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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER, Plaintiff, vs. JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange; ANTHONY RACKAUCKAS, District Attorney for the County of Orange; and DOES 1 through 50, inclusive, Defendants.	**CASE NO. CV-09-2740-WHA** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ISSUANCE OF ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION.** **SUBMITTED CONCURRENTLY WITH [PROPOSED] ORDER; EX PARTE APPLICATION, AND DECLARATION OF KENNETH SCHMIER** **DATE:** _____ **TIME:** _____ **CTRM:** **9**

Plaintiff KENNETH J. SCHMIER hereby submits the following Memorandum of Points and Authorities supporting issuance of a Temporary Restraining Order and an Order to Show Cause Why a Preliminary Injunction Should Not Be Granted. This application is brought pursuant to 42 U.S.C. § 1983, Fed.R.Civ.P. Rule 65, and Local Rule 65-1, and on the grounds that good cause exists to file this

Application on an expedited basis because irreparable injury will result to Plaintiff if the requested relief is not granted immediately.

I. INTRODUCTION.

This application for a Temporary Restraining Order ("TRO") and Order to Show Cause ("OSC") regarding Issuance of a Preliminary Injunction emerges from the action filed by Plaintiff herein, challenging the constitutionality of California Rules of Court ("C.R.C.") Rule 8.1115(a) [hereinafter the "no-citation rule"] [1] as a constitutionally impermissible prior restraint on Plaintiff's speech and civil rights under the 1st and 14th Amendments of the U.S. Constitution, actionable under 42 U.S.C. § 1983. At issue is this simple question: In a country that values free speech and the right to petition government, how can it possibly be illegal for an attorney to bring to a trial court's attention that its own appellate court has repeatedly and consistently ruled, on precisely identical facts, that charges against the defendant must be dismissed? [2]

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[1] C.R.C. Rule 8.1115 states as follows:

> **(a) Unpublished opinion**
> Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.
> **(b) Exceptions**
> An unpublished opinion may be cited or relied on:
> (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
> (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.
> **(c) Citation procedure**
> A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.
> **(d) When a published opinion may be cited**
> A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

[2] The Website www.nonpublication.com, maintained by the Committee for the Rule of Law, of which Plaintiff is a member, gathers information regarding no-citation rules and unpublished opinions. It links over a hundred scholarly publications exploring the issues raised by no-citation rules.

II. PERTINENT FACTUAL BACKGROUND

Plaintiff KENNETH J. SCHMIER is a member of the State Bar of California. He is also counsel of record for Michael N. Jennings (hereinafter "DEFENDANT JENNINGS"), who is a defendant in a presently pending criminal matter before the Orange County Superior Court, Case No. SA138658PE, arising from said DEFENDANT JENNINGS' alleged violation of Cal.Veh.C. § 21453(a) on March 12, 2009. The charges against DEFENDANT JENNINGS therein were brought by the Office of the Orange County District Attorney predicated solely upon an Automated Traffic Enforcement System ("ATES") installed by the City of Santa Ana at the intersection of Santa Ana Blvd. and Main Street ("SUBJECT ATES INTERSECTION"), in the City of Santa Ana, County of Orange, State of California (hereinafter "UNDERLYING ATES INFRACTION"). DEFENDANT JENNINGS' arraignment and criminal court trial is presently set for July 22, 2009.

The City of Santa Ana is reputed to issue approximately 1000 ATES citations each month. Plaintiff has been contacted by and expects to also defend numerous other defendants situated similarly to DEFENDANT JENNINGS.

DEFENDANT JENNINGS has discovered and is expected to offer reliable evidence in the UNDERLYING ATES ACTION that the City of Santa Ana failed to comply with the requirement of Cal.Veh.C. §21455.5(b) with respect to the SUBJECT ATES INTERSECTION because it failed to issue warning notices only for the first 30-day period following installation of the ATES at the SUBJECT ATES INTERSECTION, and has not done so for any 30 day period prior to issuing the March 12, 2009 citation to DEFENDANT JENNINGS, as a complete defense to the charges against DEFENDANT JENNINGS in the UNDERLYING ATES ACTION.

On December 18, 2008, the Appellate Division of the Orange County Superior Court issued its decision in a case styled *People of the State of California v. Fischetti*, 2009 WL 221042, 170 Cal.App.4th Supp. 1, hereinafter *Fischetti II*), wherein the Appellate Court held that compliance with Cal.Veh.C. §21455.5(b)'s warning requirements was mandatory for each ATES intersection as *separately installed* and that a controlling municipality's failure to so comply was and is a complete defense to prosecution of an infraction at any such noncompliant intersection where the sole evidence relied upon for conviction was a non-complaint ATES. The *Fischetti II* decision was subsequently

certified for publication on January 15, 2009. (A true and correct copy of the published *Fischetti II* decision is attached to the accompanying SCHMIER Declaration as Exh. B).

To date, no other appellate published authority of the State of California has reached a contrary conclusion to that reached by the Court in *Fischetti II* with respect to the mandatory application of the Cal.Veh.C. §21455.5(b)'s warning requirements by intersection, and, at the time it was published, *Fischetti II* was, and continues to be, the sole, uncontradicted, dispositive and controlling California authority on point.

Two other unpublished and uncitable opinions have previously been issued by the Appellate Department of the Superior Court, County of Orange reaching the same legal conclusions as did that Court in *Fischetti II: People of the State of California v. Anna Vrska,* Appellate Division Superior Court of California, County of Orange, Case No. 30-2008-00044334, filed Aug 28, 2008; and *People of the State of California vs. Fischetti*, Appellate Division of the Superior Court of California, County of Orange, Case No. AP-14168, filed Jan 31, 2005. (Both Fischetti cases involve the same defendant and the same fact situation but separate citations issued 3 years apart. The 2005 decision is referred to as *Fischetti I* and the 2008 Fischetti decision as *Fischetti II.*)[3] As did *Fischetti II,* both *Vrska* and *Fischetti I* held that compliance with Cal.Veh.C. §21455.5(b)'s warning requirements was mandatory for each separate ATES intersection brought on line and that a controlling municipality's failure to so comply was and is a complete defense to prosecution of an infraction at any such noncompliant intersection where the sole evidence relied upon for conviction was a non-compliant ATES. And again similarly to *Fischetti II*, both the *Vrska* and *Fischetti I* decisions were subject to numerous petitions by non parties seeking to obfuscate their rulings. In *Fischetti I,* the City of Costa Mesa, with the support of the cities of Long Beach and Santa Ana petitioned the Supreme Court of California for review of this decision. Review was denied. The appellate decision was not published. In *Vrska*, the petition of Vrska to have the decision published was denied by the Supreme Court despite a finding by the appellate judge that the decision should be published.

[3] Beyond the question whether requiring Mr. Fischetti to twice establish the same defense on appeal is just, another serious question is raised: If court time is to justify no-citation rules, the judiciary must be required to answer why it does not have time to decide issues properly in the first instance but does have time to decide the same issues over and over, at least three times in this instance?

Taken together, the collective action of the government agencies involved in these three appellate cases amounts to removing content of appellate decisions these powers find objectionable from the body of knowledge commonly known as "Law" by the expedient device of making that law unmentionable.

In *Hild v. California Supreme Court*, United States District Court Case No: C 075107 the Attorney General of California argued on behalf of the Supreme Court of California that no-citation rules are a necessary part of a system "for managing the creation and citation of precedent" (Motion to Dismiss First Amended Complaint, P&A's in Support Page 12 line 17).

Authority of a judiciary to "manage precedent" should be strictly construed because it would easily morph into Orwellian authority to "manage rational thinking" and to "manage sources of truth," traditional tools of totalitarian regimes our Constitutions are intended to disable.

There is no evidence that the People of the State of California intended to give the Supreme Court the authority to "manage precedent" or to create a no-citation rule. Nothing to either effect appears in the California Constitution. The California Constitutional Revision Commission expressly did not add a no-citation of unpublished opinions to its selective publication amendment of Article VI § 14 because it would be a "constitutional prohibition on enlightenment." [4]

Assuming, *arguendo*, that the California Supreme Court, or any court, has the power to "manage precedent" outside of deciding cases or controversies brought before them, a proposition fraught with separation of powers dangers, the method for doing so cannot be to ban citation of the actions of the Judiciary itself. In banning citation of unpublished decisions, the State of California breaches not only both the letter of the 1st Amendment and its spirit, but its fundamental purpose, for the reason government may make no law abridging freedom of speech certainly includes allowing citizens to hold government accountable for its past actions.

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[4] "Section 16 - Mr. Busterud had suggested at the May Commission meeting that the Committee consider making only published opinions available for citation as precedent. MC- Kleps - reject suggestion prohibiting citation of unpublished opinions as precedent. Mr. Kleps noted that the Judicial Council could do this by rule. Mr. Selvin stated that Illinois once has such a provision which lawyers and judges ignored so that it was repealed. He felt that since law review articles and everything else is being cited to courts that to adopt this section would be a constitutional prohibition on enlightenment."

Minutes of the Meeting of the [Constitutional Revision] Committee on Article VI, July 9, 1965 at the International Hotel, Los Angeles.

The *Fischetti II* decision, having been issued and published by an appellate division of the Orange County Superior Court, would be mandatory and binding upon the Orange County Superior Court in the UNDERLYING ATES ACTION, as a matter of law, pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Based upon discovery which has adduced absence of evidence of compliance by the City of Santa Ana with Cal.Veh.C. § 21455.5(b) insofar as the SUBJECT INTERSECTION as of March 12, 2009 was concerned, Plaintiff's citation of the *Fischetti II* decision, as counsel of record for, and on behalf of his client, DEFENDANT JENNINGS, in the UNDERLYING ATES ACTION, would necessitate and result in a complete dismissal of the UNDERLYING ATES ACTION. The same is true for *Vrska* and *Fischetti I*.

As the Appellate Department of the Superior Court, County of Orange determined in electing to certify the *Fischetti II* decision for publication, the *Fischetti II* decision met many of the independent publication criteria of C.R.C. Rule 8.1105(c) including, but not limited to, advancing a new construction of and clarifying the underlying statute at issue (Rule 8.1105(c)(4)), and involved a legal issue of continuing public interest. (Rule 8.1105(c)(6)). Accordingly, under the express language of recently-amended Rule 8.1105(c), the decision in *Fischetti II* "should be published" and was in fact properly "published."

In using the word "published" the California Judiciary intentionally misleads. Since 2001 all decisions of the appellate courts of California have, in fact, been published in that they are placed on the website supervised by the Supreme Court of California and from there archived, indexed and republished by Westlaw and LexisNexis, as well as numerous special interest websites such as www.highwayrobbery.net, a website of particular interest to lay persons charged with traffic violations because it advises on traffic citation defense. Cal. Const. Art. VI, § 14 requires that all appellate decisions be in writing with reasons stated. Therefore the *only* difference between "Published" and "Unpublished" or "Depublished" decisions in California is that "Published" decisions may be cited, while "Unpublished" or "Depublished" decisions may not be cited. *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873 (*Schmier II*).

On February 25, 2009, the California Supreme Court, without comment or explanation, ordered the *Fischetti II* decision to be depublished pursuant to C.R.C. Rule 8.1125. (Schmier Decl'n. Exh. E.)

