UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiffs,

v. Case No. 3:08-cv-15-J-34TEM

THE FLORIDA BAR, et al.,

Defendants.
_____/

O R D E R

THIS CAUSE is before the Court on The Florida Bar Defendants' Motion to Dismiss for Lack of Case or Controversy (Dkt. No. 22; Second Motion to Dismiss); The Florida Bar Defendants' Motion for Summary Judgment (Dkt. No. 25; Defendants' MSJ); and Plaintiffs' Motion for Summary Judgment (Dkt. No. 29; Plaintiffs' MSJ). These motions are opposed. See Plaintiffs' Response to Defendants' Motion to Dismiss (Dkt. No. 23; Response to Motion to Dismiss); Plaintiffs' Response to Defendants' Motion for Summary Judgment (Dkt. No. 34; Response to Defendants' MSJ); The Florida Bar Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. No. 33; Response to Plaintiffs' MSJ). In addition, with the Court's permission, Plaintiffs filed a reply to Defendants' Response to Plaintiffs' MSJ. See Plaintiffs' Reply in Support of Their Motion for Summary Judgment (Dkt. No. 38; Reply).

I. Procedural History

A. Complaint

On January 7, 2008, Plaintiffs[1] filed the Complaint for Declaratory and Injunctive Relief (Dkt. No. 1; Complaint) against Defendants, asserting, pursuant to 42 U.S.C. § 1983, that certain provisions of The Florida Bar's Rules of Professional Conduct contained with the Rules Regulating The Florida Bar (Rules) violate the First Amendment and seeking to invalidate these rules and restrain further enforcement of the provisions at issue. See Complaint at 2-3. Specifically, Plaintiffs requested that the Court declare certain portions of the following rules unconstitutional and enter preliminary and permanent injunctive relief precluding the enforcement of these provisions: Rules 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); and 4-7.7(a)(1).[2] See id. at 17-19. Thereafter, on January 17, 2008, Plaintiffs filed their Motion for a Preliminary Injunction (Dkt. No. 5; Preliminary Injunction Motion), seeking to preliminarily restrain the enforcement of the provisions cited in the Complaint.

B. Defendants' First Motion to Dismiss

Defendants responded to the Complaint on January 28, 2008, and filed The Florida Bar Defendants' Motion to Abstain or in the Alternative to Strike (Dkt. No. 12; Motion to

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[1] Plaintiffs in this action are William H. Harrell, Jr., and Harrell & Harrell, P.A. (hereinafter the Harrell Plaintiffs) and Public Citizen, Inc. (Public Citizen).

[2] Despite the fact that Plaintiffs' MSJ suggests differently, see Plaintiffs' MSJ at 1, at oral argument on the pending motions, Plaintiffs' counsel confirmed that their constitutional challenges in this case are limited to those raised in the Complaint. A review of the relief requested in the Complaint suggests that many of Plaintiffs' challenges are based on the overbreadth doctrine. See, e.g., Complaint at 18 (seeking to declare as unconstitutional and restrain enforcement of "Florida Rule of Professional Conduct § 4-7.2(c)(1)(D), to the extent the rule prohibits statements that are 'unsubstantiated in fact' but that are unquantifiable, statements of opinion, or otherwise not false or misleading"). However, the Court notes that this doctrine is not applicable to commercial speech cases. See Jacobs v. The Fla. Bar, 50 F.3d 901, 907 (11th Cir. 1995).

Strike) as well as The Florida Bar Defendants' Motion to Dismiss Complaint as to Plaintiff Public Citizen, Inc. (Dkt. No. 13; First Motion to Dismiss). In the Motion to Strike and First Motion to Dismiss, Defendants challenged Plaintiffs' claims on numerous bases, including: (1) Plaintiff Public Citizen, Inc. lacked associational standing to assert these claims; (2) the Court should exercise its discretion and abstain from resolving Plaintiffs' challenge to the validity of Rule 4-7.5(b)(1)(C), as an amendment to that rule was under consideration, as well as abstain from resolving Plaintiffs' claims in paragraph 35[3] of the Complaint, as those assertions presented unsettled questions of state law, and (3) Plaintiffs' claims in paragraph 35 of the Complaint are not ripe for review. See Motion to Strike at 1-2; First Motion to Dismiss at 1. The Court denied these motions on February 29, 2008. See Order (Dkt. No. 16) at 33. In its Order, the Court found that, based on the allegations in the Complaint, which were accepted as true, Plaintiffs had standing to challenge the Rules and their claims were not premature. See id. at 15-16, 28-32. The Court also declined to abstain from resolving Plaintiffs' challenge to Rule 4-7.5(b)(1)(C) as well as the claims in paragraph 35 of the Complaint. See id. at 23, 28.

After the entry of the Court's Order (Dkt. No. 16) resolving the First Motion to Dismiss and Motion to Strike, the parties filed the Joint Motion to Reserve Ruling on Motion for Preliminary Injunction (Dkt. No. 17; Joint Motion) requesting that the Court defer ruling on the pending motion seeking preliminary injunctive relief. See Joint Motion at 2. In support of the Joint Motion, the parties represented that "[t]he[y] . . . expect to be able to

[3] In this paragraph, Plaintiffs identify the Rules that the Harrell Plaintiffs' current television advertising campaign arguably violates and they contend that these purported violations may serve as a basis for disciplinary action. See Complaint ¶ 35.

resolve the case on the basis of motions for summary judgment," as there are not likely to be any disputed issues of fact. Id. at 1. They stated that this conclusion was based, in part, on The Florida Bar's recent letter of February 6, 2008, approving the use of the phrase, "Don't settle for less than you deserve." Id. The Court granted the Joint Motion and entered a Case Management and Scheduling Order (Dkt. No. 21; CMSO), setting the discovery and dispositive motion deadlines as August 15, 2008, and September 15, 2008, respectively. See CMSO at 1. The Court also set this matter on the February 2, 2009, trial term. See id.

C. Defendants' Second Motion to Dismiss

Subsequent to the entry of the CMSO, on May 1, 2008, Defendants filed the Second Motion to Dismiss, asserting that the Court lacks subject matter jurisdiction over this action "because there is no longer a justiciable case or controversy." Second Motion to Dismiss at 1. In particular, Defendants argue that, based on The Florida Bar's recent approval of the use of the phrase, "Don't settle for less than you deserve," "there is no longer a live controversy and the case is moot" because the Harrell Plaintiffs cannot be disciplined for disseminating any of the advertisements previously submitted for approval and the subject of the Complaint. Id. at 3. Furthermore, Defendants maintain that "[t]o 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." Id. In support of this Motion, Defendants provided the Affidavit of Defendant Elizabeth Clark Tarbert (Tarbert). See id. at Ex. A.

Plaintiffs oppose the Second Motion to Dismiss, asserting that The Florida Bar's recent approval of the phrase does not render this case moot. See Response to Motion to Dismiss at 1-2. Plaintiffs contend that the Court's previous decision regarding standing precludes this challenge to the Court's subject matter jurisdiction. See id. at 1. They also assert that, despite the Bar's recent approval, there are still several injuries that remain to be remedied by this litigation, including the chilling effect of the prior restraint rule on the Harrell Plaintiffs as well as other attorneys and, as a result of that chilling effect, the infringement of Public Citizen's right to receive information about available legal services. See id. at 1-2, 5. Indeed, Public Citizen explains that its "members are injured not as much by denial of access to a single advertisement as by the broad chilling effect that the rules cast over all lawyers advertising in the state." Id. at 2. Public Citizen further contends that its ability to maintain this action does not depend on whether the Harrell Plaintiffs have standing or whether their claims are ripe. See id. at 8.

Plaintiffs also assert that the Rules are impermissibly vague, causing the injury of self-censorship in that the Harrell Plaintiffs have abandoned several advertising campaigns as they believe that the advertisements would violate the challenged Rules. See id. at 5-7. Finally, Plaintiffs maintain that the Bar's recent approval does not moot this litigation, even as to the current advertising campaign because: (1) the approval was given merely to deprive this Court of jurisdiction; (2) the approval does not prevent The Florida Bar from disciplining the Harrell Plaintiffs for these advertisements based on other violations of the Rules; (3) the Harrell Plaintiffs could be disciplined for the period of time wherein they ran

these advertisements without approval; and (4) the allegedly wrongful behavior – prohibiting the use of the phrase – is likely to recur. See id. at 2-3, 7.

D. Defendants' Motion for Summary Judgment

On September 15, 2008, Defendants filed their MSJ asserting that there are no facts in dispute and seeking judgment as a matter of law on Plaintiffs' claims. See Defendants' MSJ at 1. In particular, Defendants assert that this matter is moot for the reasons set forth in the Second Motion to Dismiss and Plaintiffs' remaining challenges are not ripe as Plaintiffs have failed to establish that there is a concrete injury. See id. at 9-10.[4] Defendants contend that Plaintiffs failed to provide sufficient facts regarding the proposed advertisements to establish an injury, Defendants have never threatened any discipline relating to these proposed advertisements, and the Harrell Plaintiffs cannot be disciplined for simply submitting the advertisements for review. See id. at 10-11. Moreover, even if Plaintiffs' challenge is ripe for review, Defendants assert that the Rules are not constitutionally infirm, as the First Amendment does not protect unverifiable, unsubstantiated legal advertising; the rule requiring mandatory screening of electronically broadcast advertisements does not violate the First Amendment because the prior restraint doctrine does not apply to commercial speech and the rule is not a prior restraint on

[4] Defendants further assert that, on or about October 1, 2008, The Florida Bar Board of Governors will petition the Florida Supreme Court to amend the Rules. See Defendants' MSJ at 4-5; see also id. Ex. 1. If this petition is granted, it will delete Rule 4-7.5(b)(1)(C) – one of the Rules challenged by Plaintiffs in this action. See id. Although Defendants seem to suggest that an abstention may be more appropriate now as the amendment process is much further along than when they filed the Motion to Strike, they do not affirmatively request that the Court abstain from considering Plaintiffs' claims or resolving this action. See id. at 5 & n.5.

speech; and the Rules at issue are narrowly tailored to directly advance a substantial governmental interest and are not unconstitutionally vague. See id. at 12-23.

Plaintiffs oppose Defendants' MSJ, asserting that Defendants bear the burden to justify the restrictions on commercial speech and that they have failed to do so. See Response to Defendants' MSJ at 1. In particular, Plaintiffs assert that unverifiable, commercial speech, such as that precluded by the restrictions on statements promising results or characterizing the quality of legal services, is protected by the First Amendment, and Defendants must satisfy the Central Hudson[5] test in order to justify these restrictions. See id. at 2-6. In addition, Plaintiffs contend that merely because a type of speech may be misleading does not justify a complete ban on that type of speech. See id. at 3-4. Furthermore, not all of the Rules challenged relate to unverifiable speech, and, Plaintiffs assert that Defendants have not made any real effort to satisfy the evidentiary burden required by Central Hudson to sustain the constitutionality of these Rules. See id. at 6-8, 15.

Plaintiffs also argue that Rule 4-7.7(a) is invalid as it is an unconstitutional prior restraint on speech without any procedural safeguards. See id. at 15-17. Finally, Plaintiffs contend that this case is ripe for adjudication for the same reasons stated in its Response to Motion to Dismiss, including that the Harrell Plaintiffs would like to advertise without complying with the prescreening requirement, that they intend to prepare advertising campaigns in the future that would violate the current rules, Plaintiffs have standing to assert a pre-enforcement challenge to these Rules, Plaintiffs assert that these Rules are

[5] Central Hudson Gas Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

impermissibly vague, and that Public Citizen has standing regardless of whether the other Plaintiffs do. See id. at 18-20.

E. Plaintiffs' MSJ

On September 15, 2008, Plaintiffs filed their MSJ, seeking the entry of summary judgment declaring unconstitutional and permanently restraining the enforcement of specific provisions of the Rules. See Plaintiffs' MSJ at 1. In support of this motion, Plaintiffs complain that the Bar is arbitrarily enforcing these Rules; that the challenged Rules improperly and impermissibly prohibit the use of advertising devices as unverifiable or irrelevant without satisfying the First Amendment; the Bar is merely trying to regulate the public's perception of lawyers as well as dignity and decorum, which are not valid substantial government interests, with Rules that are not narrowly tailored; and that these Rules are enforced using a prior restraint rule, which provides the Bar with unbridled discretion and provides no opportunity for judicial review. See id. at 1-2, 8-25. Plaintiffs further assert that no other industry could prohibit commercial advertisements in such a way, and that there is no justification for treating attorney advertisements differently. See id. at 3. In addition, Plaintiffs maintain that members of the Bar have previously suggested a prescreening rule may be unconstitutional. See id. at 3-4, 6. Plaintiffs contend that the challenged Rules are invalid because Defendants enforce them to preclude a wide range of truthful or nonmisleading statements. See id. at 18-19.

