Chicago Daily Law Bulletin

Serving the profession since 1854

December 23, 2020

Pennsylvania's version of Rule 8.4(g) struck down

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

The First Amendment, more than any other part of the Constitution, captures the pluralistic, tolerant political and religious culture that the founders were trying to ensure for the new nation.

Recently highlighting the seemingly unusual mix of rights contained therein was an exchange between Sen. Ben Sasse and then-Judge, now Justice, Amy Coney Barrett regarding the content of the amendment and the reason for its structure.

Sasse asked what the rights were that were protected and the reason for them not being in separate amendments. After forgetting redress, Barrett did not have an answer as to purpose of the grouping. Sasse proposed a rather consequentialist answer that left out consideration of the inclusion of the Establishment Clause: "You don't really have freedom of religion if you don't also have freedom of assembly. You don't really have freedom of speech if you can't also publish your beliefs and advocate for them. You don't really have any of those freedoms if you can't protest at times and seek to redress grievances in times when government oversteps and tries to curtail any of those freedoms."

In addition to structure and text itself, historical context can be important in understanding and interpreting a statute. The founders, keen students of history, both ancient and modern, were well aware of how Europe generally, and England in particular, had been ripped asunder by religious and political strife often created by oppressive governments and restrictions on and impositions of religious belief and practice.

Understood through that lens, the five rights protected the prohibition of the general government from establishing a church make clear the purpose of grouping: making political and religious violence far less likely and thus the government far more stable. People will have closely held political and religious beliefs and thus differences, and without peaceful outlets to voice their opinion, to meet with those of like mind, and to seek changes from government, violence will likely be the result.

And that brings us to the American Bar Association's Model Rule 8.4(g) which asks the states to adopt a rule of professional conduct that would substantially restrict the speech rights of lawyers. As was written in this space on July 29, this proposal is particularly insidious because it targets the speech of lawyers by threatening their livelihoods. Pennsylvania adopted a watered down version of the rule that did not include the most expansive comments contained in the ABA proposal, but even that, in the view of Judge Chad F. Kenney of the Eastern District of Pennsylvania, did not pass constitutional muster. *Greenberg v. Haggerty*, 2020 U.S. Dist. LEXIS 228731, 20-3822, Doc. 29 (E.D. Pa., Dec. 7, 2020).

In a pre-enforcement action, the court held that the plaintiff had standing to sue (a discussion that took up over half of the opinion) and relying on longstanding First Amendment precedent and on *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018), held "'[o]utside of the two contexts discussed above — disclosures under [attorney advertising] and professional conduct — [the Supreme] Court's precedents have long protected the First Amendment rights of professionals. The dangers associated with content-based

regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" (Internal citations omitted.)

The court went on to point out the vagueness of the rule and the pernicious attempt to regulate attorney speech in particular: "The irony cannot be missed that attorneys, those who are most educated and encouraged to engage in dialogues about our freedoms, are the very ones here who are forced to limit their words to those that do not 'manifest bias or prejudice.' Pa.R.P.C. 8.4(g). This Rule represents the government restricting speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of 'administration of justice.' Even if Plaintiff makes a good faith attempt to restrict and self-censor, the Rule leaves Plaintiff with no guidance as to what is in bounds, and what is out, other than to advise Plaintiff to scour every nook and cranny of each ordinance, rule, and law in the Nation."

A "government [] created [] rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends" is exactly what the First Amendment was designed to prevent the government from doing and directly contrary to the historical background in which the First Amendment was drafted and ratified. The First Amendment, and the culture of free speech it mandates, creates the circumstances in which our differences can be discussed and debated, sometimes, and unfortunately, loudly, crudely, and offensively so.

This decision is the first that has struck down a version of Model Rule 8.4(g), but it is likely not the last word from the judiciary on the issue. Those that value free speech, especially lawyers, should continue to resist speech restrictions being imposed upon them, while still supporting sensible and constitutional rules like Illinois' Rule 8.4(j) that seek to root out discrimination from the profession.