As a direct result of the Supreme Court's February 25, 2009 decision to depublish the *Fischetti II* decision, Plaintiff has been prevented and precluded as a matter of law by C.R.C. Rule 8.1115(a) from mentioning to any California court the *Fischetti II* decision, its content, and attributing its content to an appellate court superior in authority to the trial court, such that the trial court is compelled by law to acquit his client, DEFENDANT JENNINGS, in the UNDERLYING ATES ACTION. Plaintiff's present and ongoing inability to cite *Fischetti II* has been succinctly set forth in a recent discovery response to DEFENDANT JENNINGS from the City Attorney for the City of Santa Ana.[5] (Schmier Decl'n. Exh. F.) In short, Plaintiff is denied the use of the most effective tool of his trade, a complete defense as a matter of law to the UNDERLYING ATES ACTION.

As a member of the State Bar of California, and as counsel of record for DEFENDANT JENNINGS, Plaintiff has a duty imposed upon him zealously to represent his client's interests in defense of the UNDERLYING ATES ACTION, which must include calling to the Trial Court's attention that its own appellate court has repeatedly ruled that charges against his client must be dismissed. This poses a dilemma for Plaintiff. C.R.C. Rule 8.1115(a) affirmatively precludes and restrains Plaintiff from speaking or uttering the citation or nature of the ruling in *Fischetti II, Vrska* or *Fischetti I,* or any part thereof, the only authority that will exonerate Plaintiff's client.

Were Plaintiff to speak or utter the citation of *Fischetti II, Vrska* or *Fischetti I,* or attribute the content of these decisions to the Appellate Department of the Superior Court, County of Orange, or any part thereof, in the zealous defense of DEFENDANT JENNINGS and to secure a dismissal of said UNDERLYING ATES ACTION, Plaintiff will be subjected to monetary sanctions and/or contempt proceedings by the underlying Trial Court, as well as professional discipline imposed by the State Bar

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5 Deputy City Attorney Hodges writes, "the request cites *People v. Fischetti* (Case # 30-2008-00080937). Please be advised that the California Supreme Court ordered the depublication of the *Fischetti* decision. Accordingly, the *Fischetti* ruling does not have any bearing upon the instant matter, and cannot be cited to for purposes of this case."

of California including, but not limited to, reproval, suspension, and/or disbarment, which discipline imposed at any level would remain permanently as derogatory information on Plaintiff's record of licensure with the State Bar, and/or would inflict injury in Plaintiff's professional reputation, and prevent or preclude his ability to be retained by new clients as a result of such publicly-disclosed bar record information and/or will result in his being deprived of the right and ability to practice law and thus earn a livelihood in the State of California.

Plaintiff is in heightened peril because he has already attempted to cite unpublished authority in the courts of California, been denied the opportunity to do so, fully litigated the issue in the courts of California, and been instructed that he has no right to do so. *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4th 700 cert. denied, 531 U.S. 958 (*Schmier I*) [as counsel]. *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873 (*Schmier II*) [as plaintiff], *Schmier v. Supreme Court of California* 1st Dist Ct of Appeal A101206 12/16/03 [Unpublished]. (*Schmier III*) [as plaintiff].

Plaintiff respectfully submits that Rule 8.1115(a) is an unconstitutional prior restraint on his speech violative of First Amendment rights under the First Amendment of the U.S. Constitution, as well as the same right expressly guaranteed under the California Constitution, Art. I, § 2. Because Rule 8.1115(a) as such clearly conflicts with these constitutional embodiments, it is also per se invalid under California Const. Art. VI, § 6(d), for the reasons further set forth below.

A. History and Authority by Which C.R.C. Rule 8.1115(a) Was Enacted

Under Cal. Const. Art. VI, § 14, "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." In 1967, the California Legislature enacted Cal. Gov't.C. § 68902, which provides that "[s]uch opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court." (Stats. 1967, Ch. 172, § 2.)

Pursuant to authority granted to it pursuant to Cal. Const. Art. VI, § 6(d), the JUDICIAL

COUNCIL OF CALIFORNIA has authority to adopt statewide rules of court, which have the force and effect of law, provided such rules of court may not conflict with statutory and/or constitutional law. Under Cal. Const. Art. VI, § 6(d) and subsequently decided California case authorities, any rules of court adopted by the JUDICIAL COUNCIL OF CALIFORNIA, which conflict with other statutory or constitutional law of the State of California, are invalid.

Effective November 11, 1966, the JUDICIAL COUNCIL OF CALIFORNIA promulgated C.R.C. Rule 976, since renumbered Rule 8.1105(e)(2), which states in pertinent part that "The Supreme Court may order that an opinion certified for publication is not to be published."

Effective January 1, 1974, the JUDICIAL COUNCIL OF CALIFORNIA promulgated C.R.C. Rule 977, since renumbered Rule 8.1115(a) in 2007, which now states, in pertinent part, that: "Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."

It is noteworthy that neither § 6 nor § 14 of Art. VI of the California Constitution, nor Cal. Gov't.C. § 68902 confer any authority upon on the California Supreme Court or JUDICIAL COUNCIL OF CALIFORNIA to restrain or prohibit the mention of and/or reference or citation by members of the State Bar of California (or pro se litigants) to any unpublished or depublished opinions of the Courts of Appeal.

In 1975, the JUDICIAL COUNCIL OF CALIFORNIA adopted C.R.C. Rule 227, now renumbered Rule 2.30 (effective January 1, 2007), specifically authorizing the imposition of monetary sanctions against any attorney or party violating any of the California Rules of Court including, but not limited to, C.R.C. Rule 8.1115(a). Violation of California Rules of Court including, but not limited to, C.R.C. Rule 8.1115(a), are also grounds for imposition of professional discipline by the State Bar of California including, but not limited to, reproval, suspension, and/or disbarment.

B. Defendants' Authority and Status as the Official Enforcers of C.R.C. Rule 8.1115(a).

Defendants JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE

JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange; ANTHONY RACKAUCKAS, District Attorney for the County of Orange; and DOES 1 through 50, inclusive, enforce, and continue to enforce, C.R.C. Rule 8.1115(a) while acting under color of the state law of the State of California as directed by California Constitution Art. VI, § 6(d). This enforcement violates California Constitution, Art. I, § 2, and the 1st and 14th Amendments of the United States Constitution, Plaintiff has a right to freedom of speech while acting on behalf of and as counsel of record, for his clients, including DEFENDANT JENNINGS, which right to freedom of speech may not be restrained or abridged by the States of the United States, including the State of California.

C. Constitutional Infirmity of C.R.C. Rule 8.1115(a).

As shown below, C.R.C. Rule 8.1115(a) violates Plaintiff's aforementioned constitutionally-protected right to freedom of speech, in that said Rule specifically orders and decrees in advance that Plaintiff may not orally or in writing cite or reference the *Fischetti II, Vrska* or *Fischetti I* decisions to the Trial Court in which the UNDERLYING ATES ACTION is now pending. If such unpublished decision were spoken or mentioned by Plaintiff, the trial court therein is not permitted to consider or rely upon such exercise of free speech, making such speech meaningless. [6] Were Plaintiff to even speak of *Fischetti II, Vrska* or *Fischetti I* to the trial Court, he is under immediate penalty of imposition upon him of monetary sanctions against him personally under C.R.C. Rule 2.30, as well as imposition of

[6] C.R.C.8.1115(a) also prevents courts from citing or relying upon unpublished opinions as well as attorneys and litigants. But there is a problem. It appears that the majority of California courts rely on unpublished decisions despite the rule. A survey taken by the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions [Hon. Kathryn Mickle Werdegar, Associate Justice, California Supreme Court, Chair] revealed that 58 percent of the 86 justices responding rely upon "unpublished" appellate opinions. A comment included in the Werdegar Committee's survey said, "Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division." (*Survey for Appellate Court Justices Survey Results 9/14/2005;* http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf at Question14, Page 132 of the .pdf, page 17 of the survey.) Justices are deciding cases by relying upon unpublished decisions in the same way they would use decisions marked "Certified for Publication" — except without citation or discussion in open court.

publicly-imposed professional discipline, harming his professional reputation and/or depriving him of the right to practice law in the State of California, including imposition of the penalties of reproval, suspension and/or disbarment. As a result thereof, C.R.C. Rule 8.1115(a) is, as a matter of law as explained below, an unconstitutional content-based prior restraint of Plaintiff's right to free speech guaranteed by the 1st and 14th Amendments of the U.S. Constitution imposed by the JUDICIAL COUNCIL OF CALIFORNIA. Rule 8.1115(a) is further constitutionally invalid pursuant to California Constitution, Art. VI, § 6(d), as it lies in direct conflict with Art. I, § 2(a) of said California Constitution.

In promulgating and continuously enforcing C.R.C. Rule 8.1115(a), Defendants and each of them are, as shown below, specifically depriving, and continue to deprive Plaintiff, under color of state law, of his civil rights guaranteed by the 1st and 14th Amendments of the U.S. Constitution, thus in violation of 42 U.S.C. § 1983.

As a direct result of the aforementioned violation by Defendants' promulgation and continued enforcement of Rule 8.1115(a), thus violating Plaintiff's constitutional rights under color of State law, Plaintiff has suffered and continues to suffer irreparable harm and injury, and has no adequate or speedy remedy at law. Accordingly Plaintiff seeks temporary, preliminary and permanent injunctive relief enjoining the Defendants and each of them, from the continuing promulgation and enforcement of C.R.C. Rule 8.1115(a), pursuant to 42 U.S.C. § 1983.

III. STANDARD FOR OBTAINING TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF.

The standard for obtaining a temporary restraining order is similar to that applicable to motions for preliminary injunction. To prevail, plaintiff must show (1) a likelihood of success on the merits of the claims; (2) a significant threat of irreparable injury; (3) that the balance of hardship weighs in his favor; and (4) whether any public interest favors granting an injunction. *Raich v. Ashcroft* 353 F.3d 1222, 1227 (9th Cir. 2003). An alternative test, also used in the Ninth Circuit, requires a plaintiff to demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or serious questions going to the merits, and the balance of hardships tips sharply in their favor. *Id*. These tests represent a continuum of equitable discretion, whereby "the greater the relative hardship

to the moving party, the less probability of success must be shown." *Id.*

Preliminary injunctive relief is properly granted as against a state officer responsible for its enforcement, pursuant to 42 U.S.C. § 1983, where the officer's state's rule aimed at any attorney's speech comprises a constitutionally impermissible prior restraint on such speech violative of the 1st and by extension 14th Amendments of the U.S. Constitution. *See, e.g., Rapp v. Disciplinary Bd. of Hawaii,* 916 F.Supp. 1525, 1531-1532 [prospective bar discipline in response to attorneys' exercise of speech in violation proscribed by State Bar Rule is sufficient to meet the "injury-in-fact" requirement for Article III standing in federal court action]. A copy of *Rapp* is attached hereto as "Exhibit A."

IV. PRELIMINARY CONSIDERATIONS: PLAINTIFF POSSESSES STANDING, AND NEITHER THE 11TH AMENDMENT NOR YOUNGER ABSTENTION BAR THIS ACTION.

