November 25, 2018

Elizabeth Clark Tarbert
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Dear Ms. Tarbert,

We are writing regarding the Board Review Committee's (BRC) December 13 meeting to consider proposed amendments to Rule 4-7.13. Just last week, the Federal Trade Commission (FTC) decided In the Matter of 1-800 Contacts, Inc., docket #9372. The majority opinion is at https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf, and the commission's order is at https://www.ftc.gov/system/files/documents/cases/docket_no_9372_commission_final_order.pdf . We want to highlight a few points based on the FTC's decision.

Courts Don't Think that Competitive Keyword Advertising Violates Trademark Law

The FTC explained that courts have ruled that competitive keyword advertising, without more, does not constitute trademark infringement. The majority writes:

> apart from a single district court summary judgment decision from over ten years ago, no court has found bidding on trademark keywords to constitute trademark infringement, absent some additional factor, such as a misleading use of the trademark in the ad text that confuses consumers as to the advertisement's source, sponsorship, or affiliation. Rather, "[c]ourts have consistently rejected the notion that buying or creating internet search terms, alone, is enough to raise a claim of trademark infringement." Tempur-Pedic N. Am., 2017 WL 2957912, at *7 (holding, on motion for preliminary injunction, that "[b]ecause the court has concluded that the purchase of AdWords alone, without directing consumers to a potentially confusing website, is unlikely to cause customer confusion, the AdWords will not be included in the injunction"); see Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc., 2015 WL 5311085, *50 (C.D. Cal. Sept. 10, 2015) ("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.")

This passage shows that, according to the case law, consumers do not assume a competitive keyword ad is sponsored, endorsed, or otherwise impermissibly affiliated with the trademark owner (at least when the trademark isn't referenced in the ad copy). Accordingly, trademark jurisprudence does not support any effort to regulate competitive keyword advertising based on perceived sponsorship, endorsement or affiliation.

Restrictions on Competitive Keyword Advertising May Be Anti-Competitive

The FTC decision emphasizes that advertising helps make markets more efficient, and it casts doubt on any attempts to restrict advertising by competitors. The FTC concluded that 1-800 Contacts' efforts to restrict its competitors' keyword advertisements were anti-competitive. Thus, in addition to the obvious First Amendment concerns, any regulations that suppress competitive keyword ads may raise substantial antitrust concerns.

Mandatory Disclosures of Advertiser Identity Aren't Justified

There have been several recent draft revisions to Rule 4-7.13, and we're not sure which version(s) the BRC is actively considering. One version (the "Board Review Committee on Professional Ethics Draft / November 14, 2018") has the following comment:

> An example of impermissible advertising would be including the name of a lawyer or law firm that is not part of the advertising law firm in an Internet advertisement or sponsored link that is displayed when the non-affiliated lawyer or law firm's name is used as a search term when the advertisement does not clearly indicate that the non-affiliated lawyer or law firm is not part of the advertising law firm. Another example of impermissible conduct is use of another lawyer or law firm name as an Internet search term that triggers the display of an advertisement that does not clearly indicate that the advertisement is for a lawyer or law firm that is not the lawyer or law firm used as the search term. The triggered advertisement would not be misleading if the first text displayed is the name of the advertising lawyer or law firm and, if the displayed law firm name is a trade name that does not contain the name of a current or deceased partner, the name of the lawyer responsible for the advertisement is also displayed as the first text.

There are a few obvious problems with this commentary. First, including a competitor's name in ad copy may advance a number of legitimate and pro-consumer objectives, such as comparative advertising, critical advertising, or advertising to aggregate consumers who have legal claims against the competitor. In contrast, the first quoted sentence above would prevent those types of advertising—to the detriment of both consumers and competition.

(Note: search engines typically give trademark owners the option to exclude their trademarks from ad copy, but those exclusions are not absolute. For example, even when a trademark owner has exercised the exclusion option, Google will allow the trademark to appear in ad copy for: descriptive/generic uses; resellers; sellers of components, replacement parts, and compatible items; and informational sites).

Second, mandatory disclosure of the advertising attorney's name makes sense only if that information helps consumers. However, we are not aware of any credible evidence that consumers believe that a search engine advertisement displayed in response to a trademarked keyword search comes from the trademark owner. Accordingly, the proposed mandatory disclosure won't help consumers because it does not correct any misapprehension they might

hold. Ad copy could be deceptive or misleading for other reasons, but the absence of the advertising attorney's name in the ad copy doesn't contribute to those defects.

Third, the mandatory disclosure of the advertising/responsible attorney's name could meaningfully reduce the amount of information displayed in search engine advertisements, which are severely space-constrained. The reduced information makes the ads less valuable to consumers, which hinders the ability of search engine advertising to improve market efficiency.

Conclusion

We continue to believe that competitive keyword advertising by Florida lawyers does not (1) inherently create any harms or problems that require further intervention by the Florida Bar; or (2) to the extent it's not already prohibited by the Ethics Rules, justify the limitation or deprivation of a Florida attorney's license to practice law. Because the Florida Bar's ongoing consideration of competitive keyword advertising restrictions cannot be justified by intellectual property or consumer protection law, we remain concerned that such initiatives are designed to, and would actually, restrict competition among Florida lawyers. The Florida Bar can quell such concerns by affirming the position it took in 2013.

Regards,

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