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 DISMISS FOR LACK OF CASE OR CONTROVERSY 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 pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for the court to dismiss the complaint because there is no longer a justiciable case or controversy. The more particular grounds and supporting authority for this motion are set forth in the following Memorandum of Law.

MEMORANDUM OF LAW

Introduction

An actual controversy must exist at all stages of litigation, not merely at the inception of the action. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 777 F.2d 598, 605 (11th Cir.

1985), *cert. denied,* 476 U.S. 1116 (1986). Whether or not an actual controversy exists is a question of subject matter jurisdiction properly raised in a motion to dismiss under Rule 12(b)(1), Federal Rules of Civil Procedure. *Shelley v. MRI Radiology Network,* 505 F.3d 1173, 1182 (11th Cir. 2007). Such motions may be made at any time. *Scarfo v. Ginsberg,* 175 F.3d 957, 959 (11th Cir. 1999), *cert. denied,* 529 U.S. 1003 (2000); *Torjagbo v. United States,* No. 6:05-cv-419-Orl-28KRS, 2007 WL 1970867 at *2 (M.D. Fla. July 3, 2007). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

The case at bar stems from one controversy: the alleged fear that The Florida Bar Defendants will take disciplinary action against Plaintiff William H. Harrell, Jr. for two very specific reasons: (1) the lawyer advertisements in question contain the phrase "Don't settle for less than you deserve," that Bar staff and the Bar's Standing Committee on Advertising previously advised was in violation of Rule 4-7.2(c)(2) of the Rules Regulating The Florida Bar; and (2) the lawyer advertisements in question will be later found by the Bar to violate other Rules.[1] Because Mr. Harrell failed to exhaust his administrative remedies, this federal court was asked to resolve a dispute before it had run its course through proper channels within the Bar. Since the filing of the Complaint, this matter has been finally disposed of at the administrative level. In light of this

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[1] Specifically, Plaintiffs seek to prohibit the Bar from enforcing the following Rules Regulating The Florida Bar: 4-7.1, 4-7.2(c)(1), 4-7.2(c)(1)(D), 4-7.2(c)(1)(G), 4-7.2(c)(1)(I), 4-7.2(c)(2), 4-7.2(c)(3), 4-7.5(b)(1)(A), 4-7.5(b)(1)(C) or 4-7.7(a)(1).

subsequent decision, Plaintiffs' alleged fears -- and the basis for the alleged controversy -- are now moot, as explained below.

Regarding the first alleged fear, the Florida Bar Board of Governors determined on February 1, 2008, that the phrase "Don't settle for less than you deserve" was not in violation of Rule 4-7.2(c)(2). As to the second alleged fear, even if the advertisements at issue violate other advertising rules, The Florida Bar is prohibited by Rule 4-7.7(a)(1)(F), adopted by the Florida Supreme Court, from imposing discipline in relation to such advertisements absent some hidden misrepresentation. Consequently, The Florida Bar has not, and cannot, impose discipline for the advertisements at issue under any of the Rules challenged by Plaintiffs. The Rules challenged in the Complaint can no longer affect the advertisements at issue. As such, there is no longer a live controversy and the case is moot. To the extent the Complaint challenges the Rules outside the scope of these advertisements, Plaintiffs impermissibly seek an advisory opinion on the constitutionality of the Rules without establishing a real and substantial controversy.

Background

This action was filed on January 7, 2008, in direct response to the advisory opinions by staff of The Florida Bar's Ethics and Advertising Department and 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. (Compl. ¶¶ 28, 31). The Standing Committee and Bar staff 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). (Compl. ¶¶ 28, 31). No advertisements other than the ones reviewed by Bar staff and the Standing Committee are discussed in the Complaint. The Complaint only refers to the content of Harrell's existing advertisements and to expanding those existing advertisements to other mediums. (Compl. ¶ 33).

