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Re: Florida’s Proposed Advisory Opinion A-12-1 Regarding Hidden Text, Metatags & Keyword Advertising

We submit these comments on Florida’s Proposed Advisory Opinion A-12-1 (the “Proposal”). While we appreciate the Standing Committee on Advertising’s attempt to provide clearer guidance for online attorney advertising, we think the committee should withdraw the Proposal.

Hidden Text and Metatags Are Not Necessarily Deceptive or Misleading

Rule 4-7.13¹ prohibits “deceptive or inherently misleading advertising.” This rule already clearly applies to online ad copy, including ad copy in hidden text or metatags. It does not make sense to otherwise presume that non-deceptive/non-misleading ad copy published in hidden text or metatags is deceptive or misleading.

First, consumers are unlikely to see ad copy presented as hidden text or keyword metatags. Consumers don’t see hidden text (by definition), and as the Proposal itself acknowledges, search engines already try to reduce the visibility of websites misusing hidden text. With respect to keyword metatags, Google has publicly stated that it “disregards keyword metatags completely. They simply don’t have any effect in our search ranking at present.”² Thus, ad copy in hidden text or keyword metatags is like the proverbial falling tree that no one hears—if consumers do not perceive the content, then it is pointless to worry about it.

Second, using hidden text or keyword metatags can be legitimate and beneficial. The Proposal already acknowledges that keyword metatags are not categorically prohibited, although the Proposal appears internally inconsistent about when publishing accurate ad copy in metatags is deceptive or misleading. With respect to hidden text, Google has publicly stated that:

not all hidden text is considered deceptive. For example, if your site includes technologies that search engines have difficulty accessing, like JavaScript, images, or Flash files, using descriptive text for these items can improve the accessibility of your site.³

¹ Unless otherwise indicated, all references to “Rules” mean the Rules Regulating the Florida Bar.

² Matt Cutts, *Google Does Not Use the Keywords Metatags in Web Ranking*, GOOGLE WEBMASTER CENTRAL BLOG, Sept. 21, 2009, <http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html>.

³ *Hidden Text and Links*, Google.com, <https://support.google.com/webmasters/bin/answer.py?hl=en&answer=66353> (visited April 21, 2013).

Descriptive text is just one of several examples of ways hidden text may be legitimate. As a result, the Proposal should not categorically presume that hidden text is illegitimate.

Competitive Keyword Advertising Should be Encouraged, Not Banned

Because of Rule 4-7.13, we discuss only non-deceptive/misleading keyword-triggered ad copy. The Proposal's proposed restrictions on "competitive keyword advertising"—where lawyer A displays non-deceptive/misleading keyword advertising triggered by lawyer B's name—has the potential to suppress competition among lawyers that would help consumers.

First, many lawyers share the same name, and many lawyers' names are also dictionary words. As a result, if a consumer searches using a lawyer's name, we cannot assume the consumer wanted to find any specific person.⁴

Second, consumers often use the name of one vendor as a search keyword to find competitive vendors. For example, assume a consumer familiar with John Smith, Esq.'s expertise wants to find lawyers who provide comparable services. The consumer might search the keyword "john smith esq" hoping to identify comparable competitors.⁵ By preventing lawyers from purchasing their competitors' names, the proposed restrictions would deprive consumers of valuable information to help find the right lawyer. Thus, prohibiting such advertising would reduce competition and harm consumers.

Third, courts consistently have held that competitive keyword advertising does not violate intellectual property rights. With respect to trademarks, a super-majority of cases reaching a final disposition on the trademark issues have rejected liability, including all three jury trials.⁶ With respect to publicity rights, the Wisconsin Appeals Court recently held that purchasing another lawyer's name as a keyword trigger did not violate Wisconsin's publicity rights.⁷ In light of these rulings, the Proposal effectively would create a new, dangerous and unnecessary intellectual property right.

Implications

The Standing Committee on Advertising should withdraw the Proposal completely. With respect to deceptive or misleading ad copy, existing Rules already clearly apply. Reiterating their application is unnecessary. Because the other advertising practices discussed by the Proposal are

⁴ Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507 (2005).

The Proposal also does not contemplate the widely used technique of broad matching. If a consumer searches for "john smith lawyer" and a competitor broad-matches the keyword "lawyer," the competitor's ad may legitimately appear in response to the search, even though the competitor did not buy the keyword "john smith."

⁵ David J. Franklyn & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?*, 26 HARV. J. L. & TECH. ____ (2013) ("[A]lthough a majority of consumers use trademarks to search for the trademarked product only, sizeable minorities use trademarks to search for the trademarked product along with similar competing products sold by other companies").

⁶ Eric Goldman, *Another Google AdWords Advertiser Defeats Trademark Infringement Lawsuit*, FORBES TERTIUM QUID BLOG, Nov. 8, 2012, <http://www.forbes.com/sites/ericgoldman/2012/11/08/another-google-adwords-advertiser-defeats-trademark-infringement-lawsuit/> (citing cases and noting that, in a census of thirteen final dispositions, defendants won nine and trademark owners won only four).

⁷ *Habush v. Cannon*, 2013 WL 627251 (Wis. App. Ct. 2013).

not deceptive or misleading, they do not warrant regulation. Instead, the rest of the Proposal is based on technological misunderstandings, and the proposed restrictions would potentially harm competition and consumers. As a result, the Proposal is not helpful or appropriate guidance to members of the Florida Bar.

We appreciate this opportunity to comment on the Proposed Advisory Opinion, and we would be happy to help further.

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