Defendants oppose Plaintiffs' MSJ, contending that this action no longer presents a ripe controversy and challenges nonexistent rules, and that the Rules do not impose an impermissible prior restraint, are not vague or overbroad, are constitutional restrictions on

misleading advertising, and are narrowly tailored to directly serve the substantial governmental interests of ensuring public access to nonmisleading information and preventing the erosion of public confidence in the judicial system. See Response to Plaintiffs' MSJ at 1, 4-20. Defendants assert that all of the advertisements submitted by the Harrell Plaintiffs have been approved for publication and no discipline can be imposed for disseminating those advertisements. See id. at 1-2. Thus, they contend Plaintiffs' claims regarding these advertisements are moot. See id. at 2. Additionally, with regard to future advertisements that the Harrell Plaintiffs may publish, the claim is premature as the description of these advertisements lacks factual specificity, the Bar has not reviewed these advertisements or opined that they violate the Rules, and there is no credible threat of prosecution as to such advertisements. See id. at 2-3. The Bar further asserts that the Harrell Plaintiffs' subjective fear of discipline is not sufficient to render this matter is ripe for review. See id. at 3. Last, they contend that, as a result, Public Citizen has not shown that its members' right to receive information has been infringed. See id. at 4.

After receiving permission from the Court, Plaintiffs filed the Reply to Defendants' Response to Plaintiffs' MSJ in which they further argued that their MSJ should be granted because the substantial governmental interests identified by Defendants are invalid, the plain language of Rule 4-7.7 and/or prior interpretation of this rule fails to support the conclusion that it does not impose a prior restraint, and this rule does not satisfy the Central Hudson test for commercial speech, as the review process is subjective and arbitrary, and the rules are impermissibly vague and unpredictable. See Reply at 1-10.

F. Current Posture of the Case

On December 8, 2008, the Court granted, in part, the parties' joint motion to vacate the CMSO; cancelled the final pretrial conference, which was set for December 18, 2008; and removed this case from the trial calendar, based on the parties' representation that the resolution of the pending motions for summary judgment would likely resolve this case. See Order (Dkt. No. 41) at 1. Thereafter, on December 15, 2008, the Court set these pending motions for oral argument on January 6, 2009, at 1:30 p.m. Upon consideration of the arguments of counsel as well as the written submissions of the parties, this matter is ripe for resolution.

II. Standard of Review

Under Rule 56(c), Federal Rules of Civil Procedure (Rule(s)), summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c). An issue is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the nonmovant. See Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quoting Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)). "[A] mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." Kesinger v. Herrington, 381 F.3d 1243, 1247 (11th Cir. 2004).

The party seeking summary judgment bears the initial burden of demonstrating to the court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

"When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (internal citations and quotation marks omitted). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (citing Dibrell Bros. Int'l, S.A. v. Banca Nazionale Del Lavoro, 38 F.3d 1571, 1578 (11th Cir. 1994)).[6]

III. Background Facts

A. Lawyer Advertising Rules and the Bar's Review of Advertising Decisions

The rules regulating lawyer advertising are set forth in Rules 4-7.1 through 4-7.10. Rule 4-7.1 provides general regulations applicable to all types of attorney advertising, including a list of the permissible forms of advertising as well as the types of communications covered by the Rules. Additionally, the comment to this rule provides a list of information that may be contained in the advertisement and explains that "regardless

[6] In the Second Motion to Dismiss, Defendants have challenged the Court's subject matter jurisdiction over this action pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. However, they renewed these arguments in their MSJ. As a result, the Court considers these arguments in the context of the MSJ, and, consequently, the Second Motion to Dismiss will be denied as moot.

of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner."

In Rule 4-7.2, the Bar requires certain information and disclosures to be included in all advertisements, provides a specific list of information that may be contained in advertisements, and prohibits advertisements from containing certain communications. In particular, Rule 4-7.2(c)(1) provides:

> A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or lawyer's services. A communication violates this rule if it:
>
> (B) is false or misleading;
> (C) fails to disclose material information necessary to prevent the information supplied from being false or misleading;
> (D) is unsubstantiated in fact;
> (E) is deceptive;
> (F) contains any reference to past successes or results obtained;
> (G) promises results;
>
> . . . .
>
> (I) compares the lawyer's services with other lawyer's services unless the comparison can be factually substantiated;
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> . . . .

Rule 4-7.2(c)(1)(B)-(G) & (I). Additionally, Rules 4-7.2(c)(2) and 4-7.2(c)(3) preclude an attorney from making "statements describing or characterizing the quality of the lawyer's services in advertisements and unsolicited written communications" as well as from including "any visual or verbal descriptions, depictions, illustrations, or portrayal of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer." An example of the type of misleading omission prohibited by this rule is explained in the commentary as

> an advertisement for a law firm that states that all the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the

> same claim. . . . [I]t also would be misleading for a lawyer who does not list other jurisdictions or courts to state that the lawyer is a member of The Florida Bar. Standing by itself, that otherwise truthful statement implies falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida.

Rule 4-7.5 governs advertisements published using electronic media, other than computer-based communications. This rule provides certain additional restrictions as well as a list of the permissible content for these advertisements. For example, Rule 4-7.5(b)(1)(C) prohibits the use of "any background sound other than instrumental music." Rule 4-7.7(a) also contains additional restrictions on advertisements broadcast using electronic media.

Generally, Rule 4-7.7 provides a procedure to allow the Bar to monitor and review lawyer advertisements in order to ensure compliance with the other rules. In addition, for radio and television advertisements, Rule 4-7.7(a)(1) requires that these advertisements be "filed at least 15 days prior to the lawyer's first dissemination of the advertisement" and also provides an option that allows the advertising attorney to obtain an advisory opinion regarding compliance with rules without incurring the production expense. See Rule 4-7.7(a)(1)(A)-(B). This rule further provides that the Bar will complete its evaluation of the advertisement and notify the filing attorney within the fifteen-day period and that, if no notification is provided within that period, then the advertisement is deemed approved. See Rule 4-7.7(a)(1)(C). Additionally, Rule 4-7.7(a)(1)(E) states:

> A lawyer may disseminate a television or radio advertisement upon receipt of notification by The Florida Bar that the advertisement complies with subchapter 4-7. A lawyer who disseminates an advertisement not in compliance with subchapter 4-7, whether the advertisement was filed or not, is subject to discipline and sanctions as provided in these Rules Regulating The Florida Bar.

Nevertheless, Rule 4-7.7(a)(1)(F) provides:

> 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 not apparent from the face of the advertisement.

This subsection confirms that a finding that an advertisement complies with the requirements of Rule 4-7 is binding on the Bar, unless it contains latent misrepresentations. See Rule 4-7.7(a)(1)(F).

Advertisements in media other than radio and television must be filed contemporaneously with the dissemination of the communication. See Rule 4-7.7(a)(2). This subsection of the rule also allows the advertising attorney to obtain an advisory opinion of these advertisements prior to publication. See Rule 4-7.7(a)(2)(B). As with Rule 4-7.7(a)(1), this subsection of the rule likewise provides that a finding of compliance is binding on the Bar. See Rule 4-7.7(a)(2)(F). The Ethics Department of The Florida Bar is responsible for reviewing advertisements and issuing advisory opinions, as provided in the Rules. See Response to Plaintiffs' MSJ Ex. 2 ¶¶ 3, 7; see also Second Motion to Dismiss ¶ 13; Defendants' MSJ Ex. 3 at 3. In order to assist advertising attorneys, the Bar adopted Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation. See Harrell Decl. Ex. 13. These procedures allow attorneys to obtain guidance on how to seek an advisory opinion regarding a specific advertisement as well as how to seek review of that opinion. See id. They further provide that the opinions are advisory only and cannot be used as a basis for discipline. See id. at 1. Review of advisory opinions may be sought from the Standing Committee on Advertising (SCA) and/or The Florida Bar Board of Governors (BOG). See id.

In seeking an advisory opinion or complying with the filing requirement of Rule 4-7.7(a), the attorney first submits all relevant information for review by a Bar staff attorney. See Harrell Decl. Ex. 13 at 2-3. An attorney cannot be disciplined for submitting a proposed advertisement for an advisory opinion, and a finding of compliance will be binding on the Bar.[7] See Defendants' MSJ Ex. 3 at 4; see also Rule 4-7.7(a)(1)(B). If the attorney is not satisfied with the staff attorney's decision, he or she can seek review before the SCA who will schedule the issue for the next available meeting. See Harrell Decl. Ex. 13 at 3; Response to Plaintiffs' MSJ Ex. 2 ¶ 3.

The SCA has the authority to affirm; reverse; return the issue to staff with instructions; or issue, alter, or amend an advisory opinion.[8] See Defendants' MSJ Ex. 3 at 4. If the attorney objects to this decision, he or she can seek review by the BOG. See Harrell Decl. Ex. 13 at 5; Response to Plaintiffs' MSJ Ex. 2 ¶ 3. The Board Review Committee on Professional Ethics (BRC) will schedule the matter for consideration at the next BRC meeting and will report its recommendation to the BOG for a vote. See Harrell Decl. Ex. 13 at 6. Additionally, although the staff attorneys of the Ethics Department render the initial advisory opinion, the BOG retains the authority to render, amend, or withdraw opinions upon appeal of a decision by the SCA or "upon its own initiative when the [BOG]

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[7] In response to Defendants' request for admissions, Plaintiffs "[a]dmitted that the Harrell plaintiffs may obtain the opinion of a Bar staff attorney, although this opinion is not binding on the Bar." Defendants' MSJ Ex. 2 at 2. However, this suggestion is contrary to the plain, unambiguous language of the rule. See Rule 4-7.7(a)(1)-(2).

[8] Before the SCA may render a written opinion on an attorney advertising issue, it must provide notice of its intent to do so in The Florida Bar News, publish the time and date for deliberations as well as the proposed text, and invite written comments from Bar members. See Harrell Decl. Ex. 13 at 3-4. Upon issuance of the decision, the SCA shall publish notice in The Florida Bar News, including the full text of the decision. See id. A similar procedure is followed when the BOG issues a written opinion on an advertising issue. See id. at 6.

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." Id. at 2. The advertising attorney has 30 days to seek review of the staff decision by the SCA and BOG. See id. at 7.

B. The Harrell Plaintiffs' Advertisements

Plaintiff William H. Harrell, Jr. (Harrell) is the majority shareholder and managing partner of Plaintiff Harrell & Harrell, P.A. (H&H), a law firm located in Jacksonville, Florida. See Second Declaration of William H. Harrell, Jr. (Harrell Decl.) ¶¶ 1-3, attached to Plaintiffs' MSJ. According to Harrell, H&H "advertises its services to the public through broadcast media, print advertisements, billboards, and other forms of public media." Id. ¶ 4.

On May 10, 2002, Harrell submitted for review a transcript of a proposed advertisement using the phrase, "Don't settle for anything less." Id. ¶ 8. On May 17, 2002, a Bar staff attorney reviewed the advertisement and found that it was noncompliant because the phrase violated then-existing Rule 4-7.2(b)(1)(B), which prohibited advertisements that "create unjustified expectations about results the lawyer can achieve."[9] Id. at Ex. 1. However, the staff attorney noted that the SCA had previously approved the phrase, "Don't settle for less than you deserve," and suggested that this phrase could be used as an alternative. See id. ¶ 9 & Ex. 1; see also Second Motion to Dismiss Ex. A ¶ 2; Defendants' MSJ Ex. 3 at 1. As a result of this advisory opinion, Harrell revised his

[9] This prohibition against creating an "unjustified expectation" has since been deleted. See Rule 4-7.2(c)(1); see also Harrell Decl. Ex. 10 at 7.

advertisements to include this recommended phrase, and he and his law firm have consistently used this phrase in television, radio, billboard, print, and other advertisements, which have been approved on numerous occasions by the Bar. See id. ¶ 10.

In 2006, the Harrell Plaintiffs started the process of developing a new advertising campaign. See id. ¶¶ 11, 28. In doing so, the Harrell Plaintiffs developed several ideas that they discarded upon review of the Rules. See id. ¶¶ 24, 28. Harrell asserts that he would create and publish these campaigns if the Rules did not prohibit them. See id. ¶ 28. One of those campaigns would have focused on the theme of family and "featured plaintiff William H. Harrell, Jr.'s family and dogs, demonstrated the firms past community service and charitable contributions, showed the firm's facilities, including an on-site gymnasium established to promote the health of its employees, and included other family-friendly scenes and messages." Defendants' MSJ Ex. 4 at 4; see also Complaint ¶ 26; Harrell Decl. ¶ 28. In addition, Plaintiffs represent that "[o]ther advertisements in the campaign would have sought to humanize the firm's individual lawyers by telling their personal stories." Defendants' MSJ Ex. 4 at 4; see also Harrell Decl. ¶ 28. Plaintiffs did not submit these advertisements to the Bar, and the Bar has not reviewed or rejected them. See Defendants' MSJ Ex. 2 at 1.

Additionally, Plaintiffs state that, in the past, the Harrell Plaintiffs were

> forced to abandon an idea for an advertisement based on the theme of "choices," in which it planned to emphasize the consumers would benefit from the relative size and experience of the firm as compared to other firms in the market, and that the firm's rates compared favorably to other firms. The advertisement would have emphasized the firm's experience in diverse areas of personal injury practice and the thousands of cases in which it has represented consumers.

Defendants' MSJ Ex. 4 at 4; Harrell Decl. ¶ 29. The Harrell Plaintiffs contend that they did not pursue this campaign because they believed it violated the Rules, but they have not indicated when they considered this campaign, and they do not suggest that Defendants found this proposed campaign would violate the Rules. See Defendants' MSJ Ex. 4 at 4; Harrell Decl. ¶ 29. Harrell also asserts that, over the years, he has had numerous ideas for different advertising campaigns, but he has had to discard these ideas because he believed that they would violate the Rules. See Harrell Decl. ¶ 24. However, he does not provide any specific details regarding these campaigns, such as when the ideas were developed, what specific content or advertising techniques were contemplated, or how they would have violated the Rules. See id.

