UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PUBLIC CITIZEN, INC., et al.	*	CIVIL ACTION NO. 08-4451, c/w 08-4994
Plaintiffs,	*	***This Pleading Applies to All Cases***
VERSUS	*	SECTION "F"
LOUISIANA ATTORNEY DISCIPLINARY BOARD, et al.	*	JUDGE FELDMAN
	*	MAGISTRATE WILKINSON
Defendants.	*	

* *

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

For the reasons more fully set forth below, the Plaintiffs in the two consolidated suits have failed to establish that any actual controversy presently exists as a result of the challenged amendments to Louisiana's attorney advertising rules. Presently, this matter is not ripe for adjudication and Plaintiffs are without standing to sue. Accordingly, Defendants are entitled to dismissal of Plaintiffs' complaints pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure, and Defendants pray that this Court now issue an Order to that effect.

INTRODUCTION

The consolidated cases at bar stem from one premature controversy: the alleged fear that Defendants will, at some future time, take disciplinary action against Plaintiffs, Morris Bart, Morris Bart, L.L.C., William Gee, III, and William N. Gee, III, Ltd. (also represented by Public Citizen, Inc. and herein collectively referred to as "the PCI Plaintiffs"), as well as against Plaintiffs Scott G. Wolfe, Jr. and Wolfe Law Group, L.L.C. (collectively, "the Wolfe Plaintiffs," and sometimes together with the PCI Plaintiffs, "Plaintiffs"). Plaintiffs allegedly fear that such disciplinary action will follow a determination that Plaintiffs' unspecified and/or hypothetical attorney advertisements or advertising methods violate the Louisiana Supreme Court's newly amended lawyer advertising rules,[1] which do not become effective until October 1, 2009. [*See* Exhibit A, Compiled Copy of Amended Rules, as publicly available at http://www.lsba.org/2007MemberServices/Advert0609/LARules7-1-7-10-10-01-2009amended06-04-2009.pdf].

But the Plaintiffs have not alleged and cannot show that they have submitted any advertisements to be reviewed by the Louisiana State Bar Association's Rules of Professional Conduct Committee (the "Committee"). They have not alleged and cannot show that the Committee has determined that any proposed advertisements are non-compliant. And they have not alleged and cannot show that they have been threatened with discipline by Defendants. As a result, Plaintiffs impermissibly seek an advisory opinion on the constitutionality of the new lawyer advertising rules without establishing any real and substantial controversy. Simply put,

[1] Specifically, the PCI Plaintiffs seek to prohibit Defendants from enforcing the following lawyer advertising rules: Rule 7.2(c)(1)(D), (E), (I), & (L), the prohibition on "portrayal of a judge or jury" in Rule 7.2(c)(1)(J), Rule 7.2(c)(10), and Rule 7.5(b)(2)(C). [*See* Amended Complaint, Rec. Doc. No. 69, at ¶ 61]. Further, the Wolfe Plaintiffs seek to prohibit Defendants from enforcing the following lawyer advertising rules: Rule 7.2(a), Rule 7.2(c)(11), Rule 7.6(a) & (d), Rule 7.6(c)(3), and Rule 7.7. [*See* Complaint, Case No. 08-4994, Rec. Doc. No. 1, at ¶ 51, realleged in Amended Complaint, Rec. Doc. No. 66, at ¶ 1].

Plaintiffs are without standing to sue, this matter is not ripe for adjudication, and this Court therefore lacks subject matter jurisdiction. These suits should now be dismissed pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure.

BACKGROUND

On June 26, 2008, in accordance with Article V, Sections 1 and 5 of the Louisiana Constitution of 1974, as well as its own inherent powers, the Louisiana Supreme Court adopted a series of amendments to its attorney advertising rules ("the Rules") within a reenacted Article XVI, Rule 7 of the Articles of Incorporation of the Louisiana State Bar Association (hereinafter "LSBA"). [*See* Exhibit B, June 26, 2008 Order, at 1]. The PCI Plaintiffs, followed shortly thereafter by the Wolfe Plaintiffs, subsequently challenged particular provisions within the newly amended attorney advertising rules, seeking declaratory and injunctive relief against enforcement of those provisions under 42 U.S.C. § 1983, and arguing that these provisions violate the First and Fourteenth Amendments of the United States Constitution. [*See* Complaints, Rec. Doc. No. 1, at ¶ 1 & Case No. 08-4994, Rec. Doc. No. 1, at ¶ 1].

