



therefore they are denied. By way of further response, Plaintiff's allegations regarding the threat of civil sanction under Rule 8.4(g) are legal conclusions, Plaintiff's case statement, or both, and they are denied. Further, the Office of Disciplinary Counsel does not bring cases based on "misconstru[als]"; neither does the Disciplinary Board or the Supreme Court discipline lawyers based on a complainant's "misconstru[als]." Plaintiff implicitly avers that his speech, properly construed, does not raise an issue under Rule 8.4(g); therefore, there is neither merit to his Amended Complaint nor a need for any relief.

3. Admitted insofar as this paragraph contains an accurate statement of the relief Plaintiff seeks. Defendants deny that Plaintiff is entitled to the relief requested.

### **Jurisdiction and Venue**

4. Admitted that Plaintiff brings this action pursuant to Section 1 of the Civil Rights Act of 1871 and the Declaratory Judgment Act. Defendants deny that Rule 8.4(g) violates the First and Fourteenth Amendments of the United States Constitution.

5. – 6. These paragraphs are legal conclusions, and they are denied.

### **Parties**

7. Admitted that Plaintiff is licensed to practice law in Pennsylvania. Defendants are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations; hence, they are denied.

8. Admitted.

9. Admitted that Defendant Farrell is Chief Disciplinary Counsel and Defendant Wierciszewski is Deputy Chief Disciplinary Counsel and that the Office of Disciplinary Counsel (ODC) investigates and prosecutes attorney misconduct where warranted.

## **Facts**

### **The Plaintiff**

10. – 11. Admitted that Plaintiff passed the bar exam and was admitted in 2019. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and therefore the allegations are denied.

12. – 13. Admitted upon information and belief.

14. – 34. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations, and therefore the allegations are denied.

### **Pennsylvania Rule of Professional Conduct 8.4(g)**

35. – 37. The Model Rules of Professional Responsibility and comments speak for themselves.

38. Admitted that some states have not adopted Model Rule 8.4(g). By way of further answer, many of the states cited as rejecting Model Rule 8.4(g) have, to the contrary, adopted an equivalent anti-discrimination rule or interpreted their more general rules to include an anti-discrimination ban similar to Rule 8.4(g), including Arizona, Idaho, Illinois, South Carolina, Tennessee, and Minnesota. Other

states had anti-discrimination rules that predate Model Rule 8.4(g). The remainder of this paragraph contains legal conclusions, and they are denied.

39. Denied as stated. Moreover, the letters, opinions, and resolutions are documents that speak for themselves.

40. Denied as stated. In November 2016, the Pennsylvania Bar Association House of Delegates, after consideration by the Pennsylvania Bar Legal Ethics and Professional Responsibility Committee and the Commission on Women in the Profession, approved a recommendation that the Supreme Court of Pennsylvania adopt a version of the American Bar Association's Model Rule 8.4(g).

41. Denied as stated. In December 2016, the Board published for comment proposed amendments to Pennsylvania's Rule 8.4 to add language similar to the ABA's Rule 8.4(g). *See* 46 Pa.B. 7519 (Dec. 3, 2016). Following comments and further review, the Board revised the proposed amendments to Rule 8.4 to address possible First Amendment concerns and to provide clearer guidance for attorneys. The Board published its revised proposal for comment in 2018. *See* 48 Pa.B. 2936 (May 19, 2018).

42. Denied as stated. Admitted only that the Supreme Court of Pennsylvania approved an amendment to Rule 8.4, which speaks for itself.

43. Admitted.

44. – 45. The filings are documents that speak for themselves.

46. Admitted.

47. Denied as stated. Admitted that after the Board's April 13, 2021 meeting, proposed amendments to Rule 8.4 were forwarded to the Supreme Court.

48. Denied as stated. Admitted that the Pennsylvania Supreme Court adopted amendments to Rule 8.4(g) by Order dated July 26, 2021. The filing is a document that speaks for itself.

49. Admitted that the Honorable Sallie Updyke Mundy dissented. Justice Mundy's dissent is a document that speaks for itself.

50. Admitted. By way of further response, the amendments to Rule 8.4(g) were adopted pursuant to Pa.R.J.A. No. 103(a)(3).

51. Admitted that the amendments were to take effect on August 25, 2021.

52. Admitted. The Stipulation is a document that speaks for itself.

53. The averments set forth in this paragraph are legal conclusions, and they are denied.

54. New Rule 8.4(g) speaks for itself.

55. – 58. The averments set forth in these paragraphs are legal conclusions, and they are denied. By way of further response, New Rule 8.4(g) speaks for itself.

### **The Disciplinary Process**

59. – 61. Admitted.

62. – 63. Denied as stated. Upon receipt of a complaint involving an attorney, ODC conducts an investigation and, if warranted, begins the multi-step disciplinary process. ODC receives approximately 4,000 complaints per year and

dismisses approximately 95% of them. Of those 4,000, over 80% are dismissed without even notifying the attorney that a complaint has been lodged against them.

64. Denied as stated. Submitting a complaint requires filling out a two-page form and submitting it on the Board's website or in paper form. The complaint is not a charging document, but rather a request that ODC investigate an attorney.

65. Denied.

66. – 67. The online complaint form is a document that speaks for itself.