A. Plaintiff has Article III Standing to Bring this Action

Article III standing requires a Plaintiff establish: (1) injury in fact that is concrete, particularized, and actual or imminent, not hypothetical; (2) causation; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision herein. *American Civil Liberties Union of Nevada v. Lomax* 471 F.3d 1010, 1015 (9th Cir. 2006); *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Here, Plaintiff establishes all three requirements. As shown below, as a content-based prior restraint, Rule 8.1115(a) has deprived Plaintiff of his freedom of speech rights. In *Schmier v. U.S. Court of Appeals for the Ninth Circuit,* 279 F.3d 817 (9th Cir. 2002), the Ninth Circuit Court held that a showing with specificity that Plaintiff himself would be subjected to imposition of monetary sanctions and/or that his reliance on an unpublished decision that would help his client prevail in underlying litigation, would meet the "personal stake" requirement establishing Article III standing. *Id.*, 279 F.3d at 821-822.

These facts are pled and beyond dispute. Plaintiff's citation of *Fischetti II, Vrska* or *Fischetti 1* decisions in defense of his client, DEFENDANT JENNINGS, in the unrelated criminal case below, in contravention of Rule 8.1115(a), will produce an imminent injury personal to the Plaintiff chilling his defense of his client, and leading directly to the imposition of monetary sanctions against Plaintiff

pursuant to C.R.C. Rule 2.30, as well as prospective disciplinary action against him by the California State Bar. Rule 8.1115(a) as such also deprives Plaintiff's client, DEFENDANT JENNINGS of the ability to cite, and have the criminal trial court rely on the content of *Fischetti II, Vrska* and *Fischetti I, with the significance and respect their collective provenance requires.* DEFENDANT JENNINGS will not obtain a complete dismissal of all charges as a matter of law, as would otherwise be required by the criminal trial court's obligation to adhere to the authority of an appellate court decision directly on point under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. These facts clearly establish Plaintiff's "injury-in-fact" standing in this matter pursuant to the Ninth Circuit's express ruling in *Schmier, supra,* 279 F.3d at 821-822. *See, also, Rapp, supra,* 916 F.Supp. at 1531-1532 [prospective bar discipline in response to attorneys' exercise of speech in violation proscribed by State Bar Rule is sufficient to meet the "injury-in-fact" requirement for Article III standing in federal court action.]

Continued enforcement of Rule 8.1115(a) will directly cause the aforementioned injury in fact to Plaintiff, thus meeting the second requirement for Article III standing.

Finally, if the relief sought herein is granted, Plaintiff will be free to mention and cite to *Fischetti II, Vrska* and *Fischetti I* (without any threat of imposition of monetary sanctions and/or State Bar discipline), the criminal trial court will be obliged to rely upon it, and such citation would secure a dismissal of all charges against DEFENDANT JENNINGS as the criminal trial court would be bound to follow that decision pursuant to *Auto Equity Sales, supra*. This plainly establishes the "redressability" requirement for standing, because the relief sought herein will in fact provide complete relief by preventing the aforementioned harm visited upon Plaintiff and his client by C.R.C. Rule 8.1115(a).

Accordingly, and as a matter of law, Plaintiff's relief sought herein thus cannot be denied for lack of Article III standing.

B. The *In re Young* Exception to the Eleventh Amendment Confers Jurisdiction by this Court Over this Action

It is expected Defendants will assert that the Eleventh Amendment [7] deprives this court of subject

[7] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

matter jurisdiction over the claims set forth hereinbelow. "In the absence of consent, a suit in which the State or one of its agencies or departments is named as the Defendant is proscribed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). Where a suit names state officials as defendants, the Eleventh Amendment precludes suit if "the state is the real, substantial party in interest" *Id.*, 465 U.S. at 101.

However, in *Ex Parte re Young* 209 U.S. 123, 28 S.Ct. 441, 5 L.Ed. 714 (1908), the Supreme Court enunciated a now well-known exception to the foregoing rule to permit a challenge of a state official's action by seeking prospective injunctive relief. *Pennhurst, supra,* 465 U.S. at 102, 104 S.Ct. at 909. Where as herein, Plaintiff seeks injunctive relief from a federal court enjoining a state official's future unconstitutional conduct, the Eleventh Amendment's proscription is inapplicable because the States cannot authorize unconstitutional actions by their officials. *See, Edelman v. Jordan* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

In this case, Plaintiff seeks no damages but only declaratory and prospective injunctive relief against future enforcement of Rule 8.1115(a). Accordingly, this Court has subject matter jurisdiction over these claims under the exception to the Eleventh Amendment doctrine of sovereign immunity established under *Ex Parte Young, supra,* 209 U.S. 123, *Edelman, supra,* 415 U.S. 651.

C. *Younger* Abstention is Inappropriate and Unavailable.

It is also anticipated that the Defendants will assert that this Court should abstain from adjudicating the merits of Plaintiff's claims herein under the abstention doctrine enunciated in *Younger v. Harris* 401 U.S. 37, 41, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971). However, dismissal of a federal claim based upon *Younger* abstention requires a showing of all three of the following requirements: (1) there must be ongoing state judicial proceedings; (2) the state judicial proceedings must implicate important state interests; and (3) the state judicial proceedings must afford the federal plaintiff an adequate opportunity to raise constitutional claims. *See, Benavidez v. Eu* 34 F.3d 825, 831 (9th Cir. 1994); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.* 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982).

None of these requirements, let alone all three, are met in this case.

Element 1 cannot be established because there is no ongoing state judicial proceeding. The criminal proceeding pending below does not involve Plaintiff. It involves only DEFENDANT JENNINGS (and even in that case arraignment has not yet occurred). Plaintiff herein is but Mr. JENNINGS' counsel of record, and not a party thereto. While absent grant of the injunctive and declaratory relief sought herein, Plaintiff's exercise of his free speech rights in violation of Rule 8.1115(a) will produce future disciplinary proceedings by the California State Bar and/or subject Plaintiff to monetary sanctions, no such proceedings are pending at present.

Element 2 cannot be established because no important state interest is implicated because the state has no interest in depriving its citizens of the opportunity to tell a court what it has previously done in similar circumstances. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), subsequently vacated on other grounds, 235 F.3d 1054 (8th Cir. 2000).[8]

Nor can element 3 be established, because the UNDERLYING ATES ACTION fails to afford Plaintiff, as counsel of record, any realistic opportunity to raise the constitutional questions presented by Rule 8.1115(a). The trial court is bound by *Auto Equity Sales* to follow *Schmier 1* and *Schmier II*, and not allow citation of *Fischetti II*, *Vrska* and *Fischetti I*.[9] Because Plaintiff cannot cite those cases, Plaintiff cannot raise those authorities to the trial court. [10]

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[8] "At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those they need not. Indeed, some forms of the non-publication rule even forbid citation. These courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but that does not bind us today, and what's more, you cannot even tell us what we did yesterday.' As we have tried to explain in this opinion, such a statement exceeds judicial power, which is based on reason, not *fiat*." *Anastasoff v. United States,* 223 F.3d at 904 (Judge Richard S. Arnold, writing.)

[9] The absurdity of a situation in which courts are bound by decisions of which they cannot be informed by attorneys or pro se litigants is pointed out by California Appellate Justice P. J. Cole, who writes, "a fair reading of rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 20 Cal.Rptr.321, 369 P.2d 937, but we cannot tell anyone about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law (Civ. Code, § 22.2) with its elementary reliance on the doctrine of stare decisis." Presiding Judge Cole's concurrence, *County of Los Angeles v. Wilshire Insurance Co.* (1978) 103 Cal. App. 3d Supp.1, 3, 163 Cal. Rptr. 123, 124.

[10] C.R.C. 8.1115(a) creates yet another dilemma for Plaintiff should he attempt to resolve the Federal question in California courts. Plaintiff is ethically bound by his duty of candor to inform any California court of contrary authority determined by the Appellate Court of California in *Schmier III* (1st Dist Ct of Appeal A101206 12/16/03), to the effect that 1st Amendment rights as "extremely" circumscribed in the Courts do not allow

It is not reasonable to force DEFENDANT JENNINGS to depend upon exoneration on appeal, but even if it were, Plaintiff, now addressing the Appellate Department of the Superior Court of California, County of Orange still could not cite *Fischetti II, Vrska* or *Fischetti I* to show the harm, not only because he had not raised these authorities in the trial court, but because that appellate court, too, is bound by *Auto Equity Sales, supra,* to follow *Schmier I* and *Schmier II* and not allow citation of *Fischetti II, Vrska* and *Fischetti I.* The only California appeal possible from the Appellate Department is a petition for review to the Supreme Court of California.

It is again not reasonable to force DEFENDANT JENNINGS to depend upon exoneration via the granting of a discretionary and rare grant of review by the Supreme Court of California under any circumstance, but even if it were, Plaintiff would still be forbidden by the rule at issue here from citing or properly arguing the precedential significance of *Fischetti II, Vrska* or *Fischetti I* to the Supreme Court of California. But even if Plaintiff were allowed to so argue, the argument would fall upon deaf ears because that court is staffed by DEFENDANTS MEMBERS OF THE CALIFORNIA SUPREME COURT, who approved the rule in the first instance and whose members have vigorously defended the rule.

It is even more unreasonable to force DEFENDANT JENNINGS to depend upon exoneration via the granting of a discretionary and extraordinarily rare Writ of Certiorari by the Supreme Court of the United States, particularly in a traffic infraction case, but that would be the first court in which Plaintiff would have the opportunity to freely cite and argue the law presented in *Fischetti II, Vrska* or *Fischetti I* without violating California's no-citation rule.

Of course at any step along this continuum, the California Courts could, with or without the approval of the other state agencies that seek to "manage precedent" via the no-citation rule, find reasons to dismiss the charges against DEFENDANT JENNINGS with the effect that the constitutionality of the no-citation rule will never be addressed.

All of this demonstrates that the state judicial proceedings do not afford Plaintiff an adequate opportunity to raise his federal claim. Since failure of any one of these three (3) *Younger* requirements

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citation of unpublished appellate opinions, yet he is prohibited from doing so by Rule 8.1115(a). Placing counsel in such an absurd dilemma impugns the rule.

(let alone all of them) renders the *Younger* abstention doctrine inapplicable, *Benavides, supra*, 34 F.3d at 832, this Court may not dismiss this action on that basis as a matter of law. *Id*., 34 F.3d at 832.

D. Plaintiff's Injunctive Relief Does Not Seek to Enjoin a State Officer's Performance of Judicial Duties.

It is also anticipated that Defendants will argue Plaintiff's request for injunctive relief is barred by the provision of 42 U.S.C. § 1983, that injunctive relief may not be sought against a state officer acting in his judicial capacity. The MEMBERS OF THE CALIFORNIA SUPREME COURT are not sued as judicial officers, but as the Disciplinary Board of the State Bar of California and are sued, as appropriate, as MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA. [11] Accordingly, there is no proscription against the availability of injunctive relief sought herein under 42 U.S.C. § 1983.

Defendant KENNETH I. SCHWARTZ, Commissioner of Department C54 of the Superior Court of California County of Orange, is not a real party in interest in this action. Therefore the suit is not against a judicial officer. The real parties in interest are the People of the State of California, and DEFENDANT JENNINGS.

Having addressed and disposed of Defendants' primary, anticipated preliminary attacks upon Plaintiffs' action, Plaintiff now focuses on the central constitutional issue before the Court.