Ultimately, the Harrell Plaintiffs developed a new advertising campaign, which included the phrase, "Don't settle for less than you deserve," and, on September 10, 2007, Harrell submitted the new advertisements to the Bar for review.[10] See Harrell Decl. ¶ 11; see also id. at Ex. 2. On September 21, 2007, the staff attorney assigned to review Harrell's new advertisements advised him that the advertisements did not comply with the advertising rules because the phrase, "Don't settle for less than you deserve," "describes or characterizes the quality of the services being offered in violation of Rule 4-7.2(c)(2)." Harrell Decl. ¶ 12 & Ex. 2; see also Second Motion to Dismiss Ex. A ¶ 4; Defendants' MSJ

[10] Harrell suggests that he only submitted the advertisements for review because he was required to do so by Rule 4-7.7(a). See Harrell Decl. ¶ 11. However, of the 12 advertisements submitted for review, Harrell only provided complete advertisements for two of them; for the others, he merely provided the transcripts in accordance with the provision for seeking an advisory opinion. See id. at Ex. 2; see also Rule 4-7.7(a)(1)(B). Moreover, it appears that the prescreening provision in Rule 4-7.7(a) did not become effective until February 1, 2008. See In re Amendments to the Rules Regulating The Florida Bar – Advertising, 971 So. 2d 763, 765, 784 (Fla. 2007).

Ex. 3 at 2. This decision was based on the precedent established by the SCA subsequent to the initial approval of the phrase on May 17, 2002. See Second Motion to Dismiss Ex. A ¶¶ 3-4; Defendants' MSJ Ex. 3 at 2; see also Harrell Decl. Ex. 2.

The staff attorney also noted one additional violation – several of the advertisements submitted for an advisory opinion failed to identify Harrell's bona fide office. See Harrell Decl. Ex. 2 at 2. This deficiency along with the phrase were the only two reasons identified for finding that the advertisements did not comply with the advertising rules. See id. The omission regarding Harrell's office was later remedied when all of the completed advertisements were submitted, and the only remaining violation was the use of the phrase, “Don’t settle for less than you deserve,” in contravention of Rule 4-7.2(c)(2). See id. Ex. 3 at 1-2. After finding that the advertisements did not comply with the Rules, the staff attorney cautioned that "[u]se of the advertisements may result in disciplinary action" and recommended that Harrell revise the advertisements. Id. Ex. 2 at 2.

In response to this decision, on September 26, 2007, Harrell asked the staff attorney to reconsider her decision and asserted that he had been using this same phrase since 2002.[11] See Harrell Decl. ¶ 13. Upon receipt of this letter, the staff attorney construed Harrell's request as one seeking review of the decision by the SCA. See id. at Ex. 3. Consequently, the request was treated as an appeal, and the staff attorney advised Harrell

[11] Along with his request for reconsideration, Harrell provided the staff attorney with a DVD containing completed versions of all previously submitted advertisements as well as a new television advertisement for review. See Harrell Decl. Ex. 3. In response to this submission, the staff attorney noted that these advertisements, including the new advertisement, failed to comply with the advertising rules due to the use of the phrase in violation of Rule 4-7.2(c)(2). See id. As a new advertisement was included in the materials, the staff attorney provided Harrell with the same information regarding the right to review and the effect of the decision as she provided in the initial letter reviewing Harrell's advertising campaign. See id.

that the appeal would be placed on the agenda for the next meeting of the SCA, which was scheduled for November 15, 2007. See id.

On October 10, 2007, Harrell formally appealed the staff attorney's determination to the SCA, asserting that the Bar's previous approval of this phrase was binding pursuant to Rule 4-7.7(a)(1)(F) and that the prior review requirement is unconstitutional.[12] See Harrell Decl. ¶ 14 & Exs. 4-5. The SCA affirmed the staff decision on November 26, 2007, finding that the phrase violated Rule 4-7.2(c)(2) by characterizing the quality of legal services offered. See Second Motion to Dismiss Ex. A ¶ 5; Response to Motion to Dismiss Ex. 4; Defendants' MSJ Ex. 3 at 2; see also Harrell Decl. ¶ 15 & Ex. 6. In doing so, the SCA also cautioned Harrell that "[u]se of the advertisements may result in disciplinary action" and recommended that Harrell revise the advertisements. See Harrell Decl. Ex. 6. The SCA also advised Harrell of the availability of review of the decision by the BOG. See id.

Thereafter, rather than seeking review by the Board of Governors, the Harrell Plaintiffs along with Public Citizen[13] filed suit against Defendants on January 7, 2008.[14] See

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[12] At this time, it appears Rule 4-7.7(a)(1)(F), as well as the prescreening requirement, had not been approved by the Florida Supreme Court and, thus, were not yet effective. See In re Amendments, 971 So. 2d at 765, 784-85.

[13] According to the declarations of its chief financial officer and the director of its Public Citizen Litigation Group, Public Citizen has approximately 3,700 members located in Florida, and "Public Citizen has consistently advocated for the right of consumers to receive commercial advertising and solicitations." Declaration of Joseph Stoshak ¶ 2, attached to Plaintiffs' MSJ; Declaration of Brian Wolfman ¶ 2 (Wolfman Decl.), attached to Plaintiffs' MSJ. Wolfman further avers that "Public Citizen is particularly interested in the availability of truthful legal advertising because speech in this context not only encourages beneficial competition in the marketplace for legal services, but can also educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system." Wolfman Decl. ¶ 3.

[14] Additionally, it appears that the Harrell Plaintiffs decided to publish their newly created advertising campaign, despite the finding of noncompliance, as they asserted that it would be too expensive (continued...)

Complaint at 1; see also Second Motion to Dismiss Ex. A ¶¶ 6-7; Defendants' MSJ Ex. 2 at 2 & Ex. 3 at 2. Upon serving Defendants with the Complaint, the BOG became aware of the SCA decision and decided to review it sua sponte[15] at the next scheduled board meeting.[16] See Second Motion to Dismiss Ex. A ¶ 8; see also Response to Motion to Dismiss Ex. 2 at 7; Harrell Decl. Ex. 7. Therefore, on February 1, 2008, the Board of Governors considered the decision of the SCA in a closed session[17] and decided to reverse it.[18] See Second Motion to Dismiss Ex. A ¶ 8; see also Response to Motion to Dismiss Ex. 1 at 4 & Ex. 2 at 7; Defendants' MSJ Ex. 3 at 2; Harrell Decl. ¶ 18 & Ex. 7. As a result, it found that the phrase did not violate Rule 4-7.2(c)(2) and approved it for use. See Second Motion to Dismiss Ex. A; Defendants' MSJ Ex. 3 at 2; Harrell Decl. Ex. 7.

Defendant Tarbert sent Harrell a letter on February 6, 2008, advising him of the BOG's action, which was binding on the Bar staff and the SCA. See Second Motion to

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[14](...continued)
to revise the advertisements to exclude the phrase and that they had acquired significant goodwill and public recognition attributable to the phrase. See Harrell Decl. ¶¶ 16-17. Indeed, at oral argument on the pending motions, Plaintiffs' counsel admitted that the Harrell Plaintiffs published the advertisements, despite the fact that the Bar initially found the advertisements to be noncompliant with the Rules. Plaintiffs' counsel also clarified that, despite Harrell's statement in his declaration that he was withholding certain radio, print, and billboard advertisements from publication, the Harrell Plaintiffs had since disseminated all of the advertisements related to the current advertising campaign.

[15] This was not the first time that the BOG sua sponte considered an advertising decision of the SCA. See Harrell Decl. Ex. 12 at 11, 26, 48.

[16] The next scheduled board meeting, after the BOG learned of the lawsuit, was February 1, 2008. See Response to Motion to Dismiss Ex. 1 at 4; see also id. at Ex. 2 at 7.

[17] Defendants explained that privileged information was provided by the Bar's attorneys during this closed session. See Response to Motion to Dismiss Ex. 2 at 7.

[18] At this meeting, the BOG also considered another SCA decision finding an advertisement noncompliant. See Response to Motion to Dismiss Ex. 1 at 9. The BOG likewise decided to reverse the SCA's decision on that issue as well. See id.

Dismiss ¶¶ 9-10 & Ex. 2 at 7; Defendants' MSJ Ex. 2 at 1 & Ex. 3 at 2; Harrell Decl. Ex. 7. The letter did not explain the rationale for the BOG's decision, and the minutes of the meeting only report the ultimate decision. See Harrell Decl. Ex. 7 at 2.

Tarbert asserts that the effect of the BOG's action was to approve the previously submitted advertisements for publication and no discipline could be imposed related to these advertisements. See Second Motion to Dismiss Ex. A ¶ 10; Defendants' MSJ Ex. 3 at 2. She explains that a notice of compliance is binding on The Florida Bar, and, as a result, the February 6, 2008, letter is an absolute defense to an alleged violation of any advertising rule by these advertisements. See Second Motion to Dismiss Ex. A ¶ 10; Defendants' MSJ Ex. 3 at 2-3. In particular, Tarbert contends that the Harrell Plaintiffs cannot be disciplined for violating any of the Rules challenged in this action with respect to these advertisements. See Defendants' MSJ Ex. 3 at 3. Furthermore, in their answers to interrogatories,[19] Defendants responded that "The Florida Bar does not contend that the advertisements submitted by Harrell from September 1, 2007 to the present . . . violate any advertising Rules." Response to Motion to Dismiss Ex. 2 at 8.

On the other hand, Harrell maintains that he has no confidence that the BOG's decision is binding and he fears that the Bar will again deny him the use of this phrase in future advertising campaigns. See Harrell Decl. ¶ 19. Additionally, he fears that he may be subject to discipline for his current advertisements, which use the phrase, as the Bar could conclude that this phrase violates a different provision of the advertising rules or that

[19] The answers to interrogatories were verified by Bridget Smitha, who is counsel of record for Defendants in this action. See Response to Motion to Dismiss Ex. 2 at 10. Likewise, Plaintiffs' answers to Defendants' interrogatories were verified by Gregory A. Beck, counsel of record for Plaintiffs. See Defendants' MSJ Ex. 4 at 5.

the Bar could find that the other features or statements in the advertisements violate the advertising rules. See id. ¶¶ 20-21. He also fears that he may be disciplined because he has published advertisements that he did not submit for prior review, but he does not provide any information regarding these advertisements. See id. ¶ 30. Likewise, he asserts that he intends to continue to advertise in Florida and does not want to submit his advertisements for review because he believes that "the Bar will subject them to arbitrary criteria and . . . ignore [his] constitutional rights," but he fears that he may be disciplined if he does not comply with this review requirement. Id. ¶ 31.

Since the BOG's action on February 1, 2008, the Bar has not threatened to discipline "Harrell for use of the phrase or for the advertisements at issue in the Complaint, nor has The Florida Bar threatened to discipline other attorneys for use of the same phrase." Id. ¶ 12; see also Defendants' MSJ Ex. 3 at 3. Further, the Bar has not, at any time, threatened to discipline the Harrell Plaintiffs for any other aspects of the previously submitted advertisements. See Defendants' MSJ Ex. 3 at 3. Likewise, the Bar has not instituted any disciplinary proceedings, at any time, against Harrell for violations of the Bar's advertising rules. See Defendants' MSJ Ex. 2 at 2 & Ex. 3 at 3.

IV. Discussion

A. Whether the Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims

The Court must first determine which claims, if any, it has subject matter jurisdiction to decide at this juncture. "Article III of the United States Constitution requires that federal courts address only 'cases and controversies,'" and this requirement of a "case and controversy" must be met throughout every stage of the proceedings. Graham v. Butterworth, 5 F.3d 496, 498 (11th Cir. 1993); ACLU v. The Florida Bar, 999 F.2d at 1486, 1490 (11th Cir. 1993); see also Konikov v. Orange County, Fla., 410 F.3d 1317, 1322 (11th Cir. 2005); Jacobs v. The Fla. Bar, 50 F.3d 901, 903 (11th Cir. 1995). This requirement "places a dual limitation upon federal courts which is termed 'justiciability.'"[20] Graham, 5 F.3d at 498-99. The doctrine of justiciability ensures that federal courts only consider questions presented in the adversarial context and that the judiciary does not impermissibly encroach on the other branches of government. See id. at 499. As a result, there is no justiciable controversy when subsequent developments moot the question presented or the plaintiff does not have standing to maintain the action. See id.; see also ACLU, 999 F.2d at 1489-90 ("Questions concerning the justiciability of a case traditionally take a number of forms: Does this party have standing? Is the cause of action ripe? Is it moot? Is there a real dispute between the parties constituting a case or controversy?").

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[20] The former Fifth Circuit has characterized the doctrine of justiciability as an amorphous concept of uncertain meaning and scope. See Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 817 (5th Cir. 1979).

