LAWRENCE C. YEE (84208)
MARK TORRES-GIL (91597)
TRACEY L. McCORMICK (172667)
STATE BAR OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2339
Fax: (415) 538-2321
Email: tracey.mccormick@calbar.ca.gov

Attorneys for Defendant
Scott J. Drexel as [former] Chief Trial Counsel of
the State Bar of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER, Plaintiff, v. JUSTICES OF THE CALIFORNIA SUPREME COURT, et al. Defendants.	Case No. C 09-02740 WHA **DEFENDANT CHIEF TRIAL COUNSEL'S OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF** Date: July 17, 2009 Time: 2:00 p.m. Courtroom 9 Judge: Hon. William Alsup_____

I. INTRODUCTION

Defendant SCOTT DREXEL, in his capacity as [former] Chief Trial Counsel of the State Bar of California[1] opposes the motion for injunctive relief filed by Plaintiff KENNETH J. SCHMIER ("Schmier") seeking to enjoin enforcement of unspecified disciplinary rules that Plaintiff feels may be violated if he cites unpublished or depublished opinions in a state court traffic matter currently pending in the Orange County Superior Court against a client.

Rather than awaiting the outcome of that traffic matter, which may in fact resolve in his client's favor and possibly make this action moot, or pursuing the judicial remedies which would

[1] Scott Drexel's term as Chief Trial Counsel expired on June 10, 2009 and he was not reappointed to a second term. A successor has not yet been named. In the interim, Russell Weiner is serving as Acting Chief Trial Counsel.

be available to him in both the state courts following an unfavorable outcome, Plaintiff instead seeks a prospective order in this Court which would essentially direct the State Bar of California in the regulation of the practice of law within the state.

Schmier's request for injunctive relief should be denied because, in addition to not meeting the basic requirements for such relief, Schmier lacks standing and the matter is not yet ripe for resolution. State disciplinary proceedings, to the extent they may be instituted, provide Plaintiff with an adequate state court remedy and separate prudential and equitable grounds for denial of his request for injunctive relief.

II. STATEMENT OF FACTS

Kenneth J. Schmier is a California attorney, licensed and subject to regulation by the State Bar of California, which is a public corporation within the judicial branch of state government. Cal. Const., art. VI § 9. The State Bar of California was established as an administrative arm of the Supreme Court to assist the Court in reaching its final determinations regarding attorney admission and discipline matters. In re Attorney Discipline System (1998) 19 Cal.4th 582, 611; Saleeby v. State Bar (1985) 39 Cal.3d 547, 557. The Chief Trial Counsel of the State Bar of California oversees the disciplinary functions of the State Bar. See Cal. Bus. & Prof. Code, sections 6079.5, 6092.5.

Attorney Schmier currently represents a client who received a traffic infraction citation for running a red light in Santa Ana on March 12, 2009. That client requested a trial, which is scheduled to be heard on July 22, 2009 at the Santa Ana Superior Court. Schmier asserts that he cannot zealously advocate on behalf of his client in this traffic matter without citation to three unpublished or depublished state court decisions[2].

California Rules of Court, Rule 8.1115 (a) prohibits citation, with exceptions not relevant here, to state Court of Appeal or appellate division opinions that are not specifically certified for

[2] Those matters are identified by Schmier as follows: People v. Fischetti, 170 Cal.App.4th Supp. 1; People v. Vrska, Superior Court of California, County of Orange, Appellate Division, Case No. 30-2008-00044334, filed August 28, 2008; and People v. Fischetti, Superior Court of California, County of Orange, Appellate Division, Case No. AP-14168, filed January 31, 2005.

publication. Compliance with Rule 8.1115(a) is enforceable, not by the State Bar, but by the judicial officer presiding over the subject matter being litigated. Cal. Rules of Ct., Rule 2.30.

In his client's traffic court matter, Schmier seeks to advance the straight-forward argument that a municipality's failure to comply with vehicle code warning requirements for automatic traffic enforcement devices prohibits a finding of culpability for infraction of the traffic laws at that location. Schmier does not explain why or how adopting the same *arguments* that were successful in the three unpublished matters is insufficient, would be unsuccessful or would necessarily result in disciplinary prosecution by the State Bar of California.

