the brief.

6 THE COURT: All right.

7 MR. DALEY: I don't know if you want to address
8 that.

9 THE COURT: No, I want to move through your
10 positions.

11 MR. DALEY: Okay. Okay. Sure. Moving onto the
12 merits of the ruling, Your Honor, most importantly as I
13 mentioned at the outset, certainly what troubled The Court last
14 time was the language about words manifesting bias or prejudice
15 against somebody. And Your Honor found that that was viewpoint
16 discrimination because certainly it could be interpreted as,
17 you know, ethnic slurs, that sort of things that were
18 prohibited but not other type of comments. So certainly, when
19 you look at the rule, Your Honor, that's been removed, that
20 language. We've added language that reaffirms or clarifies
21 that the harassing and discriminatory conduct has to be through
22 targeted -- it has to be targeted to a person. It has to be
23 treating a person. So it's not just, you know, making
24 offensive comments or something along those lines. I mean the
25 offensiveness of comments in general are not regulated by the

1 rule in the practice of law. So certainly for a facial
2 challenge, Your Honor, I'm sure The Court is aware of the
3 burden, strong medicine, last resort, The Court needs to
4 consider any limiting constructions which we have here through
5 the evidence from Disciplinary Counsel provided and any
6 narrowing construction, so -- excuse me, Your Honor.

7 First for the viewpoint, the -- again, this is not an
8 offensive language, the way the amendment is written now, the
9 new rule, doesn't pertain to offensive language. And the
10 courts are clear that if the goals in regulating conduct or
11 regulating activities is unrelated to suppressing expression
12 that that's okay, even if there's some incidental burden.
13 There's no evidence here, Your Honor, that the rule was enacted
14 to suppress expression. I mean the evidence is the rule was
15 enacted to prevent the outcome of discrimination and harassment
16 in the practice of law, whether that's representing clients,
17 being in court, being at events where CLE is involved because,
18 of course, CLE's, attorneys are required to get them. So
19 there's no evidence that the rule is intended to oppress
20 speech.

21 And certainly, the Matal case looms large here, and
22 of course, Counsel and I disagree on what it means to this
23 case, although, you know, our position is that Matal is
24 distinguishable, Your Honor, as laid out in the briefs. And in
25 that case, that was the case about whether or not the trademark

1 registration was denied based on an ethnic slur. And the
2 government's position there was that it was denied because it
3 may offend people. Our basis of the rule is not whether it
4 offends -- whether the conduct or the speech offends somebody,
5 you know, in the abstract without being targeted. So it was
6 pure speech. The government admitted that we were trying to
7 prevent language or prevent trademarks that might offend
8 people, and we cite a couple cases, Your Honor, that say even
9 under Matal there's the Wandering Dago case that we cite, which
10 I believe is from the Third Circuit. And even under Matal
11 doesn't prevent discriminatory-type regulations that are
12 addressed, you know, the outcome and the detrimental effects of
13 discrimination and harassment.

14 So given the reworking of the language, Your Honor,
15 because certainly the words manifesting bias and prejudice last
16 time, The Court determined fell within Matal and the same with
17 the other cases, you know, the Sacks, DeJohn case. I mean
18 those cases were concerned with offensive language, and
19 offensive language itself offending somebody and coming within
20 the rule. That's not what the rule is directed towards. And
21 in fact, I mean you could technically under the rule you could
22 harass somebody without using offensive language. You know,
23 it's vexing annoying conduct, you know, that doesn't
24 necessarily offensive but maybe, you know, if it's repeated to
25 the person could be something that could constitute harassment

1 based on one of the characteristics listed in the rule.

2 Next, Your Honor, as argued in the brief, the rule
3 regulates conduct. It regulates professional conduct.
4 Certainly, the leading case from the Supreme Court is the NIFLA
5 case that talks about that that while there's no separate
6 professional speech, you know, distinction, there is -- they
7 did reaffirm and the cases that have relied on the NIFLA case
8 have reaffirmed that when it comes to professional conduct such
9 as regulating attorneys that that's sufficient even if it
10 incidentally burdens speech. And just as a general, and I
11 think, you know, Plaintiff agreed in their brief, I mean
12 Pennsylvania certainly has a compelling interest in eradicating
13 harassment and discrimination from the practice of law. So it
14 is a compelling interest. It's a reasonable fit. It doesn't
15 have to be a perfect fit to this rule under the standards.
16 Under the Drummond case talks about if you use intermediate
17 scrutiny in the case, especially when eradicating harassment or
18 discrimination, you know, goes to not only access to the
19 judiciary but public -- public confidence in the judiciary and
20 things along those lines that are important and are laid out in
21 our brief, the reasons for this.