The opinions of Harrell's advertisements by The Bar's Ethics and Advertising Department and by the Standing Committee did not invoke Bar disciplinary proceedings. Not only are these opinions strictly advisory, but also The Florida Bar's disciplinary division is a wholly separate department from the Ethics and Advertising Department. Here, no attempt was made to enforce Bar Rules against Harrell or to discipline Harrell. (*See* Affidavit of Elizabeth Clark Tarbert ("Tarbert Aff.") ¶ 11, attached as Exhibit A).[2] Moreover, as recognized in the Complaint, the opinions were contrary to all decisions of the Bar with regard to Harrell's advertisements since 2002 (Compl. ¶ 25). Nonetheless, Harrell forewent the standard appeal procedures.[3] Instead of seeking review of the

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[2] Parties may produce affidavits and other materials to support their positions on subject matter jurisdiction. *Scarfo,* 175 F.3d at 960; *Finstad v. Florida, Dep't of Bus. and Prof'l Regulation,* No. 2:06-cv-664-FtM-29SPC, 2007 WL 3451000 (M.D. Fla. Nov. 14, 2007).

[3] Appeal procedures for appealing a decision of the Standing Committee to The Florida Bar Board of Governors are set forth in the Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation ("Procedures"), available at: http://www.floridabar.org/tfb/TFBLawReg.nsf/e0f40af2c23904c785256709006a3713/61bf68115bbe5b4985256b60005840df?OpenDocument. The Board of Governors is an entity with authority to amend, withdraw or reject the opinions of the Standing Committee and any member of The Florida Bar may, as a matter of course, appeal a Standing Committee decision to the Board. Procedures at 2(c), 4.(h) and 7.

Standing Committee's opinion by The Florida Bar Board of Governors, Harrell sought review in this federal court. (Tarbert Aff. ¶¶ 6, 7).

Subsequent to the filing of this Complaint, the Board of Governors[4] had their first opportunity to review the opinions related to Harrell's advertisements at its regularly scheduled bi-monthly meeting of February 1, 2008.[5] (Tarbert Aff. ¶ 8). Since the advisory opinions had not been properly appealed, as authorized by Bar procedures, the Board on its own initiative reviewed Harrell's advertisements.[6] (Tarbert Aff. ¶¶ 6, 8). At the meeting, after fully considering the advertisements and Rules, the Board voted to reverse the Standing Committee's opinion. (Tarbert Aff. ¶ 8). The Board found that the statement "Don't settle for less than you deserve" does not characterize the quality of legal services being offered in violation of Rule 4-7.2(c)(2) and is permissible. (Tarbert Aff. ¶ 8). A letter was issued by the Bar to Harrell on February 6, 2008, advising of the Board's decision. (Tarbert Aff. ¶ 10).

Plaintiffs do not allege in the Complaint that the Bar has objected to any other aspect of Harrell's advertisements, or that the Bar has found that the advertisements are

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[4] The Florida Bar's Board of Governors is the governing body of The Florida Bar. R. Regulating Fla. Bar 2-3.1.

[5] The Standing Committee opinion was issued on November 28, 2007. (Compl. ¶ 31). Thus, the Board of Governors did not have an opportunity to review the opinion until the February 1, 2008 meeting since the Board of Governors meets bi-monthly.

[6] Pursuant to the Procedures, the Board of Governors may render opinions, amend existing opinions, or withdraw existing opinions of the Standing Committee "upon its own initiative when the [Board] determines that the application of the attorney advertising rules to a particular set of facts is likely to be of widespread interest or unusual importance to a significant number of Florida Bar members." Procedures at 2.(c)(2).

in violation of any other Rule. In fact, the effect of the February 6 letter was to approve for use the advertisements identified in the Complaint free from fear of discipline. (Tarbert Aff. ¶ 10).