Instead, Schmier seeks injunctive relief prohibiting the Chief Trial Counsel, on behalf of the State Bar of California, from instituting attorney disciplinary proceedings against him if he violates California's no-citation rule at his client's traffic court trial.

Defendant Chief Trial Counsel opposes the request because Schmier lacks standing and fails to otherwise demonstrate that the matter is ripe for review in this forum and fails to show that he is entitled to injunctive relief.

III. ARGUMENT

A. Schmier's Request Fails to Demonstrate the Requisite Subject Matter Jurisdiction Under FRCP 12(b)(1).

1. Schmier's Motion Presents No Case or Controversy.

a. Schmier lacks Standing

A federal court litigant must have standing in order to present a justiciable case or controversy under Article III. Hein v. Freedom from Religion Found, Inc., 127 S. Ct. 2553 (2007). Article III standing requires proof that (1) the plaintiff suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (2) that there is a causal connection between the injury and the alleged conduct; and, (3) that a favorable decision will provide redress. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Beyond Article III itself, prudential standing concerns additionally require that the alleged injury reflect more than a generalized grievance and that the claim fall within the zone of

interests to be protected or regulated by the constitutional guarantee in question. See Johnson v. Stuart, 702 F.2d 193, 196 (9th Circ. 1983).

Schmier lacks standing under both constitutional and prudential analyses.

Under a purely constitutional analysis, Schmier cannot show that any State Bar action is actual or imminent. Schmier makes no showing that he has ever before been disciplined for the same or similar conduct. He does not allege that the State Bar has ever contacted him to issue any warning, or to otherwise threaten him with disciplinary prosecution if he cites to unpublished or depublished legal opinions. He does not allege that he contacted the State Bar's Ethics Hotline or was otherwise specifically informed by the State Bar that his future violation of California Rules of Court, Rule 8.1115(a) in this instance, under these circumstances, would, alone, be a disciplinable offense for which the State Bar would choose to exercise its disciplinary discretion under the State Bar Act. Schmier does not allege that any other attorney has been prosecuted solely for violation of the no-citation rule[3]. See also, Alaska Right to Life v. Feldman, 504 F.3d 840, 849-850, in which the Plaintiffs seeking judicial responses to a questionnaire were found to lack standing to challenge a judicial cannon as chilling speech in violation of the First Amendment where there was no demonstrable evidence that the Commission on Judicial Conduct contemplated any inquiry on the basis of the cannon's violation. Although in Alaska, the Executive Director of the Commission on Judicial Conduct issued a letter cautioning the judges that a response to the questionnaire might violate the judicial cannon at issue, this letter was characterized as merely "informal guidance" by the Court, which noted that the Commission itself never issued any formal advisory opinion in the matter. Here, where there is no allegation of any State Bar contact whatsoever, Schmier's basis for standing is even further attenuated.

Regardless, although the State Bar unquestionably maintains the authority to institute disciplinary proceedings for violations of Rules of Professional Conduct, rule 5-200(D), and

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[3] This matter stands in direct contrast to the facts presented in Canatella v. California, 304 F.3d 843, 852-853 (9th Cir. 2002), in which attorney Canatella had previously been disciplined by the State Bar of California for the same conduct at issue in that proceeding. It was the p

Business and Professions Code, sections 6068 (a) and (b), among other provisions, it cannot be presumed that the State Bar would issue a disciplinary recommendation that would violate the First Amendment, or that a constitutionally infirm determination would be adopted by the California Supreme Court if such a matter were brought before them. See Renne v. Geary, 501 U.S. 312, 323 (1991) (withholding jurisdiction allows the state courts to construe the challenged law based on a concrete controversy).

As to prudential standing concerns, it cannot be maintained with any sincerity that the First Amendment was adopted for the purpose of allowing attorneys the freedom to espouse their views or arguments, wholly unchecked. To the contrary, it has been repeatedly held that "'[m]embership in the bar is a privilege burdened with conditions.'" Gentile v. State Bar of Nev., 501 U.S. 1030, 1066 (1991) (quoting In re Rouss, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.)). An attorney is not only an agent for his or her client, but also "'an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.'" Gentile, 501 U.S. at 1072 (quoting In re Sawyer, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting)). For this reason, the courts permit restrictions on attorney speech that they would not permit as to ordinary citizens. Gentile, supra, at 1071 (upholding state bar discipline against an attorney who spoke to the press about his case in violation of an attorney conduct provision); United States Dist. Court v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993) (upholding sanctions against an attorney for making false statements about a trial judge).

