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.
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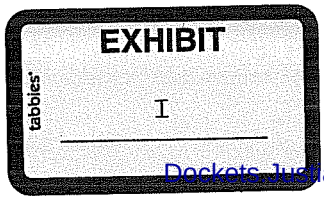
ORDER

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

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[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

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[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

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[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

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[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...)