Legal Argument

The Court Should Dismiss the Complaint on Grounds of Lack of Case or Controversy

Pursuant to Article III of the United States Constitution, courts may adjudicate "only actual, ongoing cases or controversies." *Brooks v. Georgia State Bd. of Elections,* 59 F.3d 1114, 1118 (11th Cir. 1995). A case must be viable at all stages of the litigation, not merely on the date the action was commenced. *Id.* at 1119; *Preiser,* 422 U.S. at 401; *Church of Scientology,* 777 F.2d at 605. A case is moot and must be dismissed when the issues presented are no longer live. To this end, the Eleventh Circuit has stated:

> The "case or controversy" requirement prevents federal courts from deciding a case on the merits if such a decision could no longer provide meaningful relief to the parties . . . . [s]uch a case would be moot, and a federal court determination of a moot case would constitute an impermissible advisory opinion.

Christian Coalition of Alabama v. Cole, 355 F.3d 1288, 1291 (11th Cir. 2004) (affirming grant of motion to dismiss on basis of mootness). "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Maverick Media Group, Inc. v. Hillsborough County,* 508 F. Supp.2d 1126, 1147 (M.D. Fla. 2007) (*quoting Tanner Advertising Group, L.L.C. v. Fayette County,* 451 F.3d 777, 785 (11th Cir. 2006)).

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. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Such injury must be definite and concrete as opposed to hypothetical or abstract. *Id.* 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.

In the First Amendment context, an actual controversy may be found to exist and pre-enforcement review of a law may be granted only 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) (in challenge to constitutionality of judicial canon where advisory opinion stated that proposed speech violated canon, 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). Where there is no credible threat to the exercise of 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).

Even facial challenges to governmental actions brought on First Amendment grounds require a concrete rather than a speculative injury to the litigant. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). This rule of law was succinctly set forth by the Supreme Court in *United Public Workers* where the Court stated that "[f]or adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." 330 U.S. at 89-90. The Court further stated that it would pass upon the constitutionality of statutes alleged to violate First Amendment freedoms:

> . . . . only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.

Id. at 89-90. Likewise, the Eleventh Circuit has consistently held that to establish that a First Amendment facial challenge to a governmental act presents a real and substantial controversy, a plaintiff must show more than a speculative injury. *E.g., Hallendale Prof.*

Fire Fighters v. City of Hallendale, 922 F.2d 756, 760-64 (11th Cir. 1991) (quoting and discussing *United Public Workers*). In *Hallendale,* the Court stated:

> . . . [plaintiff] tells us nothing specifically about what it is that its members might want to do or say that might be protected by the first amendment but might be chilled by the existence of the City's policy. We are left to hypothesize and to speculate about possible harms that might or might not occur, and this we cannot do.

922 F.2d at 762. *See also Wilson, v. State Bar of Ga.,* 132 F.3d at 1428; *Tanner Adver. Grp.,* 451 F.3d at 792-98 (Birch, J., concurring); *Finstad v. Florida, Dep't of Bus. and Prof'l Regulation,* No. 2:06-cv-664-FtM-29SPC, 2007 WL 3451000 (M.D. Fla. Nov. 14, 2007).

In the matter at hand, the issues presented to the court for review arise out of the Bar's Standing Committee on Advertising's decision that the phrase "Don't settle for less than you deserve" was a violation of Rule 4-7.2(c)(2). Harrell states that the decision of the Standing Committee was contrary to all other decisions of the Bar since 2002 with regard to the phrase. (Compl. ¶ 25). However, Harrell did not complete the appeal process and appeal the apparently conflicting decision to The Florida Bar Board of Governors as provided for by Bar procedures. (Tarbert Aff. ¶ 6). Nonetheless, in the normal course of business at its regularly scheduled meeting, the Board of Governors reviewed and reversed the Standing Committee's decision as to Harrell's advertisements, finding that the phrase in question is permissible under Rule 4-7.2(c)(2). (Tarbert Aff. ¶ 8). The Board of Governor's decision is binding precedent on the Standing Committee and on Bar staff. (Tarbert Aff. ¶ 9).