The Rules originally were to become effective on December 1, 2008, but in light of the constitutional challenges raised in this consolidated litigation, the Louisiana Supreme Court delayed implementation of the Rules until October 1, 2009, to allow an additional period for study and consideration of additional amendments. [*See* Exhibit C, February 18, 2009 Order; *see also* Exhibit D, February 18, 2009 Press Release, at 1].

On April 15, 2009, the LSBA presented to the Louisiana Supreme Court its "Findings and Recommendations of the LSBA Rules of Professional Conduct Committee Re: New Lawyer Advertising Rules and Constitutional Challenges Raised." [*See* Exhibit E]. The

Louisiana Supreme Court accepted these recommendations and issued updated and corresponding amendments to the Rules on June 4 and June 30, 2009. [*See* Exhibit F, June 4, 2009 Order; *see also* Exhibit G, June 30, 2009 Order]. As stated by the Louisiana Supreme Court, the newly amended Rules "balance the right of lawyers to truthfully advertise legal services with the need to improve the existing rules in order to preserve the integrity of the legal profession, to protect the public from unethical and potentially misleading forms of lawyer advertising, and to prevent erosion of the public's confidence and trust in the judicial system." [*See* Exhibit H, June 4, 2009 Press Release, at 1].

Following the action of the Louisiana Supreme Court, the Wolfe Plaintiffs were allowed to amend their complaint on June 26, 2009. [Rec. Doc. No. 66]. The PCI Plaintiffs were allowed to amend their complaint on June 30, 2009. [Rec. Doc. No. 69]. Each amended complaint raises the same constitutional challenges and requests the same relief as its original counterpart.

Plaintiffs have not alleged that they have submitted any advertisements to the LSBA Committee for review, that the Committee has found any of their advertisements to be non-compliant, or that Defendants have threatened discipline against any of the Plaintiffs under the new lawyer advertising rules. At this time, the only threat that exists is Plaintiffs' subjective fear that their future hypothetical advertisements may run afoul of the challenged rules, once they become effective on October 1, 2009. Thus, this matter is not ripe for adjudication, Plaintiffs lack standing, and there is no case or controversy for this Court to consider. As the United States District Court for the Middle District of Florida recently recognized in a very similar suit, *see Harrell v. The Florida Bar*, Case No. 3:08-cv-15-J-34TEM (M.D. Fla. Mar. 31,

2009) [attached hereto as Exhibit I], Plaintiffs' complaints must be dismissed for lack of subject matter jurisdiction.

LEGAL ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction Because There Is No Justiciable Case Or Controversy Before It.

Article III of the United States Constitution confines federal courts' jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. To give meaning to the "case or controversy" requirement set forth within Article III, federal courts have developed justiciability doctrines. *See United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). These justiciability doctrines include, as applicable in the instant matter, standing and ripeness doctrines. *See id*.; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Standing and ripeness are essential components of federal subject-matter jurisdiction, and the lack of either can thus be raised at any time, by a party, or by the court *sua sponte*. *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989); *see also Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994). Plaintiffs bear the burden of establishing both standing and ripeness under Article III.[2] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). As shown below, Plaintiffs have not satisfied and cannot satisfy this burden. Accordingly, this Court lacks subject matter jurisdiction and should dismiss these consolidated suits at this time.[3]

[2] Further, the United States Supreme Court "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotations omitted).

[3] In addition, this Court should dismiss these consolidated claims at this time for prudential reasons. *See Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979). Given the lack of any specific allegations regarding any particular advertisements at this time, this Court should "delay resolution of

A. All Plaintiffs Lack Standing To Sue.

To have standing to sue, a plaintiff bears the burden of establishing three separate elements. *See Lujan*, 504 U.S. at 560; *FW/PBS, Inc.*, 493 U.S. at 231. First, a plaintiff must have suffered an "injury in fact" ─ "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (other citations omitted). Second, a plaintiff must establish a causal connection between the complained of conduct and the injury alleged. *See id.* More particularly, the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Lastly, a plaintiff must establish that it is "likely" ─ not merely "speculative" ─ "that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

These three elements are minimum case or controversy requirements under Article III of the United States Constitution, and they must be satisfied whether Plaintiffs assert an as-applied or facial challenge to the advertising rules in question. *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 a plaintiff asserts a facial challenge to a regulation, that plaintiff must still satisfy the general rule that "a litigant only has standing to vindicate his own constitutional rights"); *see also White's Place, Inc. v. Glover*, 222 F.3d 1327, 1330 (11th Cir.