Within the courtroom, even further restrictions are permitted[4]. "An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a

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[4] "Traditional First Amendment analysis also supports the idea that lawyers (and others) have no First Amendment right to speak freely in a courtroom: a courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis. See Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (traditional public fora are "those places which 'by long tradition or by government fiat have been devoted to assembly and debate' " (citation omitted)). Although courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines." Zal v. Steppe, 1992 U.S. App. LEXIS 17413, *23-24 (9th Cir. Cal. July 31, 1992) (Trott, Circuit Judge, Concurring)

claim for appeal." Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2743 (U.S. 1991). Restrictions on courtroom speech allow the court to both preserve courtroom decorum and allow for an orderly and reasoned resolution of issues. Attorneys may not flout the authority of the court behind the shield of "zealous advocacy" under the First Amendment. Zal v. Steppe, 1992 U.S. App. LEXIS 17413, *12 (9th Cir. Cal. July 31, 1992) [Attorney citation for contempt during a state court trial did not violate the First Amendment where the attorney intentionally violated the trial court's orders excluding certain defenses].

Attorney in-court speech is simply not within the zone of interests intended to be protected under the First Amendment, and, as a result, prudential considerations lead to the conclusion that Schmier lacks standing to preclude the State Bar from taking hypothetical future action here.

b. Schmier's Claim is Not Ripe for Consideration.

It is equally axiomatic that the federal courts will not rule on a matter that is not ripe for consideration. Article III ripeness in this type of case requires consideration of (1) whether the plaintiffs have articulated a concrete plan to violate the law in question; (2) whether the authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1094 (9th Circ. 2003). These factors are similar to those required for an "injury in fact" finding for purposes of standing. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Circ. 2000).

Schmier fails to show any concrete plan to violate the law in question. His declaration reflects that he is currently representing a client in a traffic infraction trial for running a red light. Schmier states that he expects to present evidence that Santa Ana did not comply with the Vehicle Code requirements for Automatic Traffic Enforcement Systems. He contends that this failure requires dismissal of the traffic ticket issued to his client. He fails to demonstrate, however, that the presentation of this issue requires violating the Rules of Court. For example, the traffic Commissioner may agree with the argument, which may be presented on the same grounds as those relied upon in the unpublished and depublished cases that Schmier wants to rely

upon, without requiring any citation to authority. In this scenario, there would be no need to violate the Rules of Court, as the issue would not present itself. Schmier fails to demonstrate his need to cite to this authority, and thus, there is no concrete plan presented.

For the reasons discussed in the foregoing section, Schmier also fails to satisfy the second and third ripeness elements. Schmier's insistence that he is hypothetically subject to some future, as yet entirely non-existent and unthreatened, form of discipline by the State Bar if he cites unpublished cases to the State traffic court is nothing more than raw speculation. Schmier provides neither the specific warning/threat of prosecution nor the history of similar prosecutions required for his claim to be ripe.

Prudential ripeness concerns include determinations as to the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration. Thomas v. Anchorage Equal Rights Comm'n, supra, at 1141. As argued above, because the state court traffic commissioner may, in fact, rule in favor of Schmier's client without the need to cite to the unpublished or depublished cases, the issue is not fit for judicial review here. Moreover, Schmier's client has the opportunity to appeal a determination that the failure to comply with the Vehicle Code makes the citation issued by the automated traffic system *not* procedurally invalid. Thus, there is no hardship to the parties in that regard. As to Schmier, himself, should he find himself the subject of Bar disciplinary action, he has a full panoply of due process rights available to him in that forum which precludes a finding of hardship to him here. Giannini v. Real, 911 F.2d 354, 357 (9th Cir. 1990) 713.

2. The Doctrine of Abstention Under Younger v. Harris Prohibits Federal Court Interference with Ongoing State Superior Court Proceedings.

Younger v. Harris, 401 U.S. 37 (1971) and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings. *Younger* abstention is designed to promote comity and respect for state's rights. Id. at 44, n. 10. Absent 'extraordinary circumstances,' abstention from interference with state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." Canatella v. California, 304 F.3d

843, 850 (9th Cir. 2002); Hirsh v. Justices of the California Supreme Court, 67 F.3d 708, 711 (9th Cir. 1995).

