UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

WILLIAM H. HARRELL, JR.;
HARRELL & HARRELL, P.A.;
and PUBLIC CITIZEN, INC.,

Plaintiffs,

v. **Case No. 3:08-CV-15-J-33 TEM**

THE FLORIDA BAR, et al.,

Defendants.

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THE FLORIDA BAR DEFENDANTS' MOTION TO ABSTAIN OR IN THE ALTERNATIVE TO STRIKE AND SUPPORTING MEMORANDUM OF LAW

Defendants, The Florida Bar, John F. Harkness, Jr., Kenneth L. Marvin, Mary Ellen Bateman, Elizabeth Tarbert, James N. Watson, Jr., Susan V. Bloemendaal, Jan K. Wichrowski, Adria E. Quintela, and Arlene K. Sankel (collectively "The Florida Bar Defendants") move for the court to abstain, pursuant to the *Pullman* abstention doctrine, from hearing claims in this matter pertaining to Rule 4.7-5(b)(1)(C) of the Rules Regulating The Florida Bar because an amendment to this Rule is currently under consideration.

The Florida Bar Defendants also move, pursuant to *Pullman*, for the court to abstain from hearing claims relating to the constitutionality of the Rules Regulating The Florida Bar as applied to certain aspects of plaintiffs' advertisements set forth in the Complaint that have not yet been reviewed and/or interpreted by The Florida Bar. In the alternative, The Florida Bar Defendants move to strike paragraph 35 of plaintiffs'

Complaint on the grounds that the allegations set forth in that paragraph do not present a present case or controversy.[1] The more particular grounds and supporting authority for this motion are set forth in the following Memorandum of Law.

MEMORANDUM OF LAW

Introduction

This action was filed in response to the decision by The Florida Bar's Standing Committee on Advertising that certain advertisements of the legal services of plaintiffs William H. Harrell and Harrell & Harrell, P.A. (collectively "Harrell") are in violation of the Rules Regulating the Florida Bar. (Complaint ¶ 31). Taking the allegations as true, the Standing Committee and the staff of the Bar's Ethics and Advertising Department opined that because the advertisements contain the phrase "Don't settle for less than you deserve," the advertisements improperly characterize the quality of the legal services being offered in violation of Rule 4-7.2(c)(2). (Complaint ¶ 31). Harrell alleges that he "faces an imminent risk of discipline" by the Bar under the Rules even if it removes the phrase "Don't settle for less than you deserve" from the advertisements. (Complaint ¶ 35). However, the Complaint does not allege that the Bar objected to any other aspect of Harrell's advertisements, or that the Bar has found that the advertisements are in violation of any other Rule.[2]

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[1] The Complaint is not divided into counts so as to establish the basis for a dismissal of a specific count.

[2] As a point of clarification, The Florida Bar's Ethics and Advertising Department is a wholly separate and distinct branch from The Florida Bar's disciplinary arm. The opinions of Bar staff and the Standing Committee do not necessarily implicate the disciplinary authority of The Florida Bar. The disapproval of an advertisement in and of

Harrell did not appeal the decision by the Standing Committee on Advertising to The Florida Bar Board of Governors, an entity with authority to amend, withdraw or reject the opinions of the Standing Committee and Bar staff. *See* Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation, revised and adopted by the Board of Governors on May 24, 2002, at 2(b)(1) and 2(c)(1).[3] Rather Harrell, along with plaintiff Public Citizen, Inc., instituted this civil action in an attempt to have Rule 4-7.2(c)(2), Rule 4-7.5(b)(1)(C), and eight other Rules Regulating The Florida Bar pertaining to lawyer advertising[4] declared unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. (Complaint ¶¶ 1, 18, 22). The Complaint further seeks a preliminary and permanent injunction to prevent the Bar from enforcing these Rules. (Complaint ¶ 1 and pp. 17-19).

Legal Argument

The Court Should Abstain From Hearing Claims in this Matter Pertaining to Rule 4-7.5(b)(1)(C) and Background Sounds in Lawyer Advertising

Proposed Amendments to Rule 4-7.5

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itself does not invoke the Bar's disciplinary procedures. Rather, a supervening act must take place, such as publication of the disapproved advertisement, and a complaint regarding that act must be received by the Bar's disciplinary arm. Given that the Bar's disciplinary arm is complaint driven, disciplinary proceedings would not be instituted against Harrell unless or until a complaint is received regarding a published advertisement. *See generally* Ch. 3, R. Regulating Fla. Bar.