Moreover, the letter of compliance dated February 6, 2008, is binding on the Bar for purposes of any grievance proceeding:

> Reliance on Notice of Compliance. A finding of compliance by The Florida Bar in television and radio advertisements shall be binding on The Florida Bar unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement.

R. Regulating Fla. Bar 4-7.7(a)(1)(F).[7] Therefore, whether Harrell may use the phrase "Don't settle for less than you deserve" in his advertisements, is no longer a live issue. Harrell no longer has a basis for claiming a credible fear of prosecution for use of this phrase, nor do Plaintiffs have a valid basis for claiming that Harrell is "chilled" from using this phrase in other advertisements.

While Plaintiffs assert 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 advertisements as a basis for disciplinary action" (Compl. ¶ 35), this allegation is entirely without merit. The Bar has approved of all other aspects of Harrell's current advertisements. (Tarbert Aff. ¶ 10). As stated above, once the Bar approves of a lawyer's advertisements as it has in this matter, the lawyer may rely upon that approval and such approval is binding on The Florida Bar. R. Regulating Fla. Bar 4-7.7(a)(1)(F). The Florida Bar is not at liberty to discipline Harrell under any of the Rules for his advertisements that it has already

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[7] The Comment to Rule 4-7.7 further clarifies that with regard to television and radio advertisements that must be submitted to the Bar prior to dissemination, the Bar's opinion regarding an advertisement's compliance is binding on the Bar. Comment to R. Regulating Fla. Bar 4-7.7. With regard to other types advertisements that are required to be filed for review either prior to or at the time of dissemination, the Bar's opinion will likewise be binding on the Bar in a grievance proceeding and such opinion is a "safe harbor" from discipline. R. Regulating Fla. Bar 4-7.7(a)(2)(F) and Comment thereto.

approved on any basis except hidden misrepresentation. *Id.* Thus, Harrell's allegation that he fears the Bar will invalidate other portions of his current advertisement campaign and/or impose discipline in relation to such advertisements is not valid. Harrell cannot claim a realistic danger of prosecution where the Bar is prohibited from taking such action by a "safe harbor" Rule adopted by the Florida Supreme Court.[8]

Harrell has incurred no actual injury inflicted on him by The Florida Bar Defendants and, because of the action by the Board of Governors and the Rule preventing the Bar from disapproving advertisements already approved, he faces no threat of discipline or danger of prosecution for any of the advertisements at issue in the Complaint. The Florida Bar has not, and cannot, impose discipline for the advertisements at issue under **any of the Rules** challenged in this action. Harrell points to no other specific speech that has been "chilled" by The Florida Bar Defendants. Thus, Harrell has not established a real and substantial controversy in this case outside the scope of his current advertisements which is now a moot issue.

This matter is similar to the circumstances at issue in *Wilson,* 132 F.2d at 1422. In *Wilson,* the Eleventh Circuit found that the plaintiffs in that case had not shown the injury of self-censorship because the state bar had not issued specific threats or attempted to enforce bar rules against an intended course of conduct. Likewise, Harrell has indicated no course of conduct for which he has an objectively reasonable fear of prosecution. Harrell has not alleged, and cannot allege, that the Bar has informed him

[8] Rule 4-7.7(a)(1)(F) of the Rules Regulating The Florida Bar, and all other Rules of Professional Conduct contained in Chapter 4 of the Rules, may not be amended except by order of the Florida Supreme Court. R. 1-12.1, R. Regulating Fla. Bar.

that any advertisement he wishes to run would be in violation of the Rules or would subject him to prosecution. To the contrary, all of the advertisements submitted to the Bar by Harrell have been approved. (Tarbert Aff. ¶ 10). Furthermore, Harrell does not risk discipline simply by submitting additional advertisements to the Bar for approval. (Tarbert Aff. ¶ 13). Harrell therefore cannot demonstrate the injury of self-censorship.