22 So it regulates -- it regulates conduct, and again,
23 incidental burdens are okay. Again, it's not overbroad.
24 Another -- it's a heavy burden the Plaintiff has to carry.
25 There's a multitude of valid applications. The valid

1 applications being that preventing conduct that harasses or
2 discriminates somebody, against somebody specifically, in the
3 practice of law is valid. It's limited to the practice of law.
4 Offensive language is not prohibited. So there's no historic
5 misapplications because it hasn't gone into effect yet, of
6 course. But there's really no likely and permissible
7 applications either based on the way the rule is narrowed, and
8 no evidence of even in other jurisdictions of somebody
9 violating an 8.4(g) type of rule. And also certainly the
10 nature of the activity in Pennsylvania's interest, the
11 judiciary's interest, and making sure that participants in the
12 practice of law aren't harassed or discriminated against by
13 other attorneys.

14 So that's through the overbreadth, Your Honor. The
15 vagueness argument, again is laid out in our brief. You know,
16 the terms are not vague. The standard is whether an ordinary
17 attorney using ordinary common sense would understand them.
18 You know, perfect clarity is not required. You have to read --
19 read the provisions as a whole. And again, these cases are in
20 our brief, Your Honor. And when you're looking at, you know,
21 harass, I mean it's a well-known term that -- I mean it's
22 throughout the rules of professional conduct. It's in Rule 11,
23 Federal Rule 11. You know, when we cite, you know, I think
24 Black's Law Dictionary there's a Pennsylvania criminal case
25 that talks about, it's sort of repeated conduct that's directed

1 at somebody to annoy or harass -- to annoy or vexatious type of
2 conduct.

3 And excuse me, the same with discrimination, Your
4 Honor. Discrimination, again, we cite to Black's Law. It's a
5 type of -- these are terms that are well known that have
6 meaningful definitions and that ordinary attorneys and the
7 ordinary, you know, application would understand what they mean
8 based on the rule and being targeted towards a person. And I'm
9 sure, Your Honor, will have other questions. But for now, I'll
10 --.

11 THE COURT: Thank you, Counselor.

12 MR. DALEY: Thank you, Your Honor.

13 THE COURT: Counsel?

14 MR. SCHULMAN: Good morning, Your Honor. I don't
15 want to repeat too much of what I had in the briefs, but I do
16 want to make a few important points coming out of their
17 opposition. So the first is an overarching point that I think
18 is perhaps the most important that I want to get across, which
19 is the legal conclusions asserted by Mr. Farrell in his
20 Declaration don't bind The Court or control the disposition of
21 summary judgment. And I have some cites if I could put on the
22 record if that would help, Your Honor.

23 The first is North American Directory Corp. v. NLRB
24 939 F.2d 74 at page 81, which is a 1991 Third Circuit case.
25 The second is a case from December 31st, 2020, a District Court

1 case in the Western District, Chaney, C-H-A-N-E-Y, v. Bednaro,
2 B-E-D-N-A-R-O. That's 2020 Westlaw 786-4202. And the third
3 cite is in Wright & Miller Section 2738 and Footnote 29
4 compiling dozens of cases for that proposition. The legal
5 conclusions and a summary judgment affidavit don't bind the
6 court. So that's black letter law. But it needs to be said
7 because in Defendant's opposition they said -- came right out
8 on page 2 and said specifically that The Court must credit
9 Chief Counsel Farrell's Declaration and Defendants' discovery
10 responses, but that's not a correct proposition of law. And
11 that really matters because in Mr. Farrell's Declaration he
12 advances a number of legal propositions that are mistaken, and
13 I want to recite those briefly because I think that's relevant
14 to -- should be relevant to The Court.

15 The first is that 8.4(g) does not plausibly cover the
16 type of controversial and to certain people offensive speech
17 that my client engages in at CLE's. That's a legal question,
18 and Mr. Farrell gets that wrong. The second is that ODC and
19 Mr. Farrell's successors to his position are bound by official
20 estoppel to the interpretation of 8.4(g) that he presents.
21 That's also as a legal matter incorrect. And the third is that
22 the Disciplinary Board has no authority to take enforcement
23 action independent of ODC. And again, that's wrong if you look
24 at the Disciplinary Board rules and the rules of disciplinary
25 enforcement. And generally, those legal propositions go to the

1 question of justiciability. Although to some extent, the
2 question of 8.4(g)'s scope is a marriage question too.