V. RULE 8.1115(A) IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PLAINTIFF'S FREE SPEECH RIGHTS.

The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech." U.S. Const. Amend. I. The U.S. Supreme Court has extended the protection of the First Amendment to

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11 *See http://www.calbar.ca.gov/state/calbar/sbc_generic.jsp?cid=13469*: "The independent State Bar Court hears the charges and has the power to recommend that the California Supreme Court suspend or disbar attorneys found to have committed acts of professional misconduct or convicted of serious crimes...Lawyers may seek review of State Bar Court decisions in the California Supreme Court."

the states. *Edwards v. South Carolina* 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Thornhill v. Alabama* 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n. v. Stuart.* 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). The term "prior restraint" is used to describe rules and orders "forbidding certain communications when issued in advance of the time that such communications are to occur" *Alexander v. United States* 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441. "Prior restraints on speech are disfavored and carry a 'heavy presumption' of invalidity." *Long Beach Area Peace Network v. City of Long Beach,* 552 F.3d 1010, 1021-1022 (9th Cir. 2008), *citing, Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). "The heavy presumption is justified by the fact that 'prior restraints' on speech...are the most serious and the least tolerable infringement on First Amendment rights." *Grossman v. City of Portland,* 33 F.3d 1200, 1204 (9th Cir. 1994), *citing, Nebraska Press Ass'n., supra,* 427 U.S. at 559, 96 S.Ct. 2791, 49 L.Ed.2d 683.

A. Rule 8.1115(a) is a Content-Based Prior Restraint on Speech

In this instance, Rule 8.1115(a) prohibits Plaintiff, and all other members of the State Bar of California (as well as pro se litigants), from ever citing, referring to or attributing an unpublished or depublished opinion of any appellate court of the State of California under any circumstances (except subject to an exception of Rule 8.115(b)not applicable herein, i.e., where one or more of the parties has already participated in the underlying matter resulting in issuance of an appellate opinion, and citation thereof is permitted pursuant to the doctrines of law of the case, collateral estoppel or res judicata).

Although reasonable time, place and manner restrictions on speech are permissible, *Clark v. Cmt'y for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d. (1984), Rule 8.1115(a) prohibits any exercise of any and all speech of any type or manner whatsoever that cites, refers to or attributes precedent marked as "Not to be Published" or "Depublished" in the courts of California regardless that such communication regarding precedent is traditionally an essential part, or better, common due process, of American judicial institutions essential to establishing equal protection, and is *perfectly appropriate* at times of court trials, in court rooms, when done in the customary manner

of citation of precedents.

Even under the *Clark* exception, such time place and manner restrictions can only be valid provided "[1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information." *Id.* Even assuming, *arguendo*, that Rule 8.1115(a) somehow qualified under the *Clark* exception, it can comply with none of three aforementioned requirements of *Clark.*

First, the restriction of Rule 8.1115(a) must be content-neutral, i.e., based on something other than the content of the speech. *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). A law or rule "is content-based rather than content-neutral if the main purpose in enacting it was to suppress...speech of a certain content, or it differentiates based on the content of speech on its face." *ACLU of Nevada v. City of Las Vegas* 466 F.3d 784, 793 (9th Cir. 2006). Though an improper censorial motive is sufficient, such a motive is not necessary to render a regulation or rule content-based. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). If the rule "distinguish[es] favored speech from disfavored speech ***on the basis of the ideas or views expressed therein***" it is content-based. *Foti v. City of Menlo Park* 146 F.3d 629, 636 (9th Cir. 1998).

Element 1 of the Clark test is not met. Rule 8.1115(a) axiomatically is not and cannot be content-neutral as applied here via an unexplained depublication order of the California Supreme Court, because the decision to depublish *Fischetti II* was initiated by the cities of Santa Ana and West Hollywood precisely because they object to the content of *Fischetti II*.

Moreover, Rule 8.1115(a) is not content neutral on its face because it suppresses citation of cases selected pursuant to Rule 8.1105(c). [12] The standards for certification set out in Rule 8.1105 are

[12] C.R.C. 8.1105(c) **Standards for certification**

An opinion of a Court of Appeal or a superior court appellate division- whether it affirms or reverses a trial court order or judgment-should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

entirely dependant upon content. Rule 8.1110 permits partial publication. A determination to publish and thereby make citable one part of an opinion while forbidding citation of the balance of that same opinion cannot possibly be based upon anything other than content. Moreover, Rule 8.1105(c) includes a curious content based vagueness. The rule states that opinions that meet its standards "should be published." But it leaves undefined those opinions that meet its standards that *should not* be published. Plaintiff brought that issue to the attention of the Advisory Committee on Rules for Publication of Court of Appeal Opinions, Justice Katherine M. Werdegar, Chair. The committee responded:

> "The committee carefully used "should" and not "must," in order to retain some discretion on the part of the justices not to certify an opinion for publication if they conclude that the opinion does not assist in the reasoned and orderly development of the law"
> *Spring 2006 Revised Recommendations for Amendment to California Rules of Court, Rule 976 Advisory Committee on Rules for Publication of Court of Appeal Opinions, Appendix N: Chart summarizing public comments received in response to 2006 Invitation to Comment* http://nonpublication.com/sc_report_appendixes.pdf page 13, pdf page 223.

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(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

(Subd (c) amended effective April 1, 2007; previously amended effective January 1, 2007.)

If one asks, "What are the characteristics of opinions that advance new interpretations of the statutes of the State of California, or otherwise meet the criteria of Rule 8.1105(c) (4) that do not aid in the orderly development of the law," the answer must and in practice clearly does, include the content thereof. The danger here is that this vague authority to entirely remove precedent from the body of citable law will be used by the government to suppress authority that would protect citizens from improper government prosecution. That danger is not hypothetical, it is present here.

Element 2 of the *Clark* test is not met because California's entire publishing/citation scheme is vague as a result of the "should be published" clause, addressed above, that allows all manner of opinions meeting the standards of C.R.C. § 8.1105 (c) to not be published and/or citable.

Element 3 of the *Clark* test is not met because there is no other forum in which Plaintiff can possibly cite *Fischetti II*, *Vrska*, and *Fischetti I* besides the Superior Court of California, County of Orange, to exonerate his client at the trial court level.

A content-based rule is generally subject to strict scrutiny. The government must therefore show: (1) that the Rule is necessary to serve a compelling state interest, and (2) the State uses the least restrictive means to further the articulated interest. *Foti*, *supra*, 146 F.3d at 636. Under the second criterion, the government must show: (1) that the governmental interest is substantial and "unrelated to suppression of expression, *Baldwin v. Redwood City*, 540 F.2d 1360, 1365 (9th Cir. 1976); and (2) that the rule is narrowly tailored to meet that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 797, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

1. Rule 8.1115(a) Furthers No Genuine Substantial Governmental Interest

The burden to show a compelling governmental interest in barring lawyers from ever citing, referring to or attributing the content of prior unpublished appellate opinions of the Courts of California subsequently disfavored for their ideas and views expressed therein rests upon Defendants. *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (Kennedy, J., writing for the majority).[13] It is unlikely that *any* valid state

[13] A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." [citation omitted] When

interest exists, compelling or not, that can be shown. The California Supreme Court has held Rule 8.1115(a) permits the citation of *unpublished federal appellate court opinions. See, Farm Raised Salmon Cases,* 42 Cal.4th 1077, 1096, fn. 18 (2008). Additionally, the Ninth Circuit Court of Appeals does not prohibit the citation of unpublished California appellate opinions. Unless Defendants can show a reason to differentiate unpublished California appellate decisions from Federal unpublished appellate decisions, no compelling state interest can possibly be shown, particularly in light of the Cal. Const. Article VI Sec 14 additional requirement that all California appellate decisions be in writing with reasons stated. As this Court is also aware, on September 30, 2005, the Judicial Conference of the United States approved Fed.Rules.App.Proc. Rule 32.1, (which became effective December 1, 2006) barring the Circuit Courts of Appeal as of January 1, 2007, from adopting any and all no-citation rules (like Rule 8.1115(a)) which would prohibit or restrict the citation of federal judicial opinions, orders, judgment, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. The U.S. Supreme Court prospectively allowed the citation of unpublished opinions in all federal courts on April 12, 2006. Fed. R. App. Proc. 32.1.

Now Chief Justice of the Supreme Court, the Hon. Justice John Roberts, then a member of the Advisory Committee on Appellate Rules, endorsed FRAP Rule 32.1 when it was first raised in April 2004, aptly stating: "A lawyer ought to be able to tell a court what it has done." *Judicial Conference Group Backs Citing of Unpublished Opinions,* Tony Mauro; Legal Times; 4-15-2004. U.S. Supreme Court Associate Justice Samuel A. Alito, acting as Chair of the Advisory Committee on Appellate

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plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. [citation omitted] In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives. *Ashcroft v. ACLU,* 542 U.S. 656 (2004) (Kennedy, J., writing for the majority)

Rules, also strongly endorsed adoption of FRAP Rule 32.1 in a lengthy May 14, 2004 Report of the Advisory Committee (available online at http://nonpublication.com/alitomemo.pdf). Justice Alito's report succinctly and articulately explains why no-citation rules (such as C.R.C. Rule 8.1115(a)) cannot be justified by any genuine public policy considerations:

> Rules prohibiting or restricting the citation of unpublished opinions, rules that forbid a party from calling a court's attention to the court's own official actions - are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. ***A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns.*** But whether or not no-citation rules are constitutional - a question on which neither Rule 32.1 nor this Committee Note takes any position - they cannot be justified as a policy matter.
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> No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage.
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> Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In addition, every court of appeals is now required to post all of its decisions - including unpublished decisions - on its website "in a text searchable format." *See* E-Government 18 Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.
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> As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:
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> 1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.
>
> This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g., Harris v. United Fed'n of Teachers,* No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at n.2 (S.D.N.Y. Aug. 14, 2002). An exhaustive study conducted by the Federal Judicial Center ("FJC") at the request of the Advisory Committee found that over a third of the attorneys who had appeared in a random sample of fully- briefed federal appellate cases had discovered in their research at least one

unpublished opinion of the forum circuit that they wanted to cite but could not. *See* FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 15, 70 (2005) [hereinafter FJC REPORT]. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. When attorneys can and do read unpublished opinions - and when judges can and do get influenced by unpublished opinions - it only makes sense to permit attorneys and judges to talk with each other about the unpublished opinions that both are reading.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished opinions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. To the contrary, a study of the federal appellate courts conducted by the Administrative Office of the United States Courts at the request of the Advisory Committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" - that is, the time it takes appellate courts to dispose of cases - and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). The FJC, as part of its study, asked the judges of the First and D.C. Circuits - both of which have recently liberalized their citation rules - what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded - save one - reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See* FJC REPORT at 12-13, 67-68. In addition, when the FJC asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. Id. at 10, 63. It is, of course, true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished opinions causes the harms predicted by defenders of no-citation rules. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce

> into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.
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> The short answer to this argument is the same as the short answer to the argument about judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is simply no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that Rule 32.1 would not have an "appreciable impact" on their workloads. Id. at 17, 74. Moreover, the attorneys who expressed positive views about Rule 32.1 substantially outnumbered those who expressed negative views-by margins exceeding 4-to-I in some circuits. *See* id. at 17-18, 75.
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> The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point - and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.
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> The disparity between litigants who are wealthy and those who are not is an unfortunate reality.
>
> Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles - or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles - or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which makes unpublished opinions widely available at little or no cost.
>
> In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants - who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past -to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.
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> *Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1 (a) abolishes those rules and requires courts to permit unpublished opinions to be cited." Id.* [emphasis supplied]

Here, too, there can be no public policy justification for Rule 8.1115(a)'s barring altogether any attorney's of pro se litigant's right to speak of or mention what a court of appeal has previously done,

particularly when such speech may be apt or helpful to his client or to his case. Most emphatically, it cannot be said that DEFENDANT JENNINGS will save attorney fees or otherwise be benefited in any way. Being precluded from citing exonerating authority at the trial court level, and every level of California appellate process in favor of resorting to Certiorari from the United States Supreme Court for his exoneration, cannot possibly be said to benefit DEFENDANT JENNINGS. Nor can it be said that such absurdity reduces operating costs of the California judicial process.