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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 quotations omitted). Stated simply, to avoid premature adjudication, these consolidated cases must be dismissed at this time.

2000) (stating that "even in a first amendment context the injury-to-the-plaintiff requirement cannot be ignored").

In the instant matter, *each* Plaintiff must establish standing for *each* challenged rule. *See FW/PBS, Inc.*, 493 U.S. at 231; *Brazos Valley Coal. for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005). Morris Bart, Morris Bart, L.L.C., William N. Gee, III, William N. Gee, III, Ltd., Scott Wolfe, Jr., and Wolfe Law Group each assert standing based upon non-specified current and theoretical future advertising campaigns. Public Citizen, Inc. brings forth its claims upon a more amorphous, associational standing basis under which it asserts that the challenged rules deprive its members from receiving information contained in attorney advertisements. As shown below, none of the Plaintiffs can establish the requisite elements of standing.

1. Plaintiffs' Unspecified Current And/Or Theoretical Future Advertisements Are Not A Sufficient Basis For Standing.

First, as to Plaintiffs' current and theoretical advertisements, no injury-in-fact has been established. With regard to a challenge to a rule or statute under which one might be prosecuted, a case or controversy exists only where there is a credible threat or realistic danger of prosecution for engaging in a course of conduct, rather than imaginary or speculative fears of prosecution. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99, 302 (1979); *see also Monk v. Houston*, 340 F.3d 279, 282 (5th Cir. 2003) (holding that, generally, an issue is not fit for decision "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all"). In the First Amendment context, an actual controversy may be found to exist and pre-enforcement review of a law may be granted only if the challenged

conduct is likely to have an objectively chilling effect upon protected First Amendment activity. *Wilson v. State Bar of Georgia*, 132 F.3d 1422, 1428 (11th Cir. 1998); *see also Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (finding that plaintiff lacked standing to seek prospective injunctive relief for a First Amendment violation where he had not shown a likelihood of future harm via a real or immediate threat that defendants would violate his First Amendment rights in the future). Where there is no credible threat to the exercise of First Amendment rights, the court should find that there is no justiciable controversy. *Laird v. Tatum*, 408 U.S. 1, 14 (1972).

Even facial challenges to governmental actions brought on First Amendment grounds require a concrete rather than a speculative injury to the litigant. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). This rule of law was succinctly set forth by the Supreme Court in *United Public Workers*, wherein the Court stated that "[f]or adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." 330 U.S. at 89-90. The Court further stated that it would pass upon the constitutionality of statutes alleged to violate First Amendment freedoms "only when the interests of litigants require the use of this judicial authority for their protection against actual interference." *Id.* at 89.[4]

In the instant matter, Plaintiffs have suffered no injury-in-fact. Plaintiffs have not alleged that they have filed any advertisements for review under the rules or that they have received written notice of their non-compliance with any of the challenged rules. Moreover,

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[4] *United Public Workers* was decided in a political speech context, and the Court further stated that:

> A hypothetical threat is not enough. [The Court] can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.

United Public Workers, 330 U.S. at 89-90.

Plaintiffs have not alleged that they have even submitted any advertisements to the LSBA Committee for an advisory opinion or compliance review. Plaintiffs have not alleged that they have been subjected to or threatened with any disciplinary action related to their advertisements or their advertising methods. And Plaintiffs have offered no evidence that the challenged rules will be interpreted as Plaintiffs allege.