3 So in both -- in both our motion and our opposition,
4 we fully brief why those legal propositions are wrong, but they
5 do add some meat in their opposition so I want to -- I want to
6 address that. So the first thing is the Defendants revealed
7 that their concept of estoppel is grounded in the Pennsylvania
8 Supreme Court's Cosby Decision. And Cosby is inapposite here
9 because Cosby discusses a defense to criminal prosecution, a
10 defense known as entrapment by estoppel. It doesn't -- that
11 defense does not apply to civil proceedings. And a cite for
12 that is FTC v. EdebitPay, which is a district court case from
13 Central District of California, 2011. That's 2011 Westlaw 486-
14 260. And in a civil context, the defense is equitable
15 estoppel. But equitable estoppel is very limited as against
16 the government, and the Supreme Court has made that clear in
17 Heckler, which we brief, and OPM v. Richmond. And Pennsylvania
18 law is similar to that. So in our motion, we cited case DS
19 Waters, but there's an even more recent Commonwealth Court case
20 that's Mandler v. Commonwealth, which is a 2021 case, 247 A.3d
21 104, and that says point blank that estoppel cannot be created
22 by representations or opinions concerning matters of law, which
23 is exactly what you have in the Farrell Declaration.

24 So given that legal background, it seems more likely
25 than not that equitable estoppel defense against ODC and ODC

1 enforcement action wouldn't work for my client let alone not to
2 mention the thousands of other Pennsylvania attorneys who
3 certainly could not avail themselves of that defense. It
4 doesn't moot my client's claim nor mean that his speech is no
5 longer chilled. And to be clear, we do think that
6 justiciability is a matter of mootness here because as the
7 Fifth Circuit said not long ago when the Plaintiff filed their
8 complaint they had no assurances that the city would refrain
9 from enforcing the provision. That's exactly what we have
10 here. That was in Pool v. Houston, a 2020 case, 978 F.3d at
11 312. Post -- so we agree that standing remains relevant
12 throughout the case, but when you're talking about post-lawsuit
13 developments, that's a matter of mootness. So we do think that
14 it's a matter of mootness. But even if you want to view it as
15 a matter of standing, which admittedly some courts have viewed
16 these sorts of disavows as a matter of standing. We provide
17 several reasons why we have the same standing that The Court
18 correctly found we had a year ago.

19 The litigation position of the Defendants does not
20 change that standing analysis. We cite cases from all over the
21 country. And nearly all -- they do present a handful of cases
22 that found a disavow to deprive a plaintiff of standing, but
23 those were categorical disavows of enforcing a rule or a
24 statute. We don't have that sort of categorical disavow from
25 Mr. Farrell. What we have is that Mr. Farrell will consider

1 all these circumstances. So if you look at his response to our
2 question about responding to an audience question at a CLE, he
3 said, well, it will depend on the content of the speech among
4 other things. That's not a categorical disavow that can
5 deprive the Plaintiff of standing or moot a case.

6 Moreover, Mr. Farrell's Declaration is submitted
7 alongside the exact same zealous defense that Defendants have
8 continuously offered of -- for both versions of the rule, old
9 and new, 8.4(g). In other words, there's nothing in Mr.
10 Farrell's Declaration which suggests that he thinks a broader
11 interpretation of the rule would be constitutionally
12 problematic, notwithstanding The Court's contrary conclusion.
13 So that's the first -- that's the first point.

14 The second is that their opposition adds more detail
15 to Mr. Farrell's discovery response denying that the board has
16 legal authority and discretion to adjudicate enforcement
17 actions that ODC dismisses. Mr. Farrell cites Board Rule
18 89.32. But as we note, that section simply requires review --
19 it requires review of dismissals after ODC has brought a
20 petition. It says nothing about the board's discretionary
21 power to review dismissals that happened pre-petition. And
22 Defendants' opposition shifts gears and instead cites to
23 Disciplinary Board Rule 87.8 and Enforcement Rule 208. But
24 those sections address ODC's power. They don't limit the
25 board's power. The board's power is found -- is described

1 elsewhere in Board Rule 87.1 and 97 -- 93.23 and in Enforcement
2 Rule 205.

3 And so there is -- I think that there's a highly-
4 instructive case out of this Court, Pennsylvania Family
5 Institute v. Celluci, which is a published 2007 Decision, 521
6 F. Supp. 2d 351, and we cite that in the briefs. But there,
7 Judge Katz rejected a similar attempt from ODC to provide
8 assurances during the litigation in a litigation declaration
9 that what the Plaintiff wanted to do was not prevented by the
10 challenge ethics rule, and Judge Katz rejected that writing.
11 He wrote this; I'm going to quote it.

12 "Defendants' point is akin to arguing that a prosecutor
13 i.e. the Pennsylvania Judicial Conduct Board or the
14 Pennsylvania Office of Disciplinary Counsel has the authority
15 to declare certain conduct lawful or unlawful. The Court
16 cannot accept that argument because the Pennsylvania Court of
17 Judicial Discipline, not the JCD or ODC, ultimately determines
18 the merit of disciplinary charges."