[3] Available at:
http://www.floridabar.org/tfb/TFBLawReg.nsf/e0f40af2c23904c785256709006a3713/61bf68115bbe5b4985256b60005840df?OpenDocument

[4] The other Rules Regulating The Florida Bar pertaining to advertising challenged by Harrell and Public Citizen are Rule 4-7.1, Rule 4-7.2(c)(1), Rule 4-7.2(c)(1)(D), Rule 4-7.2(c)(1)(G), Rule 4-7.2(c)(1)(I), Rule 4-7.2(c)(3), Rule 4-7.5(b)(1)(A), and Rule 4-7.7(a)(1).

Rule 4-7.5(b)(1)(C) currently provides that "[t]elevision and radio advertisement shall not contain . . . any background sound other than instrumental music." R. Regulating Fla. Bar 4-7.5(b)(1)(C). The Complaint alleges that "The Florida Bar strictly applies and enforces" this Rule "regularly prohibiting, for example, advertisements containing harmless background noises, such as the sounds of traffic or children laughing." (Complaint ¶ 19). The Complaint further alleges that Harrell fears disciplinary action under the Rule because the ads in question contain "upbeat music, and a faint whooshing sound." (Complaint ¶ 35). The Complaint seeks to have Rule 4-7.5(b)(1)(C) declared unconstitutional and seeks to have the court issue a preliminary and permanent injunction against its enforcement. (Complaint pp. 17, 19). However, prior to the filing of this lawsuit, The Florida Bar's Standing Committee on Advertising ("Committee") recommended amendments to the Florida Bar Board of Governors that would substantially alter this Rule. The proposed amendments are currently before the Board of Governors for consideration.

Pursuant to the proposed amendment, Rule 4-7.5(b)(1)(C) pertaining to background noises would be deleted in its entirety from Rule 4-7.5. The Committee has proposed that Rule 4-7.2 be amended to add Rule 4-7.2(c)(16):

> *Prohibited sounds.* A lawyer shall not include in any advertisement or unsolicited written communication any sound that is deceptive, misleading, manipulative, or that is likely to confuse the listener.

A notice of the proposed amendments along with a brief summary was published in The Florida Bar News on January 1, 2008.[5] *See* R. Regulating Fla. Bar 1-12(d). At the present time, final action is scheduled to be taken on the proposed amendments at the meeting of the Board of Governors on February 1, 2008. If approved by the Board of Governors, the Board would then petition the Florida Supreme Court to amend the Rules accordingly. R. Regulating Fla. Bar 1-12(f). A notice of intent to file such a petition would be published in The Florida Bar News at least 30 days before the filing, and the notice would include the full text of the proposed amendments. R. Regulating Fla. Bar 1-12(g). The amendments would then be reviewed by The Florida Supreme Court and become effective if approved by the Court. R. Regulating Fla. Bar 1-12(h).

Pullman Abstention

In *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941), the United States Supreme Court held that a federal district court has the discretion to decline to exercise jurisdiction, or to postpone its jurisdiction, in deference to state court resolution of underlying issues of state law. Such doctrine, known as the *Pullman* abstention doctrine, is appropriate when two criteria are met: (1) the case presents an unsettled question of state law, and (2) the question of state law is dispositive of the case or would avoid, or substantially modify, the constitutional question presented. *Rindley v. Gallagher,* 929 F.2d 1552, 1554-55 (11th Cir. 1991).

[5] Available at: http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/b51ba477142f8541852573be0052626f?OpenDocument

The Eleventh Circuit has held that the principles of federalism counsel in favor of allowing state courts, instead of federal courts, to interpret and define state law before the federal courts subject the state law to federal constitutional scrutiny. *Pittman v. Cole*, 267 F.3d 1269, 1285 (11th Cir. 2001). Thus, *Pullman* abstention is appropriate if the state court decision will allow avoidance of a federal constitutional decision. *Id. See also American Inst. of Foot Medicine v. New Jersey State Bd. of Med. Exam'rs,* 807 F. Supp. 1170 (D.N.J. 1991) (*Pullman* abstention was warranted in action by podiatrist association challenging constitutionality of state regulation restricting medical professionals' advertising of board certification; state courts had never interpreted or addressed regulation and adjudication of validity of regulation under state constitution would obviate the need for review of federal claims, and state had overwhelming interest in insuring safe delivery of medical care to consumers through regulation of advertising); *Reynolds v. State Bar of Montana,* 524 F. Supp. 1003 (D. Mont. 1981) (where plaintiff sought declaratory and injunctive relief that use of compulsory bar dues to finance activities of state bar in lobbying and filing actions on political issues was violative of First Amendment rights, *Pullman* abstention was warranted inasmuch as claim involved an issue of state law that was within the inherent power of the state supreme court to decide and where construction of issue by state supreme court might obviate or at least delimit a decision on the federal constitutional question; encouraging plaintiffs to file an action for declaratory relief with the Montana Supreme Court).

