

July 26, 2018

Elizabeth Clark Tarbert
Ethics Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Dear Ms. Tarbert,

We write about proposed amendments to Rule 4-7.13 of the Rules Regulating the Florida Bar, relating to online keyword advertising by attorneys. In 2013, two of us submitted comments (<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1363&context=historical>) on this topic. This letter supplements those comments to highlight three subsequent developments:

Competitive Keyword Advertising Cases Routinely Fail in Court.

Since 2013, the caselaw has become even clearer that competitive keyword advertising is legal. Courts now routinely reject lawsuits over competitive keyword advertising. As one court recently summarized:

Virtually no court has held that, on its own, a defendant's purchase of a plaintiff's mark as a keyword term is sufficient for liability.

Alzheimer's Disease and Related Disorders Association, Inc. v. Alzheimer's Foundation of America, Inc., 307 F. Supp. 3d 260, 284 (S.D.N.Y. 2018).

The Federal Trade Commission (FTC) agrees. It recently said that “[o]ver the past decade, courts have consistently held that bidding for trademarked keywords alone is insufficient to establish a likelihood of confusion.” Complaint Counsel’s Corrected Pre-Trial Brief and Exhibits at 53, *In the Matter of 1-800 Contacts, Inc.*, Docket No. 9372 (filed April 3, 2017), <https://www.ftc.gov/system/files/documents/cases/586211.pdf> (the “FTC Brief”).

The FTC Thinks Competitive Keyword Advertising Benefits Consumers.

In 2016, the FTC brought an enforcement action against 1-800 Contacts for a systematic effort to suppress competitive keyword advertising. The FTC explained that “consumers not only understand that searches will bring ads from multiple companies, but have come to expect this variety.” FTC Brief at 58. Indeed, the absence of competitive keyword advertising *hurts* consumers and competition. An FTC-commissioned study concluded that “when a consumer of contact lenses is presented with only the 1-800 Contacts advertisement, that consumer is more apt to curtail her search and to settle for whatever price is offered by 1-800 Contacts.” FTC Brief at 33.

Empirical Evidence Continues to Prove That Consumers Benefit from Competitive Keyword Advertising.

Since 2013, several published empirical studies have examined consumers and competitive keyword advertising. In particular, Jeffrey P. Dotson et al, *Brand Attitudes and Search Engine Queries*, 37 J. INTERACTIVE MKTG. 105 (2016), demonstrated that consumers conducting keyword searches using a particular brand often are not seeking only that brand. They explained that “there are many reasons a user might submit a brand search query. Users who are shopping in a category are more likely to search for any brand in the category.” Thus, in the context of attorney advertising, some prospective clients who know a particular lawyer’s brand will use that brand as a search keyword expecting—and wanting—to find search results for other lawyers providing similar services.

These additional developments show that competitive keyword advertising by lawyers does not mislead or harm consumers. In contrast, suppressing competitive keyword advertising will likely hurt consumers and competition. This confirms that the Florida Bar made the correct decision in 2013, and we encourage the Florida Bar to affirm its current position.

Regards,

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