The doctrine of justiciability is comprised of both constitutional and prudential components. See Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 817 (5th Cir. 1979);[21] see also Konikov, 410 F.3d at 1322; Digital Props. Inc. v. City of Plantation, 121 F.3d 586, 589 (11th Cir. 1997). The constitutional requirement of a case or controversy exists as a limit on the power of the federal judiciary to resolve concrete disputes and avoid surveying the statute books in order to pass judgment on laws. See Eaves, 601 F.2d at 817 ("[A] plaintiff must not be allowed to enlist the aid of a federal court in a general effort to purge unconstitutional measures from the body of the law."); see also Pittman v. Cole, 267 F.3d 1269, 1277 (11th Cir. 2001). The prudential requirement considers whether the instant case presents a controversy that the federal court should resolve at this time, regardless of whether the constitutional minimums have been met. See Digital Props. Inc., 121 F.3d at 589; Eaves, 601 F.2d at 817; see also Konikov, 410 F.3d at 1322 ("The purpose of this doctrine is to avoid 'entangling [our]selves in abstract disagreements,' and also to shield agencies from judicial interaction 'until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'").

One consideration relevant to the prudential requirement is the question of whether the defendant is interested in enforcing the statute. See Eaves, 601 F.2d at 818-19. Indeed, when the government is not interested in enforcing the statute, it is less likely that it will provide a vigorous constitutional defense. See id. at 818. Additionally, a challenge

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[21] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

to an alleged unconstitutional provision that falls into disuse lies with the political branches, not the judiciary. See id. Another consideration is whether the court should "delay resolution of the constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available." Id. at 821 (internal quotation marks omitted). Indeed, the Eleventh Circuit has acknowledged that, "'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" Konikov, 410 F.3d at 1319 n.1.

1. Order on First Motion to Dismiss and Motion to Strike

Plaintiffs contend that Judge Covington, in her Order on the First Motion to Dismiss, resolved Defendants' challenges to the Court's subject matter jurisdiction. However, that Order did not directly address the issues raised herein. First, although Judge Covington's Order addressed a challenge to Public Citizen's standing to assert these claims, it was based on the allegations in the Complaint. See Order on First Motion to Dismiss at 8-16. While Judge Covington concluded that there were sufficient allegations in the Complaint to confer associational standing, that conclusion does not relieve Public Citizen, at this, the summary judgment stage, of the burden to prove standing. Indeed, in her Order, Judge Covington specifically distinguished cases which decided the standing question at summary judgment, as those cases were in a different procedural posture. See id. at 11-13. Thus, the fact that Plaintiffs' Complaint survived a motion to dismiss does not bar Defendants from raising the issue at summary judgment.

Likewise, Judge Covington's denial of the Motion to Strike, which was based, in part, on a challenge to the ripeness of Plaintiffs' claims in paragraph 35 of the Complaint alleging the Harrell Plaintiffs' current advertising campaign may violate other provisions of the Rules, regardless of whether the phrase is approved for use, does not prevent Defendants from asserting that argument at the summary judgment stage. Judge Covington did not address the impact of the BOG's approval of the use of the phrase, and several of the justiciability arguments presented here were not included in the Motion to Strike (i.e., the mootness and ripeness arguments). See id. at 23-32. As such, Judge Covington's Order on the Motion to Strike and First Motion to Dismiss does not control the outcome of the pending motions. Therefore, the Court will independently consider the merit of these arguments.

2. Mootness – Harrell Plaintiffs' Current Advertising Campaign

The Court first turns to the question of whether Plaintiffs' claims are moot. See KH Outdoor, LLC v. Clay County, Fla., 482 F.3d 1299, 1302 (11th Cir. 2007) (indicating that the court may first consider the issue of mootness before reaching the issue of standing). Although Defendants seem to suggest in the Second Motion to Dismiss that this case should be dismissed in its entirety based on mootness, the mootness doctrine could only be applied, if at all, to Plaintiffs' claims regarding the Harrell Plaintiff's current advertising campaign. See Second Motion to Dismiss at 2-3. The Harrell Plaintiffs submitted several advertisements for review, both seeking an advisory opinion as well as fulfilling the filing requirement. A Bar staff attorney opined that these advertisements were noncompliant because the phrase, "Don't settle for less than you deserve," improperly characterized the

quality of legal services provided. This was the only reason provided for the finding, and it was upheld by the SCA. Subsequent to the filing of this lawsuit, on February 1, 2008, the BOG voted to reverse the SCA's decision and approve the phrase for use. Defendants contend that this subsequent approval renders Plaintiffs' claims moot.

"Mootness is among the important limitations placed on the power of the federal judiciary and serves long-established notions about the role of unelected courts in our democratic system." Nat'l Advertising Co. v. City of Miami, 402 F.3d 1329, 1332 (11th Cir. 2005). As a result, the court lacks subject matter jurisdiction over moot claims, as any opinion rendered on such a claim would be an impermissible advisory opinion. See id. The existence of developments in a case subsequent to the initiation of the lawsuit can render an action moot. See Graham, 5 F.3d at 499; see also Nat'l Advertising, 402 F.3d at 1332. Indeed, the Eleventh Circuit has recognized that "'a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Graham, 5 F.3d at 499 (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)); see also Christian Coalition of Ala. v. Cole, 355 F.3d 1288, 1290-91 (11th Cir. 2004) (concluding that a case is moot when the court can no longer award meaningful relief).

However, the court will not find a case moot as a result of the defendant's voluntary cessation of the challenged actions when the defendant is free to resume its behavior at any time after the dismissal of the lawsuit. See Cole, 355 F.3d at 1291; ACLU, 999 F.2d at 1495. Instead, when a defendant has voluntarily ceased its challenged conduct, in order for such action to render a case moot, "it must be 'absolutely clear that the allegedly

wrongful behavior could not reasonably be expected to recur.'"[22] Nat'l Advertising, 402 F.3d at 1333; see also Cole, 355 F.3d at 1291; ACLU, 999 F.2d at 1495. Additionally, the case may not be moot if the defendant has changed its position solely to deprive the Court of jurisdiction. See Nat'l Advertising, 402 F.3d at 1333. On the other hand, "'governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.'" Id. Consequently, the Eleventh Circuit has instructed that, "when a court is presented with evidence of a 'substantial likelihood' that the challenged statute will be reenacted, the litigation is not moot and the court should retain jurisdiction." Id. at 1334.

In this case, Plaintiffs argue that their challenges based on Harrell Plaintiffs' current advertisements are not moot because the conduct is likely to recur. See Response to Motion to Dismiss at 1-3. Specifically, they assert that they could be disciplined (1) for other components of the advertisements or under different rules, (2) for publishing the advertisements before receiving approval, and (3) for using the slogan in the future in a different advertising campaign. See id. at 3. They further assert that the BOG acted solely to moot this litigation. See id. at 2-3. However, Plaintiffs have failed to demonstrate that the Court has subject matter jurisdiction over these claims.

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[22] There is another exception to the mootness doctrine for cases that are capable of repetition yet evading review. See ACLU, 999 F.2d at 1496. Although Plaintiffs assert in a conclusory manner that this exception applies to this case, that contention has no merit. This exception requires Plaintiffs to establish that there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party, and a showing that the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." Id. There is no argument that the duration of the challenged conduct would be too short to permit review.

First, Tarbert averred in a declaration under the penalty of perjury that the Harrell Plaintiffs cannot be disciplined for these advertisements. See Second Motion to Dismiss Ex. A at 2-3. Additionally, this representation is supported by the unambiguous language of the Rules. Rule 4-7.7(a)(1)(F) provides that a finding of compliance is binding on the Bar. There has been a finding of compliance in this case, as represented by Tarbert in her declaration. See Second Motion to Dismiss Ex. A at 2-3. On February 1, 2008, the BOG reversed the SCA's decision finding that the phrase violated the Rules. See id. at 2. This was the only violation noted by the SCA and the Bar staff attorney; the Bar implicitly concluded that the advertisements complied with all of the other Rules. See id. at 2-3. Indeed, the Rules provide that the advertisement is deemed approved when the Bar does not specifically indicate that the advertisement is noncompliant. See Rule 4-7.7(a)(1)(C). As a result, when the BOG reversed the only reason for finding the advertisements noncompliant, it approved the advertisements for publication, this decision is binding on the Bar, and no discipline can be imposed, except in the case of a latent misrepresentation. The Harrell Plaintiffs cannot be disciplined for these advertisements, which includes discipline for any violations of the Rules, such as those noted in paragraph 35 of the Complaint, as well as for any previous dissemination of the advertisements. Indeed, Tarbert specifically confirmed in her declaration that no discipline could be imposed, see Second Motion to Dismiss at 2-3, and Plaintiffs have not provided or identified any evidence to rebut this assertion.

Despite their failure to rebut Defendants' representations with any specific evidence, Plaintiffs suggest that Defendants have repeatedly changed their position with regard to the

use of this phrase in attorney advertisements and this alleged flip-flopping shows a likelihood that the conduct will recur. However, Plaintiffs' suggestion is not supported by the record. The Bar repeatedly approved the use of this phrase from 2002 to 2007. Although the staff attorney and SCA disapproved its use in 2007, which was arguably a change in position, the BOG corrected this action in February 2008, when they voted to reverse the SCA's decision, ensuring a consistent application of the Rules to this phrase. There is simply no record of flip-flopping or a pattern of the Bar arbitrarily changing its position with respect to this phrase. Moreover, Rule 4-7.7(a)(1)(F), which became effective in February, 2008, precludes the Bar from finding invalid, based on the current Rules, any portion of the current advertisements at issue. As a result, the BOG's action is binding and cannot be undone, as suggested by Plaintiffs. This further supports the conclusion that the conduct at issue is not likely to recur. Additionally, the credible threat of prosecution regarding these advertisements has evaporated, as the Bar cannot impose any discipline for the advertisements at issue, unless a latent misrepresentation is later discovered. There is no live controversy regarding these advertisements, no threat of imminent harm, and no injury to be redressed.

Defendants have shown that there is no reasonable expectation that the wrong will recur, and Plaintiffs have failed to identify any specific evidence that would suggest that Defendants will apply the Rules in the challenged manner in the future. Moreover, as a governmental entity, the Bar is entitled to a presumption that it will not resume allegedly illegal activities. See Nat'l Advertising, 402 F.3d at 1333. Plaintiffs' arguments to the contrary amount to no more than mere speculation, which is an insufficient basis to

conclude that the conduct is reasonably likely to recur. See id. at 1334 (concluding that "[m]ere speculation that the [defendant] may return to its previous ways is no substitute for concrete evidence of secret intentions" and declaring the case moot when there was "no evidence . . .[to] suggest[ ] any risk that the [defendant] has any intention of returning to its prior course of conduct").

Plaintiffs also suggest that this case is not moot and likely to recur because the Harrell Plaintiffs may use the phrase in future advertising campaigns and Defendants may again threaten disciplinary action for use of the phrase. This contention is too speculative to show that the alleged constitutional violation is likely to recur. Plaintiffs do not represent when they will create a new advertising campaign using this phrase nor do they even suggest the content of such a campaign. Indeed, the phrase could be used in a different context than in the present advertisements, which may be misleading and warrant the threat of disciplinary action. It is far too speculative at this time and there are far too many variables in a potential future, yet unnamed, undescribed, hypothetical advertising campaign to warrant the conclusion that the allegedly unconstitutional application of the Rules to this phrase is likely to recur.[23] See Nat'l Advertising, 402 F.3d at 1333.

Plaintiffs further contend that this action is not moot because Defendants acted solely to deprive this Court of jurisdiction. However, this contention is also unsupported by the record before the Court. See Nat'l Advertising, 402 F.3d at 1334. The facts with regard

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[23] Moreover, Plaintiffs' contention that Harrell will use this phrase again in some future advertising campaign also cannot serve as a basis for standing to assert the challenges to the Rules. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (concluding that "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require" (emphasis in original)).

to the Bar's reversal of the SCA's decision are not in dispute. On November 26, 2007, the SCA issued its decision affirming the staff attorney's rejection of the phrase. Thereafter, on January 7, 2008, Plaintiffs filed the lawsuit, which was served on Defendants shortly thereafter. The BOG first learned of the SCA's decision when the Bar was served with the lawsuit. Consequently, in accordance with its procedures, it determined to review the decision sua sponte at the next board meeting, which was set for February 1, 2008, and, at that meeting, it decided to reverse the SCA's decision. As explained supra, this decision has a binding effect on the Bar, as it can no longer discipline the Harrell Plaintiffs regarding these advertisements. This conclusion undermines Plaintiffs' assertion that Defendants acted simply to render this litigation moot, as their decision had a binding and lasting effect. Moreover, merely because Plaintiffs are not required to exhaust their administrative remedies prior to filing suit does not mean that the administrative process must cease upon the filing of the Complaint, and Plaintiffs have not cited any authority to support such a suggestion. Thus, the fact that the administrative process was completed after the commencement of the litigation is of no consequence and does not support Plaintiffs' contention that Defendants acted solely to moot this litigation.

Even setting aside the contention that the timing of the decision is explained based on the conclusion of the administrative review process, the mere fact that Defendants changed their position after the filing of the Complaint does not establish that the decision was made for the purpose of rendering this case moot.[24] Indeed, if the timing alone were

[24] Even if the timing of the BOG's decision suggested that the Bar was motivated to change its course by the lawsuit, the Eleventh Circuit has suggested that the defendant's motive in voluntarily ceasing the allegedly offensive conduct is not dispositive, particularly when there is affirmative evidence in the record (continued...)

sufficient, then the mootness doctrine based on voluntary cessation would not exist. Defendants have provided evidence that shows the BOG's decision was unrelated to the lawsuit. Pursuant to the Bar's procedures, the BOG can sua sponte consider the SCA's decision when it is of importance to the members of the Bar. This was the first opportunity that the BOG had to consider the SCA's decision, and the BOG's decision not only applies to Plaintiffs but all other lawyers who would like to use this phrase in their advertisements. Moreover, as Plaintiffs have asserted other challenges in this case, the BOG's decision would not render this entire action moot. As such, Defendants have shown that the Bar's change in position was based on more than a desire to end this litigation, and Plaintiffs have failed to identify any specific evidence, which would support a contrary conclusion.