Here, as discussed above, proposed amendments are currently being considered to Rules 4-7.5 and 4-7.2 pertaining to background sounds in lawyer advertising. Thus, this

issue is an unsettled question of state law. If the proposed amendments are adopted, the Rules would allow background sounds in lawyer advertising so long as they are not deceptive, misleading, manipulative, or likely to confuse the listener. Such resolution, if not dispositive of the claims in the Complaint pertaining to Rule 4-7.5(b)(1)(C) and background sounds, would certainly substantially modify the constitutional question presented. Therefore, pursuant to *Pullman*, the court should exercise its discretion to refrain from ruling on the claims pertaining to Rule 4-7.5(b)(1)(C).

The Court Should Abstain From Hearing Claims Pertaining to Aspects of Plaintiffs' Advertisements that Have Not Been Reviewed or Interpreted by The Florida Bar or, in the Alternative, Such Claims Should be Stricken for Lack of Case or Controversy

Plaintiffs allege in paragraph 35 of the Complaint:

> Moreover, plaintiffs have a reasonable fear that, even if Harrell were to remove the phrase "Don't settle for less than you deserve," the Bar will use other aspects of the ads as the basis for disciplinary action.
>
> > a) The firm's ads contain stock advertising elements such as lighting effects, fades, moving text and images, slogans, upbeat music, and a faint whooshing sound that plays as text moves across the screen. Although all these effects are subdued when compared to other sorts of advertisements that routinely run on television, the Bar could nevertheless seek to restrict them under the rules prohibiting background noises and requiring advertisements to contain "only useful, factual information."
> >
> > b) Some of the advertisements contain statements that the Bar, because of the breadth and vague nature of the rules, would likely characterize as promises of success ("we can help"); calls for legal services ("don't give up"); characterizations of quality of services ("you need strong legal representation"); appeals to emotion ("it is wrong that loved ones in nursing homes are neglected"); "unsubstantiated" or "manipulative" statements, as the Bar

> broadly defines those words ("we help accident victims fight for justice every day"; or statements that are common to most or all lawyers in Florida ("one goal: justice for all our clients"). All these statements are true or, at most, subjective and unquantifiable statements of opinion, and are not misleading to consumers. Nevertheless, plaintiffs have a reasonable fear that the Bar will take disciplinary action against the ads under these broad and vague provisions.

(Complaint ¶ 35).

Significantly, there is no indication in the Complaint that the Bar has ever found that the aspects of plaintiffs' advertisements set forth in paragraph 35 are in violation of the Rules, or that the Bar has otherwise interpreted or applied, or threatened to interpret and apply, the Rules to these aspects of plaintiffs' advertisement. In fact, the Complaint indicates that many of plaintiffs' advertisements have not even been submitted to the Bar for review. To this end, the Complaint alleges that Harrell has refrained from extending its advertising to radio, billboards, and printed advertisements because "the ads would inevitably be rejected by the Bar" under the procedural requirements that require ads to be submitted to the Bar prior to being run. (Complaint ¶¶ 20, 33).[6]

This matter is not unlike *American Inst. of Foot Medicine* where the court found that a challenge to regulations on medical professional advertising was appropriate for *Pullman* abstention where the state had never interpreted the regulation. 807 F. Supp. at 1172-73. Nor is it unlike *Reynolds* where the court found that the construction of a bar

[6] If Harrell is skeptical as to whether an advertisement will be approved, he is free to submit the contemplated advertisement to the Bar in mock or draft form before incurring full production costs of the actual advertisement. *See* R. Regulating Fla. Bar 4-7.7(a)(1)(B) and 7.7(a)(2)(B).