As was the case in the recent matter of *Harrell v. The Florida Bar*, Plaintiffs' fears of being found to be in violation of the challenged rules are entirely subjective at this time and "based on . . . rank speculation" as to how the challenged rules will be implemented. Case No. 3:08-cv-15-J-34TEM, at 44 n.36, 41-51 (holding that Plaintiffs, including Public Citizen, Inc., had no standing to sue); *see also Bell v. Legal Advertising Comm.*, 998 F. Supp. 1231, 1236-37 (D.N.M. 1998) (holding that in an as-applied challenge, a lawyer must first exhaust administrative remedies, stating that "a failure to require exhaustion of available state remedies has the potential to embroil [a court] to an unacceptable extent in the operations of [a] state bar," and disapproving of the suggestion that a court was required to entertain a federal lawsuit anytime a state bar acts in an allegedly unconstitutional manner in disapproving an advertisement). There is simply no actual or imminent injury at this time, and Plaintiffs have failed to establish standing to sue.[5] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

Second, Plaintiffs have failed to show that their alleged injury is fairly traceable to the challenged conduct. An injury is "fairly traceable" to challenged conduct only when the

[5] *Compare Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 631-36 (1985) and *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 97-98 (1990) (wherein attorneys sought review of advertising rules after being disciplined for particular advertisements and, accordingly, had standing).

injury resulted from an allegedly unconstitutional regulation in a concrete and demonstrable way. *See Warth v. Seldin*, 422 U.S. 490, 504 (1975). More succinctly, a plaintiff must show that, but for a defendant's regulation and/or conduct, there is a substantial probability that the plaintiff would not be injured. *See id.*; *Lujan*, 504 U.S. at 561. Failure to show such a causal relationship between injury and challenged conduct is fatal to a plaintiff's constitutional claim. *See Warth*, 422 U.S. at 504.

Here, Plaintiffs have failed to establish this second standing requirement for much the same reason as they failed to establish the first element: they have failed to identify any facts under which any current, concrete injury is causally connected to any of Defendants' actions. Plaintiffs allege no submissions for review by the LSBA Committee and no threatened discipline of any sort by Defendants. Plaintiffs rely only on speculation as to whether their advertisements would be acceptable under the challenged rules. Moreover, it is undisputed that Plaintiffs cannot be subject to discipline for seeking advisory opinions from the LSBA Committee regarding such advertisements. *See* Rule 7.7(b) and (g). Simply put, Plaintiffs have not met their burden of establishing an injury-in-fact, fairly traceable to Defendants' actions.

Lastly, Plaintiffs fail to establish standing because they cannot show that their alleged injury would be redressed by granting the relief requested. "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Here, such redressibility is speculative at best. Indeed, Plaintiffs have failed to allege that, even if the challenged rules were set aside, their unspecified current and/or future hypothetical advertisements would comply with the other new lawyer advertising rules. Accordingly, even if this Court were to invalidate the rules presently challenged, Plaintiffs'

advertisements still might be determined to be non-compliant under the rules. *Cf. KH Outdoor, L.L.C. v. Clay County, Fla.*, 482 F.3d 1299, 1304 (11th Cir. 2007) (holding that the plaintiff lacked standing because the advertisements in question did not comply with other, unchallenged requirements of an ordinance, and because invalidation of the challenged requirements would not result in approval of the advertisements).

In sum, Plaintiffs Morris Bart, Morris Bart, L.L.C., William N. Gee, III, William N. Gee, III, Ltd., Scott Wolfe, and Wolfe Law Group, L.L.C. cannot establish any element of standing to support their current challenges to the new lawyer advertising rules. Accordingly, this Court lacks subject matter jurisdiction over this matter at this time and should dismiss the consolidated complaints.

2. Public Citizen, Inc. Lacks Associational Standing.

Plaintiff Public Citizen, Inc. has failed to establish that it has associational standing to sue at this time. A corporate plaintiff only has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interest[s] it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, Plaintiffs cannot show that any of Public Citizen's members have standing to sue.

Though Public Citizen, Inc. claims to have "approximately 270 [members] in Louisiana[,]" [Rec. Doc. No. 69, at ¶ 3], and though Plaintiffs assert that these members' First Amendment right to receive information has been impacted by the challenged rules, Plaintiffs have failed to identify a willing speaker for those members who would otherwise have standing.

See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 754 (1976); *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 . . . ."). Here, Public Citizen, Inc. has identified Morris Bart, Morris Bart, L.L.C., William N. Gee, III, and William N. Gee, III, Ltd. as the willing speakers. But for the reasons identified above, these Plaintiffs do not satisfy the standing requirements. They, therefore, cannot supply standing for Public Citizen, Inc.