The mootness challenge in this case is similar to the challenges addressed in Graham and Cole. In Graham, the Eleventh Circuit Court of Appeals concluded that the plaintiff's challenge to the constitutionality of a statute was moot when the prosecutor, who had previously informed the plaintiff that his conduct violated the statute, withdrew his determination and informed the plaintiff that his conduct did not violate the statute. See 5 F.3d at 499. The court explained that this issue was moot because neither the plaintiff nor anyone else could be prosecuted for the conduct at issue as the government had repeatedly stated that the conduct did not fall within the language of the statute. See id. In declaring the action moot, the court distinguished its previous decision in ACLU, 999 F.2d at 1495, explaining that, in the ACLU case, the government changed its position and

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[24](...continued)
indicating that the defendant is not reasonably likely to repeat the conduct at issue. See Nat'l Advertising, 402 F.3d at 1334.

decided that it would not prosecute the plaintiff for the conduct at issue, but it continued to maintain that the regulation was constitutional and that the conduct fell within the parameters of the regulation. See Graham, 5 F.3d at 500. As a result, in ACLU, the possibility that the government would change its position and seek to enforce the regulation against the plaintiff continued to exist and the action was not moot. See id. The Eleventh Circuit found that, in the Graham case, the government had concluded that the conduct at issue did "not fall within the parameters of what the statute [sought] to regulate" and the government's "representation that the statute [did] not proscribe the appellant's proposed conduct rendered th[e] case moot." Id.

A similar conclusion was reached in Cole, wherein the Eleventh Circuit determined that the case was moot because the agency withdrew its advisory opinion indicating that the plaintiff's conduct violated its regulation based on a recent Supreme Court decision and it stated that it would not seek to discipline the plaintiff or any other judge for engaging in such conduct. See 355 F.3d at 1292. The court explained that the agency changed its position due to a recent Supreme Court decision, not to avoid an adverse ruling by a federal court, and that the plaintiff "has every reason to believe that the [defendant's] representation is genuine." Id. at 1292-93.

As in Graham and Cole, in this case, after Plaintiffs initiated this lawsuit, the Bar determined that the Harrell Plaintiffs' advertisements did not violate the Rules, and therefore, Plaintiffs' claims relating to the Harrell Plaintiffs' current advertisements are moot. Indeed, for the same reasons that the Eleventh Circuit found the ACLU decision distinguishable in Graham, the Court finds it distinguishable from the instant action. Here,

as in Graham, after the lawsuit was filed, the Bar determined that the Harrell Plaintiffs' advertisements did not violate the Rules and specifically found that the phrase, "Don't settle for less than you deserve," did not improperly describe or characterize the quality of legal services offered. As a result, it concluded that the Harrell Plaintiffs' conduct did not fall within the ambit of the Rules and approved the advertisements for dissemination as well as indicated that other lawyers would not be disciplined for using this phrase in this manner. Unlike in ACLU, 999 F.2d at 1489, there is no evidence or suggestion that the Bar still maintains that these advertisements violate the Rules. The Bar did more than simply decide not to enforce the Rules against the Harrell Plaintiffs. It determined that the advertisements at issue fell outside the conduct regulated by these Rules and were therefore permissible. Consequently, the Court finds that the Eleventh Circuit Court of Appeals' conclusion in the ACLU case is distinguishable, and that the finding of mootness is supported in this case by the court's decisions in Graham and Cole.

In light of the foregoing, the Court finds that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims challenging the Rules based on the Harrell Plaintiffs' current advertising campaign, as these claims are moot.[25]

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[25] While Harrell suggested in his declaration that he has withheld from publication certain radio, billboard, and print advertisements from the Harrell Plaintiffs' current advertising campaign, at the hearing on the pending motion, counsel for Plaintiffs clarified that all of the Harrell Plaintiffs' advertisements with respect to the current advertising campaign have been disseminated. Plaintiffs merely contend that Harrell fears that, in the future, the Bar will again deny the Harrell Plaintiffs' permission to use these advertisements or the phrase, "Don't settle for less than you deserve." Therefore, for the reasons explained in detail supra, Plaintiffs' claims regarding the Harrell Plaintiffs' current advertisements are moot.

3. Standing to Sue

Next, the Court considers whether Plaintiffs have standing to assert the claims challenging the constitutionality of the Rules. As Plaintiffs initiated this action, they bear the burden of establishing standing to sue.[26] See Graham, 5 F.3d at 499. The standing requirement "serves to identify those disputes which are appropriately resolved through the judicial process." Jacobs, 50 F.3d at 903. In order to establish standing to sue, a plaintiff must show a "personal injury fairly traceable to the defendant's allegedly unlawful conduct." Id. at 904. In other words, "'a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" White's Place, Inc. v. Glover, 222 F.3d 1327, 1329 (11th Cir. 2000); see also KH Outdoor, 482 F.3d at 1303; Pittman, 267 F.3d at 1282. These requirements are the constitutional minimums of the Article III case or controversy requirement, which is a core component of standing. See KH Outdoor, 482 F.3d at 1303; Wilson v. State Bar of Ga., 132 F.3d 1422, 1427-28 (11th Cir. 1998); see also Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs of St. Johns County, 376 F.3d 1292, 1294 (11th Cir. 2004) (opining that "[t]he most significant case-or-controversy doctrine is the requirement of standing"). However, there are also prudential principles that must be considered in determining whether the Court has subject matter jurisdiction over the claims. See KH

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[26] The Court has an independent obligation to consider whether the parties have standing, even when it is not raised in the papers. See Jacobs, 50 F.3d at 904 n.12; see also White's Place, Inc. v. Glover, 222 F.3d 1327, 1328 (11th Cir. 2000).

Outdoor, 482 F.3d at 1303; see also Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla., 351 F.3d 1112, 1116 (11th Cir. 2003). "The prudential considerations include: '1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue; 2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches;[27] and 3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.'" Bischoff v. Osceola County, Fla., 222 F.3d 874, 883 (11th Cir. 2000); see also Warth v. Seldin, 422 U.S. 490, 499 (1975); CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1270 (11th Cir. 2006).

Regardless of whether the challenge is an as-applied or a facial challenge, the plaintiff must first satisfy the Article III requirement.[28] See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) (concluding that, even when the plaintiff asserts a facial challenge to a regulation, the plaintiff must satisfy the general rule "that a litigant only has standing to vindicate his own constitutional rights"); KH Outdoor, 482 F.3d at 1305 (concluding that due to the lack of a specific, redressible injury, the court does not reach the merits of the facial or as-applied challenges); Digital Props., 121 F.3d at 590 & n.4 (finding that the plaintiff's facial and as-

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[27] This prudential concern has also been articulated as: "when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens." CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1270 (11th Cir. 2006); see also Warth v. Seldin, 422 U.S. 490, 500 (1975).

[28] Indeed, at oral argument on the pending motions, counsel for Plaintiffs conceded that they must first prove standing before the Court considers the merits of their challenges.

applied claims were not ripe, as the plaintiff prematurely filed the action and "precluded the formation of a concrete case or controversy"); ACLU, 999 F.2d at 1489-92 (despite the fact that the plaintiffs raised facial and as-applied challenges, the court first considered issues of justiciability); see also CAMP Legal Defense Fund, Inc., 451 F.3d at 1272; Fla. Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1322 (11th Cir. 2001); Bischoff, 222 F.3d at 885-86 & n.10; Jacobs, 50 F.3d at 905 (determining that the plaintiffs had standing before reaching the issue of whether the plaintiffs asserted a facial or as-applied challenge to the regulation). Likewise, the fact that a plaintiff asserts his First Amendment rights have been infringed does not absolve the plaintiff of his burden to establish an injury. See White's Place, Inc., 222 F.3d at 1330 ("'[E]ven in a first amendment context the injury-to-the-plaintiff requirement cannot be ignored.'"). Finally, in the context of summary judgment, in order to establish standing, "the plaintiff must set forth by affidavit or other evidence specific facts . . . which for purposes of the summary judgment motion will be taken to be true." Jacobs, 50 F.3d at 901. Indeed, "[t]he burden is on the party seeking to exercise jurisdiction to allege and then to prove facts sufficient to support jurisdiction." White's Place, Inc., 222 F.3d at 1329. "Each element is 'an indispensible part of the plaintiff's case' and 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" Tanner Advertising Group, LLC v. Fayette County, Ga., 451 F.3d 777, 791 (11th Cir. 2006); see also KH Outdoor, 482 F.3d at 1303. As a result, "[s]tanding cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively

appear in the record." Tanner Advertising, 451 F.3d at 791; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); CAMP Legal Defense Fund, Inc., 451 F.3d at 1276.

In this case, each Plaintiff must establish standing with respect to each challenged rule. See CAMP Legal Defense Fund, Inc., 451 F.3d at 1273; Falanga v. State Bar of Ga., 150 F.3d 1333, 1335 n.1 (11th Cir. 1998). Harrell and H&H both assert individual standing to sue based on their current as well as proposed advertising campaigns. Public Citizen's challenge is more amorphous, but appears to be based on the claim that it has associational standing to assert facial and as-applied challenges to the rules.[29] It generally argues that the challenged rules deprive its members, which include 3,700 individuals who reside in Florida, from receiving information contained in legal advertisements. In support of this contention, it cites to previous decisions by the Bar regarding specific attorney advertisements. Additionally, as evidenced by the argument asserted by counsel at the hearing on the pending motions, Public Citizen's standing appears to be based on the Harrell Plaintiffs' advertisements. In other words, Public Citizen contends that the challenged Rules have infringed their members' First Amendment right[30] to receive the information contained in the Harrell Plaintiffs' proposed and current advertising

[29] Although the Eleventh Circuit Court of Appeals has recognized that a corporate plaintiff may assert a constitutional claim based on the deprivation of its own rights, see White's Place, Inc., 222 F.3d at 1328, in this case, Plaintiffs have not asserted that Public Citizen's claims are based on a deprivation of its own rights.

[30] Indeed, the Eleventh Circuit has recognized that the speaker as well as the listener have cognizable rights under the First Amendment to speak as well as receive information. See Abramson v. Gonzalez, 949 F.2d 1567, 1578 (11th Cir. 1992).

campaigns.[31] Finally, Plaintiffs also contend that they have standing to challenge Rule 4-7.7(a) as an unconstitutional prior restraint on speech.

a. The Harrell Plaintiffs' Proposed Advertisements

The first inquiry is whether Plaintiffs have satisfied the injury-in-fact requirement. Plaintiffs contend that, but for the challenged Rules, the Harrell Plaintiffs would have created and disseminated several different advertising campaigns, including advertisements focused on the themes of "family" and "choices." See Harrell Decl. ¶¶ 24, 28-29. Harrell explains that he has not published these advertisements because he believes that the rules will be applied against him and fears he will be disciplined.

In order to satisfy the standing requirement at the summary judgment stage, the plaintiff must provide evidence of specific facts establishing that the plaintiff "personally has suffered some actual or threatened injury." CAMP Legal Defense Fund, Inc., 451 F.3d at 1269. The injury-in-fact requirement, however, does not require the plaintiff to expose himself to enforcement to challenge the statute when he or she has asserted that he or she intends to engage in a specific course of conduct affected by a constitutional interest. See Jacobs, 50 F.3d at 904; see also White's Place, Inc., 222 F.3d at 1329; ACLU, 999 F.2d at 1493; Eaves, 601 F.2d at 817, 820. Instead, when the plaintiff brings a pre-enforcement challenge to the constitutionality of a regulation,[32] he or she must allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but

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[31] Plaintiffs' claims regarding the Harrell Plaintiffs' current advertisements are moot; thus, the Court need not consider whether these advertisements otherwise satisfy the standing requirement. Thus, the injury at issue is one of self-censorship based on the proposed advertisements.

[32] The Eleventh Circuit has described a pre-enforcement challenge as "the exception." Am. Charities, 221 F.3d at 1214.

proscribed by statute, and there exists a credible threat of prosecution.'" Graham, 5 F.3d at 499 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)); see also Am. Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County, 221 F.3d 1211, 1214 (11th Cir. 2000); Wilson, 132 F.3d at 1428. There must be "'a realistic danger of sustaining direct injury as a result of the [regulation's] operation or enforcement.'" Graham, 5 F.3d at 499; see also ACLU, 999 F.2d at 1491 ("[T]he federal court must ask whether 'the conflicting parties present a real, substantial controversy which is definite and concrete rather than hypothetical and abstract.'"); Eaves, 601 F.2d at 817.