The circumstances at issue in *Jacobs v The Florida Bar,* 50 F.3d 901 (11th Cir. 1995), in which the Eleventh Circuit found that plaintiffs had standing to challenge certain Bar Rules, are unlike the circumstances presented here. In *Jacobs,* plaintiffs alleged that they wished to use advertisements that the Bar admitted would be in violation of the Rules and would subject plaintiffs to potential discipline. Here, Harrell does not propose using any advertisements that the Bar has stated would be in violation of the Rules or would subject him to potential discipline. Unlike *Jacobs,* the necessary controversy is missing from this case.

Moreover, Public Citizens, Inc. can no longer show how any of its members have been or will be injured or how their First Amendment rights to receive "truthful, non-misleading information about legal services and legal rights" have been or will be infringed upon because of the Rules and/or The Florida Bar Defendants. (Compl. ¶¶ 36, 39). Other than the now moot allegations pertaining to Harrell's advertisements that have been approved for use, there is nothing in the Complaint to show that any of the Rules interfere with Plaintiffs' First Amendment rights or "invite arbitrary and discriminatory enforcement" by The Florida Bar Defendants. (*See* Compl. ¶ 22)

Simply put, this case no longer presents a live issue as to either of the Plaintiffs. The case now amounts to no more than an abstract proposition that the Rules in question are unconstitutional and leaves the court to speculate about specific possible harms that might or might not occur. The determination of the constitutionality of the Rules challenged on such abstract grounds would amount to an impermissible advisory opinion. *See United Public Workers,* 330 U.S. at 89-90; *Christian Coalition,* 355 F.3d at 1291.

<u>Exceptions to the Mootness Doctrine Do Not Apply</u>

Voluntary Cessation Exception Does Not Apply

It is the rule that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *Troiano v. Supervisor of Elections,* 382 F.3d 1276, 1283 (11th Cir. 2004). However, there is an important exception to this "voluntary cessation" exception. It does not apply where there is no reasonable expectation that the challenged conduct that has voluntarily ceased will actually recur after the termination of the suit. *Id.* at 1283. Where the defendant is a governmental entity or official, there is a rebuttable presumption that the objectionable behavior will not recur. *Id.* (pointing out that the United States Supreme Court has held almost uniformly that governmental cessation of the challenged behavior moots the suit). A subjective fear and possibility that a governmental authority might disregard a prior decision regarding a plaintiff is not enough to overcome this rebuttable presumption. *Preiser,* 422 U.S. at 402-03.

In *Christian Coalition v. Alabama v. Cole,* the Eleventh Circuit reviewed a matter where the Alabama Judicial Inquiry Commission (JIC) had issued an advisory opinion

stating that judges would violate certain canons of judicial ethics if they responded to a questionnaire relating to the judges' views on social and political issues. 355 F.3d at 1289. The political organization that distributed the questionnaire brought an action challenging the constitutionality of the canons. The JIC subsequently withdrew its advisory opinion after the U.S. Supreme Court issued a decision finding that another state's canon of judicial ethics prohibiting judicial candidates from announcing their views on issues violated the First Amendment. Following the withdrawal of the advisory opinion, the district court granted the JIC members' motion to dismiss ruling that the case was moot. Although the JIC had the power to reissue the opinion, the Eleventh Circuit refrained from applying the doctrine of voluntary cessation because the JIC had represented that it would not file charges against any judge in connection with that particular questionnaire. The Court stated that it was satisfied that the plaintiffs had "every reason to believe that the JIC's representation is genuine and can reasonably expect that the JIC would not issue another opinion preventing judges from answering the questionnaire at issue in this case." *Id.* at 1292-93.