Moreover, Public Citizen, Inc.'s argument that its members are harmed by a broad, "chilling effect" on all lawyer advertisements is also faulty. First, this is only a generalized grievance. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). Such a generalized allegation of harm does not specifically apply to Public Citizen, Inc.'s 270 Louisiana members; rather, it applies to the public at large. Though Public Citizen, Inc. alleges that consumers *might*, at some point in the future, be denied access to advertisements from Morris Bart, Morris Bart, L.L.C., William N. Gee, III, and/or William N. Gee, III, Ltd., "Public Citizen[, Inc.] fails to identify the specific and particularized harm its members have suffered or are in imminent danger of suffering." *Harrell v. The Florida Bar*, No. 3:08-cv-15-J-34TEM, at 53 (holding that Public Citizen, Inc. lacked associational standing). Public Citizen, Inc.'s alleged harm, then, "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." *Id.*; *see also Lujan*, 504 U.S. at 573-74; *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 819 (5th Cir. 1979); *Warth*, 422 U.S. at 501

(stating that Article III requires a 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, Inc. also fails to establish standing through its reliance on the overbreadth doctrine and the assertion that the mere existence of the challenged rules causes injury. *See Taxpayers for Vincent*, 466 U.S. at 798. Indeed, such an assertion has no place in the instant matter; the United States Supreme Court has determined that the overbreadth doctrine is inappropriate in commercial speech cases. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Waters v. Churchill*, 511 U.S. 661 (1994) (stating that "the possibility that overbroad regulations may chill commercial speech [has not] convinced [the Court] to extend the overbreadth doctrine into the commercial speech area").

Moreover, even if this overbreadth argument were entertained, Public Citizen, Inc.'s claims would still lack standing, as it has failed to assert a concrete, specific injury arising from the challenged rules. The overbreadth doctrine is only an exception to ordinary *prudential* considerations of judicial administration ─ "[o]f course, [Article] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Warth*, 422 U.S. at 501; *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 247 (1994) ("Prudential considerations cannot, of course, trump constitutional ones."). The overbreadth doctrine cannot alter the requirements of standing under Article III. *Taxpayers for Vincent*, 466 U.S. at 799.

The only identified basis for a claim of any specific injury to any of Public Citizen Inc.'s members in this matter is contained in the Bart/Gee allegations of speculative harm. As shown above, those allegations are insufficient to establish a concrete injury and to

satisfy constitutional standing requirements. Neither Public Citizen, Inc. nor the individual Plaintiffs have standing, and their claims must be dismissed.

B. This Court Should Dismiss the Complaints Because The Dispute Is Not Yet Ripe.

Another aspect of justiciability, the ripeness doctrine, is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993) (citations omitted). The purpose of the ripeness doctrine is to "prevent[] federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." *Nat'l Advertising Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005), *cited in JPMorgan Chase Bank, N.A. v. Oklahoma Oncology & Hematology*, No. H-06-0645, 2008 WL 4056330, at *5 (S.D. Tex. Aug. 25, 2008).

To be ripe for adjudication, a claim must not be premature, and the injury cannot be speculative. *See Abbott Lab. v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations omitted) (holding that, to allege a case or controversy sufficiently, a plaintiff "must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'"). A court "should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003).

As with standing, Plaintiffs bear the burden of establishing that their claims are ripe for adjudication. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Plaintiffs have failed to satisfy this burden: Plaintiffs have not alleged — and cannot show — that there has been any action upon, let alone review of, any of their advertisements. Moreover, Plaintiffs have not alleged — and cannot show — that they have been subjected to or threatened with any disciplinary action related to their advertisements. The constitutional harms Plaintiffs allege are purely hypothetical. Further, Plaintiffs will face no hardship if these claims are dismissed: if Plaintiffs ever submit any advertisements to the appropriate authority for review or they are actually threatened with discipline arising from a non-compliant advertisement, then — and only then — might they be able to articulate a concrete claim to bring before the appropriate court.

Whether an issue is ripe for judicial review depends on (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Anderson v. Sch. Bd. of Madison County*, 517 F.3d 292, 296 (5th Cir. 2008) (quotations omitted). The "fitness" determination is the same as the standing inquiry: a determination of whether a plaintiff has satisfied the Article III requirements. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.") (internal quotation omitted). As established above, Plaintiffs in this consolidated matter have failed to satisfy these requirements.