The injury must be impending, and as such, the plaintiff must have been threatened with prosecution, prosecution must be likely, or there must be a credible threat of prosecution. See ACLU, 999 F.2d at 1492; see also Jacobs, 50 F.3d at 904. In other words, to show the injury of self-censorship, the plaintiff must demonstrate that "he reasonably believed that he had to forego what he considered to be constitutionally protected speech in order to avoid disciplinary charges being brought against him." ACLU, 999 F.2d at 1492. A plaintiff's subjective chill or fear of prosecution or "'imaginary or speculative' fear of prosecution" is insufficient to establishing standing. Graham, 5 F.3d at 499; ACLU, 999 F.2d at 1492 n.13; see also Pittman, 267 F.3d at 1284; Eaves, 601 F.2d at 819-20. Indeed, the Eleventh Circuit has indicated that, "'if no credible threat of prosecution looms, the chill is insufficient to sustain the burden that Article III imposes. A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.'" Pittman, 267 F.3d at 1284; see also Wilson, 132 F.3d at 1428.

Upon consideration of this requirement, the Court finds that Plaintiffs have failed to establish an injury-in-fact based on the proposed advertisements. Plaintiffs have not shown that the alleged injury of self-censorship is concrete as well as imminent.[33] For example, although Harrell's description of the proposed advertisements provides some information, he does not indicate when he would create or publish these proposed advertisements, other than his general allegations that he would develop these advertisements if the challenged rules did not exist. See Harrell Decl. ¶¶ 24, 28-29. Indeed, neither he nor Harrell & Harrell even submitted any such advertisements for an advisory opinion; nor have they suggested that the Bar has ever opined that the statements they would have included in the proposed advertisements would actually violate the Rules. Given the lack of specificity regarding the precise statements and content of such advertisements, Plaintiffs have not shown that they have concrete plans to create these advertisements.[34] Thus, as the plaintiffs in Lujan, Plaintiffs have failed to demonstrate that there is an actual or imminent injury.[35] See 504 U.S. at 564.

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[33] Plaintiffs do not assert and there is no indication in the record before the Court that they have suffered an actual injury with regard to the Harrell Plaintiffs' proposed advertisements.

[34] Additionally, Plaintiffs have not shown that Defendants implemented, threatened to enforce, or enforced regulations to suppress the plaintiff's speech at issue. The Eleventh Circuit's decision in Nat'l Alliance suggests that such a showing is required to satisfy the standing requirement. See Nat'l Alliance, 376 F.3d at 1295 (finding that "[t]o establish an injury [for a violation of the equal protection clause], [the plaintiffs] had to show that [the defendants] implemented and enforced housing policies against them in a discriminatory manner"). Indeed, it is well settled that Plaintiffs must show that Defendants' challenged conduct impacted them personally. See id. (indicating that the plaintiff had to show that he had personally been discriminated against in order to establish standing); Granite State, 351 F.3d at 1116; see also Lujan, 504 U.S. at 561 n. 1; Warth, 422 U.S. at 502; CAMP Legal Defense Fund, Inc., 451 F.3d at 1269.

[35] As Plaintiffs are seeking injunctive relief, they must show more than past exposure to illegal conduct. See Lujan, 504 U.S. at 563.

Moreover, Plaintiffs' challenge appears to be based on Harrell's subjective fear, as Plaintiffs have not cited any evidence showing that any Defendant or any employee or representative of any Defendant has opined or suggested that the proposed advertisements would violate the Rules.[36] Indeed, the only evidence in the record suggesting that these advertisements may be prohibited by the Rules is Harrell's statement, in his declaration, which is based only upon the manner in which he "fears" the Bar will apply the Rules. Although Plaintiffs do not need to expose themselves to discipline in order to challenge a regulation, Harrell's subjective fear of discipline as set forth in his declaration is not enough. As the Eleventh Circuit Court of Appeals recognized, "one should have the opportunity to challenge in federal court the constitutionality of the law as soon as state sanctions have been threatened," ACLU, 999 F.2d at 1493; however, in this case, Plaintiffs have not provided any evidence that the Bar has ever suggested – either formally or informally through any representative or employee – that the advertisements Plaintiffs suggest they wish to utilize are prohibited by the Rules or that the Harrell Plaintiffs would be disciplined if they published them. On the contrary, Tarbert affirmatively alleged that there has been no threat of discipline for any of the advertisements identified in the Complaint, except for the threat related to the use of the phrase "Don't settle for less than you deserve," which has been rendered moot. Thus, in this case, the Harrell Plaintiffs only

[36] The United States Supreme Court has been clear that there is a difference between an injury and the merits of the constitutional challenge. See Warth, 422 U.S. at 501; CAMP Legal Defense Fund, Inc., 451 F.3d at 1275 ("'Standing in no way depends on the merits of the plaintiff's contention that particular conduct was illegal.'") Thus, for example, to establish standing, Plaintiffs do not have to establish that the Rules are unconstitutional or have been applied in an unconstitutional manner, but that Defendants' actions suppressed Plaintiffs' speech at issue. However, Plaintiffs have failed to do so. While they contend that their speech has been suppressed, that contention is based on their rank speculation as to how Defendants would implement their Rules.

have a subjective fear of discipline, which is based on speculation, and they have not established by evidence of specific facts that there is a credible threat of prosecution. See Bischoff, 222 F.3d at 886 n.10 (opining that, if "the [p]laintiffs were not actually threatened with arrest, then the [p]laintiffs have not sustained a specific injury in fact and plainly, therefore, cannot bring either their as applied or facial challenge to the statutes"). Had Plaintiffs provided specific representations regarding the content of the proposed advertisements, it is possible that the Court, might independently, have been able to discern the existence of a real threat. However, Plaintiffs did not do so, choosing instead to rely on vague statements of how they believe the Bar might evaluate hypothetical advertisements.

Indeed, this case is distinguishable from the myriad of Eleventh Circuit decisions where the court found that there was a credible threat of prosecution. It is apparent that the facts identified in this case do not rise to the level required to establish such a threat. For example, the court has recognized that a letter from a representative of the defendant indicating that the plaintiff's conduct or proposed conduct was violating or would violate the challenged regulation is sufficient to establish a credible threat of prosecution, regardless of whether the defendant intended to prosecute the violation. See, e.g., Beaulieu v. City of Alabaster, 454 F.3d 1219, 1230 (11th Cir. 2006); Falanga, 150 F.3d at 1335 n.1; Graham, 5 F.3d at 499; ACLU, 999 F.2d at 1493-94. Additionally, in Am. Charities, the court found a verbal opinion from the defendant indicating that the plaintiff's conduct violated the regulation and that the violation could be punished by a fine or imprisonment sufficient to establish a credible threat, particularly when there was other evidence that the

defendant applied the same interpretation to another individual and the interpretation was confirmed in the defendant's response to request for admissions. See Am. Charities, 221 F.3d at 1214-15 (concluding that the circumstances of this case "assure us that this case 'grows out of a genuine dispute and is not a contrivance prompted solely by a desire to enforce constitutional rights.'"). Moreover, a credible threat of prosecution was found when the agency responsible for imposing discipline issued an advisory opinion indicating that the plaintiff's conduct violated its rules. See Pittman, 267 F.3d at 1284. Finally, the court has found there to be a credible threat of prosecution when the defendant admitted, during the course of the litigation, that the plaintiff's proposed conduct violated the defendant's regulations and the plaintiff could be subject to discipline for such violations. See Jacobs, 50 F.3d at 903-04.

In this case, Plaintiffs have failed to provide any evidence that any Defendant or anyone on its behalf has suggested that the proposed rather vaguely described advertisements violate the challenged rules and that publication would subject the Harrell Plaintiffs to discipline. Plaintiffs have failed to satisfy their burden, especially in light of the Eleventh Circuit's decision in Digital Properties, where it found that a statement by a nonmanagement level clerk that the defendant would not likely allow the plaintiff's conduct was insufficient to establish a credible threat of prosecution. See 121 F.3d at 589-90. Plaintiffs have presented even less evidence in this case to support their contention that they have suffered an injury-in-fact.

Plaintiffs maintain that they were not required to obtain a decision of the Bar, as there is no exhaustion of administrative remedies requirement for a § 1983 claim.

However, there is an important distinction between exhaustion of administrative remedies, which is not required in a First Amendment challenge, and satisfying the constitutional injury requirement. See Konikov, 410 F.3d at 1322; see also Beaulieu, 454 F.3d at 1226-27 (concluding that the plaintiff is not required to exhaust his or her administrative remedies in order to bring a First Amendment claim, but that the plaintiff must still "meet constitutional ripeness requirements"). Although Plaintiffs may not be required to fully exhaust administrative remedies before filing suit under § 1983, this conclusion does not relieve Plaintiffs of their constitutional obligation to establish that this Court has subject matter jurisdiction to entertain this challenge. Moreover, the critical fact is not that Plaintiffs failed to obtain an opinion from the BOG regarding their proposed advertisements, but instead, it is the absence of any evidence, other than Harrell's subjective statements of belief, to support the contention that the Bar would interpret the Rules in the manner suggested.

In addition, contrary to Harrell's conclusory assertion, Plaintiffs have not established that they had a reasonable belief that they must choose between discipline or foregoing allegedly constitutionally protected conduct. As explained supra, Plaintiffs do not identify any evidence in the record suggesting that Defendants would interpret and apply the Rules as suggested by Plaintiffs. Rather than foregoing this speech, Plaintiffs could have sought an advisory opinion from the Bar regarding whether the Rules would be applied in such a manner to suppress this proposed speech. To the extent that the Harrell Plaintiffs engaged in self-censorship, it was not based on an objectively reasonable fear of discipline. It is undisputed in this case that the Harrell Plaintiffs could not be subject to discipline for submitting the advertisements for an advisory opinion. Thus, Plaintiffs were not faced with

the Hobson's choice of choosing between discipline or foregoing constitutionally protected speech. The Eleventh Circuit has opined that "the likelihood of disciplinary action . . . is an important factor in determining whether [the plaintiff] reasonably believed that he had to forego what he considered to be constitutionally protected speech in order to avoid disciplinary charges being brought against him." ACLU, 999 F.2d at 1492.

Moreover, this case is distinguishable from the Eleventh Circuit's previous attorney advertising decisions in Jacobs and Mason v. The Fla. Bar, 208 F.3d 952 (11th Cir. 2000). In Jacobs, which also involved a pre-enforcement challenge, the Bar had reviewed the proposed advertisements and stipulated that at least some of the advertisements violated the challenged rules and that the plaintiff would be subject to discipline if he published the advertisements in violations of the rules. See 50 F.3d at 903. In this case, however, Plaintiffs have not identified or provided any evidence that the Bar or anyone on its behalf has ever opined that the proposed advertisements violate the challenged rules or that the Harrell Plaintiffs would be subject to discipline for disseminating these advertisements. Additionally, in Mason, the plaintiff had already published the advertisement at issue, the Bar informed him that the advertisements violated the Rules, and the plaintiff filed suit after exhausting his administrative appeals with the Bar. 208 F.3d at 954. Thus, these decisions do not support the conclusion that the proposed advertisements at issue in this case establish an injury-in-fact.[37]

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[37] This case is likewise distinguishable from the Supreme Court decisions in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) as well as Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91 (1990), as the advertising attorneys in those cases had been disciplined for the advertisements at issue and were seeking review of that discipline by the Supreme Court. See Zauderer, 471 U.S. at 631-36; Peel, 496 U.S. at 97-98, 111.

In addition to establishing an injury, the plaintiff must also show that its injury is fairly traceable to the challenge conduct. An injury is "fairly traceable" to the challenged conduct when the injury resulted from the alleged unconstitutional regulation in a concretely, demonstrable way. See Warth, 422 U.S. at 504. In other words, the plaintiff must establish that, but for the defendant's regulation or conduct, there is a substantial probability that plaintiff would not be injured. See id.; Lujan, 504 U.S. at 561. A plaintiff's failure to show a causal relationship between the plaintiff's injury and the challenged conduct is fatal to the plaintiff's constitutional claim. See Warth, 422 U.S. at 504.

In this case, Plaintiffs have failed to establish this requirement for many of the same reasons previously identified. Plaintiffs have not identified any specific facts establishing a causal connection between their alleged injury of self-censorship and Defendants' actions. There is no evidence that Defendants have taken any action relating to these proposed advertisements; indeed, Tarbert specifically stated, without contradiction, that the Bar has not threatened to discipline the Harrell Plaintiffs for these advertisements. Plaintiffs' contention that the challenged Rules prohibit these advertisements is supported only by Harrell's statements regarding how he believes the Bar would interpret the Rules with regard to the proposed advertisements. Indeed, Harrell explains that he discarded the ideas for the proposed advertisements based upon his review and interpretation of the Rules. See Harrell Decl. ¶¶ 24, 28-29. Moreover, it is undisputed that the Harrell Plaintiffs could not be disciplined for creating the advertisements and seeking an advisory opinion. Again, the Harrell Plaintiffs were not placed in the untenable position of self-censorship or

discipline. As a result, they have not met their burden of establishing that the injury of self-censorship is fairly traceable to Defendants' actions in a demonstrable way.

Even if Plaintiffs could show a concrete and particularized injury that is fairly traceable to Defendants' conduct, the Court finds that they still failed to establish standing, as they have not provided any evidence showing that their alleged injury likely would be redressed by granting the relief requested. "In order for an injury to be redressible, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." KH Outdoor, 482 F.3d at 1303. In the instant case, the alleged injury is the inability of the Harrell Plaintiffs to publish the proposed advertisements because of the challenged rules. However, Plaintiffs failed to demonstrate that their proposed advertisements complied with all of the other advertising rules, which have not been challenged in this action.