19 And that's Footnote 7 from that Decision where he
20 rejects that standing argument. So in total, I think that what
21 The Court said just more than a year ago that Defendants'
22 attempt -- it remains true today. Defendants' attempt to
23 sidestep a direct constitutional challenge by claiming that no
24 final discipline will ever be rendered fails.

25 So -- and then on the merits, most of what I want to

1 say is also in the briefs, so I don't want to regurgitate too
2 much of that. But I do want to reemphasize one point, which is
3 that even if The Court believes that 8.4(g) is susceptible to
4 the limiting construction that Mr. Farrell provides where you
5 require targeted speech, the rule is still unconstitutionally
6 viewpoint discriminatory, overbroad, and vague, and we brief
7 why. But in particular, this Court's Decision last year in
8 Marshall v. Amuso, Judge Pratter's Decision, and the California
9 Decision in Taking Offense, which is in our reply brief, those
10 show why it's not sufficient to have a targeting requirement.
11 It doesn't get Pennsylvania where it needs to be to sustain a
12 rule.

13 To do that, to get them where they need to be, the
14 Commonwealth needs to adhere to the limitations of NIFLA, to
15 the limitations suggested in cases like Gentile and Snyder, to
16 speech that occurs in the course of a client representation or
17 legal proceeding, to speech that actually prejudices the
18 administration of justice. And those are the long familiar
19 under NIFLA, the long familiar lines alluded to by NIFLA.

20 THE COURT: Counsel, any response to any of that?

21 MR. DALEY: Your Honor -- I guess Your Honor as far
22 as the Chief Counsel Farrell's Declaration, we would dispute
23 that it's just legal conclusions. I mean there's -- you know,
24 it's the official position of ODC, you know, as mentioned in
25 the Declaration and interrogatory and request for admissions

1 that the conduct wouldn't be prosecuted, you know, that it
2 would be frivolous if there was a complaint brought for conduct
3 that Mr. Greenberg intends to engage in. So even if there is
4 some legal conclusions in there, that there's not all legal
5 conclusions, that there are facts and it's the official
6 position of Disciplinary Counsel.

7 As far as the estoppel argument, it's estoppel, you
8 know, it's detrimental alliance -- excuse me, reliance as we
9 point out in our brief, you know, citing the Cosby case on what
10 attorneys, if they detrimentally rely on a prosecutorial agency
11 who takes a position that something doesn't come within the
12 rule but then tries to turn around and bring charges against
13 that. And you know, whether it's a criminal case or attorney
14 discipline case, it's our position that that would apply.

15 THE COURT: Okay. So just a couple of things. What
16 is the objective reasonable standard that's being used by the
17 Disciplinary Counsel and/or the Hearing Board in determining a
18 misconduct under this code -- under this section?

19 MR. DALEY: Right. So it would be the plain meaning
20 of the words, Your Honor, is the harassment and discriminate as
21 set forth in the comments to the rule, you know, that these are
22 well-known terms that are used. And again, that an ordinary
23 attorney and ordinary common sense would understand what they
24 mean.

25 THE COURT: All right. Then if you look at

1 Pennsylvania's statute on harassment, the criminal statute,
2 it's heavily -- the understanding of harassment with intent to
3 harass, annoy, or alarm another, it's heavily geared towards
4 conduct; strikes, shouts, kicks, or otherwise subjects the
5 other person to physical contact, follows the other person in
6 or about a public place, a conduct, engages in a course of
7 conduct or repeatedly commits acts that serve no legitimate
8 purpose. And then it talks about communications. But it's
9 very specific, the legislation, in terms of specifics. It
10 says:

11 "Communications to or about such other person any lewd,
12 lascivious, threatening or obscene words, language, drawings,
13 or caricatures."

14 So it's very specific as to what it has in mind in
15 terms of harassment, so I don't know that it's commonly known.
16 Then it goes on:

17 "Communicates repeatedly and in an ominous manner,
18 communicates repeatedly in extremely inconvenient hours, or
19 communicates repeatedly in a manner other than specified in
20 four, five, and six."

21 So it emphasizes anonymous, inconvenience, but the
22 harassment part is lewd, lascivious, threatening or obscene
23 words, language, drawings, or caricatures, so that's the
24 Pennsylvania statute. And if you go down further in terms of
25 harassment in the statute, their understanding is:

1 "Understanding is that a person who knowingly gives false
2 information to any law enforcement officer with the intent to
3 implicate another under this section commits an offense under
4 this section."

5 So harassment is sort of a well-defined thing in the
6 state legislature. I'm just saying the ordinary meaning of
7 harassment seems like it could take us down several pathways.
8 Let me just look at the compelling interests. You're saying --
9 the compelling interests I guess the government is looking at
10 professionals licensed to practice law, all right. And has
11 Pennsylvania identified some specific problem in the practice
12 of law? I mean we've all practiced, and I know that there's
13 issues that need to be addressed, but to cross-reference the
14 word targeted, where is the specific problem that the
15 government needs to come in and regulate here?

