In 1976, Virginia became the first state to gain licensure for counselors; in 2009, California became the 50th. In the interim 33 years, counselors worked tirelessly across the country to convince state legislators that counseling needed to be a regulated profession to protect the public. The public’s confidence and trust in the profession is increased by knowing that there are established education, training and supervised experience standards counselors must meet before they can practice independently. The ethical and legal mandates counselors must follow create several important protections for clients, including the expectation that the counselor has the skills to provide appropriate assistance, that the counselor must work in the best interests of the client and respect the confidentiality of the relationship, and that there is a mechanism for addressing problems.

Recently, a licensed professional counselor in Virginia filed two lawsuits, one in New York and one in Washington, D.C., alleging that state licensure requirements violate the First Amendment.

The case in New York state was dismissed by the trial court but was appealed to the U.S. Court of Appeals for the Second Circuit. The Court of Appeals heard the arguments on Sept. 22, 2022, and on April 27, it ruled in favor of the state, saying that the plaintiff had no standing to challenge New York’s licensure law because the law enabled her to seek a license by endorsement of her Virginia license. The court further ruled that the case had no merit, so New York’s licensure law remains in place.

In Washington, the case was brought up in the U.S. Court of Appeals for the District of Columbia Circuit. The case, which was originally filed on Dec. 9, 2020, survived an initial motion for dismissal and proceeded to discovery. Both parties have now moved for summary judgment, where the judge will decide whether the district’s licensure law violates the First Amendment.

The American Counseling Association decided to file an amicus (or “friend of court”) brief in support of the District of Columbia’s motion for summary judgment. The purpose of the amicus brief was to provide greater detail about the profession and to enhance the judge’s knowledge and thinking about what counseling entails. ACA’s brief explained that licensure laws should not be subject to the First Amendment, as they regulate the profession in the same way medical professions have always been regulated. ACA also shed light on the importance of licensure in protecting the public and ensuring those in need receive quality care, while also highlighting the negative consequences that could result in a world without licensing for professional counselors.

ACA collaborated with two attorneys from Arnold and Porter’s appellate group on the brief, which was filed with the court on May 31. The attorneys with whom ACA are working are extremely knowledgeable; both have argued before the U.S. Supreme Court (with one having argued three First Amendment cases before the Supreme Court), and one is the head of the firm’s appellate group. ACA has been fortunate to be working with these attorneys and the law firm.

The case in the district is in the final stage. Both the district and the plaintiff have filed their initial motions, and at the time of writing, the D.C. Attorney General’s Office planned to submit its brief opposing the plaintiff’s motion at the end of July. The plaintiff will have a chance to reply, with all final briefs/arguments due on Aug. 31. The judge will then decide the case, but it may be several months before a ruling is issued. ACA will keep members apprised of the status of this case and if similar cases arise in any other states or jurisdictions.

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