In his declaration, Harrell describes some proposed advertisements that he contends he "would develop and air . . . if not prohibited from doing so by the Bar." Harrell Decl. ¶¶ 24, 28-29. Yet, Harrell provides little information about these proposed advertisements. For example, he asserts that he developed numerous ideas for advertisements, but was forced to discard those ideas. See id. He does not identify the content of those proposed advertisements. See id. While he provides some information about the proposed advertisements that focused on the themes of "choices" and "family," unlike his description of his current advertising campaign, he still does not identify the specific statements that would be included in the advertisements, the context in which the statements would be made, or the depictions to be made in the advertisements. See id. ¶¶ 20-21, 24, 28-29.

Other than his conclusory assertion that he would publish these advertisements if the challenged rules did not exist, he has failed to demonstrate that these advertisements would comply with all of the remaining Rules not challenged in this action. Thus, even if the Court were to invalidate the challenged rules, Plaintiffs have failed to show that their injury likely would be redressed, i.e., the Harrell Plaintiffs would be authorized to run these advertisements. As a result, Plaintiffs have failed to meet the redressibility requirement. See KH Outdoor, 482 F.3d at 1304 (concluding that the plaintiff did not have standing because the advertisements at issue did not comply with the other, unchallenged requirements of the ordinance, such as the requirement that the application include a specific number and type of drawings, and the invalidation of the provisions at issue would not result in the defendant's approval of the billboards); see also Tanner Advertising, 451 F.3d at 791 (concluding that the plaintiff lacked standing when the record before the court failed to affirmatively establish an element of the Article III standing requirement).

In light of the foregoing, the Court finds that the Harrell Plaintiffs' proposed advertisements are insufficient to satisfy the standing requirement.

b. Associational Standing of Public Citizen

Next, the Court considers whether Public Citizen has satisfied the standing requirement. As indicated supra, Public Citizen asserts associational standing to challenge these Rules, not individual standing. In order to establish associational standing, the corporate plaintiff must show that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit." White's Place, Inc., 222 F.3d at 1330; see also Nat'l Alliance, 376 F.3d at 1296. In this case, Public Citizen has failed to show that its members have standing to sue. In their declarations, representatives of Public Citizen assert that 3,700 of its members reside in Florida[38] and these members' First Amendment right to receive information has been impacted by the challenged rules. Although the right to receive information is protected by the First Amendment, see Abramson v. Gonzalez, 949 F.2d 1567, 1578 (11th Cir. 1992); United States Postal Serv. v. Athena Prods., 654 F.2d 362, 366 (5th Cir. Unit B Aug. 27, 1981), in order to assert a constitutional challenge based on that right, the plaintiff must identify a willing speaker. See Pittman, 267 F.3d at 1283 n.12 (recognizing that "an injury in fact to the [organization's] right to receive speech from a willing speaker suffices to confer standing"). The failure to identify a willing speaker is fatal to the constitutional claim. See Florida Family Pol'y Council v. Freeman, No. 07-14830, 2009 WL 565682, at *6 (11th Cir. Mar. 6, 2009) ("For a recipient of speech . . . to demonstrate injury in fact for standing purposes, it must show . . . an otherwise willing speaker whose speech was chilled by the challenged regulation . . . ."). In this case, Public Citizen has identified the Harrell Plaintiffs, based on their current and proposed advertisements, as the willing speakers. However, for the reasons identified supra, this speech does not satisfy the standing requirement.

Nonetheless, Public Citizen contends that it has standing independent of the Harrell Plaintiffs' advertisements based on "the First Amendment rights of its Florida members to

[38] Public Citizen has not specifically identified the member who allegedly would have standing to challenge the Rules, but rather suggests that all of its members who reside in Florida would have standing.

receive advertising information." Response to Motion to Dismiss at 2. It further explains that "[t]hese members are injured not as much by denial of access to a single advertisement as by the broad chilling effect that the rules cast over all lawyer advertising in the state." Id.; see also id. at 8. This argument fails for two reasons. First, it is nothing more than a generalized grievance. See CAMP Legal Defense Fund, Inc., 451 F.3d at 1270; see also Warth, 422 U.S. at 499. This general allegation of harm does not specifically apply to the members of Public Citizen, but rather to the public at large. Setting aside the Harrell Plaintiffs' advertisements, which are addressed supra, Public Citizen fails to identify the specific and particularized harm its members have suffered or are in imminent danger of suffering. Instead, the alleged harm appears to be to their interest in ensuring that the government does not violate the First Amendment, and in sweeping unconstitutional legislation from the books, neither of which is sufficient to satisfy Article III. See Lujan, 504 U.S. at 573-74; Eaves, 601 F.2d at 819. As a result, consideration of this claim would violate the prudential requirement with respect to general grievances as well as the constitutional requirement for standing. See CAMP Legal Defense Fund, Inc., 451 F.3d at 1270; see also Lujan, 504 U.S. at 573-74; Warth, 422 U.S. at 501 (explaining that Article III requires the plaintiff to "allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants").

Public Citizen's standing argument also fails as it appears to be based on the overbreadth doctrine, i.e. that the very existence of the regulation causes the injury. See Taxpayers for Vincent, 466 U.S. at 798 (explaining that the overbreadth doctrine was recognized because "the very existence of some broadly written statutes may have such

a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected"); see also CAMP Legal Defense Fund, Inc., 451 F.3d at 1270 ("The overbreadth doctrine allows litigants . . . to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). However, it is well settled that the overbreadth doctrine is inapplicable in commercial speech cases. See Jacobs, 50 F.3d at 907.

Even if this doctrine were applicable, Public Citizen's claims would not satisfy the standing requirement, as the Eleventh Circuit has recognized that, in order to assert an overbreadth challenge, the plaintiff must first establish a concrete, specific injury arising from the challenged regulation, even though its claim may not be based on the violation of its own constitutional rights. See KH Outdoor, 482 F.3d at 1305 (acknowledging that "'[a] litigant cannot create a case or controversy just by making an untenable "facial" attack on a statute; actual injury and redressibility are essential no matter how the challenge is cast'"); CAMP Legal Defense Fund, 451 F.3d at 1270-72; Konikov, 410 F.3d at 1391 n.1; Granite State, 351 F.3d at 1116 (acknowledging that "[a] plaintiff seeking to make an overbreadth challenge must first show that he has suffered an injury in fact, as required under Article III"); Fla. Right to Life, Inc., 273 F.3d at 1323 n.4; White's Place, Inc., 222 F.3d at 1330 (indicating that a facial challenge is not justiciable when the alleged injury is too speculative). The only identified basis for a claim of specific injury to any member of Public Citizen in this case is the Harrell Plaintiffs' proposed advertisements, which, as

discussed supra, are insufficient to establish a concrete injury and satisfy the standing requirements.

c. Prescreening Requirement for Future Advertisements

In addition to the foregoing, Plaintiffs contend that they have standing to challenge Rule 4-7.7(a) as an impermissible prior restraint due to the fact that the rule gives unbridled discretion to the decisionmakers. See Plaintiffs' MSJ at 11-15. Plaintiffs also complain that this rule fails to require prompt decisionmaking and does not provide the availability of prompt judicial review. See id.

"'[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.'" United States v. Frandsen, 212 F.3d 1231, 1235 (11th Cir. 2000); see also CAMP Legal Defense Fund, Inc., 451 F.3d at 1274; Granite State, 351 F.3d at 1117-18; Ward, 217 F.3d at 1356 (concluding that the plaintiff did not need to apply for a license in order to challenge the licensing scheme itself); Abramson, 949 F.2d at 1572. Additionally, the Eleventh Circuit has explained that, "[w]here a plaintiff alleges that a statute grants unbridled discretion, a plaintiff need only be 'subject to' the provision to establish a constitutional injury." CAMP Legal Defense Fund, Inc., 451 F.3d at 1275. As Plaintiffs' counsel confirmed in the hearing on the pending motions, Plaintiffs' sole argument with regard to Rule 4-7.7(a) (the prescreening requirement) is that it imposes an unconstitutional prior restraint on lawyer advertising, based, in part, on the limitless discretion given to the decisionmakers. It is undisputed that the Harrell Plaintiffs are subject to this rule.

Therefore, Plaintiffs have established that they have standing to challenge this provision as an impermissible prior restraint. See CAMP Legal Defense Fund, Inc., 451 F.3d at 1274-75.

4. Ripeness

In addition to determining whether Plaintiffs have standing, the Court must also consider whether their claims are ripe for adjudication.[39] Indeed, in their MSJ, Defendants contend that they are entitled to judgment as a matter of law because Plaintiffs' claims are not ripe.

The Eleventh Circuit has recognized that there are two inquiries in determining whether a claim is ripe: "1) whether the issues are fit for judicial decision and 2) the hardship to the parties of withholding court consideration." Konikov, 410 F.3d at 1322; see also Digital Props. Inc., 121 F.3d at 589. These inquiries "ensure that the plaintiff has suffered a sufficient injury to meet Article III's case or controversy requirement [and] . . . permit[] us to determine 'whether the claim is sufficiently mature, and the issue sufficiently defined and concrete, to permit effective decisionmaking by the court.'" Konikov, 410 F.3d at 1322. It also "protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes" and "'seeks to avoid entangling courts in the hazards of premature adjudication.'" Digital Props., 121 F.3d at

[39] In some instances, the Eleventh Circuit has used the term "standing" interchangeably with "ripeness" or the court's analysis of the standing and ripeness challenges have been indistinguishable. See, e.g., Am. Charities, 221 F.3d at 1214-15 (indicating under the heading of "standing" that the plaintiff's challenge was ripe); Pittman, 267 F.3d at 1277-78. The court's precedent establishes that there is some overlap between the two doctrines, as they both require consideration of the Article III constitutional minimums. See KH Outdoor, 482 F.3d at 1303; Beaulieu, 454 F.3d at 1227; Fla. Right to Life, Inc., 273 F.3d at 1322-23; Wilson, 132 F.3d at 1427; Digital Props., 121 F.3d at 589; see also Warth, 422 U.S. at 499 n.10. In addition, the court has also opined that these doctrine "often are interconnected, particularly when . . . the nature of the controversy is an anticipatory challenge through an action for a declaratory judgment." ACLU, 999 F.2d at 1490.

589. Thus, the first part of the ripeness inquiry is the same as the standing inquiry – determining whether the plaintiff has satisfied the Article III requirement. See Beaulieu, 454 F.3d at 1227.

If this requirement is satisfied, the court also evaluates the following factors in determining whether the case is ripe: "'(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.'" Pittman, 267 F.3d at 1278. The Eleventh Circuit Court of Appeals has noted "that claims are less likely to be considered 'fit' for adjudication when they venture beyond purely legal issues or when they require 'speculation about contingent future events.'" Id. Additionally, the court has found a substantial hardship exists when the plaintiff is "'forced to choose between foregoing lawful activity and risking substantial legal sanctions.'" Id. at 1280. A hardship may also be present when the challenged policy results in adverse legal effects or inflicts significant practical harm[40] on the plaintiff's interests. See id. at 1280-81.

In this case, Plaintiffs have failed show that the claims asserted based on the Harrell Plaintiffs' proposed advertisements are ripe. In addition to the foregoing conclusion that Plaintiffs have failed to show a constitutional injury for standing, which also supports a finding that Plaintiffs' claims are not fit for adjudication, Plaintiffs have likewise failed to show that they will suffer undue hardship from the withholding of adjudication. Indeed, as

[40] Practical harm, however, will not be present when the plaintiff has "ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." Pittman, 267 F.3d at 1281.

Plaintiffs will have ample opportunity to bring this legal challenge upon further factual development of this claim, they have failed to show that they will suffer actual prejudice or substantial harm.

The Eleventh Circuit's decision in Beaulieu is instructive in evaluating whether Plaintiffs' claims here are ripe. In Beaulieu, the court concluded that the plaintiff's claim was ripe, in part, because the plaintiff would suffer an undue hardship if the court withheld adjudication. See 454 F.3d at 1230. Specifically, it found that the only reason the plaintiff was not suffering actual harm was because she chose to censor her speech. See id. However, unlike in Beaulieu, in this case, as explained supra, Plaintiffs are not faced with such a choice.[41] Plaintiffs had, and still have another option; to submit the advertisements for an advisory opinion. Had Plaintiffs done so, the Court could decide the case based upon a record of what statements would actually have been included in the proposed advertisements. The Court would also have a basis for determining how the Florida Bar would have interpreted its Rules as applied to the advertisements. Instead, the Court has only Plaintiffs' conjecture and speculation to support the contention that Defendants would interpret and apply the challenged Rules to prohibit their proposed speech. Finally, unlike in Beaulieu, further factual development would be beneficial because, in this case, as Defendants' position regarding their interpretation of the Rules to this conduct has not been determined. See 454 F.3d at 1231.

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[41] The decision in Beaulieu is further distinguishable as the speech at issue was political speech, which the Eleventh Circuit describes as entitled to "the broadest of First Amendment rights because it concerns the right of a political candidate to publicize her candidacy during the heat of a campaign." 454 F.3d at 1228.