16 MR. DALEY: Well, the specific problem, Your Honor,
17 is that -- and I think when you look at certainly the articles,
18 law reviews, and other things that came out of the ABA's model
19 rule, which of course, our rule is a lot narrower, but have
20 come out of that and certainly I mean both sides have cited a
21 lot of different authorities, but there's talk about that,
22 about the cases where people, you know, are harassed because of
23 the factors involved, and --.

24 THE COURT: I read the -- I read the entire article,
25 all right, and comments, so I've read all that.

1 MR. DALEY: Okay.

2 THE COURT: So I'm looking where are -- in
3 Pennsylvania, where has been this specific issue and where does
4 it come up that's being addressed by this statute, or is it a
5 broader societal we're weighing in on a societal issue?

6 MR. DALEY: Well, I think it's -- I mean I think
7 it's a combination. I think one thing is it's somewhat of a
8 prophylactic because of all the -- because of, you know, what's
9 out there and what's happened and examples. And off the top of
10 my head, Your Honor, I can't come up with a lot of them that
11 are in the articles, but there have -- where there's been
12 conduct by attorneys say at CLE's, or you know, bench bar
13 conferences where CLE credits are offered, that would be
14 considered harassing or discriminatory and this is to address
15 that because -- I was going to say because, you know, a lot of
16 the other rules, you know, that talk about it where maybe other
17 attorneys who were let's say brought in on a violation deal
18 more with, okay, well, it's only in court or it's only in
19 representing a client.

20 Now, the rule 8.4 doesn't go -- it extends it to say
21 CLE's where there's CLE credits offered but doesn't go beyond
22 that. So I think when you look at kind of the atmosphere and
23 incidents just, you know, in the practice of law that I think
24 are well documented in the articles, and obviously I'm sure
25 you've seen them, but this is to try to stop that, you know, to

1 mitigate that.

2 THE COURT: Yeah, and that's where I'm getting this
3 feeling of this amorphous problem that nobody has come and
4 said, look, at this CLE, this is what's going on, at this bench
5 bar, this is what's going on, and it's out of control, somebody
6 has got to step in, it's bringing down the practice. It just
7 seems like it's -- I'm not getting specific instances where the
8 government has to step in in a compelling way to address this.
9 What I'm hearing are broader strokes that attorneys are held to
10 a higher standard. That seems to be the foundation. But who
11 creates that foundation that for some reason attorneys are held
12 to a higher standard? Certainly where attorneys are -- who
13 creates that obligation that attorneys are held to a higher
14 standard?

15 MR. DALEY: Well, it would be the Supreme Court of
16 Pennsylvania, right, would create that. I mean all the
17 different state courts, certainly in federal court, and again,
18 we're not saying that, you know, it's a separate conduct of
19 professional speech. But within the practice of law, you know,
20 there are certain standards that say a lay person doesn't have
21 to comply with. And I think, Your Honor, that given the
22 history here as we lay out in the brief of the Pennsylvania
23 Supreme Court concern about, you know, equal access,
24 harassment, discrimination, and the practice of law, and what
25 they've done since the '90s that, you know, it's not

1 unreasonable for them to take a role to say we're going to try
2 to mitigate this. And I think that's within the purview of the
3 Supreme Court. Obviously, they need to do it constitutionally,
4 of course, which is why we're here, but I don't know that they
5 need to wait for, well, here's this -- we're not going to do
6 anything until we have a specific incident. And I'm not saying
7 there haven't been specific incidents, Your Honor. I mean
8 certainly there's no evidence before The Court in this case of
9 that. But I can't, you know, categorically say, well, there
10 hasn't been any.

11 THE COURT: And so judges are held to that higher
12 standard as well; right?

13 MR. DALEY: Correct. Probably even higher I would
14 think.

15 THE COURT: Probably even higher.

16 MR. DALEY: Yeah.

17 THE COURT: And again, again the probably. I mean I
18 would think judges are more so than lawyers. I don't know that
19 you go to law school and you've gone to law school and your
20 main goal is that you're going to make society better. Not
21 everybody goes to law school for that reason. It's not
22 everybody's standard, and I don't think it's a standard to get
23 licensed that you take a test and say you're going to make
24 society better. I mean that's a broad concept in the sense of
25 you think you're making society better. I don't think you are;

1 I'm making society better. I mean that's the whole world of
2 why we have debates and discussions because we do want to make
3 society better. Your view of how society is better may be
4 different than my view of society is better. So this overall
5 standard of a better society, well, who is defining that? And
6 then we drill down into some of these areas. And don't get me
7 wrong, like when I look at the ADA professional standards and
8 what they anticipate, from my personal point of view, I don't
9 disagree with them. But let me then wonder -- and it makes me
10 wonder why, because have you looked at the judicial code of
11 conduct and the professional -- the rule, the adoption of the
12 Pennsylvania ADA rule on professional code of conduct?