Here, because The Florida Bar is an arm of the government (Compl. ¶ 6) and its employees are agents of the Florida Supreme Court,[9] there is a rebuttable presumption

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[9] The Florida Bar is an official arm of the Florida Supreme Court, acting at all times under the supervision and control of the Court, and The Florida Bar's employees are agents of the Court. See Ch. 1, Introduction, R. Regulating the Fla. Bar; R. Regulating Fla. Bar 2-3.1 and 3-3.1; *Carroll v. Gross*, 984 F.2d 392 (11th Cir. 1993), *cert. denied*, 510 U.S. 893 (1993); *Ippolito v. The Florida Bar*, 824 F. Supp. 1562, 1572 (M.D. Fla. 1993); *Tindall v. The Florida Bar*, 1997 WL 689636, 11 Fla. L. Weekly Fed. D312 (M.D. Fla. Oct. 14, 1997), *aff'd*, 163 F.3d 1356 (11th Cir. 1993).

that the challenged conduct will not recur. Plaintiffs themselves recognize in their Complaint that the decision of the Standing Committee with regard to the phrase "Don't settle for less than you deserve" was contrary to all other decisions of the Bar since 2002 with regard to that phrase. (Compl. ¶ 25). Moreover, a decision regarding the phrase had never been issued by the Board of Governors, the governing body of The Florida Bar and the entity having the final say with regard to lawyer advertising advisory opinions. The February 1, 2008 meeting was the first and only time the Bar's Board of Governors ever rendered, or had the opportunity to render, a decision with regard to that phrase. At the February 1 meeting, the Bar's Board of Governors made the determination that the phrase, as well as all other aspects of Harrell's advertisements, is in compliance with the Bar's Rules. A letter was issued to Harrell to this effect and, pursuant to Rule 4-7.7(a)(1)(F), Bar staff and the Standing Committee are bound to that determination. The Bar does not have the freedom to disregard The Board of Governors' binding decision. As such, there is absolutely no reasonable expectation that the challenged conduct will recur after the termination of the suit.[10]

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[10] Even in cases where governmental officials have far more power than does the Bar to change its position and reinstate an allegedly illegal decision, courts have found that where there is no indication that such action will occur, the voluntary cessation exception does not apply. *E.g., Preiser,* 422 U.S. at 402-03 (where prison official had made a note in prisoner's file that transfer to another prison was not to be considered in future parole hearings, possibility that record notation would be disregarded did not invoke voluntary cessation exception); *Willow Creek Ecology v. United States Forest Serv.,* 225 F. Supp.2d 1312 (D. Utah 2002) (where forestry service official withdrew decision notice authorizing timber sale and there was currently no authorization to harvest timber but forestry service remained free to issue a new or reissued decision notice on the same project, and where there was no evidence on record to support an intent to reissue a decision notice with the same alleged deficiencies, plaintiffs injury was only hypothetical and voluntary cessation exception did not apply; granting motion to dismiss for

Capable of Repetition Yet Evading Review Exception Does Not Apply

A federal court may entertain a moot case if it arises from a situation that is capable of repetition, yet evading review. This exception to the mootness doctrine arises when two conditions are met: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). Where there is no reasonable expectation that the conduct will recur as to the same complaining party, the application of this exception is precluded. *Christian Coalition,* 335 F.3d at 1293 n. 2; *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 n. 4 (11th Cir. 1998).

As discussed above, there can be no reasonable expectation that the conduct complained of will recur as to Plaintiffs. Therefore, the "capable of repetition, yet evading review" exception to the mootness doctrine does not apply.

Conclusion

For the foregoing reasons, The Florida Bar Defendants respectfully request the court to dismiss the case as moot for a lack of a case or controversy.

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mootness); *Conservation Action Project v. Moore,* No. Civ.02-193-JD, 2002 WL 31834851 (D. N.H. Dec. 18, 2002) (where authorization for timber sale was withdrawn by forestry service and there was no reasonable expectation that challenged conduct would be repeated, voluntary cessation doctrine did not apply; granting motion to dismiss for mootness).

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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 1st day of May, 2008 upon:

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