The conclusion that Plaintiffs' claims are not ripe is further supported by the Eleventh Circuit's decisions in Digital Properties and Pittman. Indeed, the facts of this case are far more similar to the facts presented in Digital Properties, 121 F.3d at 590, where the Eleventh Circuit concluded that the plaintiff's challenge was premature, than to American Charities, 221 F.3d at 1214-15, where the court found that the plaintiff's challenge was ripe due to the defendant's confirmation of the plaintiff's interpretation of the regulation, both verbally and through discovery. Indeed, in American Charities, the court specifically found that the Digital Properties decision was materially different because that case "was 'founded upon [plaintiff's] anticipated belief that [city] would interpret [ordinance] in such a way as to violate [plaintiff's] First Amendment rights.'" 221 F.3d at 1215 n.7. Likewise, in the instant case, Plaintiffs' challenge regarding the proposed advertisements is based on how they anticipate Defendants will interpret and apply the Rules to their proposed advertisements. Plaintiffs do not cite any evidence supporting their interpretation, other than Harrell's statements of belief and fears. Thus, as in Digital Properties, Plaintiffs' "'rush to the courthouse was premature'" and the proposed advertisements constitute merely a potential dispute. 121 F.3d at 589-90.

Additionally, the Eleventh Circuit's decision in Pittman supports the conclusion that Plaintiffs' challenges are not ripe. See 267 F.3d at 1278. In Pittman, the court concluded that the plaintiff's claim against the bar was premature as it was uncertain whether the bar would find that the plaintiff's conduct violated its rules. See 267 F.3d at 1278-79 (concluding that the case was premature because there was an unresolved factual issue – "what the actual policy of the Bar is concerning" the plaintiff's conduct). It explained that

an informal opinion by the bar's general counsel was not sufficient to establish a ripe claim, as his unofficial statements are not the policy of the bar. See id. at 1279. The plaintiff did not follow the procedures for obtaining a formal position nor did it explain its failure to do so. See id. at 1280. Instead of allowing the bar to formulate its policy, the plaintiff asked the court "to speculate, without any evidentiary basis, that [the bar] would agree with the general counsel's opinion [regarding the application of the rules to the conduct at issue]." Id. The court further opined that allowing the "agency charged with overseeing lawyer discipline to formulate and crystallize its policies without undue interference from the federal courts is a good thing, and that also weighs strongly in favor of the conclusion that the plaintiff's claims against the Bar are premature." Id. Finally, the court concluded that there was no hardship in refusing to hear the constitutional challenge because the plaintiff would not suffer any actual prejudice. See id. at 1281.

Likewise, the instant case involves the same unresolved factual issues as in Pittman. Plaintiffs have not provided the Court with any evidence indicating the Bar's position with regard to these proposed vaguely described advertisements. Moreover, there is no evidence in the instant case that any representative or employee of the Bar has expressed an opinion regarding the proposed advertisements, except for Tarbert's representation that the Harrell Plaintiffs have not been disciplined or threatened with discipline regarding these advertisements. Plaintiffs, in this case, offer even less evidence than the plaintiff in Pittman. As recognized in Pittman, it would be more appropriate for the Court to allow Plaintiffs to formulate the specific advertisements and then permit the Bar to reach an opinion regarding the proposed advertisements without undue interference by this Court

before reaching the merits of the constitutional challenges, especially when there is no actual prejudice to Plaintiffs in withholding adjudication, as Plaintiffs "'will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain.'" Id. at 1281.

Accordingly, the Court concludes that Plaintiffs' claims based on the proposed advertisements are premature. However, Plaintiffs' challenge to Rule 4-7.7(a) is ripe, because Plaintiffs have established a constitutional injury, as explained supra; no further factual development is necessary in order to address whether this rule is an impermissible prior restraint; and resolution of this challenge would not inappropriately interfere with any further administrative action.

5. Conclusion

The foregoing establishes that there are no disputed issues of material fact, and Plaintiffs have failed to prove that they have standing to assert their facial and as-applied challenges, or that these challenges are not premature, except for the challenge to Rule 4-7.7(a) as an impermissible prior restraint. Likewise, the Court finds that Plaintiffs' challenges based on the Harrell Plaintiffs' current advertisements are moot. As a result, Defendants are entitled to judgment as a matter of law on these challenges,[42] as the Court lacks subject matter jurisdiction over these claims. Nevertheless, as Plaintiffs have

[42] For example, Plaintiffs assert the Rules at issue are void-for-vagueness, which is a facial challenge. As Plaintiffs have failed to establish that this claim is ripe or that they have standing to assert it, the Court need not reach the merits of this challenge. Nonetheless, the Court notes that Plaintiffs do not explain how the Rules are vague, other than conclusory assertions that the rules are all too vague to provide fair notice, and it further notes that the Rules allow an attorney to obtain an advisory opinion regarding a specific proposed advertisement. See Falanga, 150 F.3d at 1335 n.3 (refusing to consider the merits of a conclusory vagueness challenge made on appeal regarding attorney advertising regulations); see also Mason, 208 F.3d at 959 n.4 (opining that the availability of advisory opinions bolstered the validity of the attorney advertising regulations and supported the rejection of the void-for-vagueness argument); Wilson, 132 F.3d at 1430.

established the existence of subject matter jurisdiction with respect to their challenge to Rule 4-7.7(a), the Court must turn its attention there.

B. Whether Rule 4-7.7(a) Is an Unconstitutional Prior Restraint

The United States Supreme Court has held that commercial speech, such as attorney advertising, is entitled to limited protection under the First Amendment in order to ensure that consumers receive truthful and relevant information to make an informed decision.[43] See Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1204 (11th Cir. 1985) (citing Va. State Bd. of Pharm. v. Va. Citizen Council, 425 U.S. 748, 762, 765 (1976)); see also Abramson, 949 F.2d at 1575; Gould v. The Fla. Bar, 259 F. App'x 208, 210 (11th Cir. 2007); Mason, 208 F.3d at 955. However, even commercial speech that is protected by the Constitution is subject to more governmental regulation than noncommercial speech. See Abramson, 949 F.2d at 1575. For example, "the Supreme Court has repeatedly warned that traditional prior restraint safeguards do not necessarily extend to questions of commercial speech," as such speech is more resilient than political speech and subject to verification by the speaker. Kleiner, 751 F.2d at 1204. Indeed, "the chilling effect of government regulation would be mitigated by the urgency of the profit motive." Athena Prods., 654 F.2d at 366.

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[43] If the commercial speech at issue is protected by the First Amendment, then the government must establish the following in order to regulate or ban the commercial speech: (1) "a substantial governmental interest [in restricting speech], (2) which is directly advanced by the restriction, and (3) must demonstrate that there is a reasonable fit between the legislature's ends and the narrowly tailored means chosen to accomplish those ends." Abramson, 949 F.2d at 1575, 1582 (citing Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) and Central Hudson Gas Co. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)) (emphasis in original); Mason, 208 F.3d at 955-56. This is commonly referred to as the Central Hudson test.

The Eleventh Circuit in Kleiner declined to determine the applicability, if any, of the prior restraint doctrine[44] to commercial speech, concluding that the judge's order requiring approval of certain communications before they could be made during the course of litigation was valid and not an unconstitutional restriction on speech. See Kleiner, 751 F.2d at 1207. Additionally, the former Fifth Circuit recognized that, "[w]hile the government may restrain commercial speech prior to a final determination on the merits in a manner that would be unconstitutional where noncommercial speech is concerned, the first amendment protects against erroneously imposed prior restraints of excessive duration even in the area of commercial speech." Athena Prods., 654 F.2d at 367. In that case, the court determined that a prior restraint of 120 days was not of excessive duration. See id.

Here, the Court need not reach the question of whether the prior restraint doctrine is applicable in commercial speech cases, as it finds that Rule 4-7.7(a) is not a prior restraint on speech. "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." Frandsen, 212 F.3d at 1236-37; see also Cooper v. Dillon, 403 F.3d 1208, 1215 (11th Cir. 2005). On the other hand, the Eleventh Circuit has recognized that "[a] prior restraint, however, does not exist where a publisher is faced with criminal sanctions for publishing certain information." Cooper, 403 F.3d at 1215.

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[44] The prior restraint doctrine provides that prior restraints are not per se unconstitutional, but there is a strong presumption against their validity. See Frandsen, 212 F.3d at 1237. For example, a prior restraint must contain procedural safeguards to be valid, including requiring the censor to bear the burden of going to court to suppress speech as well as the burden of proof in such proceedings, the prior restraint must be of brief duration during which the status quo is maintained, and there must be an avenue of prompt judicial review. See id. at 1238. However, not all of these safeguards have been required in every situation. See id. at 1238 n.6.

In this case, there is no support for the suggestion that the Bar can deny Plaintiffs access to a forum for expression. Indeed, Harrell represented that he has published several advertisements without submitting them for prior review, but he does not assert that he has been threatened with discipline or even advised that this failure is a violation of the Rules.[45] See Harrell Decl. ¶ 30; see also Defendants' MSJ Ex. 3 at 3. Indeed, Tarbert averred that, as a result of the BOG's decision, no discipline could be imposed for any violation of the prescreening rule with respect to the current advertising campaign; that "[n]o attempt was ever made to discipline Mr. Harrell . . . for any of the advertisements at issue in the Complaint"; and that since the BOG's action on February 1, 2008, the Bar "has not threatened to discipline Mr. Harrell . . . for the advertisements at issue in the Complaint." Second Motion to Dismiss Ex. A at 3; Defendants' MSJ Ex. 3 at 3. Plaintiffs have not cited any evidence in the record indicating that the failure to comply with the contemporaneous filing requirement in Rule 4-7.7(b), which is a similar filing requirement rule that has been in existence for a longer period of time, would result in discipline. Additionally, it is undisputed that the Ethics Department, which is responsible for reviewing advertisements, is separate and distinct from the department responsible for disciplining attorneys. See Defendants' MSJ Ex. 3 at 3.

[45] At the hearing on the pending motions, Defendants' counsel indicated that, if an attorney failed to submit a television or radio advertisement for review as required by Rule 4-7.7(a), that attorney could be subject to discipline. However, there is no evidence that any attorney has been disciplined or threatened with discipline for failing to submit an advertisement as required by the rule. Additionally, the rule does not specifically state that the lawyer will be subject to discipline if he or she fails to submit the advertisement, but cautions that an attorney may be disciplined if he or she disseminates a noncompliant advertisement regardless of whether the attorney complied with the prescreening requirement.

Moreover, the Rules provide that the advertising attorney is to provide a copy of the advertisement fifteen days before the date of dissemination. Contrary to Plaintiffs' suggestion, the rule does not provide that the advertising attorney must wait fifteen days to publish the advertisement, but rather provide a copy before the scheduled date of publication. Notably, the rule does not prohibit an attorney from publishing the advertisement until approval is received. Instead, it provides an incentive to seek prior review because an attorney who does so and receives permission to publish the advertisement avoids the risk of facing future discipline for that advertisement. An attorney who chooses not to avail him or herself of the prior review mechanism is subject to discipline if the advertisement otherwise violates the substantive provisions of the Rules. A fair reading of Rule 4-7.7(a) indicates that an attorney who publishes an advertisement before receiving approval takes the risk of discipline if the advertisement ultimately is found not to comply. Accordingly, the plain language of the rule supports the conclusion that Rule 4-7.7(a) is not a prior restraint, as it does not "freeze" or stop speech, but, at most, "chills" speech by imposing a punishment after publication of the speech.[46] See Cooper, 403 F.3d at 1215-16 (determining that a statute criminalizing the publication of certain information before the time prescribed by the statute was not a prior restraint on speech).

Defendants contend that they do not have any authority to stop the publication of speech. Indeed, this is evident by Plaintiffs' admission that the Harrell Plaintiffs published their current advertisements, despite the Ethics Department's finding of noncompliance.

[46] If the law "is susceptible to an interpretation that supports its constitutionality, we must accord the law such meaning." Konikov, 410 F.3d at 1329.

Moreover, Plaintiffs did not cite to or provide any evidence demonstrating that Defendants could stop speech before it is published. Instead, this case is like Cooper where, despite the regulation proscribing the publication of certain speech, the defendant was not able to stop the plaintiff from publishing certain information – it could only punish the conduct after the dissemination occurred. See 403 F.3d at 1216. Therefore, the Court finds that Rule 4-7.7(a) is not a prior restraint. See id. (opining that, "[b]ecause the statute did not silence [the plaintiff] before he could speak, it cannot be classified as a prior restraint"). As the Court finds that Rule 4-7.7(a) is not a prior restraint, Defendants are entitled to summary judgment on this claim.[47]

V. Conclusion

For the foregoing reasons, Defendants are entitled to judgment as a matter of law. Accordingly, it is hereby **ORDERED**:

1. The Florida Bar Defendants' Motion for Summary Judgment (Dkt. No. 25) is **GRANTED** as to all of Plaintiffs' claims, and Plaintiffs' Motion for Summary Judgment (Dkt. No. 29) is **DENIED**.
2. To the extent that the Court's resolution of the pending motions for summary judgment does not resolve The Florida Bar Defendants' Motion to Dismiss for Lack of Case or Controversy (Dkt. No. 22), the motion is **DENIED as MOOT**.
3. The Clerk of the Court is directed to enter **JUDGMENT** in favor of Defendants and against Plaintiffs.

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[47] As Plaintiffs confirmed at the hearing, their only challenge with regard to this rule is that it is an impermissible prior restraint.

4. The Clerk of the Court is further directed to terminate any remaining pending motions and deadlines as moot and close the file.

DONE AND ORDERED at Jacksonville Florida, this 30th day of March, 2009.

MARCIA MORALES HOWARD
United States District Judge

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Copies to:

Counsel of Record