13 MR. DALEY: I've seen them, Your Honor. I don't --
14 I mean off the top of my head I don't --.

15 THE COURT: So there's a complimentary rule and
16 judges they've adopted, and this has been in Pennsylvania for a
17 while, 2.3 lies, prejudice, and harassment. And it reads very
18 much like the last rule. But the thing is with that, it's very
19 narrow in a sense. It says:

20 "A judge shall not in the performance of judicial duties
21 by words or conduct."

22 So it very much limits judicial -- it says judicial
23 duties. So judicial duties would be in the courtroom,
24 certainly I would think settlement conferences, things around
25 your case, and probably the management of your chambers' staff.

1 So a judge at least knows, look, you know, when I'm having a
2 cocktail at the bench bar party, that would not be a judicial
3 duty I would think. In fact, none of that would be a judicial
4 duty. They're doing it as a result of they have to do it or
5 they volunteer to do it. So I'm just wondering why would the
6 judges have a narrower -- a narrower playing field than
7 lawyers? Because as you know, practice of law just opens the
8 -- the term of art practice of law as defined in here really
9 opens the door to all these other areas. I might say the
10 practice of law has only to do with representing the client,
11 whereas this definition says it has anything that you may do
12 tangentially within the law. So I'm wondering why something
13 wouldn't have been adopted that would've been similar to what
14 the judges' playing field is?

15 MR. DALEY: Well, I think as we said in our brief in
16 opposition to the summary judgment, Your Honor, I mean, you
17 know, CLE's, I mean attorneys are required to go to CLE's.
18 They're mandated; right. So you know, the compelling interest
19 there is that, you know, if I go to a CLE or anybody goes to a
20 CLE that there's -- that they shouldn't be harassed or
21 discriminated against while there, again, targeted against
22 them. And you know, that's the distinction. So the
23 distinction isn't, you know, if the attorney is doing something
24 that isn't -- would come within the three definitions of
25 practice of law. I mean it's pretty set clearly in the

1 comment, and --.

2 THE COURT: It does extend the prohibition beyond
3 judicial proceedings and beyond representation of the client or
4 something that instructs their administration of law; it goes
5 beyond that?

6 MR. DALEY: Yes. As stated in the comment, yes,
7 Your Honor.

8 THE COURT: All right. And the Supreme Court
9 recognizes that the lawyers have free speech?

10 MR. DALEY: Of course, yes.

11 THE COURT: All right. And even within their
12 profession they have it?

13 MR. DALEY: Yes.

14 THE COURT: And that it can be regulated but there
15 has to be these compelling interests?

16 MR. DALEY: Correct.

17 THE COURT: All right.

18 MR. DALEY: And I -- I'm sorry, Your Honor, if I --.

19 THE COURT: No, go ahead.

20 MR. DALEY: And I believe based on the evidence that
21 the Disciplinary Board and Office of Disciplinary Counsel
22 recognized that as well that, you know, there are First
23 Amendment concerns in these areas -- in areas.

24 THE COURT: Yeah. You certainly wouldn't want
25 something -- you wouldn't want a rule in place that sort of

1 weaponizes certain points of view so some people are treated
2 differently with other people depending on what the point of
3 view is?

4 MR. DALEY: Correct, Your Honor.

5 THE COURT: And how does this rule prevent that?

6 MR. DALEY: Well, it prevents it because the point
7 of view in whether you're harassing or discriminating somebody
8 is irrelevant. I mean --.

9 THE COURT: Is what?

10 MR. DALEY: Irrelevant. I mean the point -- you
11 know, I guess unless your point of view is I should be allowed
12 to discriminate and harass people, but you know, what you're
13 looking for is not, again, whether it's offensive, whether you
14 take a certain side of an issue, but it's whether or not --
15 it's focusing on the detrimental effects of the harassment and
16 discrimination as we lay out in our brief and the cases we
17 cite. And you know, as Your Honor found last time, I mean the
18 words -- you know, the words that manifest bias or prejudice
19 were problematic from a viewpoint position.

20 THE COURT: All right. So by taking out words and
21 taking out manifest bias or prejudice, the statute has been
22 cured?

23 MR. SCHULMAN: The problem with that is that it
24 substituted this amorphous definition of harassment. It's a
25 non-ordinary definition. It's not like the Pennsylvania

1 criminal definition of harassment. It doesn't have vexatious,
2 annoying. It's defined as denigrating or showing hostility or
3 aversion toward, which is essentially the same thing in our
4 view as manifest bias or prejudice. It introduces the same
5 viewpoint discriminatory problem, and there's no way to rewrite
6 the statute or excise it or no way for you to do it and to take
7 that out of the rule as it is now. So that's our view on that.