In addition, courts also consider the following factors in determining whether a case is ripe for adjudication: "(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." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Plaintiffs have failed to show that these consolidated cases are ripe for consideration under these factors as well. First, as previously shown, Plaintiffs have failed to allege facts necessary to establish a constitutional injury for standing. Additionally, Plaintiffs have failed to show that they will suffer any undue hardship from withholding adjudication at this time: to the contrary, they will be able to bring their claims again upon further factual development. And despite Plaintiffs' claims that they have self-censored their advertisements for fear that they may not comply with the challenged rules, they ignore the fact that they have the option to submit their advertisements to the LSBA Committee for an advisory opinion, without risking any sort of disciplinary consequences, to determine whether or not their fears might be well-founded.

Such an action would also give this Court the benefit of knowing whether the LSBA Committee would find Plaintiffs' advertisements to be compliant or whether the Committee would issue a report of non-compliance to Defendants for disciplinary proceedings. As the Supreme Court held in *Abbott Laboratories v. Gardner*, a "basic rationale" of the ripeness doctrine is "to protect [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Indeed, if this were an as-applied challenge, the Plaintiffs would be required to show exhaustion of administrative remedies – *i.e.*, submission of their advertisements for pre-review by the Bar Committee before seeking relief in court. *See Bell v. Legal Advertising Comm.*, 998

F. Supp. 1231, 1236-37 (D.N.M. 1998) (holding that in an as-applied challenge, a lawyer must first exhaust administrative remedies, stating that "a failure to require exhaustion of available state remedies has the potential to embroil [a court] to an unacceptable extent in the operations of [a] state bar," and disapproving of the suggestion that a court was required to entertain a federal lawsuit anytime a state bar acts in an allegedly unconstitutional manner in disapproving an advertisement).

Plaintiffs' impatience aside, there has been no action, by Defendants or the LSBA Committee, through which a concrete case or controversy has been formed. Without any such action, the claims before this Court are premature, speculative, and hypothetical – they are not ripe for adjudication. Thus, this Court has no authority to act.

II. Federal Courts Should Avoid Rendering Advisory Opinions.

Finally, as a corollary to standing requirements, Article III of the United States Constitution requires that federal courts not issue advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 95-100 (1968). Indeed, the "abstract constitutional principles" within the concept of standing "reflect a traditional mistrust of roving judicial commissions and advisory opinions." *Thomas v. Johnston*, 557 F. Supp. 879, 902 (W.D. Tex. 1983). Any action before a court must be presently and currently a "live controversy" for that court to "avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). To be sure, "[t]he purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 598 n.4 (1992) (Blackmun, J., dissenting).

Federal courts have no power to render advisory opinions, *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)), and will even avoid non-advisory opinions when constitutional questions are at stake. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Gomez v. Dretke*, 422 F.3d 264, 267 (5th Cir. 2005) (recognizing "the familiar canon of constitutional avoidance"). Thus, "[w]hen the federal judicial power is invoked to pass upon the validity of actions by [other branches of government], the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast*, 392 U.S. at 96. Further, "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905).

By bringing suit at this time, Plaintiffs seek an impermissible advisory opinion from this Court. Further, Plaintiffs prematurely ask this Court to pass upon the constitutionality of proposed lawyer advertising rules that are not in effect and have not caused any harm to Plaintiffs. A decision from this Court is entirely unnecessary at this time, and these consolidated cases should be dismissed accordingly.

CONCLUSION

For the reasons stated above, the Plaintiffs in the two consolidated suits have failed to establish that any actual controversy presently exists as a result of the challenged amendments to Louisiana's attorney advertising rules. This matter is not ripe for adjudication and Plaintiffs are without standing to sue. Accordingly, Defendants are entitled to dismissal of

Plaintiffs' complaints pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure, and Defendants pray that this Court now issue an Order to that effect.

Dated: July 14, 2009

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that on this 14th day of July, 2009, a copy of the foregoing Memorandum in Support of Motion to Dismiss has been served upon each counsel of record by notice of electronic filing generated through the CM/ECF system, and/or by United States mail, facsimile, or e-mail for those counsel who are not participants in the CM/ECF system.

/s/ Phillip A. Wittmann