California's courts of appeal have failed to enunciate, in any authority of which Plaintiff is aware, any substantial governmental interest, underlying the clear prior restraint of speech effectuated by Rule 8.1115(a).

Until Defendants offer at least some legitimate state interest for restricting the citation of unpublished appellate opinions, Plaintiff cannot be expected to offer less restrictive means to further the articulated interest. However, Plaintiff notes that any or all of the Defendants, including JUSTICES OF THE CALIFORNIA SUPREME COURT, MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA, the City Attorneys for the cities of Santa Ana, West Hollywood, Costa Mesa, and all others interested in criticizing the contents of *Fischetti II*, *Vrska* and *Fischetti I*, can write criticisms of those decisions for popular and legal publications arguing that future courts should not follow those decisions, appeal future dismissals of charges against defendants charged similarly to DEFENDANT JENNINGS seeking overrule of *Fischetti II, Vrska* and *Fischetti I*, or seek legislative change of Cal Veh. Code §21455.5(b).

Plaintiff submits that the greatest harm caused by the no-citation rule is that it sedates concern members of the public have for the content of appellate decisions, and in so doing destroys the nervous system of the democracy. It allows issues to remain unaddressed. It leads scholars and others to believe appellate decisions can be ignored because they have no effect in setting the law of the land. Universal citation incentivizes all manner of persons and institutions, potentially possessing greater domain knowledge and experience than appellate judges can possibly have, to join in seeking review of unwise decisions by courts of superior jurisdiction, to write scholarly articles, editorials and the like, or petition the legislature, all of which inure not only to the protection of individuals before the judiciary, but become a substantial force constantly pressing for improvement of our law. But the system works

only when decisions are citable because people are much more concerned with potential threats to themselves than with real harm caused to their neighbors.

E. Injunctive Relief is Proper and Appropriate Because the Loss of Plaintiff's First Amendment Freedoms for Even Minimal periods of Time Constitutes Irreparable Injury Justifying the Grant of Temporary and Preliminary Injunctive Relief

It is well-settled that the loss of First-Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction. *See Elrod v. Burns* 427 U.S. 347, 373, 96 S.Ct. 2673, 2689-2690 (1976). Plaintiff's further showing herein that his First Amendment rights are threatened to be deprived by Rule 8.1115(a) is equally sufficient to constitute irreparable injury, justifying injunctive relief. *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983).

Plaintiff has found no appellate authorities (except California: *Schmier I*, *Schmier II*, and *Schmier III*) nationwide which have examined the issue of whether a state's no-citation rule constitutes an unconstitutional prior restraint,[14] (as alluded by Justice Alito's aforementioned Report) and/or which may be enjoined as unconstitutional under 42 U.S.C. § 1983. The federal District Court's opinion in *Rapp, supra*, 916 F.Supp. 1525, is highly instructive as it examines all of the legal issues presented here.

In *Rapp*, upon conclusion of a state court jury trial yielding a verdict in his favor, Plaintiff (an attorney and pro se litigant), filed an action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 22 U.S.C. § 2201, enjoining enforcement and declaring unconstitutional Hawaii Supreme Court Rule 3.5(b). Rule 3.5(b) prohibited any post-verdict communication between Plaintiff and members of the jury. While Rule 3.5 did not itself threaten any imposition of sanctions or discipline, Plaintiff alleged that any violation of the rule could lead to such results. Alleging that the Rule was an unconstitutional prior restraint on speech, Plaintiff sought a TRO and OSC re Preliminary Injunction, declaring Rule 3.5(b) unconstitutional and prohibiting its enforcement against him, so as to prevent his

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[14] *See No-Citation Rules As A Prior Restraint On Attorney Speech, Tusk, Marla Brooke 103 Colum. L. Rev. 1202 2- Jun- 03*, available at http://nonpublication.com/tusk.pdf. *See also Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533. "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. (*Id*. at p. 545.) A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech." *Id.* at 546.

ability to ascertain from the jury factual information potentially crucial to post-trial law and motion and appellate issues. After briefing and a hearing, the federal District Court granted Plaintiff's request for a Preliminary Injunction and found Rule 3.5(b) an unconstitutional prior restraint on Plaintiff's speech. The Court further denied the State of Hawaii's summary judgment motion raising the very same defenses for the very same reasons as Plaintiff herein has addressed above.

Although the District Court found that the State Defendants had advanced some compelling state interests in barring such communications to avoid potential "harassment" of jurors and to protect their privacy, such concerns were "minimal at best" and thus could not pass constitutional muster, particularly since a less restrictive form of the rule could have been advanced (as had been adopted in several other jurisdictions cited by the Court) to promote the State's governmental interests short of barring outright all such communications by Plaintiff altogether). *Id*., 916 F.Supp. at 1537-1538.

As shown above in this case, the government's interests, if there are or may be any, by the Defendants' insisting in enforcing Rule 8.1115(a)'s absolute prohibition on any citation of reference to, or attribution by Plaintiff of an unpublished or depublished opinion directly on point needed to secure his client's acquittal of all charges in the case below, are far less compelling, viable, persuasive, or justifiable than the legitimate juror privacy and harassment protection objectives underlying the nonetheless constitutionally infirm Hawaii Supreme Court Rule 3.5. Moreover, it is manifest that Defendants could easily adopt far less restrictive rules to furnish guidance to appellate courts considering the persuasive or precedential value of unpublished or depublished opinions than an outright prior restraint on any citation of such opinions altogether.

Consequently, and as shown above, Plaintiff has demonstrated that Rule 8.1115(a) has chilled his speech and that the Rule is an unconstitutional prior restraint. In view of the findings of the federal judiciary showing no evidence of harm to any one or any institution resulting from elimination of no-citation rules, such a showing is sufficient to warrant the grant of a preliminary injunction enjoining the promulgation or enforcement of C.R.C. Rule 8.1115(a) under the Ninth Circuit's criteria enunciated in *Raich v. Ashcroft, supra,* 353 F.3d at 1227.

///

VI. C.R.C. RULE 8.1115(A) IS ALSO INVALID UNDER CAL. CONST. ART. VI, § 6(d)

As a constitutionally impermissible prior restraint on speech, Rule 8.1115(a) axiomatically and fatally conflicts with the U.S. Constitution, 1st and 14th Amendments, as well as California Constitution, Art. I, §2 (mirroring Plaintiff's right to free speech set forth in the First Amendment of the U.S. Constitution). Such irreconcilable conflict by Rule 8.1115(a) with constitutional embodiments also axiomatically renders Rule 8.1115(a) invalid as a matter of law under Cal. Const. Art. VI, § 6(d), and well-settled federal and California common law. *See, e.g. Credit Suisse First Boston Corp. v. Grunwald,* 400 F.3d 119 (9th Cir. 2005); *Cooper v. Westbrook Torrey Hills, LP*, 81 Cal.App.4th 1294 (2000); *Cal. Court Reporters Ass'n. v. Judicial Council of California,* 39 Cal.App.4th 14 (1995).

VII. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that the Court grant this ex parte application and issue a Temporary Restraining Order and Order to Show Cause re Issuance of a Preliminary Injunction enjoining Defendants from the continuing promulgation and enforcement of C.R.C. Rule 8.1115(a) as a content-based prior restraint against Plaintiffs right to freedom of speech in violation of Plaintiff's civil rights guaranteed by the 1st and 14th amendments of the U.S. Constitution, and as therefore also invalid under Cal. Const. Art. VI, § 6(d).

DATED: June 19, 2009

THE AFTERGOOD LAW FIRM

By: _____
AARON D. AFTERGOOD,
Attorneys for Plaintiff.

EXHIBIT A

LEXSEE 916 F.SUPP. 1525

JOHN RAPP, Plaintiff, v. DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT, THE HONORABLE JUSTICES OF THE HAWAII SUPREME COURT RONALD T.Y. MOON, STEVEN H. LEVINSON, ROBERT G. KLEIN, PAULA A. NAKAYAMA, MARIO R. RAMIL, and THOMAS F. SCHMIDT, and LORINNA J. SCHMIDT, Defendants.

CV. NO. 95-00779 DAE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

916 F. Supp. 1525; 1996 U.S. Dist. LEXIS 2083

February 2, 1996, DATED
February 2, 1996, FILED

DISPOSITION: [**1] Plaintiff's Motion for a Preliminary Injunction GRANTED; Plaintiff's Motion for Partial Summary Judgment GRANTED; and the State Defendants' Cross-Motion for Summary Judgment DENIED.

COUNSEL: JOHN RAPP, plaintiff, [PRO SE], Honolulu, HI.

For DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT, RONALD T.Y. MOON, Honorable Justice of the Hawaii Supreme Court, STEVEN H. LEVINSON, Honorable Justice of the Hawaii Supreme Court, ROBERT G. KLEIN, Honorable Justice of the Hawaii Supreme Court, PAULA A. NAKAYAMA, Honorable Justice of the Hawaii Supreme Court, MARIO R. RAMIL, Honorable Justice of the Hawaii Supreme Court, defendants: Ann B. Andreas, Office of the Attorney General-State of Hawaii, Honolulu, HI. For THOMAS F. SCHMIDT, LORINNA J. SCHMIDT, defendants: Thomas P. Dunn, Honolulu, HI.

JUDGES: HON. DAVID ALAN EZRA, UNITED STATES DISTRICT JUDGE. Magistrate Judge Francis I. Yamashita

OPINION BY: DAVID ALAN EZRA

OPINION

[*1528] ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION; GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; DENYING STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The court heard the parties' motions on January 16, 1996. Plaintiff John Rapp ("Rapp"), an attorney, appeared [**2] pro se at the hearing. Ann B. Andreas, Deputy Attorney General, appeared at the hearing on behalf of Defendants Disciplinary Board of the Hawaii Supreme Court, Hawaii Supreme Court Justices Ronald T.Y. Moon, Steven H. Levinson, Robert G. Klein, Paula A. Nakayama, and Mario R. Ramil (collectively "State Defendants"). Thomas Dunn, Esq., appeared at the hearing on behalf of Defendants Thomas F. Schmidt and Lorinna J. Schmidt ("Schmidts"). [1] After considering the motion and supporting and opposing arguments relating thereto, the court holds that the Supreme Court of Hawaii may enact appropriate rules to restrict post-jury contact by attorneys but declares that part (b) of Rule 3.5 of the Hawaii Rules of Professional Conduct as presently constituted is UNCONSTITUTIONAL, GRANTS Plaintiff's Motion for Preliminary Injunction, GRANTS Plaintiff's Motion for Partial Summary Judgment, and DENIES the State Defendants' Cross-Motion for Summary Judgment.

1 At the hearing, Dunn reported that the Schmidts had not been served in this action until December 22, 1995, and that he had been recently retained to defend them.