Schmier seeks orders declaring Rule of Court, Rule 8.1115(a) unconstitutional. His prayer for relief seeks an order that would, inter alia, preclude the Santa Ana Superior Court traffic commissioner from enforcing the same at the "criminal arraignment and trial" scheduled for July 22, 2009. This, of course, would directly interfere with the proceedings currently pending against Schmier's client; indeed, it would dictate that the Superior Court perform its judicial function in presiding over this pending matter in accordance with federal dictates, rather than in accordance with state law. Enforcement of a state's own laws is unequivocally a core state interest and the California judicial system provides litigants with ample due process. Schmier does not argue differently. Younger itself held that a federal court could not enjoin an ongoing criminal proceeding in state court, citing both the principle that a court sitting in equity may not restrain a criminal prosecution and the "more vital consideration[s]" of comity and federalism. See Younger, 401 U.S. at 43-44.

Likewise, this court should abstain from interference with this pending state court proceeding on that same basis.

B. Schmier Fails to Satisfy the Requirements for Injunctive Relief

Schmier requests that the Court permanently enjoin the State Bar from enforcing California Rules of Court, Rule 8.1115(a) by way of prohibiting disciplinary proceedings against him. However, injunctive relief is to be awarded only if there is a showing of an inadequate remedy at law and a serious risk of harm. See Pulliam v. Allen, 466 U.S. 522, 537 (1984).

Schmier does not face any threat of irreparable harm because, first, there is no fundamental right to practice law. Rosenthal, supra, 910 F.2d at 713. Moreover, Schmier has an adequate legal remedy should he eventually be subject to any disciplinary sanction – he may ask for a *de novo* review in the Review Department, see Cal. Rules Ct. 9.12, State Bar Rules Proc. 3.52, 3.80, 301, *et seq.*, and, if not satisfied with that outcome, he may file a petition for review of the State Bar Court's decision in the California Supreme Court. Cal. Rules Ct. 9.13. Schmier, or any other State Bar member facing disciplinary proceedings for that matter, has an

adequate opportunity to raise his constitutional claims before the California Supreme Court during the course of his disciplinary proceedings.

"Any injunction regarding governmental functions is generally only permitted in extraordinary circumstances … as officials should be given the widest latitude possible while performing their official duties." Olagues v. Russoniello, 770 F.2d 791, 799 (9th Cir. 1985) (internal quotations and citation omitted).

An order from this Court barring enforcement of these statutes, not to mention preventing imposition of any discipline against Schmier for professional misconduct, would act as a bar to the State Bar's ability to regulate the profession and enforce standards of conduct for attorneys in California. Because Schmier has not – and cannot – give this court any valid reason to infringe on the State Bar's *sui generis* judiciary functions, his request for prospective injunctive relief should be denied.

The regulation of attorneys within its borders is a power unquestionably reserved to the State of California and its Bar. See Hackin v. Lockwood, 361 F.2d 499, 502-03 (9th Cir. 1966) (noting the federal courts' historic deference to the States' regulation of the legal profession), *cert. denied*, 385 U.S. 960 (1966); *see also* Cal. Bus. & Prof. Code § 6000 *et seq*. (California's State Bar Act). While a federal court may (of course) strike down state laws governing attorney conduct if they violate the federal Constitution (see, e.g., NAACP v. Button, 371 U.S. 415, 444-45 (1963)), it may not order a State Bar to refrain from applying its own disciplinary rules to an attorney practicing law within the State.

The public interest could never be served by a contrary result.

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IV. CONCLUSION.

Because Schmier lacks standing and because this matter is not ripe for review, and because Schmier cannot show entitlement to injunctive relief, for all the reasons set forth herein, Defendant Chief Trial Counsel respectfully requests the Court to deny the motion.

Dated:

Respectfully submitted,

LAWRENCE C. YEE
MARK TORRES-GIL
TRACEY L. McCORMICK

By: /s/ Tracey L. McCormick
Tracey L. McCormick

ATTORNEYS FOR DEFENDANT SCOTT J. DREXEL, [FORMER] CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA