IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT B. SURRICK	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	NO. 04-5668
v.	:	
	:	
PAUL J. KILLION, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Giles, C.J. April 18, 2005

I. Introduction

Robert Surrick brings this civil rights action pursuant to 42 U.S.C. § 1983 seeking injunctive and declaratory relief for the Defendants' alleged violations of the Supremacy Clause of the U.S. Constitution and First Amendment rights. Defendants, Paul Killion, Chief Counsel for the Pennsylvania Office of Disciplinary Counsel and each Justice of the Supreme Court of Pennsylvania (the "Judicial Defendants"), move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). The court has heard oral argument and taken testimony on the relief sought by plaintiff and the substantive matters of the complaint. Having determined that nothing more can be adduced from further proceedings, the court, with the parties' knowledge, is treating the Defendants' motion to dismiss as a Motion for Summary Judgment and the plaintiff's response as a Cross-Motion for Summary Judgment. Inasmuch as plaintiff and the Office of Disciplinary Counsel have agreed to certain undertakings which would enable a final order, this court has entered one for the reasons that follow.

II. Factual Background

Plaintiff was first admitted to practice law in the Commonwealth by the Pennsylvania Supreme Court in 1961. (Pl.'s Compl. ¶ 6.) In 1966, he was also admitted to practice law before the United States District Court for the Eastern District of Pennsylvania ("Eastern District") and the United States Court of Appeals for the Third Circuit. (Id.) At the time of federal admission, plaintiff represented that he was an attorney in good standing before the Supreme Court of Pennsylvania. In reliance upon that representation, the Eastern District admitted him to practice.

On March 24, 2000, after reviewing disciplinary recommendations of the Office of Disciplinary Counsel ("ODC"), the Supreme Court of Pennsylvania suspended the plaintiff from the practice of law in the courts of Pennsylvania for five years. (Pl.'s Compl. ¶ 7.) On June 14, 2001, the Eastern District imposed reciprocal discipline, but disagreed with the period of state suspension and instead imposed suspension from the practice of law before the Eastern District for thirty months, retroactive to April 24, 2001. (Pl.'s Compl. ¶ 8.) After the period of suspension before the Eastern District expired, a judicial panel of the Eastern District recommended that plaintiff's petition for reinstatement be granted. On May 17, 2004, the Eastern District entered an order reinstating plaintiff to practice here. (Pl.'s Compl. ¶ 8-9.) Technically, plaintiff's suspension from the practice of law in the Commonwealth's courts expired on March 24, 2005, but that suspension will continue until plaintiff reapplies to the Supreme Court of Pennsylvania for admission and is, in fact, readmitted.

On August 16, 2004, in the matter of Office of Disciplinary Counsel v. Marcone, 855 A.2d 654 (Pa. 2004), the Supreme Court of Pennsylvania granted the petition of the ODC to hold attorney Frank J. Marcone in contempt of the Supreme Court's order suspending him from the

practice of law in Pennsylvania. Mr. Marcone, like plaintiff, was suspended from practice before the Pennsylvania state courts, but was reinstated to practice here before he was eligible to apply for readmission to practice under authority of the Pennsylvania Supreme Court. Marcone, 855 A.2d at 657. Mr. Marcone's office was on the first floor of a building, advertised by a sign in the window stating "Frank J. Marcone, Attorney at Law," although his letterhead stated that his work was limited to "federal practice." Id. Unlike plaintiff, Mr. Marcone had undertaken to practice before this court and had, according to the state record, opened an office that caused, or could cause, the public to believe that he was authorized to practice law in Pennsylvania, generally, as if he had been readmitted to practice before the Pennsylvania Supreme Court. Id. at 660-61.

On December 7, 2004, plaintiff filed a complaint and a motion for a preliminary injunction against all Defendants requesting declaratory and injunction relief, contending that Defendants' "official policy and practice" of denying attorneys, admitted to practice before the Eastern District, but suspended from practice before the Pennsylvania state courts, the ability to maintain an office within the Commonwealth violates the Supremacy Clause as well as the attorney's rights to free speech, advocacy and association, and the practice of law. Plaintiff alleges that he desires to open an office in Philadelphia, Pennsylvania for the purpose of representing clients before the Eastern District. Plaintiff maintains that he has not opened such an office for fear of prosecution and subsequent contempt sanctions by Defendants in light of Defendants' actions and decisions in Marcone.

Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the complaint should be dismissed in its entirety because (1) plaintiff lacks constitutional standing, (2) the case is not ripe for judicial review, (3) that abstention under the Younger doctrine is

mandated, (4) the Judicial Defendants are judicially immune from suit, and (5) in all respects, plaintiff's claims fail to state a claim upon which relief can be granted.

The court heard testimony regarding the specific manner in which the plaintiff would open and maintain an office for the representation of clients before the Eastern District, if permitted. Oral argument was held on the legal implications of plaintiff's proposed office and federal practice in light of Marcone.

IV. Discussion

A. Judicial Defendants

As an initial matter, the court finds that the Judicial Defendants are not proper parties to this lawsuit, and claims asserted against them, individually and in their official capacities, are dismissed.

Judicial officers are not amenable to suit for declaratory relief pursuant to 42 U.S.C. § 1983 when acting in an adjudicatory capacity. Brandon E. ex rel. Listenbee v. Reynolds, 201 F.3d 194, 199-200 (3d Cir. 2000). In other to maintain a § 1983 action, the plaintiff must establish that the challenged judicial conduct is of an enforcement or administrative nature. See In re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982). In Justices, the plaintiffs sued the justices of the Supreme Court of Puerto Rico for their role in applying the Commonwealth's statutory bar membership requirements. Id. at 19-21. The first circuit dismissed the plaintiff's complaint against the justices finding that the judges' role as neutral adjudicators failed to establish a real adverse controversy between the parties. Id. at 21. The court noted that, pursuant to the statutory scheme, the bar association and Secretary of Justice

were the parties responsible for initiating disciplinary proceedings before the Supreme Court for its adjudication. Id. The court found that "[i]n deciding cases based on such complaints, the Justices act as they would in any other case based upon a Commonwealth statute: they sit as adjudicators, findings facts and determining law in a neutral and impartial judicial fashion." Id. As such, the "[j]udges sit as arbiters without any personal or institutional stake on either side of the [] controversy. . . . [T]hey have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made . . . ." Id. On the other hand, the court found that if the plaintiff were to challenge the Justices' power to initiate disciplinary proceedings against recalcitrant attorneys, this action would represent a viable claim against the Justices for their role as "enforcers," rather than "adjudicators." Id. at 24.

The third circuit has applied a similar enforcement-adjudicatory distinction in the cases of Georgevich v. Strauss, 772 F.2d 1078, 1087-88 (3d Cir. 1982) and Listenbee, 201 F.3d at 199-200. In Georgevich the third circuit permitted the action to proceed against the judges of the Court of Common Pleas finding that the judges, sued in their official capacities, were the enforcers or administrators of Pennsylvania's statutory parole scheme. Georgevich, 772 F.2d at 1087-88. In contrast, the third circuit in Listenbee disallowed an action against various state judges finding that because the judges did not initiate the proceedings for which they were being sued they were simply neutral adjudicators and not a proper party to the lawsuit. Listenbee, 201 F.3d at 199.

Here, plaintiff challenges anticipated disciplinary action which might incur should he

open a law office of any kind in Pennsylvania even if he complies with the reinstatement Order of the Eastern District. If any disciplinary action were initiated, it would have to be initiated either by a third party complaint or by the Disciplinary Board of the Supreme Court ("Board") through the ODC. Pa. R. D. E. 205(c)(1). At that point, the ODC would conduct an investigation, with the matter being reviewed first by a hearing committee within the Board and then by the Board itself. Pa. R. D. E. 206, 208. Upon the Board reaching a recommendation, the recommendation would then be reviewed by the Pennsylvania Supreme Court. Pa. R. D. E. 208. The Supreme Court's review is de novo and it is not bound by the findings of the hearing committee or the Board. See Office of Disciplinary Counsel v. Costigan, 584 A.2d 296, 298 (Pa. 1990). Therefore, the role of the Judicial Defendants would be that of neutral arbitrators over a complaint that it did not initiate, but is required by law to adjudicate. The Judicial Defendants are not proper parties to this action given that they are being sued for adjudicative, rather than enforcement, functions.

Defendant Killion, Chief Counsel for the Pennsylvania Office of Disciplinary Counsel, is a proper party because the ODC is obligated to follow the Pennsylvania Supreme Court's decision in Marcone in deciding whether the plaintiff's maintenance of an office within the Commonwealth to pursue his federal practice would support a petition for contempt sanctions.

B. Constitutional Standing

Article III of the U.S. Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. Therefore, "[t]he existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief." Presbytery of New Jersey v. Florio, 40 F.3d 1454, 1462 (3d Cir. 1994). In order to

establish standing, federal courts have long required, at an "irreducible constitutional minimum," that (1) the 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'", (2) there is "a causal connection between the injury and the conduct complained of" such that the injury can be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-05 (1998); O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Joint Stock Soc'y v. UDV North Am., 266 F.3d 164, 175 (3d Cir. 2001); Doe v. Nat'l Bd. of Med. Exam'r, 199 F.3d 146, 152 (3d Cir. 1999); AT&T Communications of New Jersey, Inc. v. Verizon New Jersey, Inc., 270 F.3d 162, 170 (3d Cir. 2001); Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 175-76 (3d Cir. 2000). The requirements of injury-in-fact, causation, and redressability assure that a plaintiff has the requisite "'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quoting Baker v. Carr, 369 U.S. 185, 204 (1962)).

To demonstrate an "injury-in-fact," plaintiff must allege an injury which is "concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical." The Pitt News v. Fisher, 215 F.3d 354, 360 (3d Cir. 2000). In other words, the "injury must affect the plaintiff in a personal and individual way." Id. (quoting Lujan, 504 U.S. at 560-61). Threatened injury

may constitute an injury-in-fact if "the threat is so great that it discourages the threatened party from even attempting to exercise his or her rights." Howard v. New Jersey Dept. of Civil Serv., 667 F.2d 1099, 1103 (3d Cir. 1981). When an injury is threatened "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)). See Whitmore, 495 U.S. at 158; Pub. Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 122 (3d Cir. 1997). When a plaintiff seeks declaratory relief, the basic question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992) (quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

The court finds that plaintiff has sufficiently established that the threat of prosecution is real, and that the impending threat has, and continues to, cause him personal and individual injury.

First, the threat of potential contempt sanctions against plaintiff is clear given any reasonable reading of the Marcone decision. Therefore, the articulated issue before the Pennsylvania Supreme Court was "whether an attorney who has been suspended from the practice of law by the Supreme Court of Pennsylvania may nevertheless maintain a law office in the Commonwealth of Pennsylvania for purposes of practicing before the United States District Court for the Eastern District of Pennsylvania." Id. at 656. Plaintiff fits the prescription. The

Marcone decision directly relates to plaintiff and serves as compelling notice to anyone similarly situated how the ODC would be expected to react to one who has been authorized to practice in the Eastern District while under suspension by the Supreme Court of Pennsylvania.

Marcone ultimately rests on an interpretation of Pa.R.D.E. 217(j) which provides that a formerly admitted attorney may not "engage in any form of law-related activities in this Commonwealth." Id. at 659. Marcone found that "any form of law-related activities" "includes the practice of law." Id. The practice of law, according to the Pennsylvania Supreme Court, entails the "holding out of oneself to the public as competent to exercise legal judgment and being competent in the law" such as "advising clients on their rights and responsibilities" and "the maintenance of a law office." Id. at 660. The Court, therefore, concluded that Mr. Marcone "has engaged in the practice of law in this Commonwealth" and the fact that his "maintenance of a law office is limited solely to his practice before the Eastern District does not alter our conclusion." Id. The Court stated that the "practice of law" for which Mr. Marcone was subject to contempt sanctions was "expansive" and neither limited by case law nor state disciplinary rules by a demarcation between advising clients on state as opposed to federal legal matters. Id. at 661. In fact, the Supreme Court emphasized the "interconnected web of legal knowledge, concerns, strategies, and consequences" associated with modern legal practice, whether at the state or federal level, which would make the notion of limiting one's "practice of law to Pennsylvania, exclusive from federal matters . . . impossible to apply and enforce." Id. at 661, 662. Taken as a whole, the Marcone decision, together with the fact that the remaining Defendants have not disavowed intention to prosecute him, sufficiently demonstrates that were plaintiff to open any law office within the Commonwealth, limited to his representation of clients

before the Eastern District, the threat of prosecution and the specter of contempt sanctions is "certainly impending" for standing purposes.

Second, the plaintiff has sufficiently alleged in the complaint and in testimony that the threat of contempt sanctions has caused him to forego his intended plans to open a law office within the Commonwealth of Pennsylvania, thereby constituting a personal and individual injury-in-fact. (Pl.'s Compl. ¶ 16.) In assessing the sufficiency of a plaintiff's claim under a 12(b)(6) motion to dismiss or for constitutional standing, the "court must accept as true all material allegations set forth in [the] complaint, and must construe those facts in favor of [the] complaining party." Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003). In addition, "a plaintiff must only allege that they have suffered sufficient injury to comply with Article III's 'case or controversy' requirement." Pitt News, 215 F.3d at 360. As a result, the plaintiff has suffered, and is currently suffering, a direct effect on his business practice before this court that is sufficient to constitute an injury-in-fact for constitutional standing. See Abbott Lab. v. Gardner, 387 U.S. 136, 152 (1967) (finding that the plaintiff demonstrated constitutional standing given that the impact of the regulations directly effected its day-to-day business practices); Pic-A-State v. Reno, 76 F.3d 1294, 1298-99 (3d Cir. 1996) (same).

C. Ripeness

Defendants argue that plaintiff's complaint should be dismissed because it is not ripe for judicial review. The ripeness doctrine, like constitutional standing, derives from the Constitution's limitation of federal jurisdiction to "cases and controversies." Armstrong, 961 F.2d at 411. A "[c]orrect analysis in terms of ripeness tells us when a proper party may bring an action and an analysis in terms of standing tells us who may bring the action. Presbytery, 40 F.3d

at 1462 (emphasis added). The basic rationale of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Armstrong, 961 F.2d at 411 (quoting Abbott Lab., 387 U.S. at 148). In determining whether a case is ripe, we generally look to: "(1) 'the fitness of the issues for judicial decision,' and (2) 'the hardship to the parties of withholding court consideration.'" Khodara Env't, Inc. v. Blakey, 376 F.3d 187, 196 (3d Cir. 2004) (quoting Abbott Lab., 387 U.S. at 149). However, in declaratory judgment actions the third circuit has developed a more "refined" test given that "declaratory judgments are typically sought before a completed injury has occurred." Pic-A-State, 76 F.3d at 1298. Therefore, " [i]n determining whether to engage in pre-enforcement review . . . in a declaratory judgment action, we look, among other factors, to (1) the adversity of the parties' interest, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." Id. See also Step-Saver Data Sys., 912 F.2d 643, 647 (3d Cir. 1990) (applying the 3-part ripeness standard to pre-enforcement declaratory judgment actions); Khodara, 376 F.3d at 196 (same); Armstrong, 961 F.2d at 411 (same); Presbytery, 40 F.3d at 1463 (same); Ne Hub Partners v. CNG Transmission Corp., 239 F.3d 333, 342 (3d Cir. 2001) (same). As the Defendants note, the court may apply either the two-part standard derived from Abbott Labs or the three-part standard first articulated in Step-Saver depending on which "framework better accommodates [the] analysis in this case." Philadelphia Fed'n of Teachers v. Ridge, 150 F.3d 319, 323 n.4 (3d Cir. 1998). See also Artway v. Attorney Gen. of New Jersey, 81 F.3d 1235, 1247 n.7 (3d Cir. 1996) (deeming the two-part Abbott Labs analysis, rather than the three-part Step-Saver analysis, to be "more apt for this case."). Here, the court determines that the Step-Saver analysis is more applicable given that it was developed by the third circuit to address specific challenges which

arise in pre-enforcement actions. See Peachlum v. City of York, 333 F.3d 429, 435 (3d Cir. 2003) (declining to apply the Step-Saver analysis given that the issue was not one of pre-enforcement review and therefore did not illicit the specific concerns for which the analysis was developed).

1. *Adversity of Interest*

In assessing the adversity of the parties' interest, courts look to "[w]hether the claim involves uncertain and contingent events, or presents a real and substantial threat of harm." Ne Hub Partners, 239 F.3d at 342 n.9. It is not necessary for the party seeking review to have suffered a completed harm in order to establish adversity of interest so long as there is a substantial threat of real harm. Presbytery, 40 F.3d at 1463. See also Armstrong, 961 F.2d at 412. As the third circuit has noted, the adversity of interest prong is substantially similar to the "injury-in-fact" prong of constitutional standing: "in measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquire merges almost completely with standing." Joint Stock Soc'y, 266 F.3d at 174 (quoting Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153, 172 (1987)).

As was previously established in Part A of this opinion, the plaintiff has sufficiently established a threat of real and immediate harm. The threat of contempt sanctions being brought against the plaintiff are real and substantial given a reasonable reading of the Pennsylvania Supreme Court's decision in Marcone. Defendants have made no assurances that were the plaintiff to open a law office within the Commonwealth for the purpose of representing clients solely before the Eastern District, that he would not be subject to the same penalties as the attorney in Marcone. In addition, the plaintiff has sufficiently alleged that he has forgone his

intended plans to open a law office in the Commonwealth for fear of prosecution by the Defendants. In other words, the actions of the Defendants have "require[d] [an] immediate and significant change in the plaintiff's conduct of [his] affairs" leaving the controversy ripe for judicial review. Pic-A-State, 76 F.3d at 1299 (quoting Abbott Lab, 387 U.S. at 153).

2. *Conclusiveness*

The second prong of the Step-Saver analysis looks to whether (1) "issues are purely legal (as against factual)" and (2) "further factual development would be useful." Ne Hub Partners, 239 F.3d at 342 n.9. "Conclusiveness" is a short-hand term for determining whether a declaratory judgment would in fact determine the parties' rights as opposed to merely serving as an advisory opinion. Id. at 344. Issues which are predominantly legal are particularly "amenable to a conclusive determination in a preenforcement context." Presbytery, 40 F.3d at 1468. When the question is predominantly legal, the need for factual development is not as great given that the court will not be in any better position to answer the question in the future as it is at present. Khodara, 376 F.3d at 198; Presbytery, 40 F.3d at 1468; Pic-A-State, 76 F.3d at 1300. Questions of federal preemption, in particular, have been found to be predominantly legal for purposes of meeting the conclusiveness requirement for judicial ripeness. See Armstrong, 961 F.2d at 421 (finding that "where the question presented is 'predominantly legal,' such as one of federal preemption, the need for factual development is not as great."); Ne Hub Partners, 239 F.3d at 344 (holding that "a determination of whether there is preemption primarily raises a legal issue, a circumstance which facilitates entry of a declaratory judgment."); Pacific Gas & Elec. Co. v. State Energy Res. Conversation & Dev. Comm'n, 61 U.S. 190, 201 (1983) (holding that the question of preemption is predominantly legal); Travelers Ins. Co. v. Obusek, 72 F.3d 1148,

1155 (3d Cir. 1995) (asserting that "where the question presented is 'predominantly legal,' such as a question of federal preemption, a factual record is not as crucial").

In Count I of the complaint, the plaintiff asserts that the official policy and practice of the Defendants, as evidenced by the Pennsylvania Supreme Court's decision in Marcone, violates the Supremacy Clause of the Constitution. (Pl.'s Compl. at ¶ 20.) The plaintiff argues that the Defendants' position that an attorney which has been suspended from the practice of law before the state courts of Pennsylvania, but admitted to practice before the Eastern District, may not maintain an office within the Commonwealth, directly conflicts with the federal court's authority to regulate its own attorney admissions. (Pl.'s Mot. for Prelim. Inj. at 4-11.) The question before this court is therefore one of federal conflict preemption.

Defendants argue that the issue is not ripe for judicial review because further factual development will be necessary in order to determine whether the plaintiff will be subject to prosecution when he has actually opened a law office within the Commonwealth. However, plaintiff has testified as to the specific parameters he would follow were he to open an office. The plaintiff has represented to the court and the Defendants that he would not place a sign or other advertisement outside his office, that any business stationary and other forms of official correspondence would specifically indicate that his practice is limited to practicing before the Eastern District, and that he would not provide any legal advice on state court litigation to anyone. The Defendants have also had the opportunity to cross examine the plaintiff at length in regards to his intended legal practice. Despite these assurances, Defendants are unable, given Marcone, to assure plaintiff that he will not be subject to disciplinary action. Therefore, the controversy between the parties is purely legal: whether the Defendants' threatened policy of

subjecting attorneys like plaintiff, who would practice strictly in accordance with the reinstatement Order of the Eastern District and have a physical law office to do so, conflicts with a federal court's authority to regulate its own bar admissions.

3. *Utility*

The last prong of the Step-Saver analysis requires courts to look to (1) the hardship of the parties of withholding a decision and (2) whether the claim involves uncertain and contingent events. Ne Hub Partners, 239 F.3d at 342 n.9. In other words, the utility inquiry looks to "whether the parties' plans of actions are likely to be affected by a declaratory judgment" such that the court is "convinced that by its action a useful purpose will be served." Step-Saver, 912 F.2d at 649 n.9, 649. More specifically, in order for an action to be considered ripe in the declaratory judgment context, the court's decision must "clarify legal relationships so that plaintiffs (and possibly Defendants) [can] make responsible decisions about the future." Id. at 649.

Entry of a declaratory judgment in this case would materially affect the parties actions going forward. Plaintiff has sufficiently alleged that fear of prosecution by the Defendants has prevented him from realizing his intentions to open a law office within the Commonwealth for the sole purpose of representing clients before the Eastern District. Therefore, a declaration of plaintiff's rights and those of any other attorney similarly situated would permit an attorney authorized to practice law before the Eastern District only, to open a law office within the Commonwealth without fear of governmental sanction.

D. Younger Abstention

Defendants also argue that this court should abstain from judicial review based on the principles set forth by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971). In Younger the Supreme Court determined that the principle of comity–"a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their functions in separate ways"–counseled against federal invention regarding criminal matters pending before state courts. Id. at 750. This doctrine has since been extended from criminal proceedings to state civil proceedings, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and state administrative proceedings, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

Before a federal court may abstain from exercising its jurisdiction, the party seeking abstention must demonstrate that: (1) there are ongoing state proceedings which are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. Marran v. Marran, 376 F.3d 143, 154 (3d Cir. 2004). See also Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989); O'Neill v. City of Philadelphia, 32 F.3d 785, 789 (3d Cir. 1994); FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 843 (3d Cir. 1996); Frank Russell Co. v. Wellington Mgmt. Co., LLP, 154 F.3d 97, 106 (3d Cir. 1998); Zahl v. Harper, 282 F.3d 204, 209 (3d Cir. 2002); Anthony v. Council 316, 316 F.3d 412, 418 (3d Cir. 2003).

At present, there are no pending actions against the plaintiff in state court. Therefore, the Defendants fail to meet the first requirement for Younger abstention. When there are no pending or ongoing state proceedings the Younger "principles of equity, comity and federal have little force." Steffel, 415 U.S. at 462. In the absence of such proceedings there are no duplicative legal proceedings which would potentially disrupt the state's exercise of its justice system. Id. Federal intervention, under these circumstances, cannot be seen to reflect negatively upon the state's ability and willingness to enforce constitutional principles. Id. More importantly, were a court to refuse to hear the plaintiff's claims "when no state proceeding is pending [would] place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a [state] proceeding." Id. In the absence of any pending state proceedings against the plaintiff, this court cannot abdicate its constitutional duty to exercise jurisdiction over those claims properly before it. See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358-59 (1989) (noting federal court's duty to hear claims over which is has jurisdiction); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (describing federal court's "virtually unflagging obligation" to exercise properly invoked jurisdiction). See also Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (declining to apply Younger in the absence of pending state proceedings); Kennecott Corp. v. Smith, 637 F.2d 181, 186 (3d Cir. 1980) (same); FOCUS, 75 F.3d at 843 (same); Marran, 376 F.3d at 155 (same).

E. The Supremacy Clause and Conflict Preemption

The plaintiff alleges that the Defendants' practice and policy of denying attorneys admitted to practice before the Eastern District, but suspended from practice before the state

courts of Pennsylvania, the ability to maintain a law office violates the Supremacy Clause of the United States Constitution. For the following reasons, the court agrees.

Pursuant to the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI cl. 2, when state law conflicts or is incompatible with federal law, the state law is preempted. Federal preemption may either be express or implied. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982). In the absence of explicit language, Congress' intent to supersede state law may be inferred and state law nullified when, for example, state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See Fidelity, 458 U.S. at 153 (holding same); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (same); Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (same); Orson, Inc. v. Miramax Film Corp., 189 F.3d 377, 382 (3d Cir. 1999). The principles apply even when confronted with matters of particular concern to the States, for the Supreme Court has stated that "[t]he relative importance to the States of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provide that the federal law must prevail." Fidelity, 458 U.S. at 153 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)). See also Sperry v. Florida, 373 U.S. 379, 384 (1963) (noting that "'the law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal [law]" (quoting Gibbons v. Ogden, 22 U.S. 1, 3 (1824)); Baylson v. Disciplinary Bd. of the Supreme Court of Pennsylvania, 975 F.2d 102, 111 (3d Cir. 1992) (holding that the principles of federal supremacy "apply even when the area being regulated by federal law is one of special concern to the state.").

The federal law at issue in the present action is the inherent power of each federal court to regulate and control its own bar. See 28 U.S.C. § 2071 (2000); 28 U.S.C. § 1654 (2000); Fed. R. Civ. P. 83; In re Snyder, 472 U.S. 634, 643 (1985); In the Matter of Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975); In re Mitchell, 901 F.2d 1179, 1183 (3d Cir. 1990). As the Supreme Court has explained, "[t]hese powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)). More specifically, it has long been recognized that the scope of the inherent power of the federal courts encompasses the power to control the admission and practice of attorneys who appear before it. Id. Although state courts also possess an inherent power to regulate the admission of its attorneys, the "two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included." Theard v. United States, 354 U.S. 278, 281 (1957). Therefore, even though "state action is entitled to respect, it is not conclusively binding on the federal courts." In the Matter of Ruffalo, 390 U.S. 544, 547 (1968). Specifically, in regards to matters which raise ethical concerns for the states "well established principles of federalism require that federal courts not be bound by either the interpretations of the state courts or opinion of various bar association committees." Grievance Committee for the Southern District of New York v. Simels, 48 F.3d 640, 645 (2d Cir. 1995). "If a particular interpretation of a state ethics rule is inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake." Id. (emphasis in original).

When confronted with the regulation of an attorney licensed to practice before the federal courts of a particular jurisdiction without an accompanying state admission for the same jurisdiction, the leading case remains Sperry v. State of Florida, 373 U.S. 379 (1963). In Sperry the Supreme Court considered whether a practitioner licensed to practice before the United States Patent Office engaged in the unauthorized practice of law by maintaining an office in Florida without admission to the bar of that state. While not challenging Florida's contention that the plaintiff's activities constituted the practice of law, the Court determined that the Supremacy Clause dictated that a federally licensed practitioner be permitted to practice his craft without restriction by the state. Id. at 384-85. Similarly, the Court noted that "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress." Id. at 385 (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851)). While "the State maintains control over the practice of law within its borders," this control is limited to the "extent necessary for the accomplishment of [] federal objectives." Id. at 402. Therefore, the state's order which enjoined the practitioner from engaging in the practice of law within the state was "vacated since it prohibits him from performing tasks which are incident to the preparation and prosecution of patent applications before the Patent Office." Id. at 404.

Sperry's reasoning has been followed with approval in two relevant circuit court of appeals cases: In re Poole, 222 F.3d 618 (9th Cir. 2000) and In re Desilets, 291 F.3d 925 (6th Cir. 2002). In Poole, the ninth circuit was called to consider whether a bankruptcy attorney admitted before the U.S. District Court for the District of Arizona was entitled to attorneys fees even though he was not licensed by the Arizona state bar. Poole, 222 F.3d at 619-20. In finding that the attorney was entitled to his fees, the ninth circuit noted that once "federal admission is

secured, a change in circumstances underlying state admission . . . is 'wholly negligible' on the right to practice before a federal court." Id. at 620 (quoting Selling v. Radford, 243 U.S. 46, 49 (1917)). The court's reasoning was predicated on its recognition that "as nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules." Id. at 622. Similarly, in Desilets, the sixth circuit found that an attorney was permitted to practice bankruptcy law before the U.S. District Court for the Western District of Michigan and maintain an office within the state for such practice even though he was not a member of the Michigan state bar. Desilets, 291 F.3d at 930-31. Specifically, the court found that "[w]hen state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way." Id. at 930.

Plaintiff is admitted to practice law before the Eastern District. The maintenance of an office within the geographic area in which this court sits is incidental to the practice of law before this court. Despite technological advances in the practice of law--such as electronic filing and case research through internet subscriptions--a physical space remains necessary for the effective representation of clients. A physical office space provides a location for confidential counseling with clients as well as room to store the necessary equipment, such as fax machines, legal text, telephones, paper files, typewriters and computers, associated with the proper management of legal matters. Without a physical office location the plaintiff would be effectively prohibited from "performing [those] tasks which are incident to the preparation and prosecution" of cases before the Eastern District.

The Eastern District has granted the plaintiff a federal license to appear before this court for the representation of clients on federal matters. To hold that the plaintiff may not maintain an

office within the state of Pennsylvania limited to federal matters before the Eastern District would result in a practical automatic reciprocity between the decisions of the states regarding attorney admissions and the federal district courts. However, the two systems of courts have autonomous control over the regulation and conduct of their judicial officers. Having determined that the plaintiff may appear on matters properly within the jurisdiction of the Eastern District, denying the plaintiff the ability to maintain an office would allow the Commonwealth of Pennsylvania to second-guess the determination of this court and give it "virtual power of review over the federal determination" of attorney admission. Leslie Miller v. Arkansas, 352 U.S. 187, 190 (1956). Such a review would present "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in vesting district courts with broad authority to regulate the admission of its judicial officers.

Therefore, to the extent that there exists a state rule prohibiting one in the position of plaintiff from opening and maintaining an office within the Commonwealth of Pennsylvania for the purpose of representing clients pursuant to his admission in good standing before the Eastern District, such state rule is preempted. While footnote 11 in Marcone states that the decision is not intended to limit such a person from practicing before the Eastern District, these salutory sentiments are not dispositive given that the body of the decision purports to preclude such an individual from opening a physical office for the sole purpose of practicing law before the Eastern District.

F. Proper Remedy

Having determined that the plaintiff has the right to maintain an office for the practice of law before the Eastern District, issues remain as to reconcile the scope of the Eastern District's reinstatement Order and the Pennsylvania Supreme Court's Marcone decision. Applying considerations both of federalism and comity, this court has a duty to declare the scope of plaintiff's federal practice in such a way as to reconcile, as much as possible, Pennsylvania's governance system with that of the Eastern District.

Plaintiff requests that this court enter a declaratory judgment "declaring unconstitutional the practice and policy of the Pennsylvania lawyer disciplinary system prohibiting lawyers suspended from practice in Pennsylvania, but admitted to practice in federal district court in Pennsylvania, from opening and operating a law office in Pennsylvania limited to the representation of clients in matters in the United States District court in which the lawyer is admitted." (Pl.'s Compl. ¶ 23(b).) This court declines to issue such relief. The principles of federalism and comity prohibit federal court interference with the state court disciplinary systems that do not interfere with federally protected rights. Plaintiff does not have a constitutional right to practice state law in the state courts of the Commonwealth, for example.

The ODC has repeatedly stressed two points: (1) that the Marcone decision must be understood to be limited to an adjudication of the factual situation presented by the actions of attorney Marcone and should not be construed as applying to plaintiff facts which have yet to be developed, and (2) that a home office or similar office to a home office without an office sign that states, or could be interpreted as stating, "Attorney at Law" would likely not offend the

ODC's understanding of the Marcone decision. Plaintiff has stressed that he will not have an exterior office sign, and therefore, that his situation, factually, will be dramatically different from the office establishment conduct attributed to attorney Marcone.

Accordingly, the court rules as follow:

1. Plaintiff is permitted to open and maintain a law office located at 1332 Ritter Street in Philadelphia, PA solely for the practice of law before this court;

2. That office shall have no exterior sign that advertises plaintiff's practice;

3. Plaintiff shall provide an inscription on all stationary, business cards, files, websites[1] or other documents or correspondence clearly delineating that his practice of law is strictly limited to cases or controversies within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania;

4. The plaintiff shall not provide legal advice or consultation on state law matters where, appropriate, shall refer to other attorneys any state court cases or inquiries;

5. Plaintiff shall promptly inform all persons seeking his legal services that he is only admitted to practice before the U.S. District Court of the Eastern District of Pennsylvania and is not authorized to practice under authority of the Supreme Court of Pennsylvania;

[1] This court does not prohibit the plaintiff from maintaining a website, as ODC suggests he might appropriately do. However, it would seem that such a website presents a more expansive, and thus potentially uncontrollable, form of advertising than an exterior sign.

6. Plaintiff shall advise clients that if they have an complaints regarding the ethics of plaintiff's legal representation that they may contact the Chief Judge for the Eastern District as well as the Office of Disciplinary Counsel;

7. The plaintiff shall commence the application for reinstatement to the Bar of the Supreme Court of Pennsylvania by April 15, 2005.[2]

The foregoing conditions strike an appropriate balance between a recognition of plaintiff's substantial substantive right to practice law before the Eastern District and the of Commonwealth of Pennsylvania's interest in protecting its citizens from the unauthorized practice law. First, the requirement that plaintiff apply for reinstatement to the Bar of the Supreme Court of Pennsylvania, while being permitted to maintain an office for his practice before the Eastern District, reflects this court's understanding that by reinstating the plaintiff to practice before the Eastern District before his suspension from practice in the courts of Pennsylvania expired, plaintiff was given a temporary pass to resume his federal law practice and not a permanent absolution from requirements and oversight of the Commonwealth. In fact, in light of this particular concern, the Eastern District adopted a rule, after plaintiff's reinstatement, that requires an attorney an attorney requesting to be reinstated to the bar of this court after reciprocal discipline has been imposed to either reapply to the state bar in which the attorney was suspended or have had an application pending for at least one year prior to being readmitted. E.D. Pa. R. 83.6.VII(C).

[2] This court believes that the reinstatement Order of the Eastern District implicitly contemplated that plaintiff would reapply to Pennsylvania as soon as he was able.

Second, the requirements that the plaintiff is not permitted to place a sign outside his office for the advertisement of his law practice and that the plaintiff must advise potential clients of the limited nature of his practice, honors the Commonwealth's goal of ensuring that attorneys not currently licensed within its jurisdiction not hold themselves out to members of the public as authorized for the general practice of law. See Marcone, 855 A.2d 654, 660-61 (Pa. 2004) (finding that suspended attorney held himself out to public as competent to exercise legal judgment by maintenance of office with sign stating "Attorney at Law"); In re Peterson, 163 B.R. 665, 673 (Bankr. D. Conn. 1994) (finding attorney to have engaged in the unauthorized practice of law by holding himself out for the practice of general bankruptcy law); In re Lite Ray Realty Corp., 257 B.R. 150, 156 (Bankr. S.D.N.Y. 2001) (same); Attorney Grievance Commission v. Bridges, 759 A.2d 233, 244-45 (Md. 2000) (holding that attorney did not participate in the unauthorized practice of law because he did not advertise, have a sign outside his office, and limited his practice to federal matters); Attorney Grievance Commission v. Harris-Smith, 737 A.2d 567, 572 (Md. 1999) (holding that unadmitted attorney held herself out to public as practicing law generally by advertising her practice and failing to notify clients that her practice was limited to federal matters); Kennedy v. Bar Association of Montgomery County, 561 A.2d 200, 208 (Md. 1989) (finding attorney to have engaged in the unauthorized practice of law by representing clients before the state courts without admission and representing through business cards and signs that attorney was permitted to practice law generally); Florida Bar v. Kaiser, 397 S.2d 1132, (Fla. 1981) (enjoining immigration attorney from advertising to the public that he was available for the general practice of law).

G. First Amendment

The plaintiff also argues that the Defendants' "official policy and practice" of denying attorneys admitted to practice before the Eastern District but suspended from practice before the Pennsylvania state courts the ability to maintain an office within the State violates the attorney's rights to free speech, advocacy and association, and the practice of law under the First Amendment. An attorney's right to practice law before a federal court derives from federal statute, see 28 U.S.C. § 2071, and, therefore, the attorney is bound to practice in conformity with that court's order. Therefore, the attorney's First Amendment rights are limited, and subjected to the conditions of the court. Plaintiff's First Amendment rights have not been violated in this context.

V. Conclusion

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT B. SURRICK,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 04-5668
	:	
v.	:	
	:	
PAUL J. KILLION, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of April, 2005, upon consideration of the Plaintiff's Motion for Preliminary Injunction (Docket No. 2), the Defendants' Motion to Dismiss (Docket No. 6) which is being treated as a Motion for Summary Judgment pursuant to the court's Order of March 17, 2005 (Docket No. 14) and the Plaintiff's Response to said Motion which is

being treated as a Cross-Motion for Summary Judgment (Docket No. 14), it is hereby ORDERED that the Motions are GRANTED IN PART and DENIED IN PART as follows:

1. As to that portion of Defendants' Motion for Summary Judgment requesting the dismissal of all claims against the Judicial Defendants, said portion is GRANTED;

2. As to that portion of Defendants' Motion for Summary Judgment requesting the dismissal of Plaintiff's First Amendment claims, said portion is GRANTED;

3. As to the remainder of Defendants' Motion for Summary Judgment requesting the dismissal of Plaintiff's complaint for (1) lack of ripeness, (2) lack of judicial standing, and (3) failure to state a claim under the Supremacy Clause, said portion is DENIED;

4. As to that portion of Plaintiff's Cross-Motion for Summary Judgment requesting the issuance of a preliminary injunction against the Defendants, said portion is DENIED;

5. As to that portion of Plaintiff's Cross-Motion for Summary Judgment requesting a judicial declaration that said Plaintiff may open a legal office for the practice of law before the United States District Court for the Eastern District, said portion is GRANTED, subject to the following conditions:

a. Plaintiff is authorized by the Eastern District's reinstatement Order to open and maintain a law office located at 1332 Ritter Street in Philadelphia, PA solely for the practice of law before this court;

b. Plaintiff shall commence an application for reinstatement to the Bar of the Supreme Court of Pennsylvania by April 15, 2005;

c. There shall not be any signs on the outside of plaintiff's office building reflecting his federal practice and plaintiff shall not advertise his practice by way of outdoor advertisement or posters;

d. Plaintiff shall provide an inscription on all stationary, business cards, files, websites or other documents or correspondence clearly delineating that his practice of law is strictly limited to cases or controversies within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania;

e. Plaintiff shall not provide legal advice or consultation on state law matters and where appropriate will refer to other attorneys any state court cases or inquiries;

f. Pursuant to his status as an admitted attorney before the Eastern District, plaintiff is authorized to represent clients on all matters within the jurisdiction of this court;

g. Plaintiff shall promptly inform all persons seeking his legal services that he is only admitted to practice before the U.S. District

Court of the Eastern District of Pennsylvania and is under suspension from practice in, and respecting legal matters to be filed in, the state courts of Pennsylvania;

h. Plaintiff shall advise clients that if they have an complaints regarding the ethics of his legal representation that they may contact the Chief Judge for the Eastern District as well as the Office of Disciplinary Counsel.

BY THE COURT:

S/ James T. Giles

C.J.

copies by FAX on

to