68. Admitted.

69. Denied as stated. If ODC determines that a complaint is frivolous or that policy or prosecutorial discretion warrant dismissal, it may dismiss the complaint without issuing a DB-7 letter to the attorney, which is a Request for Statement of Respondent's Position. For calendar years 2016 to 2018, 87.1% of complaints did not result in a DB-7 that required a formal response.

70. Denied as stated. If ODC issues a DB-7 letter, the attorney has thirty days to respond and offer a statement of position. *See* Pa.D.B.R. 87.7(b).

71. – 72. Admitted.

73. – 75. Denied as stated. If, after conducting an investigation, serving a DB-7 letter, and consideration of an attorney's response, ODC determines that some form of discipline is appropriate, multiple layers of review exist. ODC drafts a Form DB-3, a "Referral of Complaint to Reviewing Hearing Committee Member." The DB-3 recommends private discipline, public reprimand, or the filing of a petition for discipline.

76. – 79. Admitted.

80. Admitted. Further, the Supreme Court of Pennsylvania conducts a de novo review of the record.

### **Injury**

81. – 87. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. By way of further response, the allegations are legal conclusions, Plaintiff's case statement, or both, and they are denied. Moreover, the listed presentations and speeches would not violate Rule 8.4(g) as they either are outside the practice of law to which the Rule applies or describe conduct not targeted to harass or discriminate against individuals, or both.

88. – 91. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore, denied. The 2017 study from the Cato Institute on Free Speech and Tolerance in America and FIRE's 2017 Student Attitudes Free Speech Survey are documents that speak for themselves.

92. – 94. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied.

95. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and

therefore they are denied. FIRE's 2018 Student Attitude Due Process Survey is a document that speaks for itself.

96. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The June 2020 statement and the Complaint in *Victim Rights Law Center v. DeVos* are documents that speak for themselves.

97. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied.

98. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The 2015 Stacked Deck Report is a document that speaks for itself.

99. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied.

100. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The 2019 Brennan Center for Justice explainer is a document that speaks for itself.

101. – 112. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments

and, therefore, they are denied. Further, Plaintiff's allegations are legal conclusions, Plaintiff's case statement, or both, and they are denied.

113. – 114. The averments set forth in these paragraphs are legal conclusions, and they are denied. Moreover, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The reports and articles speak for themselves. By way of further answer, none of these involve attorney disciplinary proceedings or complaints for violating Rules of Professional Conduct pertaining to attorneys. Nor (with the exception of the allegations against Judge Jones, on which she prevailed) do they involve judicial disciplinary proceedings or complaints for violating the Rules of Judicial Conduct pertaining to judges, which contain anti-discrimination provisions similar to Rule 8.4(g).

115. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The Report speaks for itself.

116. – 117. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The tweets speak for themselves.

118. It is admitted only that such an allegation was recited in the articles, which speak for themselves. The allegation was categorically denied by the justice and is likewise denied here.

119. After reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. The *In re Traywick* decision speaks for itself.

120. – 122. The averments set forth in these paragraphs are legal conclusions, and they are denied. To the extent a response is required, after reasonable investigation, Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments, and therefore they are denied. Moreover, Rule 8.4(g) by its express terms prohibits harassment and discrimination that is directed toward “a person.” See Pa. R.P.C. 8.4(g), Comments [4] and [5]. Plaintiff does not allege that in the course of his speeches and writings he directs or intends to target particular individuals with denigrating or harassing conduct; therefore, the Revised Rule does not apply to the conduct he intends to engage in.

### **Causes of Action**

#### **Claim I: Unconstitutional infringement of free speech**

123. Defendants incorporate their responses to paragraphs 1 through 122 as though more fully set forth herein.

124. – 135. The averments set forth in these paragraphs are legal conclusions, and they are denied.

#### **Claim II: Unconstitutional vagueness**

136. Defendants incorporate their responses to paragraphs 1 through 135 as though more fully set forth herein.

137. – 157. The averments set forth in these paragraphs are legal conclusions, and they are denied.

**Request for Relief**

**WHEREFORE**, Defendants respectfully request that this Court enter judgment in their favor against Plaintiff.

**Affirmative Defenses**

Defendants assert the following affirmative defenses. In addition to these defenses, Defendants may allege additional defenses that become known during this case.

**First Affirmative Defense**

The Amended Complaint fails to state a claim upon which relief can be granted.

**Second Affirmative Defense**

Defendants acted in good faith in full accord with the Constitution of the United States and the laws of the United States at all relevant times.

**Third Affirmative Defense**

Plaintiff does not have standing to challenge the amendments to Rule 8.4(g), because the revised rule does not apply to the speeches and writings that Plaintiff makes and intends to make as described in his Amended Complaint.

**Fourth Affirmative Defense**

Rule 8.4(g) does not violate the First Amendment, because the revised rule prohibits only intentionally discriminatory and harassing conduct directed at individuals, and it is not viewpoint or content based, vague, or overbroad.

**WHEREFORE**, Defendants respectfully request that this Court enter judgment in their favor against Plaintiff.

Respectfully submitted,

**s/Michael Daley**  
Michael Daley, Esquire  
Attorney I.D. No. PA 77212  
Megan L. Davis, Esquire  
Attorney I.D. No. PA 321341  
Administrative Office of PA Courts  
1515 Market Street, Suite 1414  
Philadelphia, PA 19102  
legaldepartment@pacourts.us  
(215)560-6326, Fax (215)560-5486  
***Attorneys for Defendants***