[**3] BACKGROUND

Rapp filed his complaint in this action against Defendants on September 22, 1995 ("Complaint"). Rapp

brings this suit to challenge the constitutionality of Rule 3.5 of the Hawaii Supreme Court Rules of Professional Conduct ("Rule 3.5"). [2] Rapp seeks preliminary and permanent injunctions enjoining and restraining the State Disciplinary Board of the Supreme Court and the Justices of the Hawaii Supreme Court from enforcing or attempting to enforce Rule 3.5, and a declaratory judgment holding Rule 3.5 unconstitutional and unenforceable. [3] The State Defendants oppose Plaintiff's motions and have filed a Cross-Motion to Dismiss or for Summary Judgment.

2 Rule 3.5 provides that:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person except as permitted by law; or
>
> (c) engage in conduct intended to disrupt a tribunal.

3 On December 7, 1995, after a hearing, this court denied Rapp's Motion for Temporary Restraining Order.

[**4] The underlying facts of this case are not in dispute: Rapp was a pro se plaintiff in a State First Circuit Court proceeding, Rapp v. Schmidt, Civ. No. 94-0903, in which Thomas Schmidt and Lorinna Schmidt were named as defendants. The trial in that case commenced on July 31, 1995, and Rapp obtained a special verdict in his favor on August 25, 1995, and judgment was entered on August 29, 1995. See State Defendants' Statement of Facts, at P 2. Additionally, the state court denied in part and granted in part Rapp's motion for a directed verdict. Id. at P 4. On October 23, 1995, Rapp was awarded a supplemental judgment by the state court. Id. at P 5. On November 23, [*1529] 1995, defendants in the State case, Thomas and Lorinna Schmidt, filed their notice of appeal to the Hawaii Supreme Court. Id. at 6.

Rapp alleges that prior to the return of the jury's verdict, he asked the Schmidts' attorney if the attorney would be willing to remain after the jury delivered its verdict to engage in communications with the jury. The attorney declined. According to Rapp, he then requested the trial judge, Judge Daniel G. Heely, to direct counsel for all parties to remain following return [**5] of the jury verdict in order to communicate with the jury, and Judge Heely denied his request.

Rapp contends that he now wishes to engage in communications with the jurors from his First Circuit Court case but is precluded from doing so by Rule 3.5(b). He claims that he desires to talk with the jurors for various purposes, including: (1) to thank the jurors for their service, attention, and their verdict, (2) to discuss with the jurors their thinking, reasoning, and reaction to the case and to Rapp's performance, (3) to explore the possibility of "extrinsic fraud," jury misconduct, error, or other grounds upon which the verdict might be called into question by the Schmidts, (4) to answer any questions the jurors might have, (5) for other "proper and legitimate" reasons not calculated to harass or embarrass jurors or to influence their actions in their actions in future jury service. Complaint, at P 16. Rapp believes members of the jury would be willing to speak with him, but that he cannot talk with them because of the threat of suspension or disbarment from the Hawaii bar. In essence, he claims that Rule 3.5(b) is an unconstitutional prior restraint on his free speech rights.

[**6] STANDARD OF REVIEW

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

In determining the sufficiency of an alleged jurisdictional basis, the plaintiff bears the burden of proof that subject matter jurisdiction does in fact exist. Thornhill Pub. Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Moreover, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). In a motion to dismiss based upon lack of subject matter jurisdiction, the court may receive, among other forms of competent evidence, affidavits to resolve factual disputes without converting the motion to dismiss into one for summary judgment. Sudano v. Federal Airports Corp., 699 F. Supp. 824, 825-26 (D. Haw. 1988).

II. Summary Judgment

Rule 56(c) provides that summary judgment shall be entered when:

> The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine [**7] issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. Id. at 322.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Electric [**8] Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citation omitted).

[*1530] A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. Id. The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." Id. at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual quantum and quality of proof necessary to support liability under the applicable law. Id. at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. See Celotex, 477 U.S. at 322.

At the summary judgment stage, this court may not make credibility determinations [**9] or weigh conflicting evidence. Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: does the evidence present a sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law. Id. (citation omitted).

DISCUSSION

The State Defendants move for dismissal of, or summary judgment in their favor on: (1) all claims for relief which relate specifically to Rapp's attempt to obtain an order from this court allowing him to contact discharged jurors in Rapp v. Schmidt, Civil No. 94-0903-03; (2) all claims for declaratory relief, on the grounds that the remedy should be upheld because Rule 3.5 is in the process of being modified; and (3) all claims alleging that Rule 3.5 violates that the First Amendment of the United States Constitution.

I. Eleventh Amendment

First, the State Defendants argue that this court lacks subject matter jurisdiction over Rapp's claims for injunctive relief, relying on the Eleventh Amendment doctrine of sovereign immunity. The Eleventh Amendment reads:

> The [**10] Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [4]

The United States Supreme Court has interpreted this Amendment to signify that "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed[.]" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). Where state officials are the named defendants, the Eleventh Amendment bars the suit if "'the state is the real, substantial party in interest.'" Pennhurst, 465 U.S. at 101 (citing Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)). "Thus, 'the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'" Id. (citing Hawaii v. Gordon, 373 U.S. 57, 58, 10 L. Ed. 2d 191, 83 S. Ct. 1052 (1963)).

> 4 The Supreme Court has held that this provision bars suits against a state brought by its own citizens, as well as by foreign citizens. Papasan v. Allain, 478 U.S. 265, 276, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986).

[**11] Moreover, a plaintiff may not sue a state in either law or equity. Id. at 100-101 (citing Missouri v. Fiske, 290 U.S. 18, 27, 78 L. Ed. 145, 54 S. Ct. 18 (1933) ("the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when those are asserted and

prosecuted by an individual against a State")). Reading these two principles together, a suit against a state official [*1531] that is in fact a suit against a State is barred regardless of whether the plaintiff seeks monetary or injunctive relief. Id. at 101-102 (citing Cory v. White, 457 U.S. 85, 91, 72 L. Ed. 2d 694, 102 S. Ct. 2325 (1982)).

The Supreme Court has recognized an exception to this general rule: a plaintiff may challenge the constitutionality of a state official's action by seeking prospective injunctive relief. Id. at 102 (citing Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). It the plaintiff asks the federal court to enjoin the official's future unconstitutional conduct, the Eleventh Amendment presents no bar, because unconstitutional actions by state officials cannot be authorized by a state. Edelman v. Jordan, [**12] 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). However, a plaintiff may not seek retroactive monetary relief against the state official for past allegedly unconstitutional behavior. Id. at 666-667.

Simply asking for injunctive relief and not damages will not automatically allow the plaintiff to overcome the dictates of the Eleventh Amendment. The Supreme Court has recognized that the difference between retrospective and prospective relief "will not in many instances be that between day and night." Papasan, 478 U.S. at 278 (citing Edelman, 415 U.S. at 667). Generally, "relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred [by the Eleventh Amendment]." Papasan, 478 U.S. at 278.

Here, Rapp's 42 U.S.C. § 1983 [5] claims against the State Defendants in their official capacities are in fact claims against the State of Hawaii. Hence, any liability attributed to them will bind the State, and the State will bear the consequences of judgment. The State is, therefore, the "real, substantial party in interest[,]" Pennhurst, 465 U.S. at 101. [**13] Accordingly, the suit will be barred unless (1) the State of Hawaii has unequivocally waived its Eleventh Amendment immunity, or (2) Rapp seeks prospective injunctive relief.

> 5 Rapp does not specifically bring this suit under 42 U.S.C. § 1983, but the court construes it as one, since he is suing the State Defendants in their official capacities as the enforcers of Rule 3.5, for an alleged violation of his First Amendment rights under the United States Constitution.

Because there is no unequivocal indication that Hawaii has consented to this suit in federal court, Rapp may only sue the State if the claims fall within the prospective injunction exception enumerated in Ex Parte Young. 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441. In order to have standing to obtain prospective injunctive relief, a plaintiff must show some substantial likelihood that the past challenged official conduct will recur in the future. Nelsen v. King County, 895 F.2d 1248, 1250 (1990); City of Los Angeles v. Lyons, 461 U.S. [**14] 95, 108, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (reasonable showing of a sufficient likelihood that plaintiff will be injured again). Plaintiff must demonstrate a "credible threat" that he will be subject to a specific injury for which he seeks injunctive or declaratory relief. Sample v. Johnson, 771 F.2d 1335, 1340 (9th Cir. 1985), cert. denied, 475 U.S. 1019, 89 L. Ed. 2d 319, 106 S. Ct. 1206 (1986). "The 'mere physical or theoretical possibility' of a challenged action again affecting plaintiff is not sufficient." Id. (citing Murphy v. Hunt, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982)).

Rapp has requested declaratory and injunctive relief: first, he seeks injunctive relief preventing Defendants from enforcing Rule 3.5 against him. Second, Rapp seeks a declaratory judgment that Rule 3.5 is unconstitutional. Both forms of relief prayed for are prospective in nature. In addition, Rapp has satisfied his burden of demonstrating that he will be subject to a specific injury, in particular, disciplinary proceedings or disbarment, if he wishes to speak with jurors from his state case. The court concludes that Rapp's claims for relief, based on an allegedly [**15] unconstitutional Rule which is being enforced by state officials, constitute an exception to the Eleventh Amendment doctrine of sovereign immunity under Ex Parte Young. [*1532] See 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441; Edelman, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347.

II. Younger Abstention

The State Defendants also argue that this court should abstain from adjudicating the merits of Rapp's action under principles set forth by the United States Supreme Court in Younger v. Harris. 401 U.S. 37, 41, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Before Younger abstention can be applied to dismiss a federal claim, three requirements must be met: (1) there must be ongoing state judicial proceedings, (2) the state judicial proceedings must implicate important state interests, and (3) the state judicial proceedings must afford the federal plaintiff an adequate opportunity to raise constitutional claims. Benavidez v. Eu, 34 F.3d 825, 831 (9th Cir. 1994) (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982)). "All three elements of Younger must be present in order for abstention to be appropriate." [**16] Benavidez, 34 F.3d at 832.

The State submits that Younger abstention is appropriate in this case. The court disagrees. As Rapp correctly points out, abstention is improper in this case be-

cause there are no ongoing state judicial proceedings. Cf. Middlesex, 457 U.S. 423-438, 102 S. Ct. at 2521-24 (pending state bar disciplinary proceedings constituted an ongoing state judicial proceeding). The court is unaware of any pending disciplinary proceedings against Rapp in connection with this case; rather, here, there is only the potential for the institution of disciplinary proceedings against Rapp, which is insufficient for abstaining under Younger.

III. Revision of Rule 3.5

The State Defendants also assert that this court should dismiss the case because Rule 3.5 is undergoing significant modification, and that the modifications may effectively address the issues raised in this proceeding. According to the State Defendants, at its November 16, 1995 meeting, the Disciplinary Board considered and approved the final draft of a proposed amendment to Rule 3.5, which provides for an exception on ex parte communications in the case of communications with discharged jurors. See Declaration of [**17] James A. Kawachika, at P 2. Also, the State Defendants allege that pursuant to the Disciplinary Board's instructions, Chair James Kawachika transmitted to the Hawaii Supreme Court the proposed amendment to Rule 3.5 ("proposed amendment") by his letter of December 8, 1995, with the request that the court adopt the proposed amendment. Id. at P 3.