8 THE COURT: Well, let me ask you this. If the rule
9 were -- if the rule were limited to court proceedings, right,
10 court proceedings and the administration of justice, would you
11 say that the Supreme Court has the right to come in and
12 regulate --

13 MR. SCHULMAN: That's a much --

14 THE COURT: -- regulate in those areas?

15 MR. SCHULMAN: -- that's a much more difficult case;
16 right? Under NIFLA, probably so, yes, if it was limited to
17 that, I think a fair reading of NIFLA.

18 THE COURT: All right. And I think that the 2.3 in
19 the judicial code, the judicial duties really limits pretty
20 much a judge in a court proceeding. I don't know that a
21 judicial duty would go much beyond the judicial proceeding and
22 the -- and -- but the court, it doesn't define what a judicial
23 duty is, but it would seem to me it would be within the
24 courtroom environment and within chambers' environment. Then
25 -- and they have a comment, but the interesting thing too with

1 2.3 is a judge shall require lawyers in proceedings before the
2 court to refrain from manifesting bias or prejudice. So even
3 with a judge, the judge's responsibility in requiring lawyers
4 is before -- in proceedings before the court to refrain from
5 manifesting bias or prejudice. I don't think anybody would
6 disagree with that, a judge's responsibility to do that in
7 terms of limiting speech in that regard. And then -- but then
8 you turn around and you say, well, the judge does that in a
9 context, and I've read all your opinions and we reviewed them
10 in your Footnote 3, Mr. Daley. They all apply to a judicial
11 proceeding, every one of them. And then the -- and the judges
12 were absolutely right; they got it right. And the same way
13 with the ABA and their -- it's actually Opinion 493.

14 MR. DALEY: Right.

15 THE COURT: I think it was a typo, not 490.

16 MR. DALEY: Oh, did I put 490?

17 THE COURT: Yeah, I think it was a typo. It was
18 July 15 of 2020. The -- blaming you for that?

19 MR. DALEY: Unfortunately, reviewing for oral
20 argument reveals a few typos, so I apologize for that.

21 THE COURT: But in doing that, they again, they
22 right away they reference a case where it's a deposition and
23 somebody says, babe, and the lawyers -- and they call up the
24 judge. The lawyers state it was a crass attempt to gain an
25 unfair advantage through the use of demeaning language. Now,

1 that's to me an unfair advantage in a judicial administration.
2 And if you turn to 8.4, misconduct, those judges can report
3 that because it says:

4 "Engage in conduct that is prejudicial to the
5 administration of justice."

6 That is prejudicial in the administration of justice.
7 There's not one case that you have cited that I don't agree
8 with the judge. In fact, I think judges -- part of the problem
9 is judges should be educated on these issues more than lawyers.
10 The judges should be educated, and they should go to judicial
11 education courses saying, judge, this is what's happening in
12 depositions. This is what's happening in phone calls. You
13 can't say I don't want a phone call during the deposition,
14 judge. You got to say I'll take the phone call because I'm
15 going to stop it right now, so I think there is an issue. I
16 think there's a real issue. And the compelling interest is to
17 define where the interest is exactly to do something about it.
18 And if anything, you know, part of it would be the judicial
19 code of conduct to say, judges, take the call during the
20 deposition and step in and say stop this now. And bring them
21 in and say, guess what, now I'm going to sanction you and I'm
22 going to give you fees. And by the way, trial judge when you
23 do that, Mr. Lawyer, when you appeal, the appellate court is
24 going to affirm. So don't get me wrong then in terms of where
25 I'm coming from. There are methods and mechanisms to address

1 and seeds are in place pretty much everything that you just
2 laid out here.

3 The other thing is the administration of justice and
4 in representing a client. So even in a real estate transaction
5 or a transactional case where you call another attorney in a
6 transactional, outside of litigation, but within representing a
7 client, if you make that phone call and you're talking that
8 way, that's something that should go to the Disciplinary Board.
9 Because what you don't have is then a judge managing that
10 litigation. So two things, the judges need to be more
11 aggressive in how they manage their litigation, number one.
12 And number two, there needs to be a mechanism such as this to
13 pick up the phone and say, look, I'm representing a client, I'm
14 talking to this other lawyer, the way this lawyer is talking on
15 this phone is belittling, is all the things that the board
16 talks about, and then go.

17 But we're taking this -- this now is taking this to a
18 whole other level and this is what the other -- how do you
19 read this, Mr. Daley? Because I know that you don't write
20 these or develop them; you depend on them. So I want to get
21 your take on this. So now, as an attorney looking, I'm on the
22 Disciplinary Board and somebody at an event somebody complains
23 and says, you guys aren't doing your job here, and now I'm
24 getting letters, you're not doing your job here. This one is
25 saying this at a public speech. This one is saying that.

1 These people shouldn't even be able to do it at CLE. The
2 positions they're taking is outrageous. Do your job. So you
3 say, what do you mean, we're doing our job. And then they say,
4 no, you're not because look, it says here -- it says here, this
5 is my question or -- so it says the three categories for
6 practice of law, and they have interacting with witnesses. So
7 it's comprehensive there. But that's number one in the
8 comment, 3.1, it has to do with it seems to me judicial
9 proceedings and representing a client. Number two then shifts
10 over to a law firm and managing the law firm. And to some
11 extent that would be similar to -- similar to a judge managing
12 a judicial chambers. Then it says this:

13 "You go into participation in judicial boards,
14 conferences, or committees, continuing legal education
15 seminars, bench bar conferences, and bar associate activities
16 where legal education credits are offered."

17 So I just want to draw on one thing there. I'm
18 sitting at a bar at a bench bar conference. So you know,
19 you've all been at all of the conferences. You come out of the
20 conference; you sit at the bar, right. Some people sit at the
21 bar. Some people sit at a table near the bar. And I'm there,
22 I'm a lawyer, and beside me is a Supreme Court Justice. Now, I
23 say the same -- the Supreme Court Justice says the same
24 belittling thing that I said. It just seems to me when you
25 compare the two statutes, two regulations, I can be called in

1 for misconduct but the judge can't. So that's number one.

2 And then this, how do you read this?

3 "The term practice of law does not include speeches,
4 communications, debates, presentations, or publications given
5 or published outside the context described in one through
6 three."

7 Now, how do you read that?

8 MR. DALEY: Well, the way I read it, Your Honor, is
9 that it clarifies that any activities that are outside of those
10 three are not encompassed within Rule 8.4(g).

11 THE COURT: So that those activities that were done
12 within 1-3 that were just listed would be included?

13 MR. DALEY: I'm sorry, I didn't follow you there,
14 Your Honor?

15 THE COURT: So all the activities just listed there,
16 right, they're not within 8.4 if they're not done in the one
17 through three context, which leads one logically to conclude
18 that if they're done within that context they then are included
19 within 8.4?

20 MR. DALEY: Well, they could be, yes, if they meet
21 the -- if they're, again, harassing and discriminatory.

22 THE COURT: All right.

23 MR. DALEY: Yeah, I mean that's, you know --.

24 THE COURT: I just want to be sure we were reading
25 that logic conclusion the same way.

1 MR. DALEY: Correct. So that just clarifies that,
2 you know, things given outside, for instance, Mr. Greenberg
3 obviously gives a lot of speeches at colleges and presentations
4 don't come within 8.4(g). However, they could come within
5 8.4(g) if they're in one of those three, and then, of course,
6 it's going to depend on whether it's targeting, harassment,
7 discrimination. Just because it's a speech or a debate doesn't
8 mean that it violates the rule. It has to be in a harassing or
9 discriminatory manner.

10 THE COURT: All right. Anything else, Counsel?

11 MR. SCHULMAN: Nothing further.

12 THE COURT: All right. Drive safely. I know the
13 snow is piling up.

14 MR. DALEY: We took the subway from --.

15 MS. DAVIS: We're good.

16 THE COURT: You took the subway?

17 MS. DAVIS: Yes.

18 MR. DALEY: Yeah, we're at 1515 Market.

19 THE COURT: I've taken the subway up and back. And
20 when I tell people I do that, they look at me like what are you
21 doing?

22 MR. DALEY: You --.

23 THE COURT: They want me to take Uber. I say the
24 subway is great. God bless you.

25 MR. DALEY: You may run into AOPC attorneys. It's

1 very dangerous.

2 THE COURT: Well, especially they get that look on
3 their face, they are a little bit scared. You might want to
4 have them break for an Uber back. All right. Counsel. Thank
5 you. Have a good day.

6 MR. DALEY: Thank you, Your Honor.

7 MR. SCHULMAN: Thank you, Your Honor.

8 MS. DAVIS: You too. Thank you.

9 (Court adjourned)

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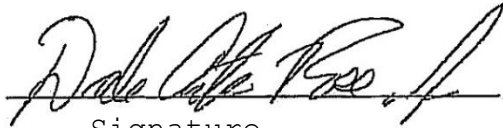
C E R T I F I C A T E

12

13 "I, Dale Curtis Rose, Jr., certify that the foregoing is a
14 correct transcript from the official electronic sound recording
15 of the proceedings in the above-entitled matter."

16

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Signature

2-4-22

Date

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