regulation by the state supreme court might obviate a decision on the federal constitutional question and encouraged the plaintiffs to file an original declaratory action with the state supreme court. 524 F. Supp. at 1007-09. Whether the aspects of plaintiffs' advertisements set forth in paragraph 35 are in violation of the Rules is clearly an unsettled question of state law. The interpretation of the Rules at issue by the Bar and The Florida Supreme Court as to these aspects of plaintiffs' advertisements could very well be dispositive of the case or avoid, or substantially modify, the constitutional questions presented. Abstention from addressing these allegations pursuant to *Pullman* is therefore appropriate.[7]

In the alternative, paragraph 35 of the Complaint should be stricken for lack of a case or controversy as to the allegations contained in this paragraph. For a sufficient case or controversy to exist to warrant federal judicial intervention, the plaintiffs must show that they have in fact been injured by defendants' challenged conduct. *Digital Prop., Inc. v. City of Plantation,* 121 F.3d 586, 589 (11th Cir. 1997). Such injury must be definite and concrete as opposed to hypothetical or abstract. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). With regard to a challenge to a statute under which one might be prosecuted, a case or controversy only exists where there is a credible threat or realistic danger of prosecution for engaging in a course of conduct, rather than imaginary or speculative fears or prosecution. *Id.* at 298-99, 302.

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[7] While the Eleventh Circuit in *Pittman* suggests that in some instances the certification process may be the preferable way to obtain state court resolution of those state law issues that are likely to shape, alter, or moot the federal constitutional issues, the certification process established by the Florida Supreme Court is limited to certified questions from the U.S. Supreme Court or federal courts of appeal. 267 F.3d at 1269; Fla. R. App. P. 9.150.

In the First Amendment context, an actual controversy may be found to exist and pre-enforcement review of a law may be granted if the challenged conduct is likely to have an objectively chilling effect upon protected First Amendment activity. *Wilson v. State Bar of Georgia,* 132 F.3d 1422, 1428 (11th Cir. 1998) (where plaintiffs challenged rules prohibiting suspended and disbarred attorneys from client contact on the grounds that rules violated their First Amendment rights, there was no actual injury where there was no evidence of specific threats or actions whereby the state bar had attempted to enforce the rules); *American Civil Liberties Union v. The Florida Bar,* 999 F.2d 1486, 1492-93 (11th Cir. 1993) (where advisory opinion stated that proposed speech violated cannon of judicial conduct, and where after inquiry the judicial qualifications commission refused to tell judicial candidate before suit was filed whether or not it would seek disciplinary charges against him for proposed speech, judicial candidate reasonably feared disciplinary action and suffered objective chill of his First Amendment rights for purposes of determining whether a live controversy existed between the candidate and the state bar and judicial qualifications commission). Yet, where a complaint does not contain specific allegations of governmental action against the plaintiffs so as to show a credible threat to the exercise of their First Amendment rights, the court should find that there is no justiciable controversy. *Laird v. Tatum,* 408 U.S. 1 (1972); *Elend v. Basham,* 471 F.3d 1199 (11th Cir. 2006); *Beeline Entertainment Partners, Ltd. v. County of Orange,* 243 F. Supp.2d 1333 (M.D. Fla. 2003); *United Brothers of the Bay Area, Inc. v. Freedman,* 742 F. Supp. 1138 (M.D. Fla. 1990), *aff'd,* 959 F.2d 970 (11th Cir. 1992), *cert. denied,* 506 U.S. 877 (1992).

In the case at bar, the Complaint is wholly devoid of allegations showing a credible threat of prosecution by any of The Florida Bar Defendants for any of the aspects of plaintiffs' advertising set forth in paragraph 35. The Complaint fails to identify a warning, advisory, or enforcement action so as to demonstrate a realistic danger of prosecution by the Bar. Plaintiffs have thus failed to establish that an actual controversy exists as to these allegations.

Conclusion

For the foregoing reasons, The Florida Bar Defendants respectfully urge the Court to abstain from hearing claims relating to Rule 4-7.5(b)(1)(C) and background sounds in lawyer advertising on the grounds of the *Pullman* abstention doctrine. The Florida Bar Defendants also respectfully urge the Court to abstain from hearing the claims set forth in paragraph 35 on the grounds of *Pullman.* In the alternative, The Florida Bar Defendants request that the Court strike paragraph 35 from the Complaint on the grounds that there is no case or controversy pertaining to these allegations.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via the Court's electronic filing system this 28th day of January, 2008 upon:

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