Rule 17(g) of the Rules of the Supreme Court of Hawaii ("RSCH") specifies the procedure by which rule amendments are proposed and adopted by the Hawaii Supreme Court, and requires a ninety (90) day notice to the Board of Directors of the Hawaii State Bar Association ("HSBA") and publication of notice in the Hawaii Bar News, which requires six weeks' lead time for publications. Id. at PP 4-6; Exhibit G to State Defendants' Motion. According to the State Defendants, interest in the proposed amendment to Rule 3.5 remains high among the Disciplinary Board and the HSBA. The State Defendants report that the communication between the Disciplinary Board and the Hawaii Supreme Court concerning the proposed amendment, with required notification of the HSBA in accordance with the provisions of RSCH 17(g), and the Supreme Court's consideration [**18] of and action upon the proposed amendment, might be completed by early June 1996. State Defendants' Statement of Facts, at P 11.

The Declaratory Judgment Act provides that, "in a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration[.]" 28 U.S.C. § 2201. "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. Of course a District Court cannot decline to entertain an action as a matter of whim or personal disinclination. A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the [*1533] public interest." Public Affairs Assocs. v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 7 L. Ed. 2d 604 (1962) (per curiam) (internal citations and quotation omitted) (emphasis added).

The State Defendants cite two cases, A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 331, 7 L. Ed. 2d 317, 82 S. Ct. 337 (1961), and City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, [**19] 71 L. Ed. 2d 152, 102 S. Ct. 1070 (1982), in support of their motion to dismiss based on Rule 3.5's ongoing revisions. Both cases are distinguishable from the one at bar.

A. L. Mechling was an action brought by barge lines to set aside an Interstate Commerce Commission order granting certain tariff relief to railroads, and for a declaratory judgment that the Commission lacked the authority to grant relief without completing a full investigation. The barge lines maintained that the Commission's administrative practice of granting railroads relief as to protested tariffs without a full investigation or hearing, was a continuing one, and prayed for a declaration that the practice was beyond the powers of the Commission. Id. at 327. Pending the determination of the action, the railroads notified the Commission that it no longer needed the relief granted, and the district court granted the Commission's motion to dismiss the action.

The Supreme Court first held that the action was moot because the railroad no longer needed the relief that had been temporarily granted and that the district court should have vacated the Commission's order which it had dismissed. Id. at 329-30. [**20] The barge lines argued that since the "practice of the Commission in granting 'temporary' authority for [tariff] departures to the Railroads over the protests of appellants and without any hearing or findings in order granting such authority" was a "continuing" one, there was an actual controversy within the jurisdiction of the Court to resolve by declaratory judgment. Id. However, in finding that a declaratory judgment was inappropriate, the court placed importance on the fact that the Commission had agreed to amend the challenged practice; the Court stated, "it thus appears that one of the 'continuing' practices whose validity appellants would have us adjudicate continues no longer." Id. at 330-31. The State Defendants here focus on the language that followed:

> Declaratory judgment is a remedy committed to judicial discretion. Nor need this court first have the view of a lower court before it may decide that such dis-

> cretion ought not to be exercised. We think that sound discretion withholds the remedy where the challenged "continuing practice" is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently [**21] predicted.

Id. at 331. Since the Supreme Court first found that the challenge was moot, it did not rest its holding solely on the possibility that the Commission's practice was being altered. Moreover, the State Defendants do not argue here that Rapp's claims are moot.

The facts of this case are markedly dissimilar to those presented in A. L. Mechling. Most importantly, although the State Defendants report that Rule 3.5 is undergoing significant revisions, unlike the scenario presented in A. L. Mechling, since the revisions have not yet been conclusively adopted by the Supreme Court and are not presently in effect, Rapp's constitutional claims are not moot. Furthermore, Aladdin's Castle is equally inapplicable here, as that case also involved a question of mootness. See 455 U.S. at 288-89. [6]

> 6 Moreover, to the extent that this case is applicable, it appears to support a proposition contrary to that of the State Defendants. The Court in Aladdin's Castle stated:
>
> > It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power. In this case, the city's repeal of the objectionable language [in the ordinance] would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.
>
> 455 U.S. at 291.

[**22] [*1534] This court concludes that adjudication of this case is in the best interest of the public since at issue here is a prior restraint on a First Amendment freedom. "A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions . . . 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). [7] Dismissal of this case is unwarranted despite the State Defendants' contentions that any alleged constitutional infirmities of Rule 3.5 will likely be addressed and corrected by early June 1996. Moreover, since the State Defendants did not file a draft of the proposed changes with their motion or specifically discuss the proposed changes at the hearing, the court can not know or conclusively determine whether Rapp's challenge would in fact be mooted. Accordingly, this court must engage in a constitutional review of Rule 3.5(b).

> 7 The United States Supreme Court has recognized that, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n, 427 U.S. at 559.

[**23] IV. Constitutionality of Rule 3.5(b)

Rapp alleges that Rule 3.5(b) is unconstitutional as interpreted by the Hawaii Supreme Court because it infringes on his guarantees of free speech. While he does not dispute the fact that "ethical authorities have a right to prohibit harassment or embarrassment," he argues that "the First Amendment should preclude a blanket ban on any and all ex parte post verdict communication between trial lawyers and jurors. Rapp's Motion for Partial Summary Judgment, at 12. [8]

> 8 Rapp mistakenly likens this issue to those involving commercial speech and situations involving post verdict interviews with jurors sought by the press. See Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1021-22 (5th Cir. 1984).

Prior to the Hawaii Supreme Court's adoption of Rule 3.5 in 1993, post-trial contacts with jurors were permitted under Disciplinary Rule 7-108(D) of the Code of Professional Responsibility as long as they were not "calculated merely to harass or embarrass the juror or to [**24] influence his action in future jury service." Rule 3.5(b), however, permits only those contacts otherwise "permitted by law." See Rule 3.5(b).

The Hawaii Supreme Court interpreted Rule 3.5(b) in State v. Furutani, 76 Haw. 172, 177 n.8, 873 P.2d 51 (1994). The court set forth the rule in a footnote stating, "subsequent to January 1, 1994, all post-trial communications between attorneys and juror, relating to the subject matter of the trial, must be in the presence of all parties to the proceeding or their legal representatives." 76

Haw. at 177 n.8. The court did not, however, base its holding on that interpretation. [9]

9 In Furutani, several hours after a jury rendered a criminal guilty verdict, a complaining juror contacted the Fifth Circuit court and defense counsel to announce that she had changed her mind about the verdict; she told the circuit court that "she had voted to convict only because she was pressured to do so by other jurors who wanted to go home for the weekend." Id. at 177. In light of the complaining juror's announcement, the prosecution retained a private investigator to contact the foreperson of the jury. The court stated that although the previous disciplinary rules did not prohibit the type of post-trial ex parte communication with a juror in the present matter, it is clear that HRPC 3.5(b) and 8.4 did. 76 Haw. at 177 n.8.

[**25] The State Defendants argue that Rule 3.5(b) is constitutional, pointing to a line of cases upholding, in First Amendment challenges, similar rules restricting lawyers' postverdict contact with jurors. See Haeberle, 739 F.2d 1019; United States v. Hooshmand, 931 F.2d 725 (9th Cir. 1991); United States v. Griek, 920 F.2d 840 (11th Cir. 1991); Maldonado v. Missouri Pacific Ry. Co., 798 F.2d 764. They urge this court to follow the basic reasoning of the Court of Appeals for the Fifth Circuit in Haeberle, and hold that Rule 3.5(b) does not violate Rapp's First Amendment rights.

The Court of Appeals for the Fifth Circuit, in Haeberle, upheld the constitutionality of a [*1535] rule forbidding counsel to interview jurors without leave of court. 739 F.2d at 1020. That rule provided:

> Neither the attorney nor any party to an action nor any other person shall himself or through any investigator or other person action for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of Court granted upon good cause shown.

[**26] 739 F.2d at 1020-21. In that case, after a judgment was rendered, counsel for the losing party sought leave to interview jurors willing to discuss the trial, on the basis that counsel for both sides could learn a lot from an opportunity to chat with jurors. The petition submitted to the district court specifically stated that leave was sought for the purpose of "educating counsel" and not to impeach the jury's verdict, and presented First Amendment arguments. Id. at 1021. Even though the motion was unopposed, the district court denied leave. Id.

First, the Fifth Circuit explained that there are several reasons why reviewing courts are reluctant to overturn a denial of leave to interview jurors, stating, "federal courts have generally disfavored post-verdict interviewing of jurors . . . Prohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the 'chances and temptations' for tampering with the jury, increases the certainty of civil trials, and spares district courts time-consuming and futile proceedings." Id. at 1021.

Second, the court examined the First Amendment interests presented and [**27] concluded that the petitioners' asserted reasons for the interviews, 'while not without first amendment significance, [were] not 'paramount' like the public's right to receive information necessary for informed self-government. The petitioners' access to information from jurors carries far less weight in the first amendment scale than a restriction on access to information that affects political behavior." Id. at 1022. [10] The court found that the jurors' interest in privacy and the public's interest in "well-administered justice," outweighed the interest in improving their advocacy. Id. [11]

10 The Haeberle court stated:

> Weighty first amendment interests may be harmed by inhibiting the flow of information from jurors to the public. To protect those interests, we [have] declared the denial of leave for a reporter to interview jurors unconstitutional . . . .

739 F.2d at 1021.

11 The court also based its holding on the fact that the attorneys, by voluntarily assuming roles as trial participants and officers of the court, subject themselves to greater restraints on their communications than might constitutionally be applied to the general public. 739 F.2d at 1022.

[**28] Similarly, in the context of a criminal trial, the First Circuit, in United States v. Kepreos, 759 F.2d 961, 966 (1st Cir.), cert. denied, 474 U.S. 901, 88 L. Ed. 2d 227, 106 S. Ct. 227 (1985), announced a new rule prohibiting counsel to interview jurors except under the supervision of the district court, and then only in ex-

traordinary circumstances. The court stated, "permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative sources of resources of the parties." Id. [12] (citations omitted).

> 12 The Eleventh Circuit has reached a similar conclusion also in the context of a criminal case. United States v. Griek, 920 F.2d 840, 842-43 (11th Cir. 1991). In Griek, a criminal defendant, after a guilty verdict was rendered against him, initiated a First Amendment challenge against a local rule which provided for jury polling "after the jury has been discharged, upon application in writing and for good cause shown . . . to determine whether the verdict is subject to legal challenge." 920 F.2d at 842. That court noted the need to balance the First Amendment right with the Sixth Amendment right of a criminal defendant to a fair trial by an impartial jury, and proceeded to determine whether the First Amendment protection outweighs other important government interests. Id. at 842. The court examined the common law rule preventing a juror from being required to testify to impeach a verdict and concluded, "it is thus clear that the compelling government interest to be protected in a case such as this is the right of criminal defendants to be tried by a jury whose deliberations cannot be exposed to public view except by a showing of outside influence . . . ." Id. at 843; see United States v. Hooshmand, 931 F.2d 725, 737 (11th Cir. 1985).

[**29] [*1536] Additionally, State of New Jersey v. Loftin, 287 N.J. Super. 76, 670 A.2d 557, 1996 N.J. Super. LEXIS 19, 1996 WL 11100, at *14-16 (N.J. Sup. Ct. Jan. 12, 1996), involved a criminal defendant's appeal of a state court's denial of his request for post-trial interviews. Specifically, the defendant challenged the constitutionality of a local rule which provided, "except by leave of court granted on good cause shown, no attorney or party shall directly . . . examine, or question any grand or petit juror with respect to any matter relating to the case." 1996 N.J. Super. LEXIS 19, 1996 WL 11100, at *15. The court examined the meaning of "good cause," that was well established by New Jersey case law, and upheld the constitutionality of the rule; the court concluded, "in allowing attorneys and litigants to question jurors for good cause, the rule provides a remedy for those extraordinary situations where an *injustice might otherwise result."* Id. at *16 (emphasis added).

The Florida Supreme Court's decision in Florida Bar v. Newhouse, 498 So. 2d 935, 936-37 (Fla. 1986), also discussed a "narrow exception" to the rule prohibiting post-verdict interviews by attorneys. In that case, a state rule of civil procedure provided that leave [**30] of the trial judge was needed before contacting members of a jury post verdict. 498 So. 2d at 936. Under that rule, a party who believed legal grounds existed for questioning jurors, was required to file a motion with the trial court. Id. at 936-37. "After notice and hearing, the trial judge determined whether the interviews [were] allowed." Id. at 937. [13] Additionally, Florida had adopted a disciplinary rule which mandated that an attorney who believed he or she had legal grounds to question a juror, ensure that the attorney avoid either embarrassing the juror or influencing the juror's action in any subsequent jury service. Id.

> 13 Importantly, the Florida Supreme Court emphasized that the rule "is not intended to authorize 'broad hunting expeditions or fishing excursions.'" 498 So. 2d at 937 (citations omitted).

Two general principles emerge from the above cited cases: first, is clear that the public policy holding jury deliberations and verdicts inviolable and the aim of protecting the privacy [**31] of jurors are two compelling interests. Second, there is no question that courts in general and the Hawaii Supreme Court in particular have the inherent authority to control or limit access to jurors to further those interests. Furthermore, lawyers do not have unfettered rights with respect to the trial process. [14] However, upon careful examination, it becomes evident that Rule 3.5(b) presents problems distinct from those in Haeberle, Kepreos, Loftin and Newhouse, necessitating a separate First Amendment analysis here.

> 14 Upon accepting a license to practice law and enjoying the privilege, attorneys agree to certain restrictions on otherwise constitutionally granted freedoms. It should be noted that in return for the opportunity to serve, Judges agree to even more severe limitations upon their rights of free speech, association, etc.

While prior restraints are not unconstitutional per se, any system of prior restraint bears a heavy presumption against its constitutional validity. See Nebraska Press [**32] Ass'n v. Stuart, 427 U.S. 539, 558, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). This court must therefore examine whether Rule 3.5(b), a prior restraint imposed to prohibit the exercise of First Amendment rights, serves the compelling state interests discussed above.

The court finds that Rule 3.5(b) as interpreted and applied suffers from two chief infirmities. First, the lan-

guage of the rule prohibiting ex parte communication with jurors "except as permitted by law," is unconstitutionally vague and overbroad. At the hearing, the State Defendants suggested that the rule requires an examination of Hawaii law or a specific determination by a judge, as to whether juror contact is permitted by law. The State Defendants point to the fact that Rapp himself understood that he could, once opposing counsel refused to join Rapp to interview the jurors, petition the court for permission. However, there is nothing in the record to indicate why Judge Heely denied Rapp leave to interview the dismissed jurors. The plain language of Rule 3.5(b) does not specifically indicate whether a judge has the authority to grant leave, or whether [*1537] "good cause" or "exigent circumstances" for seeking the interviews [**33] must be shown. Moreover, this court has not found any Hawaii case law which either sets forth an exception to Rule 3.5(b) in circumstances where counsel suspect that jury misconduct has occurred or a procedure that an attorney needs to follow if that attorney does have such suspicions. Additionally, no Hawaii case has discussed what might amount to good cause warranting jury interviews, if good cause is the applicable standard. The confusion caused by the vague language "as permitted by law" is thus apparent.

Rule 3.5(b) does not either by its language or as interpreted, operate like the rules at issue in the cases cited above; rather, it is unclear how the rule would be applied in circumstances which may warrant the grant of post-verdict interviews by a trial court. That is, a description of the mechanism for review by a trial judge is conspicuously absent from the rule. Moreover, the standard "as permitted by law" provides little guidance to lawyers as to when jurors can appropriately be contacted. What is clear is that, "as the rule presently operates, one attorney can effectively block any post-trial contact with jurors by refusing to participate in a joint interview of jurors [**34] with the other attorney." Affidavit of James J. Bickerton, at P 5. [15]

15 Bickerton states that "to his knowledge, this [blocking] has actually [] happened quite often." Affidavit of James J. Bickerton, at P 5.

Second, the probable efficacy of Rule 3.5(b), as it has been interpreted by the Hawaii Supreme Court, in protecting jury members and their verdicts, is minimal at best. Rapp correctly points out:

> Rule 3.5 permits communications with jurors which are not "ex parte." Evidently, the problems of harassment . . . are not so severe that all communications have been precluded. Joint communications with counsel for both parties may occur [without leave of court]. Thus, the Hawaii Supreme Court has not perceived a need to shut down all communications with jurors. Instead, Rule 3.5 places in the hands of opposing counsel a veto power over whether communications will take place.
>
> . . .
>
> Where there is a possibility of jury misconduct and a potential new trial motion or appeal, the last person [**35] who should have a veto power on whether communications take place is opposing counsel.

Rapp's Memorandum in Opposition to State Defendants' Cross Motion for Summary Judgment, at 4-5 (emphasis added). If the aim of Rule 3.5 is to protect the sanctity of jury verdicts and prevent jury harassment, it misses the mark. Instead, as interpreted, the rule would theoretically allow two unscrupulous lawyers who agree to interview jurors together, to engage in a jury harassment "free for all" with no court supervision. Clearly, the limitations Rule 3.5 places on ex parte jury communications is not well-tailored to achieve the State's compelling interests. [16] In fact, the State Defendants admitted [*1538] at the hearing that perceived problems with the rule prompted a desire to amend the rule even before Rapp initiated this action. It must be emphasized that while Rule 3.5(b) as presently constituted is constitutionally flawed the State Defendants have demonstrated a compelling interest in preserving the integrity of the trial process by protecting jurors from post trial harassment and unnecessary intrusion by lawyers. There is no question that a properly tailored rule such as those discussed [**36] in the cited cases above can pass constitutional muster.

16 Indeed, some of the exhibits attached to Rapp's Affidavit, filed December 28, 1995, indicate that the HSBA and its members were troubled by the language of Rule 3.5. In Exhibit G, entitled, "Summary of Proposed Rules of Professional Conduct," H. Baird Kidwell, a member of the Model Rules Committee writes:

> Rule 3.5 -- Impartiality and Decorum of the Tribunal A Lawyer is prohibited from seeking to influence a judge, juror, prospective juror or official by means prohibited by law. Ex parte communication with any such person at anytime is barred, "except as permitted by law." In the absence of any provi-

> sion of Hawaii law expressly permitting it, post-trial communication with jurors appears to be barred by this rule. Conduct intended to disrupt a tribunal is prohibited.

Also, then HSBA President Sherry P. Broder's Letter to Chief Justice Moon, dated November 19, 1983, regarding the Proposed Hawaii Rules of Professional Conduct states with respect to Rule 3.5:

> The Board feels that an outright prohibition on ex parte juror contact, except as permitted by law, is broader than necessary to protect jurors and the legal process, and that the possible abuses which Rule 3.5(b) meant to curb can be handled through less drastic means. One suggestion is to promulgate standard discharge instructions for judges to give the jury regarding communication with attorneys after trial. In the interest of preserving the ability of attorneys to appropriately communicate with jurors after a trial is concluded, the Board recommends that subsection (b) be deleted from Rule 3.5 as set forth below:
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or
>
> [EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O><O] IS OVERSTRUCK IN THE SOURCE.]
>
> [O>(b) communicate ex parte with such a person except as permitted by law; or<O]
>
> [O>(c)<O] (b) engage in conduct intended to disrupt a tribunal.

See Exhibit H to Rapp Affidavit. Furthermore, Exhibit I, entitled, "Proposed Hawaii Rules of Professional Conduct Summary of HSBA Member Comments," states in pertinent part:

> All ex parte contact between jurors . . . and attorneys is prohibited, without limitation to time, place, or content, unless explicitly permitted by law . . . Rule probably prohibits all communication, no matter who initiates . . . .
>
> Outright prohibition of ex parte post trial juror contact is broader than necessary to protect jurors and legal process. Might limit ability to ascertain whether juror misconduct occurred that might warrant a mistrial. Jurors have a lot of unanswered questions after trial and feel better being able to talk to attorneys after trial. No evidence of abuse of this procedure in Hawaii . . . .

[**37] The court concludes that Rule 3.5(b) as presently constituted is UNCONSTITUTIONAL for the reasons stated above. Accordingly, the court GRANTS Rapp's Motion for Partial Summary Judgment and DENIES the State Defendants' Cross-Motion for Summary Judgment.

V. Preliminary Injunction

The facts alleged in support of Rapp's motion for a preliminary injunction deviate only slightly from the facts contained in Rapp's Complaint: first, Rapp asserts claims that the value of the information he seeks from jurors will diminish with time. [17] Motion for Preliminary Injunction, at 12. Second, Rapp reports that a juror from the state proceeding has independently attempted to communicate with Rapp through an unsolicited letter. See Exhibit A to Plaintiff's TRO Motion; Rapp Affidavit at P 13. Plaintiff asserts that he is presently being irreparably harmed because "his right to engage in free speech is being chilled by the prospect of a suspension or disbarment if he communicates ex parte with trial jurors." Motion for Preliminary Injunction, at 12.

> 17 Rapp states, "the value of communications with jurors decreases substantially over time. It is common knowledge that memories are keenest when they are freshest. The jury's reactions in the days following the verdict will be the most reliable and meaningful." Motion for Preliminary Injunction, at 12.

[**38]

The grant of a motion for a preliminary injunction is within the discretion of the district court. See Senate of California v. Mosbacher, 968 F.2d 974, 975 (9th Cir. 1992). In the Ninth Circuit, a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor. First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. Mai Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671 (1994) (internal citations omitted). With respect to the injury requirement, "the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury . . . . A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite [**39] to preliminary injunctive relief." Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991), cert. denied, 503 U.S. 985, 112 S. Ct. 1670, 118 L. Ed. 2d 390 (1992).

It is well settled that the loss of First Amendment freedoms for even minimal periods [*1539] of time constitutes irreparable injury justifying the grant of a preliminary injunction. Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). [18] Rapp has sufficiently demonstrated how Rule 3.5(b) has chilled his speech. Since this court has already held that Rule 3.5(b) is unconstitutional as an unreasonable restraint on speech, Rapp's Motion for a Preliminary Injunction is GRANTED. The State Defendants are enjoined from enforcing Rule 3.5(b) as presently constituted.

18 In addition, generally, an alleged deprivation of a constitutional right is sufficient to constitute an irreparable injury. See Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983).

CONCLUSION

For the reasons discussed above, the [**40] court holds Rule 3.5(b) of the Hawaii Rules of Professional Conduct UNCONSTITUTIONAL; GRANTS Plaintiff's Motion for a Preliminary Injunction; GRANTS Plaintiff's Motion for Partial Summary Judgment; and DENIES the State Defendants' Cross-Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, FEB 2 1996.

DAVID ALAN EZRA

UNITED STATES DISTRICT JUDGE